In This Issue: Climate Law Reporter

1 | Editors’ Note by Paulo A. Lopes and Melissa Blue Sky

3 | China’s GreenTech Programs and the USTR Investigation by Joel B. Eisen

9 | Due Process Rights in the Carbon Markets by Lisa Hodes Rosen, Esq. & Adrienne Bossi, Esq.

15 | Carbon Reduction Projects and the Concept of Additionality by Brian Joseph McFarland

19 | Climate Change: Government, Private Property, and Individual Action by Paul Babie

22 | Options for Blue Carbon within the International Climate Change Framework by Gabriel Grimsditch

25 | Is REDD Accounting Myopic?: Why Reducing Emissions from Deforestation and Forest Degradation Programs Should Recognize and Include Other Ecosystems and Services Beyond CO₂ Sequestration by Paulo A. Lopes

32 | The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America by Luciano Butti

38 | Africa and the Climate Change Agenda: Hurdles and Prospects in Sustaining the Outcomes of the Seventh African Development Forum by James Forole Jarso

45 | Implementing a Renewable Energy Feed-In Tariff in South Africa: The Beginning of a New Dawn by Dr. Kola O Odeku, Professor Edson L Meyer, Professor Obeng Mireku, and Professor JLH Letsoalo

50 | National Security in the 21st Century: How the National Security Council Can Solve the President’s Climate Change Problem by Arija Flowers

58 | Climate Change, Intellectual Property, and the Scope of Human Rights Obligations by Kavita Kapur

66 | The Singapore Workaround: Providing a “Greenprint” for a UNFCCC Party Reclassification by P. Cal Trepagnier

http://www.wcl.american.edu/org/sustainabledevelopment
Sustainable Development Law & Policy publishes a Climate Law Reporter each year with a goal of providing practitioners and academia around the world with an accessible and concise report on the current state of climate law. After taking stock and regrouping following the UNFCCC negotiations in Copenhagen, the international community began to focus on the December 2010 meeting in Cancún, Mexico. With the continued inability of the U.S. Congress to pass a climate bill, expectations were not high going into the Cancún negotiations. Although Parties moved forward with the acceptance of numerous Agreements and Decisions, a successor to the Kyoto Protocol with the continuation of a bifurcated approach—different obligations and responsibilities for developed and developing countries—appeared even more uncertain. As the international community looks toward the 2011 negotiations in Durban, South Africa, expectations are again increasing.

One of the major challenges to reaching an international binding agreement over the past ten years has been the opposition by the United States. But in more recent years the international community has also come to recognize China as a countervailing force. This issue of the Climate Law Reporter includes proposals for climate change mitigation, as well as shifting approaches to address climate policy and effects of climate change. One of our authors reviews the tension between the United States and China on “green technology” and questions whether the portrayal of a “green energy race” is accurate or advantageous for either country. Other articles focus on climate change mitigation mechanisms such as the role of due process in the carbon markets; which metrics are best for additionality of carbon sequestration projects; the inclusion of other ecosystems and services beyond the confines of current forestry programs including reducing emissions from deforestation and forest degradation (“REDD”) programs; and even if private property monetization of carbon reduction is an approach we should pursue. Another article performs a comparative analysis of the successes and failures of climate change litigation tactics across venues and continents, while one author suggests that litigation and legislation might not be necessary because the U.S. President already has authority under existing national security laws to mitigate the threat of climate change. Additionally, one article focuses on an aspect of human rights challenges inherent in climate change—developing country use of clean energy technologies that are protected by intellectual property rights, frequently held by developed countries thousands of miles away. Two authors focus on Africa, where impacts from climate changes are disproportionate compared with the continent’s contribution. These articles review the key challenges and prospects in sustaining the outcomes of the seventh African Development Forum to address climate change, and the effects of establishing renewable energy feed in tariffs in South Africa.

As the climate conference in South Africa approaches and the international community again prepares for negotiations extending into the early mornings, we must remember that while climate change is most often seen as an international issue, actions, agreements, and compromises at all levels are required to succeed in our efforts to mitigate climate change.
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Introduction

Since the Renewable Energy Law went into effect in 2006, the Chinese government has implemented numerous laws and programs designed to encourage renewables. While China has made strong progress, many factors will influence the nation’s future success in renewable energy deployment, including the need for consistent pricing policies to stimulate private sector development and the need to upgrade the country’s transmission grid.

The issue of China’s support for renewables has taken center stage in a United States Trade Representative (“USTR”) complaint alleging that China unfairly subsidizes its greentech industries, in violation of its obligations as a member of the World Trade Organization (“WTO”). Well before that investigation began, numerous Americans believed the United States was less engaged in greentech promotion than China, and many feel the United States is falling behind. New York Times columnist Thomas L. Friedman has been perhaps the most active proponent of this view, but he has plenty of company. If recent reports are to be believed, China could be generating more electricity from renewables in 2020 than any other nation on Earth. It has also advanced rapidly in private sector spending on renewable energy technology and research and development spending.

Many observers state that the two nations are engaged in a new “green energy race.” This term deliberately invokes the “space race” competition between the U.S.S.R. and the United States to achieve milestones in space after the 1957 launch of the Sputnik satellite. To simplify matters a bit, there are two related but different arguments being made. The first is that China will dominate the global market for greentech, diminishing American companies’ ability to compete with Chinese firms. This, of course, is the bedrock principle of the USTR investigation, and must be considered in the context of the complex relationship between the two nations. The United States has departed from its “courtship” of China, criticizing it for its currency stance and so forth. The “China as green competitor” narrative has captured journalists, bloggers, politicians, environmentalists, think tanks, executives of venture capital and energy companies, financial market analysts and commentators, and many others. The USTR investigation is yet another measure of unacceptable costs. Given our nations’ pressing needs to address climate change, it would be much more productive to forego the rhetoric of the greentech war and support both nations’ greentech initiatives. Moreover, the reasons given for why China is “winning” the “race” are not yet completely convincing.

Invoking a race metaphor may be less productive than capturing national attention in the United States with concrete, clear domestic goals. I believe that the United States should articulate a single, clear national goal, just as it did with space research in the Cold War era. Elsewhere, I have argued for the creation of “solar utilities” that would deliver greentech in the residential setting by consolidating all of the functions of financing, installing, and servicing in single entities that would ramp up to utility-size scale in individual areas. This is the sort of idea that could capture the popular imagination and lead to more greentech development in the United States than casting China as a competitor.

Geopolitical Competition in Greentech?: Suitability of the “Space Race” Metaphor

The idea that the United States and China are in a competition for greentech supremacy has many adherents. A recent Internet search for “China” and “green energy race” yielded over 300,000 results, with most of the top one hundred having titles such as “Who’s Winning the Clean Energy Race?”, “Is China Beating the U.S. in Green Technology Development?”, and so forth. The “China as green competitor” narrative has captured journalists, bloggers, politicians, environmentalists, think tanks, executives of venture capital and energy companies, financial market analysts and commentators, and many others. The USTR investigation is yet another measure of...
the strength of the race idea. Some say the race is already over. One observer notes, “[t]he United States ceded its leadership in the production of clean energy technologies during the past decade of neglect.”[19]

**WHAT IS THE “RACE,” AND IS CHINA “WINNING”?**

In the space race, there were concrete goals in physical space: put satellites and humans in orbit, and land a man on the moon. Here, it is not so clear. What is the competition with China? To have more solar panels and wind turbines in place? More governmental and private investment in greentech? More greentech-friendly governmental policies? All of the above? Those writing about it often have different agendas. Companies want more investment in greentech and more access to China’s markets. Environmentalists want more active federal policies to encourage deployment of renewables. Free traders want barriers to trade removed.

Consider a threshold question: Why are we competing with China? European nations[20] have had greentech policies for many years, have seen strong growth in greentech, and have generated much electricity from renewables.[21] Some observers note that the race is not with one nation but many,[22] yet the prevailing comparison is to China. There is something more to the “race” metaphor, then, than growth in greentech. As in the space race, there is the pervasive sense that if China has more extensive greentech investments and deployment than we do, there will be drastic consequences for national power and wealth. Denmark and Germany attract less attention than China because they pose less of a threat to the United States’ superpower status.[23]

Evaluating the “race” claims on their merits, it is hardly clear that the United States is “losing” to China. The differences between the two nations are much more subtle than they appear in the prevailing narrative.[24]

**Growth of China’s Greentech Industry**

One fear is that multinational companies will find it difficult to sell their greentech in China, and Chinese companies will flood the United States with their products. This fear reflects broader American unease about China’s potential for global economic dominance. In 1979, China began to experiment with the free market, and since then, has experienced robust growth.[25] In 2010, China’s economy had become the world’s second largest, surpassing Japan’s.[26] China’s “pace of industrialization is significantly faster than that experienced by other countries throughout history.”[27] So much of China’s manufacturing output is already sold in the United States that observers believe we are “joined at the hip economically.”[28] Many believe domestic products cannot compete against those manufactured in China due to China’s advantages in less expensive labor, more lax protections of intellectual property, fixed currency rates (until very recently), and weaker environmental protections.[29] In the depths of a recession in the United States, descriptions of growing Chinese greentech firms invoke images of a rising Asian industrial juggernaut.

Is greentech destined to be another area in which the Chinese overpower American firms? China’s 2007 “Medium and Long-Term Development Plan for Renewable Energy in China” contained an explicit goal to develop a domestic renewables sector.[30] China’s wind turbine industry rose from virtual nonexistence to become a major player in the global market in less than five years. In 2009, three of the largest wind turbine manufacturers in the world were Chinese.[31] China leads the world market for solar photovoltaics (“PV”) cells and modules, producing more than forty percent.[32] Chinese firms’ share of the domestic market has increased rapidly,[33] and Chinese companies have become major players around the globe.[34]

The USTR petition details a growing imbalance in “environmental goods” between the United States and China,[35] but in some categories, Chinese firms have been less successful in the United States. Chinese firms sold only 28 megawatt (“MW”) worth of wind turbines outside of China in 2009.[36] Some predict an upswing in Chinese greentech exports to the United States,[37] and at least one high-profile proposed project involving Chinese technology has attracted negative attention.[38]

Another factor cited in the USTR investigation is that the Chinese government appears to be shutting foreign manufacturers out of its domestic market.[39] Official Chinese government policy promotes “indigenous innovation,” calling for reliance on foreign technology to decrease to thirty percent or less.[40] Foreign observers report that it has become more difficult for foreign companies to get their technology accepted in domestic projects.[41] A recent report states that thirty-six government regulations promote domestic greentech and hamper foreign firms’ ability to compete in China.[42] The USTR investigation claims, for example, that the indigenous innovation policy gives Chinese firms a five to ten percent advantage in wind turbine procurement processes.[43] Encouraging announcements of joint ventures and other developments seem to contradict this protectionist trend.[44] China has dropped a requirement that seventy percent of the components in wind turbines come from domestic sources.[45] Agreements between American companies such as First Solar[46] and Chinese local governments to develop renewable energy projects point to a potentially large market for American greentech in China.[47] Perhaps ironically, however, the USTR investigation complaint cites the First Solar memorandum of understanding to develop a 2 gigawatt (“GW”) solar project as impermissible under the WTO because First Solar agreed to work to support China’s domestic industries.[48]

The concern seems to be that Chinese firms will dominate the global greentech market if current growth rates continue. However, some signs in the past year point to overbuilding and overcapacity in the wind industry, and a possible retribution and consolidation. In mid-2010, concern about the failure to agree on a climate change agreement and projections of slowing demand in China for wind energy made for an uncertain business climate for wind energy companies.[49] The top three IPOs in 2010 in global greentech were by Chinese companies.[50] Other firms moved forward with their offerings[51] but a planned initial public offering for one firm had to be scrapped in mid-2010 due to unfavorable market conditions.[52]

There is also evidence that Chinese firms are not yet competitive in certain market segments. Some provincial utilities
have chosen Western wind turbines due to superior control systems and longer experience with manufacturing larger turbine sizes. As recently as 2009, Chinese wind turbines were less capable than their foreign counterparts, as measured by lower capacity factors (the percentage of time that turbines operate to generate electricity).

Chinese firms often do not hold key technology patents that would enable them to develop more sophisticated equipment. Firms have grown rapidly through acquiring manufacturing equipment and capitalizing on advantages such as their lower cost of labor. As a result, they have a leadership position in “downstream” areas of the PV production chain, but lag behind in “upstream” areas requiring more technological skill, such as silicon purification, ingot, and wafer manufacturing. In 2009, American companies held the top ten cited patents worldwide in solar technology.

Many familiar with China believe that it is only a matter of time before Chinese greentech improves through importing foreign technology and assimilating it. Even if Chinese solar and wind technology improves, however, the greentech industry in the United States is growing. The cost advantages of Chinese firms may eventually fade, or the gap may close. Chinese workers increasingly are demanding higher wages and better working conditions. Some greentech, like larger components of wind turbines, is heavy and expensive to transport. In the American market, the costs of shipping large turbines from China might outweigh higher domestic labor costs. And American greentech firms enjoy other cost advantages, such as preferential tax policies.

On the whole, then, Chinese firms are not yet invincible juggernauts displacing their foreign counterparts. There is obvious concern, as the USTR investigation and high-level discussions and trade missions suggest. Some retort that fear of Chinese firms is as overblown as rhetoric in the 1980s claiming that mighty Japan was about to dominate the world economic scene. Setting up China as an economic bogeyman has a potential drawback: it could imperil the bumpy economic relationship between the two nations. Some have argued that for this reason alone, it would be best to drop the rhetoric about a green energy race.

Central Government Support

Observers believe China’s national government offers consistent and committed support to the greentech sector. In this view, a Communist nation with a central government planning process can develop renewables far more quickly. However, the reality is that China occasionally struggles to find consistency in its greentech policies. Some have led to considerable progress, such as the Renewable Energy Law and the 2009 stimulus package, but others, including reorganizations of the governmental energy bureaucracy, have been less successful.

The most frequently cited instance of government support is direct financial aid, in the form of low-interest loans, export promotion, and other aid such as subsidized land made available to developers. The USTR complaint cites “prohibited subsidies to green technology” that include the Ministry of Finance’s “Special Fund for Wind Manufacturing,” the Ministry of Finance and Ministry of Commerce’s “Export Product Research and Development Fund,” and the provision of financing through export credits by China’s Export-Import Bank. The state-owned China Development Bank made $42 billion in loans in 2010 to solar and wind energy companies, a sum that exceeds comparable financing levels in the United States.

Yet some other policies, such as pricing for electricity generated from renewables added to the national electricity grid, have been anything but consistently encouraging. Over the past two years, prices in China’s feed-in tariff for solar have been inconsistent. A project priced in late summer 2010 involved a feed-in tariff of 0.73 renminbi (RMB, $0.108 at 6.8 RMB to the dollar) per kilowatt-hour. This was more than one-third less than a previous project’s winning bid, which suggests the winning bidder may have been a state-owned enterprise (“SOE”) that could undercut a private company’s bid. This hybrid system of state-owned and private companies competing for the same projects is cited in the USTR complaint as disfavoring competition. It is an ongoing challenge to China’s energy system, and as one report observes, “lack of competition reduces efficiencies and innovation that come from open and competitive markets.”

Until 2009, a bidding tender system was also in place for electricity generated from wind turbines above 50 MW. That system was criticized for failing to promote wind power development. For smaller wind installations, provincial governments set pricing policies on a project specific basis, which provided little long-run guidance on pricing. A new system of “zonal tariffs” largely replaced the previous pricing scheme, but it is too early to tell whether it will encourage more wind power development.

No fewer than nineteen governmental bodies have responsibility for some aspect of greentech policy. There are inevitable delays in coordination. Ambitious announcements are not always translated quickly into concrete policies. National proclamations tend to be broad frameworks requiring implementation by administrative organs of the national government. Unlike the American system, where public involvement can help steer actions of administrative agencies, the Chinese government has little accountability to accomplish its advertised objectives. Key personnel changes in the inner circle of the Chinese Communist Party can make for policy reversals or alterations.

The Chinese government’s top-down nature creates enormous reliance on provincial and local governments to implement national policies. Robust policy announcements by Beijing do not easily translate to the provinces, and coordination between national and local officials is difficult. Local officials often have incentives to prefer projects that can deliver short-term profits, not renewable energy projects that might not pan out for years. Some local governments have direct conflicts of interest between responsibilities to promote SOEs and mandates to implement national policies.

The perception that China’s government is unwaveringly committed to supporting greentech is often accepted uncritically, without these or any other caveats. Observers often jump
to conclusions that might be erroneous or oversimplified. It is difficult to obtain accurate information from China’s national government, which is secretive and prone to releases of propaganda (as any reader of Xinhua knows). Information routinely available in the West is often protected in China as state secrets, and recent efforts to promote a freedom of information regime show how difficult it is to understand governmental actions.

According to the USTR petition, “there is a lack of official, detailed information regarding the terms upon which financing is provided by China ExIm Bank.” Thus, sweeping pronouncements about the Chinese government’s intentions and policies should be avoided when possible.

*The Results Speak for Themselves . . . Or Do They?*

By some metrics, Chinese greentech progress is impressive. In 2009, China obtained a larger share of electricity from renewable sources than the United States (17% versus 8.8%), but this figure is skewed by the predominance of hydroelectric generation in China, especially the mammoth Three Gorges Dam project. China added 13.8 GW of new wind power capacity to 10.0 GW for the United States in 2009, but its installed total capacity still trailed that of the United States (35.1 GW versus 25.8 GW). Those numbers cannot be compared directly, as China’s wind projects have been less efficient. In 2009, China had a mere 0.4 GW of grid-connected solar PV capacity, though it pledged to meet a much higher target by 2020. The United States had a larger 1.2 GW of installed PV capacity, still far less than world leader Germany’s 9.8 GW.

At present, then, China is not outstripping the United States in total installed capacity, but it might if it achieves its ambitious targets for 2020—30 GW for wind (or possibly 100 GW, according to recent reports) and 1.8 GW for solar PV (or possibly as much as an astounding 20 GW). However, much of the increase will be in hydropower. And apples should be compared to apples: Europe and the United States also plan to increase installed capacity substantially above current levels by 2020.

Some point to a different metric. Asset financing levels in China have recently outpaced those of American firms. According to a recent report, in 2009, Chinese spending (excluding R&D) totaled $34.6 billion to $18.6 billion for the United States. As the spending levels are within the same order of magnitude, it does not seem that this is reason for panic. The real fear seems to be that if the United States does not adopt progressive climate measures (including a cap-and-trade law), it will fall further behind China. The market data seems to capture the spirit of American inaction on renewables, but does it matter, except for international bragging rights, whether the United States or China occupies the top spot in solar and wind investment or installed capacity?

Total investment figures or gigawatts of renewable energy capacity installed do not tell us how China is moving toward reducing its usage of fossil fuels and achieving climate goals. China is adding renewable energy capacity rapidly, but is much more dependent on conventional fossil fuel generation than the United States. Coal accounts for a staggering seventy percent of the nation’s electricity generation capacity. Even large deployment of renewables will not enable China to reduce that number substantially over the next decade. And that only tells part of the story. China’s growth and increasing appetite of its citizens for modern conveniences has resulted in rapid increases in energy demand. In 2010, China achieved the dubious milestone of surpassing the United States as the world’s largest primary energy user. Its industries are far less energy-efficient than those in the United States and Japan. The government’s initiatives have helped, but China still has a long way to go.

To satisfy its increasing energy demand, China has added more conventional generation capacity than greentech. An article on China and greentech stated that, “China’s investment in renewable energy and other green technologies is miniscule compared to the resources devoted to its continued building of coal-fired power plants and efforts to secure dirty oil shale supplies in Canada and elsewhere.” In 2009, China began construction of a mammoth 13.6 GW power base fueled by coal in Gansu province, the same location planned for a much-praised 10 GW wind farm. New investments in conventional technology made up over one-third of the 134.4 billion RMB (just under twenty billion dollars) in the first half of 2010. As of 2010, China “uses more coal than the United States, Europe, and Japan combined.” That context should be a central part of any discussion that touts China’s achievements in deploying solar panels and wind turbines or in greentech financing levels.

**Invoking the Space Race Metaphor Is Counter-Productive for Addressing Climate Change**

While many believe the United States is losing the green energy race, the reality does not yet match the rhetoric. However, there is more at stake. We need to confront a powerful reality: the United States and China are interdependent, not independent competitors. We need China to take the very actions some posit as competition. This makes the USTR investigation especially unwelcome. Without its greentech efforts and other measures such as its announced goal to reduce the “carbon intensity” of its economy (CO₂ emissions per unit of GDP), China’s increasing energy demand and spending on conventional technology would add considerably to greenhouse gas emissions.

There will be no effective global reduction of emissions that does not include the United States and China, because they are by far the world’s two largest emitters of greenhouse gases. Failure by either nation to reduce its emissions would imperil the entire global effort. We should encourage and support China’s efforts, not consider them a threat to our national wellbeing. Rather than creating the scorched earth of a “greentech war,” both nations can benefit from collaboration. The urgency to do this is compelling. No nation has ever had to address such daunting environmental challenges at the same time as it has pursued such rapid growth. This poses major hurdles to tackling climate change that must be surmounted by nations working together. And there are not just two
nations involved, but the whole world. Rather than creating a two-nation race, we should encourage China’s domestic policies and the climate change collaborations of the “BRIC” developing economies (Brazil, Russia, and India, in addition to China). Nationalistic rhetoric on climate change would be especially unfortunate for the U.S.-China relationship on climate matters. The two nations have ongoing tensions on a whole host of sensitive topics but have worked productively with each other to address climate change. In the two-year period of international negotiations between the promulgation of the Bali Action Plan and the December 2009 Copenhagen summit, talks took place under the auspices of the U.S.-China Strategic and Economic Dialogue. Discussions also took place during 2009 with world leaders at the Pittsburgh G-20 summit and at the Major Economies Forum on Energy and Climate. The two nations have pledged several times to take mutual action to address climate change, and while the promises are often hortatory, the ongoing discussion does have important value in strengthening the bilateral relationship. Advocating competition with the Chinese undercuts these activities. Continued antagonistic rhetoric about a clean energy race will also make it difficult to conduct cooperative efforts in energy and environmental matters. Unlike the near-complete scientific secrecy that marked the Cold War era, China and the United States are working to develop technology together.

Some even argue that China’s programs to promote renewables can be good for the United States’ economy. The Council on Foreign Relations’ Michael Levi, argues that “it’s quite possible for the United States and China both to win, with China lowering the cost of relatively low-tech parts of the value chain, in turn growing the market for the higher-tech parts that are still handled by the United States.” Levi compares this to other situations in which China manufactures products developed in the United States.

Finally, greentech warring makes it more difficult to reach a global climate agreement. According to some accounts, China’s foot-dragging and refusal to adopt binding reduction targets was in part responsible for the failure of the Copenhagen Accord to incorporate global binding limits. As China’s economy continues its rapid growth, there will be even greater demand for it to agree to limit emissions. Castigating it for its greentech policies could foster a climate of distrust and delay further progress on a post-Kyoto agreement.

For all of these reasons, the symbolism of the space race is simply not helpful in a discussion of global climate change.

Lessons for Energy Policy From the “Space Race”

Blaming China deflects attention from our own inabilities to develop progressive policies on renewables and climate change. Numerous observers have noted that we lack a stable set of policies to encourage greentech research, development, and deployment. While we have done well to invent new technologies, our efforts to advance them to the commercial stage and promote their deployment are “fragmented,” spread among numerous agencies, and lacking coordination. As many have noted, “[g]overnment policies can provide a strong impetus for constructing renewable generation facilities,” and there is a wide variety of potential incentives, including support for research and development, tax incentives, government procurement policies, renewable portfolio standards (“RPSs”), carbon cap-and-trade programs, and feed-in tariffs. Federal spending on renewable energy is both anemic in its overall levels and, even after the added billions of dollars in the 2009 stimulus package, well behind that devoted to fossil fuels. Federal tax policy for renewables is inconsistently supportive and in some years, many new projects come to fruition, but the pipeline often dries up. The cyclical pace of support clearly illustrates the consequences of on-again, off-again short-term federal incentives for wind as a market signal.

Some Obama administration actions are similar to actions taken in response to Sputnik, such as the creation of a Cabinet-level position to address climate change, which echoes governmental reorganizations taken in the late 1950s. One action that is especially comparable and noteworthy is the funding of the Advanced Research Projects Agency-Energy (“ARPA-E”) with four hundred million dollars from the American Recovery and Reinvestment Act (“ARRA”) stimulus package. ARPA-E’s name and mission deliberately echo that of the Advanced Research Projects Agency (“ARPA”) created after Sputnik in the Department of Defense.

The moon landing was the product of an amalgamation of many disparate efforts to develop different types of technologies. So too is energy research and development. Like the Apollo program, it is not clear at the outset which technology will prevail, so we need to work on a variety of fronts over a long period of time. Programs established in the stimulus package are temporary, not the comprehensive approach we need.

Much of our effort to develop greentech is mired in a rut. No climate bill, renewable electricity standard, or national feed-in tariff is forthcoming. Progress toward a stand-alone national renewable electricity standard is doubtful. Many have noted the failure of federal leadership and the actions of progressive states that have stepped into the void with their own programs. These policies are not uniform throughout the country. A national program may achieve results that piecemeal state and regional efforts underway cannot.

How can we make more progress? Addressing climate change requires the kind of committed and strong support from the federal government that the space program received throughout the 1960s. The race is really to meet a national goal that we have articulated and that is in our national self-interest, whether or not it has geopolitical significance. We put a man on the moon in part because we were captivated by the idea of a simple, clear goal. I have focused on one idea that could catalyze a push toward rapidly increasing development of renewables: a “solar utility” that would reduce the upfront cost of panels to nearly zero by subsidizing and installing them at houses.
Conclusion

China has become a major player in green tech in a short amount of time. If it could keep up its breakneck pace of growth it might look like it has pulled far ahead of us in the new “green energy race,” but at present the picture is more muddled. The “space race” metaphor and the USTR investigation are counterproductive in that they pit the two nations against each other, when they should emphasize interdependence and cooperation. In the end, competing with China in green tech is about as useful as “energy independence.” It may be much more productive to convince Americans that their nation’s future depends on investment in renewables through a specific national goal.

Endnotes: China’s Greentech Programs and the USTR Investigation


2 Id.

3 United States Launches Section 301 Investigation into China’s Policies Affecting Trade and Investment in Green Technologies, OFF. U.S. TRADE REPRESENTATIVE (Oct. 15, 2010), http://www.ustr.gov/node/6223. A full discussion of this investigation under prevailing trade law is beyond the scope of this article.

4 See, e.g., Thomas L. Friedman, Failure Is Not an Option, N.Y. TIMES, Apr. 27, 2010, http://www.nytimes.com/2010/04/28/opinion/28friedman.html?ref=thomaslfriedman (opening the column with “China is having a good week in America.” Yes it is. I’d even suggest that there is some high-fiving going on in Beijing. I mean, wouldn’t you if you saw America’s Democratic and Republican leaders conspiring to ensure that America cedes the next great global industry—E.T., energy technology—to “China?”)


6 See infra notes 10-24 and accompanying text.


**Due Process Rights in the Carbon Markets**

by Lisa Hodes Rosen, Esq. & Adrienne Bossi, Esq.*

**Introduction**

The compliance and voluntary carbon markets are facing an identity crisis. Despite minor victories following the 16th Conference of the Parties of the United Nations Framework Convention on Climate Change in Cancun, Mexico, the voluntary carbon markets are attempting to grow in an uncertain regulatory world where the fate of the Kyoto Protocol and its market mechanisms hang in the balance. At the same time, the voluntary carbon markets have been able to survive through flexibility and strong self-governance.

Critics initially attacked the fledgling voluntary market for its lack of conformity to rules and attentiveness to real environmental action. Now, as the voluntary markets mature, stricter codes of conduct are emerging. Many of the almost two-dozen carbon offset certification standards that exist in the voluntary carbon markets today seek to establish credibility and accountability for voluntary environmental commitments. They seek to enforce their rules through transparency and reputation to ensure that these commitments are fulfilled in a real and verifiable way. Indeed, social and environmental product certification systems provide the guarantee that a carbon offset project has achieved its lack of conformity to rules and attentiveness to real environmental action.

Several voluntary certification standards include dispute resolution mechanisms for private parties harmed by an adverse decision from an auditor or the standard itself during the certification process. However, these dispute resolution mechanisms vary widely and encompass diverse degrees and notions of due process rights. The available dispute resolution mechanisms in the voluntary carbon markets are important because they can serve as models for how dispute resolution will be addressed by the compliance markets, and, in particular, the Clean Development Mechanism (“CDM”) under the Kyoto Protocol, which is currently framing its own appeals procedure for private parties.

This article explores due process rights in the carbon markets and discusses how innovation in the voluntary markets can set an important example for the compliance markets. This article provides an overview of the carbon markets and then examines whether the four leading offset certification standards in the voluntary carbon markets have achieved enough credibility and status to influence the CDM’s governance structure for the resolution of conflicts. Finally, it outlines the appeals procedures currently available in the voluntary market and advocates for their continued development in both the voluntary market and the CDM.

**An Overview of the Carbon Markets**

The Compliance Carbon Markets

There are two types of carbon markets: compliance and voluntary. Compliance markets are government-mandated cap-and-trade programs. The cap-and-trade programs established by the Kyoto Protocol, e.g., the European Union Emissions Trading System (“EU ETS”), and the Regional Greenhouse Gas Initiative (“RGGI”) in the northeastern United States are examples of compliance carbon markets. To date, the success of these markets has been mixed. Although these programs have proven that carbon is a viable commodity that can attract significant capital, several problems have repeatedly plagued these markets, including the ability to set appropriate caps to enable real emissions reductions over time.

Carbon offsets, which must be certified by a third-party certification standard, are integral to any cap-and-trade program. “Certification standards” are independent organizations that provide the guarantee that a carbon offset project has achieved the promised emissions reductions. When a project’s emissions reductions have been verified against a standard’s rules and requirements, the standard will issue the project carbon credits equivalent to the emission reductions achieved. The credits are then considered “certified” and the credits can either be sold or retired.

**CDM Process of Certification**

The most prominent carbon offset certification standard in the compliance markets is the CDM. The Kyoto Protocol permits Annex I Parties (developed countries) to satisfy part of their emissions reduction targets by using Certified Emissions Reductions (“CERs”) created by registered CDM project activities. The CDM is a global market-based mechanism overseen by the CDM Executive Board (“EB”), which facilitates the creation and issuance of CERs from eligible CDM project activities. Before a CDM project can begin to generate CERs, it must proceed through the CDM project cycle. As a preliminary matter, the nation hosting the CDM project must belong to the Kyoto Protocol as a non-Annex I (developing) country. After the project is designed using an approved methodology that quantifies the

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Adrienne Bossi, Boston University School of Law, J.D. 2010; University of Massachusetts, Amherst B.A., Journalism 2005.
emissions reductions, a designated operational entity (“DOE”) is appointed to act as an independent auditor to validate and subsequently request registration of the proposed CDM project activity.15 The DOE then submits a validation report to the EB, thereby confirming that certain preset requirements are met.16 The EB then decides whether to formally accept the DOE’s recommendation and if so, it “must register CDM projects within eight weeks of the [DOE’s] request unless three members of the CDM Executive Board, or a CDM participant, require a review of the proposed activity.”17

Once registered, the project participants implement the CDM project. A second and different DOE is appointed to monitor the project during implementation and to ultimately confirm that the project’s resulting greenhouse gas (“GHG”) reductions are real, measurable, and verifiable below an approved baseline.18 This second DOE requests the EB to issue CERs after it is satisfied that the GHG reductions are “appropriate”.19 There is then a fifteen-day window during which time a three-member panel of the EB or a CDM participant can request a review of the DOE’s findings.20 However, “[b]ecause the scope of the review is limited to issues of fraud, malfeasance, or incompetence of the [second DOE], issuance of CER[s] by the Executive Board . . . is almost . . . automatic.”21 If no review is requested, the CER “issuance is considered final.”22

THE VOLUNTARY CARBON MARKETS

In contrast to the compliance markets, voluntary carbon markets do not impose a mandatory cap on greenhouse gas emissions. Instead, they rely on participants’ voluntary commitments to reduce emissions. A unique dynamic has developed between these two types of markets in which the voluntary markets often appear to act as a test-drive for companies facing the prospect of the enactment of complex, and sometimes confusing, compliance markets.23 Indeed, the voluntary markets buoyed the credibility of the overall carbon markets when the compliance markets were most vulnerable. This was particularly evident following the failures at the 15th Conference of the Parties (“COP15”) where regulators hesitantly noted the Copenhagen Accord.24 The robust growth of the voluntary markets is thus a logical response to the Kyoto Protocol’s complex rules, disparate enforcement and inefficiencies that have resulted in CDM capacity bottlenecks and slowed credit issuances.25

In the past, the voluntary markets were accessed through the Chicago Climate Exchange (“CCX”), a voluntary but legally binding cap-and-trade program, or through an over-the-counter (“OTC”) purchase or sale. However, CCX’s emissions trading program shut its doors at the end of 2010.26 Consequently, OTC transactions will now dominate the market.

Most of the transactions in the OTC market involve offset credits from third-party certification standards.27 In 2008 and 2009, more than ninety percent of the credits transacted in the voluntary markets were certified by a third-party standard.28 Over the last few years, the following certification standards have emerged as leaders in the voluntary market: the Verified Carbon Standard (“VCS”), the Climate Action Reserve (“CAR”), the American Carbon Registry (“ACR”), and the Gold Standard (“GS”).29

The VCS was launched in 2007.30 It was founded by The Climate Group, the International Emissions Trading Association, and the World Business Council for Sustainable Development.31 The World Economic Forum and approximately one thousand carbon market stakeholders also assisted in developing the standard.32 VCS issues credits called Verified Carbon Units (“VCUs”) for carbon offset projects throughout the world that can demonstrate emissions reductions that are real, measurable, permanent, additional, independently verified, unique, transparent, and conservative.33

CAR, formerly the California Climate Action Registry (“CCAR”), was established in 2001 after a group of CEOs lobbied the state of California to create a mechanism by which they could track their firms’ early emissions reductions in anticipation of the future state and potential federal regulation.34 CCAR was thus born from a state mandate.35 The program eventually separated from the state to be incorporated as a nonprofit organization and, in 2009, the organization began transitioning its tracking and inventory operations to The Climate Registry, a national nonprofit body established in 2007 that was actually modeled after CCAR.36 In turn, CAR flip-flopped its role as part of CCAR to become the new parent organization focusing on developing an offset credit, Climate Reserve Tonnes (“CRT”) that apply to GHG reduction projects within North America.37

ACR was established in 1996 by the Environmental Defense Fund and Environmental Resources Trust.38 It was the first of its kind in the United States and over the last fifteen years, it has issued over thirty million offset credits.39 These credits, called Emission Reduction Tons (“ERTs”), are issued in accordance with ACR’s requirement that reductions are “real, measurable, permanent, in excess of regulatory requirements and common practice, additional to business-as-usual, net of leakage, verified by a competent independent third party, and used only once.”40 ACR’s reach is not limited to the United States and accepts international projects.41 In 2007, ACR became an “enterprise” of Winrock International, an American nonprofit organization working globally to “empower the disadvantaged, increase economic opportunity, and sustain natural resources.”42

The GS Foundation, which manages the GS carbon certification scheme, was founded in 2003 by a network of large nongovernmental organizations (“NGO”), including the Worldwide Fund for Nature, Helio International, and SouthSouthNorth, in response to criticism that the Kyoto Protocol’s CDM did not adequately address sustainable development.43 These NGOs developed the GS as a complement to renewable energy or energy efficiency CDM projects through the addition of a sustainability assessment.44 If a project proponent successfully applied the GS’s sustainability assessment to its CDM project, then the GS would provide the CDM project with an additional GS label.45 The project could then sell the GS-labeled CERs for an additional premium in the marketplace.46 Subsequently, in 2006, the GS launched its voluntary standard whereby it issues GS Voluntary Emission Reductions (“VERs”) to renewable energy or
energy efficiency projects that successfully meet the Standard’s rigorous technical and sustainable development criteria.57

Unlike the CDM, which was born out of climate diplomacy and is therefore vulnerable to global politicking, VCS, CAR, ACR, and GS operate in an unregulated market, free from bureaucracy, political hostage-taking, and other possible effects of governmental intervention. This gives VCS, CAR, ACR, and GS freedom to respond to market demands through innovation, limited only by their own creativity and available resources. As such, these standards can experiment with a variety of governance, financial, and technical mechanisms. Indeed, experiments in the voluntary carbon markets—the successes and failures alike—can set examples for the compliance markets as they develop over time.

These third party standards play another critical role in the voluntary markets, acting as civil regulatory bodies to build consumer trust by ensuring a consistent level of quality. Thus, voluntary certification standards become “distinctive . . . because they transform the global marketplace by developing ‘deliberative and adaptive governance institutions designed to embed social and environmental norms in the global marketplace that derive authority directly from interested audiences, includ[ing] those they seek to regulate, [but do not derive their authority] from sovereign states.”48 Such non-state global governance institutions are known as non-state market driven (“NSMD”) governance systems.59 The application of the NSMD analysis to voluntary carbon certification standards is appropriate because the framework was originally developed to explain forest certification, which is similar to carbon certification.50

VCS, CAR, ACR, and GS must establish credibility, build consumer trust, develop a strong reputation in the marketplace, and operate with a certain degree of political integrity to be considered as relevant and appropriate examples for the CDM. The NSMD governance system, an academic analytical framework, provides a framework from within which to measure these characteristics.

**The NSMD Framework—A Measure of Market Credibility**

It is generally accepted that a NSMD system displays five features.51 First, a NSMD system’s authority is not derived from the state.52 That is, “there is no use of state sovereignty to enforce compliance.”53 This element is arguably the most important because of the lack of a connection with the state, which distinguishes NSMD systems from public-private partnerships or, in the case of carbon markets, the standard-setting CDM, which derives its authority from an international agreement between nations.54 Second, NSMD systems must have established governance mechanisms,55 whereby “NSMD institutions constitute governing arenas in which . . . adaptation, inclusion, and learning over time occur . . . across a wide range of stakeholders.”56 At its core, this element rests on democratic ideals of fairness, accountability and transparency, and its intent is to promote “good practice” and “practical reason.”57 Third, the NSMD’s authority is market-based,58 deriving its power from the market and civil society.59 Fourth, the NSMD is concerned with social impacts.60 A NSMD governance system seeks to address global issues that private firms are not incentivized to address, and which governments may not have the capacity or, in the case of climate change mitigation in the United States, the political will to remedy.61 Finally, the NSMD system has enforcement mechanisms and mandatory requirements.62 These are rules and regulations where compliance can be verified and non-compliance can be punished.63 “Once firms sign on, they are subject to governance, rules and enforcement that have more in common with state regulation than standards of voluntary bodies that can be abandoned with little consequence.”64

While the NSMD framework omits any *express* reference to due process rights for the NSMD system’s constituents, it is recognized that “entities that are affected by the decisions of a regulatory body [should] have access to a full and fair review of the decision in question.”65 If NSMD systems are akin to democratic regulatory bodies, then it would seem logical to expressly incorporate the protection of individual rights into the NSMD theoretical analysis. The exclusion of due process principles would appear to contravene the democratic ideals upon which the NSMD systems are founded and rely.

It is possible that the second element of a NSMD system, related to governance mechanisms, could be interpreted to include due process rights. Within the governance aspect, “good practice” is defined in terms of “fairness and procedural legitimacy,” but there is no consensus as to how to achieve it.66 Likewise, “practical reason” relates to ideas of procedural fairness.

Practical reason builds on the notion that reasons derive from interpretative and dialogical processes (e.g., legal processes) in which intersubjectively validated knowledge and normative understandings of fairness play a role. [Practical reason] . . . concerns the epistemic requirements for democratic practice, which . . . requires “discursive validation” [and] “ideal speech” conditions where validity claims can be assessed.57

In other words, constituents should be afforded the opportunity to challenge validity claims and be heard.68 “Practical reason,” however, is interpreted on a case-by-case basis in accordance with specific historical context and cultural values.69

Status as a NSMD system is important as these certification systems pursue legitimacy as civil regulatory bodies.70 Otherwise, standards that cannot meet the NSMD test risk categorization as merely a string of coordinated activities adopted by self-serving stakeholders. Under the existing five-part test, three out of the four voluntary certification standards have the elements of a NSMD system and one standard, CAR, which has gained credibility through its connections with the State of California, may be more aptly described as a public-private partnership.

**VCS**

Under the five-part NSMD test, VCS meets all of the requirements. As an industry-created standard, its power is not derived from the state. It is governed by the VCS Standard
The first NSMD prong, prohibiting the standard to have derived any power from the state, is where CAR falls short because it was created by the State of California. Despite its subsequent separation from the state to become an independent nonprofit organization, CAR is still recognized and rewarded for its early connection, and may thus be more appropriately categorized as a public-private partnership. In arguendo, supposing CAR did comply with the first NSMD prong, the standard would easily satisfy the remaining original requirements: CAR has established its own governance mechanisms with the Verification Program Manual and Climate Action Reserve Program Manual; its power is market-based (it had thirty-one percent of the voluntary market share in 2009); it is concerned with climate change, and it has instituted enforcement mechanisms and mandatory requirements in the form of a detailed program schedule and penalty structure.

CAR

Like VCS, ACR also meets the five NSMD requirements. First, as a standard founded and owned by NGOs, its power is not state-based. Second, it also has strict rules. Generally, ACR’s project cycle is similar to that used by VCS. ACR easily meets the third and fourth elements because its authority is market-based, with four percent of the voluntary market share, and its mission is also to mitigate climate change. ACR’s rules are enforceable, but it relies primarily on domestic courts. The Guidelines specifically state that any legal responsibilities or rights of ACR or parties involved (verifiers, proponents, members, etc.) are outlined in the contractual agreements they sign with one another. For example, the attestation agreement signed by parties seeking to become ACR-approved verifiers requires the parties to obtain their own liability insurance, agree to limit ACR’s liability, indemnify ACR, and submit any claims that may not otherwise be provided for in the contractual language to the courts and laws of Arkansas.

GS

The GS also meets the five-part NSMD test. First, like ACR, GS was founded by NGOs. Second, it has strict governance mechanisms. The Gold Standard Requirements (“GSR”) detail a multi-step project cycle for its voluntary standard in which the project proponent must first assess the eligibility of the project against the GS’s criteria, including strict rules regarding additionality and sustainable development. The third NSMD factor, requiring market-based authority, is also satisfied here. In 2009, GS accounted for seven percent of the transaction volume in the voluntary market. Fourth, the GS mission’s concern for social impacts is two-fold: it seeks to promote sustainable development and mitigate climate change through its offset projects. Finally, the GS rules are enforceable. The GS Terms and Conditions (“GSTC”) provide that a breach of its rules may be “prosecuted as a violation of [GS’s] intellectual property rights.” In addition, Section 10 of the GSTC addresses sanctions, including fines and/or the freezing of a GS registry account, for a violation of the GS’s rules.

PRIVATE PARTY DISPUTE RESOLUTION MECHANISMS IN THE CARBON MARKETS

There are several types of potential disputes that may arise between a private party project proponent and a certification standard. The first type involves the investment relationship. Project development requires large up-front capital expenditures and, because certification is a time-consuming process, investors may not see returns for a few years. Consequently, even a slight delay may change the investment analysis. Second, disputes can arise over registration, issuance, or revocation decisions. These disputes could involve a myriad of scenarios, such as when a standard rejects a project, revokes credits based on changes to the project, or where one project participant claims that the certification standard issued credits to the wrong party. Third, disagreements over bookkeeping could escalate into a potential dispute over, for example, an allegedly erroneous transfer. Fourth, a certification standard may invalidate credits where it has reason to believe the project documentation was fraudulent. Finally, disputes could arise in connection with the validation or verification reports from the third-party auditor on issues including, but not limited to, carbon quantification or the correct application of a methodology. A dispute could also arise when the certification standard accepts an allegedly defective validation or verification report.

Litigation may be the obvious recourse in the event of a dispute between a private party project proponent and a certification standard. However, here, litigation may be an inadequate mechanism for several reasons. A compliance market certification standard, such as the Clean Development Mechanism, may be afforded sovereign immunity. In the case of a private certification standard, domestic court systems may not have the technical expertise to properly adjudicate registration, issuance, revocation, or auditing decisions, and hiring the appropriate expert witnesses can be expensive for both sides. Furthermore, project proponents may not reside in the same country as the private certification standard, and a foreign party may distrust the ability of a foreign court to be impartial. Private arbitration may be a better forum for disputes with public or private certification standards because it has the potential to be less time consuming and more expeditious.
consumming and less expensive than litigation, parties can select independent, technically qualified judges, and some arbitration bodies provide standing to both public and private parties. More importantly, unlike potentially hostile foreign courts, a project proponent will not question the allegiance of an arbitrator if it was involved in the selection process. On the other hand, private arbitration may not be well suited to resolve disputes between project proponents and a certification standard because of the lack of uniform decision-making and difficulty for the prevailing party to enforce an award. Instead, an independent internal dispute mechanism, tailored to the standard’s rules, could be the best forum for resolving such disputes.

**DISPUTE RESOLUTION UNDER THE CDM**

The significance of the CDM lies in the way it marries the public and private sector. “The CDM is unique in regulating a market dominated by private players that depend, in the creation of the market’s underlying asset, on a United Nations committee, the CDM Executive Board that approves calculation methods and projects.” However, as the CDM grows—at the time of this writing, over 2,000 projects have been registered and the pipeline of undeveloped projects is equal or greater in size—questions about the CDM’s governance structure have arisen. In particular, the EB functions as a regulatory agency issuing decisions and creating rules that have financial and legal implications for private parties. But, unlike many regulatory agencies that operate in accordance with democratic notions of good governance, including “legality, certainty, formal equality, accountability, due process and access to justice,” the EB is not subject to the same governance controls. Compounding the problem, there is no independent tribunal for reviewing the EB’s decisions and, consequently, CDM project proponents have little, if any, due process rights.

**DISPUTE RESOLUTION IN THE VOLUNTARY CARBON MARKETS**

VCS, CAR, ACR, and GS have all developed their own frameworks for appeals. Likewise, the CDM is following suit in developing an appeals process and can look to the voluntary market for guidance. Understanding how the different certification standards address due process rights may provide insight into how the CDM should evolve.

**VCS**

The VCS Program Guidelines acknowledge the possibility of disagreements between project proponents and the validators and verifiers empowered to certify their project under the VCS Standard. Contractual disputes under the VCS program involving verifiers, validators, and project participants are generally governed by English law and will be heard exclusively in English courts. The VCS Guidelines do provide “an appeal process for cases where project proponents feel that the validator or verifier [has] misinterpreted the VCS Program and all avenues of discussion with the validator or verifier have been exhausted.” In those instances, “[t]he VCS Association will commission an independent consultant to perform this review.

The independent consultant will be selected by the VCS Secretariat and paid for by the project proponent demanding the review. Ultimately, though, the final decision rests with the VCS Board.

**CAR**

CAR offers a means of recourse for parties adversely affected by its decisions that is tailored for the specifics of its program. For example, CAR explains that disputes between a verifier and project developer are to be handled by the verifier’s internal procedures, but nonetheless offers itself as an informational resource to assist in the resolution process. However, if the parties cannot reach resolution through private negotiation, then the parties can look to CAR to play the roles of judge, jury, and prosecuting attorney. Once the verification is complete, a committee of at least three CAR staff members will review the submitted paperwork and interview the verifiers and project developers involved before issuing a final, written determination.

