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Environmental justice and international environmental law

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Environmental justice lies at the heart of most environmental disputes between the global North and South as well as grass-roots environmental struggles within nations. However, the discourse of international environmental law is often ahistorical and technocratic. It neither educates the North about its inordinate contribution to global environmental problems nor responds to the grievances of nations and communities disproportionately burdened by poverty and environmental degradation. This chapter examines the root causes of environmental injustice among and within nations from the colonial period to the present, and discusses strategies to integrate environmental justice into international law so as to promote social and economic justice while protecting natural resources for present and future generations.

Introduction

The global economy is currently exceeding ecological limits, and producing a variety of destructive impacts, including climate change, desertification, deforestation, degradation of arable land, freshwater shortages, depletion of fish stocks, unprecedented species extinction, and widespread chemical contamination of air, land, and water.[1] The United Nations Millennium Ecosystem Assessment concluded that human economic activity during the last half-century has produced more rapid and severe ecosystem degradation than in any comparable era of human history. The loss of ecosystem services intensifies poverty, exacerbates inequality, and poses significant obstacles to the achievement of the Millennium Development Goals (MDGs). Ecosystem degradation will also diminish the benefits that future generations derive from the planet's natural capital.[2]

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1 J.G. Speth, *The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability*, New Haven: Yale University Press, 2008, pp. 1–9; W. Sachs and T. Santorius (eds) *Fair Future: Resource Conflicts, Security and Global Justice*, London/New York: Zed Books, 2007, pp. 22–4.

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

The primary cause of global environmental degradation is the unsustainable consumption of environmental resources by the most economically privileged, most of whom reside in the global North or in the industrial centres of the global South.[3] Twenty per cent of the world's population consumes approximately 85 per cent of the planet's timber, 70 per cent of its energy, and 60 per cent of its food.[4] This population is also responsible for more than 90 per cent of the world's annual production of hazardous waste, some of which is exported to Southern countries and contributes to illness and widespread environmental harm.[5]

While the affluent reap the benefits of unsustainable economic activity, the burdens are borne disproportionately by the global South and by the world's most vulnerable communities, including indigenous peoples, racial and ethnic minorities, and the poor. Some scholars have described the ecological segregation of the world's population along economic and racial lines as 'eco-apartheid'.[6]

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

Environmental justice: North and South

This chapter adopts a four-part definition of environmental justice consisting of distributive justice, procedural justice, corrective justice, and social justice.[7] Distributive justice calls for the fair allocation of the benefits and burdens of natural resource exploitation among and within nations.[8] Procedural justice requires open, informed, and inclusive decision-making

3 Sachs and Santorius, op. cit., pp. 77–80; W.E. Rees and L. Westra, 'When Consumption Does Violence: Can There be Sustainability and Environmental Justice in a Resource-Limited World?', in J. Agyeman, R.D. Bullard and B. Evans (eds) *Just Sustainabilities: Development in an Unequal World*, Cambridge, MA: MIT Press, 2003, p. 116; C. Gonzalez, 'Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade', *Denver University Law Review* 78, 2001, pp. 1001–2.

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

5 D.N. Pellow, *Resisting Global Toxics: Transnational Movements for Environmental Justice*, Cambridge, MA: MIT Press, 2007, p. 8; Gonzalez, 'Beyond Eco-Imperialism', op. cit., pp. 991–2.

6 Rees and Westra, op. cit., pp. 100–3.

7 R.R. Kuehn, 'A Taxonomy of Environmental Justice', *Environmental Law Reporter* 30, 2000, p. 10681.

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

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

Environmental justice has an important North–South dimension. Through overconsumption of natural resources, wealthy countries have contributed disproportionately to a variety of environmental problems. Despite their far smaller contribution to global environmental degradation, poor countries bear most of the harm due to their vulnerable geographic locations, lack of resources and limited administrative infrastructure.[13] In addition to this *distributive injustice*, North–South relations are also plagued by *procedural inequities*. The North dominates decision-making in the International Monetary Fund (IMF), the World Bank, the World Trade Organization (WTO), and multilateral environmental treaty fora as a consequence of its greater economic and political clout. While the South can present alternative points of view, the preferences of the powerful generally dictate the substantive outcomes.[14] *Corrective injustice* is evident in the plight of small island states whose very existence is threatened by climate change, but who possess no legal mechanism to obtain compensation or cessation of the harmful conduct.[15] In addition, North–South environmental conflicts reflect broader *social injustice* because they are inextricably intertwined with colonial and post-colonial economic policies that impoverished the global South and facilitated the North's appropriation of its natural resources.[16]

The concept of environmental justice draws its moral force from grass-roots social struggles in both the North and the South. Beginning in the 1980s, the environmental justice movement emerged in the United States (US) in response to the concentration of polluting industry

9 Kuehn, op. cit., p. 10688.

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

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

12 Gonzalez, 'Beyond Eco-Imperialism', op. cit., pp. 1014; T. Yang, 'International Environmental Protection: Human Rights and the North–South Divide', in K.H. Mutz, G. Bryner and D. Kenney (eds) *Justice and Natural Resources: Concepts, Strategies and Applications*, Washington DC: Island Press, 2002 pp. 94–8.

13 R. Anand, *International Environmental Justice: A North–South Dimension*, Burlington: Ashgate, 2004, pp. 128–30; Gonzalez, 'Beyond Eco-Imperialism', op. cit., pp. 987–1000.

14 Anand, op. cit., pp. 132–3; P. Hossay, *Unsustainable: A Primer for Global Environmental and Social Justice*, London/New York: Zed Books, 2006, pp. 191–8; R. Peet, *Unholy Trinity: The IMF, World Bank and WTO*. London/New York: Zed Books, 2003, pp. 200–4.

