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# Accounting the Value of Human Rights and Environmental Protection in the Current Alien Tort Claims Act Paradigm

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ACCOUNTING THE VALUE OF HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION IN THE  
CURRENT ALIEN TORT CLAIMS ACT PARADIGM

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**1.0 - Introduction**

The global need to drill deeper, remove more mountaintops, burn, and bury has not only created unparalleled environmental degradation, but also contributes to a systematic erosion of human rights and value, particularly in developing countries. The exploitation of natural resources for economic prosperity, from crude oil that fuels industries to the rare earth metals

used in solar energy systems, is a common element amongst today's most challenging human rights issues. Spurred by cavalier negligence and egregious disregard for internationally recognized standards of accounting and risk management, the extractive industry enjoys negligible liability exposure. Without an effective check, the drive for natural resources disproportionately burdens large segments of many societies by undermining social worth and imposing a form of economic slavery. A common theme to these social and economic burdens, particularly in developing countries, is weak environmental management regulations, as well as lax risk controls to stem the prevalence of large-scale environmental and human health catastrophes.

Although this paradigm of poor environmental stewardship evinces a strong link to human rights, the access to legal redress is a significant impediment against substantive changes in the social, environmental, and economic conditions for affected people. This paper's goals are to: (1) add support to the argument linking poor environmental stewardship with human rights violations; (2) discuss how the current United States legal framework and jurisprudence does not adequately address the apparent complexity of this class of tortious acts, and (3) demonstrate that negligent contravention of internationally recognized standards of accounting and risk management, designed in part to protect natural resources, has caused cognizable harm and human rights grievances.

This paper is organized into four sections: first, a summary of the current international environmental law regime and the link to human rights commitments (2.0); second, what

burden of specificity the United States' jurisprudence on environmental claims creates for plaintiffs (3.0); third, jurisprudence what other viable arguments are there to determine if human rights and environmental harms are the result of negligent acts (4.0); and finally, some general comments on the reforms needed to improve the human condition in light of environmental degradation (5.0).

## **2.0 – A Legal Framework for International Environmental Law**

International environmental law, especially as it relates to human rights, is amorphous and difficult to define with any certainty.<sup>1</sup> Within the United States, the difficulty in ascribing a judicable standard of review has posed a significant bar to many claims arising from environmental degradation and its impact on the plight of affected persons, especially in developing countries. This section begins with a short overview of the pertinent international conventions related to environmental protection, then transitions to a discussion of linking environmental issues with particular human rights conventions. Following this, the paper will summarize the prevailing Alien Tort Claims Act (ATCA) jurisprudence (3.0) that determines the standard of specificity required in any discussion of human rights and environmental protection. Against this backdrop, the next section (4.0) then analyzes how international accounting standards are designed to disclose environmental and human value to various governing bodies. The goal of Section 4.0 is to take environmental and human health protection beyond non-specific environmental standards and instead discuss the duty states

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<sup>1</sup> Luis Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 Col. J. Int'l Env. L. and Policy, 1,1 (Winter 2001).

and corporations have to explicit accounting standards and rules. In this way, in order to meet the threshold of ATCA claims, the standard of review for courts is tied to much more exacting standards to determine if environmental and human rights concerns are arising from negligent behavior.

## **2.1 – The Foundation of Modern International Environmental Law**

The development of international environment law began with several important United Nations conventions providing global forums to discuss key environmental concepts and to standardize policy considerations for participating states. Beginning in 1972, the United Nations Conference on the Human Environment (“Stockholm Conference”) was the first international conference dedicated to global environmental issues and included an “Action Plan” declaring several recommendations and 26 principles to improve environmental stewardship.<sup>2</sup> Following the Stockholm Conference, the United Nations convened three major conferences to further pursue internationally recognized standards for environmental protection: World Commission on Environment and Development (1983) (“Brundtland Commission”); United Nations Conference on Environment and Development (1992) (“Rio Summit”); and the World Summit on Sustainable Development (2002) (“Earth Summit 2002”). The culmination of these meetings is several declarations, principles, or other policy considerations embodying the idea that humans have an obligation to protecting the planet’s

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<sup>2</sup> Declaration of the United Nations Conference on the Human Environment. June 16, 1972, U.N. Doc. A/CONF.151/26.

natural resources, responsibly consuming these natural resources, and recognizing the fragile interlink between humans and their environment.<sup>3</sup>

The nexus between economic growth, environmental stewardship, and human health became readily apparent early on in international discussions. As part of the Stockholm Conference, the U.N. created the U.N. Environment Programme (UNEP) to coordinate the U.N.'s efforts in harmonizing international environmental laws and policies.<sup>4</sup> As highlighted in UNEP's most recent Annual Report, "[g]lobal environmental action and governance have come under increasing scrutiny...[and] it is in the interests of all nations to...decouple[] growth from the unsustainable use of natural resources."<sup>5</sup> To this end, UNEP has developed a host of research, publications, and reports in various areas of environmental protection, including environmental governance and resource efficiency.<sup>6</sup> However, as discussed below (see 3.0), the arena of international environmental law is plagued by non-binding commitments that has created an ad-hoc approach to resolving trans-boundary environmental disputes and making it difficult, if not nearly impossible, for courts to determine what norms of international environmental law are universally accepted.<sup>7</sup>

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<sup>3</sup> Tseming Yang, *The Emergence of Global Environmental Law*, 36 Ecology L. Q. 615, 624 (2009).