Likewise, disagreements with regard to CAR’s decisions affecting verifiers and project developers are also addressed in CAR’s Verification Guidelines. Upon written request for appeal, CAR will assemble a Dispute Resolution Committee containing “an odd number of individuals, including at least one Reserve staff member not directly involved in the case, one Reserve Board member, [and] a representative from an appropriate oversight agency—potentially . . . [a] regulatory or government agency—that is knowledgeable of Reserve policies and procedures.” The Dispute Resolution Committee will review all relevant paperwork and is authorized to consult outside experts. A decision is reached by majority vote and is considered final and not appealable.

**ACR**

ACR, unlike its aforementioned counterparts, does not detail any appeal process in its Program Guidelines and although the framework for the program provides project developers opportunities to resolve issues discovered in the verification process, there is no express recourse in the event of a material disagreement or breakdown of communication. Instead, as discussed above, ACR relies primarily on domestic courts for dispute resolution.

**GS**

GS also provides an appeals process that protects constituents’ due process rights in a manner akin to traditional governmental regulatory bodies. In July 2010, GS released a proposal for an appeals procedure to provide project developers with recourse against adverse decisions by GS regarding registration, issuance, or labeling. The purpose of the appeals procedure is to “fill the gap in remedies between the decisions from the certification standard and the consequences for project developers.” It is the first of its kind in the voluntary carbon markets.

Although the GS appeals process is in its pilot phase, it is currently the most developed dispute resolution mechanism in the voluntary carbon markets. If successful, it can serve as an
example for other certification standards—both in the compliance and voluntary markets—that do not currently afford their project proponents the same level of independent review.

The GS Rules for Appeals on Registration, Issuance and Labeling (“Arbitration Rules”), which are based on the International Bureau of the Permanent Court of Arbitration’s (‘‘PCA’’) “Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources,” (“Environmental Rules”), will govern the arbitration procedure.121 Created in 2001, the Environmental Rules fill a gap in international environmental dispute resolution by providing a forum in which governments, NGOs, private entities, and individuals can seek redress.122 Certain changes have been made to the Environmental Rules to account for the particular characteristics of GS projects and the GS project cycle.123

Initially, the scope of the proposed appellate procedure would be limited to project proponents, project applicants, and project owners.124 These parties would be required to submit their disagreement with a GS decision to mediation within six weeks.125 If the mediation proves unsuccessful, the parties would have the option to appeal the dispute to the PCA at the Peace Palace in The Hague, who will serve as the registrar of proceedings and will channel communications between or among the parties.126

In accordance with the GS Arbitration Rules, the parties will have the option to choose one arbitrator or a tribunal of three arbitrators, with opportunities to challenge the appointment of an arbitrator on various grounds.127 The arbitrators will be appointed from a list of specialized arbitrators to be created and maintained by a neutral appointing committee.128 Hearings may be held in person, or via telecommunication and parties may call experts to provide evidence during the hearings.129

With regard to the award, the purpose of the arbitration procedure is not to award damages or pecuniary compensation.130 Rather, the award will determine whether the adverse decision was well-founded and in accordance with the relevant version of the GSRs.131 If it is determined that the adverse decision was not well-founded or it violated the relevant GSRs, the arbitration tribunal may issue an alternative decision or provide for an alternative action.132

Conclusion

The right to due process is fundamental to democratic ideals and governance systems. As the compliance markets and, in particular, the CDM, evolve, they will likely seek to incorporate mechanisms to protect individual procedural rights. Those best positioned to play the part of role model are CAR, ACR, VCS, and GS, having all achieved a level of market credibility measured by the NSMD framework. However, the appeals procedures provided for by these four standards vary widely. The voluntary carbon markets, and the offset certification standards that operate within them, are gaining credibility and can set the tone for the compliance markets.

Endnotes: Due Process Rights in the Carbon Markets

2 Id. (citing Benjamin Cashore, Legitimacy and the Privatization of Environmental Governance: How Non-State Market Driven (NSMD) Governance Systems Gain Rule-Making Authority, 14 GOVERNANCE 502 (2002)).
3 The Kyoto Protocol, which established the most prominent international carbon market, is an international agreement linked to the United Nations Framework Convention on Climate Change that was adopted on December 11, 1997 and later entered into force on February 16, 2005. For the purpose of determining national commitments, the 185 nations that have ratified the Protocol are categorized as an Annex I country, an Annex II country or a developing country. To aid nations in attaining their emissions targets, the Protocol created two offset mechanisms: the Clean Development Mechanism (“CDM”), and Joint Implementation (“JI”). See generally Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 32 Stat. 97, 34 U.N.T.S. 243 [hereinafter Kyoto Protocol].
5 See generally, Kyoto Protocol, supra note 3.
9 See generally Ricardo Bayon et al., VOLUNTARY CARBON MARKETS: AN INTERNATIONAL BUSINESS GUIDE TO WHAT THEY ARE AND HOW THEY WORK 22-23 (2007).
10 Id. at 22.
11 Once a carbon credit is retired, it cannot be re-sold. Companies, organizations, governments, or individuals looking to reduce their carbon footprint must retire a corresponding number of carbon credits. See id. at 31.
12 See Rolf H. Weber & Aline Darbellay, Regulation and Financial Intermediation in the Kyoto Protocol’s Clean Development Mechanism, 22 Geo. Int’l Envtl. L. Rev. 271, 279-80 (2010) (explaining that “[o]ne CER represents one ton of carbon dioxide equivalent . . . . No tangible certificate is created upon issuance, but an electronic database tracks the output of CER. Carbon units are accounting units that have their own unique serial numbers and are tracked and recorded through the CDM registry or any subsequent registry. CER are transferable and can be traded in the carbon market.”).
13 Id. at 278-79; Kyoto Protocol, supra note 3, at art. 12, ¶ 1.
15 Id. at 14-15.
16 Weber & Darbellay, supra note 12, at 278 (explaining that DOEs are designated by the CDM Executive Board); UNFCCC Report, supra note 14, ¶ 27(e), 35-40; Kyoto Protocol, supra note 3, at art. 12, ¶ 5.
17 Weber & Darbellay, supra note 12, at 278; UNFCCC Report, supra note 14, ¶¶ 36,43; Kyoto Protocol supra note 3, at art. 12, ¶ 5(c).
18 Weber & Darbellay, supra note 12, at 279; UNFCCC Report, supra note 14, ¶¶ 44-47; Kyoto Protocol supra note 3, at art. 12, ¶ 5(b).
19 Weber & Darbellay, supra note 12, at 279.
20 Id.
21 Id.

Endnotes: Due Process Rights in the Carbon Markets continued on page 75
CARBON REDUCTION PROJECTS AND THE CONCEPT OF ADDITIONALITY

by Brian Joseph McFarland*

INTRODUCTION

Carbon reduction projects follow a cycle that includes conceptualization, due diligence, implementation, documentation, audit or validation, and finally certification, with the eventual issuance of verified, serialized carbon reduction credits, also known as carbon offsets. To fulfill this process, there are several technical elements that must be addressed: monitoring or measurement, reporting, and verification (“MRV”), permanence (i.e. ensuring the project’s duration), leakage (i.e. addressing negative and identifying positive offsite impacts), and additionality.

Additionality is a test that a carbon reduction project must meet to ensure the project would not have been implemented without the revenue of the carbon markets. This test of additionality must be satisfied if the project is being submitted to the voluntary carbon markets—for which, voluntary buyers want to be ensured their donations actually matter for a project—or to the compliance markets since buyers need to be confident that regulators will accept their carbon reduction purchase.

It is important to further note that all of the most prominent carbon reduction certification standards—again, whether a compliance market under the Kyoto Protocol or an internationally recognized voluntary standard—require some type of additionality test. This includes, but is not limited to, the following certification standards: the American Carbon Registry (“ACR”), Center for Resource Solutions (“CRS”), Green-e Climate Protocol for Renewable Energy, Chicago Climate Exchange (“CCX”), Clean Development Mechanism (“CDM”), Climate Action Reserve (“CAR”), Climate, Community and Biodiversity Standard (“CCBS”), Gold Standard, Regional Greenhouse Gas Initiative (“RGGI”), and the Verified Carbon Standard (“VCS”).

Additionality is an important requirement because if non-additional (i.e. “business-as-usual”) projects are eligible for carbon finance, then the net amount of greenhouse gas emissions will continue to increase and the environmental integrity of carbon reduction projects will be called into question. For example, if a project was already far exceeding its industry average return on investment and was implemented over fifty years ago when no carbon markets existed, why should this particular project also be eligible for additional revenue from the carbon markets? Similarly, if an activity was legally required, then why should this activity of a regulated entity also be eligible for additional revenue from the carbon markets? The challenge with additionality, however, is that one must prove a counterfactual argument (i.e. what would have otherwise happened in the absence of a project) to ensure the project provides carbon reductions that would not have otherwise occurred. This article explores the different concepts of additionality, while acknowledging its controversial elements and proposing inclusion of some important considerations to ensure net emissions reductions.

LEGAL OR REGULATORY ADDITIONALITY

Legal additionality, or what is sometimes referred to as regulatory additionality or surplus, is perhaps the most objective type of additionality. If a law exists and a given activity is regulated, then the project is most likely not eligible for carbon finance. Therefore, for a project to meet the legal additionality standard, it must provide carbon reductions beyond those required by law.

To put this in context, the U.S. Environmental Protection Agency (“EPA”) regulates large municipal solid waste (“MSW”) landfills, and according to the Climate Action Reserve’s Landfill Project Protocol Version 3.0, “[t]here are several EPA regulations for MSW landfills that have a bearing on the eligibility of methane collection and destruction projects as voluntary GHG reduction projects.”

Two challenges with legal additionality are that on one hand, the concept might create perverse incentives, and on the other hand, sometimes following the law is not common practice. With the first idea in mind, the Montreal Protocol is an international treaty designed to phase out the production of ozone depleting substances (“ODS”). While the United States, Canada, and European nations have phased out the production of hydrofluorocarbons (“HFC”), which are ODSs and greenhouse gases, the largest contributor of certified emission reductions (“GER”) under the Kyoto Protocol’s Clean Development Mechanism are from HFC projects in China and India. Since legal additionality would rule out the eligibility of HFC projects hosted in China and India if these countries were to pass

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domestic laws eliminating the production of HFCs, they have little incentive to begin regulating HFCs. If they did pass regulations, China and India would experience a reduction of foreign investment towards the purchase of these carbon reduction credits and would need to use their own public funds to phase out HFCs. Due to the perception that manufacturers are actually producing excess HFCs, the European Union Emission Trading Scheme will no longer accept these HFC reduction credits beginning in 2013. Another example of this legal additionality challenge is the tough predicament a government might face when contemplating the passage of a strict feed-in tariff or an aggressive renewable portfolio standard. Such a passage would effectively legally require an increase in renewable energy production, however, there would be fewer carbon reduction credits from these renewable energy sources eligible for purchase from international buyers.

On the second challenge of additionality, there are legal reserve requirements on private property in Brazil. Depending on the region (e.g. Amazon Region versus Cerrado Region), a landowner is restricted from using twenty to eighty percent of his or her land. However, it is a somewhat common practice—particularly in the remote Amazon—to illegally clear forests from the legal reserve. Now, if such practices are deemed to be common, should legal additionality still apply and thus prevent the reforestation of this fallow land using carbon finance?

Corruption also presents challenges for ensuring the legal additionality of a project. There are currently carbon reduction projects either certified or under development in Ethiopia, Nicaragua, the Philippines, Kenya, and Venezuela. Yet, Transparency International’s Global Corruption Report 2009 rates Ethiopia as the 126th most corrupt country out of 180 countries, Nicaragua as the 134th, the Philippines as the 141st, Kenya as the 147th, and Venezuela as the 158th. Where projects provide much needed financing in developing countries with already corrupt infrastructures, there may be a disincentive to upgrade or improve legal frameworks that could reduce the number of carbon reduction projects.

The evolving regional compliance carbon markets of the U.S.—which are the Western Climate Initiative (“WCI”), the Regional Greenhouse Gas Initiative (“RGGI”), and the Midwestern Greenhouse Gas Reduction Accord (“Accord”)—have Canadian Provinces and Mexican States as either participants or observers. As these regional programs transform, it will be interesting to see how state or national laws, and thus legal additionality, will be applied.

**COMMON PRACTICE OR TECHNOLOGICAL ADDITIONALITY**

Common practice additionality, which could incorporate either the technological or market penetration of a given project type based on its geography, is another objective additionality test. The aspect of geography is important because what is prevalent in one location—for example, wind turbines in Texas or solar photovoltaic systems in California—might not be so prevalent in other locations (i.e. such as New Hampshire or Alaska).

According to the American Carbon Registry’s standard, common practice is determined by whether there is “widespread deployment of the project . . . within the relevant geographic area.” Similarly, the Verified Carbon Standard defines it as one which is “not common practice in the sector/region, compared with projects that have received no carbon finance.”

Yet, how does one define common practice and what specifically would be the particular geographic focus (i.e. a country, state, local electric grid)? Perhaps one of most controversial examples surrounding common practice was the Chicago Climate Exchange’s acceptance of soil conservation carbon reduction projects (i.e. also known as no-till), which were previously enrolled in the U.S. Department of Agriculture’s Conservation Reserve Program. Under this program, farmers were rewarded by the purchase of their carbon reduction credits for activities that they were already undertaking without revenue from the carbon markets. If a regulated industry is allowed to emit greenhouse gas emissions because they are supporting non-additional carbon offset projects, then the environmental integrity of the system should be called into question because the net greenhouse gas emissions will continue to increase. Climate Action Reserve (“Reserve”) aptly points out that there are many difficulties in actually defining the common practice of a region.

According to Derek Six, the Portfolio Manager for Environmental Credit Corporation, the best assessment of additionality would be the use of a market penetration approach. Such an approach, which is similar to common practice, would incorporate knowledge and technology barriers to implementation, along with financial aspects of additionality. For example, agricultural methane destruction or agricultural methane gas-to-energy projects are only installed on about 0.5% of U.S. farms. Thus under a market penetration approach, all agricultural methane destruction and agricultural methane gas-to-energy projects would be eligible for carbon finance whether or not there were projects clustered in a specific region (e.g. California) or whether a particular project had a slightly higher financial return (i.e. financial additionality).

**FINANCIAL ADDITIONALITY**

Many carbon market participants are averse to the concept of financial additionality, which is much more subjective than legal additionality or common practice. Likewise, financial additionality is difficult to determine due to matters of confidentiality, proprietary internal business decisions, and the potential use of arbitrary metrics. The Clean Development Mechanism, which refers to financial additionality as the investment analysis, considers whether the project would have been financially attractive without the revenue from carbon reduction credits.

The Verified Carbon Standard considers financial additionality, which it defines as an investment barrier and a subset of implementation barriers. The American Carbon Registry also considers financial additionality a subset of implementation barriers and asks whether funding from carbon reduction credits will incentivize the project’s implementation.
Confidential and proprietary internal business matters that make financial additionality a subjective and difficult assessment include, but are not limited to:

- Capital budgeting decisions (i.e. which projects will get funded and why?)
- Financing sources (e.g. banks, internal funds, venture capitalists)
- Portfolio of available projects (i.e. what alternative investments/projects are possible?)
- Required internal rate of return (“IRR”), return on assets (“ROA”), return on equity (“ROE”), and/or payback period (i.e. which metric does a firm use and what is the requirement?)

While the Clean Development Mechanism has an extensive discussion on appropriate metrics for financial additionality (i.e. discount rates and benchmarks), arbitrary metrics such as the following could be used as justification for allowing or not allowing a project to count as eligible for carbon finance:

- Companies of the same size (e.g. in terms of money and/or employees)
- Geographical location (e.g. country, sub-national, local electric grid)
- Length of time company is in business
- Public vs. private ownership

This said, how do you compare a small, specialized renewable energy company to a large, diversified provider? Similarly, do start-ups differ from “well-established” companies enough to present a challenge when comparing financial additionality thresholds? Also, how does the ownership structure (i.e. non-profit, limited liability corporation, type C corporation, public-owned entity, joint-ownership) impact financial decisions and thus, financial additionality?

Applying financial additionality across a broad spectrum of project types is another significant challenge, posing many serious questions. Likewise, why should carbon markets reward projects that demonstrate the poorest financials? If two different projects existed and with one thousand dollars, one could reduce one thousand metric tons of carbon dioxide and the other could reduce one hundred metric tons, why should the one hundred metric tons project be considered more financially additional? On the other hand, why reward projects that already have “superior” returns and that existed before the formation of carbon markets (i.e. a question which relates to voluntary buyers wanting their donations to matter)?

Financial additionality should be phased out of future certification standards and new revisions of current certification standards, a position supported by Green-e Climate.33

**Project-By-Project Additionality**

Under the project-by-project test for additionality, each project individually undergoes a series of additionality tests according to the given standard. Two main standards, which apply a project-by-project additionality test, are the Clean Development Mechanism and the Verified Carbon Standard. The Clean Development Mechanism is the carbon reduction standard for Certified Emission Reductions (“CER”) for the Kyoto Protocol’s international compliance market.34 In contrast, the Verified Carbon Standard is the leading voluntary carbon markets standard, in terms of market share, and has adopted methodologies from the CDM.35

Essentially, project proponents—whether referring to investors, project developers, landowners or buyers—need to assess whether each and every individual project meets the additionality tests. Such a process can be expensive, time-consuming (i.e. reduces scalability and time-to-market), and difficult for both the general public and local communities to grasp. Furthermore, it is difficult for auditors to determine an individual project’s subjective assertions, especially with regard to financial additionality.

**Performance or Sectoral Additionality**

Many current and evolving certification standards—including the Regional Greenhouse Gas Initiative, the Western Climate Initiative, and the Climate Action Reserve—are adopting performance or sectoral approaches to additionality. Essentially, such performance or sectoral approaches use a uniform additionality test or benchmark, which could be based on an industry or geographic region. It is important to note, the same additionality criteria—such as legal, common practice/technology, and financial—can be applied to a performance or sectoral approach, the main difference is that such criteria are not uniquely applied to each single project. Under the Regional Greenhouse Gas Initiative (“RGGI”) offset projects may not be government ordered projects, may not receive incentives from RGGI auction proceeds, and must meet certain requirements to qualify.36

Recent discussions of the WCI indicate that it will attempt to set a standardized baseline for offset protocols that reflect the strictest regulatory and legal requirements.37 The Climate Action Reserve uses standardized performance based tests for additionality because they are administratively easier to implement and less subjective.38

For the level of scalability required to address global climate change, there needs to be a near-full transition to sectoral or performance benchmarks for additionality. To this end, one of the decisions made at the sixteenth session of the Conference of the Parties of the United Nations Framework Convention on Climate Change in Cancun, Mexico, was for the Clean Development Mechanism to work towards standardized baselines and additionality tests.39 Similarly, the Verified Carbon Standard has convened a steering committee, which is developing “VCS requirements and guidance on performance benchmark and technology test approaches to baselines/additionality.”40

**Conclusion**

Carbon reduction credits, also known as carbon offsets, are an effective cost-containment mechanism and have the potential to produce greenhouse gas reductions alongside a host of co-benefits (e.g. local jobs, technology transfer, reforesting critical wildlife habitat). However, the general public, regulators, and environmentalists do not want to hear, “well we were already doing the project and we are doing nothing different, but now
we are getting revenue from the carbon markets.” To ensure overall reductions in greenhouse gas emissions, additionality is a useful technical tool to ensure the integrity of carbon reduction projects, but certification standards should be less concerned about financial additionality and more focused on transitioning to sectoral or performance approaches.

Endnotes: Carbon Reduction Projects and the Concept of Additionality

4 See Climate Standards and Governing Documents, Green-e, http://www.green-e.org/getcert_gbstd_condition.shtml (last visited Jan. 25, 2011). CRS also operates the Green-e Energy program to certify Renewable Energy Certificates (“RECs”), which are in a different environmental asset class than carbon reduction credits. There are different mechanisms—such as technology type and project start date—to determine eligibility of REC projects.
12 For example, the American Carbon Registry’s standard asks the following question: “Regulatory Surplus: Is there an existing law, regulation, statute, legal ruling, or other regulatory framework in effect now or as of the project start date that mandates the project or effectively requires the GHG emissions reductions? Yes = Fail; No = Pass.” Am. Carbon Registry, Am. Carbon Registry 2.1, at 23 (2010), http://www.americancarbonregistry.org/carbon-accounting/ACR%20Standard%20v2.1%200ct%202010.pdf. Similarly, the Verified Carbon Standard states: “Test 1–The Project Test: Step 1: Regulatory Surplus: The project shall not be mandated by any enforced law, statute or other regulatory framework.” VCS Association, Voluntary Carbon Standard 2007.1, at 16 (2008), http://www.v-c-s.org/docs/Voluntary%20Carbon%20Standard%202007_1.pdf. The full name of the VCS changed from Voluntary Carbon Standard to Verified Carbon Standard in 2011; therefore reports cited include the former designation while websites include the latter.

• New Source Performance Standards (NSPS) for MSW Landfills, codified in 40 CFR 60 subpart WW — Targets landfills that commenced construction or made modifications after May 1991.
• The National Emission Standards for Hazardous Air Pollutants (NESHAP), codified in 40 CFR 63 subpart AAAA — Regulates new and existing landfills.”
22 Am. Carbon Registry, supra note 12, at 23.
23 VCS Association, supra note 12, at 16.
27 Interview with Derek Six, Portfolio Manager, Environmental Credit Corp (Dec. 8, 2010).
28 Id.
29 Id.
31 VCS Association, supra note 12, at 16.
32 Am. Carbon Registry, supra, note 12, at 23.
39 Climate Action Reserve, supra note 26, at 7.
Climate Change: Government, Private Property, and Individual Action*

by Paul Babie**

INTRODUCTION

Climate change is a private property problem. Some may react strongly to such a bold claim—after all, private property is seen as a solution to the crisis, as illustrated by the current fascination with the “commodification”\(^1\) and “propertization”\(^2\) of carbon through “cap-and-trade”\(^3\) schemes. Notwithstanding the current fashionability of legislative responses to climate change, in the last year governments seem to be backing away from taking bold action.

In late 2009, the United Nations climate talks in Copenhagen failed to produce a successor agreement to the Kyoto Protocol\(^5\)—participants opted instead for a weak political agreement.\(^6\) Throughout 2010, this compounded the inability of national governments, especially those of the major developed nations such as the United States\(^7\) and Australia,\(^8\) to mitigate greenhouse gas (“GHG”) emissions through “cap-and-trade” legislation aimed at permitting the purchase and sale of rights to emit GHG.\(^9\) Governments let their initiatives lapse.\(^10\) Some more cynical might say the failure of Copenhagen galvanized the resolve of such governments to oppose mitigating legislation of any kind.\(^11\)

Finally, at the end of 2010, the Cancún UN climate talks, rather than focusing on mitigation through binding political agreement, issued a set of agreements, a major portion of which aims at adaptation to the changes wrought by the un-mitigated emission of GHG.\(^12\)

As matters currently stand, as of January 1, 2013, the day Kyoto expires, the world will have no binding limits on GHG.\(^13\) For many,\(^14\) this fact causes real alarm. And it ought to, for this governmental failure stands as a depressing indictment of the effects on people of anthropogenic climate change. Bjørn Lomborg, the self-proclaimed “skeptical environmentalist,”\(^15\) puts it this way:

The risks of unchecked global warming are now widely acknowledged: a rise in sea levels threatening the existence of some low-lying coastal communities; pressure on freshwater resources, making food production more difficult in some countries and possibly becoming a source of societal conflict; changing weather patterns providing favorable conditions for the spread of malaria. To make matters worse, the effects will be felt most in those parts of the world which are home to the poorest people who are least able to protect themselves and who bear the least responsibility for the build-up of greenhouse gases . . . . Concern has been great, but humanity has so far done very little that will actually prevent these outcomes. Carbon emissions have kept increasing, despite repeated promises of cuts.\(^16\)

Another way of looking at humanity’s inaction may simply be the recognition, by governments if not yet by humanity as a whole, that what is necessary is nothing short of wholesale change to the dominant concept of private property. This brief essay aims to explain why private property, touted as recently as last year as the saviour to the challenge posed by climate change, may in fact be the source of the problem and why we need to take individual, personal action rather than wait for governments to act for us.

WHAT PRIVATE PROPERTY IS

We begin with liberal theory, from which the dominant contemporary concept of private property emerges.\(^17\) Liberalism concerns itself with the establishment and maintenance of a political and legal order which, among other things, secures individual freedom in choosing a “life project”—the values and ends of a preferred way of life.\(^18\) In order for life to have meaning, some control over the use of goods and resources is necessary; private property is liberalism’s means of ensuring that individuals enjoy choice over goods and resources so as to allow them to fulfill their life project.\(^19\)

In simple terms, the liberal conception of private property is a “bundle” of legal relations (or rights) created, conferred, and enforced by the state (through law) between people in relation to the control of goods and resources.\(^20\) At a minimum, these rights typically include use, exclusivity, and disposition.\(^21\) One can use one’s car (or, with few exceptions, any other tangible or intangible good, resource, or item of social wealth), for example, to the exclusion of all others, and may dispose of it. The holder may exercise these rights in any way to satisfy personal preferences and desires.\(^22\) Alternatively, crafting this in a way that comports with the language of liberal theory—rights are the shorthand way of saying that individuals enjoy choice about the control and use of goods and resources in accordance with and to give meaning to a chosen life project.

* This is a revised version of Paul Babie, Private Property: the Solution or the Source of the Problem?, 2 AMSTERDAM L. F., no. 2, 2010 at 17, http://ojs.ubvu. vu.nl/alf/article/view/124/231.

** University of Adelaide Law School, Australia. Thanks to Joseph William Singer and Peter Burdon for reading and providing invaluable comments on earlier versions of this project. Any remaining errors are, of course, entirely my own responsibility.
Notice, though, that in this definition, such rights exist only as a product of relationship between individuals. This is significant, for it focuses our attention on the fact that where there is a right (choice) to do something, there is a corresponding duty (a lack of choice) to refrain from interfering with the interest protected by the right. Rights would clearly be meaningless if this were not so. As concerns a particular good or resource, then, the liberal individual holds choice, while all others (the community, society) are burdened with a lack of it. C. Edwin Baker summarizes the ideas of rights and relationship this way: “[private] property [i]s a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A specific property right amounts to the decisionmaking authority of the holder of that right.”

Private property, then, is not merely about the control and use of goods and resources, but also significantly about controlling the lives of others. Using evocative and graphic language, Roberto Mangabeira Unger puts it this way:

[the right [choice] is a loaded gun that the rightholder [the holder of choice] may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down. But the give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the other person are incompatible with this view of right.

Identifying the importance of relationship reveals the fact that private property and non-property rights overlap; choices made by those with the former have the potential to create negative outcomes—consequences, or what economists call “externalities”—for those with the latter. At the highest level of generality, Unger’s “gunman” is vested with absolute discretion to “an absolute claim to a divisible portion of social capital[]” and that “[i]n this zone the rightholder [can] avoid any tangle of claims to mutual responsibility.” The individual revels in “a zone of unchecked discretionary action that others, whether private citizens or governmental officials, may not invade.”

Every legal system acknowledges this problem and, in doing so, seems to accept that with rights come obligations towards others. The state, through law, creates private property, just as through that same law (what is more commonly known as regulation), it is said to mediate the socially contingent boundary between private property and non-property holders. This is, in fact, the essence of private property—state conferral of self-serving rights that come with obligations towards others.

Yet there is something much more disturbing lurking just below the surface of what appears to be state control aimed at preventing harmful outcomes like those of climate change. What is really being conferred by private property is what Duncan Kennedy calls the legal ground rules giving “permissions to injure” others, to cause legalised injury. This is insidious, for “we don’t think of [them] as ground rules at all, by contrast with ground rules of prohibition. This is Wesley Hohfeld’s insight: the legal order permits as well as prohibits, in the simple-minded sense that it could prohibit, but judges and legislators reject demands from those injured that the injurers be restrained.”

And they are invisible, in the sense, that when lawmakers do nothing, they appear to have nothing to do with the outcome. But when one thinks that many other forms of injury are prohibited, it becomes clear that inaction is a policy, and that law is responsible for the outcome, at least in the abstract sense that the law could have made it otherwise . . . . It is clear that lawmakers could require almost anything. When they require nothing, it looks as though the law is uninvolved in the situation, though the legal decision not to impose a duty is in another sense the cause of the outcome when one person is allowed to ignore another’s plight.

This brings us full circle to the broader liberal theory with which we began, for the importance of relationship in understanding private property reveals an important, yet paradoxical, dimension of choice. It is simply this: the freedom that liberalism secures to the individual to choose a life project means that in the course of doing that, the individual also chooses the laws, relationships, communities, and so forth that constitute the political and legal order. In other words, in the province of politics people choose their contexts (through electing representatives, who enact laws and appoint judges who interpret those laws), which in turn defines the scope of one’s rights—choice, decisionmaking authority—and the institutions that confer, protect and enforce it (bearing in mind the ground rules of permission as well as the ground rules of prohibition). Individuals as much choose the regulation of property as they do the control and use of goods and resources.

**How Private Property Facilitates the Externalities of Climate Change**

When we focus on relationship as central to private property and the political-regulatory contexts we choose, we begin to see something else that was always there, although it was hidden from our view. The externalities of private property create many other types of relationship in which the lives of many are controlled by the choices of a few. Anthropogenic climate change is a stark example.

While the science is complex, it is clear enough that humans, through their choices, produce the GHG that enhance the natural greenhouse effect, which heats the earth’s surface. Among other effects, anthropogenic climate change results in drought and desertification, increased extreme weather events, and the melting of polar ice (especially in the north) and so rising seas. We might call this the “climate change relationship.” Private property, as a concept, facilitates choice (both human and corporate) about the use of goods and resources in such a way that emits greenhouse gases.

Our choices about goods and resources cover the gamut of our chosen life projects: where we live, what we do there, how we travel from place to place and so forth. Corporate choices are equally important, for they structure the range of choice available to individuals in setting their own agendas, thus giving...
corporations the power to broaden or restrict the meaning of private property in the hands of individuals.40 Green energy (solar or wind power), for instance, remains unavailable to the individual consumer if no corporate energy provider is willing to produce it.41

Externalities do not end at the borders, physical or legal, of a good or resource; choices occur within a web of relationships, not only legal and social, but also physical and spatial. Who is affected? Everyone, the world over, is affected, with the poor and disadvantaged of the developing world disproportionately bearing the brunt of the human consequences of climate change—decreasing security, shortages of food, increased health problems, and greater stress on available water supplies. Indeed, as Jedediah Purdy argues,

[climate change] threatens to become, fairly literally, the externality that ate the world. The last two hundred years of economic growth have been not just a preference-satisfaction machine but an externality machine, churning out greenhouse gases that cost polluters nothing and disperse through the atmosphere to affect the whole globe.43

Consider human security. It will decrease both within countries affected directly by climate change, and in those countries indirectly affected through the movement of large numbers of people displaced by the direct effects of climate change in their own countries.44 In the case of rising sea levels, for instance, sixty percent of the human population lives within one hundred kilometers of the ocean, with the majority in small- and medium-sized settlements on land no more than five meters above sea level.45 Even the modest sea level rises predicted for these places will result in a massive displacement of “climate” or “environmental refugees.”46 Private property, by securing choice about the use of goods and resources to those in the developed world, makes all of this possible.

**Conclusion: Is It the Solution?**

Nonetheless, private property and the commodification upon which it depends seem to be in vogue at the moment as a solution to anthropogenic climate change. Creating a proprietary interest in carbon that can be bought and sold is the answer—is the political choice, it is claimed and we believe—to the climate crisis. Is it really? We could just as easily say that the concept of private property is the primary culprit. Is it wise to entrust the solution to the concept that put us here? Or might it be more appropriate, as Mike Hulme suggests, to “see how we can use the idea of climate change—the matrix of ecological functions, power relationships, cultural discourses and material flows that climate change reveals—to rethink how we take forward our political, social, economic, and personal projects over the decades to come.”47

Before we pin our hopes on it as a cure-all, we might ask first whether the liberal concept of private property is ripe for just such a reappraisal. We can choose, but we must do so with our eyes open to the reality: that private property and the contexts in which we live are in fact our choice, not that of governments. We can no longer wait for government to act, with cap-and-trade schemes or any other form of regulation. At the very least, it is not enough, and at worst, it will take too long. Now is the time to act. And only we can take action. In exercising choice about our context and about goods and resources, we must take responsibility for ourselves, rather than waiting for our governments to act for us.48

**Endnotes:** Climate Change: Government, Private Property, and Individual Action

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3. See, e.g., American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). This bill is also referred to by the names of its sponsors, Congressmen Waxman and Markey.
4. The popular press and media are filled with analysis of such schemes. For a recent example, see *Lexington: A Refreshing Dose of Honesty*, Economist (Feb. 4, 2010), http://www.economist.com/world/united-states/displaystory.cfm?story_id=15453166.
**INTRODUCTION**

The concept of “Blue Carbon,” or atmospheric carbon captured by coastal ecosystems, has recently been the focus of reports by the United Nations Environment Programme (“UNEP”) and the International Union for the Conservation of Nature (“IUCN”). The international community is increasingly interested in exploring the potential of conserving coastal ecosystems for their role in climate change mitigation, reflected in the Manado Oceans Declaration signed by countries in 2009 which recognizes that “healthy and productive coastal ecosystems, already increasingly stressed by land-based and sea-based sources of pollution, coastal development, and habitat destruction, have a growing role in mitigating the effects of climate change on coastal communities and economies in the near term” and “invite[s] the scientific community/institutions to continue developing reliable scientific information on the roles of coastal wetlands, mangrove, algae, seagrass, and coral reef ecosystems in reducing the effects of climate change.”

**BLUE CARBON IN THE CLIMATE CONTEXT**

The 2009 UNEP “Blue Carbon” report noted that fifty-five percent of atmospheric carbon captured by living organisms is captured by marine organisms and between fifty to seventy-one percent of that is captured by ocean vegetated habitats (e.g. mangroves, salt marshes, seagrasses, seaweed), which account for less than 0.5% of the seabed. The report states that coastal vegetated habitats sequester between 114 and 328 teragrams (“Tg”) of carbon per year, or 1.6 to 4.6% of total anthropogenic emissions (7,200 Tg per year). Furthermore, the report found that between two and seven percent of these marine and coastal ecosystems are lost annually—one of the highest rates of loss amongst all ecosystems. Because of their high carbon sequestration potential, there is a growing interest in exploring the potential of including Blue Carbon in existing and emerging climate change frameworks.

Several opportunities for Blue Carbon exist within the United Nations Climate Change Framework (“UNFCCC”). The UNFCCC is an international environmental treaty with a goal of the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” The UNFCCC includes coastal and marine ecosystems in Article 4(d), which states that all parties shall “promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all GHG not controlled by the Montreal Protocol, including . . . oceans as well as other . . . coastal and marine ecosystems.” However, the current UNFCCC processes does not include adequate measures for protection and restoration of Blue Carbon ecosystems as a climate change mitigation strategy, and this represents a missed opportunity in our global portfolio of options for combating climate change.

Countries that have signed the UNFCCC are obligated to submit annual National Inventory Submissions (“NIS”); these inventory submissions record the country’s greenhouse gas emissions from anthropogenic activity, as well as sequestration from land use and forestry, based on guidance from the Intergovernmental Panel on Climate Change (“IPCC”). Within the NIS, there is a section on Land Use, Land-Use Change and Forestry (“LULUCF”) that accounts for the carbon budget (i.e. emissions and reductions) due to the management of terrestrial ecosystems including forests, peatlands, grasslands, and agricultural wetlands. In this section, only the carbon sequestered or emitted due to direct human management of ecosystems can be included. However, unmanaged ecosystems are not accounted for. Blue Carbon ecosystems—whether managed or not—are not accounted for under LULUCF and thus, not included in the UNFCCC. The IPCC should amend their guidance on LULUCF in order to include Blue Carbon ecosystems under LULUCF and UNFCCC processes. Moreover, management of coastal and wetland ecosystems should be defined as an activity under LULUCF. The IPCC operates based on peer-reviewed science and therefore, the current scientific gaps in knowledge regarding carbon fluxes need to first be addressed in the peer-reviewed literature. In order for Blue Carbon ecosystems to be included in the wider UNFCCC and Kyoto Protocol processes, an important step would be to have Blue Carbon ecosystems fully embedded and accounted for in the LULUCF process.

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**Existing International Climate Change Mitigation Frameworks**

Although the UNFCCC is legally non-binding, the Kyoto Protocol (“Protocol”) adopted in 1997 commits industrialized countries to reduce emissions of the greenhouse gases, carbon dioxide, methane, nitrous oxide, and sulfur hexafluoride by at least five percent from 1990 levels. The Protocol includes flexible mechanisms such as emissions trading and offsets for industrialized countries, known as the clean development mechanism (“CDM”), which allows the nation to meet its emission reduction obligations by funding carbon capture in developing countries. Blue Carbon projects could potentially become an offset category for CDM projects and—although presently standardized—UNFCCC-approved methodologies do not exist for establishing project baselines and monitoring results. UNFCCC criteria would have to be amended to include Blue Carbon projects under the CDM in the form of protection or rehabilitation of coastal ecosystems. However, as discussed above, appropriate methodologies would have to be developed and approved.

In addition to the CDM, under the 2009 Copenhagen Accord, developing countries agreed to report Nationally Appropriate Mitigation Actions (“NAMAs”) to the UNFCCC every two years; such mitigation actions are monitored domestically. NAMAs refer to a set of policies and actions countries undertake as part of a commitment to reduce greenhouse gas emissions, recognizing that various countries may engage in different actions based on equity, and in accordance with their respective responsibilities and capabilities. Presently, NAMAs include, for example, investments in alternative energy or in reducing illegal logging, but not Blue Carbon projects. There is potential to expand NAMAs to include protection and restoration of Blue Carbon ecosystems, but as discussed previously, an international standard approved by the UNFCCC needs to be developed and applied to Blue Carbon.

Furthermore, the Reducing Emissions from Deforestation and Forest Degradation ("REDD") program within the UNFCCC presents another opportunity for Blue Carbon ecosystem protection. This program aims to create financial incentives to reduce forest destruction and degradation, thus reducing emissions and maintaining sequestration. REDD+ is a program defined under the Cancun Agreement as including activities such as “(a) Reducing emissions from deforestation; (b) Reducing emissions from forest degradation; (c) Conservation of forest carbon stocks; (d) Sustainable management of forests; and (e) Enhancement of forest carbon stocks.” REDD+ carbon credits would allow funding from industrialized countries to reduce deforestation and rehabilitate degraded forests in developing countries. After the decision in Cancun at the Sixteenth Session of the Conference of the Parties to the UNFCCC, it is clear that mangroves are eligible for REDD+ funding, yet their full potential has not yet been realized by countries. Again, standardized protocols for measurement, reporting, and verification (“MRV”) and monitoring of carbon sequestration and carbon emissions due to habitat degradation need to be developed and approved by appropriate international bodies, such as the Voluntary Carbon Standard (“VCS”). Pilot projects exploring the feasibility of mangroves under REDD+, are currently being developed by non-governmental organizations and national governments in REDD countries around the world.

**New Opportunities for Blue Carbon in Climate Frameworks**

While opportunities exist, for Blue Carbon to be included in any of these UNFCCC frameworks certain preconditions need to be met. First, the science has to be robust, and adequate peer-reviewed evidence must exist to make a compelling case for the IPCC or the UNFCCC to amend their guidelines. This includes the development of standardized and internationally approved methodologies for MRV of carbon sequestration and emissions from habitat degradation. Additionally, an adequate level of understanding of carbon fluxes and their response to management in and around Blue Carbon ecosystems is necessary for the IPCC to include the coastal ecosystems in their Assessment Reports. The evidence is mounting that Blue Carbon ecosystems are an important part of the global carbon cycle, and that their destruction releases dangerous amounts of greenhouse gases into the atmosphere. Secondly, Blue Carbon projects need to demonstrate “additionality” (the project must demonstrate that the reduction in greenhouse gas emissions through the protection or rehabilitation of Blue Carbon ecosystems would not have happened without the sale of Blue Carbon offsets), “minimal leakage” (the decrease in greenhouse gas emissions by the Blue Carbon project does not cause an equivalent increase in emissions by another entity), and “permanence” (minimizing the risk that greenhouse gas emissions will occur after the Blue Carbon project has been sold as a carbon offset). Finally, the third precondition for the success of Blue Carbon projects and acceptance under the UNFCCC and other international climate frameworks is a feasible economic model, which actually generates revenue from the Blue Carbon project. The revenue generated by carbon credits sold in the carbon markets must be higher than the cost of protecting or restoring the Blue Carbon ecosystems. Economic feasibility studies need to be undertaken which examine the total revenue from carbon sequestered (including carbon fluxes), the total value of ecosystem services associated with Blue Carbon ecosystems, the total direct costs of protection or restoration, and the total opportunity costs associated with the project (e.g. loss of revenue from lost coastal development opportunities).

**Conclusion**

The fact that Blue Carbon ecosystems such as mangroves, sea grass, salt marsh, and seaweed are currently largely overlooked by the UNFCCC, CDM, and other international climate frameworks represents a missed opportunity in our global portfolio for mitigating climate change through ecosystem management. The UNFCCC does provide appropriate frameworks and opportunities to include Blue Carbon in the global climate change debate, and a growing community of UN agencies, non-governmental organizations, research institutions, civil society...
groups, and national governments are forwarding the agenda for this change to occur. Crucial steps include the development and standardization of MRV protocols in order to monitor the success of pilot Blue Carbon projects, as well as the continued amassing of evidence and understanding of the role of Blue Carbon ecosystems in the global carbon cycle, including the effects of anthropogenic management on their greenhouse gas sequestration or emissions. This peer-reviewed evidence should be presented to the IPCC and be used to drive changes in guidelines so that Blue Carbon ecosystems are included in the NIS and LULUCF processes and thus, into the wider UNFCCC framework. The potential of Blue Carbon is clear; it is now a matter of expediting this process in international frameworks before we lose even more of these precious ecosystems.

Endnotes: Options for Blue Carbon within the International Climate Change Framework

3. Id. at 3.
5. Id.
6. Id.
7. Id. at 7.
11. Id. art. 4.
15. Id.
16. Id.
17. Defining “carbonflux” as “the net difference between carbon removal [sequestration] and carbon addition [e.g. from emissions due to habitat degradation] in Blue Carbon ecosystems” . . . .” See Carbonflux, http://www.carbonflux.co.uk (last visited Mar. 10, 2011).
19. Id.
26. Id.
28. See AWG-LCA, supra note 25.
33. Id.
34. Id.
Is REDD Accounting Myopic?:
Why Reducing Emissions from Deforestation and Forest Degradation Programs Should Recognize and Include Other Ecosystems and Services Beyond CO₂ Sequestration
by Paulo A. Lopes*

INTRODUCTION

What is a cynic? A man who knows the price of everything and the value of nothing.1
Although uttered in Oscar Wilde’s 1892 comedy, Lady Windermere’s Fan, its reference could not have been more foreboding.2 Wilde’s comedy foreshadowed what was to come as the classical economics of the 18th and 19th century3 evolved into neoclassical economics in the 20th century,4 and finally into mainstream economics5 built on the theory, and now the practice, of free market economies.6

Unfortunately, over the years, free market economies have long since forgotten Wilde’s definition of a “cynic” even though remembrance of it today is paramount for environmentalists as they try to mitigate climate change. Today, humans have embarked on what may be the last frontier of mainstream economics, the monetization of what was once thought incalculable, Earth’s ecosystems,7 some of which remain largely unscathed by mainstream economies.

Payment for ecosystem services (“PES”)8 is a type of mainstream economic recognition of benefits provided by land. However, this rebirth of economic land recognition is not a reincarnation of Adam Smith’s economics that consisted of labor, land, and capital.9 Instead, PES programs, such as reducing emissions from deforestation and forest degradation (“REDD”),10 try to monetize aspects of nature, including carbon dioxide (“CO₂”) sequestration with REDD projects.11

The lack of recognition of the total value of land by mainstream economics is in large part because of the continued classification of land as a subcategory of capital, which results in undervaluation of the land.12 This undervaluation of land is an externality of mainstream economics that discounts the ecosystem services provided by the natural environment.13 Mitigation of these externalities can occur when there is actual recognition of the ecosystem services.14 Although mainstream economies advocate that REDD programs will help “save” the planet from climate change,15 current REDD programs fail to internalize many of the ecosystem services provided by forests, thus perpetuating the undervaluation of land recognition in mainstream economics.16

This article argues that the current design of REDD is a myopic Partial PES at best.17 Forest ecosystems provide numerous services beyond the sequestration of CO₂, such as protecting upstream watersheds,18 conserving biodiversity19 and gene pools,20 soil formation,21 nutrient recycling,22 and plant pollination.23 Thus REDD programs should recognize and include these and other ecosystem services.24 After reviewing REDD in the international context and the accounting scheme, recommendations and concerns are provided for why the expansion of REDD to include other ecosystems and services would result in not only a greater CO₂ reduction, but also other important environmental benefits.25 The article concludes by recognizing that REDD’s accounting loopholes, by focusing solely on CO₂ reduction without recognition of the ensuing impact from that reduction, will impose negative externalities on other ecosystem services, and that REDD needs to transition to a program that internalizes these externalities.26

PAYING FOR ECOSYSTEM SERVICES

PAYMENT FOR ECOSYSTEM SERVICES GENERALLY

The Earth’s ecosystem provides benefits, sometimes referred to as “services,” for all organisms on the planet.27 These ecosystem services may or may not be directly recognized by mainstream economics.28 PES is a financial valuation of Earth’s ecosystem services.29 The primary purpose of a PES program is to maintain a specific ecosystem “service,” such as clean water,30 carbon sequestration,31 or biodiversity habitat,32 for some type of economic value.33 However, the transfer of money to maintain the ecosystem service is not the defining factor of a PES program.34 Rather, it is the fact that the “payment causes the benefit to occur where it would not have otherwise.”35 By having the service be “additional,” a value for the service can be determined, thus creating a PES program.36

REDUCING EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION IS AN EXAMPLE OF A PAYMENT FOR ECOSYSTEM SERVICES PROGRAM

As mentioned above, carbon sequestration is one of the ecosystem services provided by forests. The net forest loss between 1990 and 2000 was 13.1 million hectares (“ha”) per year and 12.9 million ha between 2000 and 2005,37 the equivalent of the land area of Greece38 or New York39 every year, and according to the Intergovernmental Panel on Climate Change (“IPCC”), emissions from deforestation during the 1990s were estimated at 5.8 gigatonnes (“Gt”) of CO₂ per year.40 With emissions

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from deforestation and forest degradation accounting for nearly twenty percent of total greenhouse gas emissions, there is a need to reduce emissions from forests.

Over the years, varying countries have undertaken numerous schemes, and institutions have proposed ways to reduce emissions from deforestation. Some programs, listed in order from narrowest to broadest include: reducing emissions from deforestation (“RED”); reducing emissions from deforestation and degradation (“REDD”); and reducing emissions from deforestation, degradation, and the enhancement of carbon stocks (the “+” in “REDD+”) by means of carbon sequestration. These schemes—coupled with needed financing—should result in reducing emissions from deforestation.

**REDD Within the International Climate Context**

In 1997, the third Conference of the Parties (“COP-3”) of the United Nations Framework Convention on Climate Change (“UNFCCC” or “Convention”) adopted the Kyoto Protocol. Article 3(3) of the Kyoto Protocol limited Land-Use Change and Forestry (“LULUCF”) activities to afforestation, reforestation, and deforestation, while Article 3(4) provided flexibility with the inclusion of other activities as determined by the first session of the Meeting of the Parties to the Kyoto Protocol.