15 M. Burkett, 'Climate Reparations', *Melbourne Journal of International Law* 10, 2009, pp. 513–20.

16 C.G. Gonzalez, 'Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology', *Georgetown International Environmental Law Review* 19, 2007, pp. 595–602.

and hazardous waste disposal facilities in low-income and minority communities.[17] The movement soon expanded to encompass additional environmental issues.[18] Environmental justice advocates alleged distributive injustice in the form of disproportionate exposure to environmental hazards; procedural unfairness in environmental decision-making; corrective injustice due to inadequate environmental enforcement; and social injustice because environmental degradation cannot be separated from other problems plaguing low-income communities and communities of colour (such as unemployment and underfunded schools).[19]

Environmental justice struggles are taking place on every continent. Many environmental justice struggles in the global South have been spearheaded by local and indigenous communities in opposition to development projects that threaten their lands, livelihoods, and natural resources.[20] Scholars have dubbed these grass-roots social movements 'the environmentalism of the poor'.[21]

The root causes of environmental injustice

In order to remedy environmental injustice, it is important to understand its historic roots. When European nations conquered America, they laid the groundwork for contemporary disparities in wealth and well-being.[22] The riches of the New World triggered a scramble among European countries for colonies in Asia, Africa, and the Americas. By 1800, Europe controlled 55 per cent of the global land mass. By 1914, 84.4 per cent of the planet's territory was under the effective control of Europe and the US.[23]

Colonialism transformed subsistence economies into economic satellites of Europe, and wreaked havoc on the peoples and environments of the colonised territories. Asia, Africa, and Latin America were incorporated into the global economy as exporters of raw materials and importers of manufactured products. Mining, logging, and plantation agriculture destroyed forests, displaced indigenous communities, and disrupted local ecosystems. The diversion of prime agricultural lands to export production created poverty and inequality by concentrating landholding in the hands of local elites, converting farmers into landless

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

18 Gonzalez, 'Genetically Modified Organisms and Justice', op, cit., pp. 727–8; A.H. Alkon and J. Agyeman, 'Introduction: The Food Movement as Polyculture', in A.H. Alkon and J. Agyeman (eds) *Cultivating Food Justice: Race, Class, and Sustainability*, Cambridge, MA: MIT Press, 2011, pp. 4–10; D.N. Suagee, 'Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability', *Widener Law Symposium* 3, 1998, pp. 236–9.

19 Kuehn, op. cit., pp. 10685, 10689, 10694–5, 10700–2.

20 Guha, op. cit., pp. 99–100, 115–19.

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

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

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

peasants, promoting the use of slave labour, and degrading the natural resource base necessary for food production. Resistance to colonial domination was brutally repressed.[24]

Colonialism also introduced racial hierarchies that linger to the present day. The colonial enterprise was justified by the ideology of European racial and cultural superiority. Europeans asserted a moral obligation to subjugate non-white 'savages' in order to 'civilise' them and convert them to Christianity.[25] Post-colonial elites would later internalise European cultural norms and subordinate indigenous communities in the name of modernisation and development.[26]

When political independence failed to eliminate the former colonies' crippling economic dependence on the export of primary commodities, many nations in the global South embarked on a state-led development strategy known as import substitution industrialisation (ISI). These countries sought to industrialise their economies by substituting imported manufactured goods with domestically produced equivalents.[27] Beginning in the 1960s, these nations came together as the Group of 77 (G–77) to demand the establishment of a New International Economic Order (NIEO), under the auspices of the United Nations (UN), that would restructure the international economic system to achieve a more equitable distribution of global wealth.[28] Recognising that Southern poverty was due to Northern dominance of the international economic system, the G–77 nations demanded full and effective participation in global governance, debt forgiveness, technology transfer, special trade preferences, and stabilisation of export prices for the commodities produced by the global South.[29] They asserted permanent sovereignty over their natural resources and the right to nationalise foreign companies exploiting these resources. In other words, the G–77 nations attempted to leverage their control over the raw materials needed by the global North in order to create a more just economic order.[30] The G–77 nations (whose current membership far exceeds the original 77 members) remain a significant force in negotiations, and their demands for justice have profoundly influenced international environmental law. Given the lack of a precise definition of developing countries in most environmental treaties, the G–77 nations are generally regarded as 'developing countries' in conventions that impose differential obligations on Northern and Southern countries.[31]

24 Hossay, op. cit., pp. 52–5; C.G. Gonzalez, 'Trade Liberalization, Food Security, and the Environment: The Neoliberal Threat to Sustainable Rural Development', *Transnational Law & Contemporary Problems* 14, 2004, pp. 433–37.

25 R. Gordon, 'Saving Failed States: Sometimes a Neocolonialist Notion', *American University Journal of International Law and Policy* 19, 1997, pp. 929–40; Elliott, op. cit., p. 85.

26 J. Ngugi, 'The Decolonization–Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa', *Wisconsin International Law Journal* 20, 2002, p. 324–6; R. Stavenhagen, 'Indigenous Peoples and the State in Latin America: An Ongoing Debate', in R. Sieder (ed.) *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy*, New York: Palgrave Macmillan, 2002, pp. 24–6.

27 C.G. Gonzalez, 'China in Latin America: Law, Economics, and Sustainable Development', *Environmental Law Reporter* 40, 2010, p. 10173.

28 L. Rajamani, *Differential Treatment in International Environmental Law*, Oxford: Oxford University Press, 2006, pp. 17–18.

29 Ibid., p. 18; R. Gordon and J.H. Sylvester, 'Deconstructing Development', *Wisconsin International Law Journal* 22, 2004, pp. 56–8.

30 R. Gordon, 'The Dawn of a New, New International Economic Order?' *Law and Contemporary Problems* 72, 2009, pp. 142–9.

31 Rajamani, op. cit., pp. 92, 115.

The debt crisis of the 1980s marked the demise of both the NIEO and ISI and ushered in the free market economic reforms known as the Washington Consensus. Lured into borrowing money from commercial banks to finance expensive development projects, many Southern nations struggled to repay these loans. In order to secure IMF and World Bank assistance, these debtor nations were required to adopt free market reforms that included privatisation of industry and public services; trade liberalisation; curtailment of government expenditures on health, education, and social programmes; the implementation of laws and policies favourable to foreign investors; and the maximisation of primary product exports in order to service the foreign debt. These policies were designed to put an end to state-led development strategies and to open up the global South to foreign exporters and investors.[32]

By promoting specialisation in primary commodities, the Washington Consensus reinforced the South's dependence on the export of raw materials rather than fostering investment in more dynamic economic sectors.[33] The lifting of tariff and non-tariff barriers in the agricultural sector rendered small farmers in the global South destitute by placing them in direct competition with highly subsidised US and European Union agribusiness.[34] The opening of domestic markets to cheap, imported manufactured goods jeopardised nascent industries. Finally, the mass privatisations of the 1990s enabled transnational corporations to dominate key economic sectors in the global South.[35]

The Washington Consensus's emphasis on export-led growth facilitated the global North's overconsumption of natural resources by increasing the supply and lowering the price of primary commodities.[36] The intense competition among debt-ridden Southern countries to maximise exports in order to obtain badly needed foreign exchange drove down prices and encouraged overproduction and overconsumption. Much of the environmental degradation in the global South has been caused not by local consumption of natural resources but by export-oriented production designed to satisfy Northern demand.[37] For example, chemical-intensive agro-export production in the global South accelerated deforestation, eroded agrobiodiversity, depleted aquifers, and contaminated water supplies with toxic agrochemicals. It also drove subsistence farmers from the land, fractured the integrity of rural communities, and accelerated rural-to-urban migration.[38]