<sup>4</sup> G.A. Res. 2997 (XXVII), U.N. GAOR, 27th Sess., U.N. Doc. A/Res/27/2997 (Dec. 15, 1972).

<sup>5</sup> Annual Report on Environment Programme, U.N. Doc. DCP/1354/NA (2011) at 7.

<sup>6</sup> UNEP – Six Priority Areas Factsheets (2010), available at [http://hqweb.unep.org/publications/contents/title\\_search.asp?search=priority+areas&image.x=0&image.y=0](http://hqweb.unep.org/publications/contents/title_search.asp?search=priority+areas&image.x=0&image.y=0) (last visited April 28, 2011).

<sup>7</sup> Jutta Brunnee, *Transboundary Harm in International Law: Lessons From the Trail Smelter Arbitration*, 102 Am. J. Int'l L. 395, 396 (2008), citing Jutta Brunnee, *Common Areas, Common Heritage, and Common Concern*, Oxford Handbook of International Law 550 (Daniel Bodansky, Jutta Brunnee, & Ellen Hey eds., 2007) (Using the *Trail Smelter* case (1941) between the U.S. and Canada to highlight the difficulties in establishing the norms of international environmental law).

A central theme of many conventions is the concept of “sustainability” and “sustainable development.” The widely accepted definition for sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>8</sup> As globalization has quickened the pace of resource consumption, the concept of sustainability has gained increasing import as the link between the environment and economy has grown stronger.<sup>9</sup> One aspect of sustainability is for people not only to subsist in their ability to procure food necessary for survival, but also more broadly, to fulfill their right of self-determination.<sup>10</sup> Arguably, one of the most important international institutions that purportedly support this concept is the World Bank. As codified in the World Bank’s Operation Manual, “the economies...of indigenous peoples are often closely tied to land, water, and other natural resources.”<sup>11</sup> Focusing on this essential part of international environmental law, the protection of a population’s subsistence has often not been met because the “state of affairs has devalued the worth of resources to local communities.”<sup>12</sup> This paper presents the argument that states and corporations do possess a clearly articulated duty to properly account for environmental and human health degradation (4.0).

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<sup>8</sup> Our Common Future: Report of the World Commission on Environment and Development, UN Doc. A/42/427, Ch. 2.IV Conclusion (1987).

<sup>9</sup> Exec. Order No. 13514 (Oct. 5, 2009) (Federal Leadership in Environmental, Energy, and Economic Performance).

<sup>10</sup> David Freestone, *A Decade of the Law of the Sea Convention: Is it a Success?*, 29 Geo. Wash. Int’l L. Rev. 499, 520 (2007).

<sup>11</sup> World Bank Operational Manual, Operational Policy 4.10 – Indigenous Peoples; *see also* Fergus MacKay, *Universal Rights or a Universe Unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples*, 17 Am. U. Int’l L. Rev. 527, 589 (2002) (a comprehensive review of the World Bank’s role in protecting the livelihoods and survivability of indigenous peoples).

<sup>12</sup> Gregory Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity*, 16 U.C.L.A. J. Env’tl L. & Policy 179, 180 (1998).

## 2.2 – The Link Between Human Rights and the Environment

From the inception of the U.N. and its founding documents, all states make the universal pledge not to “deprive[] [people] of its own means of subsistence.”<sup>13</sup> Yet, common throughout most countries, improper environmental stewardship directly contributes to physical, social, and economic hardships for citizens.<sup>14</sup> This hardship is a result of many factors, including:

ineffective regulation that fails to protect human health and environment; a corporate race to the bottom approach maximizing profits at the expense of fair labor wages and operational safety; and the lack of capacity to prevent, plan for, or respond to catastrophic events.

Although each country is substantially different than the next, the result is often the same - vulnerable segments of societies are disproportionately burdened by environmental hazards, which limit a population’s ability to subsist and survive.<sup>15</sup> The duty of a sovereign state not to interfere with their citizens’ right to subsistence and self-determination is engrained within the foundations of public and customary international law.<sup>16</sup> However, little inroads have been made in protecting disadvantaged people seeking redress from such harm to their health and livelihood.

This paper argues that a cognizable standard of customary international law is found within the specific economic agreements ensuring a fair, honest, and open global trading market.

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<sup>13</sup> U.N. International Covenant of Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc A/6316 (Dec. 16, 1966) Art. 1.

<sup>14</sup> Carmen Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous People, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. Pa. J. Int’l L. 723, 728 (Spring 2011).

<sup>15</sup> *Id.* at 729.

<sup>16</sup> *See generally Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COJELP 1, 4 (Winter 2001) (“Since there is an ongoing debate regarding the proper sources of international norms...determining whether there is in fact a human right to a particular environmental quality is a difficult and essentially subjective exercise.”).



Ineffective environmental stewardship, caused by a negligent accounting to externalize and devalue human and environmental conditions, has directly contributed to poor physical, social, and economic conditions. This negligent accounting is a paramount cause of the deplorable human suffering and environmental damage that occurs throughout the world. These actions violate, most notably, the International Covenant on Civil and Political Rights (ICCPR). Although this particular link between environmental issues and human rights has been readily challenged, this paper's tack will attempt to avoid the common pitfalls of previous arguments.<sup>17</sup>

As a point of contrast, this paper will not mimic many plaintiffs' previous attempts under the ATCA, which argues that conduct violates "international environmental law" as it relates to protecting the rights of human health and the environment. Rather, this paper presents a more plausible argument in the implementation of accounting practices causing environmental and human health harm. Unfortunately or not, the 21<sup>st</sup> century paradigm equivalent to the laws of the sea during the Age of Sail has become the accounting principles that disclose global market behavior. The negligence of states, as well as multi-national corporations, in properly valuing and disclosing the risks associated with mining and oil and gas operations, for instance, has had a dramatic effect on people's livelihoods, social standing, and physical well-being.<sup>18</sup> The apparent ineffectiveness of today's international community to remedy these conditions, which arguably violate human rights commitments, requires a paradigm shift in the application of norms widely accepted throughout the world. One viable method to improve the environment

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<sup>17</sup> Id.