Noting the conclusions found by the Subsidiary Body for Scientific and Technological Advice (“SBSTA”) at its eighth session and the decision by the IPCC to prepare a report on Land-Use, Land-Change and Forestry (“LULUCF”), the fourth Conference of the Parties (“COP-4”) of the UNFCCC, began to lay the legal groundwork for the recognition and inclusion of LULUCF. This establishment of more specific legal provisions for LULUCF continued with the sixth Conference of the Parties (“COP-6”) in 2000, with the IPCC scientific report and the Food and Agriculture Organization (“FAO”) definition for “forests.” At the 2001 seventh Conference of the Parties (“COP-7”), the Parties agreed upon the inclusion of additional activities, such as revegetation, forest management, cropland management, and grazing land management, which were prohibited from jointly implemented activities but included in domestically conducted activities.

In 2007 in Bali, Indonesia, the thirteenth Conference of the Parties (“COP-13”) recognized “the urgent need to take further meaningful action to reduce emissions from deforestation and forest degradation in developing countries.” The Bali Action Plan established a goal to complete the policy approaches and incentives to reduce emissions from deforestation by 2009. While the fifteenth Conference of the Parties (“COP-15”), in 2009, concluded with the nonbinding Copenhagen Accord, which “recogniz[ed] the crucial role of reducing emission[s] from deforestation and forest degradation,” the goal set by the Bali Action Plan was not met.

At the sixteenth Conference of the Parties (“COP-16”), in 2010 in Cancun, Mexico, the COP concluded by adopting numerous decisions, including one that recognized the need to reduce emissions from forests. The outcome of the thirteenth session of the Ad Hoc Working Group on Long-term Cooperative Action (“AWG-LCA-13”) under the Convention resulted in agreement by Parties for “policy approaches and positive incentives on issues relating to [REDD] in developing countries, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.” It encouraged each country, as appropriate, to undertake the following actions: “(a) Reduce emissions from deforestation; (b) Reduce emissions from forest degradation; (c) Conservation of forest carbon stocks; (d) Sustainable management of forest; and (e) Enhancement of forest carbon stocks.”

Countries agreed to develop a national strategy or action plan and a “robust and transparent national forest monitoring system for the monitoring and reporting of the activities” listed above. During the development and implementation of their national strategies or action plans, developing countries are asked, “to address, inter alia, drivers of deforestation and forest degradation, land tenure issues, forest governance issues, gender considerations and . . .”

**CO₂ Emissions Accounting**

It is important to recognize that forestry accounting of CO₂ emissions, although maturing, is in its infancy and thus still imprecise. Accurate accounting allows for the determination of whether the REDD program will have added benefit, which requires that the benefit be accurately quantified and documented. For a carbon offset to actually result from a REDD program, one must review the additionality, definition of a forest, leakage, measurement, verification, and permanence of the offset. If a REDD program fails to meet any or all of these requirements, then the offset is not actually realized since forestry CO₂ emissions were not reduced. Recognition of this failed emission reduction offset would allow countries to emit more, since emissions were not offset by the REDD program even though they were recognized as having occurred.

**Additionality**

Additionality refers to the quantity of emission reductions that result from the implementation of the REDD program when compared to business as usual. The difference between the reference level and the emission reductions achieved is the “additionality.” Although in theory this sounds possible, if not straightforward, experts still differ on approaches for determining the additionality amount since “there is no correct technique for determining additionality because it requires comparison of expected reductions against a projected business-as-usual emissions baseline . . .”

Fundamentally, the test to determine additionality will always vary depending on the balance between reduction of administrative costs versus program rigor and environmental certainty.
Definitions of Forests

Article 3(3) of the Kyoto Protocol lists LULUCF activities as afforestation, reforestation, and deforestation but does not provide definitions for these activities. In 2000, the IPCC, in a special report on LULUCF, recognized the importance of providing clear definitions of these activities to facilitate accounting for different land-use activities. The report also notes that “[f]orest definitions based on legal, administrative, or cultural considerations” may not be appropriate for carbon accounting since these definitions do not always correlate to the quantity of carbon stored on the site as illustrated by the following forest definitions. The ninth session of the Conference of the Parties (“COP-9”), in 2003 in Milan, Italy, provided the Parties with flexibility on a forest definition with “(a) A single minimum tree crown cover between 10 and 30 percent; (b) A single minimum land area value between 0.05 and 1 hectare; and (c) A single minimum tree height value between 2 and 5 meters.” The Food and Agriculture Organization (“FAO”), in a 2006 working paper, also noted the issue of selecting a forest definition for accounting in Clean Development Mechanism (“CDM”) projects. Unlike COP-9’s three criteria, the FAO working paper put forward a ten-step process to aid countries in selecting the optimal parameters for a forest definition. As evident by these different approaches, providing flexibility in defining forests is necessary since ecosystems around the world vary greatly. This variation prohibits creation of a uniform international definition applicable to all countries, because it would result in winners and losers amongst countries.

Leakage

While the emphasis and requirements under the Kyoto Protocol that CDM projects be additional is important, the risk of leakage must also be recognized. Leakage “occurs when economic activity is shifted as a result of the emission control regulation and, as a result, emission abatement achieved in one location that is subject to emission control regulation is offset by increased emissions in unregulated locations.” For example, by increased emissions in unregulated locations. For example, location that is subject to emission control regulation. As a result, emission abatement achieved in one economic activity is shifted as a result of the emission control program. COP-9 recognized leakage if the increased emissions from site B, resulting in a zero-sum game of emission reductions. COP-9 recognized leakage if the increase in emissions occurs outside of the project and is measurable and attributable to the reduced emissions undertaken by the project.

Measurement and Verification

Measurement and verification of deforestation is essential to any REDD project with a goal of issuing emission reduction credits. However, measurement and verification of carbon sequestration is difficult since “rates vary by tree species, soil type, regional climate, topography and management practice.” In the United States, carbon sequestration rates for tree species are better understood than soil carbon sequestration rates, which vary by cropping practice and soil type. Over time, the rate of carbon sequestration absorption decreases in trees and stops as it nears the saturation point, when no additional sequestration of carbon is possible.

Permanence

Permanence is one of the major concerns with biological carbon sequestration projects such as REDD, because it is key when trying to achieve overall emission reductions. With biological sequestration programs— unlike emission reductions that achieve results by reducing the release of carbon—if the sequestered carbon is released sometime in the future, the sequestration program is a failure. This concern over a potential release also applies to avoided deforestation, since avoided deforestation today may turn into future deforestation. The release of sequestered carbon may result from human causes, such as changes in land use and management, or from natural causes, such as a fire.

Policy Recommendations and Concerns: Expanding Beyond the Myopic Confines of REDD to Recognize and Include Other Ecosystems and Services Will Result in Not Only a Greater CO2 Reduction But Other Important Environmental Benefits.

Other Ecosystems: Expanding REDD to Mitigate REDD’s Accounting Loopholes

The negotiations concerning biological carbon sequestration evolved over the years from COP-3 with the Kyoto Protocol’s recognition of LULUCF, to the COP-6 debate, and final recognition by COP-7 of a more expansive program recognizing additional activities. In 2007, the Bali Action Plan of COP-13 acknowledged the need to establish incentives to reduce emissions from deforestation, which was reiterated in the Copenhagen Accord of COP-15. At COP-16, additional progress occurred with the decision to adopt the AWG-LCA-13 policy approaches and positive incentives on REDD. Although the progression of the need to reduce emissions from biological sources is evident, the unifying theme over the COPs has come to focus on forests, as a result of the recognition of the need to reduce emissions from deforestation and degradation.

The progression is also apparent with the IPCC accounting of emissions recognized by the UNFCCC. The IPCC has released numerous reports over the years on forestry and carbon capture: in 1996, on Land-Use Change and Forestry (“LUCF”), which identified major emissions from large probable land use sources; LULUCF in 2003, which expanded LUCF to include all carbon pools; and in 2006, a report that transformed LULUCF into Agriculture, Forestry, and Other Land Use (“AFOLU”), which integrated both the agriculture and LULUCF sectors.

While the IPCC accounting has evolved over the years to include all carbon pools from all sectors, the UNFCCC’s decisions and resolutions on RED, REDD, and REDD+ all focus on forestry. Although emissions from forests are substantial and
the need to reduce forest emissions is necessary,109 the UNFCCC should evolve negotiations on REDD+ to include all of the land use sectors recognized under AFOLU.

Is There a Better Scheme than RED, REDD, or REDD+?

A scheme that would go beyond the confines of RED, REDD, and REDD+ is Reducing Emission from All Land Uses (“REALU”).110 By applying AFOLU accounting, some of the emissions recognized by REALU would include forestland, grassland, cropland, settlements, wetlands, and other lands; meanwhile this would also account for agriculture and other land use emissions resulting from liming, urea, manure, enteric fermentation, nitrous oxide, and others.111 REALU with AFOLU accounting would “include all land use proportionate to actual emissions and emission potential.”112 REALU, like other proposals,113 is supported by many organizations and is still evolving.114

One of the lingering issues pertaining to REDD is the definition of what is a forest115—or rather when does a tree become classified as a forest? The Kyoto Protocol and COP-9 provided a flexible definition based on tree crown cover, minimum land area per hectare, and minimum tree height,116 a 2006 working paper by the FAO provided a ten-step process for selecting the optimal parameters for a forest definition,117 and the IPCC special report on LULUCF noted the importance of clarity.118 However, none of these definitions account for trees outside the forest or wetlands, which also sequester large quantities of carbon.119 REALU with AFOLU accounting, since it covers all sectors, would recognize the tree that is not yet considered a forest under these other definitions, along with the vast expanses of wetlands.120

The definition of forests in the Kyoto Protocol also allows for “areas normally forming part of the forest area which are temporarily unstocked as a result of human intervention such as harvesting or natural causes but which are expected to revert to forest” to maintain their forest classification.121 The Kyoto Protocol establishes no duration for “temporarily unstocked” forest,122 yet still regards these areas as forested.123 Thus, the Kyoto Protocol does not recognize the release of emissions from clearcutting as long as there is an intention to replant the forest since it is only a “temporary” release.124 Furthermore, the Kyoto Protocol forest definition does not account for the emissions from clearcutting of trees not classified as forest, regardless of whether there was an intention to replant the trees.125 The Kyoto Protocol forest definition creates this “in or out” distinction for a tree,126 which would not be a concern under the more expansive REALU with AFOLU accounting.127

Another issue created by distinguishing among trees is that of leakage.128 To avoid leakage, forest B’s emissions should not increase as a result of a REDD program decreasing forest A’s emissions.129 However, by only counting forests, a REDD program that decreases forest A’s emissions may result in an emissions increase from the non-forest area C of woody vegetation or wetlands.130 Technically, there is leakage, since the increase in emissions from area C negated the decrease in emissions from forest A.131 Yet under REDD, which only pertains to forests, there is no leakage.132 REALU, by applying a more expansive landscape accounting, AFOLU, would recognize the leakage coming from area C, since AFOLU encompasses sequestered carbon areas above and below ground, forested and non-forested.133

Reduction of forest emissions is necessary, as emissions from deforestation and forest degradation account for nearly twenty percent of total greenhouse gas emissions.134 But it is also evident that the current attempts with RED, REDD, and REDD+ still falter in many areas because of the forest definition.135 Emissions and leakages pertaining to wetlands, agriculture, and other land uses are not accounted for in forestry schemes.136 Thus, the deficiency that stems from the definition of forests impacts the other accounting elements of REDD, additionality and leakage, which subsequently impacts measurement and verification.137

REALU with AFOLU captures all of the sectors, which is more effective and efficient138 while also being more equitable since AFOLU accounting standards would apply to all countries. REALU and AFOLU sectors include high forest cover and low rates of deforestation (“HFLD”)139 and low forest cover and low rates of deforestation (“LFLD”).140 A phased implementation of biological sequestration starting with REDD that recognizes indigenous peoples’ rights, as established in COP-16,141 and that transitions to REALU with AFOLU accounting, would prevent a delay in emission mitigation from the forestry sector while also allowing the necessary time for the development and refinement of REALU with AFOLU.142 A REALU scheme with AFOLU may not address all of the biological sequestration issues, but it would alleviate many of the problems with the current efforts to mitigate forestry emissions under REDD.143

Wetlands: An Example of Biological Carbon Sequestration Within REALU but Excluded by REDD Type Schemes

Wetlands include freshwater mineral-soil wetlands, peatlands, and estuarine wetlands (i.e. salt marshes) and in North America, they are the second largest natural carbon sink.144 Worldwide wetlands store about 223 billion tons of carbon.145 Although wetlands absorb about one-tenth of the amount of carbon as forests, wetlands absorb three times more than agricultural soils.146

While one-tenth might appear to be a small amount, wetlands currently only comprise 5.5% of the U.S. landmass because land use changes, such as agriculture, have led to the destruction of over fifty percent of wetlands.147 In the United States, wetlands sequester thirty-five percent of the nation’s total terrestrial carbon and further loss of the wetlands would result in the release of sequestered carbon, increasing the carbon concentration in the atmosphere.148 The North American estuarine wetland carbon sequestration is currently estimated at over ten million tons per year.150 Collectively, North American wetlands have the ability to sequester forty-nine million tons of carbon per year.151 It is important to recognize that although wetlands
only comprise 5.5% of the total landmass, the total sequestered carbon stored in wetlands is sixty-four billion tons, only slightly less than forests, which store sixty-seven billion tons in twenty-five percent more land.

Wetlands are a much more effective natural carbon sink than forests. As peatlands are drained and converted from wetlands to other land uses, the carbon oxidizes, which reduces the carbon captured in wetlands by about fifteen million tons per year in North America. The recognition of wetlands by the UNFCCC and payment for the service of carbon sequestration would help mitigate the destruction of wetlands through land use changes.

**Other Services: Expanding the Carbon Centric “Partial” Payment for Ecosystem Services to Recognize Co-Benefits**

In addition to storing carbon, forests provide multiple ecosystem services such as soil formation, water cycle storage and release, biodiversity conservation, and nutrient recycling. However, forests under a REDD scheme are only recognized for one ecosystem service, carbon sequestration. Although carbon sequestration is an important and necessary ecosystem service provided by forests, the current REDD scheme can and already has led to the deterioration of other forest ecosystem services.

The other ecosystem services that are not internalized by REDD are not only valuable but also necessary for native forests to survive. Although REDD is a PES, in its current insular form REDD should be viewed as a Partial PES. In contrast, the recognition of and payment for CO2 sequestration, soil formation, water cycle storage and release, biodiversity conservation, and nutrient recycling could be considered a Full PES. By recognizing these other economic benefits, mitigation of the perverse incentives induced by REDD would be mitigated.

The numerous ailments of the Partial PES REDD are reviewed below and illustrate the need for the transition to a Full PES, such as REALU with AFOLU accounting, to protect the forests and other ecosystems.

**Soil Erosion: What Role Does Flora Coverage Play?**

The first ecosystem service that REDD does not recognize is that provided by soil in reducing or preventing erosion. Erosion occurs when the energy from water or wind is transmitted to the soil, and it increases after a forest is deforested or temporarily unstocked. When raindrops hit exposed soil, such as a deforested area, the particles of soil and water are launched into the air. When the land is covered by biomass, such as a forest, it protects the land area by dissipating the wind and water energy, which results in reduced soil erosion.

After erosion occurs, the quantity of water runoff on the area of land increases, which reduces the availability of water for plant vegetation to grow. The rate of erosion is often high on lands with higher gradients, with sometimes half of the soil within the splash eroding. Deforestation on higher gradient land is regularly used to replace spent agricultural land damaged by erosion.

The eroded soil can end up in ecosystems such as streams and lakes. The shape of the Araguaia River in Brazil has changed, as sedimentation increased by twenty-eight percent, and the river became straighter and deeper. According to the U.S. Department of Agriculture, the final destination for sixty percent of soil erosion is streams. The Huang He River in China, often referred to as the Yellow River because of the color of the silt, transports and deposits two billion tons of soil per year into the Gulf of Bohai.

For a forested area to prevent soil erosion, the forest must cover a minimum of sixty percent of the land. Without the flora that reduces the rain and wind energy, soil erosion results in a decrease in plant nutrients, such as nitrogen, phosphorus, potassium, and calcium. Without these vital nutrients, yields in plant growth decrease. The eroded soil can contain as much as three times the nutrient content as the soil that remains. Fertilizers and pesticides, derived from hydrocarbons, along with irrigation, are often used to temporarily mitigate the natural nutrient depletion from erosion on cropland.

Once the application of hydrocarbon-based fertilizers and pesticides become futile against the barren soil, the cropland is abandoned. To replace this wasted land, additional forests are cleared for agricultural use and the cycle repeats.

While at first glance it may appear that a REDD scheme would mitigate many of the above soil erosion issues, since people would be paid to reduce deforestation and forest degradation, if the scheme uses the term “temporarily unstocked” in the definition of forests as the Kyoto Protocol does, it actually facilitates soil erosion. Since the Kyoto Protocol establishes no duration for a “temporarily unstocked” forest, but still classifies it as a forest, with enough time, the extent of soil erosion may have degraded the soil to the point of not allowing the land to be “restocked” with the forest that once existed. Since erosion increases water runoff, the soil in the “temporarily unstocked” region will have less moisture because less water has infiltrated the land, resulting in a decrease in water-storage capacity of the soil. Additionally, the erosion of the soil reduces organic nutrients and soil depth, which are necessary to restock the forest.

Restoration of the eroded soil is a slow process that can take between 200 and 1,000 years to form 2.5 cm (1 inch) of topsoil under cropland conditions, and even longer under pasture and forest conditions.

**Water Cycle: Does Variation in Root Depth Matter?**

The second ecosystem service not recognized by REDD is the water cycle storage and release provided by the deep roots of forests. After a forest is removed as a result of deforestation, the flora that replaces the forest typically has shallower root structures and fewer leaves, which results in the new flora requiring less water than the forest. The evaporation from the new flora is less than that from a forest because the new flora has shallower roots. This decrease in evaporation reduces the quantity of water vapor returned to the atmosphere, resulting in more water runoff from the land and increasing stream flow. Thus the shallower roots result in less water availability and
evapotranspiration during the dry season along with less precipitation during the wet season, all of which negatively impact the water cycle.\(^{194}\)

The degree of impact on the water cycle depends on not only how the forested land is utilized after deforestation but also how much of the forest remains.\(^{195}\) Deforestation of twenty percent or less will have little effect on the water cycle while deforestation of fifty to one hundred percent, which typically results from modern agricultural and heavy equipment use, can result in a large change in the quantity of water runoff.\(^{196}\) In Brazil, the deforestation of about fifty percent of the Tocantins and Araguaia watersheds over the past fifty years has resulted in a twenty-five percent annual increase in river discharge.\(^{197}\)

The decrease in evapotranspiration, because of the decrease in root depth,\(^{198}\) impacts the heat flux, resulting in a decrease in the cooling of the surface soil, equating to higher surface temperatures, especially during the dry seasons.\(^{199}\) The dry season is vital for reforestation efforts, but because of the impacts from deforestation, such as a decrease in evapotranspiration and an increase in surface temperature, there may be a water shortage.\(^{200}\) This decrease in evapotranspiration can result in extended drought periods, thus slowing the uptake of the reforestation efforts and possibly making the habitat more hospitable for drought-resistant species.\(^{201}\)

However, there is cause for concern if the project uses a definition for forests that permits them to be "temporarily unstocked."\(^{202}\) Although the removal of the forest is not classified as deforestation, because there is an intention to restock the forest, the deep roots from the forest are "temporarily" killed.\(^{203}\) Without deep roots, the evapotranspiration will decrease and the water runoff will increase.\(^ {204}\) This in turn makes reforestation efforts more difficult because the quantity of water stored in the soil has decreased\(^ {205}\) and the surface temperature has increased.\(^ {206}\) If schemes allow for forests to be temporarily unstocked they assume the replanting of the forest and that the restocking of the forest will negate the initial carbon release.\(^ {207}\) Nevertheless, this reasoning is myopic since successful restocking is dependent on the root growth, and reestablishment of deep roots will likely be more difficult because of longer dry periods that are "warmer, drier and more intense."\(^ {208}\)

**Biodiversity: Does REDD’s Focus on Carbon Concentration Create Perverse Incentives for Other Ecosystems?**

The third ecosystem service that REDD does not internalize is biodiversity of fauna and flora that have a symbiotic relationship with the forest. Forests cover roughly seven percent of the Earth’s dry land, yet they may contain half of the species on Earth.\(^ {209}\) Some species are so particular to their forest microhabitats that they live nowhere else, which increases the chances of their extinction.\(^ {210}\) After deforestation and loss of these specialized species, the surrounding fauna and flora may also face extinction as the biodiversity in the forest decreases and the habitat becomes fragmented.\(^ {211}\) In Riau, Indonesia, the tiger population actually declined at a quicker rate than the rate of deforestation because of habitat fragmentation.\(^ {212}\)

The fauna and flora also impact the soil composition.\(^ {213}\) Before deforestation, the forest soil is teeming with organic matter, possibly supporting up to one thousand species of fauna per square meter.\(^ {214}\) The bacteria and fungi in the soil can add an additional four to five thousand diverse species.\(^ {215}\) However, the lack of forest cover exposes the soil to erosion, washing the nutrients from the deforested land and further diminishing biodiversity, and potentially causes the surrounding ecosystem to collapse.\(^ {216}\)

Although initially it would appear as though REDD would complement efforts to protect biodiversity, low-biomass and high-diversity ecosystems, such as grasslands, savannas, woodlands, and transition forests, may be at a disadvantage for protection when compared to high-biomass forests, such as plantations.\(^ {217}\) This is because REDD focuses on the quantity of biological carbon sequestered and thus biomass that sequesters more carbon, i.e. high-biomass ecosystems, are more advantageous for REDD projects than ecosystems that store less carbon, i.e. low-biomass ecosystems.\(^ {218}\) This focus on carbon concentration in biomass results in a preference for high-biomass ecosystems even if the low-biomass ecosystem has a higher conservation value pertaining to biodiversity, soil, and water, since the focus of REDD is on biomass concentration and not biodiversity.\(^ {219}\) Thus, REDD programs will be more apt to protect high-biomass ecosystems because of the higher return on investment, which is based on carbon concentration, than that of a low-biomass high-diversity ecosystem, with the latter likely being more prone to conversion for agricultural use.\(^ {220}\)

Forests with high-diversity native ecosystems must also counter the introduction of alien species that grow quickly, such as monocrop eucalyptus plantations.\(^ {221}\) With REDD’s focus on high-biomass because of carbon credits, trees that grow quickly, such as eucalyptus trees, are already encouraging some REDD projects to introduce these alien monocrop species.\(^ {222}\) In Brazil, in an effort to earn carbon credits, eucalyptus plantations, which are native to Australia, are replacing savannas and high-diversity cerrado woodland ecosystems.\(^ {223}\) However, these eucalyptus plantations, since they are non-native, often require fertilizers and pesticides, which increases the risk of chemical contamination and soil degradation.\(^ {224}\) Additionally, the definition of forests under the Kyoto Protocol makes no requirement that a temporarily unstocked forest be restocked with species native to that ecosystem.\(^ {225}\)

Furthermore, genetically modifying the non-native species to increase the chance of survival in the foreign habitat is another risk since species with increased resilience may overtake the native species.\(^ {226}\) These practices currently occur under REDD projects and is one of the perverse incentives induced by REDD since the accounting does not recognize a distinction between carbon stored in genetically modified species versus native species.\(^ {227}\) This deficiency in REDD is one of the reasons that organizations are proposing REALU with AFOLU accounting since
it does recognize the carbon sequestered in native species of the savannas and woodlands. The exclusion of ecosystems from the Kyoto Protocol separated biodiversity and ecosystems from carbon and climate change, and has resulted in the UNFCCC ignoring these synergies and placing biodiversity at risk. This is unfortunate and inward-looking by the international community because only five years prior to the adoption of the Kyoto Protocol, the United Nations Conference on Environment and Development, more commonly known as the Earth Summit, in Rio de Janeiro in 1992 resulted in numerous important achievements, two of which were the Convention on Biological Diversity (“CBD”) and the Framework Convention on Climate Change (“UNFCCC”), the latter of which lead to the Kyoto Protocol.

Some might view the link between these two documents as only being intrinsic, but in 2001, the CBD’s Subsidiary Body on Scientific, Technical and Technological Advice took “note of the discussion of the interlinkages between biological diversity and climate change.” Two years later, the Secretariat of the CBD released a formal report and in 2008, COP-9 of the CBD recognized the possible use of REDD pertaining to climate change but also the need to monitor “the threats and likely impacts of climate change mitigation and adaptation activities on biodiversity.” In 2009, the Secretariat of the CBD released a second formal report and a year later at COP-10, the CBD recognized the need to “enhance the benefits for, and avoid negative impacts on, biodiversity from [REDD].” Moreover the CBD stressed the need to consider “converting only land of low biodiversity value or ecosystems largely composed of non-native species, and preferably degraded ones” while also “avoiding [the use of] invasive alien species.”

Although the CBD has been proactive in recognizing the interlinkages between biological diversity and climate change, the UNFCCC is focused almost exclusively on the objective outlined in 1992—the adverse affect of anthropogenic climate change on natural ecosystems and humankind. At COP-16, the AWG-LCA under the Convention indicated that actions should be “consistent with the conservation of natural forests and biological diversity” and that they should not be “used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits.”

While the AWG-LCA document does mention biodiversity, the UNFCCC continues to be myopic in regards to biodiversity and makes no reference or granular distinction like the CBD’s document between low- and high-biodiversity ecosystems or the risk of introducing alien species, such as eucalyptus trees.

**Conclusion**

The accounting of REDD, which focuses on additionality, definitions of forests, leakage, measurement, verification, and permanence, while all important facets, is not actually the difficult part of implementing a successful REDD program. These “difficult” facets are merely illusions that hide the true difficulties of REDD, the loopholes that REDD accounting are plagued with. The lack of protection of other ecosystems and services beyond CO₂ sequestration, which REDD accounting externalizes instead of internalizes, facilitates the market’s ability to exploit these loopholes, without regard to the externalities imposed on others.

REDD accounting currently gives no regard and thus no value to soil formation, water cycle storage and release, biodiversity conservation and nutrient recycling. REDD simply facilitates the market determination of the price of carbon stored at the expense of these other ecosystems and services provided by nature. Adam Smith’s recognition of labor, land, and capital resulted in a more accurate valuation and pricing of these other ecosystems and services. However, REDD in its current form classifies land as a subcategory of capital by disregarding these other ecosystem services. Although a transition from REDD to REALU with AFOLU accounting may not mitigate all of REDD’s externalities, it would help to elevate and start to recognize land as an equal with labor and capital. Therefore, since REDD merely determines the price of carbon without valuing the other ecosystem services provided by forests, environmentalists, when sequestering and monetizing carbon, must not forget Oscar Wilde’s definition of a cynic: “[a] man who knows the price of everything and the value of nothing.”

Endnotes: Is REDD Accounting Myopic?

1. See Oscar Wilde, Lady Windermere’s Fan, A Play About a Good Woman, Act III (1892) (“LORD DARLINGTON. What cynics you fellows are! CECIL GRAHAM. What is a cynic? [Sitting on the back of the sofa.] LORD DARLINGTON. A man who knows the price of everything and the value of nothing. CECIL GRAHAM. And a sentimentalist, my dear Darlington, is a man who sees an absurd value in everything, and doesn’t know the market price of any single thing.”).

2. Id.


5. See Paul Samuelson & William Nordhaus, Economics (back of front cover) (1948) (introducing the term “mainstream economics”).


8. Compare Smith, supra note 3, at 70-75 (listing the “component parts of price” — land, labor, and capital stock) with Morten H. Miller, Macroeconomics: A Neoclassical Introduction 19 (1986) (“The neoclassical growth model . . . take[s] human labor as one of two inputs . . . [the second factor of production, however, is no longer land but capital . . .].”).

Endnotes: Is REDD Accounting Myopic? continued on page 78
**THE TORTUOUS ROAD TO LIABILITY: A CRITICAL SURVEY ON CLIMATE CHANGE LITIGATION IN EUROPE AND NORTH AMERICA**

by Luciano Butti*

**INTRODUCTION**

Climate change is increasingly coming to the fore of public debate. Since the adoption of the Kyoto Protocol on December 10, 1997¹ and its entry into force on February 16, 2005,² the international community has drawn increasing attention to the topic of carbon dioxide (“CO₂”) emissions. The most recent international meetings and political trends, such as the Copenhagen Climate Conference of 2009³ and the latest steps taken by the U.S. administration⁴ have resulted in perplexity and criticism from many international commentators.⁵ Critics have argued that “the Copenhagen Accord left most substantive disagreements unresolved.”⁶ However, these recent developments have paved the way for a more informed debate on global warming and environmental issues in general.⁷

The development of high-profile domestic and global discussion has also impacted the legal realm.⁸ In recent years, particularly since 2006,⁹ climate change lawsuits have increased in quantity and in sophistication, presenting one of the newest challenges within the public law arena. The increased sophistication of climate change lawsuits is a result of individuals who recognize that climate regulation is an issue for both governments and citizens to pursue. This mounting public awareness is evident in U.S. climate change lawsuits. The vast majority of U.S. climate change-related claims are based on individual or communal actions meant to influence industrial and environmental policies by promoting regulation and impact assessment. The U.S. focus on “regulatory claims,” rather than on tort law claims, is mainly due to the difficulties individual applicants face in showing *locus standi*, in demonstrating direct liability of the entity sued, and in finding a feasible pathway for redressability. On the other hand, European climate change litigation has blossomed out of private and governmental market-induced interests, as they have been brought primarily with respect to “carbon market” issues. Such a tendency has clearly been highlighted by European Union Courts’ case law concerning the European Union Emissions Trading System (“EU ETS”) Directive.

An additional method of linking climate change to legal claims is the presentation of individual actions for damages directly associated with global warming-related human rights violations. Although important, such an approach to climate change litigation is still far from being widely accepted by courts. The decisions of the European Court of Human Rights (“ECtHR”) and the Inter-American Commission on Human Rights (“IACHR”) are not encouraging for the prospects of the viability of human rights claims within the climate change context. Therefore, it may be a long time before climate change litigation becomes commonplace among individual rights claims.

This article provides an overview of the evolution of climate change related litigation, highlighting the differences and similarities between the U.S. and the European context. Additionally, the article analyzes the future perspective of such claims and concludes with a discussion concerning the possibility of linking climate change to human rights.

**CLIMATE CHANGE LITIGATION: THE UNITED STATES SCENARIO**

Recent U.S. case law involving climate change demonstrates that most successful claims concern existing regulations. This is due to the specific aims that applicants pursue, using “existing law—primarily environmental law—to force or block regulatory behavior” in response to policy failures.¹⁰ Thus what climate change litigation has so far achieved is to effectively function as a “gap-filling role” as defined by Professor Hari Osofsky.¹¹

The results of a recent study relating to climate change cases filed through the end of 2009 highlights that the courts play a pivotal role in governance, especially with respect to partially unregulated areas such as those of environmental law, regulation, and responsibility.¹² The same survey depicts a situation where almost 40.5% of legal actions related to climate change are brought to achieve “substantive mitigation regulation.”¹³ Therefore, most controversies are based on the willingness of public bodies, states, companies, or non-governmental organizations (“NGOs”) to urge for public intervention, focusing on the necessity of the limitations of the promulgation of statutes and policies establishing more stringent limits on emissions. The 2006 U.S. Supreme Court case of *Massachusetts v. EPA*¹⁴ is probably the most distinguished example of a regulatory claim.

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in the context of climate change.\textsuperscript{15} Twelve states, three cities, a U.S. territory, and several NGOs claimed that the Environmental Protection Agency’s (“EPA”) denial of a petition to address CO\textsubscript{2} emissions was an arbitrary exercise of the EPA’s mandatory function.\textsuperscript{16} Many petitions of the same nature\textsuperscript{17} have been filed by public and private actors\textsuperscript{18} in state and federal U.S. courts to promote enhanced regulation of carbon dioxide emissions and to force public authorities to take positive action in limiting CO\textsubscript{2} pollution. Such pressures by both public and private actors ultimately resulted in urging public authorities to reform the existing regulatory framework, which happened mainly through the modification of existing laws. Examples of these modifications may be found in some of the major environmental related acts such as the Clean Air Act of 2000 (“CAA”) or the National Environmental Policy Act of 1969 (“NEPA”).\textsuperscript{19} The aforementioned statistics uncontrovertibly demonstrate that in most circumstances “climate change litigation . . . represents an effort to fill perceived regulatory gaps.”\textsuperscript{20}

A second trend playing a dominant part in U.S. climate change litigation is what Professors David Markell and J.B. Ruhl have defined as “Procedural Monitoring, Impact Assessment, and Information Reporting.”\textsuperscript{21} Claims that fall within this category are similar in scope to those of the “regulatory claims model” outlined above, as they seek to impose on public or private entities new or more stringent obligations in monitoring, assessing, or disclosing the environmental impact of activities that such entities perform. An example of this type of claim is the complaint for declaratory and injunctive relief that Greenpeace, Friends of Earth, and four U.S. cities filed against a private investment corporation and a bank for the failure to produce an environmental impact assessment when developing heavily polluting overseas projects.\textsuperscript{22} Some fifty-five petitions of this kind have been filed in U.S. courts with the same monitoring and assessment purpose,\textsuperscript{23} representing the majority of the U.S. climate change related claims.

Thirdly, tort claims, mostly public nuisance and negligence, have also been brought in U.S. litigation.\textsuperscript{24} However, case law concerning the violation of individual rights and liabilities represents only a small minority of the legal arguments brought before U.S. judges when compared to the amount of cases aimed at pushing authorities toward a more efficient, large-scale regulation of CO\textsubscript{2} emissions.\textsuperscript{25} Although tort law as a basis for climate change challenges has advanced from a situation in which “such cases were . . . derided as frivolous long shots that would be shot down quickly”\textsuperscript{26} to one in which more reliance is placed in claims of individual harms from CO\textsubscript{2} emitters, such claims have yet to result in fully successful outcomes.

The difficulties complainants encounter are numerous when seeking redress of environmental wrongs linked with carbon emissions through tort actions.\textsuperscript{27} The primary hurdle for applicants is demonstrating substantial interest for standing.\textsuperscript{28} The “classic” U.S. theory of environmental \textit{locus standi} does not fit the peculiar requirements of climate change.\textsuperscript{29} Climate change usually does not entail the existence of a specific natural feature (e.g. a river or a forest) which human behavior is about to despoil or endanger. On the contrary, climate change stems from a multiplicity of sources and affects different aspects of the environment including: arctic melting, rising sea-levels, and disappearing endangered species due to changed weather conditions; these are merely examples of the numerous, yet unpredictable, consequences of greenhouse gas emissions in the atmosphere.\textsuperscript{30} Since it is difficult to identify the specific harms that may affect the environment and the specific species that are at risk of being endangered, it is that much more difficult for a judicial panel to grant standing to the plaintiffs.\textsuperscript{31}

The most difficult standing-related hardship that applicants must face when filing emissions-related court claims is proving an emitter’s direct responsibility. It is often argued that there are not a definitive number of entities liable for climate change, or that, on the contrary, this number is too great. Scholars have tried to overcome such hurdles by applying innovative theories on climate change liability,\textsuperscript{32} some of which aim to establish a link between local causation and local consequences.\textsuperscript{33} These doctrines may prove successful in those cases where the damages at stake are clearly identifiable (and, therefore, the obstacle of \textit{locus standi} has already been surmounted) and where such damages occur in areas where major emitters directly operate. Also, the application of the environmentally based precautionary principle to tort litigation may provide a clearer basis for allocating liability, thereby providing a reverse burden of proof under which “economic actors are liable unless they can prove that their activities are environmentally harmless.”\textsuperscript{34} Such a principle though, despite having been frequently recognized as a “general principle of international law,”\textsuperscript{35} has not yet been accepted by U.S. courts, so that future applications within the United States still appear highly improbable.

However, even if these doctrines may sometimes prove successful, applicants may not always find the road to redress clear of impediments since “there is at present no international liability framework directly applicable to climate change-related damage.”\textsuperscript{36} This is demonstrated, for instance, by the unfortunate outcome of \textit{Connecticut v. American Electric Power Company},\textsuperscript{37} in which plaintiffs unsuccessfully alleged infringement by six U.S. power companies (alleged to be major polluters with respect to carbon dioxide emissions) of federal and state public nuisance law.\textsuperscript{38} Although the decision was reversed by the U.S. Court of Appeals for the Second Circuit,\textsuperscript{39} the District Court decision represents a valuable example of an approach that is still frequently adopted by U.S. courts. Even if it were proven beyond a reasonable doubt that climate change-related damages had actually occurred, it would nonetheless be difficult to identify the entity liable for damages.\textsuperscript{40}

Finally, there is one other barrier to justiciability which may be the most difficult to overcome. The “political question doctrine” permits judges to defer climate change questions for political consideration reason.\textsuperscript{41} The doctrine highlights the fact that climate change concerns are more appropriate for the legislative branch of the government than for the judiciary.\textsuperscript{42} The original District Court’s decision in \textit{Connecticut v. American Electric Power Co.} aligned with this doctrine,\textsuperscript{43} which is now at the center of the American debate.\textsuperscript{44}
Nevertheless, tort claims have attracted a lot of attention from the public. Many “liability” actions result in widespread discussion. Some of the most renowned examples include the Inuit Circumpolar Conference Petition, which will be further examined below, or the Hurricane Katrina case, in which victims of the Katrina hurricane sought compensation from CO2 emitters for loss of private property and use of public property.47

In light of the above, it can be concluded that the U.S. approach to climate change litigation has been primarily based on regulatory claims. Although it is debatable whether the CAA is the most suitable instrument for addressing such problems, it is nonetheless clear that judicial rulings cannot substitute for robust and stringent policies on global warming and carbon emissions, and that the “abdication of congressional responsibility” feared by some commentators should be avoided.49 Despite the fact that many, even within Congress, applauded the initiatives undertaken by the Supreme Court, viewing them as ways to enact CO2 controls without directly taking responsibility for them, it has been noted that such ceding of legislative power to non-elected litigators and judges may ultimately endanger the principle of representative democracy.50

**Climate Change Litigation: The European Scenario**

European climate change litigation has differed from that of the U.S. mainly because of the diverse and less homogeneous framework that characterizes Europe. Each European state tends to tackle domestic issues, including those related to the environment, with a unique and cultural-specific approach, not only from a legal perspective, but also from political and cultural points of view.

To identify a common European trend, it is necessary to reference the supranational political framework provided by the European Union (“EU”) institutions, which have been far-sighted in enacting a thorough regulation of greenhouse gas emissions. When analyzing EU climate change policies, recall that the EU, which was born out of the ashes of a purely economic entity,51 is facing a difficult process of integrating political, military, financial, and cultural aspects.52 This process is ongoing, with many purported goals still unachieved, and the road to further unification seems at present tortuous and uncertain.53 Although important steps have been taken to allow individuals to use the European Union Foundation Treaties, which include the defense of individual subjective rights, when European Union litigation is involved (the Luxembourg-based Court of First Instance and European Court of Justice) the concerns of applicants and defendants are arguably of a purely economic nature.54

Directive 2003/87/EC established a greenhouse gas emission allowance trading system within the Community commonly known as the Emissions Trading Scheme (“ETS”), which fixes a number of allowances for the quantity of CO2 that can be emitted by a single Member state over a particular period; the level of emissions in such period shall then “be equal to the established cap.”55 Under the ETS, Member states may buy and sell allowances, thereby creating a supply and demand model that forms a basis for the European carbon market.

As a result, carbon market litigation has ensued, resulting in a considerable number of proceedings before the Luxembourg Courts, which have been conceptually divided into the following three categories: challenges to the validity of the Directive, infringement proceedings, and challenges to decisions of the European Commission on the National Allocation Plans designed by Member states for re-allocating the allowances to national installations. The case of *Abraham and Others* slightly detaches itself from this categorization since the applicants asked the European Court of Justice (“ECJ”) to interpret the European Environmental Impact Assessment Directive (85/337/EEC) so that restructuring of the Liège-Bierset Airport could be included within the definition of “project” set out in the directive, and the environmental impact assessment could be considered mandatory for the restructuring.65

Although many claims have been brought with respect to carbon market issues, regulatory claims are similarly predominant in Europe. Even the abovementioned case of *Abraham and Others*, although directly linked to the impact of potentially polluting works on the well being of a community, was aimed at triggering inclusionary interpretation by the ECJ of a specific regulation. Evidently, little room is left for individual applications aimed at recovering damages suffered as a result of global warming and, therefore, linked to CO2 emissions. Currently “EU ETS litigation is not concerned with the impacts of climate change . . . but rather the finessing of a new market mechanism from the perspective of key market actors within the established confines of EU law.”66

The implications of this mainly regulatory approach to climate change litigation are even worse for Europe than they are for the U.S. Although the U.S. carbon emissions framework is in dire need of further regulation,68 and though litigation may not be a completely adequate substitute for legislative control, the benefits of litigation far outweigh the drawbacks of total inaction. In Europe, where the ETS is the core of the carbon emission regulatory framework, climate change related claims are primarily concerned only with the applications of such a scheme. The influence of the resulting jurisprudence thus ends up being considerably more limited, and the possibilities of evolution more scant.

In addition, other criticisms may arise. Firstly, as has already been mentioned, regulation is not considered by some as an appropriate task for judges. Even though such an assertion is debatable, it will always be difficult for counter-arguments to prevail, even from a theoretical standpoint. It may be argued, for instance, that the strict “separation of tasks” theory, which some British judges are already accustomed to, is often supported by governments, entities, and courts for nothing but specious reasons.72 Such arguments, though, appear particularly difficult to prove, and the “spatial separation of competence theory” remains difficult to rebut.73

Secondly, once a regulatory mechanism has been successfully implemented, it may not suffice on its own to reduce the effects that greenhouse gases have on the environment. As Philippe Cullet argues, “[I]t cannot be expected that the Climate
Change Convention, the Kyoto Protocol, or any other protocol... would be sufficient to effectively mitigate global warming so as to avert the need for adaptation...” In other words, the EU ETS Directive, as well as the other international instruments mentioned by Cullet, should be supported by a more complete framework of policies (for instance, liability schemes applicable at the international level), in order to be more effective at preventing—or at least in limiting—climate change.

Thirdly, a lack of political willingness to attain a stricter liability regime for ecological damages exists. The European Environmental Liability Directive, which entered into force in 2009 with the purpose of harmonizing the concept of pollution and the reinstatement of regimes throughout the region, has been until now heavily criticized for not having provided Europe with the expected uniformity with regard to liability for ecological damages. Similarly, the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which established tougher rules for liability for environmental damages, has not yet been ratified or entered into force. The above analysis clearly does not favor a bright future for a comprehensive civil liability regime for damages stemming from carbon dioxide emissions. The outcomes of the efforts made by applicants in the human rights law arena are not any more encouraging.

**LINKING CLIMATE CHANGE TO HUMAN RIGHTS**

Recent attempts to link climate change claims to human rights principles have not achieved any revolutionary outcomes. While several human rights-based petitions alleging climate change damages have been filed in international or regional tribunals, none of them has yet come to a completely favorable conclusion for the applicants.

The Inuit petition filed at the IACHR, by far the most famous case in which a human rights-focused body addressed climate change, featured applicants seeking “relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States.” The action was brought against the U.S. for being the largest emitter of greenhouse gases and because, according to the applicants, it continually refused to undertake serious efforts to reduce emissions. The IACHR rejected the petition, holding that the information provided by the claimants did not enable the Commission to determine whether the alleged facts entailed a violation of the rights protected by the American Declaration of the Rights and Duties of Man. Even though a subsequent hearing could be held by the IACHR focusing on “the right to use and enjoy property; the right of peoples to enjoy the benefits of culture; and the right to life, physical integrity, and security,” no further action has been taken.

The Inuit petition outcome may sound surprising, especially in light of the fact that the IACHR had previously upheld indigenous people’s claims related to violations of rights analogous to those mentioned in the petition. However, the Inuit petition distinguishes itself from other indigenous communities’ legal actions because of its peculiar liability-related aspects. It is difficult to establish direct links of causation between emitters, no matter how big they are, and damages when climate change is involved. In addition, it can be argued that a decision holding the United States responsible for arctic melting and other damages related to CO2 emissions would have ended up being too big of a step, providing legal basis for claimants all around the world to sue Western industrialized countries for sea-level rise, hurricanes, flooding, and other effects of climate change. It is undisputable that politically revolutionary decisions have to be balanced with political counter-interests that cannot be set aside: therefore, justices and commissioners tend to be cautious before allowing potentially destabilizing claims to succeed.

In Europe, claimants have not been any more successful. The ECtHR, based in Strasbourg and acting within the framework of the 1951 European Convention of Human Rights (“ECHR”), is renowned for being the most important tribunal for assessing human rights claims in Europe and one of the most efficient civil rights monitoring bodies in the world. However, the area pertaining to environmental damages is a partially neglected area in the ECtHR’s case law: successful claims in connection with the environment have so far been grounded mostly on Article 8 of the ECHR on protection of private and family life, broadly interpreted so as to include interferences with individuals’ well-being caused by public nuisance and environmental damage. In the context of violation of property rights, the Court has also recognized that “the environment is a value in itself in which both society and the public authorities take keen interest.” Although the ECtHR has recently begun to consider the precautionary principle, while assessing claims on unlawful interference on the applicant’s right to a healthy life, there are several obstacles that impede climate change-related claims from being justiciable within the ECHR framework.

First, for a claim to succeed, applicants must demonstrate a concrete interference of their rights beyond all doubt. Given that the Convention does not provide for an express right to a safe and healthy environment, whether the latter is included within the scope of Article 8 (the right to private and family life) or Article 1, Protocol 1 (the right to peaceful enjoyment of possession) of the ECHR, is a matter of interpretation. In light of the abovementioned case law, this hurdle may not seem insurmountable. However, climate change claims are different from the classic “environmental claims” brought before the ECtHR because in the former no explicit link between emissions and damages can be easily demonstrated.

Second, in the unlikely case of an incontrovertible causal relationship between greenhouse gases and local damages in Europe, the “margin of appreciation” doctrine could serve as a convenient tool for the ECtHR judges to defer the matter to the national regulatory level. In short, once a private or public entity has satisfactorily demonstrated that domestic law on greenhouse gas emissions has not been infringed upon, the Court could decide to leave this sensitive area of judgment to the discretion of national Member states’ authorities (legislators and judges), thereby abiding by the Court’s subsidiary role.
It has been recently argued that the ECtHR should address climate change within the scope of the right to property, namely that of protecting private low-carbon investors against risks of excessive state interference through regulatory changes and the imposition of heavy financial burdens.99 This innovative and practical approach is proof that there are strong countervailing interests (namely, those of investors and corporations) that should be balanced with the perceived need of establishing the civil liability of corporations and emitters. These countervailing interests are worth considering if their aim is “stimulate[ing] the flow of private capital in the implementation of low-carbon investments.”100

In other fora, more attention has been drawn to the human rights implications of climate change. For example, in Gbemre v. Shell101 the Federal High Court of Nigeria held that gas flaring, an unconstitutional practice in breach of the fundamental human right to health, also contributes to adverse climate change as it emits carbon dioxide.102 The case is particularly important because it is “one of the first where a national court held that climate change, like other environmental issues, may implicate human rights.”103 However, the Nigerian judges’ conclusions on climate change are not final and do not address global warming directly since gas flaring was the real underlying issue in the case.

