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## MESSAGE FROM THE CO-CHAIRS

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We are pleased to provide our International Environmental Law Committee members with this March, 2009 issue of The International Environmental Law News. We are grateful to Richard Horsch and Kevin Haroff for two very informative articles on climate change developments: the international negotiations at Poznan leading to the COP meeting in Copenhagen and a look ahead at President Obama's approach to climate change.

Additionally, Karen Bridges looks ahead to how the 11th Congress and the Obama Administration will approach International Environmental Law issues, generally. Finally, we've introduced an exciting new component to our newsletter: the student article. This month, Stetson University's Elizabeth Jean-Pierre contributes our first law student article, a discussion of the interplay between human rights and the environment in China.

As usual, we endeavor to provide timely upcoming events of interest to our membership. Please see our announcements section for more information on the 11th International Wildlife Law Conference and the call for assistance in memorial and oral judging in the Jessup International Environmental Law competition, both events upcoming at Stetson Law School.

On April 15, join us Washington for our panel at the Section Spring Meeting. Our panel, on "Can Carbon Trading Save the World (or Does the World Need to Be Saved from Carbon Trading)?", is scheduled for 4:00 to 5:30 pm on April 15. Speakers will be Michael Gerrard, who recently joined the Columbia law faculty to lead its new Center on Climate Change Law, and practitioners Jeff Gracer and Jeff Smith. Professor Gerrard will lay out the present legal and regulatory framework as well as the proposals likely to emerge from Congress and the White House, while the two Jeffs will debate the pros and cons of the proposals and alternative approaches.

Sincerely,

Joseph Dellapenna

Kim Stollar

Co-Chairs, International Environmental Law Committee

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## POZNAŃ: PROGRESS OR PROCRASTINATION?

By RICHARD HORSCH<sup>1</sup>

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For two weeks in early December 2008, representatives from more than 180 countries, together with observers from governmental and nongovernmental organizations, gathered in Poznań, Poland for the 2008 United Nations Climate Change Conference. In attendance were several luminaries, including former U.S. Vice President Al Gore and United Nations Secretary General Ban Ki-Moon. A combined round of meetings of several bodies on two distinct negotiating tracks, the Conference encompassed the Fourteenth Conference of the Parties ("COP 14") to the United Nations Framework Convention on Climate Change ("UNFCCC"), the Fourth Meeting of the Parties to the Kyoto Protocol ("CMP 4"), together with other subsidiary bodies and ministers.

Negotiations on a successor to the Kyoto Protocol were the primary focus of the Conference. The Kyoto Protocol expires in 2012 and the United Nations has warned that unless agreement can be reached on the terms of a successor treaty by the end of 2009, there may not be enough time for a sufficient number of governments to ratify any new treaty so that it takes effect in 2012. With this deadline in mind, in December 2007 in Bali, Indonesia, the UNFCCC Parties laid out a two-year "roadmap" for forging a new global response to climate change, beginning with COP 13 in Bali (in 2007) and ending with COP 15 in Copenhagen (in 2009), with the Poznań talks as an important bridge.

As the Poznań talks neared, several critical issues remained to be resolved with respect to the four main "building blocks" of a new agreement -- mitigation (including a commitment to quantifiable reduction targets by developed nations and the question whether the reduction of emissions from deforestation and forest degradation ("REDD") should be recognized as a mitigation strategy), adaptation, technology transfer, and the overarching question of financing. (Of course, a number of subsidiary issues are embedded within each category.) These building block issues were highlighted in the "Bali Action Plan," the document adopted by the UNFCCC Parties that charts the course for a new negotiating process to address climate change with a goal of reaching resolution by December 2009.

[2007 United Nations Climate Change Conference, Thirteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), Bali Action Plan, U.N. Doc. FCCC/CP/2007/6/Add.1 (Dec. 3-15, 2007).]

Many approached the Poznań talks with high hopes. Some progress was made: the Parties agreed on an ambitious schedule for continued negotiations and meetings leading up to the December 2009 talks in Copenhagen. Agreement was also reached on making the Adaptation Fund "operational," which had the effect of allowing direct funding to flow to developing countries for adaptation research and projects. It was agreed that REDD will be an integral part of a post-Kyoto framework and steps were agreed on that are expected to pave the way for including REDD projects in the Clean Development Mechanism ("CDM"). But much more remains to be resolved before a final, post-Kyoto agreement is feasible.

