International Environmental Law and Foreign Direct Investment

David Hunter and Stephen Porter
Center for International Environmental Law

Discussion Draft
3/19/98

Center for International Environmental Law
1367 Connecticut Ave., NW
Suite 300
Washington, D.C. 20036
tel.: (202) 785-8700
fax: (202) 785-8701

International Environmental Law and Foreign Direct Investment

David Hunter and Stephen Porter
Center for International Environmental Law

I. Introduction: An Environmental Perspective on FDI

II. Emerging International Environmental Concepts and Principles.
- A. Principles and Concepts of International Environmental Law that Affect FDI in the Global or Transboundary Context
  1. Permanent Sovereignty over Natural Resources
  2. Principle of Common Concern of Humankind
  3. The Duty to Prevent Environmental Harm
  4. The Precautionary Principle
  5. Notification and Consultation
  6. Prior Informed Consent
  7. State Responsibility and Liability in the Environmental Field
- B. International Principles Shaping and Harmonizing National Environmental Laws that May Affect FDI
  1. The Polluter and User Pays Principle
  2. Environmental Impact Assessment
  3. Principle of Participatory and Informed Decisionmaking
  4. Equal Access to Justice

III. Implications of International Environmental Treaties for FDI
- A. The Montreal Protocol Regime and CFC Production
- B. The Convention on Climate Change and Greenhouse Gas Emissions
- C. The Basel Convention and Hazardous Wastes
- D. The Nuclear Liability Conventions
- E. Oil Pollution Liability Conventions
- F. Liability for Other Activities Dangerous to the Environment

IV. Environmental Provisions in International Investment Agreements
- A. North American Free Trade Agreement
- B. The European Energy Charter
- C. Multilateral Agreement on Investment

V. Environmental Standards for Public Financing of FDI.
- A. World Bank Group
- B. Bilateral Overseas Private Investment Corporation
- C. Export Credit Agencies

VI. Voluntary Guidelines and Standards.
- A. ISO 14000
- B. The OECD Guidelines on Multinational Enterprises.
- C. The UNCTC Draft Code of Conduct on Transnational Corporations.
- D. ICC Business Charter for Sustainable Development
- E. The Valdez Principles

VII. National Laws and Standards
- A. Extraterritorial Application of Domestic Law
- B. Transnational Environmental Litigation: Bringing Cases in Home Country Courts

International Environmental Law and Foreign Direct Investment

David Hunter and Stephen Porter
Center for International Environmental Law

This chapter addresses how the field of international environmental law approaches issues relating to foreign direct investment (FDI). International environmental law is one of the most important mechanisms for integrating and achieving sustainable development through better environmental protection and economic goals. Although international environmental law is primarily aimed at States (at least in the public international law realm), it is also increasingly influencing private economic activities such as FDI.

International environmental law has largely developed in an *ad hoc* way, through relatively discrete treaty regimes and other instruments negotiated in response to specific environmental threats or issues. By some estimates, more than eight hundred multilateral and bilateral agreements now contain provisions dealing with one or more aspects of the environment. Some of these treaties could require parties to assert important controls on FDI. For example, the Basel Convention on the Transboundary Movement of Hazardous Waste requires specific management standards for hazardous waste facilities and recent revisions to the Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer ban the production and consumption of ozone destroying substances.

Despite the *ad hoc* nature of how international environmental law has developed, the field now includes a growing number of increasingly well-defined principles and concepts that are expected to guide the future development of the law. Because there is no universal or general environmental treaty and because no international institution is charged primarily with law-making in the environmental field, these emerging principles and concepts help to provide necessary coherence and consistency in the application of international environmental law to new areas, such as FDI. These principles and concepts also provide guidance and legitimacy for the further development of national laws and policies for the environment. A discussion of international environmental concepts and principles with particular relevance to FDI is provided in Part II. Part III includes a description of some of the most important environmental treaties and their impact on FDI.

Recent international investment agreements and proposed investment agreements include language on environmental issues, but have generally failed to impose any substantive, enforceable environmental requirements on investors. These agreements represent an important intersection of the interests of investors and environmentalists and are likely to become a more important fulcrum for efforts to link environmental interests with economic development. These international investment agreements are discussed in Part IV.

Part V reviews environmental standards placed on investment funding from multilateral and bilateral financial institutions. Even where public financing is not involved, these environmental standards are increasingly used as benchmarks for FDI, particularly in developing countries where national standards may not exist or (more commonly) are not enforced. Part VI reviews the environmental requirements of a number of voluntary codes of conduct for multinational enterprises and considers the effect such codes have on FDI. Finally, as an illustration of the potential importance of domestic or unilateral restrictions on investment, Part VII briefly examines two ways U.S. domestic environmental law may impact FDI: through extraterritorial application of U.S. environmental standards and through expanding access to domestic courts for activities and damage occurring abroad.

I. Introduction: An Environmental Perspective on FDI

In recent years, private capital flows have dwarfed other forms of resource transfers from the industrialized countries to developing countries. According to the World Bank, private capital flows (both FDI and private debt) to developing countries and economies in transition quadrupled from 1989 to 1994, and reached 1996 total of $244 billion. FDI is expected to continue to expand in developing countries at an annual rate of 7% to 10% over the next decade.

The rise in FDI brings with it important challenges for environmentalists and international environmental law. These challenges can be divided into five categories: (1) the trend away from local control and responsibility over resources; (2) the scale and speed of today's global economy; (3) the distribution of potentially environmentally damaging technologies to ill-prepared communities; (4) double-standards that allow companies to provide developing countries lower environmen-

tal and health safeguards; and (5) the concern that countries will lower their environmental and health standards in an effort to increase competitiveness. In addition to these challenges, FDI also creates opportunities to fund environmentally sustainable investments and to expand markets for environmentally beneficial technologies.

From Local to Global Control. Globalization of the market economy and with it the growth of multinational corporate power conflicts at least conceptually with the goal of sustainable development, which requires local participation and control over development choices. In the global economy, owners who may benefit from environmentally damaging processes typically do not live in or near the local communities that are affected by the environmental harm. Given that the political and economic power is vested in people physically separated from the environmental harm, less environmental protection can be expected. Moreover, when States agree to broad investment agreements such as the proposed Multilateral Agreement on Investment (MAI), they may be ceding some of their sovereign power to assert local control over the environmental and social impacts of FDI.[1]

The Scale and Speed of the Global Economy. The sheer scale and speed at which the global economy now operates presents new and important challenges to the planet's environment. For example, chemicals and other products go from the laboratory to mass-marketed global production quicker than ever. Our knowledge of potential environmental damage may not keep pace with the ability to distribute through global networks persistent chemicals and other technologies that potentially pose substantial environmental threats. The adverse impact of these chemicals or technologies may already be locked in, *before* we even identify the problem. This is in part the lesson learned from ozone depletion. Although the international community implemented a ban on CFCs just twenty-two years after the potential threat was identified, this unprecedented rapid international response may still not be in time to avoid significant environmental and health impacts that were already "banked" by the long-lasting accumulation of CFCs and other substances in the atmosphere. The sheer scale and pace of the economy is now so great that these chemicals and other potentially hazardous technologies or products should be reviewed for environmental impact before they are produced and distributed in mass quantities.

Dangerous and Inappropriate Technologies. Just as important as these global environmental issues are the issues raised by FDI at the national level. Environmental disasters, such as the 1984 isocyanate gas leak in Bhopal, India, that killed several thousand people, highlight the problems that occur when FDI brings environmentally hazardous technologies to countries or local communities with neither the legal framework nor the technical infrastructure to address the resulting environmental problems. Consequently, environmentalist insist that some types of investments not be allowed until adequate environmental and public health controls can reasonably be expected to be in place.

Double-standards and Fairness. The export of technologies and use of practices through FDI that have been banned in industrialized countries also raise issues of fairness and equity. Many chemical products, for example pesticides like DDT, that are illegal in OECD countries are nonetheless produced by subsidiaries of OECD-country companies in developing countries. Practices in certain other industries, for example oil production and gold mining, have repeatedly involved serious allegations of environmental and human rights abuses. Texaco in Ecuador, Shell Oil in Nigeria, Ok Tedi in Papua New Guinea, and Freeport McMoran in Indonesia are well known cases of environmentally harmful operations, often linked with militarization of the area and allegations of human rights abuses. The disparity between how companies operate in developing countries when compared to their industrialized home countries raise troublesome moral and ethical questions. This has led to some discussions about controlling the exports of domestically prohibited technologies and goods, or imposing minimum industry operating standards on multinational corporations. Some of these "codes of conduct" or standards are discussed in Part VI.

Competitiveness and the Lowest Common Denominator. Some environmentalists fear that competition for FDI could lead developing countries to sacrifice environmental standards and public health in a 'race to the bottom' to lure foreign investments. Most evidence shows that environmental standards and performance have no competitiveness impacts at least in developed countries, but this does not stop developing countries from resisting stronger environmental policies at least in part to promote FDI.[2] Although countries should be given some deference to choose lower environmental standards based on their domestic priorities, national governments frequently encourage FDI in ways that harm local populations and provide little or no local participation in decision making. Some minimum national environmental standards and laws should perhaps be a prerequisite for open trade and investment.

Environmental Opportunities. Of course, FDI not only presents challenges, but also opportunities, for environmental protection. Official development assistance is declining and has never met the levels required for

moving developing countries toward sustainable development. Private sector investments will have to provide the majority of environmentally sustainable investments in the future. In addition, the markets for environmental investments are large and increasing; for example, investments for global pollution control are expected to reach $300-600 billion per year by the year 2000 and investments in energy efficiency projects are expected to reach another $250 billion in the next 20 years. Many of these opportunities for environmental investments are being created or stimulated by international environmental instruments and other legal responses to environmental problems.[3]

II. Emerging International Environmental Concepts and Principles.

In recent years a core set of concepts and principles have emerged in international environmental law.[4] These concepts and principles have been endorsed in a number of different contexts, including the Rio and Stockholm declarations,[5] Agenda 21,[6] and many specific environmental treaties. These concepts and principles serve a number of different functions: adding coherence and consistency to the field of international environmental law; providing a framework for negotiating future international instruments; guiding the interpretation and application of international environmental law in specific circumstances; establishing standards for harmonizing domestic environmental laws and policies; and assisting the coherent integration of international environmental law with other fields of international law, including those relating to trade and investment.

The nature and legal status of these concepts and principles vary. Some are incorporated in legally binding instruments, including major global environmental conventions, and some of them are found primarily in soft law instruments. Some are supported by considerable State practice, while others may be too new or controversial to be reflected in State practice. Some contain precise legal obligations and others require further elaboration. Through repetition and subsequent State practice, including through incorporation into domestic legal systems, many of these principles or standards may emerge as binding customary law. In the meantime, these principles, standards and other forms of "soft" law form a growing and increasingly comprehensive set of principles that guide international society toward sustainable development.

Despite the uncertain legal status of some of these principles, they all provide guidance regarding the future path of international environmental law as it evolves to address issues like FDI. The following discussion divides these principles into two categories: those principles that are having or might have an impact on FDI in the global or transboundary context and those principles that are shaping and thereby tending to harmonize domestic environmental laws. These principles thus may lend some greater predictability to future domestic law in ways that may make investors better able to evaluate the risks relating to future regulation. The two categories of principles overlap somewhat and should not be considered discrete.