In light of the above, it is clear that counter-interests have thus far prevailed over the commitment of states to take a strong standpoint against violations of fundamental human rights caused by human-induced global warming. Arguments against linkages between climate change and human rights law have been brought on several grounds, including the idea that international human rights actors and tribunals should prioritize other emergencies (which are also depicted as easier to cope with in legal terms) and concerns relating to the current trend of excessive anthropocentricity under which climate change is currently being approached.104 The most convincing explanation of the scant success obtained by climate change petitions in human rights fora seems to be, however, the one which links together hypothetical favorable judgments and their potential consequences, and which takes into account the countervailing economic interests of major public and private emitters.105 The unwillingness of domestic tribunals throughout the world to acknowledge the existence of “environmental refugees” (who often flee from their countries because of the consequences of climate change) and to grant to such migrants the state-onerous refugee status is clearly another side of the same story.106 In this sense, the obstacles that prevent human rights tribunals from intervening directly in the climate change issue are similar to those that actors seeking redress in domestic tort actions have found.

**Conclusion: Bleak Prospects for Civil Liability?**

Notwithstanding the recent developments of the environmental liability doctrine, which seems to be undergoing a process of strong “internationalization,”107 it can be concluded that the road to clear and convincing guidelines for establishing liability in cases of climate change-originated damages still appears to be long and tortuous. Even those authors who have tried to provide climate change litigation advocates with a “more realistic understanding of the scientific reality of causation” that “will suitably address climate change”108 have had to deal with the fact that the proposed solution of making recourse to “probabilistic causation” still leaves several problems unsolved.109

Moreover, all the proposed “technical” solutions for establishing airtight causal links tend to overlook the political and institutional problems underlying the task that courts should perform in relation to climate change. As it has been argued in this article, there is a lack of commitment by governments, judges, and other public and private multinational actors to allow the courts to take over the role, which many see as best left to domestic and international regulators. Should a court provide leeway for claimants to obtain redress for damages not strictly linked to local infringements, more petitions would proliferate and the consequences on the international equilibrium would be immense.

The scenarios discussed may be satisfying to those who are “skeptical that tort litigation will be an effective way to combat climate change.”110 However, from a different standpoint, this “skeptical” approach appears to be misplaced as it tends to confuse the regulatory function with that of assessing damages. While on the one hand it is difficult to rebut the critiques that regulation should be left to the government, on the other hand one could object that the “skeptical” approach would sound more reasonable if applied to regulatory claims, which have proved to be the most successful up to now. On the contrary, establishing standing, liability, and redressability is an appropriate task for the judiciary to carry out.111

Civil liability is still far from taking root in the climate change litigation context for different reasons. They are grounded on the far-sightedness that judicial panels have so far demonstrated in dealing with this area of litigation. Judges are often conscious of the vast, wide-ranging consequences (involving, *inter alia*, economic, energetic, developmental, and migratory issues) that holding an American or European actor responsible for damages occurring thousands of miles away would entail in legal terms. Consequently, before innovative liability principles are established, decision-makers, such as national legislators, must ask if the climate change litigation floodgates are ready to be opened.

**Endnotes:** The Tortuous Road to Liability

2 Id.

*WINTER 2011*

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**Endnotes: The Tortuous Road to Liability continued on page 82**
A series of Republican-supported bills in the 112th Congress are aimed at preventing the Environmental Protection Agency (“EPA”) from regulating the heaviest polluting industries in America. At the forefront is H.R. 97—short-titled the Free Industry Act—a bill introduced by Rep. Marsha Blackburn (R-TN) and sponsored by 120 other representatives. H.R. 97 would amend the Clean Air Act (“CAA”) to exclude a series of greenhouse gases (“GHG”) from the list of pollutants that the EPA can regulate. Media sources have already pointed out that H.R. 97 will likely die in the Senate or by Presidential veto. Regardless, H.R. 97 indicates an agenda to impede EPA regulatory authority that could rise to the forefront should Republicans take control of Congress. The philosophy that undergirds H.R. 97 represents a paralytic force to U.S. climate change policy, and policymakers should begin drafting solutions now before H.R. 97 and similar bills become a reality.

The CAA is a cornerstone of U.S. climate change policy, and the EPA is the primary vehicle through which the federal government enforces the provisions of the CAA. Congress successively increased the EPA’s authority to regulate harmful pollutants under the CAA with amendments in 1977 and 1990. GHG emissions entered the dialogue in 2007 when the Supreme Court decided Massachusetts v. EPA, mandating that the EPA had the authority to regulate GHG emissions pursuant to the CAA. In 2009, the EPA issued an Endangerment Finding, stating that GHG emissions posed a serious health risk for the population and environment. With the support of the Obama Administration, the EPA declared that it would pursue new regulations for mobile and stationary sources. It is against this backdrop that Republicans in the 112th Congress levy their attacks against the EPA.

Supporters of H.R. 97 (“97’ers”) wish to strip the EPA of its regulatory authority because they claim that stricter GHG standards will “kill” American industrial jobs. The 97’ers first argue that the detrimental effects of GHG emissions are uncertain and require more research before the EPA can move to regulate those emissions. The argument continues that stricter regulations will force companies to expend money installing new equipment and put American jobs at risk. There is evidence that lends credence to the 97’ers’ economic argument, but most of it comes from industry-led reports.

The two largest stationary sources of GHG emissions are the electric power industry (oil, natural gas, and coal) and manufacturing, producing an estimated 51.3% of U.S. GHG emissions in 2007. The oil and natural gas industries directly employ roughly two million people, coal employs about ninety thousand, and manufacturing employs around twelve million people. With more than fourteen million people employed by these industries (not including “supporting” industries), it is reasonable to assume that new regulations could cause potential job losses. However, the 97’ers’ argument fails to consider the potential for job creation resulting from new technology and programs required to comply with these regulations. Instead, H.R. 97 proposes an extreme political maneuver that threatens to dismantle the core of U.S. climate change policy.

By eliminating EPA’s authority to regulate GHG, H.R. 97 unleashes a host of consequences. Without the EPA as the regulatory authority, state governments will have the choice, or obligation, to regulate GHG emissions. This means a patchwork of regulations from state to state instead of one uniform federal standard. Companies who wish to escape GHG regulations may decide to move to states without emissions standards. Also, without GHG regulations, it is unlikely that industrial companies will invest in “clean tech,” only further delaying U.S. entrance into a growing global marketplace with $7.8 billion in investment in 2010. Finally, there is no way to measure how much credibility the U.S. will lose in the international climate change dialogue without an effective policy in place.

H.R. 97 is part of a broader Republican plan to dismantle the EPA. The bills presented in the 112th Congress bear an eerie resemblance to bills presented by Republicans during the 111th legislative session. To assume that Republicans will not present these bills in the 113th Congress would be foolish. Policymakers who favor a strong climate change policy must take affirmative steps to entrench the EPA’s authority to regulate GHG emissions. Amending the CAA or passing an authorization bill would be two ways of accomplishing this goal. Although the political distribution of the 112th Congress is unlikely to allow the entrenchment efforts to succeed, it could provide a rally-point for all those in the public who stand against H.R. 97.

Endnotes: Hazy Skies in America’s Future?


* Oded Cedar is a J.D. Candidate, May 2012, at American University Washington College of Law.
Climate change has become one of the biggest developmental challenges facing the planet. The challenges are even more pronounced and significant for the African continent, because of its levels of poverty and low capacity to adapt. . . . Time has now come that we collectively as nations (and) individually in our right have to do something to avert consequences of climate change in order to avoid a future catastrophe. We need to act now, because if we do not, the development gains that we have attained in our countries will be lost, thereby leaving more people in poverty. – Dr. Bingu wa Mutharika

**INTRODUCTION**

Over the past decade or so, climate change has been regularly cited as one of the biggest impediments to Africa’s realization of sustainable growth and development. In particular, African leaders have been warned that, in light of the immense challenges posed by the phenomenon, the continent stands a very marginal chance of making meaningful progress towards achievement of the Millennium Development Goals (“MDGs”) by 2015. It cannot be gainsaid that these warnings are not without basis. Climate change commands significant influence on Africa’s performance; it portends innumerable socio-economic and political challenges for the continent, which has perennially garnered “breaking news” coverage largely for the appalling humanitarian catastrophes on its soil.

Though it contributes only about 3.8% of the total greenhouse gas (“GHG”) emissions, the continent constantly experiences the adverse impacts of climate change, as a result of its high poverty levels and low capacity to adapt. For example, the continent’s food security situation has continually worsened as the productivity of rain-fed agriculture, the main source of livelihood for most Africans, frequently slumps due to erratic rainfall patterns; massive livestock losses have been caused by successive prolonged droughts in virtually every corner of the continent; sea level rise (leading to coastal erosion) and flooding (even in areas that never before experienced floods) have become a common sight; persistent and new health problems are increasingly reported in virtually every corner of the vast continent; and violent conflicts have become the order of the day as environmental migrants and local communities clash over control of, or access to, resources. Worryingly, the effects of climate change have proved to be akin to Russian roulette, with every pull of the trigger posing risks for all, and the poor bearing the heaviest brunt because of their dependence on the surrounding environment for their survival.

Today, issues relating to climate change are addressed in a plethora of treaties adopted within the United Nations (“UN”) framework. These international instruments include the UN Framework Convention on Climate Change (“UNFCCC”), which was adopted at the landmark UN Conference on Environment and Development (“Earth Summit”) in 1992 as part of the package to save the planet along with the UN Convention to Combat Desertification (“Desertification Convention”), and the Convention on Biological Diversity (“CBD”), which seeks to ensure conservation and sustainable use of biodiversity, as well as fair and equitable sharing of the benefits of genetic resources. Other instruments related to climate change which were subsequently created include the Kyoto Protocol to the UNFCCC (“Kyoto Protocol”), which establishes legally binding obligations for the developed countries to reduce their GHG emissions and, the Cartagena Protocol on Biosafety (“Cartagena Protocol”), which was adopted (as a supplement to the CBD) to protect biodiversity from the potential risks posed by living modified organisms (“LMOs”) resulting from modern biotechnology. In their formal acknowledgment of the importance of climate change issues, African countries have overwhelmingly subscribed to these instruments.

Africa’s predicament has received formal acknowledgement in various circles. Within the inter-governmental African Union (“AU”) framework, on several occasions climate change has garnered the attention of the Assembly of Heads of State and Government (“the Assembly”). For instance, in January 2007, the Assembly called upon the AU Member States to integrate climate change into their respective national development programs. In February 2009, the Assembly emphasized the need for international climate change negotiations to give Africa an opportunity to demand compensation for damage caused by global warming. More importantly, the Assembly approved the Algiers Declaration on Climate Change (“Algiers Declaration”), thereby paving way for the building of a common framework. These international instruments include the

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African Position in preparation for the fifteenth Conference of the Parties to the UNFCCC (“COP-15”).

In July 2009, the Assembly, among other things: 1) established the Conference of African Heads of State and Government on Climate Change (“CAHOSCC”) to spearhead leadership in the climate change negotiation process; 2) urged the CAHOSCC, all ambassadors, and negotiators to use the approved African Common Position to achieve optimal results for the continent; and 3) authorized the AU Commission to facilitate the AU’s accession to the UNFCCC, the Kyoto Protocol, and the CBD. Then, in February 2010, the Assembly requested the CAHOSCC to establish a streamlined single negotiating structure at both Ministerial and Expert levels.

At the inter-ministerial level of the African Ministerial Conference on the Environment (“AMCEN”), climate change issues were addressed on a number of occasions. The agenda was officially floated at the Conference’s twelfth session in Johannesburg, laying the groundwork for the preparation of a common continental position on climate change. Shortly thereafter the special session on climate change, which also had the African Group of Negotiators in attendance, adopted the Nairobi Declaration on the African Process for Combating Climate Change, which, among other things: 1) noted with concern the inadequacy, complexity, and fragmentation of the existing climate financing mechanisms, as well as the constraints faced by African countries in accessing these facilities; 2) reaffirmed the adoption (by the Assembly) of the Algiers Declaration, and “the need [for African countries] to speak with one voice in the negotiations process for the new legally binding global climate change regime;” 3) stressed that “Africa’s priorities are to implement climate change programmes on adaptation . . . , in particular to alleviate poverty and attain the Millennium Development Goals, with emphasis on the most vulnerable groups, especially women and children;” and 4) recognized the need “to ensure coordination and coherence in the implementation” of existing climate change adaptation and mitigation actions in Africa.

Within the framework of the New Partnership for Africa’s Development (“NEPAD”), the Action Plan of the Environment Initiative affirms the continent’s concerns vis-à-vis the challenges posed by climate change, and provides for climate change as one of the core priority areas to be addressed by the continent’s leadership. On the realization that climate change poses a key challenge to environmental sustainability, biodiversity, and food security in Africa, through its Climate Change and Natural Resource Management program, NEPAD provides a platform on which the continent’s players share knowledge and experiences in addressing the fast-creeping threat.

Climate change issues have equally garnered the attention of various forums, in particular the African Development Forum (“ADF”), a biennial multi-stakeholder gathering committed to building consensus and mobilizing partners for Africa’s development. The 2010 Seventh African Development Forum (“ADF VII”), whose theme was “Acting on Climate Change for Sustainable Development in Africa,” was jointly organized by the Addis Ababa-based UN Economic Commission for Africa (“UNECA”), the AU Commission, and the Tunis-based African Development Bank (“AfDB”). The participants, drawn from diverse stakeholders, deliberated on the challenges and opportunities presented by climate change in Africa, and, after the five days of intensive panel discussions and parallel sessions, adopted a common statement (“Consensus Statement”) with some fifty-six points of agreement.

This article aims to unearth the challenges and prospects in sustaining the outcomes of these principled negotiations for the African continent to make lasting progress in addressing the effects and impacts of climate change and variability.

**Understanding the Forum**

**On the Forum Generally**

The African Development Forum (“ADF”) is a joint initiative of UNECA, the AU Commission, and the AfDB. It is Africa’s pioneer multi-stakeholder platform established with a view to establishing a consensual African-driven development agenda, and mobilizing partners for Africa’s development. Every forum has a designated theme, on which deliberations are based. Initially, it was intended that the Forum be convened annually. However, after the second ADF, in 2000, the participants agreed that the Forum be convened biennially. Thus, the third ADF was held in 2002, instead of 2001. The seventh ADF VII was recently held in October 2010 and the eighth ADF VIII is slated for 2012.

**ADF VII: A Contextual Overview**

**Thematic Focus of the Forum**

ADF VII was devoted to discussions on climate change and participants were tasked to examine the challenges and opportunities presented by the phenomenon, with a view to, within the global context, identifying long-term actions to ensure Africa’s development process is climate resilient. The discussions were carried out against the backdrop of the realization that climate change is one of the biggest threats to sustainable growth and development in Africa.

**Objectives of the Forum**

Generally, ADF VII was intended to provide a multi-stakeholder platform to discuss and build consensus on how to mainstream climate change concerns into development policies, strategies, programs and practices in Africa, and to strengthen the African Common Position to ensure that it adequately reflected the continent’s concerns and priorities in the on-going international climate change negotiations.

Specifically, the Forum was convened to accomplish several goals. First, it considered the evidence and impacts of climate change in Africa and the need for adequate information and services to better inform decision-making and actions. Second, it deliberated on the challenges and opportunities climate change poses in Africa and policy-making, while promoting cooperation in sharing of best practices and lessons-learned. Finally, within the framework of the demonstrated evidence and impacts of, as well as the challenges and opportunities presented...
by, climate change, the Forum defined priority actions and measures, built new strategic alliances and partnerships, and provided momentum for the African Common Position, in preparation for the sixteenth Conference of the Parties (“COP-16”) in Cancún, Mexico.47

**ADF VII: Highlight of the Key Outcomes**

On the premise of the evidence presented, which reflected climate change as a serious, urgent, and compelling reality in Africa,48 the participants concluded the Common Statement, which embodies some fifty-six points of agreement. The key ones are highlighted below.

**Consensus on the African Common Position**

With a view to enhancing the continent’s position in the international climate change processes, ADF VII participants agreed that African countries and their leadership should engage all relevant stakeholders in the on-going climate change discussions, and in particular, build the continent’s capacity through a coordinated, effective, and representative position to effectively participate in the relevant international negotiations, in order to ensure that the outcomes reflect the continent’s concerns and priorities.49 The agreement also pledged to support implementation of decisions and resolutions of the AU Assembly, the AMCEN, and other relevant continental bodies in regard to climate change concerns for the continent.50

**Leadership for Climate Change Response**

On the understanding that African leaders and their development partners have critical roles to play in implementing Africa’s climate change agenda, participants also agreed that African leaders and their development partners should strongly support the CAHOSCC to enable it to effectively mobilize political commitment and provide effective political leadership. Further, there were pledges to demonstrate additional leadership.51 These included commitments relating to: 1) taking bold decisions on the issue of innovative climate change financing mechanisms, including proper carbon pricing to complement funding under the UNFCCC;52 2) educating the public to enhance understanding of climate change and variability; 3) garnering support necessary to meet national commitments; and 4) addressing the fallacy that developed countries only have a charitable obligation to finance climate change actions in developing countries.53

**The Role of the Private Sector**

On the understanding that the private sector54 has a vital role to play in addressing climate change in Africa, the participants agreed that African governments should “create an enabling policy environment to encourage the private sector to harness its expertise, resources and creativity.”55 Related to this pledge, there was agreement to create and develop partnerships between public, private, and civil society stakeholders.56

Further, the participants called on African governments to “establish minimum standards for local and Foreign Direct Investments” (“FDIs”) that were appropriate for both national needs and the private sector.57 Finally, there was a pledge to “encourage research and development that will create Africa-specific technological solutions . . . taking into account [the continent’s] rich indigenous knowledge systems.”58

**Key Outcomes on Food Security and Economic Development**59

In the Consensus Agreement, ADF VII participants pledged a number of sector-specific actions, including in agriculture, food security, and infrastructure. For instance, in order to improve the continent’s approach in addressing agriculture and food security challenges, the Agreement called on African countries to take a “holistic approach,” seek a strong, fair, and comprehensive future agreement on payment systems for agriculture sector emissions;60 improve and grow “index-based insurance schemes and safety nets;” and accelerate initiatives aimed at reducing dependence on rain-fed farming.61

In addition, to address the adverse impacts of climate change on the continent’s infrastructure development efforts, the agreement called on African governments to “climate-proof their water infrastructure,” promote more sustainable demand, increase efficiency, increase rain-water harvesting, and support more successful water management at all levels, including for states sharing water resources, notably rivers.62 In addition, the agreement pledged to adopt a “holistic approach” to promote low-carbon energy sources and technology, and “to support the Programme for Infrastructure Development in Africa (“PIDA”)63 to ensure development of the continent’s priority infrastructure projects.64

**Outcomes on Human Development, Security, and Ecosystem Sustainability**

In their resolve to address the social and human development challenges posed by climate change,65 the participants agreed to “employ . . . a human rights-based approach (HRBA) in climate change mitigation and adaptation policies.”66 The agreement pledges the governments to support an “equity-based health care financing in climate change funding mechanisms and internal resource mobilization.”67 There was also a pledge to comprehensively incorporate gender perspectives in development, encourage eco-friendly development and awareness, and promote “youth-led actions and processes.”68

Further, the participants agreed that, in order to address the peace and security issues posed by climate change,69 African countries should “engage in preventive diplomacy,”70 in part through the Climate for Development in Africa (“ClimDev-Africa”) Programme, to effectively address the interface between climate change, peace and security issues, and disaster response.71 The agreement also proposed amending the African Union Protocol on peace and security,72 and tasked the AU Peace and Security Council (“PSC”) to, in its work, take into account climate-related peace and security issues, including migration.73

Finally, in their efforts to address the impacts of climate change on ecosystem sustainability,74 African governments agreed to promote effective and sustainable human-centered ecosystem management,75 encourage the use of Reducing Emissions from Deforestation and Forest Degradation Plus (“REDD+”)
initiatives to reduce poverty, and implement the UNFCCC, the CBD, and the Desertification Convention “in a synergistic manner to promote coherent [environmental] management.”

OUTCOMES ON HARNESING MEANS OF RESPONSE TO CLIMATE CHANGE: FINANCING, RISK MANAGEMENT, SCIENCE & TECHNOLOGY, AND CAPACITY BUILDING

It was agreed that, in order to improve financing for climate change actions in Africa, African governments and their development partners should promote financial reform to enhance funding access for Africa, in particular by identifying and prioritizing efficient financial resource distribution, in part through newly forged Public-Private Partnerships. The agreement also “strongly supports” the establishment and setting up of the proposed African Green Fund (“AGF”), which is expected to coordinate and manage climate financing on the continent.

In addition, the participants agreed that to improve the continent’s capacity to manage the risks of climate-related disasters, African governments should strengthen the national institutions generating and handling climate-related data, and promote the exchange of this information. The agreement also calls for promotion of broad cooperation in sharing climate-related knowledge (through early warning systems) and disaster management, and strengthening of surveillance and monitoring systems across all regional levels. It also calls for promotion of index-based insurance in arid and semi-arid areas, as well as promotion of integration of climate risk management (“CRM”) in all levels of education and all levels of policy-making.

Further, to improve the continent’s level of scientific and technological innovativeness to respond to climate change, the participants agreed that African countries should “build a regional climate change knowledge repository,” invest in scientific research and development, and support and prioritize disaster risk-management and preventive capacity. On the international level, the agreement seeks to promote the pursuit of technology transfer and global partnerships to that end. Finally, the Agreement promotes the strengthening of African universities and research and technology centers to “increas[e] their competitiveness in the global market.” To improve Africa’s capacity to respond to climate change, the agreement pledged that African countries, with the support of their development partners, should strengthen CRM-related national institutions, including educational institutions at all levels, and improve the capacity of vulnerable groups, and foster South-South cooperation.

SUSTAINING THE OUTCOMES: A REALITY CHECK

PRACTICAL CHALLENGES IN SUSTAINING THE OUTCOMES

Impotent Political Leadership

Africa lacks credible leadership to address climate change. The political leaders are yet to effectively walk their unending talks; save for the multitude of pious resolutions, there is no concrete effort to deal with the fast-unfolding crisis. In fact, the continent’s affairs have been reduced to endless spirals of meetings and deliberations, only to come up with more meetings. It is this circus that has, for instance, delayed the establishment of the AGF. In general, the continent’s leadership lacks the requisite political will to steer the continent to the path of sustainable growth and development, with mere rhetorical promise to tackle the climate change-related challenges engulfing the continent.

Further, leadership has been lacking in preventing the destruction of the continent’s ecosystems, and in mitigating poverty and hunger, two of the biggest drivers of environmental destruction on the continent. For instance, in the fast-evolving “global land rush,” millions of African farmers have lost their arable lands to foreign investors. These deals, often shrouded in veils of secrecy, have violated the resource rights of millions of poor Africans, fuelling poverty and food insecurity, two of the biggest drivers of environmental destruction on the African continent. Furthermore, as vast forestlands (and other ecosystems that act as carbon sinks) are opened up to large-scale farming, the continent continues to be exposed to further threats of climate change. Sadly, attempts by environmental activists to resist the deals are often forcibly countered by the concerned governments.

Against this backdrop and in the absence of committed and visionary leadership, it cannot be denied that at both regional and national levels it would be an exercise in futility to attempt sustaining the outcomes of ADF VII. Sadly, if African leaders continue to act in the way they are currently, the Consensus Statement may as well land in the heap of unimplemented texts on climate change, only to gather dust and be forgotten altogether.

Corruption and Economic Mismanagement

Corruption may be the most talked about problem in most African countries, many of which have been poorly managed for the better part of their post-independence histories. As we begin the twenty-first century, unfortunately, not much has changed; most of the leaders still use their official positions for self-aggrandizement, as opposed to public service. In fact, over the years, many African countries have perpetually ranked very poorly on Transparency International’s corruption scorecard.

In both the public and private spheres, the vice has greatly undermined the continent’s growth and development prospects, while exacerbating the costs and effects of climate change. Undoubtedly, the resulting impoverishment, dilapidation of basic infrastructure, and decay of the social justice system, among many other associate evils, will adversely undermine the affected population’s resilience to shocks related to climate change. More importantly, corruption affects the flow of financing for addressing climate change. These are real challenges that starkly stand in the path to effectuation of the outcomes of ADF VII.

Continued Impoverishment and Worsening Food Insecurity

For decades, Africa has unsuccessfully struggled to eradicate poverty. Closely intertwined with, and largely culminating from, poverty is chronic food insecurity, a situation that
has seen millions of Africans deprived of food, the most basic
necessity in life. According to a recent estimate by the Food
and Agriculture Organization (“FAO”) of the UN, Africa hosts
approximately thirty percent of the world’s hungry population—about 276 million Africans face hunger. The causes are
many and complex, and include corruption, protracted armed
conflicts, economic and political marginalization, and continued
desertification.

Unfortunately, the millions condemned to perpetual poverty
and chronic food insecurity have often turned to various forms
of environmentally harmful means of survival, including charcoal
burning, fuel-wood vending, logging, and encroachment on for-
est and other sensitive ecological zones to open up more farm-
lands. These actions will undoubtedly exacerbate the impacts
of climate change in the affected areas, thereby potending a vis-
able challenge to sustenance of the outcomes of ADF VII.

The Culture of Marginalization

Discussions on climate change issues in Africa are largely
dominated by the political elites and their ilk. Many have been
left out of the process. In particular, groups that have remained
vulnerable to the adverse impacts of climate change (like indig-
enous peoples, women, children, and the youth) have been
pushed to the peripheries of the discussion, and millions of Afri-
cans have had no effective voice in the process. This has fur-
ther led to a number of individuals and communities expressing
skepticism of the nexus between the environment and climate
change, thereby dismissing claims that the current problems are
attributable to man’s activities.

These challenges, which were expressly acknowledged at
ADF VII, cannot be wished away even in the post-Forum
periods, for they portend a serious challenge to effectuating the
outcomes of the Forum. Indeed, it need not be emphasized that
addressing these challenges will greatly contribute to sustenance
of the outcomes.

Global Inaction and Unreliable Pledges

Africa’s efforts to address climate change issues cannot suc-
cceed if treated in isolation of the global trends. Further, we must
not forget that, contributing only about 3.8% of the global GHG
emissions, Africa is suffering the wrongs of others, and even
if it were to fully tackle climate change in its domain, its efforts
would not be more than a drop in the ocean. In light of this, a
cursory view of the prevailing global practices reveals a mixed
track record, with non-commitment surfacing at various times.

For instance, the commitment of some developed coun-
tries to address climate change in developing countries has
been merely rhetorical; some of them have yet to honor their
pledges under the current global financing mechanism. This
has resulted in inadequate, unpredictable, and unreliable financ-
ing for climate change actions in Africa, as in other developing
countries. The World Bank too has not been straightforward
in its dealing with (and in) developing countries; through its sub-
sidiaries, it continues to finance the “global land rush” and
other projects that would likely contribute to climate change.

Surely, if Africa is to meaningfully address climate change,
and if the outcomes of ADF VII are to be sustained, adequate,
predictable, and reliable, financing for climate change actions is
indispensable. Otherwise, in the absence of such external financ-
ing support and recognizing that most climate change actions
are largely capital-intensive, Africa may be able to only do very
little, if anything, to manage climate change on its own.

Prospects in Sustaining the Outcomes

Proliferation of Climate Funds

Over the last few years, we have witnessed proliferation of
cclimate funds, a handful of which have benefited (or are expected
to benefit) the African continent in its efforts to implement vari-
ous climate change mitigation and adaptation actions. Such fund-
ning regimes include the Clean Technology Fund (“CTF”), the
Special Climate Fund (“SCF”), the Kyoto Protocol Adaptation
Fund, the Congo Basin Forest Fund (“CBFF”), the Forest Carbon
Partnership Facility (“FCPF”), the Global Environment Facility
Trust Fund (“GEF Trust Fund”), the Global Climate Change
Alliance (“GCCA”), the Least Developed Countries Fund (“LDCF”),
and the Special Climate Change Fund (“SCCF”). These funding efforts received a
major boost when the establishment of a “Green Climate” Fund
was proposed at the recently concluded COP-16.

It cannot be denied that, the dissatisfactions notwithstanding,
cumulatively, these initiatives can greatly contribute to Africa’s cause to address the challenges posed by climate
change. If well harnessed, these funding mechanisms have the
potential to significantly contribute to the sustaining the out-
comes of ADF VII.

Developments within the AU Framework

A number of recent developments within the AU frame-
work hold some positive prospects in sustaining the ADF VII
Outcomes. For instance, on October 13, 2010, at a ceremony
on the sidelines of ADF VII, the AU Commission, the AfDB,
and UNECA launched the Climate for Development in Africa
(“ClimDev-Africa”) Programme, which aims at strengthening
the climate-resilience of economic growth and the MDGs
through mainstreaming of CRM in sensitive sectors. Shortly
thereafter, in November 2010, under the auspices of the AU
Conference of Energy Ministers (“CEMA”), the AU Commis-
sion, the AfDB, and UNECA jointly hosted the First All-Africa
Energy Week 2010 (“AAEW”), a high-level stakeholder forum
for monitoring progress, taking stock, undertaking constructive
dialog, and sharing knowledge, with the aim of enhancing uni-
versal energy access.

In addition, on November 4, 2010, the AfDB launched the
African Carbon Support Project (“ACSP”), which is designed
to assist project developers in the continent in accessing carbon
finance to ensure commercial viability of their projects. Most
recently, on December 6, 2010, the AfDB representatives joined
representatives from other Multilateral Development Banks in a
joint side event of the COP-16, whose theme was “Scaling-up
International Climate Finance.”
By and large, their individual merits or otherwise notwithstanding, these initiatives hold immense potential to sustain the outcomes of ADF VII, as well as other regional commitments to address challenges related to climate change and variability.

The Cancún Gains

Though heavily criticized as having yielded too little, COP-16 heralded a number of gains with potential to contribute to sustenance of the Outcomes of ADF VII. For instance, though not legally binding, the Cancún Agreement reflects some level of changing relations between developing countries and the developed countries; it embodies a "fairly modest" deal on reduction of emissions, calling on developed countries to reduce their GHG emissions (as pledged in the Copenhagen Accord). The Agreement also proposes the establishment of a “Green Climate” Fund, which is intended to assist developing countries finance emission reductions and adaptation actions.

Contributions of the Civil Society and the Private Sector

The African private sector and the civil society, though long excluded from the mainstream discussions, currently play indispensable roles in addressing climate change issues on the continent. While the civil society has been particularly involved in lobby and advocacy activities, the private sector has proved critical in supplementing the existing global climate financing initiatives. For instance, on June 5, 2008, the Rockefeller Foundation and the Bill & Melinda Gates Foundation—through their Nairobi-based Alliance for a Green Revolution in Africa (“AGRA”)—established the Africa Enterprise Challenge Fund (“AECF”) to leverage private sector and donor funding for successful eco-friendly projects and enterprises.

Sustaining the Outcomes: The Way Forward

In order to sustain the various outcomes of ADF VII, African governments should, as a matter of priority, implement a number of measures. Though not offered as an absolute panacea for the climate change problem in Africa, these measures are believed to wield immense potential to sustain the outcomes and other related initiatives to address the challenges posed by climate change and variability on the continent.

First and foremost, they must back up their words with action—moving from the unending official rhetoric to offering effective leadership in addressing issues related to climate change. In particular, they have to link the continent’s Common Position and the prevailing regional, sub-regional, and national policies, strategies, practices, and programs. Second, they have to fully commit themselves to the fight against corruption, ensure proper targeting of funds received under the prevailing climate funds regimes, and establish effective normative and institutional frameworks. Third, they have to fully commit themselves to the fight against poverty, also through the establishment of appropriate normative and institutional approaches, and with adequate budgetary focus.

Fourth, they must profile climate change as a human rights issue and nurture a sustainable culture of human rights, in particular through mainstreaming of human rights concerns into all regional, sub-regional, and national polices, strategies, practices, and programs. Indeed, climate change issues have to be effectively integrated in litigations on the environment, with effective remedies for any resulting violations of environmental rights. Fifth, African governments need to effectively leverage the window of opportunity availed by climate change and variability, in particular the opportunity to establish green economies.

Sixth, African governments have to consider inviting leaders from developed countries to their meetings, with a view to enabling them to fully appreciate the African version of the climate change debates. Seventh, they need to effectively engage the big GHG emitters, with a view to having them honor their pledges to reduce their emissions and support climate change adaptation and mitigation actions in Africa. Eighth, they need to engage the international community to break the long-standing lack of transparency at the Breton Woods institutions, in particular the World Bank.

Ninth, African governments have to invest in routine situational assessments in order to establish the progress, challenges and prospects in addressing climate change. In addition, they need to work towards breaking the reigning skepticism (through, for instance, broad-based social mobilization and dissemination on the interface between the environment and climate change. Further, the governments have to establish and sustain credible specialized institutions, preferably within the AU Commission framework, to coherently address climate change issues on the continent. In particular, they must prioritize the operationalization of the AGF, while engaging the continent’s international development partners to sustainably support the initiative.

Last but not the least, African governments have to consider subscribing to the Nagoya Protocol to the Convention on Biological Diversity. The Protocol, which opened for signature and ratification on February 2, 2011, has the potential to promote more equitable distribution of genetic resources for the continent.

Conclusion

This article highlighted key challenges and prospects in sustaining the outcomes of ADF VII. Although immense challenges lie in the path to sustenance of the outcomes, there are equally immense prospects, which, if properly harnessed, can ultimately drive Africa towards effectively combating climate change. On the basis of the balance sheet of challenges and prospects, the article has offered measures that African governments must to adopt. These measures, though not an absolute panacea for the continent’s woes, have the potential to contribute to the cause of fighting the challenges posed by climate change and variability on the continent.

African leaders must improve the continent’s normative and institutional capacities to deal with the challenges posed by climate change. Undoubtedly, they cannot just sit and watch calamities unfold in series; the time has come for them to jointly and individually take action to avert the consequences.
of climate change, if they are at all committed to saving Africa from fatal catastrophes. Otherwise, the continent’s hard-earned development gains may quickly erode, thereby subjecting more Africans to the curse of poverty for the foreseeable future.

Endnotes: Africa and the Climate Change Agenda


4. Id. at 3 (noting that Africa is the least responsible for the anthropogenic causes of climate change).


8. Id.

9. Id.

10. Id.


23. See Decision on the African Common Position, supra note 19, ¶ 2 (approving the Executive Council’s recommendations in Decision EX.CL/500(XV)).


Endnotes: Africa and the Climate Change Agenda continued on page 86
IMPLEMENTING A RENEWABLE ENERGY FEED-IN TARIFF IN SOUTH AFRICA:
THE BEGINNING OF A NEW DAWN

by Dr. Kola O Odeku, Professor Edson L Meyer, Professor Obeng Mireku, and Professor JLH Letsoalo*

INTRODUCTION

The notion that nothing is possible belongs to those who are reluctant or unwilling to take the first bold steps. South Africa has taken a bold step in the right direction, which may unlock various potential opportunities for renewable energy in South Africa. On March 31, 2009, the National Energy Regulator of South Africa ("NERSA") announced the long-awaited Renewable Energy Feed-in Tariff ("REFIT") Regulatory Guidelines. South Africa, in order to source and use energy in a sustainable way, has focused on renewable energy as opposed to energy from conventional sources. REFITs "are, in essence, guaranteed prices for electricity supply rather than conventional consumer tariffs." The underlying basic economic principle underpinning this system is the "establishment of a tariff (price) that covers the cost of generation plus a 'reasonable profit' to induce developers to invest."4

In October 2009, NERSA approved REFIT Phase 2 based on the Levelized Cost of Electricity ("LCOE"). The newly approved regulatory framework adds new technologies to the existing REFIT guidelines, namely, biomass, biogas, concentrated solar without storage, photovoltaic ("PV"), concentrating photovoltaic, and concentrated solar power (central tower). Though the guidelines were generally welcomed by the role players in the renewable industry, the overarching contention was the omission of PV from the March 2009 RREFIT guidelines. Consequently, Phase 2 of the guidelines addressed this concern and includes large-scale PV that is greater than 1 megawatt ("MW") due to economies of scale. It is expected that during the annual REFIT review, small-scale PV technology would be considered and added.

The first and the second phases of the REFIT guidelines are the culmination of a study initiated in 2007 by NERSA to facilitate the introduction of renewable energy generation into the electricity network in order to meet the target of 10,000 gigawatt hours ("GWh") from renewable energy sources, and possibly surpass the target prior to the 2013 due date set by the 2003 Government White Paper on Renewable Energy. Articulating the cost benefit of REFIT to the investors, NERSA likens it to the cost recovery used to regulate utilities, which is based on the cost of capital. There have been aggressive moves and attempts by the proponents of REFIT to rename the mechanism "Renewable Energy Payments" in order to stop using the term tariff. However, these efforts proved unsuccessful and the name still remains.

REFITs are common in many countries and are aimed at encouraging renewable energy generation by making renewable energy generators financially viable. The REFIT approach makes strategic sense in South Africa because it will serve as a powerful tool to address rapid climate disruption. REFIT is now promoting growth of renewable energy and private sector and donor financing at the same time.

Against this backdrop, South Africa has joined a number of countries that have already introduced regulatory frameworks on REFIT. With the proper political and administrative will, the current steps taken towards aggressive implementation promise to be a success—particularly as the system was adopted by South Africa from countries that have successfully introduced and implemented REFIT. Germany, Spain, and Denmark are among the countries that have successfully used legislation to promote the least expensive and fastest growth of renewable energy. As a result of substantial successes achieved through renewable tariffs, massive increase in investments in renewable electricity generation has occurred and these countries have produced "more installed generating capacity and more robust competition among manufacturers." Moreover, the tariffs have stimulated more renewable technology development, not withstanding some problems encountered at the commencement periods.

POLICY FRAMEWORK SUPPORTS AND BENEFITS OF REFIT

"Within a policy framework, the development of renewable energy in South Africa is supported by the White Paper on Renewable Energy, which has set a target of 10,000 GWh [of] renewable energy to [contribute to the final] energy consumption by 2013." REFIT is anticipated to run over fifteen years until 2022, beyond the 2013 target of 10,000 GWh set by the...

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Department of Minerals and Energy (“DME”) in the 2003 White Paper on Renewable Energy.\(^2\) The “DME’s macroeconomic study of renewable energy, developed under the now completed Capacity Building in Energy Efficiency and Renewable Energy (“CaBEERE”) project, has established that the achievement of this target would provide a number of economic benefits, including increased government revenue amounting to \(R299\) million, increased GDP of up to 1 billion [rand] per year and the creation of an estimated 20,500 new jobs.”\(^26\) “In addition, the development of renewable energy beyond the 10,000 GWh target holds further employment benefits and would maximize the number of jobs created” per terawatt hour (“TWh”).\(^27\)

One of the activists for the promotion and deployment of wind energy for electricity generation saluted the courage and the bold step taken by South Africa and described the REFIT as a laudable project.\(^28\) Stefan Gsänger, the Secretary General of the World Wind Energy Association said in a release that “South Africa is the first African country to introduce a feed-in tariff for wind energy. Many small and big investors will now be able to contribute to the take-off of the South African wind industry. Such decentralized investment will enable South Africa to overcome its current energy crisis. It will also help many South African communities to invest in wind farms and generate electricity, new jobs and new income.”\(^29\)

Furthermore, REFIT has many advantages over other mechanisms in spite of the extra initial cost.\(^30\) In order to ensure stable return on investment by the investors renewable power prices should not be subjected to the forces of demand and supply in the market place.\(^31\) Guaranteeing profits for project developers will serve as an impetus for the investors to expand the business by applying for credit/loan facility from banks and other financial institutions since repayments are guaranteed from the sale of electricity.\(^32\)

**South Africa’s Renewable Energy Feed-in Tariff: An Overview**

**Background to Initiatives Taken by Role-players**

REFIT was introduced in South Africa to progressively reduce carbon-based power generation by creating a move towards sustainable energy sources, along with socio-economic and environmentally sustainable growth.\(^33\) Endless debates in Parliament about energy crises, global footprints, endangered species, and new coal-fired power stations had done little to solve South African problems. Stemming from this lack of progress, efforts to decrease greenhouse gas emissions fostered a movement known as e-Parliament Renewable Energy Activists (“eREACT”) by some parliamentarians with the objective of shifting the government’s focus away from coal and nuclear towards renewable energy.\(^34\) The introduction of REFIT was initially met with stiff opposition from those entities that believed in business as usual.\(^35\) But, in 2008, South Africa endured a serious energy crisis when the national energy supplier, Eskom, failed to meet electricity demand.\(^36\) As a result, eREACT was able to influence future decisions and present the financial viability of developing renewable energy in South Africa.\(^37\)

This initiative commenced the bold step towards the establishment of the current energy generation mix in South Africa. South African Member of Parliament Dr. Ruth Rabinowitz, explaining the stiff opposition encountered in the Parliament, said that at the hearing of the private members’ legislative committee in the South African Parliament on the REFIT, “in spite of overwhelming support from NGO’s, businesses, academics, local governments and civil society, both the DME and Eskom were opposed to the idea of separate REFIT legislation” claiming that the Guidelines had already been drafted and would be introduced to the public in early 2009.\(^38\) “Their resistance to Parliament’s involvement is hardly surprising since the Eskom monopoly is unlikely to suddenly give way to diversity, flexibility and open competition.”\(^39\) The firm commitment and perseverance of parliamentarians who believed that South Africa should jettison the notion of using cheap coal to generate electricity and shift to renewables eventually led to the promulgation of the regulatory guidelines.\(^40\)

**The Guidelines in Context**

The most potent legislative mechanism being used worldwide to introduce and implement the use of renewable energy to generate energy is feed-in tariff. South Africa has just joined the numbers of the countries that are using renewable energy to generate power. It is the responsibility of NERSA to ensure that the energy utility, Eskom, purchases energy from the generators at a fixed price, provided they conform with the standard prescribed by NERSA.\(^41\) The guidelines contain twelve sections. Section 1 provides a general introduction, while sections 2 and 3 highlight the purpose, scope, and objectives of the guidelines in detail. Purchase obligations of all players and stakeholders are outlined in section 4, while sections 5 and 6 deal extensively with the qualification criteria and the application process respectively. Section 7 enumerates tariffs applicable to different technologies. The rights and obligations of qualified renewable power generators, regulator, and renewable energy purchasing agency (“REPA”) are provided for in sections 8, 9, and 10 respectively. While section 11 provides for the monitoring, reporting, and review mechanisms, section 12 provides for appropriate applicable law to resolve dispute arising from the guidelines. Any ensuing dispute must be resolved in accordance with section 5 of the Electricity Regulation Act 2006 of South Africa (including the Regulations).

**Exposition, Analysis, and Critique of the Guidelines**

**Introduction, Purpose, Scope, and Objective**

Section 1 of the guidelines provides an overview of why the government has opted for renewable energy provisions side by side with the current conventional energy. One of the key reasons is that renewable energy resources in South Africa are enormous.\(^42\) In a move to enlarge the market implementation, government has now, through NERSA, introduced REFIT.\(^43\) “This is quite similar to the concept of cost recovery used in utility rate regulation based on the costs of capital”\(^44\) invested in
each technology deployed. With regards to cost, using the technique of degression, both the grid interconnection and metering are covered by REFIT. The overarching benefit of this is that the costs are spread across electricity customers and the tariff is reduced overtime. The essence of this technique is to mount pressure on the generators to continue to lower the costs of generating electricity from REFIT so that it will be affordable.

The IPPs will be remunerated based on the renewable energy power they feed into the national grid. The guidelines allow IPPs operators to receive preferential rate in a pay-for-energy-delivered contract allowing them to earn payment over and above conventional prices. It is hoped that REFIT system will create and foster an enduring and economically sustainable renewable energy industry in South Africa.

The scope and objective of the guidelines are outlined in section 3.5. Section 3.1 provides for the applicable rules and requirements governing license applications and the issuing of approved licenses to energy developers. Section 3.2 gives NERSA the mandate to determine the prices and the conditions under which generated electricity may be supplied. Sections 3.3 and 3.4 provide that all subsequent relevant Acts of Amendment would also be applicable in conjunction with relevant license procedures.

The underlying economic basis of section 3.2 is that economic principles of supply and demand do not affect prices because NERSA has the absolute authority to determine the rates. The rationale for this is that these prices have been chosen to promote and increase investment in renewable energy, allow small enterprises to make substantive entry into the market, and operate by generating electricity for sale. This model is suitable to developing countries in view of the fact that energy markets are small in number and dispersed.

But these guidelines could be amended by subsequent Acts under section 3.3, which raises some concerns. The section sets no boundaries on what type of amendments are permitted. A preferred approach would be to exempt certain provisions from future amendment. One provision that, if amended, would undermine the entire regulation is the guarantee of payments over a specified period of time. This is assuredly the only way an investor can realize the projected return on investment. Notwithstanding the fact that there is no explicit prohibition on amending any section, the fears of the investors have been allayed by virtue of section 3.5(ii), which states that one of the key objectives and principles of REFIT is the establishment of “a guaranteed price for electricity generated from renewables for a fixed period of time that provides a stable income stream and an adequate return on investment.”

Obligation to Purchase

Section 3.5(iv) enables access to the grid and obligates Eskom to purchase power generated by IPPs. Eskom is designated as the Single Buyer and appointed as the Renewable Energy Purchasing Agency (“REPA”) under sections 4 and 4.3. To be eligible the generator must follow the rules and procedures of the regulatory body duly licensed under section 5.4 and fulfill all the license conditions under Section 5.5. While Eskom must purchase electricity from the IPPs at set rates, under section 4.4 the IPPs can also sell renewable energy to buyers outside of REFIT.

If a particular generator receives a license and fails to produce electricity for any reason, NERSA faces no obligations to the generator and Eskom cannot be compelled to act on its purchasing obligation. Consequently, the maxim nemo dat quad non abet meaning you cannot give what you do not have applies to the generator if it fails to produce electricity.

Financial Implications for Consumers

Section 3.5(v) mandates the establishment of an equal playing field with conventional electricity, but this provision is ambiguous in both context and content. The meaning of “an equal level playing field” is not defined in the guidelines and this may result to different interpretations. Section 3.6 allows for future inclusion of more technologies, bands within technologies, and incentives for projects in different geographical areas.

Section 4.5 provides that the financial subsidy required to offset the difference in the cost of energy purchased under REFIT and the Avoided Cost will be borne by all Eskom electricity customers through existing “pass-through” arrangements for costs of independent power production. While this provision makes good economic and financial sense, a cursory look at the section shows that neither the poor nor the rich are exempted from the “pass-through” arrangements. The implication of this is that various customers of Eskom, irrespective of their resources, will bear the financial burden. In South Africa, both advanced and developing economies operate alongside one another. Those who live in perpetual abject poverty outnumbered the rich elites.

The huge disparity of income in South Africa is reflected in limited access to electricity, with the majority of the population in rural areas living without modern electricity. Even where there is access, electricity is not usually affordable and is considered a luxury by most residents. Even in those areas serviced by a grid, there have been reports of persistent default or non-payment of electricity bills and in some instances, these people have improvised and connected to the grid illegally. The drafters of the guidelines should have excluded indigents and the poor from the current additional burden of paying more for electricity.

Governments in countries such as Denmark, Australia, and a number of U.S. states are sensitive to the plight of indigent citizens who would not be able to afford electricity. Consequently, various concessions in the form of subsidies and incentives such as reduction in bills, special loans, extra rebates and so on, are being offered to unemployed, elderly, disabled, and low-income households. As noted earlier, section 3.3 authorizes amendments; the guidelines should be amended to offer a range of concessions to the poorest of the poor, as has occurred in the United States, Australia, and Denmark.