Scholars, activists, and Southern governments have argued that the global North owes an ecological debt to the global South.[39] Having prospered on the basis of resources extracted from its colonial possessions, the global North continues to exploit the global South at prices that do not reflect social and environmental externalities. In addition, the global North

32 Gordon, 'The Dawn of a New, New International Economic Order?', op. cit., pp. 145–50; Gonzalez, 'China in Latin America', op. cit., pp. 10173–4.
33 Gordon, 'The Dawn of a New, New International Economic Order?', op. cit., pp. 149–50.
34 Gonzalez, 'Trade Liberalization, Food Security, and the Environment', op. cit., p. 466.
35 Gonzalez, 'China in Latin America', op. cit., pp. 10174, 10177.
36 Ibid., p. 10174; J. Martinez-Alier, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation*, Cheltenham: Edward Elgar, 2002, p. 220.
37 Rees and Westra, op. cit., pp. 105, 110.
38 Gonzalez, 'Trade Liberalization, Food Security, and the Environment', op. cit., pp. 467–71.
39 K. Mickelson, 'Competing narratives of justice in North-South environmental relations: the case of ozone layer depletion', in Ebbesson and Okowa (eds) op. cit., pp. 153–7.

industrialised rapidly and cheaply by using more than its fair share of the global commons, and its per capita ecological footprint continues to dwarf that of the global South.[40] Based on empirical evidence regarding material and energy flows from extraction of natural resources through production of finished goods, economists have confirmed that Northern economies 'are draining ecological capacity from extractive regions by importing resource-intensive products and have shifted their environmental burdens to the South through the export of waste'.[41]

The ecological debt concept is particularly compelling in the context of climate change, and it has achieved at least partial recognition in binding legal instruments. Between 1880 and 1990, the global North was responsible for 84 per cent of all fossil fuel-related carbon dioxide emissions and 75 per cent of all deforestation-related carbon dioxide emissions.[42] The United Nations Framework Convention on Climate Change (UNFCCC) acknowledges the North's disproportionate contribution to climate change by noting 'that the largest share of historical and current global emissions has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and developmental needs'.[43] In order to mitigate this North–South distributive inequity, Article 3(1) of the UNFCCC requires the global North to take the lead in combating climate change.[44]

By promoting trade and investment while restricting the ability of the state to intervene in the economy, the Washington Consensus increased corporate power. Corporations comprise 53 of the hundred largest economies in the world. They produce half of the world's greenhouse gas (GHG) emissions and control half of the global extraction of oil, gas, and coal. Due to their economic power and political influence, corporations are adept at evading regulatory oversight and democratic control.[45]

The burdens of the Washington Consensus are borne disproportionately by the planet's poorest and most marginalised communities. Economic inequality and environmental degradation have increased in most countries and regions in recent decades. Poor and indigenous rural communities that depend on natural resources for physical and economic survival are harmed by declining fish stocks, soil erosion, water scarcity, desertification, and deforestation. Women are particularly affected because they are often responsible for subsistence farming, gathering of fuel wood, water collection, and cooking. In urban areas, slum dwellers face the greatest risks from climate change-related sea level rises and increases in extreme weather events due to precarious living conditions, inadequate disaster preparation and response, and

40 A. Simms, *Ecological Debt: The Health of the Planet & the Wealth of Nations*, London: Pluto Press, 2005, pp. 86–109; D. McLaren, 'Environmental Space, Equity and the Ecological Debt', in Alkon and Agyeman (eds) op. cit., pp. 30–2; Martinez-Alier, op. cit., pp. 213–29; Rees and Westra, op. cit., pp. 109–12.

41 J.T. Roberts and B.C. Parks, *A Climate of Injustice: Global Inequality, North–South Politics, and Climate Policy*, Cambridge, MA: MIT Press, 2007, p. 168.

42 K. Mickelson, 'Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation', *Osgoode Hall Law Journal* 43, 2005, pp. 154–5.

43 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) (UNFCCC), preamble, para. 3.

44 Ibid., Art. 3(1).

45 Speth, op. cit., pp. 166–73.

lack of social safety nets.[46] In general, 'the most disadvantaged people carry a double burden of deprivation: more vulnerable to the wider effects of environmental degradation, they must also cope with threats to their immediate environment posed by indoor air pollution, dirty water and unimproved sanitation.'[47]

Finally, even nations that reject the Washington Consensus have adopted economic development strategies that mimic the development paths of the global North and impose disparate environmental burdens on vulnerable populations. China, for example, pursued an unorthodox development strategy based on proactive state intervention in the economy. However, its 'grow first, clean up later' economic policies have produced environmental degradation of staggering proportions within China, and have contributed to global environmental problems, such as climate change, transboundary air pollution, and the illegal timber trade.[48] Invoking the need for local sacrifices to promote national well-being, even populist Southern governments, such as the left-of-centre regimes in Ecuador, Bolivia, Venezuela, and Brazil, have embraced growth-at-any-cost development strategies based on mining and petroleum extraction despite these industries' devastating impacts on the livelihoods and natural resources of impoverished rural and indigenous communities.[49]

Environmental justice and international law

In order to foster equitable and effective solutions to global environmental problems, international environmental law must be informed by a morally compelling narrative that recognises the historic roots of environmental injustice and seeks to provide redress to the nations and communities disproportionately burdened by environmental degradation. Regrettably, the discourse of international environmental law is often technocratic and ahistorical. It does not educate the world's wealthy about their inordinate contribution to global environmental problems, and it frequently alienates the world's poor, who demand fairness and equity in the distribution of finite resources. As one observer points out in connection with climate change:

> Public outrage in the United States at the collapse in the livelihood of hundreds of millions is virtually non-existent. A discussion distinct from 'caps' and 'trades', and 'costs to the average consumer' will help to illuminate [the] suffering of the climate vulnerable, and the developed world's understanding of its own responsibility.[50]

Reframing international environmental law with justice at its core may facilitate the development of international environmental regimes that are more effective and more responsive to the inequities in global resource allocation.

Environmental justice requires the mitigation of structural inequities that impose a disproportionate share of the environmental costs of global economic activity on the global South

46 United Nations Development Programme (UNDP), *Human Development Report 2011: Sustainability and Equity: A Better Future for All*, New York: Palgrave Macmillan, 2011, pp. 4–5, 28–30, 51, 59.
47 UNDP, op. cit., p. 5.
48 Gonzalez, 'China in Latin America', op. cit., pp. 10175–76.
49 E. Gudynas, 'Más allá del nuevo extractivismo: transiciones sostenibles y alternativas al desarrollo', in F. Wanderley (ed.) *El desarrollo en cuestión. Reflexiones desde América Latina*, La Paz, Bolivia: Oxfam, 2011, pp. 385–90.
50 Burkett, op. cit., pp. 510–11.

and on vulnerable populations in both affluent and poor countries. Environmental justice necessitates the implementation of measures to scale back the North's overconsumption of the world's resources, to reduce North–South inequality, to curb the power of transnational corporations, and to guarantee full and effective participation in international, national, regional, and local governance by Southern nations and vulnerable communities. Lastly, environmental justice calls for a bold rethinking of the dominant economic paradigm so as to promote economic and social development while respecting the planet's biophysical limits.