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<sup>1</sup> Richard Horsch is a partner at White & Case LLP in New York, NY. He is a member of the firm's International Environmental Practice Group and the firm's Climate Change Practice

The lack of significant progress at Poznań may be attributable as much to the promise of the full engagement by the United States in the future as it is to the absence of U.S. leadership at Poznań. [Fiona Harvey, 'As Night from Day', *Fin. Times*, Jan. 2, 2009.] The talks took place during the transition between U.S. administrations. During his campaign, President Obama pledged to engage in climate change negotiations at the international level and to support carbon cap and trade legislation at the domestic level. Many believe that serious negotiations on the principal provisions of a successor to the Kyoto Protocol will not begin in earnest until the United States takes the lead. Until that time, the Parties may be reluctant to begin to negotiate seriously. The fact that the meetings took place in the midst of global economic turmoil may also have hampered progress. [Alister Doyle, *PREVIEW-Downturn Tests Resolve at UN Climate Talks*, *Reuters*, Nov. 25, 2008.]

The critical outstanding issues addressed and the agreements reached at Poznań are discussed below. (Given the overlap of and close linkage between the issues addressed by the two distinct negotiating tracks -- the Kyoto Protocol track and the UNFCCC track - - the discussion here does not distinguish between the two.)

### Mitigation

#### 1. Quantifiable Reduction Targets

Central to any post-Kyoto regime will be agreement on actions to mitigate projected climate change effects, most importantly agreement on significant cuts in future greenhouse gas emissions by participating nations.

The 2007 discussions in Bali had suggested that the next round of emissions reductions by developed countries should be in the neighborhood of 25-40% below 1990 levels by 2020, a reduction target based on recommendations by the Intergovernmental Panel on Climate Change ("IPCC") that cuts of that magnitude will be necessary to limit global warming to the targeted 2.0° - 2.4°C. [United Nations Intergovernmental Panel on Climate Change [IPCC], Working Groups I, II and III to the Fourth Assessment Report of the IPCC, *Climate Change 2007: Synthesis Report*, (prepared by R.K. Pachauri and A. Reisinger).]

The Bali Action Plan addresses emissions cuts but does not establish specific targets. Instead, the Action Plan calls for "enhanced national/international action on mitigation of climate change," and the consideration of specific greenhouse gas emission reduction targets by developed countries. (In the words of the Action Plan, consideration of "measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country Parties . . . ." [Bali Action Plan § 1(b)(i).]) The Action Plan calls for mitigation by developing countries as well, but includes no express requirement that emissions reductions be measurable, reportable and verifiable. That developed countries should take the lead on committing to absolute emissions cuts is based on arguments that developed countries are responsible for the vast majority of greenhouse gas emissions to date, have per capita greenhouse gas emissions far higher than developing countries and have a greater financial ability to deliver emissions cuts.

Many had hoped that at Poznań the developed countries would take an important step beyond Bali's mere acknowledgment of the science-based recommendations of 25-40% cuts, and formally commit to those targets. But, little progress was made at Poznań on binding reduction targets. Instead, several developed countries (Canada, Australia, Russia and Japan) sought to disavow the IPCC-based targets, an effort critics characterized as a troubling move away from a science-based agreement. Ultimately, the parties failed to agree to specific emission reduction targets.

## 2. Reducing Emissions from Deforestation and Forest Degradation ("REDD") in Developing Countries

Worldwide deforestation, forest degradation and similar land use changes are estimated to account for nearly twenty percent of global warming, and may well be the largest source of greenhouse gas emissions from the developing world. Most deforestation occurs in the world's tropical regions. Brazil, India, Indonesia, Sudan, Zambia, Mexico, the Democratic Republic of Congo and Myanmar have the highest rates of deforestation, although Brazil is, by far, the leader. [Pew Environment Group, Reducing Emissions from Deforestation and Forest Degradation in the Next International Climate Agreement, [http://www.pewglobalwarming.org/resources/Poznań/9\\_REDD.pdf](http://www.pewglobalwarming.org/resources/Poznań/9_REDD.pdf). ("Pew REDD Report").]

Incentives for reducing emissions from deforestation and land use change are considered critical for a successful post-2012 climate regime. Recognizing this fact, the Bali Action Plan requires the consideration of: "[p]olicy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries." [Bali Action Plan § 1(b)(iii).] Strategically, giving developing countries credit for climate-friendly land use policies provides them with a means to contribute to global emissions reductions without binding targets. In fact, some argue that an agreement on deforestation may "offer the best opportunity for developing countries to make binding commitments." [Pew REDD Report, supra.] In addition to a reduction in greenhouse gas emissions, forest preservation has the potential for other significant environmental benefits including the preservation of biodiversity, the prevention of species extinction, the protection of ecosystem services, and the strengthening of the rights of indigenous peoples.