Qualification Criteria for the Generator

Section 5 lists the qualification criteria for renewable generators. Section 5.1 defines renewable energy, and section
By virtue of section 5.5(i), renewable energy generators may generate electricity from non-renewables. But the generators must report the quantities of electricity generated from these two different sources. Section 5.5(ii) provides for monitoring and verification to ensure credible production of renewable energy. Failure on the part of any electricity generators to comply or act in accordance with sections 5.5(i) or 5.5(ii) leads to the imposition of sanctions under section 5.5(iii), including termination of the REFIT license.

Importantly, under section 5.7, REFIT does not include any electricity generated off-grid. Rather, “REFIT only includes power generation from generators connected to the Transmission System and Distribution System and excludes off-grid power generation.” Although this is the current scheme, in the near future advancement in technology innovation and diffusion might allow for the consideration of off-grid.

Application Process

Sections 6.1 to 6.4 require the renewable electricity generator to state the specific REFIT technology and tariff category for electricity produced in accordance to section 6.2. This will enable regulatory authority to “specify the technology, the tariff approved, duration of the REFIT, and other specific licensing conditions” in compliance with section 6.4. The purpose of this section is to ensure that applicants state the type of technology used, due to different prices for electricity produced from each technology. It is expected that the majority of the applicants will use technologies that are economically beneficial in terms of cost and maintenance, and at the same time reap the so-called “reasonable profit” because this will continue to guarantee return on investment and the continuity of the venture.

Tariffs

Section 7.3 protects the licensees against inflation in each year of operation and allows for an adjustment to the tariffs once per annum using the consumer price index (“CPI”) or another suitable inflation index. Section 7.4 requires monitoring of the performance and the impacts of each technology, as well as analysis of reports from the monitoring to ascertain whether there is any need for review. Irrespective of whether or not inflation occurs, a full tariff review will take place every year for the first five-year period of implementation and every three years thereafter. Section 7.5 stipulates that the resulting tariffs will only be applicable to new projects. Section 7.6 provides for future pricing of electricity produced by the generators. Consequently, at the end of the contracted REFIT tariff, the generator will be required to negotiate tariffs under current market conditions. The implication is that the economic principles of demand and supply will dictate prices to be charged by the regulator. While this is beneficial to the regulator, it does not foreclose the appropriate intervention by the regulator at any point in time—this is achievable in view of the fact that the generators still have to negotiate tariffs under market conditions. The significance of these tariffs is that they will stimulate the inflow of investment into the renewable sector and increase the pool of capital in the sector, which may be used to promote the innovation and advancement in renewable technology.

Rights and Obligations of Generators, Regulators, and REPA

Sections 8, 9, and 10 of the guidelines explicitly provide for the rights and obligations of all parties. Any meaningful discussion on rights and obligations must necessarily be founded on conceptualization of both terms. The description of rights as enshrined in the guidelines recognizes the legal rights of the generators to be entitled to an amount that will ensure their investments are properly protected, connected to the grid, and able to provide a reasonable return on investment. In the same vein, regulators are expected to act responsibly by virtue of section 8.5, which mandates that all the parties be on an equal level.

It must however be mentioned that failure to act as stipulated under section 8.5 of the guidelines imposes an obligation on the regulator to apply the appropriate sanction that could lead to termination of the erring generator’s license. This is the only reason why the right of the generator could be restricted. Conclusive and well founded evidence that a generator has acted contrary to section 8.5, for instance by generating electricity from non-renewable technology mentioned in the guidelines without a full disclosure to the regulator, will automatically affect all the inherent rights in the guidelines and allow for imposition of the appropriate sanction.

Monitoring, Reporting, and Review.

In accordance with sections 11.1 to 11.10, the regulator will closely monitor the overall activities of the players and stakeholders enshrined in the REFIT. Monitoring, collection, and maintenance of data on energy purchased under REFIT are outlined in section 11.2, and the publication of summary of the progress report by June 1st of every year is required by section 11.4. Section 11.4(iii) mandates the regulator to disclose the financial impacts of REFIT, which includes both the increase in electricity prices and the additional overall cost to consumers. This proviso serves as a basis for determining whether the poor and previously disadvantaged people are able or not able to access electricity services due to the additional cost imposed on them. If the majority of the poor are unable to access and use electricity based on the increase in cost, one of the fundamentals of poverty reduction and eradication, as enshrined in the principles set out in the Millennium Development Goals, will not be achieved. One of the ways to assist the poor in realizing their economic and social aspirations is to offer them concessions on electricity. It is suggested that in the interim, costs should be passed on to the affluent in the hybrid residential and industrial areas of urban South Africa. Various electrical appliances and industrial equipment that are not energy efficient are used in these areas. Increasing the costs of electricity for the more affluent might encourage them to use energy efficient appliances. An
Resolution of Disputes and Remedies

Section 12 provides that any disputes arising from the operation of REFIT would be resolved as laid down in sections 42 to 43 of the Electricity Regulation Act 2006.96 Before the commencement of any dispute resolution, the Minister is compelled by virtue of section 42(3) to prescribe the procedure to be followed for the mediation and the fees to be paid.91 However, mediation or arbitration of disputes occurs only at the request of the parties to the dispute by virtue of section 42(4).92 While section 42(1)(a) compels the regulator to appoint a mediator in a dispute between licensees if so requested by both parties to the dispute, sections 42(1)(b) and 42(2) give discretionary power to the regulator to appoint a suitable person to mediate.93

However, if any party disagrees with the outcome of the decisions regarding adjudication as provided in section 42, such party, under section 43, can seek remedies pursuant to section 10 of the National Energy Regulation Act of 2004, and specifically invoke sections 10(3)(4)(a)(b) which provide that:

Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). Any person affected by a decision of the Energy Regulator sitting as a tribunal may appeal to the High Court against such decision. The procedure applicable to an appeal from a decision of a magistrate’s court in a civil matter applies, with the changes required by the context, to an appeal contemplated in paragraph (a).94

Section 10(1)(a) of the Act recognizes the supremacy of the Constitution of the Republic South Africa.95 Hence every decision of the regulator or of the mediator, arbitrator or any person appointed by the regulator, must be consistent with the provisions of the Constitution and applicable laws. The legal implication is that any party who is not satisfied with the decisions arising out of section 42 of the Electricity Regulator Act, can appeal for review of the decision, and ultimately appeal constitutional rights up to the Constitutional court.

Conclusion

The establishment of REFIT in South Africa provides an excellent opportunity for South Africa to increase the use of renewable energy and enhance the growth of the sector both nationally and internationally. Most of the renewable energy considered for the initial implementation has been included as a result of experiences and success stories in countries that have introduced and implemented REFIT. However, there is need for extensive and expansive improvements in areas such as, namely, harmonization of various policies on renewable energy, enhancement of the standard to achieve sustainability, dissemination of information on the benefits of renewable energy to attract investors, making stakeholders be more proactive, and creating enabling policy and law for concessions and incentives that will continue to bring down the cost of investment and make cost of electricity affordable.

Endnotes: Implementing a Renewable Energy Feed-In Tariff in South Africa

1 NATIONAL ENERGY REGULATOR OF SOUTH AFRIKA (NERSA), SOUTH AFRIKA RENEWABLE ENERGY TARIFF (REFIT), REGULATORY GUIDELINES (2009) [hereinafter REFIT].
3 REFIT, supra note 1, at 1.
4 Id.
5 Id.
6 Id.; see also NERSA, PHASE 2 OF REFIT BASED ON THE LEVELISED COST OF ELECTRICITY (2009).
7 REFIT, supra note 1, at 16; see also Christy van der Merwe, Renewable Energy Industry Players Make Refit Submissions to Nersa, ENGINEERING NEWS (Sept. 3, 2009), http://www.engineeringnews.co.za/article/renewable-energy-industry-players-make-refit-submissions-to-nersa-2009-09-03.
9 Id.
11 An electrical unit equal to one billion (10^9) watts (1,000 megawatts) used for one hour.
13 NERSA CONSULTATION PAPER, supra note 10, at 4.
NATIONAL SECURITY IN THE 21ST CENTURY:
HOW THE NATIONAL SECURITY COUNCIL CAN SOLVE THE PRESIDENT’S CLIMATE CHANGE PROBLEM

by Arija Flowers*

INTRODUCTION

To adequately protect the national security interests of the United States, the President should immediately implement domestic policies and vigorously pursue agreement on international standards that stabilize greenhouse gas concentration at 350 parts per million (“ppm”) as soon as possible, and no later than 2050.¹ The Obama Administration acknowledged the real threat climate change poses to U.S. security in the 2009 National Intelligence Strategy (“NIS”) and 2010 National Security Strategy (“NSS”).² However, in failing to use the authority delegated to the Committee on Transnational Threats to implement climate change prevention policies, the Administration has not met its obligation under the National Security Act of 1947 to protect U.S. people, property, and interests.³

The most politically feasible and compelling argument for addressing climate change promptly is that U.S. security depends upon it. Threats to security emanating from climate change are many and varied, internal and external, and are already beginning to occur.⁴ This article explains the science behind climate change, then discusses the impacts that climate change will have on people and communities, and the relationship of those impacts to threats on U.S. security. In response to these impacts, the article examines national security law and the Administration’s faulty understanding of its power under that law and suggests how the Administration can use the authority it already possesses to implement the necessary policies to ensure a comprehensive national security program and actions to take to meet the present and future threat posed by climate change.

CLIMATE SCIENCE

There is no longer any scientifically sound question as to whether anthropogenic climate change is occurring, and will continue to occur in the future; only the ongoing debate of how much change human activity will produce remains.⁵ The Intergovernmental Panel on Climate Change (“IPCC”) report finds definitive anthropogenic warming between 3.2°F and 9.2°F over the twenty-first century.⁶ Based on the amount of carbon already released into the atmosphere, the Earth is committed to a temperature increase of at least 2°F.⁷ The best estimates of the IPCC, which depend on future reductions in CO₂ emissions, predict global average temperature increases of 3.2°F to 7.2°F during the twenty-first century.⁸

In order to understand climate science, it is important to also understand the political environment surrounding climate change science and to consider what that means for determining future policies in the United States. The IPCC is a joint project of the United Nations and the World Meteorological Organization that has compiled extensive, highly scrutinized data⁹ to become the source of internationally accepted science on climate change, relied on by governments around the world including the U.S. government.¹⁰

The problem with the scientific numbers presented by the IPCC is that they are influenced by the politics of strong, fossil-fuel-dependent nations like Saudi Arabia, the United States, and China, whose economies run on the sale and use of fossil fuels.¹¹ The desire to keep their economies humming without changing their habits is a strong incentive to downplay the impacts of CO₂.¹² Middle Eastern member states, like Saudi Arabia, work to ensure that the primary export upon which their entire economy depends on is not rendered valueless by the findings.¹³ Thus, the highly certain findings of the IPCC report exist in spite of the efforts of oil exporting countries to water-down the language until more evidence of anthropogenic change is found.¹⁴ The result is an IPCC report with watered-down, politically motivated findings,¹⁵ being represented to the global community as scientifically factual findings,¹⁶ and ultimately the international acceptance of compromised science as the basis for climate change policy.

Other scientists, unconstrained by the challenges within the IPCC, believe more significant temperature—and climate—change will occur.¹⁷ Scientists know from studying ice cores that Earth’s surface temperature increased 9°F when CO₂ levels in the atmosphere rose by 100 ppm at the end of the last ice age.¹⁸ Thus, logic renders it unlikely that a doubling of CO₂ over the level in 1800 (an increase of approximately 280 ppm, or nearly three times larger than the prior increase) will result in a temperature increase of just 5.4°F, as the IPCC seems to predict.¹⁹ Based on scientific data, leading experts believe that the current global goal must be to reduce CO₂ concentrations below 350 ppm in order to prevent and reverse destabilizing global warming.²⁰

Climate science is becoming increasingly more accurate as scientists continue to refine computer simulation programs called Global Circulation Models.²¹ With increasing frequency, these computer programs are able to accurately model weather

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and climate events based on inputted data, for events that already happened in the past. Because the events already happened and we know what the model *should* look like, the computer models’ accuracy can be readily tested and proven by its ability to correctly forecast those events.

Comparing current predictions with known previous atmospheric changes illustrates the appropriateness of skepticism regarding the more conservative scientific estimates, like those of the IPCC. Further, the scientifically accepted 550 ppm CO₂ “threshold,” which is the maximum allowable level to avoid inducing dangerous climate change, is nearly twice as high as pre-Industrial Revolution levels. Even the IPCC predicts an increase in temperature varying from 3.2°F to 7.2°F, which is clearly below the 9°F history has proven can occur. Given these illogical ratios, it is reasonable to be skeptical of the conservative estimates of the impacts of climate change, rather than skeptical that climate change is real.

**Ways in Which Climate Change Impacts Threaten U.S. Security**

Congress and the White House understand that climate change threatens U.S. national security, because it threatens internal systems and contributes to the destabilization of governments and people abroad. The range of threats begin with “natural” disasters, including increasingly severe hurricanes like Katrina in 2005, and extend to heightened terrorism risks as diminished resources threaten livelihoods and foreign populations slip further into extremism.

Natural disaster impacts are easier to visualize because they have a direct cause and effect. Sea level rise threatens to wipe small island nations off the face of the Earth. Rapid rising sea levels of this type directly threaten military infrastructure on low-lying islands, and in all coastal regions worldwide. More hurricanes of higher intensity means military equipment and personnel must be moved out of harm’s way, adding expense and wear and tear, reducing general readiness, and interrupting training operations. Increasingly severe storms can devastate infrastructure, as hurricane Andrew damaged Homestead Air Force Base in Florida in 1992 and prevented the base from ever reopening. More frequent and intense flooding has similar impacts, requiring disaster response, while simultaneously damaging the economy, and wasting resources that could be utilized elsewhere. The Navy has additional concerns about vessel safety in a polar ice-free world, since mapping of shifting ice locations will become more difficult.

The United States has the most varied and severe weather of any country on Earth. With vast, drought-prone, high, arid plains, extensive coasts vulnerable to sea level rise, coasts that have already been battered by record-intensity hurricanes, and plains repeatedly flooded by rivers following massive rains and snow-melt runoff, the United States has more to lose in terms of climate change induced domestic threats than nearly any other country, except perhaps those that will be lost to the oceans. The western states should prepare for decreased snowpack and correspondingly reduced summer runoff and extended periods of drought. Without even addressing the military components of homeland security, these direct impacts on the infrastructure, economy, and livelihoods of citizens threaten the security of most of the largest cities in the U.S., because they are located on coasts, and much of the farmland located in flood plains. It is clear, however, that changing precipitation patterns, increased severe weather events, and rising sea levels are all expected in the future, with negative direct implications for U.S. national security interests.

The more complex threats are the indirect effects, which result not from the changed climate and associated weather events, but from the human actions which follow. As resources become scarcer and local living conditions harsher, populations with weak governments that are unable to assist those people in adapting to changes will likely resort to methods of self-preservation. U.S. military leaders expect the United States will see increased conflict for resources, mass migrations to escape the dearth of resources, and incidences of terrorism. Where the most basic resource needs—food and water—go unmet, disputes spiral into full-fledged conflict, as evidenced by the “at least [eleven] violent conflicts since 1990 [which] have been fueled in part by the degradation of renewable natural resources.” In these situations, populations may turn to extremism and terrorism, similar to al-Qaida in Afghanistan where half the country’s gross domestic product comes from farming or ranching, but drought and overuse of the land has left most of the country at risk of desertification. Populations will also likely participate in mass migrations as environmental refugees increase global tensions and further strain resources in the new location. The IPCC and others believe that average global warming exceeding 3.6°F may be dangerous, while others argue that 3.6°F “warming would be catastrophic for large segments of humanity.”

This type of instability in the developing world is a “threat multiplier” and U.S. military leaders believe that “climate change will provide the conditions that will extend the war on terror” because “droughts, violent weather, ruined agricultural lands—those are the kinds of stresses we’ll see more of under climate change [which lead directly to] more poverty, more forced migrations, higher unemployment” so that “climate change prolongs those conditions [that increase terrorism risks] . . . [and] makes them worse.” Many nations that struggle to maintain political stability currently, or are likely terrorist safe-havens, are also highly vulnerable to destabilizing climate change impacts, such as drought, flooding, and increased disease. When a region is “traumatized by an event or a change in conditions triggered by climate change . . . [if] the government there is not able to cope with the effects . . . you can be faced with a collapsing state . . . as breeding grounds for instability, for insurgencies, for warlords.” Ultimately, these conditions enhance the threat of terrorist networks and risks for U.S. security.

Increased temperatures will have dire consequences for fresh water access, flood mitigation, and human health. Access to fresh water for drinking, farming, and hygiene is threatened by changing precipitation patterns and especially by altered mountain glacier runoff. Three billion people already live in
water-stressed developing nations. However, that number is expected to increase to half of the global population by 2030 and those people will be exposed to high water stress, beyond what is currently experienced. In addition to the increased spread of disease resulting from reduced water availability, human exposure to malaria will double and dengue fever will increase with only a 1°F to 2°F temperature rise as the geographical range of mosquitoes expands to new regions. Drought—or exposure to malaria will double and dengue fever will increase in many vulnerable populations and countries should be anticipated, along with strained resources and tempers in all regions.

Changes in sea level and acidity could also have a devastating impact on communities around the world. Approximately two-thirds of the world population lives within fifty miles of the coast, and in some places, including New Orleans and The Netherlands, below sea-level. Many vulnerable populations live within the expected zone of sea-level rise, including the ten million inhabitants living within three feet of sea-level in Bangladesh. In addition to the encroaching waters, many of the vulnerable populations are also vulnerable to the increasing acidity of the oceans, which is a primary source for protein for more than one billion people. Ocean acidity is increasing at a rate that will be evolutionarily difficult for fish to keep up with, and diminished food supplies are expected to result in greater unrest.

Between increased crises within the United States, reduced capacity to respond to those crises, and the possibility of increased extremism abroad, climate change impacts directly and indirectly threaten U.S. national security. If the President truly believes that “to advance our common security, we must address the underlying political and economic deficits that foster instability, enable radicalization and extremism, and ultimately undermine the ability of governments to manage threats within their borders,” then the United States must address climate change as a leading future cause of those political and economic de-stabilizers.

The Obama Administration fully acknowledges that prompt and sweeping action is needed to bring greenhouse gases (“GHG”) to a safe level, thereby reducing the effects and degree of climate change. The 2010 NSS acknowledges that the “danger from climate change is real, urgent, and severe” and that the effects of climate change “will lead to new conflicts over refugees and resources” as well as “catastrophic natural disasters.” However, the Administration incorrectly believes that comprehensive legislation from Congress is required before such climate protection actions can be taken. The Administration already has the authority to take decisive action under the National Security Act.

The National Security Act of 1947 (“NSA”) established the National Security Council (“NSC”) with the intention of ensuring an open and effective working “relationship between those responsible for foreign policy and those responsible for military policy” by creating a central advisory coordinating office for all matters related to national security. Before World War II, it had become increasingly clear that the United States needed a more unified approach to deal with national security issues, and that need became apparent to the public at large with the attack on Pearl Harbor. The NSC may have originally been conceived of as an advisory group, rather than a force for implementation, but the group’s function has varied to both ends of that spectrum over the years.

The sweeping language in the opening lines of the National Security Act of 1947 expresses Congress’s acknowledgement of the need for a large-scale program to address threats to U.S. security. The Act opens with the declaration that, “[i]n enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security.” The Act does not define a threat to national security, instead leaving that undefined for future experts to determine in order to fulfill the stated purpose of the Act.

Congress also provided for a National Security Council whose purpose was advising the President regarding “the integration of domestic, foreign, and military policies relating to the national security to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security,” and other duties in addition to functions directed by the President. Congress’s plain intention was government-wide policies promoting national security. Though some members of Congress expressed concern that the NSA should not delegate unsupervised authority to the Executive, they were persuaded that extensive delegation would not deprive Congress the authority of oversight or implementation of new laws, and gave the Executive the power necessary to carry out the desired mission: protecting national security. Additionally, at the time of enactment, like today, flexibility in national security was a serious concern and other members of Congress believed too many restrictions on military activity would undermine the purpose of unifying defense intelligence and strategy under this new protocol. Ultimately, Congress was convinced of the necessity of the NSC as an advisory council to the President and coordination center for all matters relating to national security. The result of these competing Congressional concerns was a broadly written statute creating the NSC, which has enabled Presidents to determine the structure and workings of the Council, while conforming to the purpose, functions, and duties established in the original Act of 1947.
Given the flexibility of the NSA, Presidents have altered the structure and use of the NSC from its beginnings to fit their leadership styles and the changing nature of the challenges faced by the nation at any particular time.91 Where President Truman rejected the authority to promote “implementation,” President Eisenhower specifically authorized the coordinated implementation of national security policies under the NCS, creating an Operations Coordinating Board.92 While this “implementation” function was criticized by some, its legal validity was not questioned,93 and President Kennedy went on to invoke similar powers during the Cuban Missile Crisis, even after rejecting the practice.94

The oscillating nature of the NSC95 peaked during President Reagan’s tenure, in the form of the Iran-Contra Affair, but ultimately resulted in a strong and stable NSC to shape and monitor the implementation of national security policy.96 Accordingly, extensive reforms were made whereby the NSC became responsible for making policy recommendations and “reviewing, coordinating, and monitoring the implementation of national security policy.”97 Upon assuming office, President George H. W. Bush was able to use his experience as the lead intelligence officer to the NSC as a prior Director of National Intelligence to establish working groups (Policy Coordinating Committees “PCCs”) for the NSC that actually worked.98 This structure was also adopted by Presidents Clinton and George W. Bush because of its effectiveness.99

Congressional approval of increased authority to the Executive was evident following the attacks on September 11, 2001 in the United States, in the creation of the Department of Homeland Security,100 and in President Bush’s creation of a Homeland Security Council (“HSC”) with extensive powers.101 The President created the HSC to assist in developing and implementing homeland security policy, and created the Policy Coordinating Committees—modeled after the NSCs PCCs—that became so effective under the first President Bush—to coordinate the development and implementation of homeland security policies, including working with local governments.102 Congress passed legislation supporting this Executive-created expanded authority (the HSC’s creation), and authorized the Council to advise the President and “perform such other functions as the President may direct.”103 supporting a similar attitude towards the NSC, which also contains language authorizing “other functions as the President may direct.”104 Even before September 11, 2001, Congressional appreciation for the need of unified, flexible, and responsive national security systems, following increasing international terror attacks,105 was plainly expressed in the passage of the Intelligence Renewal Act of 1996.106

Specifically, Congress added the Committee on Transnational Threats (“CTT”) to the NSC107 as part of a commitment to reexamine and modernize intelligence and security programs108 following attacks on U.S. soil in the 1990s.109 The statute defines a “transnational threat” as “any transnational activity (including international terrorism, narcotics trafficking, the proliferation of weapons of mass destruction and the delivery systems for such weapons, and organized crime) that threatens the national security of the United States”110 or “any individual or group that engages in an activity referred to in [the prior definition].”111 The CTT is directed to “coordinate and direct the activities of the United States government relating to combating transnational threats.”112 The Committee is required to identify these threats; develop strategies to respond to such threats; “monitor implementation” of those strategies; make recommendations of appropriate responses to specific transnational threats; develop policies and “procedures” to ensure effective information sharing about such threats between Federal departments and agencies; and develop guidelines to enhance and improve the coordination of activities regarding national security.113

The Committee membership includes the Director of Central Intelligence, the Secretaries of State and Defense, the Attorney General, the Assistant to the President for National Security Affairs, and any other members that the President chooses to include.114 The NSC membership has fluctuated remarkably since its inception,115 but Congress clearly granted the President authority to include any one else he believes is properly included for the purpose of protecting national security from transnational threats.

Congress understood when passing the Intelligence Renewal and Reform Act of 1996 that with the close of the Cold War, non-traditional factors, from increasingly varied sources,116 influenced national security.117 Before passage of the law, floor speeches from members of both houses of Congress advocated for an adaptable118 and “dynamic” twenty-first century security force119 to counter the “rapidly changing threats.”120 This included environmental research desired by the departments to increase “understanding of global environmental challenges.”121

The language in the Conference Report indicates that Congress supports CTT engagement in both developing and implementing coordinated policies across departments to protect the nation from transnational threats, whatever they may be.122

Climate change is a transnational threat to U.S. national security by the plain language of the law. First, it inherently extends beyond the national borders of the United States because it occurs across the planet through the atmosphere and oceans.123 Second, the negative impacts of climate change, documented above, both from a purely domestic perspective and from added tensions and risks at the global scale, establish the consequences of climate change as national security threats.124 The original intention of Congress to create a unified security force capable of adapting to the emerging and unknown threats that left the United States vulnerable prior to World War II supports these broad and evolving views of national security.125 Even President George W. Bush’s policies support the inclusion of climate change by including “manmade disasters” in the realm of national security.126 Thus climate change plainly falls within the delegated responsibility of the NSA’s Committee on Transnational Threats.

Congress has specifically recognized the importance of climate change in the context of national defense127 and, since 2008, has required the Department of Defense to include the armed forces capability to handle “the consequences of climate...
change” in its Quadrennial Defense Review. At the same time, Congress required all future National Security Strategy and National Defense Strategy reports to provide military personnel guidance on how to “assess the risks of projected climate change.”

Excuses that responsibility for implementing policies to protect against climate change are already within the authority of other departments and agencies within the Executive, and thus outside the President’s authority within the NSC, are unfounded. This argument rests on CO2 regulation by the Environmental Protection Agency (“EPA”), which currently only has authority to regulate GHG emissions to protect the public health or welfare. EPA does not have authority to implement GHG policies to protect national security. The President and his NSC have a mandate to do so, and climate change policy is not solely about air quality standards, but also about protecting Americans from increasing threats posed by catastrophic weather events, destabilized global populations, and terrorism.

The variation in Presidential styles and uses of the NSC over the years, recently expanded powers granted to the Presidency, and creation of the CTT all demonstrate the President’s power to use the NSC to establish policies and to oversee their implementation in the other departments. President Obama ought to use his NSC to implement policies protecting the U.S. from modern threats, since the purpose of the Act was to provide the United States with a “comprehensive program . . . of integrated policies and procedures for the departments, agencies, and functions of the government relating to the national security.” Congress has recognized climate change as a national security issue and it is now the President’s responsibility to use the NSC and the CTT to their fullest capacity, as Congress intended, to protect U.S. security.

**Recommendations**

U.S. national security policies cannot be based on internationally accepted science, when that science is subject to manipulation by segments of the U.S. public and private sectors, as well as some of the very nations whose activities may threaten U.S. national security. To adequately address climate change in the national security context, the United States ought to abandon its reliance on the conservative IPCC estimates and use the best available science to determine the actual risks, and likelihood of those risks, to people, property, and interests of the United States. Recent studies, including those by NASA scientists, make clear that change must occur promptly to adequately reduce CO2 levels.

The United States should also take on the challenge like a new Cold War, fully deploying all resources necessary to defeat the threat. President Obama already recognized this in his 2010 National Security Strategy stating, “[w]hen the world was confronted by fascism, America prepared itself to win a war and to shape the peace that followed. When the United States encountered an ideological, economic, and military threat from communism, we shaped our practices and institutions at home—and policies abroad—to meet this challenge. Now, we must once again position the United States to champion mutual interests among nations and peoples.”

Fully engaging to defeat the threats of climate change will require more than just tax incentives—though these should be utilized too—it will require significant financial investment in overhauling U.S. infrastructure and international diplomatic maneuvering to effect the necessary changes.

First, the President should implement an aggressive green Job Corps program, in the style of President Franklin Roosevelt’s Works Progress Administration, employing Americans and building U.S. infrastructure for the new technological age, harnessing the power of proven renewable energy resources. While such a program would cost significant sums of money, it would also provide jobs to millions of Americans who currently receive ongoing unemployment benefits, without any benefit to U.S. infrastructure, as the job market refuses to improve significantly. These jobs would vary in skill level from senior planning positions to low-skill labor jobs building and installing the new electrical generation and transmission systems. Additionally, proven economic advantages exist in moving to a low-carbon economy. Similar to the construction of the National System of Interstate and Defense Highways under President Eisenhower, this new infrastructure system is necessary for U.S. security in the future. Not only are U.S. civilians reliant on the current fossil-fuel-burning energy grid, exposing cities and entire regions to potential brown-outs, so too is the U.S. military which relies almost entirely on the national power grid at fixed installations and on petroleum in combat and operations. Thus, strategic security motivations exist for moving to renewable energies that actually improve battlefield readiness. Dependence on fuel supply lines reduces operational preparedness, and results in astronomical monetary costs associated with transporting large quantities of fuel in comparison to the dependable renewable energy options, while jeopardizing troops’ lives.

Second, working with the Secretary of State, the President must actively convince other nations, like China, to do the same, to secure U.S. security into the future. This could be accomplished in a similar fashion to the “space race,” but intentionally created, since countries that implement the new technologies first will be better prepared for the future. Unfortunately, the 2010 NSS claim that the United States is “promoting universal values abroad by living them at home,” is simply not true. The 2010 NSS claims that the United States must be a global leader and “reengage the world” to facilitate “global cooperation on issues . . . [including] climate change . . . that challenge all nations, but that no one nation alone can meet.” These statements, while true, effectively punt U.S. responsibility in dealing with climate change by: emphasizing the global nature of the problem and the need for individual nations to take responsibility; professing U.S. leadership on climate change solutions while also asserting that the U.S. will meet climate goals; but hedging the promise with the need for Congressional action. Now is
not the time for the United States to shy away, but the time to lead by example and convince others to join our efforts, through diplomacy and fear of future ostracism in the global community for failure to adopt clean renewable energy technology.

**CONCLUSION**

The impacts of climate change touch every aspect of U.S. national security. They increase destabilization of governments and demands on U.S. resources to aid or re-stabilize a region after a crisis. They threaten U.S. land, people, and infrastructure around the world, and are largely preventable. However, they are only preventable if the Administration takes responsibility for our future and utilizes the resources available to it, indeed required of it, to protect the national security of the United States. The President should seek Senate approval to appoint the Secretaries of Interior, Agriculture, and Labor, as well as the EPA Administrator, to the NSC.\(^\text{159}\) The President should rely on the best science available, not the lowest common denominator, and should take responsibility on the international stage for U.S. CO\(_2\) emissions by making the United States the leader in climate change mitigation technology, enabling effective diplomatic and economic pressure in convincing other nations to do the same. The President has the authority, and the responsibility, to establish these policies and procedures to protect U.S. national security.

### Endnotes: National Security in the 21st Century


4. See **Lenny Bernstein et al., An Assessment of the Intergovernmental Panel on Climate Change: Synthesis Report** 30 (2007) (finding observed significant increases in precipitation in some regions and decreases in other regions including the Sahel over the past one hundred years, as well as increased drought since the 1970s, increased severe weather events in the past fifty years, and higher temperatures during the last half of the 20th century than in any other time frame in the past 500 years and likely the past 1,300 years); see generally **Flannery, supra note 1** (explaining the scientifically proven increased rates of melting of land-based ice masses and polar ice that is increasing the rate of sea-level rise).

5. **Bernstein et al., supra note 4** (reporting the findings of the one hundred delegate nations and 899 scientists, experts, editors, and peer reviewers comprising the United Nations IPCC under the World Meteorological Association that climate system warming is definitely occurring at least in part due to human emission of greenhouse gasses). See also **Flannery, supra note 1**, at 2-3 (explaining the importance of skepticism in science, but also that the debate no longer is on the impact of the greenhouse gasses being emitted by man as opposed to if man is contributing); Jeffrey D. Sachs, *Climate Change and the Law: Even the Bush Administration Has Started to Recognize U.S. Legal Obligations to Fight Global Warming*, Sci. Am., Oct. 14, 2007, http://www.sciencemag.org/content/818/7374/402.abstract (providing that the most ardent climate change deniers acknowledge the scientific validity through legal obligations to prevent effects).

6. E.g., **Bernstein et al., supra note 4**, at 7-8 (finding the likely range of temperature increase between 2.0°F and 11.5°F with best estimates as the numbers above; these changes are over the average temperatures between 1980-1999); **Flannery, supra note 1**, at 161-62 (referring to a 2005 study at Oxford University using 90,000 computers to generate possible results ranging from 3.6°F to 20°F).

7. See **Flannery, supra note 1**, at 176 (warning that a 2.0°F increase is now inevitable and will necessarily result in the extinction of at least one newly discovered and entirely unique wet tropics frog species); **Hansen et al., supra note 1** (warning that a 2.0°F temperature increase is “in the pipeline” due to imbalance between current global temperatures and the appropriate “equilibrium” temperature due to slow feedback cycles in the ice sheets and oceans).

8. **Bernstein et al., supra note 4**, at 7 (providing a table of CO\(_2\) emission scenarios, along with average expected associated temperature increase and sea level rise for the years 2090-2099 compared against averages from 1980-1999, and noting that actual change will depend on what policies are adopted to deal with CO\(_2\) and that the IPCC anticipates an increase in GHG of at least twenty-five percent by 2030 over 2000 levels).

9. **Organization, Intergovernmental Panel on Climate Change** [hereinafter IPCC], http://www.ipcc.ch/organization/organization.htm (explaining the make-up, workings, and politics of the IPCC) (last visited Feb. 15, 2011). See also **Flannery, supra note 1**, at 245 (explaining that the Assessment Report is the result of thousands of scientists’ contributions, 426 climate experts, whose work was twice reviewed by 440 other experts with thirty-three editors and a final adoption by delegates from one hundred nations, and that any nation that wants to participate is allowed to do so).

10. See 10 U.S.C.S. § 118(g) (2010) (mandating that beginning in 2009 the President’s National Security Strategy report and the Department of Defense Quadrennial Defense Review use IPCC data in determining U.S. military capabilities to deal with climate change, including extreme weather events and to use other “consensus climate projections” if available); **Bernstein et al., supra note 4** (providing the international consensus report); **Flannery, supra note 1**, at 245 (recognizing the IPCC as the internationally accepted authority on climate change science, but questioning the basis for that authority).

11. **Bernstein et al., supra note 4**; **Flannery, supra note 1**, at 245-46.

12. Id.

13. **Flannery, supra note 1**, at 245-46 (citing the Saudi Arabian delegate’s claimed reason for seeking changes in wording in the Panel’s reports was a desire to avoid repercussions to oil sales until even stronger evidence existed precisely because oil is ninety-six percent of Saudi Arabia’s total exports, and noting that these countries likely realize it is better for them to have a seat at the table to influence the final language of the IPCC report, thereby protecting their economic survival by avoiding the abandonment of fossil fuels, for as long as possible).

14. See id. (advocating for reliance on alternative scientific resources, like the Hadley Centre and other such non-political, science-based organizations).

15. Id. at 246.

16. **IPCC, supra note 9** (describing itself as a “scientific body” working to provide “rigorous and balanced scientific information” and a “clear scientific view” on climate change and potential consequences).

### Endnotes: National Security in the 21st Century continued on page 90
I n 1999, the rising sea level swallowed two islands of the nation Kiribati. Rising sea level is one of the effects of climate change to which small island nations are particularly susceptible. Considering that the average elevation of this nation of ninety thousand people on thirty-three islands and atolls is only about two meters above sea level, it is no surprise that Kiribati’s President Anote Tong considers the rising sea a threat to the very existence of his nation. Taking a cue from a policy first announced by the Maldives, President Tong has suggested that the solution to his nation’s disappearance could be purchasing land in another country to relocate the entire population of Kiribati. This unprecedented situation raises the question: what would be the legal status of an I-Kiribati or Maldives population on the run from the rising waters?

Estimates vary, but it is undisputed that current and future effects of climate change, including droughts, floods, desertification, and rising sea level, will displace millions each year. At least some displacement will occur across borders, especially when dealing with small islands nations. In spite of this potential for massive displacement, at present no international legal framework exists which will recognize and protect those displaced by environmental factors, even though the concepts of “environmental” and “climate” refugees have been contemplated since the 1980s.

Two different approaches to the legal problems have been proposed. On one hand there have been voices calling for an expansion of the legal definition of “refugee” to incorporate environmentally displaced persons, while others argue that a new and separate legal framework be created. Island nations, while supportive of finding an international legal solution, are unwilling to wait for international consensus and are taking their own measures to avoid catastrophe.

“Refugee” is a legal term, narrowly-defined by the 1951 UN Convention Relating to the Status of Refugees, protecting persons who fled their home country in fear of persecution for reasons of race, religion, political opinion, or ethnicity. In 2006, the Maldives proposed amending the Convention to include “climate refugee.” Recently, the Bangladeshi Finance Minister called for “[t]he [C]onvention on refugees [to] be revised to protect [those displaced by climate change].” However, the UN High Commissioner for Refugees (“UNHCR”) is concerned that the inclusion of environmental or climate refugee could potentially undermine the clarity of current standards. Further, UNHCR is already under pressure from host countries to reduce the burden of refugees and it is also concerned that renegotiation of the Convention could result in the lowering of existing protection standards.

For these reasons, some argue that dealing with climate refugees calls for a new and independent legal framework. Any new framework would need to draw upon widely agreed principles and connect the protection of those displaced with the broader international legal framework on climate change. The international instrument would also need to address the practicalities of enforcement and establishment of rights.

One proposed convention from the University of Limoges recognizes different types of environmental displacement, protecting generally against “natural and technological disasters.” It calls for the creation of a monitoring agency akin to the UNHCR. The convention would recognize the duty of the international community to assist a State that suffers from ecological disasters and the right to “conserve the nationality of [the environmentally displaced person’s] state of origin . . . and to acquire the nationality of the receiving state.” This last right is especially important for a nation such as Kiribati, where complete loss of territory could result in the destruction of its legal status as a nation.

 Territory is one of the key elements of nationhood and without physical territory under sovereign control, no nation can exist. On the other hand, nationality is considered a fundamental right in international law. How can this right be squared with permanent loss of sovereign territory and nationhood? It is unlikely that another nation would accept a cash payment to transfer the sovereignty of a part of its existing territory. Certainly, consideration would have to be made for those already settled upon the land. Without an existing legal framework,
perhaps Kiribati and the Maldives are doing the right thing to proactively seek out alternatives.

Beyond purchasing land, one plan currently underway is to secure “merit-based relocation.” Island nations would be trained in needed professions (e.g. nursing) in other countries, with the ability to stay and seek citizenship there. In this way, pockets of 1-Kiribati community would be built up worldwide, facilitating future resettlement. Furthermore, with removal of much of the population, it would be possible to build up one island and use it to “anchor” the sovereignty of the nation in the event of drastic sea level rise. However, even if the state continued to exist in legal terms it is unclear how it would function.

The best choice may be for an island nation to be absorbed into another nation, using its own sovereignty to pay for relocation. For example, in exchange for control of Kiribati’s sovereign territory, India could accept Kiribati’s population and provide resettlement assistance such as language training, vocational training, and financial aid. An end to nationhood, incorporation and relocation of an island nation in exchange for the sovereign control of its resources and maritime zone would then benefit both parties.

The world will see an increase in environmentally displaced persons in the coming years. Room must be made for them with the creation of a new and separate legal framework. However, this will take time. In the meantime, small island nations are best served to take matters into their own hands.

Endnotes: Climate Change and Small Island States

1 Alex Kirby, Islands Disappear Under Rising Seas, BBC News (June 14, 1999), http://news.bbc.co.uk/2/hi/science/nature/368892.stm.
3 IPCC, supra note 2, at 690-91, http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter16.pdf (“Many small islands are highly vulnerable to the impacts of climate change and sea-level rise. They comprise small land masses surrounded by ocean, and are frequently located in regions prone to natural disasters, often of a hydrometeorological and/or geological nature. In tropical areas they host relatively large populations for the area they occupy, with high growth rates and densities. Many small islands have poorly developed infrastructure and limited natural, human and economic resources, and often small island populations are dependent on marine resources to meet their protein needs. Most of their economies are reliant on a limited resource base and are subject to external forces, such as changing terms of trade, economic liberalisation, and migration flows. Adaptive capacity to climate change is generally low, though traditionally there has been some resilience in the face of environmental change.”).
5 Secretariat of the UN Permanent Forum on Indigenous Issues, N. Aust. Indigenous Land & Sea Mgmt. Alliance, International Expert Group Meeting on Indigenous Peoples & Climate Change, at 3, U.N. Doc. 2007/W.S.3 (April 4, 2008) (“Kiribati almost entirely consists of low lying atolls with an average elevation below 2 meters (6.5ft). The small island of Tebua in Tarawa used to be a landmark for fishermen. It cannot be seen any more–it is now knee-deep under water! Kiribati suffers the effects of king tides that wash through the islands from one side to the other with great ease. It is now a common factor in Kiribati to have king tides with waves of 2.8 meters high!”). See Christian Aid, Human Tide: The Real Migration Crisis, at 6, 48 n.10 (2007) (estimating displacement of 250 million “[b]ased on an updated figure calculated by Dr Norman Myers. In 1995, Dr Myers suggested that between 150 and 200 million people would have to permanently leave their homes because of climate change (Norman Myers & Jennifer Kant, The Climate Inst., Environmental Exodus: An Emergency Crisis in the Global Arena (1995)). This was quoted last year in the UK Government’s Stern Review on the Economics of Climate Change, which described the estimate as being based on ‘conservative assumptions’. Dr Myers now believes that the true figure will be closer to 250 million. (Christian Aid interview, 14 March, 2007).”). But see Alex Brown, Int’l. Org. for Migrat. Migrat. and Climate Change 12 (Ise Pinto-Dober-nig ed., 2008) (analyzing different estimates, including that of Norman Myers, Brown concludes that “the simple fact is that nobody really knows with any certainty what climate change will mean for human population distribution. Current estimates range between 25 million and 1 billion people [displaced] by 2050.”).
6 See generally UN High Commissioner for Refugees, Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective 2 (2009) [hereinafter UNHCR], http://www.unhcr.org/refworld/docid/4a8e4f8b2.html (noting that most environmental displacement will occur domestically and those displaced in this manner should be afforded protection and rights under the UN Guiding Principles on Internal Displacement, however, some displacement will occur across borders and, as such, protection cannot be afforded under the Guiding Principles).
9 See, e.g., Sharma supra note 6; Ramesh supra note 7.
10 U.N. Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 189 U.N.T.S. 150. (“Any person owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).
Climate Change, Intellectual Property, and the Scope of Human Rights Obligations

by Kavita Kapur*

INTRODUCTION

Hunger,1 displacement,2 and loss of culture and traditional ways of life3 are the likely consequences of continuing on the world’s current trajectory of climate change.4 These phenomena and the images of suffering that they evoke reflect situations rich with human rights concerns. Indeed, rights activists demanding international action to halt global warming invoke these themes of human vulnerability as a central part of their protests.5 However, the extent to which the threatened effects of climate change can be understood as imposing legal obligations within the normative framework of international human rights law, rather than simply as rhetorical ideas of moral rights, remains unclear.6 In January 2009, the UN Office of the High Commissioner for Human Rights (“OHCHR”) published a report announcing that climate change had a range of effects on human rights.7 Although it may be unclear whether those effects constitute violations of human rights law, states still have obligations to protect those affected by climate change.8 The OHCHR report provided minimal guidance on what those human rights obligations consist of, thus much remains uncertain about the scope of the obligations imposed on states by climate change. As the international community continues to wrangle with the task of delineating a strategy for climate stabilization,9 clarifying the human rights obligations of states may help to inform both relevant national policies and the emerging international framework.

The move towards climate stabilization, and consequently an alleviation of pressures on human rights, will require all states to transform the ways in which they produce energy, especially developing countries with substantial green house gas emissions. This in turn demands adequate development, deployment, and implementation of clean energy technologies, and diffusion to those countries in need, including much of the developing world.10 Because of the high-tech nature of clean energy solutions, the protection of intellectual property (“IP”) rights has an important role to play in each stage of the process.11 States seeking climate change solutions will increasingly deal with tensions caused when human rights and IP protection obligations conflict. States must find a way to protect human rights while addressing climate change.12 This article attempts to anticipate some of these tensions and to propose potential resolutions. The climate change crisis, the clean energy solutions that have emerged in response, and the role of intellectual property protections in that process, provide a backdrop against which the relationship between human rights and climate change can be charted. This article begins by looking specifically at the challenges that climate change poses to the traditional human rights framework, as well as the sources of human rights obligations in relation to climate change. The discussion then turns to questions of access to clean energy technology, and contrasts the issue to the debate over access to essential medicines. Next, the article focuses on prospective tensions with IP protections in the context of access to clean energy technology by applying various analytical frameworks grounded in human rights. The article concludes by underscoring the importance of the human rights analysis in mediating this tension and by cautioning against the creation of fortified IP protections that do not prioritize human rights considerations.

Climate Change, Clean Energy Solutions, and Intellectual Property

THE CLIMATE CHANGE PROBLEM

The temperature of the global climate is rising.13 Once the subject of considerable debate,14 the fact of global warming, both natural and anthropogenic (human-induced), is now nearly universally accepted.15 Most states in the international community are members of the United Nations Framework Convention on Climate Change (“UNFCCC”), an international treaty aimed at the reduction of global warming.16 Members of the UNFCCC are thus aligned in their commitment to combat the “change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”17 Significant strides made in the direction of reaching international consensus on the problem of climate change are due in part to the availability of reliable scientific information on the causes and effects of global warming.18

In particular, the reports of the Intergovernmental Panel on Climate Change (“IPCC”) contain assessments and projections about climate change which are regarded as authoritative by the international community.19 The IPCC is an intergovernmental scientific organization established by the UN Environment Programme and the World Meteorological Organization, currently with 194 members, that reviews and assesses available information on climate change in order to provide “rigorous and balanced scientific information to decision makers.”20 According to the IPCC’s most recent assessment, published in 2007, there is sufficient scientific consensus to unequivocally establish the fact of global warming.21 In making this conclusion, the IPCC draws upon observations of increases in global average

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air and ocean temperatures, the widespread melting of snow and ice, and the rising global average sea level.\textsuperscript{22} Additionally, the same report asserts with more than ninety percent certainty that most of the global warming experienced in the last fifty years is due to anthropogenic emissions of greenhouse gases.\textsuperscript{23}

Beyond establishing the reality of human-induced climate change, the IPCC assessment also presents the current scientific consensus on the effects of climate change.\textsuperscript{24} These include changes in weather patterns, which are ninety percent certain to result in the shrinking of snow-covered areas and of sea ice, rising sea levels and water temperatures, increased frequency of heat waves, and heavy precipitation events.\textsuperscript{25} These weather changes will in turn have grave consequences for agriculture, forestry, ecosystems, water resources, human health, and society at large.\textsuperscript{26}

The increased strength of consensus around the anthropogenic causes of climate change has inspired response efforts aimed at reducing emissions levels. These strategies seek to mitigate the trend of global warming by sufficiently reducing greenhouse gas emissions to a level that would stabilize the rising climate temperature.\textsuperscript{27} Although specific target emissions levels were established in the Kyoto Protocol to the UNFCCC,\textsuperscript{28} the shift towards a stable climate will require additional strategies and tools in order to reach any global target levels.

**Clean Energy Technologies and Intellectual Property**

Climate stabilization, or the emissions reductions that must be reached globally in order to effectively combat global warming, requires a drastic overhaul of energy production systems.\textsuperscript{29} As such, there is a need for efficient clean energy technologies that can be developed relatively quickly, deployed into action, and diffused widely.\textsuperscript{30}

Efforts to develop, deploy, and diffuse clean energy technologies have been underway for many years now, with significant successes. There is great variation in the types of technologies available to facilitate the global shift to less carbon-reliant energy production. Amongst the most prominent technologies are photovoltaic (solar), biofuels, and wind technologies.\textsuperscript{31}

As with any other technology industry, clean energy technologies are subject to a variety of IP protections. However, there is considerable debate over the propriety and scope of such IP protections since these technologies are integral to alleviating the global stress of climate change.\textsuperscript{32} Those who generally favor IP protections for clean energy technologies argue that incentives are critical to drive innovation and diffusion of such technologies.\textsuperscript{33} Without IP protections, the theory goes, innovation would be severely limited and new clean energy technologies would not be developed.\textsuperscript{34} Opponents of IP protections for clean energy focus on the problems of access caused by the exclusion rights afforded to patent holders, which almost inevitably results in prohibitively high costs.\textsuperscript{35} Thus, IP protections may render the technology unaffordable for those who most desperately need it, including, in this case, those developing countries with high energy demands.