A. Principles and Concepts of International Environmental Law that Affect FDI in the Global or Transboundary Context

1. Sustainable Development

Beginning at the 1992 U.N. Conference on Environment and Development (UNCED), States have affirmed sustainable development as the major conceptual framework for integrating the goals of environmental protection, social justice, and economic development.[7] Although precise definitions of sustainable development are still elusive, the language emanating from the 1995 Copenhagen Social Summit and repeated verbatim in subsequent instruments is a good starting point:

> "We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people. Equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice."[8]

With its emphasis on the integration of environmental protection and economic development, the concept of sustainable development provides the conceptual framework for addressing issues such as the relationship between the environment and FDI.

2. Permanent Sovereignty over Natural Resources

Growing out of calls for a New International Economic Order in the 1970s, developing countries in particular have pushed for a legally binding principle of permanent sovereignty over natural resources. The principle

was meant to secure that benefits from the exploitation of developing country resources by northern corporations would accrue at least somewhat to local populations. The principle is frequently viewed as a principle of international economic law, but it is of obvious importance for the field of environmental law, as well.

As set forth in the 1966 Resolution on Permanent Sovereignty over Natural Resources, the U.N. General Assembly.

> 1. Realizes the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development, in conformity with the spirit and principles of the Charter of the United Nations and as recognized in General Assembly resolution 1803 (XVII); ***
>
> 3. States that such an effort should help in achieving the maximum possible development of the natural resources of the developing countries and in strengthening their ability to undertake this development themselves, so that they might effectively exercise their choice in deciding the manner in which the exploitation and marketing of their natural resources should be carried out;
>
> 4. Confirms that the exploitation of natural resources in each country shall always be conducted in accordance with its national laws and regulations;
>
> 5. Recognizes the right of all countries, and in particular of the developing countries, to secure and increase their share in the administration of enterprises which are fully or partly operated by foreign capital and to have a greater share in the advantages and profits derived therefrom on an equitable basis, with due regard to the development needs and objectives of the peoples concerned and to mutually acceptable contractual practices, and calls upon the countries from which such capital originates to refrain from any action which would hinder the exercise of that right;
>
> 6. Considers that, when natural resources of the developing countries' are exploited by foreign investors, the latter should undertake proper and accelerated training of national personnel at all levels and in all fields connected with such exploitation;
>
> 7. Calls upon the developed countries to make available to the developing countries, at their request, assistance, including capital goods and know-how, for the exploitation and marketing of their natural resources in order to accelerate their economic development, and to refrain from placing on the world market non-commercial reserves of primary commodities which may have an adverse effect on the foreign exchange earnings of the developing countries.[9]

The general principle of permanent sovereignty over natural resources is widely viewed to have some binding nature, but the clear restraints on FDI suggested by the language (particularly paragraphs 4-7) have never been operationalized in international law. Although their spirit still informs some developing country responses to liberalized investment rules, for example under the proposed multilateral investment agreement, the principle of sovereignty over natural resources is more likely today to be invoked as a counter-argument to international environmental protection efforts than it is an argument for controlling FDI.

3. Principle of Common Concern of Humankind

Protecting the global environment is increasingly being considered a common concern of humankind.[10] The principle of common cern is a direct result of the gowing understanding of the ecological interdependence of all states. Many environmentally damaging activities, such as the emission of greenhouse gases or the destruction of biodiversity, have until relatively recently been considered wholly the concern of the States within which the activities take place. These activities are now recognized as affecting the global environment and the health and welfare of future generations. Taken together, the treaties that regulate these and similar environmentally damaging activities reflect an emerging acceptance that protecting the environment and achieving sustainable development are common concerns of humankind.

The principle of common concern does not necessarily contain specific legal obligations, but rather provides a conceptual framework for legitimizing international regulation and lawmaking with respect to what would otherwise be activities or resources within the sovereign control of individual States. The common concern principle thus is a potential conceptual framework for future international efforts to manage the environmental impacts of FDI.

4. The Duty to Prevent Environmental Harm

Under customary international law, States are required to ensure activities within their jurisdiction or control

do not harm the environment of other states or of areas beyond national jurisdictions.[11] This principle first emerged in the *Trail Smelter Arbitration* between Canada and the United States, in which an Arbitral Panel held that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another."[12] The International Court of Justice subsequently confirmed that a "general obligation to respect the environment of other states. . ."[13] The wording of the ICJ opinion differs from formulations in *Trail Smelter* and in international environmental instruments such as the *Stockholm* and *Rio Declarations* (Principles 21 and 2, respectively), but nonetheless generally endorses the obligation not to cause environmental harm.

When harm from pollution is involved, the duty to avoid environmental damage is often articulated as the pollution prevention principle. Pollution prevention has been adopted, in general terms, by numerous instruments restricting the introduction of pollutants into the environment.[14] Principle 6 of the Stockholm Declaration set out the principle in sweeping terms:

> The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems.

Some agreements prescribe concrete quantitative standards for pollution abatement and in some cases include specific timetables for reducing or eliminating certain emissions.[15] Other instruments require States to exercise due diligence in applying best available technology to ensure that no harm is caused to the environment of other States by pollution.[16]

In *Trail Smelter*, Canada was found liable for damage caused by a private company to private landowners, because there was no other way for the private landowners to gain access to national courts under private international law. Where FDI is in a company or activity causing significant transboundary impact, and where private international law options are not available, this principle may conceivably serve as a cause of action.

5. Notification and Consultation

The principle of prior notification obliges States planning an activity to transmit to potentially affected States all necessary information sufficiently in advance so that the latter can, if necessary, enter into consultation with the acting State. Article 19 of the Rio Declaration confirms this principle:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect.[17]

The principle of consultation requires States to allow potentially affected parties an opportunity to review and discuss a planned activity that may have potentially damaging effects. The acting State is not necessarily obliged to conform to the interests of affected States, but should take them into account. The principle has been reiterated in various other declarations and conventions, frequently including a requirement that the consultation be "in good faith and over a reasonable period of time."[18] For example, the recently negotiated U.N. Convention on Non-navigational Uses of International Watercourses requires that planned activities be delayed for up to a year as the affected State is given time first to become informed about the project and then to participate in good faith negotiations.[19]

Notification and consultation would typically be required for projects and other planned activities in one country that might harm another State's environment. Investments in such activities with potential transboundary impacts will be subject to the national implementation of the State's obligation to notify and consult. Frequently these obligations are implemented through transboundary environmental impact assessment systems or other notice and comment mechanisms.[20]

6. Prior Informed Consent

When one State wants to act in the territory of another State, simple notification and consultation has been deemed insufficient; most treaties now require the acting State to obtain the other States prior informed consent. Thus, for example, a party to the Basel Convention that seeks to export hazardous wastes must inform the importing State of the nature of the wastes and receive the written consent of the importing State. Other activities requiring prior informed consent include transporting hazardous wastes through a State, lending emergency assistance after a nuclear accident, exporting domestically banned chemical substances and prospecting for genetic resources.[21] Investors in these types of activities or other environmentally harmful activities may soon have to face a similar obligation to obtain prior informed consent.

7. State Responsibility and Liability in the Environmental Field

Under the principle of state responsibility, States are generally responsible for breaches of their obligations under international law. As Ian Brownlie puts it:

> Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of compensation for loss caused.[22]

The *Corfu Channel* case affirmed the state responsibility principle.[23] There, the Court found that Albania had breached its international obligation to ensure that its territory was not used in a way that harmed others. Finding that Albania failed to take necessary steps to warn ships approaching the danger zone or to otherwise avoid the harm caused by exploding mines, the Court concluded that Albania was "responsible under international law" for the explosions and was required to pay compensation for the loss of property and human life.

State responsibility extends to breaches of international environmental law, as well. Thus, for example, states are responsible for violating the obligation not to cause environmental harm. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration refer to the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment...."[24] Both *Trail Smelter* and the ICJ opinion addressed environmental harms clearly emanating from the territory of a State. They confirm that activities within the territory of a State cannot cause significant harm to the environment of a neighboring State. In this context, a State may be responsible both for its own activities and for activities of private corporations or individuals under its jurisdiction or control. Thus, the State can be responsible for failing to prevent the polluting activities, for not enacting or enforcing necessary environmental laws, for not terminating dangerous activities, or for letting violations go unpunished. To the extent that FDI-related activities cause transboundary environmental impacts (in violation of the duty to prevent harm for example), the host State would clearly have the obligation to abate or mitigate the harm by imposing restrictions on or possibly preventing the activity.

More controversial, however, is whether the general obligation not to cause harm to the environment can be extended to activities of a company created under the laws of one State when it is investing or otherwise operating in the territory of another State. Both Stockholm and Rio extended a State's responsibility "to ensure that *activities within their jurisdiction or control* do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (emphasis added). Thus, the issue is whether a corporation's home State, by virtue of it being the State of incorporation and presumably of the corporate headquarters, has sufficient "jurisdiction or control" over the corporation to be required to ensure that the activities of that corporation in another State does not harm the environment of that host State.

This issue has not been definitively decided in the context of international environmental law, but would have to be considered a progressive extension of the prevailing opinion. Most commentators agree that "jurisdiction" relates to situations such as flag ships in maritime law, where the State traditionally retains jurisdiction under international law over activities occurring outside the State's territory. "Control" has tended to address "situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction de jure, such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law."[25]

In practice, there are relatively few judicial claims based on state responsibility; most pollution cases are settled not at the international level but through private international rules of civil liability (i.e. directly between the private individuals involved). International claims commissions that distribute funds "donated" by the acting State directly to the foreign plaintiffs are also important and relatively common. Such a procedure allows States to settle the claims without acknowledging legal responsibility.

No international consensus yet exists regarding the details for when and how liability should be assessed when environmental damage has been caused by a lawful act. The International Law Commission, which has been working on the requirements for State liability for some time now, has endorsed the concept that states should be liable for some environmental harms. The progress has been so slow that twenty years later the *Rio Declaration* repeated included the same exhortation found in the Stockholm Declaration; that the international community should "develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control."

Similarly, the Basel Convention contains an obligation for the Parties to:

> co-operate with the view to adopting, as soon as practicable, a protocol setting out appropri-

> ate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.[26]

The negotiations on the Basel Convention's protocol on liability continue. Although the protocol is likely to extend liability to private companies for damage caused by hazardous waste shipments, it is not clear whether such liability will extend to FDI in hazardous waste management facilities or transshipment companies.

C. International Principles Shaping and Harmonizing National Environmental Laws that May Affect FDI

1. The Precautionary Principle

As set forth in Principle 15 of the Rio Declaration, the Precautionary Principle states that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[27] The precautionary principle evolved from the growing recognition that scientific certainty often comes too late to design effective legal and policy responses to potential environmental threats. In essence, it switches the burden of scientific proof necessary for triggering policy responses, thus shortening the time period between the identification of a potential threat to the environment, proof of the causes and impacts of that threat, and implementation of a policy response.