The remainder of this chapter describes several strategies for bringing justice to the forefront of environmental protection and mitigating the stark disparities in social and economic development within and among nations.

Environmental human rights

Environmental justice is grounded in international human rights, including the rights to life, health, and cultural integrity, the right to be free from race and sex discrimination, the rights to information, participation, and redress for environmental harm, and the right to a healthy environment.[51] The enjoyment of internationally protected human rights depends upon a healthy environment, and serious environmental degradation is often accompanied by human rights abuses. Similarly, environmental protection is strengthened by the exercise of human rights, such as the right to information and the right to participate in governmental decision-making.[52] Invoking human rights law and institutions when human rights are threatened by environmental degradation ensures that 'the environment does not deteriorate to the point where the human right to life, the right to health, the right to a family and private life, the right to culture, the right to safe drinking water, or other human rights are seriously impaired'.[53]

Recognising entitlements as human rights protects them from the tyranny of the majority, the dictatorship of the minority, and the reciprocal exchange of obligations that takes place in the negotiation of international trade and investment agreements.[54] Although most human rights treaties do not contain explicit environmental provisions, global and regional human rights tribunals have interpreted these agreements to permit claims against states based on human rights violations caused by inadequate environmental protection.[55] These tribunals have recognised that environmental degradation may interfere with the rights to life, health, property, privacy, food, water, and an adequate standard of living and with the collective rights of indigenous peoples to their ancestral lands and resources.[56] Human rights

51 Gonzalez, 'Genetically Modified Organisms and Justice', op. cit., p. 626.
52 D. Shelton, 'Environmental Rights', in Philip Alston (ed.) *Peoples' Rights*, New York: Oxford University Press, 2001, pp. 187–94; Gonzalez, 'Beyond Eco-Imperialism', op. cit., pp. 1014–15.
53 Shelton, 'Environmental Rights', op. cit., p. 187.
54 Ibid., pp. 187–94; Gonzalez, 'Genetically Modified Organisms and Justice', op. cit., pp. 777–8.
55 J. Knox, 'Climate Change and Human Rights Law', *Virginia Journal of International Law* 50, 2009, pp. 168–70; D. Shelton, 'The Environmental Jurisprudence of International Human Rights Tribunals', in R. Picolotti and J.D. Taillant (eds) *Linking Human Rights and the Environment*, Tucson: University of Arizona Press, 2003, pp. 11–12.
56 D. Shelton, 'Environmental Rights and Brazil's Obligations in the Inter-American Human Rights System', *George Washington International Law Review* 40, 2009, pp. 750–67; A. Boyle, 'Human Rights or Environmental Rights? A Reassessment', *Fordham Environmental Law Review* 18, 2007, p. 487; Knox, 'Climate Change and Human Rights Law', op. cit., pp. 170–8.

tribunals have held that states have a duty to refrain from directly violating these rights and an obligation to protect these rights by regulating the conduct of private parties.[57]

Human rights violations linked to environmental degradation have been recognised under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights despite the lack of explicit environmental human rights provisions in these treaties. The African Charter on Human and People's Rights and the Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights (San Salvador Protocol) do recognise substantive environmental human rights.[58] International human rights law is therefore an essential tool for victims of environmental injustice.

A human rights approach to environmental protection reveals some of the deficiencies of the current state-centric model of international environmental law. Most environmental treaties seek to constrain environmentally deleterious behaviour, but do not address human impacts. The environmental treaty regime tends to focus on transboundary consequences or impacts on the global commons, but lacks mechanisms to address harm that is purely domestic.[59] Environmental treaties generally lack citizen complaint mechanisms, and human rights tribunals are often the only international forum in which victims of environmental injustice can challenge governmental action or inaction related to the environment.[60]

International environmental law can better address environmental injustice by incorporating complaint procedures into environmental treaties so as to permit members of civil society to bring claims against states for non-compliance – whether or not such non-compliance results in transboundary harm. This approach is not unprecedented. The Aarhus Convention, for example, creates a Compliance Committee of independent experts and authorises any member of the public and any non-governmental organisation (NGO) to file a communication with the Committee alleging a party's non-compliance. The Compliance Committee can issue declarations of non-compliance, make recommendations to the party concerned, suspend the party's rights under the treaty, or make recommendations to the Meeting of the Parties regarding the imposition of punitive measures.[61] In addition, the North American Agreement on Environmental Cooperation (NAAEC), popularly known as the NAFTA (North American Free Trade Agreement) environmental side agreement, permits members of the public to file complaints against the parties (the US, Canada, and Mexico) for failure to effectively enforce their environmental laws. However, this mechanism is less effective than that of the Aarhus Convention because it is controlled by the very governments whose conduct is challenged and because the public is largely excluded from the

57 Knox, 'Climate Change and Human Rights Law', op. cit., pp. 170–1, 178–9.
58 S. Kravchenko and J.E. Bonine, *Human Rights and the Environment: Cases, Law, and Policy*, Durham, NC: Carolina Academic Press, 2008, pp. 3–4.
59 H.M. Osofsky, 'Learning from Environmental Justice: A New Model for International Environmental Rights', *Stanford Environmental Law Journal* 24, 2005, 71–131, pp. 78–87.
60 Shelton, 'Environmental Jurisprudence of International Human Rights Tribunals', op. cit., pp. 1–2.
61 S. Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements', *University of Colorado Journal of International Environmental Law and Policy* 18, 2007, pp. 10–18, 30.

decision-making process. Moreover, the process results in a non-binding 'factual record' rather than a legal determination on the merits of the complaint.[62]

The Aarhus Convention is a ground-breaking contribution to procedural human rights that promotes environmental justice by empowering citizens to challenge governmental non-compliance with environmental commitments. Individuals and NGOs can bring claims of non-compliance against their own country or against any other party to the treaty in order to secure the rights guaranteed therein, including access to information, public participation, and access to justice. The Convention's complaint process promotes transparency, democracy, and accountability, and serves as a potential model for citizen participation in future environmental treaties.[63]