<sup>18</sup> David Spense, *Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk*, 86 Chi.-Kent L. Rev. 59, 76 (2011).

and human condition is the accounting standards that ensure full disclosure of how states and corporations govern the global energy market. There are hardly any justifiable alternatives to clean water, air, land, and the ability to decide for oneself. Yet the activities of extractive industries, like oil and gas production, have often left populations with little choice other than to be mistreated, displaced, or poisoned.<sup>19</sup> At its core, the ICCPR frames the commitment of all signatory parties to refrain from limiting not only local food sources, such as fisheries and agricultural land, but also the opportunity for people to survive culturally.

### **3.0 – Alien Tort Claims Act and the Standard of Review**

The ATCA, enacted as part of the Judiciary Act of 1789, provides for federal jurisdiction of “any civil action...for a tort only...committed in violation of the law of nations or a treaty of the United States.”<sup>20</sup> The modern history of the ATCA is one of significant debate regarding its scope and application within the context of globalization.<sup>21</sup> Recently, the Supreme Court has framed the extent of the ATCA in two important cases – Filartiga v. Pena-Irala and Sosa v. Alvarez-Machain. The Supreme Court holds in Sosa that the scope of ATCA claims is limited to cognizable harms that are “based on the present-day law of nations [that] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized [such as piracy

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<sup>19</sup> Major Christopher Martin, *Sovereignty, Meet Globalization: Using Public-Private Partnerships to Promote the Rule of Law in a Complex World*, 202 Mil. L. Rev. 91, 132 (2009); see also Luis Cuervo, *The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea*, 19 Tul. Envtl. L. J. 151, 186 (2006).

<sup>20</sup> 28 U.S.C. § 1350.

<sup>21</sup> Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. UNOCAL*, 43 Law & Society Rev. 271, 281 (2009).

and offenses against ambassadors].”<sup>22</sup> Although this rule evinces some level of specificity, it does not altogether provide lower courts with any clearer idea of what acts fall within the ATCA’s scope.<sup>23</sup>

Preceding Sosa, several other lower courts applied similar standards to claims seeking redress from environmental and human health damage. In Beanal v. Freeport-McMoran, Inc., a case alleging a violation of law of nations for strip mining activities, the United States Court of Appeals (5<sup>th</sup> Circuit), quoting Filartiga, held that “[i]t is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation in the meaning of the [ATCA].”<sup>24</sup> ATCA claims therefore require a substantially high level of specificity related to well-established norms of international law. In addition, there are a host of cases besides Beanal that have tested the judicial waters regarding environmental harms. One of the earliest attempts to use the ATCA as a jurisdictional hook was Amlon Metals, Inc. v. FMC Corp.. In Amlon, the plaintiff argued that Principle 21 of the Stockholm Declaration, stating signatory parties “not cause damage to the environment...beyond the limits of national jurisdiction,” reached the level of customary international law for purposes of ATCA standing.<sup>25</sup> As the majority opinion held in discarding plaintiff’s claims in Amlon, “the [Stockholm Principles] do not set forth any specific proscriptions, but rather refer only in a general sense to the

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<sup>22</sup> 542 U.S. 692, 725 (2004).

<sup>23</sup> Michael Koebeler, Corporate Responsibility Under the Alien Tort Statute 37-40 (2009).

<sup>24</sup> Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (1999).

<sup>25</sup> Stockholm Declaration on the United Nations Conference on the Human Environment, 16 June 1972, U.N. Doc. A/CONF.4hg8/14.

responsibility of nations....”<sup>26</sup> The law of nations and customary international law standard for ATCA claims requires not only international comity, but more importantly, specific standards that give courts sufficient benchmarks to determine if defendants have breached such standards. Merely pointing to generalized statements of responsibility will not suffice.

The substantive challenge when articulating the link between human rights and environmental law is, as bluntly proclaimed by United States courts, effectively barred under the ATCA because “allegations of environmental harm do not state a claim under the law of nations.”<sup>27</sup> As the court in Beanal remarks, as well as in other cases deciding the merit of internationally recognized environmental law, even the totality of “soft law” still fails to provide enough specificity for internationally recognized environmental norms to survive ATCA muster.<sup>28</sup> Because environmental law, even in highly developed nations, is a conglomeration of many “soft-law principles,” the opportunity for distortion is a credible counterargument.<sup>29</sup>

In discussing how environmental degradation relates to human rights violations, it is essential that human harms are attributed to the negligence of more exacting duties of care. In this paper, environmental and human conditions provide evidentiary support for the argument that accounting standards, which fail to account for these conditions, are negligently violated. Put another way, it is not because of a failure to adhere to environmental standards that results in human rights violations, rather, it is because of other negligent practices that creates human

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<sup>26</sup> Amlon Metals, Inc. v. FMC Corp., 775 F. Supp 668 at 671 (S.D.N.Y. 1991).