In the past, when little was known about how certain substances would affect the environment, the general assumption was that the air or the water or the land could assimilate the chemical so that these substances would never harm the environment. In the last two decades, however, these assumptions have repeatedly proven false. For example, the accumulation of PCBs in the oceans severely harm marine mammals, and CFCs destroy the ozone layer. Because so little is known about the future and cumulative effects of these and other persistent chemicals, the precautionary approach provides the most ecologically defensible guideline addressing policy responses to these problems.

Although there is an emerging consensus regarding the conceptual significance of the precautionary principle, practical application of the principle, even at the national level, is rare. Nonetheless, the precautionary principle could eventually have profound effects on the process by which new products and technologies are developed and marketed globally. Strict application of the precautionary principle would prohibit potentially hazardous activities until they have been shown not to cause significant environmental damage. Restrictions on global production of new persistent chemicals, for example, might be put in place, until the manufacturer demonstrates the chemical degrades to harmless compounds. Foreign investment that could harm the environment might have to be reviewed in light of potential environmental damage; FDI in certain ultra-hazardous activities might be curtailed where it presents major risks even if the threats are poorly understood.

2. The Polluter and User Pays Principle

Under the polluter and user pays principle, States should take those actions necessary to ensure that polluters and users of natural resources bear the full environmental and social costs of their activities. The principle aims at integrating environmental protection and economic activities, by ensuring that the full social costs, including environmental and health costs associated with pollution and resource degradation, are reflected in the ultimate market price for a good or service. Environmentally harmful or unsustainable goods will tend to cost more, and consumers will switch to less polluting substitutes. This will result in a more efficient and sustainable allocation of resources. Originally recommended by the OECD Council in May 1972, the principle is still highly controversial, particularly in developing countries where the burden of internalizing environmental costs is perceived as being too high. As a result the principle has not been widely accepted outside of OECD countries.[28]

Developing countries' ambivalence toward the polluter pays principle is illustrated by the Rio Declaration's formulation, which exhorted authorities to "promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, without distorting international trade and investment."[29] The Rio Declaration thus cautions (as does the similar Article 19 of the Energy Charter) against implementing the polluter pays principle in ways that distort trade or investment, apparently to discourage use of countervailing duties or other at-the-border measures to implement the polluter pays principle. Use of such measures would actually conflict with the principle, however, which is intended to harmonize domestic policies so as to reduce distortions in trade and investment, by minimizing the chance that environmental "subsidies" in the form of lax standards are used to gain a competitive advantage. Competition for FDI must then be on other than environmental grounds.

3. Environmental Impact Assessment

Environmental impact assessment (EIA) is a process for examining, analyzing and assessing proposed activities

likely to have a significant adverse impact on the environment, in order to integrate environmental protection and economic development. The EIA process is designed to ensure that (i) the appropriate government authorities have fully identified and considered the environmental effects of proposed activities, as well as any alternatives that could avoid or mitigate the environmental effects, before any decision to approve an activity and (ii) affected citizens have an opportunity to understand the proposed project or policy and to express their views to decisionmakers in advance.

EIA requirements are now a regular feature of international instruments,[30] the policies of international financial institutions,[31] and many national laws.[32] EIA has also become a major element of a State's environment and development responsibilities in the transboundary context. For example, the 1991 Convention on EIA in a Transboundary Context specifies obligations related to transboundary environmental impact assessment.[33]

To achieve the objectives of greater citizen participation and better development decisions, EIAs should begin as early as possible in the planning stage. All relevant impacts, mitigation measures, and alternatives should be analyzed fully. A draft environmental impact statement (EIS) detailing the proposed project, the resulting environmental impacts, alternatives to the project, and potential mitigation options should be made available to the public for study and comment, *before* any final decision is made. The final EIS and the final decision on the project should take into account citizen comments and recommend a final form of the project that mitigates environmental damage.

Most international and national EIA requirements apply only to decisions made by governmental entities. Strictly speaking, therefore, EIA requirements will typically not apply to private investment decisions, except to the extent they involve government approvals or permits. As a practical matter, most large-scale investment projects require government permits of some sort and thus would be covered by the EIA regime. Regardless of whether an EIA statute applies, investors should ensure that adequate environmental assessments, with full citizen participation, have been carried out as part of best environmental practices when investing in a new project in developing countries. The EIA process may enable investors in new projects to identify and avoid potentially significant future environmental liabilities, and it allows an opportunity for strengthening local support for a project.

4. Principle of Public Participation and Access to Environmental Information

Decisions that threaten to harm the environment should be based on consideration of the most current ecological, economic and social information, and the views of all affected stakeholders. Principle 10 of the Rio Declaration clarified the link between effective public participation and access to information:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have the appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[34]

The principle of public participation thus obligates governments to establish a process for citizens and nongovernmental organizations (NGOs) to obtain environmental information, comment on environmental information, develop and submit their own information, have their input considered, and have remedial procedures available to them. Special emphasis has also been placed on ensuring the full and effective participation of politically disadvantaged groups including women, indigenous peoples and minorities. The trend in all countries is to expand such public participation in the design of major projects, thus providing new challenges to investors.

This principle suggests that information regarding FDI generally as well as specific projects should be made available to project-affected people *before* decisions are made. Project-affected people should also be provided an opportunity to participate in the design of the project and should be provided some access to judicial relief for protecting these participation rights. Ensuring meaningful and effective public participation is thus a major challenge for project sponsors, particularly given the many different cultures and languages that may be present in project areas.

5. Equal Access to Justice

Under this principle, countries from which pollution originates "should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution shall at least receive equivalent treatment to that

afforded to persons of equivalent status in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status."[35] This includes the right to take part in all administrative and judicial procedures existing within the Country of origin relating to pollution control.

Europe has taken the lead in ensuring access to transfrontier plaintiffs. In 1976, the European Court of Justice held that within the European Community the victim of transfrontier pollution may sue either in his or her own or in the polluter's country, and that a decision by either country's court can be executed in any Community country.[36] Previously in 1974, the Nordic Environmental Protection Convention of 1974 introduced a strong regime for citizens in the Nordic countries to assert their rights against transfrontier environmental nuisances.[37]

The right of equal access is less developed in the United States. The Boundary Waters Treaty between the United States and Canada provides in Article 2 that "any interference with or diversion from their natural channel of [waters flowing across the boundary or into boundary waters] on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs."[38] Article 4(2) relating to pollution contains no similar provision, however, and the United States has no other such agreement on remedies for pollution. Since negotiation of the North American Free Trade Agreement, however, the United States along with Canada and Mexico have been examining their approach to transfrontier access to justice with an eye toward expanding the rights of affected people living in the other countries.

Although not directly related to FDI, the principle of equal access to justice clearly illustrates the trend toward expanding judicial access for persons suffering from environmental damage. We can expect that some of the same reasons underlying equal access to justice in the transfrontier context may in fact lead to greater access to justice in transnational litigation where persons suffering from environmental damage seek to bring a case against a foreign company in their home country courts. Such cases have been brought in the United Kingdom, Australia and the United States, albeit with mixed success.[39]

III. Implications of International Environmental Treaties for FDI

The field of international environmental law is comprised of literally hundreds of treaties addressing specific environmental problems. For the most part, these treaties address specific activities or issues that threaten the environment and require international cooperation to address. International treaties, generally speaking, only bind States, which means that these treaties do not directly govern corporate behavior. Environmental regulation of corporations occurs only indirectly when, and if, each country implements any obligations the treaty may place upon it.

The impact of international environmental treaties on FDI reflects the specific—and indeed relatively narrow—purpose of each of the treaties. The treaties each circumscribe certain activities that may restrict opportunities for FDI. Thus, for example, the production and consumption of certain ozone destroying substances or the export of hazardous wastes may be prohibited or substantially regulated in many countries of operation.

Several major global treaties and their impact on FDI are described briefly below. Also described are examples of several environmental liability connections designed to assist injured parties to gain compensation from private companies.[40]

A. The Montreal Protocol Regime and CFC Production

The Montreal Protocol on Substances that Deplete the Ozone Layer, which came into force in January 1989, and subsequent revisions and amendments (particularly those made in London in 1990 and in Copenhagen in 1992) establish a detailed and comprehensive regime for the phase-out of chlorofluorocarbons (CFCs) and other chemicals that deplete the stratospheric ozone layer. The stratospheric ozone layer shields the earth's surface from excess ultraviolet radiation. Increases in ultraviolet radiation within the ranges anticipated due to ozone layer depletion will: cause increased skin cancers, cataracts, and immune suppression among humans; reduce yields of some agricultural and timber crops; harm some species of wildlife; and reduce the growth of phytoplankton and potentially reduce the productivity of the oceans.

Because of the clear scientific evidence of the impact of CFCs and other chemicals on the ozone layer, governments remarkably have agreed to phase out many of these compounds altogether. In fact, the manufacture or production of some of these valuable chemicals is already banned in most developed countries. Developing countries have additional time and are provided some dispensation, but are also expected to phase these chemicals out over time. In addition, the Montreal Protocol and subsequent revisions have important provisions that provide for financial assistance and

technology transfers to developing countries; provide for trade measures to assist in enforcing the regimes' provisions; and establish a relatively detailed noncompliance procedure aimed at assisting Parties in meeting their obligations under the regime.

Like most environmental treaties, the Montreal Protocol does not have any direct impact on FDI other than the prohibitions on the manufacture, export or import of CFCs and other ozone depleting substances. Over time, however, the Montreal Protocol regime clearly disfavors investments in ozone depleting technologies. For example, Parties to the Protocol agree to undertake "to the fullest practicable extent to discourage the export to any State not party to this Protocol of technology for producing and for utilizing controlled substances...", and each Party shall refrain "from providing new subsidies, aid, credits, guarantees or insurance programmes for the export to States not party to this Protocol of products, equipment, plants or technology that would facilitate the production of controlled substances...." As ozone depletion continues to increase and as the health and environmental impacts become clearer, more direct restrictions on FDI are virtually guaranteed either as national initiatives or as amendments to the Montreal Protocol regime.

B. The Convention on Climate Change and Greenhouse Gas Emissions

Opened for signature in 1992, the Framework Convention on Climate Change entered into force in March, 1994. It currently has over 160 parties. The Convention creates an institutional and policy framework for addressing the impact of carbon dioxide, methane, and other "greenhouse gas" emissions on the planet's climate systems. Although the ultimate magnitude of the impact from climate change is still hotly debated, the large majority of scientists now agree that increased concentrations of man-made greenhouse gases in the atmosphere have had a measurable effect on the planet's climate.[41] Because greenhouse gases (GHGs) are common by-products of most industrial processes, at least those involving fossil fuels, reducing the concentration of these gases over time means restructuring the global economy, particularly the energy sector.

The Convention set an implicit goal of stabilizing emissions of greenhouse gasses at 1990 levels. The Kyoto Protocol to the Convention, concluded in December 1997 but not yet in force, sets out developed country obligations for reducing emissions of greenhouse gas emissions by 2008-2012.[42] The Protocol imposes differing obligations across countries ranging from 8% reductions from 1990 levels for most European countries to modest increases for some countries over 1990 levels. The Convention establishes the institutional and administrative structure to measure and monitor greenhouse gas emissions, study and review the impacts of such emissions on global climate, and to take further policy steps as required through amendments or additional protocols to the framework convention.