Basic renewable energy technologies, including wind, biofuel, and photovoltaic, are not new and have been off patent protection for a number of years.\textsuperscript{36} Instead, specific improvements and add-on features to these existing technologies are increasingly being patented.\textsuperscript{37} The emerging modifications and adaptations are variously aimed at improving efficiency by minimizing cost, maximizing energy production, or both.\textsuperscript{38} With solar energy, for example, new technologies attempt to create a thin film of semiconductors that can be applied to existing surfaces, greatly reducing the costs of manufacturing solar technology.\textsuperscript{39}

While these complex technologies and processes are central to any effort to advance climate stabilization, the impacts of climate change on humans should not be overlooked. Scientific, environmental, and economic dimensions have long occupied center stage in the discourse around climate change. However, the grave threat that climate change poses to human lives and human well-being should be the central consideration in crafting solutions that are responsive to the lived realities of this crisis.

**Human Rights and Climate Change**

The symbolic force of framing climate change as an affront to human rights may in itself have great utility. However, it does not carry the same weight or consequences as violations of states’ legal duties to guarantee the rights of individuals in their territories. States will face little formal accountability for breaching moral priorities that are simply phrased as a matter of conceptual right.\textsuperscript{40} Violations of international human rights law, on the other hand, may give rise to monitoring by an international treaty body, scrutiny by a special rapporteur, or litigation of individual petitions before a regional human rights institution.\textsuperscript{41} Additionally, because the legal obligations of a state under international human rights law include those standards to which the state has explicitly consented to be bound, violations of human rights law are a form of a breach. Such a breach threatens to call the credibility of a state into serious consideration.

**Challenging the Framework**

Conceptualizing the effects of climate change as human rights violations poses a difficult conundrum for the international human rights law framework. At one level, there is no explicit normative provision dealing with climate change that would give rise to an international legal obligation.\textsuperscript{42} The universal treaties that create international human rights obligations for states do not explicitly address the dangers posed by the climate change crisis.\textsuperscript{43} Even if we attempt to locate the human impacts of climate change within the framework of environmental protection, the key human rights treaties—the International Covenant on Civil and Political Rights ("ICCPR")\textsuperscript{44} and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")\textsuperscript{45}—include no reference to a specific right to a safe and healthy environment.\textsuperscript{46}

The global nature of greenhouse gas emissions along with the related transboundary impacts disrupts the traditional focus of human rights on obligations that states have to individuals in their territories.\textsuperscript{47} Although there are certain states who have contributed more significantly to climate change, the effects on their populations is often more attenuated. The most severe impacts threaten to disrupt the lives of citizens in other parts
of the world.48 Indeed, the states whose citizens would be most dramatically affected by climate change, and thus who have the greatest stake in efforts to combat global warming, are those states who have least contributed to global greenhouse gas emissions.49 Holding these states responsible for human rights violations that they did not directly cause is untenable under the existing framework. The traditionally territorial nature of human rights obligations is thus inadequate to address the global climate change problem.

**Human Rights Obligations Arising from Climate Change**

Pursuant to a resolution of the Human Rights Council, in January 2009 the UN Office of the High Commissioner for Human Rights (“OHCHR”) released a detailed analytical report of the relationship between climate change and human rights.50 The report analyzed the impacts of climate change on various human rights protected within the ICCPR, the ICESCR, and other international human rights treaties.51 Specifically, the OHCHR report detailed the significant threats that climate change poses to the rights to life, adequate food, water, health, adequate housing, and self-determination, while also highlighting the particular impacts on highly vulnerable groups such as women, children, and indigenous peoples.52 Additionally, the report discussed the prospects for displacement, as well as for conflict and related security risks, that are likely to occur as a result of climate change along with the attendant human rights implications for the individuals affected.53

The OHCHR report concluded that while it was unclear whether the effects of climate change amounted to human rights violations, states nonetheless had obligations to protect human rights in the context of national-level measures undertaken to address climate change.54 In addition, human rights law also obliges states to engage in international cooperation to protect and promote human rights. Specifically, the ICESCR carries extraterritorial obligations that require states to

1. refrain from interfering with the enjoyment of human rights in other countries;
2. take measures to prevent third parties over which they hold influence from interfering with the enjoyment of human rights in other countries;
3. take steps through international assistance and cooperation, depending on the availability of resources, to facilitate the fulfillment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons; and
4. ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.55

Within the framework of the ICESCR, a state is obliged to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.”56 The duty to engage in international cooperative efforts aimed at the advancement of economic, social, and cultural rights is in direct contrast to the language in the ICCPR, which expressly describes obligations of a state to “individuals within its territory and subject to its jurisdiction.”57 The broader scope of duties under the ICESCR than in a traditional human rights model is supported by the General Comments of the Committee on Economic, Social and Cultural Rights (“CESCR”) which note, *inter alia*, that under the ICESCR, it is “particularly incumbent on States parties and other actors in a position to assist to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfill their core and other obligations.”58

**Access to Clean Energy Technology**

**Overview of Technology and Access Issues**

Most of the clean energy technology that has been developed in response to climate change has originated in developed countries.59 This has created an imbalance in access between developing and developed countries, with developing countries asserting that intellectual property regimes prevent them from gaining access to these critical technologies.60 Although there have been numerous attempts to study the issue, there is no conclusive evidence that IP protections present or do not present a barrier to the diffusion of clean energy technologies.61 However, there are at least some indications that the process of negotiating for access when the base technology is subject to foreign IP protection hinders developing country industries that want to produce new technologies or develop an adaptation to an existing technology.62 Strong IP protection in developing countries may promote diffusion by assuring patent holders that if they license their technology to a firm in the target country, there will be sufficient protection against unlawful copying.63

Regardless of the lack of conclusive data on whether intellectual property rights are a barrier to access to clean energy technologies, it is irrefutable that they do influence access in a variety of different ways.64 Despite the particular importance of encouraging innovation in the clean energy technology industry in light of the great significance that slight modifications or adaptations can have, technology transfer has rarely focused on supporting the development stage of climate stabilization technology.65 Instead, funding and other forms of programmatic support have been the primary strategies for spurring innovation in developing countries.66

Most of the technology transfer that has taken place in the context of climate change has been in the deployment stage.67 Transfer of technology for the purposes of deployment can take various forms. First, products that incorporate the technology can be transferred directly to the developing country for domestic use.68 A second form of transfer would be licensing production to a company in the target country.69 Third, transfer may simply involve capacity building for research and production facilities in the target country.70
CONTRASTING CLEAN ENERGY AND ESSENTIAL MEDICINES

Despite the apparent parallels in the debates over access to medicine and access to clean energy technology, there are some acute differences between the two industries that limit the extent to which arguments for access can be shared. One key difference between pharmaceuticals and clean energy is the availability of substitutes. A drug that is developed to cure or treat a particular disease is likely to be one of the only medications that serve that purpose; there are unlikely to be many, if any, substitutes. Technologies that produce clean energy, on the other hand, range from wind and solar to hydro and nuclear.

The framework of normative instruments for facilitating access to essential medicines is much richer than that for clean energy technologies. The Doha Declaration to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) formally recognized the flexibilities within the TRIPS agreement that could be used as a basis for compulsory licenses on essential medicines. The CESCR even issued a General Comment asserting that the right to health includes an obligation for states to promote medical research and to provide access to affordable treatments, including essential drugs.

The Doha Declaration does not significantly adopt a human rights framework of analysis despite the human rights arguments made by many within the access to medicines movement. Instead, it carves out of the general rule of intellectual property protection a limited range of exceptions to apply in narrow circumstances. Thus, the effect of the Doha Declaration is limited to issues directly implicating public health rather than the full range of human rights.

REGIME SHIFTING: HUMAN RIGHTS ANALYSIS

As the forum for the coordination of the global climate stabilization framework, the UNFCCC has been the site of negotiations over technology transfer, innovation, collaborations, and other strategies aimed at facilitating the development, deployment, and diffusion of clean energy technologies in the developing world. The various climate change conferences held under the UNFCCC auspices have not recognized any progress towards articulating an actionable global strategy to facilitate a developing world shift to clean energy technologies. At the same time, activists, nongovernmental organizations (“NGOs”), and international organizations have made repeated calls for the mainstreaming of human rights concerns within the UNFCCC process. These demands have similarly been met with little real action in the way of prioritizing human rights within the negotiating texts and processes.

Accordingly, the UNFCCC regime has yet to connect human rights to the debate over how to facilitate developing world adoption and adaptation of clean energy technologies. Therefore, a discursive regime shift should be attempted from the politicized negotiations of the UNFCCC process to a series of human rights analyses that seek to link the human impacts of climate change to the question of barriers to clean energy technology. While the flexibilities within the TRIPS Agreement that sufficed for guaranteeing access to medicines in the Doha Declaration may provide a sufficient legal basis for the granting of compulsory licenses for clean energy technologies, the alternative frameworks presented in this section aim to conduct the analysis starting from a position of human rights protection. These frameworks are centered in the protection of human rights and are utilized to find theories of accommodating intellectual property protections.

The starting point of a human rights analysis is necessarily international instruments and other sources of human rights obligations. This framework of analysis is in contrast to intellectual property analyses, which take as the starting point instruments relating to intellectual property rights.

HUMAN RIGHTS OBLIGATIONS

Intellectual Property Rights as Human Rights

The protection of intellectual property is not simply an economic tool designed to encourage and award innovation. Instead, the protections afforded to a patent holder may also be an iteration of human rights. As such, intellectual property systems may be frameworks for states to fulfill their human rights obligations. The ICESCR delineates the right “authors” to “protection of moral and material interests resulting from any scientific, literary, or artistic production.”

Rights Affected by Climate Change

In accordance with the guidance provided by the CESCR, states are obliged to ensure the minimum essential level of each right codified in the ICESCR. The duties of states derive from the obligation to secure certain minimum standards of human rights; thus, the duty is not fulfilled simply by adopting a particular policy or engaging in a particular transfer of technology if that policy or transfer does not result in the realization of the minimum value of the relevant human right. Rather, the duty is satisfied when the minimum standards are guaranteed. This substantive duty and its various constituent rights oblige states to simultaneously advance development, deployment, and diffusion of clean energy technology. The human rights obligation includes not only the importation of technology, but also support for local capabilities to adopt, diffuse, adapt, and develop technologies that fit within the particular circumstances of the state. This results in changing energy production systems in a manner sufficient to meet the core minimum standards of human rights. The simple transfer of technology will not provide the requisite knowledge about how or why the technology works without this focus on local industry and infrastructure. Consequently, it will be of little utility to advancing the realization of human rights.

The ICESCR obliges developed states and other actors to engage in international cooperation in furtherance of the realization of human rights in developing countries. This does little to ease the tension of how to balance the human rights of those most directly affected by climate change with the rights to moral and material interests of those innovators who are developing technological solutions to the energy crisis. While various human rights are affected by climate change, the legal obligations of states to cooperatively address climate change issues are not based on any explicit norm. Nonetheless, various frameworks of analysis centered on human rights may prove useful in developing a sense for how these obligations may play out vis-à-vis IP protections.
Frameworks of Analysis

Strict Scrutiny

Borrowing the term from U.S. Constitutional law, Margaret Chon proposes a principle of substantive equality that would require adjudicators and norm-generators to exercise a non-differential standard of review when considering whether a grant of an exclusive IP right or the denial of a limitation on the right appears to conflict with a basic human need. Although motivated by a development rationale, Chon’s framework is useful for thinking about clean energy technology as a “public good” that advances an important human need (or a series of human rights). The framework requires the potential IP barriers to access to clean energy technologies to be balanced against the ways in which those technologies would help to guarantee human rights by providing access to an important public good. As Chon notes, this is not only important for the advancement of development and human rights, but also for the fortification of IP systems in developing countries that “cannot ‘take root’ absent a basic national capacity, which can only be developed with a population that has its essential needs met.”

The extent to which IP is a barrier to the spread of clean energy technology through the developing world is admittedly uncertain. Yet, its recurrent mention in policy documents and commentary on the UNFCCC process imply that it is at least perceived as an important issue by both the technology companies who hold the IP protections and developing countries who encounter obstacles in accessing existing clean energy technologies. Applying Chon’s strict scrutiny to a theoretical category of IP protections for such technologies prioritizes the experiences of the most marginalized within the process of norm setting. The implications on the rights of indigenous communities, displaced persons, and other vulnerable groups who suffer as a result of lack of access to clean energy technologies becomes the starting point against which all IP protection regimes must be measured. IP regimes that pose barriers to access to clean energy technology would be deemed excessive where such lack of access negatively impacts human rights.

The appeal of this framework is in its stark simplicity. It brings forward the human rights impacts of climate change that are all too often relegated to the background of international discussions or to exceptional circumstances in analyzing the TRIPS flexibilities. Strict scrutiny allows for the human side of climate change to be made the center point of the discussion. However, the problem with applying this analysis to clean energy technologies is that it is difficult to imagine any IP protections without some negative impact on access and human rights. In other words, all IP protections would seem to fail the strict scrutiny test. As such, the utility of strict scrutiny is less as a framework than as an important framing device that establishes the centrality of human rights concerns.

Human Rights Primacy

Another framework through which to understand the relationship between human rights and the protection of IP is that of human rights primacy. Under this theory, “the protection of the non-human rights aspects of intellectual property protection should be subordinated to human rights obligations.” Human rights primacy as a tool to mediate tensions caused by IP protection involves striking a balance between the public and private interests in innovation with the primary objective of promoting and protecting human rights. Additionally, this tool of analysis is premised on categorizing IP protections as qualitatively different from other human rights. Specifically, human rights primacy understands IP protections as privileges assigned by the state according to a pre-determined set of criteria. By contrast, human rights are innate to an individual and are only recognized (rather than granted) by the state. IP rights can be licensed or otherwise assigned, whereas human rights are universal and inalienable. Although similar to the strict scrutiny approach advanced by Chon, human rights primacy carries a number of alternating theories that can be used to delineate the scope of rights.

Core Minimum

One such framework is the core minimum approach advocated by both Laurence Helfer and Peter Yu in similar iterations. The ICESCR requires that states take sufficient steps, as determined by the resources available to that state, to realize the obligations to protect economic, social, and cultural rights enshrined in the Convention. Regardless of available resources, however, states are obliged to guarantee certain minimum levels of rights protection. The core minimum approach seeks to reduce the competing categories of rights—those of the innovator and those of the community that desire the technology—to the “irreducible core.” For innovators, the core right under Article 15(1)(c) of the ICESCR is “a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent intellectual lives.” Once this irreducible core of rights has been protected, any additional protections afforded to innovators must be measured against other human rights. The CESCR directs states to ensure that their IP protection regimes “constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant.” This approach takes as a starting point that there are certain minimum human rights standards required of states, and locates intellectual property rights as one of the tools to be utilized in advancing those standards. Thus, as Yu notes, under the core minimum approach states will not violate the ICESCR if they modify or roll back excess protection required under TRIPS, the WIPO treaties, and other international, regional, and bilateral treaties provided that such protection does not have any human rights basis. They can also do so if the protection already exceeds what is required under their core minimum obligations and if they offer compelling evidence of the competing demands with other human rights obligations.

Applying this to the situation of protections for clean energy technologies, it appears that anything other than the protection...
of an innovator’s “zone of personal autonomy” would violate a state’s other human rights obligations under the ICESCR. As discussed above, the realization of even minimum standards of the various rights will allow a state to not only secure clean energy technology, but also develop domestic capacities to adapt the technology and develop locally relevant diffusion mechanisms.

Just Remuneration

Another framework for delineating human rights obligations in relation to IP protections for clean energy technology is the just remuneration approach.110 Similarly based off of the primacy of human rights, the just remuneration approach seeks to delineate the human rights dimensions of IP protections and assess adequate compensation for use of the protected technology.111 The underlying theory is that IP protections have limitations in the form of other human rights.112 Thus, if it is within an individual’s human rights to utilize a particular creation in advancement of those rights, some sort of compensation would be due for any limitations.113 This is different from a compulsory licensing framework, although a national-level licensing policy could follow from this theory.114 The just remuneration model requires that the innovator be paid for his creation, either by the person or entity using it, or by the state on behalf of the public (and in fulfillment of the state’s obligations to advance human rights protections).115

Under this analysis, the IP protections extended to clean energy technologies reflect a mix of human rights obligations and non-human rights (economic) purposes. As with almost all IP, the innovator of clean energy technologies possesses (human) rights to the protection of moral or material interests in his intellectual creations.116 However, if the utility of the technology would serve to advance the human rights of others, then the interests of the author are not limitless.117 In order to adequately protect the innovator’s rights under Article 15 of the ICESCR, a state may employ a just remuneration approach that provides appropriate compensation in the context of a compulsory license to utilize the technology for public welfare.118 This effectively changes the protection from an IP form to a human rights form, by balancing only the human rights interests of the innovator against the human rights interests of the individual, industry, or state that is pursuing access to the technology. Under this framework, “human rights grant to the [entity seeking access to the technology] a compulsory license, as compared to a free license, and to the right holder a right to remuneration, rather than exclusive control.”119 Thus, those individuals or entities holding patents to important clean energy technology could have their human rights guaranteed by receiving adequate compensation for their technologies.

**Conclusion**

Although the existing flexibilities within the TRIPS Agreement which, through the Doha Declaration, were asserted to be sufficient for facilitating access to essential medicines may similarly be sufficient for easing the IP protections on important clean energy technologies, the fundamental differences between the regimes of IP and human rights protections warrants this human rights analysis. The TRIPS Agreement is focused on “the promotion of innovation through the provision of commercial incentives.”120 With its economic priorities at odds with those of the human rights approach, which is centered on the protection and promotion of human rights, TRIPS is not an ideal or sufficient basis upon which to build climate change solutions. Instead, in order to keep the climate stabilization framework grounded in the realities of the human suffering induced by climate change, solutions to the technology access gap should begin with a human rights analysis, even if they are eventually realized through TRIPS flexibilities.

Beyond the mainstreaming of human rights in the climate stabilization context, the human rights analyses assist in identifying a range of interests and obligations beyond the transfer of a clean energy technology to a developing country. Funding and programmatic support for the development stage of clean energy technologies in developing states is a more sustainable fix for the climate change problem. Local technology industries in developing countries would benefit more from direct access to technologies that they could improve or adapt to their local contexts if they had increased training in know-how and know-why. In many ways, this would place developing countries on equal footing with developed countries and would enable the development of build-on technologies.

The human rights analysis also reflects an obligation of states to cooperate internationally to lend their support to the realization of human rights for individuals outside of their territories. In the context of the UNFCCC negotiations, the intergovernmental bloc of developing countries within the UN, known as the G77, has advocated for the creation of a multilateral fund to buy up the various IP instruments protecting clean energy technologies.121

As at least one commentator has stated, “[a]n appropriate and effective ‘social contract’ needs to be developed around low carbon and climate resilient innovation to balance public and private interests.”122 Rather than simply transferring technology or purchasing the IP protections to certain technologies, the framework in which innovation can be incentivized and made accessible needs to be revisited.

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**Endnotes: Climate Change, Intellectual Property, and the Scope of Human Rights Obligations**

In 2010, with the aim of deviating from “business as usual,” the member states of the United Nations Framework Convention on Climate Change (“Convention”) gathered in Cancun, Mexico. The Convention currently consists of two tracks, the Ad Hoc Working Group under the Kyoto Protocol (“AWG-KP”)3 and the Ad Hoc Working Group on Long-term Cooperative Action (“AWG-LCA”).4 The latter track agreed that developing countries would take on a greater responsibility in climate change mitigation.5 Many of these countries already play a key role in the mitigation effort by voluntarily participating in projects.6 Now they have agreed to further their role under the AWG-LCA by implementing nationally appropriate mitigation actions (“NAMAs”) for sustainable development7 and outlining a national strategy for reducing emissions from deforestation and forest degradation (“REDD”).8 Developed countries, under AWG-LCA, will continue to provide financial, technological, and capacity-building support for both projects.9 However, many climate change programs involving outside investment have resulted in violations to the rights of indigenous peoples,10 such as forced relocation or loss of sacred land.11 In an effort to prevent further violations, the developing countries should consider investing foreign funds in indigenous technologies when implementing their NAMA and REDD Agreements.

Indigenous technology stems from traditional ecological knowledge.12 This specific knowledge is a collection of “botanical, zoological, hydrological, cultural, and geographical knowhow . . . that has developed over time, and that continues to develop.”13 Implementing traditional ecological knowledge has the potential to result in carbon sequestration, forest protection, renewable energy production, and land rehabilitation.14 The technologies derived from this knowledge have proved to be environmentally sustainable for eons.15 Moreover, the indigenous technologies are evolving to combat climate change impacts.16

Simona Gomez Lopez, a representative from a Mexican forest community explained how her village evolved their cooking methods to mitigate climate change during the opening plenary of the Sixteenth Conference of the Parties in Cancun, Mexico.17 The community recognized the forest warming, the rains starting earlier, and the rivers drying up.18 The village also noticed that their traditional use of wood for cooking, which required two to three truckloads of wood per family, was significantly contributing to deforestation.19 To mitigate their contribution to climate change, the community created an environmentally friendly kiln and now has eight for regular use.20 These kilns require approximately eighty percent less wood.21

Indigenous technology, which can help mitigate climate change, is also a valuable tool for reforestation and biodiversity conservation projects.22 For example, the indigenous peoples in the Chittagong Hill Tracts of Bangladesh devised new sustainable forest management practices, which expanded twenty acres of forest to one hundred acres.23 Additionally, the Serangan community of Bali rehabilitated their coral reefs and mangrove forests, and managed to plant fifteen thousand pieces of coral in various coastal regions of Indonesia.24 This collection of knowledge is a valuable resource that developing countries should incorporate in the NAMA and REDD projects as appropriate.25

Incorporating indigenous technology into mitigation and adaptation efforts will help alleviate the obstacles other climate change programs face.26 Certain programs under the Kyoto Protocol’s Clean Development Mechanism (“CDM”) caused significant threats to indigenous peoples who refused to hand over their territories for the purpose specified in the projects.27 The CDM is considered a success.28 However, because developed countries meet their emissions targets by designing projects that mitigate climate change in developing countries,29 they have such a strong incentive to maximize the emission reductions yielded from these projects that the effects on local populations are often ignored.30 For instance, one CDM project included hydroelectric dams, which impacted river ecosystems and required relocation of an entire indigenous community.31 Conversely, traditional ecological knowledge employed in the Indian Himalayan region utilizes hydro-energy from the hill streams and rivers through traditional watermills.32 Placing the financial support of developed countries in technology derived from traditional knowledge can help maintain indigenous communities’ continued existence with sustainable means.

Implementing the Cancun Agreements with traditional ecological knowledge also upholds the general principles developed from the United Nations Declaration on the Rights of Indigenous Peoples (“Declaration”).33 While not a binding treaty, the standards of the Declaration are widely accepted and incorporated into policies and programs.34 The preamble of the Declaration, “[r]ecogniz[es] that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable

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development and proper management of the environment.” 35

Investing in available indigenous technologies while respecting indigenous rights can help developing countries fulfill their obligations under the AWG-LCA.

The indigenous communities are the most vulnerable to not only climate change impacts, but the mitigation measures as well. 36 Although the Convention has begun to recognize indigenous peoples, “cooperative action” within the Ad Hoc Working Group on Long-Term Cooperative Action requires improvement. 37 Incorporating proven and available indigenous technologies can provide nationally appropriate mitigation actions for sustainable development and reforestation projects within developing countries while still respecting the rights of indigenous peoples.

Endnotes: Is Newer Technology Always Better?

6 Christina Voigt, The Deadlock of the Clean Development Mechanism: Caught Between Sustainability, Environmental Integrity and Economic Efficiency, in CLIMATE LAW AND DEVELOPING COUNTRIES LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY 235 (Benjamin J. Richardson et al. eds., 2009) (recognizing the most notable as the Clean Development Mechanism, Community Development Carbon Fund, and the Global Environmental Facility).
7 See AWG-LCA Outcome, supra note 6, ¶ 48.
8 Id. ¶ 70.
9 Id. ¶ 52.
12 What is Indigenous Knowledge?, World Bank, http://www.worldbank.org/ afr/ik/basic.htm (last visited Jan. 14, 2010) (discussing significant contributions to global knowledge that have originated from indigenous people such as medicinal properties, pastoralist practices, and architecture).
15 Eric Kwa, Climate Change and Indigenous Peoples in South Pacific: The Need for Regional and Local Strategies, in CLIMATE LAW AND DEVELOPING COUNTRIES LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY 102 (Benjamin J. Richardson et al. eds., 2009).
16 See McLean, supra note 14, at 20.
18 Id.
19 Id.
20 Id.
21 Id.
22 See McLean, supra note 14, at 6.
23 Id. at 61.
24 Id. at 67.
25 Id. at 6.
26 Id.
27 Id.
29 Damiolola S. Olagbaju, Beautifying Africa for the Clean Development Mechanism: Legal and Institutional Issues Considered, in CLIMATE LAW AND DEVELOPING COUNTRIES LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY 262 (Benjamin J. Richardson et al. eds., 2009).
30 See Voigt, supra note 6, at 238.
31 Id.
32 See McLean, supra note 14, at 20.
34 Wiessner, supra note 33.
35 See UNDRIP, supra note 10.
The Singapore Workaround: Providing a “Greenprint” for a UNFCCC Party Reclassification

by P. Cal Trepagnier*

Introduction

The international climate debate currently focuses on the world’s two largest greenhouse gas emitters: China and the United States.1 However, to successfully address the impasse in climate change negotiations, the focus should actually be on one of the smaller emitters, the Republic of Singapore (“Singapore”). The United Nations Framework Convention on Climate Change (“UNFCCC”)2 classifies nations into two categories originally based on 1990 economic levels: Annex I Parties (developed countries) and Non-Annex I Parties (developing countries).3 Although there is no automatic graduation based on predefined criteria, a process and a precedent exists for status graduation that could provide a model for countries to shift from Non-Annex I to Annex I Parties. In 2009, Malta, originally a Non-Annex I country, successfully petitioned the UNFCCC after joining the European Union (“EU”) to “put itself on the same legal footing as the other Member States of the European Union that are included in Annex I to the Convention.”4 Singapore’s economy is also strong enough to shift it from a Non-Annex I to an Annex I country and other countries can then follow suit, providing a solution to the current impasse in negotiations.

This article offers a “Singapore workaround” as a way forward: diplomatic negotiations with Singapore aimed at changing the classification of nations that have developed economically since the formation of the UNFCCC. It has been argued by “[p]roponents of reclassification . . . that responsibility for mitigation and eligibility for support should reflect contemporary differences in levels of development among developing countries, rather than those current[ly] built into the Convention.”5 The reclassification of Singapore from a Non-Annex I to an Annex I Party would provide the ideal model for shifting parties’ obligations in the climate realm in the future. Singapore is a financial leader in both the global financial and energy sectors,6 and is well positioned for international and domestic “carbon finance.”8 The nation is economically poised to retool its energy sector,9 faces imminent and significant risks from climate change impacts,10 and is also ready to create and enforce modern climate laws.11 This article examines climate law in Germany and Spain to show how Annex I classification benefited their economies over the past six years. Finally, it discusses how establishing climate laws in Singapore could affect emerging economies, namely Brazil, India, and China.

Opportunity for Breakthrough in International Climate Law

Current international climate law is regulated primarily by the UNFCCC, which was created in 1992 from the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, also commonly known as the “Earth Summit.”12 Article 3 of the Kyoto Protocol of 1997 binds Annex I Parties to reduce “their overall emissions of such gases by at least 5 percent below 1990 levels in the commitment period between 2008 and 2012.”13 Under the Kyoto Protocol, however, the majority of countries—Non-Annex I nations—do not have greenhouse gas reduction targets.14 Moreover, there is no automatic system that requires them to reduce emissions, regardless of the level of gross domestic product (“GDP”) per capita.15 The lack of a mechanism to graduate Non-Annex I Parties once they achieve a certain level of economic development has emerged as perhaps the greatest challenge of the UNFCCC.

The richer developing nations with high emissions that do not take on Annex I rights and responsibilities have long caused frustration and concern for the United States,16 which refuses to ratify the Kyoto Protocol and commit to emissions reductions.17 The first commitment period of the Kyoto Protocol is on course to end in 2012 and recent UNFCCC negotiations in Cancun, Mexico fell short of creating a second commitment period.18 A lack of emissions reductions targets from emerging economies such as Brazil, India, and China have caused stalemates in international negotiations.19 Despite Singapore’s small size and its relatively minor greenhouse gas emissions, Singapore’s graduation to an Annex I Party could have broader implications for emerging economies in the international effort to curb global climate change.

A graduation mechanism in the UNFCCC would adjust country mitigation obligations over time. A similar option was successfully established by the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; that Protocol created a panel that reviews country requests for exemptions from ozone depleting substance commitments.20 Currently however, the UNFCCC’s approach to evaluating country classification is ambiguous.21 Singapore taking on the rights and responsibilities of an Annex I Party would help to kick-start the process and encourage other rising nations to follow suit. Therefore, the United Nations should facilitate talks with Singapore regarding the transition of Singapore’s status from a Non-Annex I country to an Annex I country.

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ECONOMIC READINESS

The International Monetary Fund (“IMF”) describes Singapore as a “newly industrialized Asian economy.”22 Singapore, by land area, is a small, densely populated urban city-state that has limited energy resources.23 In contrast to its Southeast Asian neighbors, Singapore is not a major agricultural center and therefore much of its food is obtained through importation.24 The IMF last reported on Singapore’s GDP in 2009 and, at recession levels, Singapore had a GDP of $182.2 billion U.S. dollars or $37,200 U.S. dollars per capita.25 Singapore’s economy has proven to be one of the most stable—not just in Asia, but also globally.26

As a result of a strong economic outlook, Singapore can continue to retool its energy sector and meet the challenges of carbon reduction.27 Singapore has already taken significant action toward clean energy development. In 2001, for example, Singapore’s National Environment Agency set up the Innovation for Environmental Sustainability Fund to provide grants for clean energy investment.28 In 2007, the Economic Development Board created the inter-agency Clean Energy Programme Office (“CEPO”).29 Additionally, the Ministry of National Development allocated approximately thirty-nine million U.S. dollars over a five-year period for a Research Fund for the Built Environment.30

Currently, Singapore also receives carbon finance through the Clean Development Mechanism (“CDM”), under which Annex I Parties sponsor projects in Singapore to offset the sponsoring country’s emissions.31 The Kyoto Protocol defines the CDM as an instrument “to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the UNFCCC, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.”32 If Singapore were to accept Annex I responsibilities, it could no longer receive CDM financing and would instead finance these projects in the developing world to help offset its own emissions.33 With its regional placement and cultural expertise, Singapore would be well positioned to sponsor the projects for other Association of Southeast Asian Nations (“ASEAN”)—nine other developing countries that do not traditionally participate in climate finance projects.34 Furthermore, Singapore’s stable and strong financial sector would bring additional liquidity to the global carbon market.

SINGAPORE’S CLIMATE NEGOTIATING POSITION

The Singaporean government has taken a proactive stance on mitigating global climate change and enforces its laws effectively. Singaporean climate negotiators made statements during the last two Conferences of Parties (“COP”) meetings that indicate its willingness to address global climate change.35 On January 28, 2010, Singaporean Ambassador-at-Large and Chief Negotiator for Climate Change, Chew Tai Soo, wrote, “Singapore therefore wishes to associate with the [Copenhagen] Accord as a good basis for advancing further international negotiations towards reaching a legally binding agreement on climate change” in a letter to the Executive Secretary, Yvo de Boer, of the UNFCCC Secretariat.36 On December 9, 2010, Shunmugam Jayakumar, Singapore’s Senior Minister and Chairman of the Inter-Ministerial Committee on Climate Change addressed a high level conference in Cancun, Mexico at the 16th COP meeting.37 He emphasized his commitment to a legal framework stating that it is important that as we pursue a “Balanced Package” in Cancun, we must have clarity that our end goal is to reach a legally binding outcome. Whatever we achieve in Cancun, and whatever be our next steps, it is imperative that these elements or decisions will eventually be stitched together in a legally binding nature, without which, there can be no guarantee of mitigation actions, nor can there be guarantee of the support provided.38

Moreover, as a requirement for being a member of the UNFCCC, Singapore submitted two “national communications on climate change.”39 Each communication shows a willingness to offer solutions to mitigate and adapt to climate change.40 In its first national communication to the UNFCCC in August 2000, the government of Singapore wrote, “[c]omprehensive preventive measures to safeguard the environment will not work unless there is stringent enforcement to ensure that the laws and regulations are complied with.”41 In its second national communication from November 2010, the Singaporean government stated, As a non-Annex I Party to the UNFCCC, we are not subject to binding greenhouse gas emissions reduction commitments under the Kyoto Protocol. Our contribution to global greenhouse gas emissions is, and will remain, small. Nonetheless, as a small-island state vulnerable to the impacts of global climate change, Singapore takes climate change seriously. We will therefore continue to do our part in global efforts to address climate change.42

However, some opposition exists within the Singaporean government. Its chief climate negotiator, Chew Tai Soo, made a statement in February 2009 that Singapore should not become an Annex I Party given its size and relatively small carbon footprint: 0.3% of global emissions.43 Mr. Chew also made an unofficial statement at a sustainability conference in Singapore regarding his opinion on the UNFCCC country classifications: “This approach is flawed as it does not take into account the unique considerations and capabilities of different countries . . . it penalizes small countries with small populations without taking into account their limitations.”44

These comments do not reflect Singapore’s overall commitment in addressing climate change and the important example it would set for the global community by becoming an Annex I party. For example, in 2009 a program called Sustainable Singapore Blueprint pledged that the nation would reduce greenhouse gases by sixteen percent below 2020 business as usual levels if a binding international agreement on climate change were reached.45 With this program, Singapore is already implementing a voluntary mitigation plan, as a contingency should there be a binding international climate agreement. The United Nations
should facilitate discussions to encourage Singapore to “graduate” and accept these responsibilities since Singapore is willing and able to create and enforce laws necessary to achieve carbon reductions.

ANNEX I SUCCESS AND IMPLICATIONS FOR EMERGING ECONOMIES

Singapore can benefit from looking to two Annex I Parties, Germany and Spain, as models for maintaining economic growth through Kyoto Protocol-based energy efficiency and renewable energy projects. In 2005, both Germany and Spain entered into a binding agreement to reduce carbon emissions under the Kyoto Protocol. Since then, laws designed to reduce carbon and modernize electricity generation, distribution, and consumption have steadily increased. Germany has a national commitment to reduce its carbon footprint forty percent from its 1990 levels by 2020. Germany met its 2012 goal early, in 2007, by generating 12.5% of its electricity from renewables, and Germany will likely exceed its twenty percent by 2020 goal as early as 2011. By 2020, conservative estimates show that Germany will source forty-seven percent of its electricity from renewable energy. Thus, while honoring its Kyoto Protocol commitments, German energy projects have in turn bolstered the fifth largest economy in the world. Spain made a commitment to reduce its carbon emissions by twenty percent from its 1990 levels by 2020, in line with the EU target. Spain also committed to achieving twenty percent of its own final consumption and ten percent of its transport energy needs from renewable energy. According to its 2005-2010 Renewable Energy Plan, Spain plans to deploy clean energy to meet 12.1% of its primary energy needs, 30.3% of electricity needs, and 5.83% of transportation fuel. One of Spain’s goals in its 2004-2012 Energy Efficiency Strategy is to reduce domestic energy intensity by 7.2% by 2012.

If Singapore adopts Annex I status and follows in Germany and Spain’s carbon reduction footsteps, it could advance compliance in other developing countries such as Brazil, India, and China. These countries will face greater and different challenges in greenhouse gas reduction from Singapore due to their larger size and strong economies. However, Singapore could establish the model and blueprint, which would help to change the playing field for non-Annex I Parties and encourage greater participation among those nations. Binding carbon emission reductions and carbon finance are only possible if countries take responsibility for their contributions to climate change, however small they are.

CONCLUSION

In the UNFCCC, richer nations, mostly those in the EU, have assumed the role of Annex I Parties. Singapore can and should become an Annex I nation so that it can fulfill a broader role on the global stage as a leader in greenhouse gas reduction. Singapore is the ideal candidate for graduating from Non-Annex I to Annex I. Its mature economy is ready to retool its electricity sector and to finance clean development mechanism projects. Singapore has national interests in safeguarding its borders from flooding and protecting the health of its citizens. It has a stable government with a history of developing innovative laws and enforcing them. As the international climate law community awaits 17th COP in Durban, South Africa, it should consider graduating a nation to Annex I status as a way to shift binding obligations from the Kyoto Protocol to a new international agreement between nations.

Endnotes: The Singapore Workaround

5 Sikina Jinnah et al., Tripping Points: Barriers and Bargaining Chips on the Road to Copenhagen, 4 ENVTL. RES. LETTERS 034003 (2009), http://iopscience.
9 NAT’L ENV. AGENCY, SINGAPORE’S SECOND NATIONAL COMMUNICATION: UNDER THE UNITED FRAMEWORK CONVENTION ON CLIMATE CHANGE 4 (Nov. 12, 2010), http://unfccc.int/resource/docs/docs/nate/sinnc2.pdf [hereinafter SSNC].
10 Id. at 3.
12 See Graciela Chichilnisky & Kristen A. Sheeran, Saving Kyoto 56-57 (Kate Parker ed., 2009); David Hunter et al., International Environmental Law and Policy 667-74 (Robert C. Clark et al. eds., 2007).
13 Id.
14 Id.
15 Chichilnisky, supra note 12; U.N. Framework Convention on Climate Change art. 4(1)-(2), May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].
Between November 29, 2010 and December 10, 2010, the Parties to the United Nations Framework Convention on Climate Change (“UNFCCC” or “Convention”) met in Cancun, Mexico, for the sixteenth Conference of the Parties (“COP”) and the sixth Meeting of the Parties to the Kyoto Protocol. One of the major decisions that emerged from this meeting was to establish the Green Climate Fund. While the Fund has the potential to be a huge step forward in creating long-term, centralized climate change funding, its success will depend on how subsequent decisions on management shape its efficacy.

The idea for a climate change fund originates from Article 11 of the UNFCCC, which calls on the Parties to create a mechanism that allows developed countries to financially support developing countries in implementing the Convention. This concept formally took shape as part of the Copenhagen Accord, where Parties agreed to finance projects that address climate change impacts in developing countries. The finalized Fund includes provisions for technology development and transfer, and capacity-building to help developing countries implement effective mitigation and adaptation actions.

In Cancun, the Ad Hoc Working Group on Long-term Cooperative Action, made up from representatives of all member countries, under the Convention put together the terms of the Fund. The terms include the creation of a governing body, who will contribute to it, and the trustees. The Fund has been developed under the guidance of and will be held accountable to the Conference of the Parties. The Parties established a Standing Committee, to manage the financial mechanism as well as verify and report financial support that developed countries will provide developing countries.

The Green Climate Fund will be controlled by a governing board of twenty-four members, half each from developed and developing country Parties. The Parties have designated the World Bank as the interim trustee of the Fund, and its status as trustee will be subject to review after three years of operating the fund. The trustee will aid the governing board in managing the administrative portions of the Fund, such as the financial records and statements. The trustee is required to act in a manner consistent with decisions made by the governing board and is accountable to the board in performing its responsibilities.

The Parties have also established the Transitional Committee to spearhead designing the operational components of the Fund. The Committee includes fifteen members from developed countries and twenty-five members from developing countries. The Committee will design the legal and institutional arrangements for the Fund, including its governance structure; methods on gathering financial, technological, and capacity-building resources; and ways to ensure that the Fund’s activities work well with other funding mechanisms that already exist. The Transitional Committee is also responsible for creating mechanisms for independent review of the Fund, stakeholder input, environmental and social safeguards, and financial accountability.

The Green Climate Fund helps create new funding for projects that will allow developing countries to better mitigate and adapt to global climate change. However, whether the Fund will be a major improvement over the current financial regime will largely depend on the effectiveness of the mechanisms that the Transitional Committee establishes. One of the greatest opportunities for the Fund is the creation of environmental and social safeguards, which currently do not exist with the other funds. Strong safeguards are essential in order to protect both the environment and human rights. The independent review mechanism will review decisions made by the governing board and help ensure that the Fund runs smoothly and effectively. While the creation of the Fund can be hailed as a successful outcome of the UNFCCC’s COP-16, its true measure will be determined down the road.

Endnotes:

2. Id.
3. Id.

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A recent report by the Center for American Progress compares United States’ renewable energy policies unfavorably to both European nations and China. Kate Gordon, Julian L. Wong & JT McLain, Ctr. For AM. Progress, Out of the Runners? How Germany, Spain, and China Are Seizing the Energy Opportunity and Why the United States Risks Getting Left Behind (2010), http://www.americanprogress.org/issues/2010/03/pdf/out_of_running.pdf. See also Markey, supra note 14 (noting Rep. Markey’s comment that “Russia was our singular competitor in the celestial contest. In this terrestrial endeavor, we have many.”).

Christina Larson puts it as follows: It is telling what is left out of the increasingly dominant “U.S. versus China” green-tech “race” narrative. For starters, there are a lot of other countries at work developing green-tech and becoming significant green-tech markets—the low-carbon future, after all, isn’t solely a G-2 aspiration. Yet because the politics are different (there’s not the anxiety of the reigning superpower nervously eyeing the new kid on the block), the green aspirations of any country not named China are viewed through an entirely different prism by U.S. commentators. Germany, for instance, is home to the world’s top two solar manufacturing companies. Yet we don’t read headlines about Old Europe “cleaning our clock” to the 21st century. Larson, supra note 5.

Id. (including statement of Elizabeth Economy, director of Asia Studies at the Council on Foreign Relations, that “[e]ven when you are looking at these big numbers (for example, the numbers that are coming out of China today, I think it really pays to give a close look at what is actually happening on the ground [and then you begin to get a different, more nuanced picture than what is blasted on the business section of the New York Times”).


27. CHINA GREENTECH INITIATIVE, supra note 25, at 21.


29. See, e.g., Stan Abrams, This Is Your Brain on Nationalism: US-China Trade Deficit Follies, CHINA/DIVIDE (Apr. 14, 2010), http://chinadivide.com/2010/your-brain-on-nationalism-us-china-trade-deficit-follies.html (summarizing a number of claims and reports). With respect to greentech specifically, see Bradsher, China Leading Global Race to Make Clean Energy, supra note 12, citing low labor costs as a Chinese advantage.

30. Nat’l Dev. & Reform Comm’n, Medium and Long-Term Development Plan for Renewable Energy in China, CHINA DEV. GATEWAY (Sept. 4, 2007), http://en.chinagate.cn/reports/2007-09-13/content_8872839.htm (“By 2020, a relatively complete renewable energy technology and industry system will have been established, so that a domestic manufacturing capability based mainly on China’s own IPRs will have been established, satisfying the needs for developing renewable energy on a large scale in China.”).


38. See, e.g., Press Release, Senator Charles E. Schumer, Schumer, Casey, Brown & Tester Urge Obama Administration to Suspend Stimulus Program Funneling Billions Overseas (Mar. 3, 2010), http://schumer.senate.gov/record.cfm?id=322732& (detailing efforts by four Senators to block federal funding for the project); see also Yael Borofsky & Jesse Jenkins, The Real Policy Lesson From the Chinese Wind Turbine “Scare,” BREAKTHROUGH INST. BLOG (Nov. 9, 2009, 1:47 PM), http://thebreakthrough.org/blog/2009/11/the_real_policy_lesson_from_th_scary.html (claiming that “Senator Schumer and others who seek to bar Chinese manufacturers from stimulus funds are missing the point” and should focus instead in promoting American greentech firms).

39. See, e.g., Wynn, supra note 12 (stating that “Western businesses are worried China is freezing them out of this lucrative market, preferring to nurture its own nascent industries without subjecting them to competition.”); Keith Johnson, Protectionist Breezes: Wind-Power Companies Cry Foul on China, WALL ST. J. BLOGS (May 28, 2009, 12:02 PM), http://blogs.wsj.com/environmentalcapital/2009/05/28/protectionist-breezes-wind-power-companies-cry-foul-on-china/.

40. See JAMES MCGREGOR, CHINA’S DRIVE FOR “INDIGENOUS INNOVATION”: A Web

42 McGeeorde, supra note 40, at 33.

Id. at 96.


47 Pet. for Relief Under Section 301 of the Trade Act of 1974, as amended, 94-95.


51 Biggs, supra note 49.


53 David Cyranoski, Renewable Energy: Beijing’s Windy Bet, 457 Nature 372, 372 (2009), http://www.nature.com/news/2009/090121/full/4573732a.html (“Wind turbine manufacturers and wind-farm developers everywhere have faced teething problems, but China has perhaps faced more difficulties than most. Its wind farms are much less efficient than those in other leading countries [and] manufacturing defects have plagued Chinese equipment ... ”).

54 Hout, supra note 53 (calling the quality of Chinese turbines “questionable”); Richard Lim, Julisa Mandeville, Ryan Petersen, Jon Saxon, Benjamin Vannier & Tom Wuegner, Winds of Change: How China’s Government Supports Domestic Wind Energy Providers, KELLOGG SCH. OF MGMT, NORTHWESTERN U. (Oct. 1, 2009), http://www.kellogg.northwestern.edu/departments/international/internationalfocus/article/winds_of_change.aspx (“Chinese-made turbines cost up to 20% less than those of multinational manufacturers. However, field data suggests that Chinese turbines significantly lag foreign products in quality, to the extent that the long-term revenue sacrificed from lower quality (as measured by turbine capacity factor) outweighs the upfront cost savings.”).

55 Id.

56 Bradsher, On Clean Energy, China Skirts Rules, supra note 12; see generally Amaud de la Tour, Matthieu Glachant & Yann Ménièreme, Innovation and Inter-

57 de la Tour, Glachant & Ménièreme, supra note 57; Global Market Outlook for Photovoltaics Until 2014: May 2010 Update, supra note 32, at 22 & fig.23 (demonstrating that China leads in production of cells and modules but trails in other areas).

58 Id.


60 Bradsher, On Clean Energy, China Skirts Rules, supra note 12 (“Because China’s clean energy industry has relied so heavily on land deals and cheap state-supported loans, the industry could be vulnerable if China’s real estate bubble bursts, or if the banks’ loose lending creates financial problems of the sort that have plagued Western financial markets in recent years.”).


62 Id. (noting a “bias in favor of local sourcing” because “shipping wind power apparatus is heavy and awkward”); Trabish, supra note 60; Chinese Wind Turbine Manufacturers’ Global Expansion: The Dream and The Reality, supra note 26.

63 Wong, supra note 40, at 8; Bradsher, On Clean Energy, China Skirts Rules, supra note 12 (“Many state and local governments in the United States have also built roads, installed power lines and made other infrastructure improvements that have increased the value of private land as part of programs to attract clean energy. Tax holidays for such businesses are common in the United States, as in China.”).