An environmental justice approach to environmental protection must be particularly attentive to public participation by vulnerable communities. Poverty, illiteracy, lack of information, and government indifference or hostility have excluded vulnerable communities from effective participation in decision-making regarding climate change, biodiversity protection, and environmental impact assessments for local, regional, or national development projects.[64] Once again, the Aarhus Convention's minimum requirements for access to information, public participation, and access to justice are instructive, requiring governments to provide support to facilitate participation in environmental decision-making. Among the types of support provided are financial grants, technical assistance, capacity-building, and free legal representation offered by the government or financed by domestic or foreign donors.[65]

Reducing North–South inequality through differential treatment

Environmental justice requires recognition and redress of the enduring inequalities between states arising from the colonial encounter and the post-colonial development practices described in this chapter. One important tool to mitigate North–South inequality is differential treatment in international law. Norms of differential treatment in favour of Southern countries are designed to redress historic inequities, and have been utilised in both international economic law and international environmental law. While differential treatment has been on the wane in international economic law since the early 1990s, it has been on the rise in international environmental law.[66] The following subsections explore the principles that have arisen to promote differential treatment: (1) special and differential treatment in international trade law; and (2) common but differentiated responsibility in international environmental law.

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

63 M. Fitzmaurice, 'Environmental Justice through International Complaint Procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation', in Ebbesson and Okowa (eds) op. cit., pp. 222–3; Kravchenko, 'Aarhus Convention and Innovations in Compliance', op. cit., pp. 1–2.

64 S. Kravchenko, 'The Myth of Public Participation in a World of Poverty', *Tulane Environmental Law Journal* 23, 2009, pp. 35–46.

65 Ibid., pp. 48–55.

66 Rajamani, op. cit., pp. 47–8.

International economic law: special and differential treatment

Differential treatment in international law may appear to violate the doctrine of sovereign equality of states, but it is entirely consistent with international law and is justified by the need to promote social and economic development. Given the economic disparities among states, formal equality would exacerbate poverty and inequality. Differential treatment seeks to narrow the gap between the colonisers and the formerly colonised by providing more advantageous treatment to the latter. Since states have the sovereign right to elect to be bound by treaties that confer special treatment on other states, differential treatment in international legal instruments does not run afoul of international law.[67]

Differential treatment has its origins in the demands of the G–77 nations for a more equitable distribution of the planet's resources. Differential norms were adopted initially in international economic law and were subsequently incorporated into international environmental law.[68]

The 1947 General Agreement on Tariffs and Trade (GATT) was negotiated when most of the South was under colonial rule. The GATT benefited the global North by reducing tariffs on manufactured goods, but it did not address the global South's needs for economic diversification and industrialisation or compel the global North to open its highly protected agricultural markets to Southern imports.[69] By the mid–1950s, Southern nations had mobilised to demand a variety of measures to promote economic development, including removal of the global North's trade-distorting agricultural subsidies and import barriers; preferential market access and non-reciprocal tariff reductions for Southern country products; and the right to protect infant industries through tariffs, subsidies, and quotas.[70]

The concerted efforts of the global South introduced the principle of special and differential treatment into the GATT through a series of amendments that permitted (but did not require) the global North to provide differential and more favourable treatment to its Southern trading partners.[71] Pursuant to this principle, Southern countries were granted preferential market access and non-reciprocal tariff concessions, and were not required to become parties to all of the side agreements resulting from the 1973 to 1979 Tokyo Round of trade negotiations.[72]

However, the advantages of special and differential treatment generally proved illusory. The benefits of preferential market access to Northern markets declined as Northern tariff levels were reduced. The most significant products of the global South (clothing, textiles, agriculture) were either excluded or received less preference. Because the norms imposing differential treatment were often drafted in aspirational rather than mandatory language, the compliance of the global North was strictly voluntary, and non-compliance did not result in sanctions.[73] For example, GATT Article XXXVII requires Northern countries to 'accord

67 Ibid., pp. 2, 48–9.
68 Ibid., pp. 17–19, 48–9.
69 Gonzalez, 'China in Latin America', op. cit., pp. 10178–9; Gonzalez, 'Trade Liberalization, Food Security, and the Environment', op. cit., pp. 456–7.
70 Gonzalez, 'China in Latin America', op. cit., p. 10179; F. Ismail, 'Rediscovering the Role of Developing Countries in GATT Before the Doha Round', *Law and Development Review* 1, 2008, pp. 59–67.
71 Ismail, op. cit., pp. 65–7.
72 Gonzalez, 'Genetically Modified Organisms and Justice', op. cit., pp. 633–4.
73 Ibid., pp. 634–5.

high priority' to the export products of interest to the global South and to refrain from introducing or increasing import barriers to such products.[74] However, this provision excuses Northern countries from complying with these obligations if they invoke 'compelling reasons', including contrary legal obligations.[75] In other words, 'developed countries may escape from those so-called commitments by legislating against them'.[76]

The WTO, which succeeded the 1947 GATT, eroded differential treatment by imposing the same obligations on all countries but merely giving the global South more time to comply. The WTO failed to phase out the Northern import barriers on clothing, textiles, and agricultural products, but managed to constrain the development options of Southern nations. Reinforcing the free market reforms imposed by the IMF in the wake of the debt crisis, the WTO required the global South to eliminate the import barriers that had formerly protected domestic industries from more technologically advanced foreign competitors; restricted the ability of the state to use tariffs and subsidies to promote dynamic new industries; and imposed new and expensive obligations on the global South in the areas of intellectual property, services, and investment.[77]

The free market reforms imposed by international trade and financial institutions deprive the global South of the protectionist tools used by the global North and by the rising powers of the global South to achieve economic prosperity. The US, Germany, France, Japan, the United Kingdom, China, South Korea, and Taiwan deployed a broad array of state interventionist measures (industrial policy) in order to diversify and industrialise their economies. These measures included subsidies, tariffs, state financing of major industries, local content requirements, technology transfer requirements, and even state-sponsored theft of intellectual property through industrial espionage.[78] Regrettably, nations that arrive at the pinnacle of economic success through protectionism often advocate free trade so as to 'kick away the ladder' and prevent others from climbing up.[79]

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

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

75 Ibid., Art. XXXVII(1).

76 Y.S. Lee, *Reclaiming Development in the World Trading System*. Cambridge: Cambridge University Press, 2006, p. 35.

77 Ibid., pp. 41–3; F.J. Garcia, 'Beyond Special and Differential Treatment', *Boston College International and Comparative Law Review* 27, 2004, pp. 297–9.

78 H. Chang, 'The East Asian Development Experience', in H. Chang (ed.) *Rethinking Development Economics*, London/New York: Anthem Press, 2003, pp. 111–17; H. Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective*, London/New York: Anthem Press, 2002, pp. 19–51, 59–66; Gonzalez, 'China in Latin America', op. cit., pp. 10174–5.