The new obligations in the Protocol are sure to influence the future rate and nature of FDI in certain energy-related industries, in both developing and developed countries. The Climate Regime also endorses several approaches for facilitating FDI in energy projects that do not emit GHGs. For example, Article 6 of the Kyoto Protocol establishs a joint implementation (JI) mechanism. JI involves the sale of "reduction units" of GHG emissions from one Annex I party, or private enterprise, to another Annex I party or enterprise. Reduction units are generated by specific projects that reduce emissions or increase removals. The selling party or enterprise is rewarded for making additional reductions in GHG emissions (or for enhancing sinks for sequestering carbon). The buying party or enterprise presumably finds that the overall costs of purchasing these pollution rights is less than making operational changes that would result in an equivalent amount of GHG reductions.

Similarly, the Clean Development Mechanism (CDM) is a new entity created by Article 12 of the Kyoto Protocol to facilitate the financing of GHG abatement projects in developing countries. The CDM replaces JI where one of the parties is a non-Annex I country. Article 12 provides that Annex I parties, or their private entities, may fund activities in non-Annex I countries that result in emissions reductions and, after they are certified, use those reductions to contribute to their own compliance. At present, it is virtually undefined – it may be a funding mechanism, a clearinghouse, or merely a mechanism for accreditation and oversight. Whichever view prevails, the CDM has the potential to leverage more private sector investment into clean energy development than any prior or existing entity. Taken together, JI and CDM could well create powerful incentives for additional FDI for energy efficient and low emission projects.

C. The Basel Convention and Hazardous Wastes

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which came into force in May 1992, regulates the export, import and to some extent the management of hazardous wastes. Among other things, the Convention: affirms Parties' right to ban the import of wastes; endorses criminal penalties for illegal traffic in wastes; requires the prior informed consent for the import of

wastes; and requires that exporting States take steps to ensure that Parties receiving wastes have the technologies and know-how necessary for environmentally sound management of the wastes. The Convention also contains general provisions promoting technology transfer and financial assistance, although these functions are not that well developed in practice.

Because the Basel Convention addresses exports and imports of wastes, it affects FDI mostly with respect to hazardous waste technologies or operations. Perhaps most important are efforts under the Convention to develop a liability regime for environmental harm caused by the transport and disposal of hazardous wastes. The Convention obligates Parties to cooperate in negotiating a protocol "setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes."[43] Negotiations on such a protocol are leading toward a three-tier liability system. Primary liability would be through civil liability of the private operators, and depending on the regime might even attach liability to investors. Liability of private operators will be supplemented by a subsidiary compensation fund, and, as a last resort, the State may be held liable for damage to another State.

D. The Nuclear Liability Conventions

A number of conventions have attempted to clarify and limit the liability of nuclear operators for environmental damage that could be caused from radioactive or toxic releases from nuclear power plants. The Paris Convention on Third Party Liability in the Field of Nuclear Energy, which entered into force in April 1968, is widely viewed as the model for the subsequent global Convention on Civil Liability for Nuclear Damage.[44] The Paris Convention established a cap on the amount of liability facing nuclear facility operators in an overall attempt to harmonize European national laws on nuclear liability. The Convention required operators to have insurance or some other financial guarantee that ensured their liability could be met. Because of concerns that the liability cap was not large enough to cover potential damage, the Brussels Supplementary Convention, which entered into force in December 1974, required Parties to provide for additional compensation.[45] At least a small part of the additional compensation (approximately 5% depending on national laws) should come from private insurers or guarantors; approximately 60% would come from the Contracting Party in which the facility that caused the damage was located; and the remainder would be provided by the other Contracting Parties according to an established formula. Although the nuclear liability conventions have been criticized by environmentalists for failing to protect potentially harmed individuals and for unnecessarily subsidizing a potentially harmful industry, the Convention has reduced at least the environmental uncertainty surrounding investments in nuclear facilities.

E. Liability for Other Activities Dangerous to the Environment

The Council of Europe's Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which was opened for signature in 1993 but has not come into force, extended the same basic approach described above with respect to nuclear threats to a wider range of "dangerous" activities.[46] Dangerous activities covered by the Convention include operations involving the manufacture, management or use of substances that can present a significant risk to man, the environment or property; the production, management or use of genetically modified organisms or certain microorganisms; and the disposal or management of wastes. The Convention places no limit to liability but sets parameters for harmonizing the Parties' domestic laws relating to liability. Liability is extended to the operators in each instance, which means the person who exercises control over the dangerous activity; thus, the Convention does not address liability for passive investors.

IV. Environmental Provisions In International Investment Agreements

The trade and environment debate that has raged for the past several years over the World Trade Organizations and certian regional agreements (for example, the North American Free Trade Agreement (NAFTA)) has led to a flurry of academic and policy papers and some institutional and policy reforms. or example, the WTO has extablished a Committee on Trade and Environment to address the linkage between trade and environment. Regionally, both the NAFTA and the EU strcutre have strong environmental components with separate environmental institutions.

The NAFTA's investment provisions include language on environmental issues, as does the European Energy Charter. These are discussed below, along with a review of the current status of the Multilateral Agreement on Investments (MAI) being negotiated under the auspices of the OECD.

A. North American Free Trade Agreement

The North American Free Trade Agreement[47] (NAFTA) sets out the basic trade relationship between the United States, Canada, and Mexico. NAFTA's

investment provisions, Chapter 11, include several environmental measures, but ultimately do not substantively qualify investor protections in any meaningful manner. Hortatory language calls on the Parties not to lower health and environmental standards in order to attract investment and calls only for consultations in the event another Party objects to such a lowering of standards. n addition, Chapter 11 includes an environmental "exception" that gives nothing away. In order to "ensure that investment in its territory is undertaken in a manner sensitive to environmental concerns," a Party is only allowed to adopt or enforce measures "not otherwise inconsistent with" the provisions of Chapter 11. oreover, Chapter 11's limits on the use of performance requirements to condition investments are subject to very narrowly drawn environmental exceptions. These provisions do not provide any meaningful environmental exceptions to the national treatment, most favored nation, and expropriation requirements of Chapter 11, nor do they provide an enforceable guarantee that environmental standards will not be compromised to attract investment.

The dispute resolution provisions of Chapter 11 do provide for the use of reports by environmental experts under certain circumstances in the arbitration process, however, such reports are limited only to factual or scientific issues raised in the proceeding.

In addition to the provisions in Chapter 11, several general environmental provisions of NAFTA may also apply to the agreement's investment provisions. For example, the preamble expresses the parties' commitment to sustainable development, calls on the parties to "strengthen the development and enforcement of environmental laws and regulations," and commits the parties to implement the agreement "in a manner consistent with environmental protection and conservation." ost significantly perhaps, Article 104 of NAFTA provides that the trade and investment related obligations imposed by several listed international environmental agreements have precedence over NAFTA's requirements, including those of Chapter 11.

Under the North American Agreement on Environmental Cooperation (the so-called NAFTA environmental side agreement) any NGO or person established or residing in the territory of a Party to the Agreement (i.e. Canada, the United States or Mexico) may petition the North American Commission on Environmental Cooperation (CEC) Secretariat asserting that a Party is failing to enforce its environmental laws effectively.[48] The petitioner must identify the applicable statute or regulation that is not being enforced and must show that they have exhausted domestic remedies. In determining whether a petition is appropriate, the Secretariat will consider among other things whether the petition is focused on the acts or omissions of a Party rather than on compliance by a particular company or business (particularly in the case if a petitioner is a competitor that may stand to benefit economically from the submission).

If the Secretariat determines that a submission merits a response, the Secretariat will forward to the Party a copy of the submission and any supporting information provided by the petitioner. Assuming that the Secretariat is allowed to conduct its inquiry, the final factual records prepared by the Secretariat will contain: (a) a summary of the submission that initiated the process; (b) a summary of the response, if any, provided by the concerned Party; (c) a summary of any other relevant factual information; and (d) the facts presented by the Secretariat with respect to the matters raised in the submission. The CEC has received petitions involving all three countries.

Although not aimed directly at FDI, the CEC's focus on domestic enforcement efforts is meant to ensure that none of the three countries establishes a "pollution haven" or competes for FDI through non-enforcement of environmental laws. In this way, the competition for FDI is shifted to non-environmental factors.

B. The European Energy Charter

The European Energy Charter[49] may be considered the first major investment treaty to include explicit environmental provisions. In Article 19(1), the Contracting Parties agreed to "strive to minimize in an economically efficient manner harmful Environmental Impacts . . ." Under the Charter, Contracting Parties shall also "promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring of Environmental impacts of environmentally significant energy investment projects." In signing the Charter, the Parties agreed that: "[i]t is for each Contracting Party to decide the extent to which the assessment and monitoring of Environmental Impacts should be subject to legal requirements, the authorities competent to take decisions in relation to such requirements, and the appropriate procedures to be followed." The Energy Charter also generally endorsed the precautionary approach and the polluter pays principle as they relate to the energy cycle.

The Charter excludes the environmental provisions from the normal dispute resolution provisions of the Charter. Instead of being allowed to submit such disputes to an ad hoc arbitral tribunal, disputes between Contracting Parties relating to the environmental provisions of Article 19 are to be reviewed by the Charter Conference. Moreover, although investors are given an opportunity to have their disputes heard in a

variety of fora, people affected by the environmental impacts are not.

The Parties agreed to the Protocol on Energy Efficiency and Related Environmental Aspects. The Energy Efficiency Protocol highlights the importance of energy efficiency as a "considerable source of energy and for reducing adverse Environmental Impacts of energy systems." The Protocol promotes cooperation and coordination among the Contracting Parties in promoting investment and development of energy efficiency. Contracting Parties are also required to adopt domestic energy efficiency policies, appropriate legal frameworks, and energy efficiency programmes. With its emphasis on encouraging international cooperation in promoting international trade and investment in energy efficiency investments, the Protocol is an example of how at least on paper environmental concerns can increase international cooperation in investments in certain technologies important for sustainable development.

C. Multilateral Agreement on Investment

Negotiations on a Multilateral Agreement on Investment (MAI) have been undertaken by members of the Organization for Economic Cooperation and Development (OECD) since May 1995. Although substantially complete as this text goes to press, the agreement has not yet been finalized and indeed it may not be concluded in part due to environmental concerns. The MAI represents an effort to codify a broad new set of international rules governing the treatment of foreign investors. The three primary aims of the agreement are to increase market access for foreign investors by opening previously restricted sectors of nations' economies, provide foreign investors with greater certainty and protection by creating broad restrictions on the ability of governments to restrict, regulate, or control investment flows, and ensure that foreign investors have a legally binding means of resolving investment disputes with host governments. In seeking to achieve these goals, the MAI expands significantly on the investment provisions of the NAFTA and existing bi-lateral investment agreements.