65 Dan Harris, Why China Won’t Rule Tech., CHINA LAW BLOG (July 15, 2010), http://www.chinalawblog.com/2010/07/why_china_wont_rule_tech.html (stating that “[the] arguments are no different than the arguments that were being made about Russia in the 1960s and about Japan in the 1980s and neither country is really anywhere these days on the technology map”). See also Gady Epstein, This Just In: China Economy Doing Better Than Japan, REUTERS (Aug. 16, 2010, 1:47AM) (observing that “we should remember Japan’s seeming invincibility in the 1980’s and the stunning two decades of stagnation that followed when we look at China now”). It would hardly be surprising if objections to Chinese involvement in the United States looked remarkably similar to those of the 1980s regarding Japanese investment. One recent report claims: “nothing in the review of U.S. reactions to the boom in Japanese FDI suggests that the experience will not be repeated in the case of another formidable East Asian nation, particularly one that does not share many of the strategic, political and military common interests with the U.S. that muted and cabined the investment friction vis-à-vis Japan.” Curtis J. Milhaupt, Is the U.S. Ready for FDI from China? Lessons from Japan’s Experience in the 1980s, in INVESTING in the UNITED STATES: IS THE US READY for FDI from CHINA? (Karl P. Sauvant ed., 2008), http://www.vcc.columbia.edu/pubs/documents/MilhauptFinalEnglish.pdf.


67 Kachan, supra note 50 (“China is making decisions quickly, and isn’t encumbered by democratic process.”); Todd Woody, The Next Great Leap Forward: China Powers the Global Green Tech Revolution, GRIST (Jan. 11, 2010), http://www.grist.org/article/2010-01-11-china-powers-global-green-tech-revolution/ (“In a one-party state, a government official saying, ‘Make it so,’ can remove obstacles to any given project and allocate resources for its development.”); 10 Reasons Why China is the Greentech Leader, SOLAR FEEDS (Aug. 27, 2010), http://www.solarfeeds.com/green-chip-stocks/14040-10-reasons-why-china-is-the-greentech-leader (“And unlike a western democracy, when China’s central leaders make up their minds, action follows quickly.”).
year on a 20 times bigger project.” Kachan, supra note 50. See also Bradsher, On Clean Energy, China Skirts Rules, supra note 12 (noting that the Sunzone firm obtained permits for and constructed a solar panel manufacturing plant in less than a year, far shorter than the process would taken in the United States).

69 Martino & Jungfen, supra note 34 (discussing impacts of recent policy changes).

70 The four trillion RMB ($586 billion) package contained billions of dollars worth of incentives for green projects. China GreenTech Initiative, supra note 25, at 50, states that $31 billion of the stimulus package was for green investments. Caution about that figure is warranted. An analysis by Julian Wong shows that “All that Glitters is Not Green,” in that “bullish” estimates of which specific parts of the package would have green impact are overstated. Julian L. Wong, How Green is China’s Stimulus Package, Green Leap Forward (Mar. 3, 2010), http://greenleapforward.com/2010/03/03/how-green-is-chinas-stimulus-package/.

71 Eisen, supra note 1; Wong, supra note 40, at 7 (noting that with respect to China’s greentech R&D programs, “while some of these programs have been in place for nearly two decades, it is not clear that they are yielding the hoped-for results”).

72 Bradsher, On Clean Energy, China Skirts Rules, supra note 12.

73 Pet. for Relief Under Section 301 of the Trade Act of 1974, as amended, 63.

74 Id. at 66-63.


77 China GreenTech Initiative, supra note 25, at 104 (noting that “substantial policy divergence has occurred” in this area “at local levels across China”).


80 Wang Mingyuan, Issues Related to the Implementation of China’s Energy Law: Analysis of the Energy Conservation Law and the Renewable Energy Law as Examples, 8 VT. J. ENVTL. L. 225, 248 (2007) (observing that “[t]he lack of open, fair, regulated, and orderly market competition mechanisms in the energy sector is a fundamental hindrance to renewable energy development and to the Renewable Energy Law’s implementation”). SOEs continue to be an important sector is a fundamental hindrance to renewable energy development and to the renewable energy projects”). SOEs continue to be an important sector is a fundamental hindrance to renewable energy development and to the renewable energy projects”). SOEs continue to be an important sector is a fundamental hindrance to renewable energy development and to the renewable energy projects”). SOEs continue to be an important sector is a fundamental hindrance to renewable energy development and to the renewable energy projects”). SOEs continue to be an important sector is a fundamental hindrance to renewable energy development and to the renewables projects still compare expected growth rate goals, and only talk idly of energy conservation and environmental protection”).

81 Id. at 245 (observing that “most thermal power projects are larger in scale, attract greater investment, bring about faster results, and are more profitable than renewable energy projects”).

82 China GreenTech Initiative, supra note 25, at 92.

83 See generally David Shambaugh, China’s Propaganda System: Institutions, Processes, and Efficacy, 57 CHINA J. 25 (2007), http://web.rollins.edu/~tliason/ china/chipropaganda.pdf. Shambaugh describes the Chinese propaganda system as a “sprawling bureaucratic establishment, extending into virtually every medium concerned with the dissemination of information.” Id. at 27, “Xinhua” is the Xinhua News Agency, the official press agency of the People’s Republic of China, which, Shambaugh notes, “has always had a dual role: to report news and to disseminate Party and state propaganda.” Id. at 44. Many in the West cite stories from Xinhua without this important context.


85 A 2010 workshop on transparency in reporting of environmental information and accompanying report by the Natural Resources Defense Council found that there had been a “good start on open information” but that the system had a long way to go. Alex Wang, Assessing the State of Environmental Transparency in China, SWITCHBOARD: NAT. RESOURCES DEF. COUNCIL STAFF BLOG (June 7, 2010), http://switchboard.nrdc.org/blogs/awang/assessing_the_state_of_environ.html.

86 Pet. for Relief Under Section 301 of the Trade Act of 1974, as amended, 78.

87 Renewables, supra note 31, at 59.


89 David Biello, The Dam Building Boom: Right Path to Clean Energy?, YALE ENV’T’S 360 (Feb. 23, 2009), http://e360.yale.edu/content/feature.jsp?id=2119.


91 See China GreenTech Initiative, supra note 25, at 87-88 (discussing reasons for lower efficiency in earlier installed wind farms).


95 China GreenTech Initiative, supra note 25, at 36 fig.21. The lower targets are contained in the Medium and Long Term Development Plan for Renewable Energy, and the higher figures are based on reports of new targets likely to be contained in the National Energy Administration’s ten-year plan. See, e.g., Kevin Ma, Go with Wind: China to Dramatically Boost its Wind Power Capacity, Again, SWITCHBOARD: NAT. RESOURCES DEF. COUNCIL STAFF BLOG (July 29, 2009), http://switchboard.nrdc.org/blogs/kma/go_with_wind_china_to_dramatic.html. But see Charles McElwee, A Mighty Wind, CHINA ENVTL. L. (May 6, 2009), http://www.chinaenvironmentallaw.com/2009/05/06/a-mighty-wind/=more1697 (stating, “I’m not believing [new targets] until I see a formally amended copy of China’s Medium & Long-Term Renewable Energy Development Plan”). According to projections about increased 2020 targets, 300 GW of capacity—far more than wind and solar combined—would be in hydropower. China GreenTech Initiative, supra note 25, at 36 fig.21.


108 Id. at 7 fig.4.

109 Id. (noting that “[d]omestic policy decisions appear to have shifted the competitive positions of G-20 member countries”).


111 China GREENTECH INITIATIVE, supra note 25, at 40 (noting that “even if China were to achieve its target of deriving 20% of energy from renewable sources by 2020, most of the non-renewable energy would still be derived from coal”); Ma & He, supra note 110, at 1707.


113 China GREENTECH INITIATIVE, supra note 25, at 32-33.


118 Woody, supra note 68; see also Two Energy Giants, supra note 116 (“The size and scope of [China’s] investments in conventional forms of energy dwarf their commitment to ‘green energy’.”).

119 Charlie McElwee, China Starts Construction on 13.6GW Coal-Fired Power Base, CHINA ENVTL. L. (Aug. 10, 2009), http://www.chinaenvironmentallaw.com/2009/08/10/china-starts-construction-on-136gw-coal-fired-power-base/. One Chinese professor claims that provincial governments have stronger incentives to build conventional plants than greentech facilities. Mingyuan, supra note 80, at 244-45 (“[E]ven though the State has made clear that renewable energy exploitation and utilization is an area of high priority and that key public and private actors are encouraged to be involved, some local governments are enthusiastic about, and spare no effort in, starting thermal power plants, while renewable energy generation projects are often ‘pending discussion.’ The objective cause of this phenomenon is that most thermal power projects are larger in scale, attract greater investment, bring about faster results, and are more profitable than renewable energy projects.”).


123 See, e.g., Press Release, Bloomberg New Energy Finance, supra note 121 (“The two nations may be in competition, but the big win for both of them would be to drive the cost of a clean power generation below the cost of fossil fuels.”); Christina Larson, America’s Unfocused Fears of a Green-Tech Race with China, YALE ENV’T 360 (Feb. 8, 2010), http://e360.yale.edu/content/feature.msp?id=2238 (quoting Shanghai-based American entrepreneur Richard Brubaker’s statement that “[t]he clean-tech war is overblown from the start” and discussing how “the green-tech ‘race’ is not one that one side wins and the others lose, but a scenario...
where partnerships are sought out and the final equation doesn’t have to be a zero-sum game).” Wong, supra note 47, at 11.

133 CHINA GREENTECH INITIATIVE, supra note 25, at 35.

134 The website of the United Nations Framework Convention on Climate Change contains a wealth of information on global responses to climate change, including the Kyoto Protocol, Copenhagen Accord, and many more documents. See UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int (last visited Oct. 6, 2010).

135 See, e.g., BRIC Countries’ Think-Tanks Discuss Climate Change, CHINA. OBS.CN (Apr. 15, 2010), http://www.china.org.cn/world/nuclear_bric_summits/2010-04/15/content_19823233.htm.

136 There are many books, articles, and studies that analyze the U.S.-China relationship, and it would take an entire bookshelf to list them all. See, e.g., Dan Edwards, New China Books Roundup, BEIJINGER BLOG (Aug. 26, 2010, 12:00 PM), http://www.thebeijinger.com/blog/2010/08/26/New-China-Books-Roundup.


142 CHINA GREENTECH INITIATIVE, supra note 25, at 58 (discussing the importance of the S&ED in this regard).


144 Plumer, supra note 123.


146 China has “associated with” (agreed in principle to) the Copenhagen Accord. On the other hand, it believes “it is neither viable nor acceptable to start a new negotiating process,” a stance which would reverse years of international work. Arthur Max, China, India Join Copenhagen Accord, Last Major Emitters To Sign On, HUFFINGTON POST (Mar. 9, 2010, 2:24 PM), http://www.huffingtonpost.com/2010/03/09/china-india-join-copenhagen_n_491640.html (comments of Premier Wen Jiabao).

147 See, e.g., Mark Lynas, How Do I Know China Wrecked the Copenhagen Deal? I Was in the Room, GUARDIAN (Dec. 22, 2009), http://www.guardian.co.uk/environment/2009/dec/22/copenhagen-climate-change-mark-lynas. Lynas’ argument was criticized by many who believed it unwise to ascribe sole blame to the Chinese.

148 CHINA GREENTECH INITIATIVE, supra note 25, at 34 (noting that if China develops at its current pace, “international concerns over global warming would increasingly be directed toward China”).

149 Wong, supra note 47 (noting that “[t]he United States risks falling behind not just China, but other Asian and EU countries, because of its failure to create a national long-term vision for clean energy development, and a supporting stable policy framework to realize that vision”).

150 Id. (noting that “the United States has been tremendously successful in inventing many important clean energy technologies, but has failed [sic] less well in mass production and commercialization relative to the size of its economy”).


156 Romm, supra note 154 (discussing the potential for tax incentives to expire at the end of 2010).


160 Wong, supra note 47.


162 Id.

163 See, e.g., Wong, supra note 47, at 10 (noting that “[i]nstead, what the United States has is a patchwork of differing state and local policies, and federal policy tools that are temporary and unpredictable”).


166 Engelen, supra note 159.

167 Id. at 3.
22 Id.
27 See KATHERINE HAMILTON ET AL., ECOSYSTEM MARKETPLACE & BLOOMBERG NEW ENERGY FINANCE, STATE OF THE VOLUNTARY CARBON MARKETS, at ii-iii, vi (2010) http://moderncms.documents/vcarbon_2010.2.pdf. In 2009, an estimated 93.7 million tons of carbon or its equivalent were traded in voluntary market transactions, totaling $387.4 million. Trades on the Chicago Climate Exchange (“CCX”) accounted for almost half of the volume, but only thirteen percent of the market share valued at $49.8 million. Over-the-counter (“OTC”) transactions accounted for eighty-four percent of the market share, valued at approximately $325.9 million; trades on other voluntary exchanges comprised the remainder. Approximately fifty-six percent of OTC transactions in the voluntary markets originated in North America.
28 Id. at 57.
29 Id. at viii.
30 About VCS, VERIFIED CARBON STANDARD, http://www.v-c-s.org/about.html (last visited Mar. 8, 2011). The full name of the VCS changed from Voluntary Carbon Standard to Verified Carbon Standard in 2011; therefore reports cited include the former designation while websites include the latter.
31 Id.
33 Id. at 4-5 (stating that “Real” means that the reductions actually occurred, “additional” means that the reductions are beyond a business-as-usual scenario, “conservative” means the assumptions and procedures will not over-estimate a given project’s GHG impact, and “unique” means the reductions are not double counted).
36 Id.
41 Id. at 7.
49 Levin et al., supra note 48, at 777-78; Bernstein, supra note 1, at 104; Benja- min Cashore et al., Revising Theories of Nonstate Market-Driven (NSMD) Governance: Lessons from the Finnish Forest Certification Experience, GLOBAL ENVTL. POL., Feb. 2007, at 1.
50 See Cashore at al., supra note 49 at 2. Forest certification is a means of identifying and certifying well-maintained forestland with a label, similar to a VERT, CERT, or VCU in the carbon market, that denotes the land as compliant with a certain standard of stewardship thereby allowing products from certified forest to demand a price premium in the relevant market. See Eric Hansen, Michael P. Washburn & Jim Finley, Understanding Forest Certification, SUS- TAINABLE FORESTS P’SHIP, http://sfp.cas.psu.edu/pdfs/PS%20underforestcert.pdf (last visited Feb. 27, 2011).
51 See, e.g., Levin et al., supra note 48, at 778.
52 See, e.g., id.; Bernstein, supra note 1, at 106-07; Cashore et al., supra note 49, at 8.
53 Cashore et al., supra note 49, at 8 (emphasis omitted).
54 Id. (arguing that the first prong of the test is the most important); Bernstein, supra note 1, at 107 (stating that NSMDs are distinguishable from public-private partnerships).
55 See, e.g., Bernstein, supra note 1, at 107-09; Cashore et al., supra note 49, at 8; Levin et al., supra note 48, at 778.
56 Cashore et al., supra note 49, at 8.
57 Id.
58 See, e.g., Levin et al., supra note 48, at 778; Bernstein, supra note 1, at 109-10.
59 See Bernstein, supra note 1, at 109.
60 See, e.g., id. at 110; Levin et al., supra note 48 at 778.
61 Bernstein, supra note 1, at 110.
62 See, e.g., id. at 110-11; Cashore et al., supra note 49, at 9; Levin et al., supra note 48, at 778.
63 See Bernstein, supra note 1, at 110.
64 Id.
66 Id. at 102-03.
67 Id. at 103.
68 Id.
69 Id.
70 See Levin et al., supra note 48, at 781-82. For a NSMD system to obtain “political legitimacy”—defined as “acceptance and [justification] of [a] shared rule by [the] community as appropriate and justified”—the NSMD system must complete a three-step process. First, the NSMD system must be “initiated.” This can be achieved through adoption of the NSMD system by firms that already meet the standard’s criteria. Second, the market must build widespread support for the NSMD system. This can be done through the relaxation of the standard’s criteria, or, if the standard refuses to lower its barriers, competing standards will develop. The competing standards may converge at a later stage depending on market forces. Finally, the NSMD system will achieve “political legitimacy” once business, social, and environmental interests look to the NSMD system “as [a] legitimate arena[] in which to mediate disputes and address policy problems.” Id. (quoting Steven Bernstein & Benjamin Cashore, Can Non-State Global Governance Be Legitimate? An Analytical Framework, 1 REL. & GOVERNANCE 347, 361 (2007)). It is beyond the scope of this Article to determine the political legitimacy of each certification standard. However, without a review process for aggrieved constituents, a certification cannot reasonably expect to be viewed as a forum “in which to mediate disputes.”
72 Id. at 5. The VCS 2007.1 project cycle consists of six steps: (1) the project proponent submits all project documents to the auditor; (2) the verifier assesses the project against VCS 2007.1 and writes a validation and, later, a verification
report; (3) the VCS Registry Operator receives the project documents; (4) the VCS Registry Operator reviews the project documents and submits them to the VCS Project Database; (5) the VCS Project Database reviews the documents and checks for issues such as double-counting; (6) the VCS Registry Operator requests the registration fee and, once those are paid, issues VCUs to the project proponent.

73 See HAMILTON ET AL., supra note 27, at 68.
75 VCS Program Guidelines, supra note 32, at 7.
76 See Valerie Volcovici, US Voluntary Market to See Steady Demand: Observers, Point Carbon (Jan. 3, 2011) (stating that, to date, the California Air Resources Board, which will manage California’s cap and trade program, has only endorsed offset protocols from CAR).
77 See HAMILTON ET AL., supra note 27, at 68.
79 Am. Carbon Registry, supra note 40. Under ACR’s rules, a project proponent submits paperwork to ACR for an initial eligibility screening, which it must pass, before the proponent can then seek out an ACR-approved verifier to validate the project as compliant with ACR’s standards and verify the integrity of the GHG reductions involved in the project. ACR permits proponents to submit projects utilizing GHG measurement tools and methodologies of other standards, some of which have been preapproved as compliant with ACR’s rules, while others will require case-by-case approval by an ACR Board. Once ACR accepts the verification report, the project will be registered in ACR’s database and ERTs will be issued as they accrue and in accordance with the sums outlined in the verification report.
80 See HAMILTON ET AL., supra note 27, at 68.
81 Am. Carbon Registry, supra note 40, at 6 (last visited Jan. 8, 2011).
83 The GS project cycle requires that the project proponent host two meetings with the project’s local host community to assess the impacts of the project. An independent auditor must validate the project and the Gold Standard’s independent Technical Advisory Committee (“GS TAC”) reviews the validation report. If there are no issues, then the Gold Standard registers the project. Following registration, a different independent auditor must periodically verify that the claimed emissions reductions are occurring. The GS TAC will review the verification report, and if there are no issues, the Gold Standard will issue VERs to the legal owner of the credits. See The Gold Standard Found., Requirements 49-50 (2009), http://www.cdmgoldstandard.org/fileadmin/editors/files/6_GS_technical_docs/GSv2.1/GSv2_1_Requirements.pdf.
86 Id. at 10.
88 Id. at 111.
89 Id.
90 Id.
91 Id.
93 Id. at 88, 103-05.
94 The International Centre for the Settlement of Investment Disputes is one such example. See generally Int’l CTR. FOR THE SETTLEMENT OF INV. DISPUTES, http://icsid.worldbank.org/ICSID/Index.jsp; see id. at 103-05 (discussing the advantages and disadvantages of private arbitration under the Kyoto Protocol).
95 Id.
96 Id.
97 Id. (recommending an internal dispute mechanism as the most appropriate forum for resolving certain disputes under the Kyoto Protocol).
98 Streek & Lin, supra note 65, at 410.
99 See KOSOVO & AMBROSS, supra note 25, at 48 (summarizing issues facing the CDM market).
100 See Streek & Lin, supra note 67, at 410-11.
101 See id. at 411.
102 See id. at 410-11.
103 See Procedures for Appeals, supra note 4.
104 VCS Program Guidelines, supra note 32, at 10; Voluntary Carbon Standard, supra note 71, at 10, 22. Also explaining that appeals for “micro-projects” will be governed by the International Standards Organisation.
106 VCS Program Guidelines, supra note 32, at 10.
107 Id. at 7, 10. The VCS Association is a nonprofit organization under Swiss law that legally represents the VCS Secretariat and Board. The VCS Association is managed by the VCS Program, which has its own Secretariat that is “responsible [sic] for responding to stakeholder queries, liaising with the media, entering into contracts, managing relationships with VCS Registry operators and accreditation bodies . . . .”
108 Id. at 10.
109 CLIMATE ACTION RESERVE, supra note 78, at 52-53.
110 Id. at 52.
111 Id. (stating that the committee must also contain at least two management level staff members).
112 Id.
113 Id. at 53.
114 Id.
115 Id.
116 Id.
117 Am. Carbon Registry, supra note 40, at 6.
119 Id.
120 Id.
123 Press Release, supra note 118.
125 Id. at 28-29.
127 See The Gold Standard Found., supra note 121 at 8-12.
128 Id.
129 Id. at 14, 19.
130 Id. at 20-22.
131 Id.
132 Id.

8 Other jurisdictions, such as Australia, are currently embroiled in their own attempts to enact climate change legislation, see, e.g., Carbon Pollution Reduction Scheme Bill 2009 [No. 2], Oct. 29, 2009, ISSN 1328-8091 (Austl.), and a suite of complementary legislative enactments (noting that they were all defeated in the Australian Senate on December 2, 2009).

9 But see Gerald Trautferth, The US and China Joined Forces Against Europe, SPEigel ONLINE (Dec. 8, 2010) (citing cables that the United States and China worked together to prevent any binding agreement at Copenhagen); The Road from Copenhagen: The Experts’ View, NATURE REPORTS CLIMATE CHANGE (Feb. 28, 2010), http://www.nature.com/climate/2010/1002/full/climate.2010.09.html (noting that the outcome of the Copenhagen climate summit was merely an agreement to meet again in twelve months in Mexico); Scott Barrett, How to Prevent Climate Change Summit from Failure, YALEGLOBAL (May 1, 2009), http://yaleglobal.yale.edu/content/prevent-climate-change (recommending the United States to negotiate a skeleton agreement that lays a foundation to allow for improvements over time).

10 See Stefan Theil, A Green Retreat: Why the Environment is No Longer a Surefire Political Winner, NEWSWEEK (July 12, 2010), http://www.newsweek.com/2010/07/12/a-green-retreat.html (discussing the climate politics that have slowed the movement towards meeting environmental goals); Climate-change Policy: Let it Be, ECONOMIST (July 29, 2010), http://www.economist.com/node/16693691 (noting that although President Obama instructed lawmakers to “tackle our addiction to fossil fuels,” the energy bill unvield on July 27, 2010 did not further that initiative); see also America’s Climate Policy: Capped, ECONOMIST (July 31, 2010), http://www.economist.com/node/16693293 (stating that although the Senate’s retreat from cap-and-trade may lead to a carbon tax, it currently leaves “a dreadful mess”); Carbon Pollution Reduction Scheme, AUSTRALIAN GOVERNMENT DEPARTMENT OF CLIMATE CHANGE & ENERGY EFFICIENCY (May 5, 2010), http://www.climatechange.gov.au/media/whats-new/cprs-delayed.aspx (reporting that the Prime Minister decided to delay the implementation of the Carbon Pollution Reduction Scheme due to the lack of bipartisan support and slower process on global action on climate change); Rudd Delays Carbon Scheme Until 2012, SYDNEY MORNING HERALD (Apr. 27, 2010), http://www.smh.com.au/business/rudd-delays-carbon-scheme-until-2012-20100427-tp29.html?comments=41 (noting that the Senate is seven votes short of passing the carbon pollution reduction scheme).


12 COP 16 / CMP 6, supra note 6.


16 LOMBORG, supra note 6, at 1.


18 See Michael J. Sandel, Liberalism and its Critics 1 (1984) (discussing different arguments concerning the freedom of choice and the weight of values, such as toleration, freedom, and fairness, in making decisions); J.W. Harris, LEGAL PHILOSOPHIES 277-300 (2nd ed. 2004).


20 See Singer, supra note 19, at 2.

21 Elizabeth Olson, Reinterpreting Property 121-23 (1993). This builds, of course, upon the groundbreaking work of Anthony M. Honore, Ownership, in, OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961), who identified eleven ‘standard incidents’ of ownership.

22 This begins with John Stuart Mill’s “self-regarding act.” John Stuart Mill, On Liberty (Gertrude Himmelfarb ed., 1974 (1859)); see also Singer, supra note 17 (outlining how property norms assist in determining the difference between a truly self-regarding act and one that is not); Munzer, supra note 19, at 3-9 (arguing for a pluralist approach to property).

23 See generally WESLEY NEWCOMB HOHFIELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Walter W. Cook ed., 1919), http://www.archive.org/stream/fundamentallegal00hohofu#page/n11/mode/2up (providing the journal articles in published book format); Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917) (continuing the earlier discussion of basic legal concepts).


27 Cf. Singer, supra note 17, at 59 (juxtaposing the castle or ownership conception of property with the environmental or good neighbor conception).

28 UNGER, supra note 26, at 37-38.

29 Id. at 38.

30 Singer, supra note 17, at 60-61.


33 Id. at 91 (internal quotations omitted).

34 Id. (emphasis in the original, footnotes removed).

35 I am most grateful to Joseph William Singer for bringing this crucial point to my attention. See also PROPERTY AND COMMUNITY (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010), and the essays collected therein.

36 For additional information on social-legal relationships, see WILLIAM TWING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 1-7 (2009), http://www.ucl.ac.uk/laws/academics/profiles/twing/gen_juris.pdf.

37 See Steven L. Hunter, The Human Challenges of Climate Change, in HARD CHOICES: CLIMATE CHANGE IN CANADA 45 (Harold Coward & Andrew J. Weaver eds., 2004) (arguing that changing land use and increased fossil fuel consumption are primary contributors to GHG).

38 Cf. Singer, supra note 37, at 50 (noting that it will be necessary “to find a way to maintain a reasonable level of global economic output while reducing our level of fossil-fuel energy consumption”).
(Terrestrial Carbon); TNC (Integrated Incentives); WHRC (Stock-Flow with Targets).

43 See id. at 20.

44 See id. at 26-27.


46 See id. at 3(3) (“The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation . . . .”).

47 See id. at 3(4) (“The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session or as soon as practicable thereafter, decide upon modalities, rules and guidelines as to how, and which, additional human-induced activities related to changes in greenhouse gas emissions by sources and removals by sinks in the agricultural soils and the land-use change and forestry categories shall be added to, or subtracted from, the assigned amounts for Parties included in Annex I . . . .”).


50 See id. at Decision 1/C.P.6 Box C. Land-use, Land-use change and forestry ("Parties agree that for the implementation of Article 3.3 [of the Kyoto Protocol] ‘forest’ is defined in accordance with the FAO definition;”); see also The Forest Resources Assessment Programme, Food & Agric. Org. of the United Nations, http://www.fao.org/docrep/007/ac217e/ac217e00.htm (last visited Feb. 3, 2010) (defining forests as “Land with tree crown cover (or equivalent stocking level) of more than 10 percent and area of more than 0.5 hectares (ha). The trees should be able to reach a minimum height of 5 meters (m) at maturity in situ. May consist either of closed forest formations where trees of various stories and undergrowth cover a high proportion of the ground; or open forest formations with a continuous vegetation cover in which tree crown cover exceeds 10 percent. Young natural stands and all plantations established for forestry purposes which have yet to reach a crown density of 10 percent or tree height of 5 m are included under forest, as are areas normally forming part of the forest area which are temporarily unstocked as a result of human intervention or natural causes but which are expected to revert to forest.”).


53 See id. at 1/C.P.13 1(b)(iii).


56 The Copenhagen Accord also provided “new and additional resources ... approaching USD 30 billion” during 2010 to 2012 on climate change mitigation approaches including REDD+ programs. See COP-15 Addendum-Two, supra note 55, at 2/C.P.15.6, 2/C.P.15.8. During COP-15, REDD was discussed in two bodies, SBSTA-31 and AWG-LCA-8. The REDD text recognized by the Copenhagen Accord was from the SBSTA-31, which produced draft text on the methodological issues of REDD. However, the Copenhagen Accord did not include the AWG-LCA-8 draft text on policy approaches and positive incentives of REDD. See, e.g., United Nations Framework Convention on Climate Change, 15th Conference of the Parties, Copenhagen, Den., Dec. 7-19, 2009, Methodological Guidance for Activities Relating to Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries, Subsidiary Body for Scientific and Technological Advice, Draft decision -/CP.15 (Advanced unedited version), http:// unfccc. int/files/na/application/pdf/cop15_ddc_auv.pdf (illustrating the SBSTA draft text that would be incorporated into the Copenhagen Accord); United Nations Framework Convention on Climate Change, 15th Conference of the Parties, Copenhagen, Den., Dec. 7-19, 2009, Policy Approaches and Positive Incentives on Issues Relating to Reducing Emissions from Deforestation and Forest Degradation in Developing Countries; and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries, Ad Hoc Working Group On Long-Term Cooperative Action Under The Convention, Eighth session, Draft decision -/CP.15, U.N. Doc. FCCC/AGWCLA/2009/L.7/Add.6 (Dec. 15, 2009) http:// unfccc.int/resource/docs/ docs/2009/agwclac8/eng/07ab06.pdf (illustrating the deficiencies in the AWG-LCA, which does not implement (1) target measures to stop deforestation, (2) long-term finance commitments, (3) strong safeguards, (4) strong mitigation tools to prevent leakage, or (5) discuss free, prior and informed consent by indigenous peoples); COP-15 Addendum-Two, supra note 55 (illustrating the incorporation of the SBSTA draft text but lack of incorporation of the AWG-LCA draft text into the Copenhagen Accord).

The concern over these deficiencies were reinforced when over twenty thousand people and one hundred twenty-five countries attended The World People’s Conference on Climate Change and the Rights of Mother Earth hosted by the government of Bolivia in April 2010. See Andres Schipani, Evo Morales’ Message to Grassroots Climate Talks – Planet or Death, GUARDIAN (Apr. 21, 2010, 16:19 BST), http://www.guardian.co.uk/environment/2010/apr/21/ evo-morales-grassroots-climate-talks. The World People’s Conference voiced ardent concern over the developments occurring under the UNFCCC generally, the definition of forests, and the progression of the market based REDD program. See, e.g., World People’s Conference on Climate Change and the Rights of Mother Earth, Cochabamba, Bol., Apr. 22, 2010, Peoples Agreement (2010) http://pwccc.wordpress.com/support/ (“The definition of forests used in the negotiations of the United Nations Framework Convention on Climate Change, which includes plantations, is unacceptable. Definition of forests should not include or permit plantations, monoculture plantations are not forests. Therefore, we require a definition for forests that recognizes the native forests, jungles and the diverse ecosystems on Earth.” “We condemn market mechanisms such as REDD (Reducing Emissions from Deforestation and Forest Degradation) and its versions + and + +, which are violating the sovereignty of peoples and their right to prior free and informed consent as well as the sovereignty of national States, the customs of Peoples, and the Rights of Nature.”).


58 Id.

59 Id. at III.C.70.

60 See id. at III.C.71(a).

61 Id. at III.C.71(c).

62 Id. at III.C.72.

63 See id. at III.C.

that there are uncertainties in both the estimated rate of deforestation and with forest carbon stocks).

65 See Parker et al., supra note 42, at 21.


68 See id.


70 See Parker et al., supra note 42, at 21.

71 See id.


74 Kyoto Protocol, supra note 45, at art. 3(3).

75 See generally id.


77 Id. ¶ 16.


80 Id. at 3.

81 See id. at 5-6 (noting the variances in forest definitions among countries).

82 Kyoto Protocol, supra note 45, at art. 12.

83 U.S. Gov’t. Accountability Office, supra note 67, at 35.


85 Ramsey, supra note 67, at 21.

86 Office of Air and Radiation, supra note 84, at 3.

87 See COP-9 Report, Part Two, supra note 78, at -/CMP.1 Annex A.1.(e) (defining leakage as “the increase in greenhouse gas emissions by sources which occurs outside the boundary of an afforestation or reforestation project activity under the CDM which is measurable and attributable to the afforestation or reforestation project activity”).

88 DeFries et al., supra note 66, at 35.


90 Id.

91 See id. (explaining how when trees reach maturity they are also saturated at which point the tree must be maintained to maintain the saturation and thus prevent the sequestered carbon from recentering the atmosphere).

92 Ramsey, supra note 67, at 20.


94 Office of Air and Radiation, supra note 84, at 3.


97 Kyoto Protocol, supra note 45, at art. 3(3), 3(4).

98 COP-6, supra note 49. See also Lavanya Rajamani, Re-Negotiating Kyoto: A Review of the Sixth Conference of the Parties to the Framework Convention on Climate Change, 12 Colo. J. Int’l Envtl. L. & Pol’y 201, 223 (2001) (“At COP-6, the Umbrella Group argued in favor of including additional activities in the first commitment period. However, the [Alliance of Small Island States] (AOSIS) and the European Union (EU) opposed it.”).

99 COP-7 Report–Part Two (Volume I), supra note 51.

100 COP-13 Addendum-Two, supra note 52, at 2/CP.13.11.


102 COP-16 AWG-LCA, supra note 57, at III.C.

103 See COP-13 Addendum-Two, supra note 52, at 1/CP.13, ¶ (b)(iii) (“Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries”); COP-15 Addendum-Two, supra note 55, at 4/CP.15 (“We recognize the crucial role of reducing emission from deforestation and forest degradation and the need to enhance removals of greenhouse gas emissions by forests and agree on the need to provide positive incentives to such actions through the immediate establishment of a mechanism including REDD-plus, to enable the mobilization of financial resources from developed countries.”); COP-16 AWG-LCA, supra note 57, at III.C (noting the inclusion of the role of conservation and sustainable management of forests with REDD+).


108 Good Practice Guidance for Land Use, Land-Use Change and Forestry, supra note 106.

109 About REDD+, supra note 11.

110 See Meine van Noordwijk et al., Reducing Emissions from All Land Uses (RELLU): The Case for a Whole Landscape Approach, ASB Policy Brief 13, (ASB Partnership for the Tropical Forest Margins, Nairobi, 2009), at 2, http://www.asb.cgiar.org/pdfwebdocs/ASBPB13.pdf (defining the following “REDD: Reducing emissions from (gross) deforestation; only changes from ‘forest’ to ‘non-forest’ land cover types are included, and details depend very much on the operational definition of ‘forest’. REDD+: REDD and (forest) degradation, or the shifts to lower carbon stock densities within the forest; details depend very much on the operational definition of ‘forest’. REDD++: REDD and restocking within and towards ‘forest’ (as specified in the Bali Action Plan); in some versions REDD++ will also include peatlands, regardless of their forest status; details still depend on the operational definition of ‘forest’ and defining REALU which includes REDD+ and all transitions in land cover that affect carbon storage, whether peatland or mineral soil, trees-outside-forest, agroforests, plantations or natural forests. It does not depend on the operation definition of ‘forest’.”).

111 2006 IPCC Guidelines for National Greenhouse Gas Inventories, supra note 107, at 1.5.

112 van Noordwijk et al., supra note 110, at 2.

113 See Nophea Sasaki, What are REDD, REDD++ and REDD+++?, http://nopheasasaki.net/papers/2010/nopheasasaki_REDD.pdf ("REDD++: This is to prevent the conversion of low-carbon but high biodiversity forest lands (reaching minimum threshold of forest definition) for intensive agricultural cultivation or other short-term benefit practices when high carbon-stock forests are guarded for REDD+ benefits.").


115 Neef et al., supra note 79, at 6; COP-9 Report-Part Two, supra note 78, at 19/CP.9 Annex F. Participation requirements, ¶ 8.

Winter 2011
The “Gift” that Keeps on Giving: Climate Change

Robert H. Cutler

The Making and Unmaking of the Copenhagen Accord

See generally COP/MOP-1 Report-Part Two, supra note 51, at Decision 16/CMP.1 Annex Definitions A(1)(a).

Id.


Stickler et al., supra note 161, at 421.

Id.

Id. at 416.

Id.

217 Stickler et al., supra note 161, at 2806.

Id.

Id.


Pimentel et al., supra note 169, at 411.

216 COP-16 AWG-LCA, supra note 57, at III.C; Good Practice Guidance for Land Use, Land-Use Change and Forestry, supra note 106.

225 COP/MOP-1 Report-Part Two, supra note 51, at Decision 16/CMP.1 Annex Definitions A(1)(a).


227 COP-16 AWG-LCA, supra note 57, at III.C; Good Practice Guidance for Land Use, Land-Use Change and Forestry, supra note 106.

213  Pimentel et al., supra note 169, at 421.

Pimentel et al., supra note 169, at 421.

214  Stickler et al., supra note 161, at 2806.

Id.

215  Pimentel et al., supra note 169, at 421.


Pimentel et al., supra note 169, at 421.

216 COP-16 AWG-LCA, supra note 57, at III.C; Good Practice Guidance for Land Use, Land-Use Change and Forestry, supra note 106.

225 COP/MOP-1 Report-Part Two, supra note 51, at Decision 16/CMP.1 Annex Definitions A(1)(a).


227 COP-16 AWG-LCA, supra note 57, at III.C; Good Practice Guidance for Land Use, Land-Use Change and Forestry, supra note 106.

ENDNOTES: THE TORTUOUS ROAD TO LIABILITY continued from page 36


7 Id. at 24 (“No collective challenge facing humanity has ever before attracted such attention, participation and political capital . . . .”). See also Robert H. Cutting & Lawrence B. Cahoon, The “Gift” that Keeps on Giving: Climate Change Meets the Common Law, 10 VT. J. ENV’T. L. 109, 111 (2008) (“Global warming issues have captured an Oscar, the Nobel Prize, and the attention of mainstream media and main street America.”).


11 Id. at 1005.


13 Id. at 10651.


16 42 U.S.C. § 7521(a)(1) (2006) (“The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”).

17 See Markell & Ruhl, supra note 12 (providing that no fewer than 52 cases involving climate change regulatory issues have been brought since December 31, 2009).


19 See Christopher R. Reeves, Climate Change on Trial: Making the Case for Causation, 32 AM. J. TRIAL ADVOC. 495, 497-503 (2010).
Substantial Interest Requirement for Judicial Review of Planning Decisions

tial interest theory in connection with environmental law, see Rónán Kennedy, council on human RiGhts policy

42 Randall S. Abate, Symposium, 41

The case is now pending before the Supreme Court of the United States (No. reversing


32 An international framework for allocating responsibility for damage that has and will occur due to global warming has been upheld, among others, in Sierra Club v. Morton, 405 U.S. 727, 741-52 (1972) (Douglas, J., dissenting) (elaborating the classic U.S. theory for environmental standing by arguing that standing should be accorded when claims are brought “in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage”).


30 Sienna Club v. Morton, 405 U.S. 727, 741-52 (1972) (Douglas, J., dissenting) (elaborating the classic U.S. theory for environmental standing by arguing that standing should be accorded when claims are brought “in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage”).

29 John Schwartz, Climate Change, the United States and the

28 John Schwartz, Climate Change, the United States and the

27 Hari M. Osofsky, Human Rights Seeking Relief From Violations Resulting From Global Warming


23 Id. at 935.

22 Id.

21 Josephine Steiner, Lorna Woods & Christian Twigg-Flesner, E.U. LAW 3 (2006) (illustrating that the EU arose from the European Economic Community, which itself evolved out of the European Coal and Steel Community, established in 1951).


18 By way of example, art. 6(2) of the Lisbon Treaty (entered into force on December 1, 2009, now art. 6(2) of the Treaty on European Union), provides: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” When realized, it is expected that this change will bring significant improvement for the European framework of human rights protection.

17 For the primacy of the economic aspects underlying the European Union framework, see Alex Warleigh-Lack, European Union: The Basics 60 (2004).


13 Id. at 13, 16, 27.


8 Id.

7 Id. Ghaleigh, supra note 58, at 28-29.


5 Frank J. Convery, Origins and Development of the EU ETS, 43 ENVTL. & RESOURCE ECON. 391, 407 (2009) (“[T]he EU is the initiator and the operator of the world’s first and largest international emissions trading scheme.”).

See, e.g., the observations of Lord Hoffmann, according to whom some legal decisions (those concerning the allocation of resources, for example) should be deferred by judges to the Government. Secretary of State for the Home Department v. Rehman, [2001] UKHL 47, [62].


Culter, supra note 32, at 115 (agreeing with the idea that regulation and allocation of greenhouse gases emissions would not be sufficient to mitigate global warming).

Id.


See MONIKA HINTEREGGER, ENVIRONMENTAL LIABILITY AND ECLOGICAL DAMAGES IN EUROPEAN LAW (2008).

The Lugano convention was adopted on June 21, 1993 within the framework of the Council of Europe.

Under Article 2.7(d), the definition of damages for the purposes of the Convention also includes “the costs of preventive measures and any loss or damage caused by preventive measures.”


See Watt-Cloutier, supra note 45.

See id. at 1.

See id. at 6.


See Kyttaros v. Greece, 40 Eur. H.R. Rep. 16 (2003) (holding that there had been no violation of article 8 as the applicants had not been directly affected by urban development in the south-eastern part of the island of Tinos, which had changed the area from a wild natural habitat to a tourist attraction).


See Aminzadeh, supra note 95, at 238.

See id. at 262-64.

See id.


Id. at 240 (admitting that “defendants may not be selected based on moral culpability or the ease and efficiency with which they can abate their harmful activity”).


endnotes: Hazy Skies in America’s Future? The Battle Between “Free Industry” and Clean Air
continued from page 37


4 See Schoof, supra note 3.

5 Since Democrats retain control over the Senate and Presidency, any Republican efforts to eliminate EPA regulatory authority will probably fail. Republicans are posturing for the 2012 elections and setting an agenda early. Should Republicans gain control of the Senate, it is likely that laws similar to H.R. 97 will pass during the 113th Congress. See generally OMB WATCH, supra note 1 (highlighting that Republicans are fulfilling their campaign promises by attacking specific regulations and the rulemaking process itself); see also Nick Wing, Fred Upton’s EPA Battle: Incoming Energy Chair Announces Plan to Stymie Carbon Regulations, HUFFINGTON POST (Dec. 30, 2010, 1:15 AM), http://www.huffingtonpost.com/2010/12/30/fred-upton-epa-carbon-emissions_n_802295.html (noting that the chairman of the House Energy and Commerce Committee intends to use his position to fight EPA regulations); Kasie Hunt, Republicans are posturing for 2012, GOP Turn to Climate Change, Time, Fox NEWS (Feb. 2, 2011), http://www.foxnews.com/us/2011/02/02/house-gop-readies-ban-epa-greenhouse-gas-regulations/ (establishing that critics of EPA regulations do not believe that the evidence proving the negative impacts of climate change are conclusive).

6 See Understanding the Clean Air Act, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/air/peg/underline (last visited Feb. 12, 2011) (discussing the passage of the 1970 version of the Clean Air Act and the subsequent creation of the EPA, to which Congress gave the primary authority of enforcing the provisions of the Clean Air Act).


8 The 1990 amendments to the Clean Air Act were far broader than the 1977 amendments. The 1990 amendments were instrumental in expanding the federal governments control over acid rain deposition and emission of other toxic pollutants. After the 1990 amendments, EPA had far more enforcement authority due to new permitting standards. There was also significant concentration on the elimination of chemicals that depleted the ozone layer. See S.1630, 101st Cong. (1990) (enacted) http://thomas.loc.gov/cgi-bin/query/F?c101:5:./;temp;c101kCQZqGq; etc; see also History of the Clean Air Act, supra note 7.


15 See Industry Jobs, AM. PETROLEUM INST., http://energytomorrow.org/issues/economy-industry-jobs/ (last visited Feb. 12, 2011) (stating that the oil and gas industries directly employ 2.1 million people); see also PRICEWATERHOUSECOOPERS, THE ECONOMIC IMPACTS OF THE OIL AND NATURAL GAS INDUSTRY ON THE U.S. ECONOMY: EMPLOYMENT, LABOR INCOME AND VALUE ADDED tbl. 2 (2009), http://www.ipi.org/Newsroom/upload/Industry_Economic_Contributions_Report.pdf (providing statistics that indicate the total employment provided by the oil and gas industries is 9.2 million when all supporting industries are included).


18 The employment figures used in this article only take account of the people directly employed by the respective industrial sectors mentioned above. “Supporting industries,” as used in this article, refers to industries that are inter-related with a specific industry so much so that the livelihood of a “supporting industry” depends considerably upon the success of its “parent industry.” For instance, according to figures provided by the American Petroleum Institute, the oil and natural gas industry directly employs 2.1 million Americans, but employs 9.1 million Americans when we take account of “supporting industries.” See Industry Jobs, supra note 17.

19 See James Heintz, Heidi Garrett-Peltier, & Ben Zipperer, State GHG Actions of EPAs Proposed Ozone Standard, 9 (June 8, 2010), http://www.mapi.org/Resource-Center/Facts-About-Manufacturing/Landing.aspx (providing statistics that indicate the total employment provided by the oil and gas industries is 9.2 million when all supporting industries are included).


21 One federal regulatory standard that is applicable across all states would be more uniform than various laws that differ from state to state. As the chart referenced below indicates, some states already have stricter standards, others have less stringent ones, and still others have none at all. See Amy Royden Bloom, NAT’L ASSOC. OF CLEAN AIR AGENCIES, STATE GREENHOUSE GAS (GHG) ACTIONS, (Jan. 16, 2008), http://www.4cleanair.org/documents/statethghgactions-chart.pdf.
This is a classic “race-to-the-bottom” argument, where in the face of economic competition governmental entities (nations, states, cities, etc.) relax their regulatory standards to promote economic growth in their jurisdiction. This idea gained recognition in the U.S. after Justice Louis Brandeis discussed it in his dissenting opinion in Liggert Co. v. Lee, 288 U.S. 517, 558-60 (1933) (Brandeis, J., dissenting).


See McCarthy, supra note 16, at n.31 (discussing the Obama administration’s efforts to seek international reduction of global GHG emissions, and the central role that U.S. emissions reductions play in the international process).

See OMB Watch, supra note 1; Cappiello, supra note 1 (citing several House and Senate measures aimed at limiting the EPA’s ability to enforce regulations GHG).


Congress has acted in a similar fashion with respect to EPA authority in the 1977 and 1990 amendments to the Clean Air Act. See McCarthy, supra note 16, at 13.

ENDNOTES: AFRICA AND THE CLIMATE CHANGE AGENDA: HURDLES AND PROSPECTS IN SUSTAINING THE OUTCOMES OF THE SEVENTH AFRICAN DEVELOPMENT FORUM continued from page 44


Id. at pmbl., ¶ 4.

Id. at pmbl., ¶ 6.

Id. at pmbl., ¶ 8.

Id. at pmbl., ¶ 13.

Id. at pmbl., ¶ 15.


70 Congress has acted in a similar fashion with respect to EPA authority in the 1977 and 1990 amendments to the Clean Air Act. See McCarthy, supra note 16, at 13.


See Seventh African Development Forum, supra note 4, ¶ 1.


See McCarthy, supra note 16, at 11.


Consensus Statement, supra note 39, at 4.

Consensus Statement, supra note 39, at 4.

Id.

Id.

Id.

Id.


Id.

Id.

Id.

Id.


Winter 2011


101 See FAO, supra note 6.


106 See Report on Climate Change and Development, supra note 2, at 3.


108 See, e.g., S. Tong, *Poor Man’s Burden, supra note 107.

109 Arguably, by financing the numerous land deals, which have resulted in millions of Africans continually losing their arable lands to private investors, the World Bank is fuelling climate change on the continent. See MacFarquhar, supra note 93.