79 Chang, *Kicking Away the Ladder*, op. cit., pp. 4–5.

reviewed with a view to strengthening them and making them more precise, effective and operational'.[80]

International environmental law: common but differentiated responsibility

States differ in terms of their contribution to global environmental degradation, their vulnerability to environmental harm, and their capacity to address environmental problems. Northern proposals to protect the global environment without taking these differences into account have sparked scepticism in the global South.[81] Indeed, Northern environmentalism was initially regarded as yet another effort to 'kick away the ladder' and perpetuate Southern poverty by depriving the global South of the polluting technologies that the North had used to industrialise.[82]

Nevertheless, the global South has been an active partner in the development of international environmental law. However, Southern nations have generally articulated a different concept of environmentalism. While the North has typically focused on global environmental problems (such as ozone depletion, climate change, and biodiversity loss), the South has often pressed for action on environmental problems with more immediate impacts on vulnerable local populations, including desertification, food security, the hazardous waste trade, access to safe drinking water and sanitation, and indoor air pollution caused by lack of access to sustainable energy.[83] As awareness of the potentially devastating local and global consequences of climate change grew, the South demanded an aggressive response based on the North's disproportionate contribution to the problem.[84]

During the major diplomatic conferences on the environment convened by the United Nations, the South has emphasised responsibility for historic environmental harm and the need to address poverty and inequality.[85] From the 1972 Stockholm Conference through the 2002 World Summit on Sustainable Development, the South played an instrumental role in the development of soft-law principles and treaty mechanisms that introduced differential treatment into international environmental law so as to foster social and economic development. The relevant soft-law principles include Principles 3, 5, 6, and 9 of the Rio Declaration, which endorse the right to development, require states to cooperate to decrease disparities in living standards, express concern for the special needs and circumstances of developing countries, and recognise the need for technology transfer to achieve sustainable development.[86] The relevant treaty mechanisms include provisions exempting the South from substantive obligations (such as the Kyoto Protocol, which does not impose binding emission reduction

80 World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 ILM 746 (2002), ¶44.
81 Gonzalez, 'Beyond Eco-Imperialism', op. cit., pp. 1008–9.
82 R. Falk, 'The Second Cycle of Ecological Urgency: An Environmental Justice Perspective' in Ebbesson and Okowa (eds) op. cit., p. 45.
83 Gonzalez, 'Beyond Eco-Imperialism', op. cit., pp. 1008–9; L. Guruswamy, 'Energy Justice and Sustainable Development', *Colorado Journal of International Environmental Law and Policy* 12, 2010, pp. 235–8.
84 Roberts and Parks, op. cit., pp. 132–50.
85 K. Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers', *Yearbook of International Environmental Law*, 2000, pp. 70–1.
86 *Rio Declaration on Environment and Development* (1992), Report of the UN Conference on Environment and Development, UN Doc A/CONF.151/26 (vol. I), reprinted in 31 ILM 874 ('Rio Declaration') Principles 3, 5, 6 and 9; Rajamani, op. cit., p. 60.

obligations on Southern countries); giving Southern countries more time to comply (such as the Montreal Protocol's differential phase-out schedules for ozone-depleting chemicals); and conditioning the South's duty to comply with treaty provisions on the North's transfer of financial resources and technology (such as the Convention on Biological Diversity (CBD) and the UNFCCC).[87]

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

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[88]

The principle of common but differentiated responsibility finds use in international environmental law to impose asymmetrical obligations on the North and the South in light of: (1) the North's disproportionate contribution to global environmental degradation; (2) the North's superior financial and technical resources; and (3) the South's economic and ecological vulnerability.[89] The principle of common but differentiated responsibility appears in a variety of environmental treaties, including the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the UNFCCC, the Kyoto Protocol, the CBD, and the United Nations Convention on the Law of the Sea (UNCLOS).[90]

Notwithstanding the incorporation of common but differentiated responsibility into so many treaties, its meaning remains contested – particularly in climate change negotiations. From the perspective of the global South, the principle acknowledges 'the historic, moral, and legal responsibility of the North to shoulder the burdens of environmental protection, just as it has enjoyed the benefits of economic and industrial development largely unconstrained by environmental concerns'.[91] However, there is disagreement as to whether the principle operates in terms of corrective or distributive injustice. One prominent scholar argues that the principle 'provides a corrective justice basis for obliging the developed world to pay for past harms as well as present and future harms' through the transfer of financial resources and technology.[92] Others are not persuaded that the principle unequivocally mandates Northern financing of Southern adaptation and mitigation measures.[93] To the extent that the principle merely requires the North to scale back its own emissions in order

87 D. Shelton, 'Describing the Elephant: International Justice and Environmental Law', in Ebbesson and Okowa (eds) op. cit., p. 62.
88 Rio Declaration, op. cit., Principle 7.
89 C.D. Stone, 'Common But Differentiated Responsibilities in International Law', *American Journal of International Law* 98, 2004, pp. 279–80.
90 Gonzalez, 'Genetically Modified Organisms and Justice', op. cit., p. 632.
91 Mickelson, 'South, North, International Environmental Law', op. cit., p. 70.
92 Shelton, 'Describing the Elephant', op. cit., pp. 67–8.
93 J. Brunnée, 'Climate change, global environmental justice and international environmental law', in Ebbesson and Okowa (eds) op. cit., pp. 325–6.

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

Northern countries, however, have refused to accept responsibility for historical acts of environmental degradation, and have instead attributed their leadership role in the climate regime to their greater wealth, technical expertise, and capacity to take response measures.[94] In addition to refusing to ratify the Kyoto Protocol, the US went so far as to submit an interpretive statement on Principle 7 of the Rio Declaration rejecting legal responsibility for past actions.[95]

The global North's ahistorical understanding of global environmental problems is one of the fundamental obstacles to North–South environmental collaboration. This approach 'seeks to wipe the colonial past from our collective memories and start afresh, as if past patterns of exploitation have little bearing on current inequities, and the efforts of developing countries to raise them time and again are no more than special pleading'.[96] Instead of acknowledging responsibility for past wrongs, the global North ascribes its differential commitments under the climate regime and other environmental treaties to *noblesse oblige* – benevolence, morality, and good will. This justification ensures that the North's obligations are drafted in discretionary rather than binding language, and are included in soft law rather than hard law instruments. The North's ahistorical approach is inconsistent with the polluter pays principle, which requires the polluter to bear the cost of environmental degradation. It is also at odds with the climate regime's use of 1990 as the baseline for mitigation – a baseline that grandfathers the historical emissions of the global North.[97]