From an environmental perspective, the MAI as currently drafted[50] represents a missed opportunity to ensure that economic globalization occurs in an environmentally sustainable manner and poses a number of significant problems, only a few of which will be discussed here. The MAI grants significant protections to investors but does not impose any concomitant obligations to behave in socially desirable ways. Proposed language in the text would incorporate the non-binding OECD Guidelines for Multinational Enterprises into the MAI. These guidelines however, are not sufficient to ensure environmentally appropriate behavior and their non-binding status renders the limited protections they contain unenforceable. The MAI would also limit the sovereign ability of national and sub-national governments to impose performance requirements and other regulatory measures to ensure that foreign investment helps to advance local priorities. Requiring the transfer of environmentally beneficial technology, for example, would be prohibited. These types of arrangements have been used in many developing countries to help promote environmentally sustainable development and have been recognized as important policy tools in a number of international environmental regimes, including the Convention on Biological Diversity.

Among the most troublesome aspects of the draft MAI is the broad expropriation/compensation provision. Arguably the provision allows foreign investors to bring claims for monetary compensation when the value of their investment is reduced by environmental regulation – a reversal of the widely accepted polluter pays principle. The expropriation provision is particularly troubling in light of the dispute settlement mechanism which allows an investor to bring its grievances against host country governments to a narrowly focused arbitration panel. This effectively relegates to a panel of investment experts what is (in the United States, at least) a highly complex and controversial area of the law – the extent to which government regulation may interfere or "take" a person's property without having to compensate the owner. In addition, the arbitration process does not allow concerned or affected individuals or NGOs any opportunity to participate in the dispute settlement process. A similar combination of expropriation language and arbitral settlement procedures in NAFTA has given rise to several pending cases challenging Mexican and Canadian environmental regulations.

A number of process-based objections to the MAI have also been raised. The negotiations have been largely conducted in isolation, without the benefit of input or participation of many potentially affected constituencies. It was not until a leaked copy of the draft text was made available in early 1997 by public interest groups in Canada that the environmental community and other interested actors had a chance to understand the sweeping nature of the proposed agreement and to begin influencing the negotiations. Many have objected to the use of the OECD forum to negotiate such a sweeping global agreement, because the plan has been to offer the completed agreement to non-OECD countries on a take it or leave it basis once it is completed. A broader negotiating forum would ensure that the concerns of less developed countries, often the destination of FDI, could be addressed in the formula-

tion of an agreement.

V. Environmental Standards for Public Financing of FDI

In recent years, largely in response to pressure from environmental NGOs, multilateral and bilateral funding agencies have increasingly conditioned their support of private sector projects on compliance with certain environmental conditions. Thus, for example, all of the multilateral development banks as well as private sector lenders like the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) now have environmental policies that require, for example, environmental impact assessments, compliance with minimum environmental standards, public access to information, consultation with affected people, protection of indigenous peoples, and resettlement of displaced persons.

Projects that receive support from one or more IFI may be subject to more intense international scrutiny, because the presence of the IFIs gives the international environmental movement greater legitimacy and a policy "hook" for mounting international campaigns. The significance of some of these standards, particularly those of the World Bank Group, extends beyond those projects that are receiving financial support from the IFIs. As a practical matter, project sponsors frequently look to standards set by the IFIs as guidance in designing and implementing projects in developing countries. In this way, project sponsors hope they will avoid serious environmental problems and be insulated from public criticism by the international environmental movement.

The following is a brief review of the more important environmental policies or standards applied by the International Finance Corporation, the World Bank Group's private sector arm. These standards often serve as models for private sector lending by the regional development banks, although such banks also have their own environmental policies and procedures.

V. Environmental Standards for Public Financing of FDI

In recent years, largely in response to pressure from environmental NGOs, multilateral and bilateral funding agencies have increasingly conditioned their support of private sector projects on compliance with certain environmental and social conditions. Thus, for example, most of the multilateral development banks as well as private sector lenders like the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) now have environmental policies that require *inter alia* environmental impact assessments, compliance with minimum environmental standards, public access to information, consultation with affected people, protection of indigenous peoples, and resettlement of displaced persons.

Projects that receive support from one or more international financial institutions (IFIs) will be subject to the applicable standards. In general, these standards are not as strict or comprehensive as the national standards found in most developed countries, but they often are stronger than those that apply in developing countries. This is particularly true, given the relative lack of enforcement in developing countries. The IFIs have increasingly added to their environmental staff and now include environmental reviews as routine parts of their project review. In addition, projects that depend on funds through the IFIs may be subject to more intense international scrutiny, because the presence of the IFIs gives the international environmental movement greater legitimacy and a policy "hook" for mounting international campaigns.

The significance of some of these standards, particularly those of the World Bank Group, also extends beyond those projects that are receiving financial support from the IFIs. As a practical matter, project sponsors frequently look to standards set by the IFIs as guidance in designing and implementing projects in developing countries. In this way, project sponsors hope they will avoid serious environmental problems and be insulated from public criticism by the international environmental movement.

The following is a brief review of the more important environmental policies or standards applied by the International Finance Corporation, the World Bank Group's private sector arm. These standards often serve as models for private sector lending by the regional development banks, although such banks also have their own environmental policies and procedures.

A. The World Bank Group

In an effort to integrate environmental concerns more fully into Bank operations, the Bank has begun to develop operational policies and procedures to guide the conduct of Bank staff in preparing and implementing Bank projects. According to Ibrahim Shihata, the World Bank General Council, the following eight principles still generally guide Bank activities with respect to the environment:

(a) the Bank will endeavor to ensure that each project affecting renewable natural resources does not exceed the regenerative

capacities of the environment;
(b) the Bank will not finance projects that cause severe or irreversible environmental deterioration, including species extinctions without mitigatory measures acceptable to the Bank;
(c) the Bank will not finance projects that unduly compromise the public's health and safety;
(d) the Bank will not finance projects that displace people or seriously disadvantage certain vulnerable groups without undertaking mitigatory measures acceptable to the Bank;
(e) the Bank will not finance projects that contravene any international environmental agreement to which the member country concerned is a party;
(f) the Bank will not finance projects that could significantly harm the environment of a neighboring country without the consent of that country. The Bank is willing to assist neighboring members to find an appropriate solution in cases where such harm could result;
(g) the Bank will not finance projects which would significantly modify natural areas designated by international conventions as World Heritage sites or biosphere Reserves, or designated by national legislation as national parks, wildlife refuges, or other protected areas; and
(h) the Bank will endeavor to ensure that projects with unavoidable adverse consequences for the environment are sited in areas where the environmental damage is minimized, even at somewhat greater initial costs.[51]

Since the 1984 OMS on environmental issues, the Bank has altered its policy format twice. First there was a comprehensive set of "Operational Directives" (ODs). These have recently been slated for reformatting into "Operational Policies" (OPs), "Bank Procedures" (BP), and "Good Practices" (GP). Operational Policies are substantive policy instructions which Bank staff must follow in all Bank operations and projects. Bank Procedures are also mandatory. The Good Practices series of guidance documents are discretionary. As of this writing, a handful of Operation Directives remained to be reformatted, among them some of the more controversial and important policies on indigenous peoples, involuntary resettlement, and environmental assessment.[52]

For FDI purposes, the most important environmental standards are those applicable to the International Finance Corporation and the Multilateral Investment Guarantee Agency, the two private sector arms of the Bank. IFC and MIGA are in the process of revising their environmental policies and standards, motivated in part by the goal of harmonizing their standards with the rest of the World Bank Group. The IFC is "committed to adhere to the same policies and guidelines as used by the World Bank in addressing environmental, resettlement, indigenous peoples, and occupational health and safety issues in projects."[53] This commitment is qualified, though, by the IFC's own policy on the environment, titled "Environmental Analysis and Review of Projects," which differs from the World Bank's OD4.01 because of differences in "mission, organization, project cycle, and clientele (private sector versus national governments)."

In general, potential IFC and MIGA projects, many of which involve co-financing and FDI from the private sector, must meet certain standards for environmental impact assessment,[54] information disclosure.[55] In January of 1997, the IFC also issued a set of draft policies covering a wider range of issues, including resettlement, indigenous peoples, and environmental issues. The IFC is soliciting comments on these policies and they should be in force by the time this book is published.

The IFC has also taken the lead within the World Bank Group in issuing a set of substantive pollution prevention and abatement standards. The *Pollution Prevention and Abatement Handbook* establishes standards for nearly fifty specific industrial sectors.[56] Thus, for example, projects involving aluminmum manufacturing, the dairy industry or pulp and paper mills, each have a specific set of standards that except in rare circumstances the World Bank Group will expect to have met. The standards were set after a review of different international and national standards, and an evaluation of what was feasible in most developing countries. in particular, are frequently used as international "standards" to measure the environmental issues surrounding a proposed investment—even when no IFC financing is involved.

B. Bilateral Funding Agencies

Bilateral financing agencies are also strengthening their environmental requirements. The U.S. Overseas Private Investment Corporation (OPIC), for example, which assists U.S. companies by insuring new investments overseas against the risk of loss due to civil unrest issued a new environmental handbook in January, 1998, which provides guidance on environmental standards, assessment and monitoring procedures that OPIC applies to prospective and ongoing projects.[57] All OPIC projects must comply with host

country environmental regulations; and most activities must adhere to World Bank environmental, health, and safety standards. OPIC environmental assessments are available to the public under U.S. domestic law.

Export credit agencies, which provide financial support to their own industries to help them sell exports and create jobs at home, are also beginning to apply environmental standards or screens to proposed investments. Export credit agencies are not, strictly speaking, directly involved in promoting FDI, but some long-term projects where export credit is involved may also involve substantial amounts of FDI (and thus environmental standards attached to the export credit may influence standards applying to the entire project.)

Every OECD country has an export credit agency. Among export credit agencies, the U.S. Export-Import Bank is widely viewed as having the most stringent environmental standards, and U.S. industry and environmental groups have pushed for increased harmonization among OECD export credit agencies. Harmonization of these standards among different countries has been a recurring issue discussed at G-7 meetings in the past few years.

In the United States, Congress revised Ex-Im Bank's Charter in 1992 to require the Bank to establish an environmental review procedure consistent with the Bank's overall competitiveness mandate. The Charter also authorized the Bank to consider environmental issues in granting or withholding financial support. The Ex-Im Bank Board of Directors formally adopted its first permanent Environmental Procedures and Guidelines on February 2, 1995.

These Procedures dictate that each preliminary commitment and final application for long-term and limited recourse project finance (Project Finance) transactions be screened to determine the extent of environmental review required by Ex-Im Bank when processing the application. An Environmental Evaluation is conducted by the Engineering and Environment Division which examines the environmental effects of the transaction against the Environmental Guidelines applicable to the transaction.[58]

Applicants for loans for long-term projects must provide sufficient environmental information to enable the Bank to screen the project. Depending on the potential impacts of the project and its proximity to important ecological areas, the project will be reviewed against minimum industry-specific standards. These are quantitative and qualitative standards for air quality, water use and quality, management of hazardous materials and waste, natural hazards, social and cultural effects, ecological resources, and noise protection. Projects that do not achieve the minimum environmental standards set for the specific industry group may not receive funding without implementing mitigation measures.