<sup>27</sup> Sarei v. Rio Tinto, PLC., 221 F.Supp 2d. 1116, 1159 (D.C. CA 2002) *citing* Beanal v. Freeport-McMoran, 197 F.3d 161 (Cir. 5 1999).

<sup>28</sup> Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 169 (Cir. 5th 1999).

<sup>29</sup> Tim Stephens, International Courts and Environmental Protection 326-31 (2009).

rights issues. Accounting standards, which function to disclose environmental and human issues, become the central focus of the judicial review to determine if negligent risk management has caused cognizable harm.

### 3.1 – Issues with Forum Non Conveniens

Separate, but equally important in the context of the ATCA, is the judicial discretion of the *forum non conveniens* doctrine. This doctrine provides judges with the ability to refrain from hearing a claim in favor of it being tried in a foreign court.<sup>30</sup> The test for applying *forum non conveniens* has been developed through a number of Supreme Court cases and it includes a two-part analysis. First, courts must determine the availability of the proposed alternative forum and then second, if available, must determine through a balance test if the plaintiff's and society's interests are best served in the alternative forum.<sup>31</sup> Considering the modern trend of increasing ATCA claims, the *forum non conveniens* doctrine is widely used to relieve domestic courts from adjudicating international matters.<sup>32</sup>

Particularly for environmental cases, the *forum non conveniens* has been a substantial barrier to foreign nationals proceeding with their claims under the ATCA. In Flores v. Southern Peru Copper Corp., the court held that the allegation of severe environmental and human health harm caused by a mining company would be dismissed because Peruvian courts were an

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<sup>30</sup> Michael Koebele, Corporate Responsibility Under the Alien Tort Statute, 323-7 (2009).

<sup>31</sup> Id. at 325; citing *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947).

<sup>32</sup> Christopher Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481, 518 (2011).

“adequate alternative...because the relevant public and private interest factors weigh heavily in favor of the Peruvian forum.”<sup>33</sup> Similarly, in Aguinda v. Texaco, Inc., Ecuadorian residents were also barred from having their claims of vast environmental devastation from oil and gas exploration heard even though the corporation’s headquarters were located within the same judicial district hearing the case.<sup>34</sup> The issue of *forum non conveniens* is a cogent concern for any plaintiff seeking redress in United States courts, but until courts are presented with cases challenging the status quo of ATCA claims, it is foreseeable that many of these claims will follow suit and be dismissed so long as the alternative forum possesses a semblance of judicial integrity.

#### **4.0 – Global Markets and Environmental and Human Harms**

In the globalized world, an individual’s reliance on the goods produced by transnational corporations (TNCs) and government owned corporations cannot be understated. Corporate responsibility in either case is covered by a web of internationally recognized standards. The goal of these standards, within the areas of accounting, financial reporting, and operational safety, are all designed to provide corporate shareholders, the general public, and governmental regulators with confidence that corporate activities are being conducted in line with the corporate officers’ fiduciary duties. These duties are designed to limit opportunities of severely risky financial positioning, and regulate significantly risky operations that could cause

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<sup>33</sup> *Flores v. Southern Peru Copper Corp.*, 406 F.3d 65, 69 (Cir. 2 2003).

<sup>34</sup> *Aguinda v. Texaco, Inc.*, 945 F. Supp 625, 627 (S.D.N.Y. 1996).

environmental and human health hazards.<sup>35</sup> The duties arise out of the corporation's responsibility to disclose pertinent financial and accounting information that must clearly categorize and value risks associated with certain activities.

As an example of how global markets can directly impact local populations, a short description of environmental and human rights issues in Nigeria may better demonstrate this interconnectedness. The most populous country in Africa is also the world's fifteenth largest petroleum producer.<sup>36</sup> Human rights concerns relating to pollution and the impact on human health, as well as safety have been well catalogued by the international community.<sup>37</sup> Since the discovery of oil in Nigeria, the country has failed to capitalize on the economic boom because of misaligned interests between government decision-makers and the common citizen.<sup>38</sup> Known as the "Resource Curse," Nigeria's corrupt governance has resulted in severe environmental and social harms and instability.<sup>39</sup> The problems facing Nigeria are not for lack of regulations and policies. On the contrary, Nigeria is a member of several regional and international organizations that provide guidance and other tools to more effectively govern commodities and natural resource consumption. For example, Nigeria is a member of the Economic Community of West African States (ECOWAS) that has a stated mission to "enhance competitiveness of the regional private sector through promoting good corporate

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<sup>35</sup> Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 Wash. L. Rev. 1, 21 (2011); see also Larry DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 Am. Bus. L. J. 727, 790 (2010) (remarking that corporations make strategic decisions to "ignore or circumvent certain regulations...that directly impact issues of safety, privacy and environmental harm.").

<sup>36</sup> Nigeria – World Factbook, Central Intelligence Agency, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last visited March 26, 2011)

<sup>37</sup> Nigeria: Petroleum, Pollution and Poverty in the Niger Delta, Amnesty International (2009), 9.

<sup>38</sup> Laws and Codes For the Resource Curse, 11 Yale Hum. Rts. & Dev. L.J. 9, 11 (2008).

<sup>39</sup> Id. at 12.

governance...and sustainable development in the region.”<sup>40</sup> In addition, since 1995, Nigeria is a member of the World Trade Organization (WTO), which has published information with the stated purpose to provide “the steps governments could take to make producers and consumers [of natural resources] take account of the social costs of their activities.”<sup>41</sup> In sum, these memberships oblige Nigeria to take necessary steps to properly account for and mitigate the inherent risks associated with such activities as mining and oil and gas production. Nigeria is but one, easily identifiable example of how certain activities, if not accurately accounted for, can disproportionately affect vulnerable segments of populations. Although the relation between international trade and human and environmental value is complex, the rules of accounting provide one method to determine causation of harms.