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

Mitigating the power of transnational corporations

Corporations are frequently implicated in serious human rights and environmental abuses. While corporations have begun to adopt voluntary codes of conduct, the magnitude of corporate influence in the global economy requires a stronger response.[98]

An environmental justice approach to international environmental law requires creative use of international and domestic law to regulate the extraterritorial conduct of transnational corporations. When these corporations engage in environmentally irresponsible conduct in

94 Rajamani, op. cit., pp. 76, 81.
95 J.D. Kovar, 'A Short Guide to the Rio Declaration', *University of Colorado Journal of International Environmental Law and Policy* 4, 1993, pp. 129–30.
96 Rajamani, op. cit., p. 87.
97 Ibid., pp. 86–7.
98 A. Sinden, 'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs', in D. McBarnet, A. Voiculescu and T. Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press, 2009, pp. 501–3.

the global South, they are externalising the costs on local populations while internalising the economic benefits. The geographic separation between the home state and the host state obscures the injury and may prevent shareholders and the public in the home state from experiencing moral culpability.[99] Furthermore, if these activities proceed via a subsidiary, the legal separation between the parent company in the home state and the subsidiary in the host state may make it difficult for the legal system to hold the parent company and its shareholders liable despite the profits that they derive from this activity.[100] Under well-settled legal principles, the corporate subsidiary is deemed a separate legal person, and the parent company is not generally liable for the actions of its subsidiary.[101] Because Southern governments are often implicated in human rights and environmental abuses or are vulnerable to exploitation by transnational corporations due to their staggering foreign debts, the host country may not be able to adequately regulate the corporation's activities. Transnational regulation may therefore be the best solution.[102] The remainder of this section considers several regulatory strategies that may promote socially responsible corporate behaviour.

Some scholars have argued that corporations should be treated like states under international human rights law.[103] Transnational corporations, like states, could elect to be bound by human rights treaties, and would be subject to *jus cogens* norms and to norms that have achieved the status of customary international law. Transnational corporations, like states, would also be liable for complicity in the human rights violations of another state, including knowingly aiding and assisting; directing and controlling; and coercing another state in the commission of human rights violations.[104] The problem with this approach is that corporations would likely refuse to be bound by human rights treaties and refuse to consent to the jurisdiction of international or regional human rights tribunals. In the absence of consent, there may be no mechanism to enforce applicable customary international law norms against recalcitrant corporations.

A second strategy calls for legislation subjecting the corporation to liability in the home state for violations of legal norms abroad. This strategy may be appealing to victims of human rights and environmental abuses if significant barriers frustrate justice in the host state. An example of this approach is the US Alien Tort Claims Act (ATCA), which gives federal courts jurisdiction over civil suits by aliens for torts 'committed in violation of the law of nations or a treaty of the United States'.[105] The statute has been invoked against transnational corporations for complicity in human rights violations.[106] Despite high-profile settlements in cases brought against Unocal and Shell, few ATCA cases have been successful due, in part, to the significant procedural hurdles that these cases encounter, including the doctrines of *forum non conveniens*, act of state, political question, sovereign immunity, and

99 Yang, 'International Environmental Protection', op. cit., p. 105.
100 J. Overland, 'A Multi-Faceted Journey: Globalisation, Transnational Corporations, and Corporate Social Responsibility', in S. Alam, N. Klein and J. Overland (eds) *Globalisation and the Quest for Social and Environmental Justice: the Relevance of International Law in an Evolving World Order*, New York: Routledge, 2011, pp. 136–7.
101 A. De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment*, Cheltenham: Edward Elgar, 2011, pp. 83–4.
102 Yang, 'International Environmental Protection', op. cit., pp. 97, 105–6.
103 Sinden, op. cit., p. 519.
104 De Jonge, op. cit., pp. 150–1.
105 *Alien Torts Claims Act*, 28 USC §1350.
106 De Jonge, op. cit., pp. 100–1.

comity.[107] In addition, the plaintiffs will need to establish the liability of the parent for breaches that are most commonly committed by its subsidiaries.[108] Thus, the threat of a successful lawsuit in the home state may not be sufficient to deter misconduct in the host state. In addition, on 17 September 2010, the US Court of Appeals for the Second Circuit ruled in the case of *Kiobel v Royal Dutch Petroleum* that corporations cannot be sued under the ATCA because no international tribunal has ever held a corporation liable for human rights violations.[109] In October 2011, the US Supreme Court granted *certiorari* to hear this case.[110] The decision will determine the fate of corporate liability in the US under the ATCA.

A third strategy is extraterritorial legislation in the home state regulating the conduct of its corporations abroad or state responsibility for failure to regulate. Many states already impose liability on corporations for money-laundering and bribery in their operations abroad, and could expand existing legislation to encompass human rights and environmental standards.[111] States that fail to regulate could be held responsible for the extraterritorial conduct of their corporate nationals. Under customary international law, states have a duty to refrain from causing transboundary harm, including a due diligence obligation to regulate the conduct of private parties within their territories. States that have ratified the ICESCR have an additional obligation to ensure that corporations under their jurisdiction and control respect economic, social, and cultural rights in other countries.[112] Where a state has actual or constructive knowledge that extraterritorial corporate activity (such as oil drilling) may violate human rights (including environmental human rights) and fails to exercise due diligence to prevent such violations, the state may incur liability on that basis.[113] Furthermore, capital exporting countries that enter into bilateral investment treaties (BITs) with capital importing countries may be liable for the human rights violations of their corporate nationals to the extent that the BITs restrict the ability of the host state to regulate the foreign investor in a manner that protects human rights.[114]

A fourth strategy is to incorporate sustainable development into BITs and free trade agreement investment chapters. These agreements have historically protected foreign investors while limiting the regulatory authority of the host state.[115] For example, arbitration tribunals have interpreted the key operative clauses of BITs to require host state governments to compensate foreign investors when health, safety, and environmental regulations diminish the profitability of the investment – with little or no deference to the state's exercise of regulatory authority and with no opportunity for the state to complain of the foreign investor's conduct.[116] Drawing upon the model investment agreement developed by the International

107 Ibid., pp. 99–100; 108–17.
108 Overland, op. cit., p. 138.
109 De Jonge, op. cit., pp. 105–6.
110 M. Sacks, 'Supreme Court to Rule on Corporate Personhood for Crimes Against Humanity', Huffington Post, 17 October 2011. Online. Available HTTP: <http://www.huffingtonpost.com/2011/10/17/supreme-court_n_1015953.html> (accessed 26 November 2011).
111 De Jonge, op. cit., pp. 91–3.
112 R. McCorquodale and P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', *Modern Law Review* 70, 2007, pp. 617–19.
113 Ibid., pp. 619–21.
114 Ibid., pp. 621–3.
115 X. Fuentes, 'The Impact of Foreign Investment Rules on Domestic Law', in D. French (ed.) op. cit., pp. 192–203.
116 Ibid., pp. 199–206.