VI. Voluntary Guidelines and Standards

In addition to standards that apply to public financing of FDI, investors may also want to consider the environmental provisions of voluntary guidelines or standards for corporate conduct prepared by governmental and private bodies. This body of "soft law" is relevant both for evaluating the operations of a specific FDI project and for predicting the future development of binding standards. For example, several countries have suggested that the OECD Guidelines on Multinational Enterprises be incorporated into the proposed multilateral agreement on investment. Some observers have also suggested that companies who violate voluntary corporate standards to which they have agreed could potentially be liable under common law theories of contract or torts to persons injured by the breach of the promise.[59] Nonetheless, standards are not enforceable in the traditional sense, and the Codes may give the appearance of responsible corporate behavior with little real on-the-ground improvement in practice.

A. ISO 14000

The International Organization for Standardization (ISO) is an international body comprised of national standardization bodies from over 100 countries. The ISO was formed in 1946 to standardize specifications for industrial and consumer products in international trade. More recently, ISO has worked to formulate uniform management systems for industry, including the ISO 14000 series on Environmental Management Principles, Systems, and Supporting Techniques. The ISO 14000 standards seek to ensure conformance with minimum procedures for environmental management and do not directly address environmental substantive performance.[60]

Work on the ISO 14000 series is ongoing, with only portions of the series completed. The first standard adopted under the series is ISO 14001, the core environmental management system designed to improve environmental performance. In order to be certified under ISO 14001, businesses must put into place four action-forcing measures aimed at improving environmental performance. First, they must articulate and implement an environmental policy that addresses the significant business and environmental issues of the particular facility. This environmental policy is the only portion of the environmental management system that must be made available to the public. Second, they must demonstrate senior management commitment

and implement necessary organizational structure, training and implementation systems, including regulatory compliance management. Third, each business must set measurable environmental objectives and targets. Finally, they must establish performance measurement systems that includes an audit and review of their overall environmental management system, to determine if they are improving environmental performance.

While ISO has long-established credibility with respect to industrial standards, ISO's efforts in the environmental management field have been criticized. Some feel that ISO is straying too far from its area of experience and expertise - product related standards. Some point to the lack of public participation in ISO's standard setting process, a lack of public access to data concerning individual companies' compliance with ISO standards, and a general failure to incorporate the public interest into the ISO process. Others fear that the ISO 14000 series in particular is an effort by industry to preempt the field of environmental management standards by issuing voluntary non-binding standards that will blunt pressure for more proscriptive and binding standards of environmental management. Industry hopes that ISO will provide a minimum standard for environmental management that will be honored throughout the world, thus harmonizing legal standards and clarifying the risks of investment that come from differential and frequently unpredictable environmental standards.

B. The OECD Guidelines on Multinational Enterprises

Since adopting the "Declaration on International Investment and Multinational Enterprises" in 1976, the Organization for Economic Cooperation and Development (OECD) has been extremely active in developing and promoting international standards for safety, health and the environment. The Declaration, coupled with a variety of other recommendations, decisions and treaties have established a fairly detailed set of principles (hereinafter, OECD guidelines) to be observed by multinational corporations (MNCs) and OECD governments. Generally, the OECD guidelines state that MNCs should consider economic and social progress and the protection of the environment and consumer interests in considering their operations in host countries.

This general mandate was clarified in 1984 by the OECD Committee on Investment and Multinational Enterprise. Under the clarified guideliness, MNCs should: 1) account for the major, foreseeable environmental consequences of their operations in their decision-making process; 2) provide timely information to governmental authorities regarding all the potential environmental impacts and hazards of their operations; and 3) mitigate adverse environmental impacts by adopting appropriate control technology and practices, implementing training programs for all employees, and preparing contingency plans.[61] Although aimed primarily at MNCs, and thus foreign investment, Paragraph 9 of the Guidelines indicates that the Guidelines are intended to reflect good practice for all domestic projects to follow.

The Environmental Committee of the OECD has achieved significant results in the shaping of national policies with regard to international environmental and safety regulation, as illustrated by the various environment measures that the Council has adopted during the 1970s and 80s. One example is the "Polluter-Pays-Principle," which was adopted in 1972 by OECD member countries. They agreed that each country should avoid subsidies for pollution control costs of major contaminating enterprises; instead, the industry itself should cover abatement costs. The aim of the principle is to ensure that control costs are borne by the polluters themselves and to avoid any unfair competitive advantages to an industry located in one country over another. Other examples include a general framework for establishing internationally acceptable test data to assess the potential environmental and health effects of chemicals, and guidelines for the transboundary movement of hazardous wastes.

C. The UNCTC Draft Code of Conduct on Transnational Corporations

The Draft Code of Conduct on Transnational Corporations had been perhaps the most well known set of principles to guide the conduct of MNCs. The United Nations Centre for Transnational Corporations (UNCTC) worked for fifteen years to develop a set of guidelines that would reflect a consensus among nations. In 1996, however, the UNCTC has formally scrapped the project concluding that no consensus was currently available. Developed countries, where many MNCs are based, were unwilling—ultimately—to accede to developing countries' demands. Though the UNCTC Code has been shelved, the UNCTC may still have a role to play in providing technical assistance to NGOs, governments, and MNCs

D. ICC Business Charter for Sustainable Development

Another voluntary set of principles for corporate environmental management was issued in 1991 by the Paris based International Chamber of Commerce (ICC). The ICC has over 7500 member company and business organizations operating in 123 countries. The Business Charter for Sustainable Development contains 16 principles for environmental management for

companies to integrate into their daily operations. As of 1994, more than 1200 companies have pledged support for the Charter since it was issued, including 132 of the Fortune 500 companies.[62]

The Charter is designed to assist a wide variety of organizations in improving their environmental performance by implementing management practices in accordance with the sixteen principles, measuring progress, and reporting progress both internally and externally. Among the principles set out in the Charter are: 1) recognition of environmental management as among the highest corporate priorities, 2) integration of environmental management into all phases of business management, 3) striving to improve environmental performance and train employees, 4) prior assessment of a new project's environmental impact, 5) the development of products and services with no undue environmental impact and safe for their intended use, 6) adoption of the precautionary approach, 7) fostering open dialogue within and without the company, and 8) measuring and reporting on environmental performance. The ICC has also developed guidelines explicitly directing companies how to implement the charter.

While the Charter incorporates many important concepts, it offers very little in terms of substantive requirements. Consequently, compliance with these general and vague requirements is virtually impossible to verify.

E. The Valdez Principles

The Valdez Principles were created by the Coalition for Environmentally Responsible Economies (CERES) as a response to the catastrophe of the Exxon Valdez oil spill in Valdez, Alaska. The Principles commit signing corporations to maintain the highest environmental standards wherever it conducts its operations. In addition, the Principles commit the company to internal audits and external disclosure through an annual CERES report. This feature distinguishes the Code from other nonbinding agreements, in that although a corporation is free to adopt the Principles voluntarily, once it becomes committed to the Principles, the mandates become binding. Thus, an MNC, operating in a host country with lower environmental standards than that of the home country, must adhere to the limits and standards of the home country's more stringent requirements. As a consequence of this rule, MNCs would no longer have the incentive to lobby for less strict environmental standards in the developing host country; indeed, the host country may be forced to adopted higher standards in order to "level the playing field" and attract foreign investment.

Though the Valdez Principles employ a unique and laudatory approach to environmental degradation by MNCs, in reality the internal inspection and reporting requirement deters large corporations from committing to the document. Because no incentive, other than a moral one, is offered to embrace the Principles, as of September 1995, only 57 companies have joined the Valdez Principles.

VIII. National Laws and Standards.

International environmental law has perhaps its most profound impact on FDI by setting benchmarks for national law. After Rio, many countries began substantial planning efforts to move toward sustainable development by implementing Agenda 21. Many different approaches are being adopted. For example, several countries beginning with the Philippines and, more recently, the United States have created high-level national councils on sustainable development. Chile implemented Agenda 21 in part through a series of consultative meetings held throughout the country. Environmental laws are increasingly integrating sustainable development at the national level; the first and still one of the most innovative is the 1991 New Zealand Resources Management Act. National policy plans for sustainable development are also becoming increasingly common (for example, Canada's Green Plan). Moreover, as noted above, the emerging concepts and principles of international environmental law discussed in Part II above, also serve to shape the contours of domestic environmental law regimes.

FDI and investors may not only be impacted by the laws of the host country, but may conceivably be subjected to the environmental laws of the investor's home country as well. The following two section focus on attempts to apply laws of the United States relevant to environmental matters to actions or events that take place outside of the territorial United States. While the successful application of home country laws to events and actions occurring abroad is rare, investors may want to consider the potential for such legal action when making investment decisions.

A. Extraterritorial Application of Domestic Law [63]

While international agreements are the most obvious means of protecting the international environment, often the use of domestic laws to regulate conduct beyond national borders can be as or more effective than international action. The extraterritorial application of domestic environmental laws is controversial, but allows individual nations to move much more quickly to address pressing international environmental problems than is possible using multilateral approaches.

In addition, unilateral action can serve to strengthen customary international law and provide the basis for subsequent international actions. Critics of the extra-territorial application of domestic laws point to the potential for infringing on the sovereignty of other nations as a form of eco-imperialism. The analysis below focuses on the United States as it has aggressively extended the reach of some of its laws beyond its borders.

In US law there is a presumption against the extraterritorial application of domestic laws which is designed to prevent conflict with other nations and is based on the assumption that the US Congress is primarily concerned with domestic affairs.[64] To overcome this presumption and apply a US law extraterritorially, the courts will generally apply a three step analysis. First, does the Congress have authority to exercise extraterritorial jurisdiction? Second, has Congress expressed its intent that the law be applied beyond the border? Finally, is extraterritorial application of the law reasonable when its purpose is weighed against the interests of foreign countries?[65]

Some laws, such as the securities and antitrust laws, have often been given extraterritorial reach, however environmental laws have only rarely been held to have an extraterritorial scope. Generally, environmental laws are not found to have been enacted with the intent that they apply beyond the territorial United States.[66] One notable case which applied the National Environmental Policy Act's (NEPA) environmental impact assessment requirements to actions taken in Antarctica is *EDF v. Massy.*[67] The case involved a decision by the Washington-based National Science Foundation to incinerate food wastes at the McMurdo Station research facility in Antarctica. As the presumption against extraterritorial application of US laws is based largely on notions of comity among nations, the court held that it was not applicable to areas not within any State's sovereign jurisdiction. Given the unique nature of Antarctica, the extent to which this holding would extend to other situations is unclear. Arguably however, the reasoning could extend to situations where extraterritorial effects would be felt in the global commons, also areas beyond national jurisdiction.

On the other hand, a subsequent case illustrates the reluctance of courts to extend US environmental laws beyond US territory where doing so would interfere with the interests of other nations or upset delicate diplomatic arrangements. In *NEPA Coalition of Japan et al. v. Aspin,*[68] the court refused to apply NEPA to actions on a US military instillation in Japan. The court distinguished *Massey* on the grounds that the location at issue was not sovereignless, but instead was governed by "complex and long standing treaty arrangements."