#### **4.1 –International Trade Agreements and Human and Environmental Value**

The global market functions, in part, by valuing products against the myriad complex relationships and duties among producers. Trade not only includes commodities, but also services, intangible goods provided by people. Prior to 1994, commodities and services were tightly regulated under the General Agreement on Trade and Tariffs (GATT).<sup>42</sup> In 1995, GATT’s conditions were incorporated into the World Trade Organization (WTO), along with several other agreements and reforms to the international trade legal framework. Today, the WTO

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<sup>40</sup> Economic Community of West African States - Office of the Commissioner – Private Sector Department, Brief Description, *available at* [http://www.comm.ecowas.int/dept/stand.php?id=g\\_g1\\_brief&lang=en](http://www.comm.ecowas.int/dept/stand.php?id=g_g1_brief&lang=en) (last visited April 22, 2011).

<sup>41</sup> Report of the Director-General, *Trade in Natural Resources: WTO – World Trade Report 2010* (2010) at 112.

<sup>42</sup> Jagdeep S. Bhandari, *World Migration and Trading Regimes*, 3 Alb. Gov’t L. Rev. 169, 180 (2010)



exists as the premier international organization with 153 member states, representing nearly 97% of the world body.<sup>43</sup> Most notably, the United States is a key member of the WTO and has embraced a duty to abide by international agreements, such as GATT.<sup>44</sup>

The WTO rules are five-fold: (1) broad principles, such as GATT, the General Agreement on Trade in Services (GATS), and Trade-Related Aspects of Intellectual Property (TRIPS) must be adhered to by all member states; (2) extra agreements and annexes are applicable to specific areas or issues; (3) schedules of commitments are made by individual countries that frame how foreign products and services can access the domestic market; (4) use of the Dispute Settlement Body (DSB) for dispute resolution amongst member states; and (5) review of government trade policies by the WTO Secretariat.<sup>45</sup>

As globalization weaves local, regional, and national economies together, the WTO plays a critical role in resolving disputes that, among other things, arise from the impact of activities on human health and the environment. Among WTO's core codes, GATT specifies certain exemptions that signatory parties can claim in enacting trade restrictions with other countries.<sup>46</sup> In particular, General Exceptions – Article XX (a) and (b) provides exemptions for restrictions necessary to “protect public morals...[and] human, animal or plant life or health.”<sup>47</sup>

These exemptions have formed the basis of a limited number of disputes before the WTO

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<sup>43</sup> WTO - Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>44</sup> Whether Uruguay Round Agreements Required Ratification as a Treaty, 18 U.S. Op. Off. Legal Counsel 232, n. 1 (1994).

<sup>45</sup> See World Trade Organization, *available at* [http://www.wto.org/english/thewto\\_e/whatis\\_e/agrm1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/agrm1_e.htm) (last visited April 20, 2010)

<sup>46</sup> General Agreement on Trade and Tariffs, Oct. 30, 1947, 55 U.N.T.S. 194, Art. XX (a)-(b).

<sup>47</sup> *Id.*

Dispute Settlement Body that link environmental and human harm to certain trade restrictions enacted by countries.<sup>48</sup> However, these types of trade restrictions have yet to be used to influence oil producing countries to improve environmental and human rights conditions. The complex political considerations forming the basis of this inaction is worthy of a more exacting discussion beyond the scope of this paper.<sup>49</sup> However, for purposes of this paper, the discussion is to what cognizable standard these restrictive trade policies could be formed around if action were to take place. This standard, codified in the international trade and accounting regulations, requires the disclosure of externalized costs due to unfair and harmful behavior, in the form of risks in financial information statements, which affects the environment or human rights.

#### **4.2 – Financial Information, Accounting Standards and Their Role in Human Value**

Access and dissemination of reliable financial information is an integral part to market economies because it provides investors, consumers, financial institutions, and other market actors with the tools to develop and implement informed financial decisions and strategies. Within this widely accepted practice, is the accurate reflection of how humans are impacted, from health-related issues to depressed real estate value from polluted properties.<sup>50</sup> In

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<sup>48</sup> Matthew Hurlock, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 Colum. L. Rev. 2098, 2106 (1992).

<sup>49</sup> Manuel Utset, *Complex Financial Institutions and Systemic Risk*, 45 Ga. L. Rev. 779, 815 (Spring 2011) (“[T]here are numerous reasons why the incentives to manage disclosures are even greater in financial institutions, including concerns about the reaction of regulators, the privacy of customers and investors, and the need to keep proprietary models used for valuing and trading securities out of the hands of competitors.”).

<sup>50</sup> Lawrence Smith, *Analysis of Environmental and Economic Damages from British Petroleum’s Deepwater Horizon Oil Spill*, 74 Alb. L. Rev. 563, 569 (2011) (“[O]nce environmental risks have been identified, the auditor must check

practice, however, the costs of environmental harm, especially in extractive processes like oil and gas production, are often externalized to the point of causing significant hardship to people.<sup>51</sup> Today's standards of accounting, equally specific to 18<sup>th</sup> century paradigms of universally accepted norms, places a duty on those engaged in disclosing financial information to properly value the human and environmental impact of certain activities.