Institute for Sustainable Development (IISD), states might enter into BITs that: (1) make sustainable development the objective of the agreement and affirm the right of the host state to regulate in the public interest; (2) revise the substantive obligations of the host state to explicitly preserve regulatory flexibility; (3) require the host state to adopt high levels of environmental and human rights protection in its national legislation; (4) require foreign investors to comply with domestic and international human rights and environmental norms; (5) establish civil liability in the investor's home state for breach of these domestic and international norms; and (6) permit the host state to make counterclaims against the foreign investor for failure to comply with the obligations set forth in the BIT.[117] This approach imposes standards of conduct on transnational corporations, requires the home country of the foreign investor to more closely monitor and regulate the extraterritorial activities of its companies, and expands the rights of victims of human rights and environmental abuses. Indeed, these BITs should also include a hierarchy of norms clause that recognises the primacy of human rights and environmental norms in the event of a conflict with other BIT obligations.

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

Re-conceptualising development

Climate change jeopardises the health and well-being of present and future generations, and represents the single greatest threat to sustainable development. It is also one of the most devastating manifestations of a deeper problem: a failed development model premised on the fallacy of unlimited economic growth. Since the Second World War, Northern trade, aid and financial institutions have trumpeted the growth-at-any-cost economic model as the solution to global poverty and inequality.[118] This 'has brought us to the point where sustained material growth destroys ecosystems, impoverishes the planet, diminishes the human spirit, and visits violence upon whole poor communities'.[119] The world's wealthiest countries (the US, the European Union, and Japan) and its rising powers (China, India, Russia, and Brazil) are currently responsible for almost 70 per cent of global GHG emissions, and these emissions are growing.[120] This practice is sustainable only if poor countries freeze their development and consume only a fraction of the planet's resources. If all countries of the world simultaneously pursue the growth-at-any-cost economic model, the result would be global environmental catastrophe.[121] It is

117 H. Mann, K. von Moltke, L.E. Peterson and A. Cosbey (2005), *International Institute for Sustainable Development Model International Agreement for Sustainable Development*. Online. Available HTTP: <http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> (accessed 28 December 2011).

118 Sachs and Sartorius, op. cit., pp. 30–1.

119 Rees and Westra, op. cit., p. 107.

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

121 C. Flavin and G. Gardner, 'China, India, and the New World Order', in Worldwatch Institute, *State of the World 2006: Special Focus: India and China*, New York: W. W. Norton and Company, 2006, pp. 16–18; Gonzalez, 'Beyond Eco-Imperialism', op. cit., pp. 1002–3.

therefore necessary to develop alternative models of economic development that require reductions in per capita energy and resource consumption by the affluent so as to create the ecological space necessary to improve the living standards of the poor.

One solution to the impasse in the climate change negotiations is a reinvigorated conception of common but differentiated responsibility that imposes differential mitigation obligations on *all* nations based on historic responsibility, vulnerability, and capacity to reduce GHG emissions. Popularly known as contraction and convergence, this approach would cap and reduce greenhouse gas emissions by allocating emissions entitlements to each nation based on the above criteria with the ultimate goal of having Northern and Southern per capita emissions converge. Excluding the global South from mandatory emissions caps is fundamentally unjust because it equates countries such as India and China (with their significant and growing emissions) with Sudan and Tuvalu (with their minimal emissions, limited capacity, and significant vulnerability) and guarantees gridlock in the climate negotiations as the planet teeters on the brink of catastrophe.[122] The contraction and convergence approach to climate change will promote environmental justice by scaling back the North's overconsumption of the planet's resources so that the South will be able to improve living standards – instead of simply grandfathering the global North's emissions based on the climate regime's 1990 baseline.[123]

Foregrounding justice in the climate change negotiations can also produce a new model of economic development that reduces GHG emissions, improves the well-being of the world's poor, and facilitates the transition to renewable energy. A large percentage of humanity relies on animal dung, crop residues, rotted wood, and other forms of biomass for energy. Biomass can be used for cooking and heating, but it exacts a terrible toll on the health of women and children exposed to indoor pollution, and produces black carbon, a powerful contributor to global warming. In addition, biomass cannot provide the energy necessary to power water pumps and agricultural machinery or to provide water filtration and lighting for homes and schools – all of which contribute to the fulfilment of the MDGs of reducing hunger, increasing access to safe water and sanitation, and providing primary education.[124] Instead of ignoring the plight of the most vulnerable, climate negotiators should deploy the Kyoto Protocol's Clean Development Mechanism (CDM) and develop new mechanisms in the Kyoto Protocol's successor to finance renewable energy projects (such as small-scale hydroelectric, wind, or solar power) in the poorest countries of the global South in order to simultaneously reduce black carbon emissions, decrease indoor air pollution, contribute to the achievement of the MDGs, and enable countries in the global South to leapfrog the fossil fuel-based development path taken by the global North.[125]

An environmental justice approach to climate policy would prioritise the needs of the most vulnerable by placing greater emphasis on climate adaptation. Consistent with the principle of common but differentiated responsibility, the nations that contributed the most to climate change would have an obligation to increase the adaptive capacity of the poorest,

122 J. Ngugi, 'The "Curse" of Ecological Interdependence: Africa, Climate Change and Social Justice', in W.H. Rodgers, Jr and M. Robinson-Dorn (eds) *Climate Change: A Reader*, Durham, NC: Carolina Academic Press, 2011, pp. 982–3.

123 Simms, op. cit., pp. 171–7.

124 Guruswamy, op. cit., pp. 233–8.

125 R. Gordon, 'Climate Change and the Poorest Nations: Further Reflections on Global Inequality', *University of Colorado Law Review* 78, 2007, p. 1615.

least culpable, and most vulnerable.[126] Adaptation funds should focus on the poorest countries and target the neediest segments of society.[127] Adaptation funding would build resilience to climate change, combat poverty and inequality, contribute to the fulfilment of the MDGs, and promote North–South cooperation. Climate change adaptation will require coordination of environmental policy with trade, investment, finance, immigration, public health, land use, energy, and national security law and policy. As one observer puts it, 'climate change adaptation policy is going to transcend environmental law quickly and decisively.'[128]

Conclusion

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

126 Ngugi, 'The "Curse" of Ecological Interdependence', op. cit. p. 985.
127 Verchik, 'Adaptive Justice' in Rodgers, op. cit., pp. 891–93.
128 J.B. Ruhl, 'Climate Change Adaptation and the Structural Transformation of Environmental Law', *Environmental Law* 40, 2010, p. 415.