While not technically involving extraterritorial application of domestic law, domestic laws may use trade sanctions (typically a restriction on imports) to influence behaviors outside of the country. While this type of approach raises issues of consistency with WTO trade rules, it can be highly effective in using access to the US market to influence environmentally damaging behaviors outside of the US and raising international consciousness of the environmental issue at stake. For example, the US has used this mechanism to try to limit the number of dolphins and endangered sea turtles killed by foreign tuna and shrimp fishing fleets by banning or limiting the importation of tuna or shrimp that are harvested without the use of techniques to limit dolphin and turtle mortality. Although the tuna import ban was struck down by a GATT dispute resolution panel, there have been subsequent international efforts to reduce dolphin mortality. The shrimp import restrictions are currently being challenged in the WTO.

B. Transnational Environmental Litigation: Bringing Cases in Home Country Courts

From the perspective of citizens living in areas harmed by industrial accidents or other environmentally harmful activities, the range of potential responses under international environmental law as described above is relatively weak and ineffective. Moreover, in many developing countries citizens harmed by environmental damage do not have fair recourse to domestic courts. As a result, when faced with severe environmental damages, citizens from developing countries are beginning to look increasingly toward the courts of the home countries of foreign companies operating in their homelands.

The most well known litigation of this sort emanated from Bhopal disaster. In the early hours of December 3, 1984, a Union Carbide India pesticide plant released an estimated 40 tons of methyl isocyanate over the city of Bhopal, India, killing about 2,500 people and sending more than 200,000 fleeing for their lives. As many as 100,000 people are still suffering side effects, such as blurred vision, disabling lung diseases, intestinal bleeding, and neurological and psychological disorders. Ironically, many of those who died or were injured were awakened by the plant's alarm and headed toward the plant believing a fire had been started and that it might require their help.

Union Carbide India was more than 50% owned by Union Carbide Corp., a U.S. company. The victims of the disaster sued Union Carbide on a variety of "tort" theories in U.S. courts. But U.S. courts dismissed the

suit on the basis that the suit would be more conveniently heard in India, and on the condition that Union Carbide subject itself to the jurisdiction of India's courts.[69] Union Carbide spent several years in Indian courts and millions of dollars in trying to defend the suit. Ultimately, they settled all claims related to the matter for $470 million.

In 1987, criminal homicide charges were filed in Bhopal district court against Union Carbide's Chief Executive Officer, Warren Anderson and eight other Union Carbide officials, and an arrest warrant was issued in 1988. In January 1992, Warren Anderson (now the former CEO) was ordered to appear before the Indian Court to face criminal charges.

Despite the ruling that foreclosed access to U.S. courts, a number of similar cases have been brought in U.S. courts in recent years. Thus, for example, 101 Costa Rican banana farm workers sued Dow Chemical and Shell Oil for damages caused by exposure to a pesticide containing dibromochloropropane (DBCP). The plaintiffs were among up to 2000 workers who suffered sterility and higher risks of cancer due to the exposures. According to allegations in the lawsuit, Shell had known since the 1950s that DBCP caused sterility in male laboratory animals, but did not include this information on product labels. Even after the U.S. EPA determined that DBCP caused sterility in humans and banned production, Shell continued to distribute the product.

In response to the suit, the companies relied on the Bhopal cases and others to say that the case should not be heard in the United States because in essence it is inconvenient (under the legal doctrine of "forum non conveniens").[70] In a surprising decision, the Court ruled that Texas had statutorily abolished the doctrine of forum non conveniens and thus allowed the case. The following dicta in a concurring opinion illustrates the underlying motivation of at least some of the Court's decision:

> Some United States multinational corporations will undoubtedly continue to endanger human life and the environment with such activities until the economic consequences of these actions are such that it becomes unprofitable to operate in this manner. At present, the tort laws of many third world countries are not yet developed. When a court dismisses a case against a United States multinational corporation, it eliminates the most effective restraint on corporate misconduct.
>
> The doctrine of forum non conveniens is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet. The parochial perspective embodied in the doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational.... In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed to repeat itself for decades to come.[71]

Similarly Ecuadorean indians have sued Texaco in both Texas and New York for polluting their homelands through oil exploration;[72] Indonesians sued Freeport McMoran in Louisiana for alleged enviromental torts, human rights violations and genocide;[73] and thousands of banana workers from twelve developing countries have filed another suit against Shell for DBCP poisoning.[74] To be sure, with the exception of the first DBCP case excerpted above, none of these cases have managed yet to survive arguments of forum non conveniens or similar discretionary rules based on international comity.

Nonetheless, more of these cases are likely in the future. Regardless of whether rules change in the United States to open up its courts, such cases may enjoy greater success in other countries. Thus, for example, citizens from Papua New Guinea sued the Australian company in Australian courts for damage caused by companies mining operations—and the citizens ultimately received a significant settlement. Similarly cases brought in the United Kingdom for damage caused by U.K. companies operating in Africa have survived initial jurisdictional challenges.

There are many difficulties in this approach, but the long-term trend appears to be for increased extraterritorial application of domestic laws over their corporate activities abroad.

[1] WESTERN GOVERNORS' ASSOCIATION, MULTILATERAL AGREEMENT ON INVESTMENT: POTENTIAL EFFECTS ON STATE & LOCAL GOVERNMENT, April 1997 (available on the Internet at www.westgov.org).

[2] *See, e.g.*, ROBERT REPETTO, JOBS, COMPETITIVENESS, AND ENVIRONMENTAL REGULATION: WHAT ARE THE REAL ISSUES? (World Resources Institute, 1995).

[3] *See generally* BRADFORD GENTRY, ET AL, PRIVATE SECTOR INVESTMENT FLOWS AND THE ENVIRONMENT: DEFINING THE OPPORTUNITIES AND ISSUES (1995) (Background paper for UNEP Round-Table Discussion on Banks and the Environment).

[4] *See, e.g.*, UNEP, FINAL REPORT OF THE EXPERT GROUP WORKSHOP ON INTERNATIONAL ENVIRONMENTAL LAW AIMING AT SUSTAINABLE DEVELOPMENT, October 4, 1996, UNEP/IEL/WS/3/2; DAVID HUNTER, JULIA SOMMER & SCOTT VAUGHAN, CONCEPTS AND PRINCIPLES

OF INTERNATIONAL ENVIRONMENTAL LAW: AN INTRODUCTION (UNEP Environment and Trade Monograph No. 2, 1994); Phillippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles*, in W. Lang, ed., SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW (1995); INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE'S COMMISSION ON ENVIRONMENTAL LAW, INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT (March, 1995) [hereinafter IUCN DRAFT COVENANT ON ENVIRONMENT AND DEVELOPMENT].

[5] Stockholm Declaration on the Human Environment, June 16, 1972, UN Doc. A/CONF.48/14/Rev.1 [hereinafter Stockholm Declaration]; Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 876 (1992) [hereinafter Rio Declaration];

[6] Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151.26, June 3-14, 1992 [hereinafter Agenda 21].

[7]Both the Rio Declaration, *supra* note 5, and Agenda 21, *supra* note 6, a five-hundred page blueprint detailing the "new global partnership for sustainable development," explicitly adopted the goals of integrating environment and development and implementing sustainable development. Since UNCED, other major summits, including the Copenhagen Summit for Social Development, the Beijing Summit on Women, the Cairo Population Summit, and the Istanbul Summit have all reaffirmed the goal of sustainable development.

[8]World Summit for Social Development, Copenhagen, Denmark 6-12 March 1995, A/CONF.166/9 (19 April 1995), Para. 6 [hereinafter the Copenhagen Summit].

[9] G.A. Res. 2158 (XXI), U.N. GAOR, Twenty-first session (1966) (Sovereignty).

[10] *See,* IUCN DRAFT COVENANT ON ENVIRONMENT AND DEVELOPMENT, *supra* note 4 at 32.

[11] As Principle 21 of the Stockholm Declaration (and more recently Principle 2 of the Rio Declaration) states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

[12] United Nations, Reports of International Arbitral Awards, Vol. III, 1905-81. In the Trail Smelter case, fumes from a Canadian smelter were damaging U.S. citizens and property. After the two countries agreed to arbitration, the U.S.-Canada International Joint Commission (IJC) concluded that under principles of international law Canada was obliged to ensure that activities within its jurisdiction did not cause harm in the United States.

[13] ICJ, Advisory Opinion on the Use or Threat of Nuclear Weapons, July 1996, *reprinted in* 35 ILM 809 (1996).

[14] *See, e.g.,* Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, done June 4, 1974, *reprinted in* 13 I.L.M. 352 (1974); Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, U.N.T.S. Reg. #16908, *reprinted in* 15 I.L.M. 290 (1976); Great Lakes Water Quality Agreement, as amended by the 1983 and 1987 Protocols, 26 I.P.E. 19 (1988).

[15] *See, e.g.,* London Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer and Non-Compliance Procedure, at Annex II, Article I.A.1 (amendment to 6th preambular paragraph), Decision IV/18, Nov. 25, 1992, UNEP/Oz.L.Pro.4/15 [hereinafter London Revisions to the Montreal Protocol] (phasing out certain chloroflourocarbons and calling for the reduction in other ozone destroying substances); Helsinki Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes By at Least 30 Per Cent, done July 8, 1985, U.N. Doc. EB.AIR/12(1988) *reprinted in* 27 I.L.M. 707 (1988) (calling for a reduction in sulfur dioxide emissions).

[16]*See, e.g.,* U.N. Convention on the Non-Navigable Uses of International Watercourses, May 21, 1997, *reprinted in* 36 ILM 700 (1997).

[17] Rio Declaration, *supra* note 5 at Principle 19; *see also, e.g.,* Lac Lanoux Arbitration (Spain v. France) 24 ILR (1957) 101; Montreal Rules of International Law Applicable to Transfrontier Pollution, September 4, 1982, 60 ILA 158 (1983), (International Law Association, 1982) [hereinafter Montreal Rules for Transfrontier Pollution]; UNEP Governing Council Decision: Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared By Two or More States, May 19, 1978, G.A. Res. 3129 (XXVIII), *reprinted in* 17 ILM 1097 (1978), Principle 6 (hereinafter UNEP Principles on Shared Natural Resoruces].

[18] Montreal Rules for Transfrontier Pollution, *supra* note 17 at Article 8; *see also, e.g.,* UNEP Principles on Shared Natural Resources, *supra* note 17 at Principles 6-7; Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden, done February 19, 1974, 1092 U.N.S.T. 279 (1974), *reprinted in* 13 I.L.M. 591 (1974) [hereinafter Nordic Convention for Protecting the Environment];

[19] UN Convention on the Law of the Non-Navigational Uses of International Watercourses, *supra* note 16 at Articles 13 and 17.

[20]See, e.g., Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, February 25, 1991 UNECE Environmental Conventions 1992, *reprinted in* 30 ILM 802 (1991).

[21] *See* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Article 6, March 22, 1989, 28 I.L.M. 657 (1989) [hereinafter Basel Convention]; *see also* Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa, Article 6, Jan. 30, 1991, 30 I.L.M. 775 (1991); International Atomic Energy Agency Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Article 2, September 26, 1986, U.N.T.S. Reg. No. 24643, *reprinted in* 25 I.L.M. 1377 (1986); *see also* FAO International Code of Conduct on the Distribution and Use of Pesticides, Article 9, Nov. 28, 1985 (as amended in 1989).