Accounting norms are encapsulated within a large, yet specifically enumerated, body of internationally accepted standards, practices, and methods, designed to provide all market actors, including consumers and investors, with transparent accounting. This accounting includes the risks and associated costs of harmful conduct to humans and the environment.<sup>52</sup> To achieve accurate valuation in financial information, a number of international standards for financial information reporting and accounting exist, such as Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards (IFRS) overseen by the International Accounting Standards Board (IASB). The IASB's purpose for developing "high quality global standards" in financial reporting is to

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for compliance with accounting standards" including GAAP and IFRS); see generally Richard Schwartz, *Environmental Disclosure Requirements Under Federal Securities Laws*, 1839 PLI/Corp 93 (2010) (Considering the United States' important role in the global market, this article details the prevailing methods for environmental disclosure in financial accounting reports using internationally accepted norms).

<sup>51</sup> Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 Colum. J. Envtl. L. 491, 492 (2002); see also Tseming Yang, *The Emergence of Global Environmental Law*, 36 Ecology L. Q. 615 (2009) ("When environmental standards are low...consumers of globally traded products externalize the environmental costs of production.").

<sup>52</sup> Lawrence Smith, *Analysis of Environmental and Economic Damages from British Petroleum's Deepwater Horizon Oil Spill*, 74 Alb. L. Rev. 563, 569 (2011)

Ensure that investors and other users of financial information have transparent information about the entities in which they have, or are considering having, an economic interest. With transparency comes the confidence that they know what risks they are taking as investors. And with that confidence will come increased stability.<sup>53</sup>

All TNCs conducting business within the United States, through the sale and trade of securities are required to abide by the Securities Act (1933) and Securities Exchange Act (1934). As part of these acts, TNCs are required to disclose financial and operational information that conforms to GAAP and IFRS. These two standards, which all corporations are responsible for adhering to, are an aggregate of specific rules and principles. The purpose of these standards is to ensure a certain indicia of reliability and confidence in the information that is disclosed to investors, shareholders, and regulators. As part of these standards, corporations are required to appropriately study, catalogue, and accurately account for risks that are managed as part of financial and operational activities.

Spurred by the prevalence of “cross-border banking business” between private entities, publicly traded companies, national banks, and other market actors, the interdependence of national economies necessitates reliable financial reporting.<sup>54</sup> If “national policies and international cooperation are poorly managed” and perpetuate unfair market conditions, the resulting untrustworthiness of financial information could severely hamper contract formation between

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<sup>53</sup> Annual Report 2008, International Accounting Standards Committee Foundation, Report of the Chairman of the IASB at 19 (2008), *available at* <http://www.iasb.org/NR/rdonlyres/90CC93BF-581B-44DA-B685-C0503CC24A69/0/IASCFannualreport2008.pdf>

<sup>54</sup> Thomas Schobel, *Telos versus Unilateralism: Cross-Border Banking Business and the the International Applicability of Domestic Banking Law*, 63 Consumer Fin. L. Q. Rep. 177, 178 (Fall-Winter 2009)

market actors.<sup>55</sup> Although not binding, these standards “are increasingly followed and the international momentum is in their favor...[because] harmonization of accounting standards is an important process...of the internationalization of securities markets and securities regulation.”<sup>56</sup>

As it relates to human and environmental value, financial information must properly disclose the most accurate costs associated with environmental degradation and the impact on human populations. Keeping in mind the universal pledge to not “deprive[] [people] of its own means of subsistence,” accounting practices can readily ascertain if local food sources, such as fisheries and agricultural land, which are necessary for survival are being impacted by environmentally degrading activities like oil production.<sup>57</sup> Only representing a microcosm of the potential disputes, United States corporations are increasingly being called to account for the environmental and human health ramifications of corporate activity, partly due to state sanctions or acquiescence.<sup>58</sup> Although the current regulatory regime possesses substantive accounting and disclosure methods to consider environmental and human health concerns, the current implementation is imperfect because of weak enforcement.<sup>59</sup> In light of potential ATCA claims, the distinction should be made to the scope of compliance versus the limited

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<sup>55</sup> Richard Herring & Robert E. Litan, *Financial Regulation in the Global Economy* xvii (1995). *See also* Thomas Schobel, *Telos versus Unilateralism: Cross-Border Banking Business and the International Applicability of Domestic Banking Law*, 63 *Consumer Fin. L. Q. Rep.* 177, 178 (Fall-Winter 2009). *See also* Lawrence A. Cunningham, *The SEC’s Global Accounting Vision: A Realistic Appraisal of a Quixotic Quest*, 87 *N.C.L.R.* 1, 6 (Dec. 2008).

<sup>56</sup> Harold Bloomenthal & Samuel Wolff, *International accounting standards committee – National and International Reaction*, 3F *Sec. & Fed. Corp. Law* §27:82 (2d ed. 2011).

<sup>57</sup> U.N. International Covenant of Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc A/6316 (Dec. 16, 1966) Art. 1.