110 For instance, on April 9, 2010, the World Bank granted a loan of (USD 3.75 billion) to the South African electricity utility, Eskom, to develop the world’s fourth largest coal-fired power plant. This decision did not go well with environmental activists, who rightly argued that it clearly conflicts with the global resolve to fight against climate change. See Annika Lindorsson Krugel, *The World Bank vs Climate Change, Poverty and Corruption* (Apr. 12, 2010), http://www.suite101.com/content/renewable-energy-given-the-boot-as-leading-party-pockets-profit-a226337.

111 The CTF, which finances scaled-up demonstration, deployment, and transfer of low-carbon technologies with significant potential for reducing emissions, is largely funded by the governments of Australia, France, Germany, Japan, Spain, Sweden, the United Kingdom, and the United States. It is expected to channel (through the ADB) up to USD 625 million for clean technology projects in Africa. See ADB, *Status of Involvement of the Bank in the Climate Investment Funds* (Jul. 2010), at 1-3, [hereinafter Status of AIDB Involvement in CIFs]; see also, e.g., Gbenga Lawal, see supra note 6.

112 The SCF, which finances various targeted programs to pilot new climate change action projects, with a possibility of scaling up, has three components: (1) the Pilot Program for Climate Resilience, designed to support countries to scale up climate action and transformational change by integrating climate resilience in their national development plans (currently benefiting Mozambique, Niger, and Zambia); (2) the Forest Investment Program, designed to significantly reduce emissions from deforestation and forest degradation and promote improved sustainable management of forests (currently benefiting Burkina Faso, the Democratic Republic of Congo, Ghana, and Liberia); and (3) the Scaling Up Renewable Energy Program, aimed at piloting energy sector transformation projects (set to benefit Ethiopia, Kenya, and Mali). For in-depth insights into the Fund, see Strategic Climate Fund, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/listing/strategic-climate-fund-update (last visited Nov. 28, 2010).

113 The Kyoto Protocol Adaptation Fund, which finances adaptation projects in developing countries that are parties to the Kyoto Protocol, was established at COP-7 in 2001 and operationalized in 2009. Administered by an independent Board, it is funded with a share of proceeds from the Clean Development Mechanism ("CDM") projects, as well as voluntary pledges by donor governments. Africa’s benefit currently stands at 59.8% of the total project expenditure of the Fund. See Sénégal’s “Adaptation to Coastal Erosion in Vulnerable Areas” is one of the two inaugural projects funded by the Fund, the other being Honduras’ “Addressing Climate Change Risks on Water Resources.” See Adaptation Fund, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/listing/adaptation-fund (last visited Nov. 28, 2010).

114 The CBFF, was “set up in June 2008 to take early action to save forests in the Congo Basin,” Africa’s biggest carbon sink. While complementing existing activities, it aims at: 1) supporting “transformative and innovative proposals which will increase the capacities of peoples and institutions to enable them to manage their forests;” 2) helping “local communities find livelihoods that are consistent with forest conservation;” and 3) reducing the rate of deforestation. Financed by the British and Norwegian governments, it benefits the ten Central African Forests Commission member countries: Burundi, Cameroon, Chad, the Central African Republic (“CAR”), the Democratic Republic of Congo (“DRC”), Equatorial Guinea, Gabon, Rwanda, and Sao Tome and Principe. For further insights, see Congo Basin Forest Fund, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/listing/congo-basin-forest-fund (last visited Nov. 28, 2010).
The FCPE, which was established in December 2007 (and operationalized in June 2008), is intended “to assist developing countries in their efforts to reduce emission from deforestation and land degradation.” Africa’s benefit share stands at 25.5% of the Facility’s total projects expenditure. So far, it is benefiting fourteen African countries (Cameroon, CAR, Congo, the DRC, Equatorial Guinea, Ethiopia, Gabon, Ghana, Kenya, Liberia, Madagascar, Mozambique, Tanzania, and Uganda). See Forest Carbon Partnership Facility, Climate Funds Update, http://www.climatefundsupdate.org/listing/forest-carbon-partnership-facility (last visited Nov. 28, 2010).

The GEF Trust Fund, which is primarily funded by the United States, Japan, Germany, the UK, France, and Canada, has a climate change focal area which supports, inter alia, renewable energy projects, energy efficient technologies, new low-emission technologies, and sustainable transportation. In its fourth phase, covering the period 2006-2010, 14.1% of the total projects were in Africa. The continent is expected to benefit even more in the fifth phase, 2010-2014. See Global Environment Facility Trust Fund – Climate Change Focal Area, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/listing/gef-trust-fund (last visited Nov. 28, 2010).

The GCCA is an initiative of the European Union (“EU”) which aims at building a new alliance between the EU and poor developing countries most affected by, and with the least capacity to deal with, climate change. Africa is the biggest beneficiary of the initiative, taking home about 69.2% of the total project expenditure. So far, the initiative has benefited eight African countries (Mali, Mauritius, Rwanda, Senegal, Seychelles, and Tanzania). For insights, see Global Climate Change Alliance, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/listing/global-climate-change-alliance (last visited Nov. 28, 2010).

The LDCF, which aims at addressing the special needs of LDCs, “which are especially vulnerable to the adverse impacts of climate change,” including preparation and implementation of National Adaptation Programmes of Action, was proposed at COP-7 and operationalized at COP-8 (New Delhi, India, Oct. 23 – Nov. 1, 2002). It is managed by the Global Environment Facility (“GEF”), the multilateral environmental initiative that brings together over 180 UN Member States and ten partner institutions. So far, it has benefited over twenty-five African countries, including Angola, Burkina Faso, Burundi, the CAR, Cape Verde, Chad, Comoros, Congo, Djibouti, the DRC, Eritrea, Ethiopia, the Gambia, Guinea Bissau, Lesotho, Liberia, Malawi, Mali, Niger, Rwanda, Sierra Leone, Senegal, the Sudan, Tanzania, Uganda, and Zambia. For insights into the Fund, see Least Development Countries Fund, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/listing/least-developed-countries-fund (last visited Nov. 28, 2010). For insights into the details of funding, see Funded Projects, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/projects (last visited Nov. 28, 2010).

The SCCF, whose establishment was proposed at COP-7, was operationalized at COP-8. Managed by GEF, it funds “long-term adaptation measures that increase the resilience of [developing countries]’ national development sectors to the impacts of climate change.” Africa currently takes home about 26.5% of the total project expenditure, benefiting, among others, Egypt, Ghana, and Kenya. See Special Climate Change Fund, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/listing/special-climate-change-fund (last visited Nov. 28, 2010).


African leaders generally feel that the continent is not enjoying equitable access to the funds, especially those funded under the Clean Development Mechanism (“CDM”). The leaders blame this on non-inclusion (in the CDM financing package) of emissions from agriculture and other land use practices, which arguably form important parts of the continent’s economy. See Ramesh Jaura, Africa Paves the Way for Climate for Development, ISD/INNENews (Oct. 23, 2010), http://www. indepenews.net/news/news.php?key1=2010-10-23%2017:07:57&key2=1 (arguing that while Brazil, Mexico, India, and China enjoy hundreds of projects funded under the CDM, Africa has only a handful of such projects).


The GEF Trust Fund, which is primarily funded by the United States, Japan, Germany, the UK, France, and Canada, has a climate change focal area which supports, inter alia, renewable energy projects, energy efficient technologies, new low-emission technologies, and sustainable transportation. In its fourth phase, covering the period 2006-2010, 14.1% of the total projects were in Africa. The continent is expected to benefit even more in the fifth phase, 2010-2014. See Global Environment Facility Trust Fund – Climate Change Focal Area, CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/listing/gef-trust-fund (last visited Nov. 28, 2010).

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22. Id.
23. REFIT, supra note 1, at 1.
27. Id. A terrawatt hour is an electrical unit equal to one trillion (1012) watts (1,000,000 megawatts) used for one hour.
29. Id.
30. Sovacool, supra note 14.
32. Sovacool, supra note 14.
33. REFIT, supra note 1, at 4.
36. eReact Making Progress in South Africa, supra note 34.
37. Id.
38. Rabinowitz, supra, note 35.
39. Id.
41. REFIT, supra note 1, § 3.5(iV).
43. REFIT, supra note 1.
44. Id. at 1.
45. Id.
46. Sovacool, supra note 14.
47. Id.
48. REFIT, supra note 1.
49. Id.
50. Id.
51. Id. § 3.
52. Id. § 3.1.
53. Id. § 3.2.
55. REFIT, supra note 1, § 3.3.
56. Id.
57. Id. § 5.5(ii).
58. Id. § 4.4 (“With the aid of supporting the wider green electricity market and ensuring flexibility in the market, renewable energy IPPs are permitted to sell power direct to buyers wishing to purchase renewable energy outside of the REFIT.”).
59. Id. § 5.5(iii).
60. Id. § 3.5(v).
61. Id. § 3.6.
62. Id. § 4.5.
63. Id.
64. See generally Randall Spalding-Fecher et al., The Economics of Energy Efficiency for the Poor—A South African Case Study, 27 ENERGY 1099 (2002); Gilbert Meehereburua, Acting Against Energy Poverty In Africa (2009), http://www.g8energy2009.it/pdf/27.05/Acting_against_energypoverty_and_crisis%20in%20Africa-Ram.pdf.
65. Id.
66. Id.
68. Sovacool, supra note 13, at 1536.
69. NERSA CONSULTATION PAPER, supra note 10.
70. REFIT, supra note 1.
71. Id. § 5.5(i).
72. Id.
73. Id. § 5.5.
75. REFIT, supra note 1, § 5.7.
77. REFIT, supra note 1, § 6.4.
78. See NERSA CONSULTATION PAPER, supra note 10, at 4.
79. REFIT, supra note 1, § 7.4.
80. Id.
81. Id. § 7.5.
82. Id.
83. Id. § 7.6.
85. REFIT, supra note 1.
86. Id. § 8.5.
87. Id.
88. Id. § 11.4(iii).
89. Spalding-Fecher et al., supra note 64.
90. REFIT, supra note 1, § 12.
91. Electricity Regulation Act 4 of 2006 § 42(3) (S. Afr.).
92. Id. § 42(4).
93. Id. § 42(1)-(2).

EndNotes: National Security in the 21st Century: How the National Security Council Can Solve the President’s Climate Change Problem continued from page 55

17. See generally Hansen et al., supra note 1; Flannery, supra note 1.
18. Flannery, supra note 1, at 161.
19. See id. (questioning the IPCC findings and explaining the likelihood that modeling data is understimating the actual impacts of climate change, possibly from a lack of understanding about feedback loops).
20. See, e.g., Hansen et al., supra note 1, at 13, 16 (promoting the aggressive pursuance of 350 ppm CO2 targets in order to avoid irreversible dynamic alterations to climate based on observations of paleoclimate data).
21. E.g., Flannery, supra note 1, at 155 (explaining that ten GCMs currently exist in the world, where researchers create global climate modeling systems based on massive data inputs to create computer programs that accurately recreate previous, i.e. known, weather events and climate changes, thereby proving the accuracy of the modeling program to accurately predict future climate changes, and that the leading one is the Hadley Centre in England).
22. Id. at 155-56.
23. Id.
24. Id. at 28-29.
25. Bernstein et al., supra note 4, at 45 (providing data from IPCC Special Report on Emissions Scenarios 2000 with projections varying between 1.8°C and 4.0°C).
26. E.g., Flannery, supra note 1, at 161 (explaining that CO2 levels at the end of the last ice age increased by only one hundred ppm yet resulted in 9°F increase in average global surface temperatures).
See, e.g., DAVID TILLEY, Rear Admiral, United States Navy, Presentation at the American Meteorological Society Climate Briefing Series: Climate Change & National Security (June 4, 2010), http://www.ametsoc.org/atmospolicy/climat-ebriefing/titley.html (explaining real anticipated challenges to Naval operations in the next century in adapting to climate change, and advocating for efforts to mitigate changes, including a commitment by the Secretary of the Navy to reduce the Navy’s carbon footprint by twenty percent by 2020 from 2008 levels).

See, e.g., TILLEY, supra note 30 (explaining concerns that accompany the Navy’s forecast that the Arctic will be ice-free for approximately four to six weeks each year by the mid to late 2030s).

See, e.g., BERNSTEIN ET AL., supra note 4, at 114 (citing FREDERICK K. LUTGENS & EDWARD J. TARBICK, THE ATMOSPHERE: AN INTRODUCTION TO METEOROLOGY (Pearson Prentice Hall 2004)).

See, e.g., BERNSTEIN ET AL., supra note 4, at 11 (projecting regionalized impacts of climate change).

FLANNERY, supra note 1, at 140 (citing FREDERICK K. LUTGENS & EDWARD J. TARBICK, THE ATMOSPHERE: AN INTRODUCTION TO METEOROLOGY (Pearson Prentice Hall 2004)).

Id. at 140.

FLANNERY, supra note 1, at 131 (referring to the ongoing drought of the U.S. West, which in 2004 was in its fifth year of drought, and drawing parallels to Darfur, Sudan, noting that such severe hot and dry conditions had not been seen in the region in 700 years).

Id.

Id.

See CNA CORP., supra note 28, at 16-18 (explaining the security consequences of the destabilizing effects of climate change).

Id.

See, e.g., BERNSTEIN ET AL., supra note 4, at 16 (mentioning both Hezbollah in Lebanon and the gang First Capital Command in Brazil as examples of how extra-governmental extremists fill the power vacuum when large populations are left without the basic benefits of government).

E.g., CNA CORP., supra note 28, at 16 (pointing to the examples of the Rwandan genocide resulting from insufficient agricultural resources and ongoing situation in Darfur, which began as a conflict between farmers and ranchers over scarce food and water supplies).


E.g., CNA CORP., supra note 28, at 16 (mentioning both Hezbollah in Lebanon and the gang First Capital Command in Brazil as examples of how extra-governmental extremists fill the power vacuum when large populations are left without the basic benefits of government).

PARTHEMORE & ROGERS, supra note 44, at 5.

LILIANA HISAS, THE FOOD GAP: THE IMPACTS OF CLIMATE CHANGE ON GLOBAL FOOD PRODUCTION: A 2020 PERSPECTIVE, at iii, 6, 12-35 (2011), http://www.cnea.coop/assets/2011/01/19/document_cw_02.pdf (explaining the likelihood, based on the IPCC’s own data and projections, that Earth will experience a 2.4°F increase in temperature by 2020 based on current business-as-usual patterns, likely resulting in global food shortages); Accord CNA CORP., supra note 28, at 16 (commenting that forty percent of the world population will live in a country experiencing significant water shortages by the year 2025).


E.g., FLANNERY, supra note 1, at 161 (urging climate change action by the United States, during the Bush Administration, despite claims of concern about “uncertainty” in the science, on the grounds that massive scientific advances over thirty years of climate research have not dramatically reduced uncertainty, since humanity cannot absolutely predict the future).

E.g., JEFFREY MAZO, Research Fellow for Envtl. Sec. & Sci. Policy, Int’l Inst. for Strategic Studies, Presentation at the American Meteorological Society Climate Briefing Series: Climate Change & National Security (June 4, 2010) (explaining that many countries where climate change will likely have an adverse impact on global terrorism are already vulnerable or failing states, so future failure will not be a surprise, but will multiply the threat faced; however, new threats from states that are not currently in danger of collapse, like North Korea, Indonesia, and Columbia, could be pushed that direction by severe water and food scarcity; hence multiplying threats that currently exist).


E.g., id. (quoting Retired Navy Admiral Joseph Lopez, explaining why climate change promotes terrorism risks and threatens U.S. national security into the future).

E.g., PARTHEMORE & ROGERS, supra note 44, at 19 (highlighting the importance of Yemen’s precarious increasing risk of drought because destabilization or a failed state in the Arab peninsula region would threaten regional trade routes and global security).

See CNA CORP., supra note 28, at 13 (explaining that even governments which appear stable may be unable to deal with climate change stresses and that ineffective government breeds extremism); see also FLANNERY, supra note 1, at 177, 288 (attributing the dense human population distributions in mountain valleys in tropical climates like Mexico City and Papua New Guinea, and not in the valleys below, to the occurrence of malaria in the massive forests below); PARTHEMORE & ROGERS, supra note 44, at 17-19 (supporting the proposition that these factors are connected).

CNA CORP., supra note 28, at 31 (quoting Retired Marine Corps General Anthony C. Zinni, the former Commander-in-Chief of U.S. Central Command, explaining the high price the United States will pay in the future—in human lives and U.S. dollars lost in the war on terror—if we do not instead choose now to spend our dollars to reduce greenhouse gas emissions).

Id.

See, e.g., FLANNERY, supra note 1, at 165 (highlighting challenges human- ity will face with only a global surface temperature rise of 3.6°F which would result in an 8.1°F increase for Europe, Asia, and the Americas).

E.g., CNA CORP., supra note 28, at 13 (asserting that even a modest rise in temperature of only 2° to 4°F can result in increased flooding with less snow and ice available for much needed runoff water in the dry summer months).


E.g., CNA CORP., supra note 28, at 15 (explaining that good health and access to fresh water are necessarily linked).

E.g., FLANNERY, supra note 1, at 177, 288 (raising concerns about what will happen to populations that are currently not exposed to malaria and have no immunity to the disease once a rapid exposure to the disease begins); CNA CORP., supra note 28, at 15 (finding an increase in disease and reduced overall health will result from temperature increases and other climate change impacts, as identified by the World Health Organization).

E.g., FLANNERY, supra note 1, at 124-27 (explaining that a “drought” is a temporary and transient lack of precipitation, but what is beginning to occur in regions around the planet is actually a new, drier, Saharan-like climate where there is no expectation that rain will return).
increased incidence of terrorism and extremism resulting from desperation.\footnote{Eg., Bernstein et al., supra note 4, at 13 (projecting a likely increase in the amount of area affected by drought, creating more widespread water stress, increased risk of food and water shortages and of water- and food-borne diseases, reduced ability to produce hydropower, and exacerbating the potential for large-scale population migrations).}

FLANNERY, supra note 1, at 124-27; CNA CORP., supra note 28, at 20.

E.g., CNA CORP., supra note 28, at 22 (explaining the geopolitical landscape of the future will be one of scarcity, exacerbating migrations to Europe and within Africa, which already increases tensions and adds to national security concerns).

FLANNERY, supra note 1, at 143.

See id. (explaining the planned construction of a “super dyke” in The Netherlands to protect the country from the rising oceans).

Id.

E.g., Titley, supra note 30 (asking “what will happen” to these hungry and displaced populations living under weak governmental regimes, and posing that military leaders believe such scenarios present increasing threats to U.S. security due to increased demands on humanitarian aid missions in addition to increased incidence of terrorism and extremism resulting from desperation).

Id.

The White House, supra note 2, at 26 (discussing how the United States can best go about advancing its own national interests).

See id. at 47 (calling for increased fuel efficiency standards and investment in renewable energy technologies with the goal of cutting U.S. emissions by seventeen percent by 2020 and more than eighty percent by 2050 as the (no doubt inadequate) solution).

Id.

Id.

Id.


Id. at 1-6.

See, e.g., Douglas T. Stuart, Foreword to Brown, supra note 76 (relating how Americans responded to the surprise attack on Pearl Harbor by desiring a new, high-level mechanism for coordination and implementation of policies that would effectively protect the United States from threats).

See Brown, supra note 76.


Id. (emphasis added).

See generally id. (providing no guidance as to what qualifies as national security issues, only requiring that strong unified efforts must be made to protect national security and a unified defense).

See National Security Act, 50 U.S.C. § 402(a) (2006) (emphasis added) (creating the National Security Council and establishing the broad purpose of the council to promote policies and activities increasing national security across all parts of the federal government).

See 50 U.S.C. § 402(b) (indicating the President was authorized to task the Council with other duties to advise and monitor the implementation of the policies created to protect the national security).

See, e.g., Brown, supra note 76, at 2-3 (explaining the sentiment of the Committee on Naval Affairs that the NSC must fill a policy advisory role lest it usurp the authority of the executive in holding power to direct foreign affairs in the name of national security).

E.g., id. at 39 (noting the authority Congress can assert when it believes the Executive is exceeding appropriate authority, as happened with the War Powers Resolution).

Id.

See 93 Cong. Rec. 9895 (July 21, 1947) (statement of Sen. Lodge) (expressing fear of an immobile and inflexible security program incapable of meeting the needs of a future war due to provisions insisted upon by the House that seemingly codified what general types of warfare tactics each service could engage in; arguing that Congress should not presume any ability to foresee the future by cementing such decisions in statute).

See Brown, supra note 76, at 3-4 (citing an exchange on the Senate floor between Senators Leverett Saltonstall and Ray Baldwin expressing that the purpose of the NSC would not be as an administrative agency, but solely as an advisory committee, found at 93 Cong. Rec. 8497 (July 9, 1947)).

See id. at 10, 81 (quoting Robert Cutler, the U.S.’s first National Security Advisor, that under the flexible framework in the NSA, “each President may avail himself of the mechanism in whatever way he finds best suited to his needs” and arguing that the NSC’s development was not the result of Congress but of powerful Executive actions necessarily resulting from the complicated task of coordinating and effectively implementing national security policies).

See id. at 11, 13, 17 (elucidating the policies and practices of each President in using and transforming the NSC since its inception, explaining the different approaches taken specifically by President’s Truman and Eisenhower, and referring to President Dwight D. Eisenhower’s Message to Congress (Apr. 3, 1958) (advocating for unifying changes so that in any future war the United States would fight “in all elements, with all services, as one single concerted effort” and advancing his belief that “peacetime preparatory and organizational activity must conform to this fact”) and Reorganization Plan No. 4 of 1949, 63 Stat. 1067 (eff. Aug. 20, 1949), which moved the NSC into the Executive Office of the President, and indicating that efforts by members of the NCS to establish themselves as implementers of policy was rejected by Truman).


See Brown, supra note 76, at 24-26 (referring Senator Jackson’s recommendation as Chairman of the Senate Government Operations Subcommittee on National Policy Machinery that a President use the NSC as an inner circle for policy and strategy debate rather than as a policy development bureaucracy and subsequent implementation bureaucracy following Presidential adoption of a policy).

E.g., Id. at 27-29 (citing NSAM-196, Establishment of an Executive Committee of the National Security Council (Kennedy, Oct. 22, 1962) which included all members of the NSC, specifically to ensure “effective conduct of the operations . . . in the current crisis”).

E.g., Id. at 7, 39 (explaining how Congress’s discomfort was evidenced by its assertion of authority in the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541 et seq.), which was passed in the aftermath of President Nixon’s fall from grace and stretched to the very limits its Constitutional power in limiting the authority of the Executive, and the 1974 Amendments to the Foreign Assistance Act of 1961 (Pub. L. No. 93-559, 88 Stat. 1795 (1974)); Christopher C. Shoemaker, The NSC Staff: Counseling the Council 18 (1991) (claiming that the NSC rebounded in the mid-1970s as it became clear that “only the White House could execute the coordination demanded by the mounting completion of the international system”).

Brown, supra note 76, at 47-59 (explaining the changes Reagan made to the NSC during his tenure and the facts surrounding the Iran-Contra affair, leading to Congressional oversight hearings and the reworking of the NSC structures and authority).

See id. at 55 (describing how the NSC became involved in implementing foreign policy through the sale of arms to Iran in exchange for hostages and the funneling of excess funds earned from the arms sales to Nicaraguan rebels, exceeding the scope of the authority to “advise” the President on national security policy and explaining the streamlined, smaller NSC organization with the “Senior Review Group” and the “Policy Review Group”).

Id. at 57-58 (explaining how the “Principles Committee” (“PC”), was made up of the Secretaries of State and Defense and the National Security Advisor, Chairman of the JCS, Director of Central Intelligence, and the President’s Chief of Staff, who were all able to implement the policy within their department once the group had reached a policy decision, and identifying the other two sub-groups within the NSC as the Deputies Committee—made up of the agency deputies to the principles, which was the primary policy group and the Policy Coordinating Committee, consisting of assistant secretaries in the departments—which primarily identified and suggested policy issues for the NSC to take into consideration).

Id. at 63, 72-74.

See id. at 76.


See Brown, supra note 76, at 77 (noting the difference in responsibilities to the PCCs between the NSC and the Presidentially created HSC).


See 104 Cong. Rec. S10625 (daily ed. Sept. 17, 1996) (statements of Sens. Specter, R-PA and Kerrey, D-NE) (referring to recent terrorist attack on Khobar Towers and the Aldrich Ames spy incident, among other examples to support...
the need for flexible thinking and progressive national security programs to meet the ever changing challenges of the future).


107 See 50 U.S.C. § 402(i) (amending the NSA in 1996 in response to newly perceived and developing threats); BROWN, supra note 76, at 27-29.

108 See 50 U.S.C. § 402 (contained in the Intelligence Authorization Act for FY 1997) (adding a Committee on Foreign Intelligence, making changes to the annual intelligence reports, and fourteen other substantive additions or changes to the National Security statute).


111 §402(i)(5)(B) (emphasis added).

112 §402(i)(3) (emphasis added).

113 §402(i)(4) (emphasis added).

114 §402(i)(2).

115 See generally BROWN, supra note 76 (providing a history of the NSC).


119 104 Cong. Rec. S10625 (daily ed. Sept. 17, 1996) (statement of Sen. Kerry) (stating the purpose in creating the two committees—the CTT and the Foreign Intelligence Committee—was to provide the President with the necessary tools to affect change, should the President choose to use them and to bring these types of threats to the forefront for policy-makers who sometimes ignore intelligence warnings, and remain focused on threats of past world paradigms, rather than follow in the “moribund” footsteps of the NSC’s Low Intensity Conflict Board which had become ineffective).


122 See H.R. Rep. No. 104-832, at 38, 40 (1996) (Conf. Rep.) (stating the Committee function includes not just developing strategies to respond to transnational threats in a coordinated way, but also assisting in resolving operational differences between departments and ensuring effective information sharing by developing unified policies and procedures).


124 See Bernstein et al., supra note 4, at 11-15 (providing examples of expected negative impacts to all regions of the planet, specifying what types of negative impacts to expect, and identifying water, agriculture, infrastructure, human health, tourism, transportation, and energy as sectors that will be impacted and require adaptation to these negative climate impacts); CNA Corp., supra note 28 (identifying both direct climate threats and threats from increased extremism in response to destabilized governments resulting from climate change); Flannery, supra note 1, at 124-27 (noting decreased resources necessary for survival leads to increased desperation and increased destabilization).

125 E.g., 50 U.S.C. § 401 (declaring the intent of Congress). See also BROWN, supra note 76, at 3-5 (noting the remarkable breadth of the NSA calling for a modernized national security system, though focused on the military institutions).

126 See Exec. Order No. 13434, 72 Fed. Reg. 25,853 (May 17, 2007) (intending no doubt to reach “mammade disasters” like terrorist events, but also including other mammade disasters like anthropogenic climate change which leads to altered precipitation patterns, increased temperatures, the resulting food shortages and economic devastation which leads to government destabilization abroad and enhanced threats to the U.S.; also creating a Steering Committee, including both the Secretaries of Energy and Agriculture, to “facilitate the implementation” of an integrated education system to ensure national security personnel have the skills and knowledge to protect the nation, leaving what is needed to the Steering Committee to establish).


128 See id. (codified at 10 U.S.C.S. § 118(g)(2)) (extending national defense and security issues to include impacts of climate change and requiring the Department of Defense to include planning and preparations for such impacts in reports to Congress, specifically requiring information on “preparedness for natural disasters from extreme weather events and other missions the armed forces may be asked to support inside the United States and overseas”).

129 See 50 U.S.C. § 404(a) (requiring the President to transmit an NSS to Congress each year on the date he transmits the budget proposal for the next fiscal year and stating required topics for the President to address in the NSS including explaining U.S. interests, goals, and objectives vital to national security and efforts to deter aggression, and long- and short-term plans for meeting U.S. national security interests, and any additional information the President believes would be useful to Congress that relates to national security).

130 See 110 Pub. L. 181 (codified at 10 U.S.C.S. § 118(g)(1)) (requiring alterations to planning in accordance with these new risks, and to work “with allies and partners to incorporate climate mitigation strategies, capacity building, and relevant research and development” (emphasis added)).

131 See Massachusetts v. EPA, 549 U.S. 497 (2007) (requiring the EPA to regulate CO2 and greenhouse gasses as pollutants under the Clean Air Act, 42 U.S.C. § 7521(a)(1) which requires EPA set emissions standards for air pollutants which cause, contribute to, or may reasonably be expected to endanger public health or welfare).

132 See 42 U.S.C. § 7521(a)(1) (limiting the authority of the EPA Administrator to regulate such emissions to when those emissions endanger public health or welfare, not when it endangers national security).

133 Id.


135 See The White House, supra note 2, at 51 (asserting that the NSS takes a broad view of what constitutes national security and seeks a full range of actions to address the myriad challenges identified, the President correctly attempts to implement this broad definition, including the release of CO2 by all government agencies).


137 110 Pub. L. 181 § 951 (codified at 10 U.S.C.S. § 118(g)(1)).

138 See Flannery, supra note 1, at 245-46 (critiquing the validity of the IPCC’s findings based on the political influences exerted by the member nations and warning that while you had better believe whatever the IPCC says, but also then believe that it is likely that the actual situation is “far worse than” the IPCC says it is).

139 50 U.S.C. § 401(a) (defining “intelligence” and “foreign intelligence” for national security reasons as all intelligence that pertains to more than one U.S. government agency under presidential guidance, and that involves “threats to the United States, its people, property, or interests” among other possible options, further supporting the conclusion that climate change does fall within the purview of national security issues, since it meets the definition of national security intelligence). See Flannery, supra note 1, at 245-46 (critiquing political influences that undermine science in IPCC findings); Peter Schwartz & Doug Randall, An Abrupt Climate Change Scenario and Its Implications for United States National Security 4 (2003), http://www.edf.org/documents/3566_AbruptClimateChange.pdf (providing plausible abrupt climate change scenarios in advocating U.S. consideration of such possibilities in national security planning).

139 See Hansen et al., supra note 1, at 217-18 (recommending the reduction of CO2 to 350 ppm immediately, or else as quickly as possible); Flannery, supra note 1, at 6 (arguing that the best available science shows global CO2 emissions need to be reduced by seventy percent by the year 2050 to stabilize carbon levels and the climate); Climate Change: Halving Carbon Dioxide Emissions by 2050 Could Stabilize Global Warming, SCIENCE DAILY (May 4, 2009), http://www.sciencedaily.com/releases/2009/05/090502092019.htm (supporting a fifty percent reduction from 1990 levels by the year 2050).

139 See The White House, supra note 2, at 9 (acknowledging that when U.S. security has previously been threatened by significant challenges, massive coordinated responses were required to defeat those threats and that the United States currently faces similar challenges requiring aggressive, targeted programs).

140 See Hansen et al., supra note 1, at 17 (comparing the “Herculean” effort required to eliminate the use of coal that does not capture CO2 over the next twenty to twenty-five years with the effort required to protect the U.S. and global security during World War II and arguing that WWII was the significantly larger challenge).
143 See Nick Taylor, Works Progress Administration, N.Y. Times (Jan. 5, 1935), http://topics.nytimes.com/top/reference/timestopics/organizations/w/works_progress_administration/index.html (explaining that the WPA was more than just a jobs program during hard economic times, but a strategic investment to address the U.S.’s weak infrastructure of unpaved roads, dangerous bridges, insufficient water and sewage systems, inadequate hospitals, and schools, and degraded forests and parks around the country).

144 See id. (recalling that the WPA employed 8.5 million people during the eight years it was in existence); Roosevelt to Make Jobs for 3,500,000 Now on Relief; Pushes his Social Program, N.Y. Times (Jan. 5, 1935), http://graphics8.nytimes.com/packages/pdf/topics/WPA/35_01_05.pdf.

145 See, e.g., Ron Scherer, Unemployment Extension 101: What You Need to Know, CHRISTIAN SCIENCE MONITOR (July 22, 2010), http://www.csmonitor.com/Money/2010/0722/Unemployment-extension-101-what-you-need-to-know (noting that this is the fourth extension of unemployment benefits to aid unemployed workers as the economic downturn lasting, costing thirty-four billion dollars in this extension alone).

146 See The White House, supra note 2, at 34 (claiming economic advantage exists for the country that leads the way to the new low carbon economy); Flannery, supra note 1, at 246-47 (highlighting the case of BP which made a profit by reducing the company’s CO₂ emissions through photovoltaic cells, and also explaining a thirty-six percent increase in British national economic growth during a period where CO₂ emissions dropped by fifteen percent through creation of a Carbon Trust and requirements that power suppliers get over fifteen percent of their energy from renewable resources).

147 See Henry Petrofski, On the Road, 94 ASI. ScT. 936-99 (2006) (explaining how President Eisenhower believed the national interstate highway system was necessary for U.S. security based on his own experiences traveling across the country in the Army and after witnessing the effectiveness of the German autobahn while serving as an Allied Commander in World War II).

148 See CNA Corp., supra note 28, at 38 (highlighting the delicate nature of the national power grid which was thrust into an eight-state, and parts of Canada, regional blackout in 2003, costing four to ten billion dollars and impacting fifty million people because trees fell on power lines in Ohio).

149 See id. (comparing the vulnerabilities faced by the military to civilian energy supplies and offering a combination of increased energy efficiency, use of renewable energy sources, and removing installations from the national grid as one potential solution for military security, though civilians and business would still be at risk and thus risking the national security).

150 Id. at 39 (explaining how military commanders in Afghanistan and Iraq requested new renewable energy technologies to improve operations as well as reduce danger to the fuel supply convoys).

151 Id.

152 Id. at 25 (quoting Retired U.S. Navy Admiral Joseph W. Prueher’s explanation of why the United States must encourage China and convince them to move to a low-carbon or carbon-free energy economy because the U.S.’s climate problems cannot be resolved unless China also reduces carbon emissions).

153 See The White House, supra note 2, at 11 (promoting the idea that the United States must have sustainable international cooperation, similar to post-WWII, to deal with global issues like climate change).

154 See e.g., id. at 30 (claiming that the country that leads the path to a clean energy economy will have a “substantial economic and security advantage” and further claiming that the United States is spending heavily on research and energy development).

155 Id. at 5.

156 See Stephen Stromberg, What Sank the Senate’s Climate Bill, Wash. Post (July 29, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072804527.html?hpid=opinionsbox1 (explaining how the U.S. Congress failed to pass legislation to address carbon emissions and begin dealing with climate change during the summer of 2010, while Washington, D.C. itself was experiencing record temperatures and a severe summer storm that knocked out power for days in the greater capitol region).

157 The White House, supra note 2, at 11 (advancing the idea that the United States is fully engaged and leading the way to solutions on climate change, and other international challenges, and indicating that the United States intends to support enforcement of international law in combating these challenges).

158 See generally id. at 5, 11, 13, 47 (claiming the United States is a leader heavily invested in clean technology and committed to diplomacy to engage others in combating climate change; further, promising CO₂ cuts of eighty percent by 2050 and seventeen percent by 2020, but only if Congress implements legislation to do so).

159 See 50 U.S.C. § 402(a) (including the Secretary of Energy in the council membership along with the Secretaries of State and Defense, and permitting Presidential appointment, with the advice and consent of the Senate, of Secretaries and Under Secretaries of other executive and military departments, among others).

ENDNOTES: CLIMATE CHANGE AND SMALL ISLAND STATES: ADrift in a RAISING Sea of LEGAL Uncertainty continued from page 57

16 Grant et al., supra note 11 (“It’s been through other revisions, so this should be possible.”).

17 UNHCR, supra note 9, at 9.


19 UNHCR, supra note 9, at 9.

20 Different theories for a proposed framework exist. One has proposed modeling it on the Convention Against Torture. See Zartman, supra note 12, at 21 (“By following the structure of the Convention Against Torture, a new Convention could be drafted addressing the specific issue of environmentally displaced persons . . . focus[ed] not only on protecting those individuals . . . but would also require specific obligations from State parties to prevent the root causes from occurring.”). Others have focused on the connections between ecological integrity and human rights. See Westra, supra note 12, at 182 (“[T]he issues of ecological refugees are primarily, though not exclusively, ecological issues – that is, unless the interface between human rights and ecological integrity is accepted, it will not be possible to design instruments that will truly address the problem, or even use existing instruments to the best advantage of present and future migrants.”).

21 Biermann & Boas, supra note 11 (stating five principles under which an agreement would operate: 1) the objective of planned and voluntary resettlement and reintegration; 2) treatment and classification as permanent immigrants; 3) tailored to the needs of entire groups, not individuals; 4) targeted less toward the protection of persons outside their states than toward the support of domestic agencies to protect people within their territories; and 5) that protection is a global problem and a global responsibility).

22 VIKRAM ODEERA KOLMANSKOG, NORWEGIAN REFUGEE COUNCIL, FUTURE FLOODS OF REFUGEES 31 (2008), http://www.nrc.no/arch_img/9268480.pdf. The NRC is an independent, humanitarian non-governmental organization, which

provides assistance, protection, and durable solutions to refugees and internally displaced persons worldwide.


24 Id. pmbl. ¶ 2.

25 Id. art. 11.

26 Id. pmbl. ¶ 15.

27 Id. art. 7(2).


29 Island of Palmas (U.S./Neth.) 2 R.I.A.A 831, 838 (Perm. Ct. Arb. 1928) (“[S]overeignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State . . . Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exist therein, to the exclusion of another State, the functions of a State.”)


31 For example, problems would arise as to the rights of those already on the land. Would they be resettled themselves? Who would pay? Would they be offered Kiribati citizenship? What happens if they refuse to move?


WINTER 2011

94
Although this raises a number of issues as to whether such an island would be considered an “artificial island” in the eyes of the UN Convention on the Law of the Seas and what that would mean in terms of sovereignty. See Francesca Galea, Artifical Islands In The Law of the Sea (May 2009) (unpublished Doctor of Law dissertation, University of Malta), http://seastead.org/files/research/law/ARTIFICIAL-ISLANDS-_0-01.09.09_mod.doc.pdf.

A “permanent population” is also a required element of a state. See Restatement (Third) of Foreign Relations Law: States, supra note 26; Montevideo Convention, supra note 28. Can a permanent population be one that is scattered worldwide? How many people need be on this built up island to continue the legal existence of a state?

ENDNOTES:
Climate Change, Intellectual Property, and the Scope of Human Rights Obligations
continued from page 63


For the purposes of this paper “climate change” refers to the social crisis of anthropogenic effects on climatic temperature.


See, e.g., Knox, supra note 3; see also OHCHR Panel Discussion, supra note 2, ¶ 36 (stating that “The United States of America, while agreeing that climate change had implications for the full enjoyment of human rights, did not consider that there was a direct formal relationship between climate change and human rights as a legal matter.”).

See generally OHCHR Report CC-HR, supra note 2, ¶ 72-77.

Id. ¶ 21.


See generally Bernstein et al., supra note 9.

See generally id.

See generally id.


Id. art. 1(2).

See, e.g., Bernstein et al., supra note 9.

The reports of the IPCC form the basis of reports from the UN Office of the High Commissioner for Human Rights.


Bernstein et al., supra note 9.

Id. at 72.

Id.

Id.

Id. at 53.

Id.

OHCHR Report CC-HR, supra note 2 (noting that mitigation strategies are often complemented by adaptation programs that strive to “strengthen the capacity of societies and ecosystems to cope with and adapt to climate change risks and impacts”). While adaptation is an important component of any comprehensive response to the climate change crisis, this paper focuses on the mitigation efforts that aim to restructure global energy production.


See Frederick M. Abbott, Int’l Ctr. for Trade and Sustainable Dev., Innovation and Technology Transfer to Address Climate Change: Lessons from the Global Debate on Intellectual Property and Public Health 1 (2009), http://ictsd.org/downloads/2009/07/innovation-and-technology-transfer-to-address-climate-change.pdf (noting the international acknowledgement that greenhouse gasses from combustion energy generation substantially contribute to causing climate change and thus that one of the primary objectives to addressing climate change is to develop and implement alternative energy-generation systems including solar, wind, biomass, nuclear, geothermal, and tidal energy sources).

See Tomlinson et al., supra note 11.


Id. at 7 (referencing the suggestion of others that flexibility is needed in the context of IP in clean energy technology); Tomlinson et al., supra note 11, at 83.

Tomlinson et al., supra note 11, at 83.

Id. at 83-85 (discussing global competitiveness debates in the climate context).

Id.

Barton et al., supra note 31.

Id. at 9, 12, 15 (explaining the background and development of the technologies).

Id. at 20 (highlighting the risk that broad patents could hinder development of more efficient or less expensive technologies).

Id. at 9.


For example, how would the government be administered in such a situation? See Cleo Paskal, Global Warming: How Environmental, Economic, and Political Crises Will Redraw the World Map 225 (2010) (suggesting such a government could be run like a corporation managing the national resources for the citizens in exile who would act like stock holders, or alternatively, like the administrative systems set up to manage the land claim settlements of North American First Nations in Canada).

Id. at 235.

Id. at 235-36.

Id.

The first steps have been taken with the proposed Limoges Convention, see Prieur, supra note 23. This proposal outlines a starting point for the conversation on rights of those displaced and the obligations on the international community.

For example, the hope, [Kiribati’s Foreign Minister] said, is that the families of immigrants could eventually qualify for immigration as well.”).

Id.

Endnotes continued

See OHCHR Report CC-HR, supra note 2, ¶ 18.


ICESCR, supra note 43.

46 ICCPR, supra note 43. ICESCR, supra note 43.


47 See John H. Knox, Diagonal Environmental Rights, in SUGN SkOGLY & MARK GINNEY, Universal Human Rights and Extraterritorial Obligations 82 (Mark Gibney et al. eds., 2010) (noting that “[h]uman rights law operates primarily along a vertical axis, setting out individuals’ rights against their governments and the corresponding duties owed by the governments, but it may also be diagonal, giving rise to duties on the part of states that extend beyond their own territory[ies]”).

48 OHCHR Report CC-HR, supra note 2, at 5.

See id.

Id. at 8-10.

Id. at 18-22.

Id. at 24, ¶ 72.

Id. (citing CESCR general comments No. 12 (1999), No. 13 (1999), No. 14 (2000), and No. 15 (2002) on adequate food, education, highest attainable standard of health, and water, respectively).

49 ICESCR, supra note 43, art 2(1).

50 ICCPR, supra note 43, art. 2(1).


See Barton et al., supra note 31, at 2-5.

See id.

Tomlinson et al., supra note 11, at 88-89.

See David Ockwell et al., Enhancing Developing Country Access to Eco-Innovation: The Case for Technology Transfer and Climate Change in a Post-2012 Policy Framework 21 (OECD Environment Working Papers No. 12, 2010), http://www.oecd-ilibrary.org/environment/enhancing-developing-country-access-to-eco-innovation_5kmfplm8xxf5-en (reporting a situation in India where local firms’ efforts to develop commercial hybrid vehicle technology were stalled by the process of negotiating the IP protections on existing technology with an international industry leader).

53 Barton et al., supra note 31, at 4.

54 Tomlinson et al., supra note 11, at 88.

55 Bendoff et al., supra note 10, at 1, 10.

56 See id.

Id. at 10.

Barton et al., supra note 31, at 3.

69 Id.

70 Id.

71 See Abbott, supra note 29, at v.


74 See generally Doha Declaration, supra note 72.

75 Id.

76 See generally id.


78 Id.


See Wewerinke, supra note 5; see also OHCHR Panel Discussion, supra note 2.

80 See generally COP 15, supra note 78; SBI 32, supra note 78.

81 “Regime shifting,” as applied by Laurence Helfer to the context of intellectual property, describes a type of forum shopping practiced by states and NGOs whose political interests receive limited traction or are silenced in the intellectual property regime. These actors are increasingly turning to non-IP regimes, with different substantive, institutional, and relational dimensions, in search of new (soft) law-making that will serve to maximize their interests. Laurence Helfer, Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Making, 29 Yale J. Int’l L. 1, 8-14 (2004).

82 The “flexibilities” within the TRIPS Agreement are exceptional limitations that are intended to accommodate some extreme human rights conditions with only limited easements in the IP protection (compulsory licensing). The exceptional nature of these provisions means that they “have more often than not been construed against the needs of users.” Margaret Chon, Intellectual Property and the Development Divide, 27 Cardozo L. Rev. 2813, 2880 (2006).

83 Most analyses of the problem of access to clean energy technologies and IP are structured around various IP instruments. See, e.g., Abbott, supra note 29, at 4-7.


See id.

See id.

See id.; CESCR No. 17, supra note 85; CESCR No. 14, supra note 58.

87 See Ockwell et al., supra note 62, at 7 (concluding that “[i]ndigenous eco-innovation capabilities are essential to facilitating both the diffusion of existing eco-innovations within developing countries and sustainable economic development based on the adoption, adaptation and development of environmentally sound technologies that fit within the bespoke conditions faced by developing countries”).

88 Id. at 22 (relaying how Indian firms producing light-emitting diodes (“LEDs”) expressed that they would not be able to begin production of LEDs simply with access to technology, but rather needed knowledge and experience of the manufacturing process).

89 Chon, supra note 83, at 2880-83.

90 Id. at 2884-85.

91 See, e.g., UNFCCC Note by the Chair, supra note 77.

92 Yu, supra note 40, at 1045.


See endnoTes: the SinGapoRe workARound: prOvidinG a “greenprint” for a UNFccc party reclassification continued from page 68

16 See Hunter et al., supra note 12, at 681.


19 Marianne Lavelle, Toward a Stalemate in Copenhagen, CTR. FOR. PUB. INTEGR. (Nov. 5, 2009), http://www.publicintegrity.org/investigations/global_climate_change_lobby/overview/.

20 The Montreal Protocol on Substances that Deplete the Ozone Layer arts.


23 SSNC, supra note 9, at 2.

24 Id. at 14.


28 SSNC, supra note 9, at 57.

29 Id. at 57 (considering that the CEPO was set up administratively in April 2007 with $170 million to coordinate research and test-bedding and leverage other government agencies to grow the clean energy industry).

30 Id. at 56 (considering the Research Fund for the Built Environment is a $500 million fund from the Ministry of National Development ("MND") funds projects such as including sustainable development projects such as integrating solar technologies into building facades).

31 Id. at 53.

32 Kyoto Protocol, supra note 2, art. 12.

33 See UNFCCC, supra note 15, art. 12(2) (“The purpose of the clean development mechanism [is] to assist parties not included in Annex I in achieving sustainable development . . . and to assist parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments . . .”).


37 Jayakumar, supra note 35.

38 Id.


40 See MINISTRY OF THE Env’t, SINGAPORE’S INITIAL NATIONAL COMMUNICATION: UNDER THE UNITED NATION FRAMEWORK CONVENTION ON CLIMATE CHANGE, 35 U.N. Doc. SGP/COM/1 B (Aug. 21, 2000) (explaining that “Singapore has developed many policies and implemented many measures that have helped to mitigate the increase in greenhouse gas emissions.”), http://unfccc.int/resource/internet/docs/nate/sinnc1.pdf [hereinafter SINC]; SSNC, supra note 9, at 36 (“The predominant greenhouse gas in Singapore is carbon dioxide ("CO2") that arises from the combustion of fossil fuels. While Singapore faces many geographical constraints that limit our energy options, we have developed policies and implemented measures that help to mitigate the increase in greenhouse gases.”).

41 SINC, supra note 40, at 17.

42 SSNC, supra note 9, at i.


44 Id.

45 SSNC, supra note 9, at 20.


ENDNOTES: WORLD NEWS UPDATE continued from page 69


6 Id. ¶ 10.

7 LCA Report, supra note 1.

8 Id.


10 LCA Report, supra note 1, ¶ 112.

11 Id. ¶ 103.


13 LCA Report, supra note 1, ¶ 104.

14 Id. ¶ 105.

15 Id. ¶ 106.


17 LCA Report, supra note 1, at Annex III.

18 Id.

19 Id.


23 LCA Report, supra note 1, at Annex III.

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