[22] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, at 433.

[23] Corfu Channel (U.K. v. Albania), ICJ Rep. (1949) 4.

[24] Many commentators thus refer to Stockholm Principle 21 and Rio Principle 2 as elaborating the principle of "state responsibility for environmental harm." Nonetheless, it is useful to think of the two principles separately because "state responsibility" applies to the responsibility of a State for violations of all obligations under international law, for example breaches of the obligation to notify or consult, and not only for environmental harm.

[25] *See, e.g.,* International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, Report of the International Law Commission, 1994, UN Doc. A/49/10, at 397-98.

[26] Basel Convention, *supra* note 21 at Article 12; *see also* UNEP Principles for Shared Natural Resources, *supra* note 17 at Principle 12.

[27]The precautionary approach underlies a number of international instruments in a variety of contexts from protecting endangered species to preventing pollution. *See, e.g.,* Rio Declaration,*supra* note 5 at Principle 15. World Charter for Nature, Principle 11, G.A. Res. 37/7 (Oct. 28, 1982); Convention on Biological Diversity, Preamble, Rio de Janeiro, June 5, 1992, *reprinted in* 31 ILM 822 (1992) [hereinafter Biodiversity Convention]; UN Framework Convention on Climate Change, Article 3.3, New York, May 9, 1992, UN Doc A/CONF.151/26, *reprinted in* 31 ILM 849 (1992) [hereinafter Climate Convention]; U.N. Economic Commission for Europe, Convention on Protection and Use of Transboundary Watercourses and International Lakes, Article 2(5)(a), Mar. 17, 1992, 31 I.L.M. 1312 (1992) (not yet in force) [hereinafter Convention on Transboundary Watercourses and Lakes]; Treaty Establishing the European Economic Community, Mar. 25, 1957, 294 U.N.T.S. 17,

U.K.T.S. 15 (1979) [hereinafter EEC Treaty] *as amended by* Treaty on European Union, Title XVI, Article 130r, Feb. 7, 1992.

[28] *See, e.g.,* OECD Council Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies, May 26, 1972, C(72)128 (1972); OECD Council Recommendation on the Implementation of the Polluter-Pays Principle, Nov. 14, 1974, C(74)223 (1974); European Charter on the Environment and Health, Principles for Public Policy, Article 11, Dec. 8, 1989, WHO Doc. ICP/RUD 113/Conf.Doc./1, *reprinted in* 20 ENVTL. POL. & LAW 57 (1990); Convention on Transboundary Lakes and Watercourses, *supra* note 27 at Article 2(5)(b); EEC Treaty, *as amended by* Single European Act, Title VII, Article 130r, Paragraph 2, Feb. 17, 1982.

[29] *See, e.g.,* Rio Declaration, *supra* note 5 at Principle 16; Agenda 21, *supra* note 6 at Paragraph 30.3 (governments should use "free market mechanisms in which the prices of goods and services should increasingly reflect the environmental costs"), Paragraph 2.14 (commodity prices should reflect environmental costs); Convention on Transboundary Lakes and Watercourses, *supra* note 27 at Article 2(5)(b); Energy Charter, *infra* note 49 at Article 19.

[30] *See, e.g.,* Rio Declaration, *supra* note 5 at Principle 17; Wellington Convention on the Regulation of Antarctic Mineral Resources Activities, Articles 37(7)(d)-(e), 39(2)(c), 54(3)(b), June 2, 1990, 27 I.L.M. 868 (1988) (*not yet in force*); World Charter for Nature, *supra* note 27, at Principle 11(c); UNEP Governing Council Decision: Goals and Principles of Environmental Impact Assessment, UNEP GC/DEC/14/17, Annex III (June 17, 1987); EEC Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment, Council Directive 85/337, Article 2, 1985 O.J. (L175) 40-41; Biodiversity Convention, *supra* note 27 at Article 14; European Economic Community Fourth Lome Convention, Article 37, Dec. 15, 1988, 29 I.L.M. 783 (1990) (*not yet in force*); Energy Charter, *infra* note 49 at Art. 19.

[31] All of the multilateral development banks now have environmental impact assessment policies and procedures. *See, e.g.,* World Bank Operational Directive 4.00 (Annex A)

[32] *See, e.g.,* The U.S. National Environmental Policy Act of 1969, 42 U.S.C. §§4331-4344; E.U. Directive on Assessment of the Effects of Certain Public and Private Projects on the Environment, June 27, 1985, Dir.No.85/337, OJEC 1985 L 175/40. Over 100 countries now require EIAs on at least some types of projects.

[33] Convention on EIA in a Transboundary Context, *supra* note 20;UNEP Principles on Shared Natural Resources, *supra* note 17 at Principle 4.

[34] Rio Declaration, *supra* note 5 at Principle 10; *see also* Biodiversity Convention, *supra* note 27 at Preamble; ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, July 9, 1985, 15 EPL 64, Article 16; OECD Council Recommendation Concerning the Provision of Information to the Public and Public Participation in Decision-Making Processes Related to the Prevention of, and Responses to, Accidents Involving Hazardous Substances, C(88)85(Final) (July 8, 1988); World Charter for Nature, *supra* note 27 at Articles 23-24.

[35] Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, OECD Council Recommendation adopted on 17th May, 1977, (C(77)28).

[36] Bier v. Mines de Potasse d'Alsace, 1976 Eur. Comm. Ct.J.Rep. 1735.

[37] Nordic Convention for Protecting the Environment, *supra* note 18.

[38] Canada-United States of America: Washington Treaty Relating to Boundary Waters and Questions Arising Along the Boundary between the United States and Canada, January 11, 1909, 36 Stat. 2448, T.S. No. 548, 12 Bevans 319.

[39] *See* Part VII, *infra* (discussing several such cases).

[40] *See, e.g.,* Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, October 10, 1989, ELE Doc. ECE/Trans/79 (not yet in force); Convention on Civil Liability for Nuclear Damage, *done* May 21, 1963, *reprinted in* 2 I.L.M. 727; International Convention on Civil Liability for Oil Pollution Damage, done November 29, 1969, as amended by the 1976 Protocol, *reprinted in* 9 I.L.M. 45 (1970); *see also* International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Law Commission (draft)).

[41] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE, (1996)

[42] Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 10, 1997, FCCP/CP/1997/L.7/Add.1.

[43] Basel Convention, *supra* note 21 at Art. 12.

[44] Paris Convention Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251; Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.NT.S. 265, *reprinted in* 2 ILM 727 (1963).

[45] Paris Convention on Third Party Liability in the Field of Nuclear Energy, Brussels Supplementary Convention, January 31, 1963, *reprinted in* 2 ILM 685 (1963).

[46] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, June 21, 1993, *reprinted in* 32 ILM 1228 (1993).

[47] North American Free Trade Agreement between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Dec., 17, 1992, *reprinted in* 32 I.L.M. 289 (1993) (preamble through chapter 10) and 32 I.L.M. 605 (1993) (chapter 10 through Errata table) [hereinafter NAFTA].

[48] *See Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation,* available at the home page of the North American Commission on Environmental Cooperation (http://www/cec.org).

[49] The European Energy Charter Treaty, Lisbon, December 17, 1994, *reprinted in* 33 ILM 374 (1995).

[50] The most recent draft available to the authors is dated May 13, 1997. *See* OECD, Multilateral Agreement on Investment, Draft MAI(97)1/Rev2.

[51] *Environmental Aspects of Bank Activities,* Operational Management Statement 2.36 (1984); Ibrahim Shihata, *The World Bank and the Environment: Legal Instruments for Achieving Environmental Objectives,* in 2 The World Bank in a Changing World (1996).

[52] *See* Operational Directive 4.00 Annex A (1989) and 4.01 (1991) on Environmental Assessment; Operational Directive 4.30 on Involuntary Resettlement (June 1990); Bank Procedures 17.50: Disclosure of Operational Information (August 1993).

[53] CODE, Consultations with Private Sector Clients and Co-financiers, re: Extension of the Inspection Panel to IFC, Annex 2, "Summary/Key Points of the Policies, Procedures, Guidelines and other Documents that are used by IFC for addressing Environmental, Resettlement, Indigenous Peoples, and Occupational Health and Safety Issues".

[54] IFC Environmental Policy – Environmental Analysis and Review of Projects (September 1993).

[55] *See,* Chris Chamberlain, *Public Access to Information at the International Finance Corporation and the Multilateral Investment Guarantee Agency,* Bank Information Center (1997).

[56] The World Bank Group, Pollution Prevention and Abatement Handbook: Toward Cleaner Production (Sept. 1997).

[57] 62 Fed. Reg.5645.(Feb. 6, 1997).

[58] Ex-Im Bank, Engineering and Environment Division, The Impact of the Environmental Procedures and Guidelines on Ex-Im Bank Activity for FY '95 & '96 (January 27, 1997); Export-Import Bank of the United States, Environmental Procedures and Guidelines, (April 2, 1996).

[59] *See* Will Cook, *Corporate Subscription to Voluntary Enviromental Principles: Global Stewardship or New Legal Duties (1997)* (available from the authors).

[60] The following discussion is adapted from D. HUNTER, J. SALZMAN & D. ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (Foundation Press, forthcoming 1998).

[61] *See* Organization for Economic Cooperation and Development, *The OECD Guidelines for Multinational Corporations, 47-48 (OECD, 1994).*

[62] *UNEP, ICC Announce Joint Effort to Encourage Sustainable*

Development, BNA DAILY ENVIRONMENT REPORT, May 4, 1994.

[63] This section was adapted from DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (forthcoming Foundation Press, 1998).

[64] *Foley Bros., Inc. v. Filardo,* 336 U.S.281 (1949); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) [hereinafter *Aramco*].

[65] *Aramco, supra* note 64 at 1230-34. The jurisdictional question poses interesting problems in the international context which will not be dealt with here. The basic premises most often offered to establish the jurisdictional reach for application of domestic laws are the nationality principle and the effects doctrine. The former extends jurisdiction to US nationals regardless of where they are located. The latter extends jurisdiction to actions taken outside the US that have a direct effect or consequence in the territorial US.

[66] *See, e.g., Amlon Metal, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991)

[67] 986 F.2d 528 (D.C. Cir. 1993).

[68] 837 F. Supp. 266 (D.D.C. 1993).

[69] *See In Re Union Carbide Corp. Gas Plant Disaster,* 634 F. Supp. 842 (S.D.N.Y. 1986), *modified* 809 F.2d 195 (2d. Cir. 1987).

[70] *Dow Chemical Co. v. Alfaro,* 33 Tex. Sup. Ct. J. 326, 786 S.W.2d 674 (Tex. 1990).

[71] Id. at 688-89.

[72] *See Sequihua v. Texaco, Inc.,*775 F. Supp.668 (S.D.N.Y. 1991); *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (SDNY 1996).

[73] *Beanal v. Freeport-McMoran, Inc.*, 1997 U.S. Dist. LEXIS 4767 (E.D. La. 1997).

[74] *Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995).*