<sup>58</sup> Mitchell F. Crusto, *Endangered Green Reports: Cumulative Materiality in Corporate Environmental Disclosure After Sarbanes-Oxley*, 42 *Harv. J. on Legis.* 483,486 (Summer 2005)

<sup>59</sup> *Id.* at 487

unenforced sector. As a result of inconsistent application of accounting practices, not necessarily disagreement of their applicability, market instability has perpetuated a cycle of continued human rights and environmental abuses.<sup>60</sup> In essence, state-sanctioned or acquiesced environmentally harmful behavior has become the 21<sup>st</sup> century equivalent of privateering - where state-sanctioned piracy, through a “letter of marque and reprisal,” became an extension of a state’s sphere of influence.<sup>61</sup> Considering this under the specificity threshold for an ATCA claim, the law of nations analysis must focus on the universal acceptance of accounting practices, not necessarily on the compliance of such practices. And as the growing “fair trade” movement indicates, global market actors are increasingly pursuing practices that transparently account for social and environmental impacts of business decisions.<sup>62</sup>

#### 4.3 –How Unreliability in Financial Markets Impacts Social Value

The global accounting regime is imperfect, as the recent global financial crisis has demonstrated, but the standards are nonetheless present in states’ and corporations’ decisions, such as in the extractive industry. The recent global financial crisis is partly the result of a value system that unjustly rewards negligently caused physical harm due to high risk taking with limited liability exposure.<sup>63</sup> State complicity, as well as improper corporate action, is

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<sup>60</sup> *Id.* at 489

<sup>61</sup> Gary Anderson & Adam Gifford, Jr., *Privateering and the Private Production of Naval Power*, 11 Cato Journal 99, 101 (1991).

<sup>62</sup> Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U.L Rev. 1, 48 (2010).

<sup>63</sup> Wall Street As Community of Fate: Toward Financial Industry Self-Regulation, Saule T. Omarova, 159 U. Pa. L. Rev. 411, 411 (January 2011).

negligent in terms of failing to meet the duty under internationally recognized standards to properly disclose risks and risk management strategies. This has directly caused egregious environmental and human health disasters that have left immense swaths of places and people maltreated, poisoned, and degraded.

Unreliability, a hallmark of volatile financial markets, is a direct result of market actors undermining the basic concept of disclosure through means such as “information hiding.”<sup>64</sup> Transparency in financial reporting benefits markets by providing accurate and reliable information to contracting parties. Economist George A. Akerlof, a Nobel laureate, analyzed the “economic costs of dishonesty” caused by unregulated “asymmetric information,” a measure of the lack of confidence in financial information, which leads to doubt between contracting parties and ultimately to market failure.<sup>65</sup> The costs of dishonest information are two-fold: contracting parties may be cheated; and legitimate business may be driven out of existence.<sup>66</sup> In terms of environmental harm and human rights violations, elevated competition that accompanies larger market participation often can lead to “disastrous” outcomes.<sup>67</sup> As an example of over exploitation of natural resources and the impact on an indigenous population’s subsistence is Lubicon Lake Band v. Canada, which was heard by the U.N. Human Rights Committee. In Lubicon, the U.N. Commission on Human Rights held that Canada’s actions in

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<sup>64</sup> Manual Utset, *Complex Financial Institutions and Systemic Risk*, 45 Ga. L. Rev. 779, 816 (Spring 2011).

<sup>65</sup> George A. Akerlof, The Market for “Lemons”: Quality Uncertainty and the Market Mechanism, 84 The Quarterly Journal of Economics No. 3, 489 (Aug. 1970).

<sup>66</sup> *Id.* at 495.

<sup>67</sup> The World Bank, *Agriculture for Development: World Development Report* (2008) at 97; see also Natasha Dhillon-Penner, *Globalization, the WTO and Fair Trade: Is the International Trade System Working in the Interests of Coffee Farmers?*, 9 Asper. Rev. Int’l Bus. & Trade L. 201 (2009) (Looking solely at the impact of globalization for coffee farmers, the results have often left small, family-based farms severely disadvantaged against larger corporations in terms of profit distribution).

building an oil pipeline violated Article 27 of the International Covenant on Civil and Political Rights because it directly impacted the ability of tribal persons to survive and retain cultural integrity amid severe environmental burdens.<sup>68</sup> The underlying concern for corporations and states is that a lack of confidence in the viability of an extracted resource, like oil, will create a crisis of public confidence in the industry and therefore negatively affect the resource's value.<sup>69</sup> The lack of confidence can result from multiple factors: negative publicity from human rights concerns; environmental degradation that directly impact the producer's ability to acquire materials; unsustainable resource consumption that causes extreme demand on suppliers.

#### **4.4 – Operational Risk Management and Environmental Degradation**

As the recent Gulf of Mexico oil spill has demonstrated, the likelihood and scope of a catastrophic environmental, social, and economic event can occur overnight. The spectacle of industry representatives appearing before a Congressional hearing and regressing to “finger-pointing” also demonstrates that significant lapses in risk oversight can easily permeate through even the most well-funded and organized operations. But underlying this one event is the very real problem faced by industry and people alike – the extent to which humans are willing to engage in exceptionally risky activities that pose significant socio-economic and environmental concerns. The use of accounting standards, like GAAP and IFRS, are not simply limited to the financial risks taken by corporations as they extend financial positions through

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<sup>68</sup> U.N. Comm. On Human Rights, Communication No. 167/1984 - *Lubicon Lake Band v. Canada*, U.N. Doc. Supp. No. 40 (A/45/40) (March 26, 1990).

<sup>69</sup> Wall Street As Community of Fate: Toward Financial Industry Self-Regulation, 159 U. Pa. L. Rev. 411, 451 (January 2011).



exotic investment vehicles like swaps or other derivatives, but more practically to the quantification of risks taken by corporations and even states in their day-to-day operations. To quantify risk and its associated costs on the environment, economy, and the potential impact to human health may not be an exact science, but it necessitates an honest appraisal of how dangerous certain industrial activities like mining and oil development are and to what extent should corporations engage in risk mitigation strategies to offset the potential negative fall-out.

What corporations engaging in extractive processes have perpetuated is the negligent practice of manipulating risk management disclosures to reduce the appearance of substantial operational risk and therefore reduce the necessity to implement more costly protective measures.<sup>70</sup> In addition, manipulated risk management information also reduces the projected costs associated with human health and economic loss associated with environmental catastrophes.<sup>71</sup> The universally accepted norm of accurate information disclosure for corporations, under GAAP and IFRS, as well as states, under the WTO, which are engaged in certain trading activities, including commodities like oil and other extracted minerals necessitates reliable risk management disclosures.

## **5.0 –Reforms to Improve Environmental Considerations in a Human Rights**

### **Framework**

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<sup>70</sup> David Martin, *A New Season for Environmental Risk Factors and Related Disclosures*, 1773 PLI/Corp. 979, 995 (2009).

<sup>71</sup> Michael Levine, *Corporate Social Responsibility Standards and Monitoring Programs*, 1753 PLI/Corp 817 §7.4 at 864 (2009).

Although the argument presented in this paper represents a different approach to analyzing the reprehensible environmental and human conditions found within many developing countries, it is nonetheless a small component of the larger global context – humanity is advancing at a rate that may cause catastrophic harm to itself and the living planet.<sup>72</sup> In terms of the accounting principles, standards, and methods discussed above, the overarching concern is that their implementation is arguably nothing more than a hollow form of their own true potential. If the core function of these widely accepted standards is to provide transparency, reliability, and accuracy for international trading, then they must adhere to valuing the environmental and social costs associated with highly polluting activities. In the end, market volatility may not be created by extremely exotic investment instruments that hardly anyone can grasp, but rather through the systemic collapse of social worth and natural resource value throughout the world.

### 5.1 – Consumer Education

To give traction to the idea that accounting standards are a reliable means to ensure environmental and human rights are preserved, a significant paradigm shift must occur throughout society in our own value systems. As consumers weigh the costs associated with any commodity, whether gasoline or food, the necessary first step in proper valuation is education. Education is absolutely vital to provide the driving mechanism of international trade – consumers – with the power to affect socially and environmentally fair behavior by

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<sup>72</sup> L. Hunter Lovins, *Climate Capitalism: The Business Case for Climate Protection*, 27 Pace Env'tl. L. Rev. 735, 741 (2010); see also Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Law Making*, 35 Yale J. Int'l L. 469, 472 (2010).

producers. The notion of “information hiding,” as discussed above, reflects the competing interests between an educated consumer base and the producers. However, considering the wealth of internationally accepted accounting and disclosure requirements, it is arguable that the improvement of information dissemination, particularly to consumers, is a readily available reform to the current global market paradigm.

## 5.2 – Domestic Energy Policy

As a driving force of consumer demand, domestic energy policies are an integral vehicle that significantly affects the costs of many consumer choices.<sup>73</sup> Cheap energy reduces costs and spurs economic growth.<sup>74</sup> And as the disparate conditions grow between energy-intensive developed countries and the energy producers of developing countries, the need for accurate accounting of social and environmental costs in energy prices will become that much more apparent. As the current humanitarian crisis in Libya demonstrates, even small oil producers can have a significant impact on global energy prices.<sup>75</sup> To this end, as a major importer of foreign energy sources, the United States must act to reduce dependence on foreign oil through all available policy choices. Such a diversified strategy is embraced by current United

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<sup>73</sup> A. Dan Tarlock, *The Influence of International Law on United States Pollution Control Law*, 21 Vt. L. Rev. 759, 775 (1997); see also Robert Nordhaus, *Assessing the Options for Designing a Mandatory U.S. Greenhouse Gas Reduction Program*, 32 B.C. Envtl Aff. L. Rev. 97, 119 (2005).

<sup>74</sup> *Id.*

<sup>75</sup> *Libya no-fly resolution keeps oil prices volatile*, BBC News, March 18, 2011.

States leadership, but it remains to be seen if such a plan can be implemented quickly enough to affect substantial environmental and humanitarian change.<sup>76</sup>

Until such time that nations, especially large energy importers like the United States and China, implement more diversified energy portfolios that reduce unaccounted externalities, it is not easily seen if substantive inroads can be made in improving international environmental and humanitarian issues. While individual efforts, tied to specific locations or issues, may provide an interim reprieve for some people, the globalized market will continue to strain vulnerable segments of all societies. Of vital importance is continued dialogue in the global community to elicit a comprehensive vision of how energy dependence, environmental degradation, and human dignity can best be balanced.

## **6.0 - Conclusion**

The path of environmental protection and vindication of human rights violations has a long-fought legacy that has taken on many forms – conventions, institutions, court cases, and even military action. For all this work, the international community still wrestles, more than ever, with the ability to create lasting peace, as well as ensuring human dignity is preserved.

Although no greater hope can be realized when environmental and social well-being is completely harmonized across the globe, the current injustices require a flexible and resource approach to achieving redress. One such approach is pursuing compliance with internationally

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<sup>76</sup> Remarks on Blueprint For a Secure Energy Future, Pres. Doc. (Mar. 30, 2011) at 3.

recognized standards of accounting and financial reporting because of their wide acceptance, specific conditions, and applicability to both public and private governance structures. If there is ever a standard that is close to the 18<sup>th</sup> century equivalent of piracy, it is the act of states and corporations plundering natural and human capital for the sake of their own treasure troves without adequately disclosing such activity to the rest of those sailing on the globalized sea of trade.