While there is broad agreement on the desirability of encouraging emissions reductions through REDD, the debate on how to design and operate REDD mechanisms has become complex and controversial. A number of important and divisive questions remained unresolved as Poznań approached.

First was the threshold question whether REDD should be included as part of the post-2012 mitigation framework at all, including whether it should be recognized as part of the CDM, a mechanism established under the Kyoto Protocol by which entities in developed countries can finance greenhouse gas emission reduction projects in developing countries and receive offset credits. At the time the Kyoto Protocol was agreed to in 1997, "avoided deforestation" credits were controversial and were not included in the CDM. [Id.]

Also at issue as Poznań approached was the type of financial mechanism to be used to fund REDD. That is, whether carbon credits for reducing emissions from deforestation and forest degradation should be sold on the market (the "market-based approach") or whether an international fund to support REDD should be created to which developed countries would contribute, or whether a combination of the two would provide the most appropriate funding for REDD.

Another open issue was whether a subnational approach or a national approach to REDD should be adopted. This issue is, in essence, a question of the level at which accounting should be applied to, and incentives offered for, REDD activities. Should the focus of REDD efforts and incentives be limited to the project (i.e. subnational) level, which may have greater appeal to private funders, and, some believe, would result in a greater amount of funding devoted to REDD? Or should REDD target the national level,

where each participating country would be responsible for reducing emissions from deforestation and forest degradation within its boundaries? Or should a combination of the two approaches -- a "nesting approach" -- be adopted? [Arild Angelsen et al., Center for International Forestry Research [CIFOR], What is the Right Scale for REDD?: The Implications of National, Subnational and Nested Approaches (Nov. 2008), <http://www.cifor.cgiar.org/Publications/Detail?pid=2595>.]

Only the first of these issues was resolved at Poznań. The parties agreed generally that REDD will be an integral part of a post-Kyoto framework, which some countries viewed as an important victory in and of itself. A joint ministerial declaration was issued, committing a number of developed countries and key tropical developing countries to early action to reduce emissions from deforestation and forest degradation, among other actions. [Press Release, European Union at the United Nations, The European Commission, Climate Change: Commission Endorses Poznań Declaration on Reducing Emissions from Deforestation, 1P/08/1965 U.N. Doc. (Dec. 12, 2008).]

The declaration is expected to pave the way for including REDD projects in the CDM program. But the other important issues concerning REDD, including the most appropriate funding mechanism and whether a national, subnational or hybrid approach should be taken, remain unresolved.

#### Adaptation

Adaptation strategies -- strategies designed to deal with the hardships climate change will cause, including rising seas, floods, droughts, wildfires and other natural disasters -- have become increasingly important in the climate change debate. Adaptation strategies can run the gamut from building higher levees to preparing disaster relief plans to providing for sufficient insurance coverage to relocating coastal and island communities. The focus on adaptation is the result of the recent recognition that, despite strong mitigation efforts, many adverse climate effects will likely occur and human suffering and economic losses can, and should, be reduced through adaptation strategies. That recognition was fostered, in part, by the 2007 IPCC Report, which made clear that "even the most stringent mitigation efforts cannot avoid further impacts of climate change in the next few decades, making adaptation unavoidable." [United Nations Intergovernmental Panel on Climate Change [IPCC], Working Group II to the Fourth Assessment Report of the IPCC, Climate Change 2007: Synthesis Report, Ch. 18 at 747, (prepared by R.K. Pachauri and A. Reisinger).]

The Bali Action Plan calls for "enhanced action on adaptation," and lists a number of actions the parties agree to consider in support of adaptation (including vulnerability assessments, capacity-building and response strategies, specific projects and programs as well as "other ways to enable climate-resilient development and reduce vulnerability of all Parties"). Addressing the funding for adaptation, the Action Plan calls for "the provision of financial resources and investment to support action on . . . adaptation." [Bali Action Plan § 1(c)-(e).]

At Bali, the Kyoto Parties also agreed to establish an Adaptation Fund to finance adaptation projects and programs in developing countries that are Parties to the Kyoto Protocol. It was also agreed that the Global Environment Facility ("GEF") would provide secretariat services to the Adaptation Fund and the World Bank would serve as the Fund's trustee. The amount of the Fund, however, was not established. [2007 United Nations Climate Change Conference, Thirteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), 2007, Adaptation Fund, U.N. Doc. FCCC/KP/CMP/2007/9/Add. 1 (Mar. 14, 2008).]

Moreover, start up of the Fund was delayed by legal difficulties concerning the application of the principle that developing countries should have direct access to funding, which raised concerns about the oversight of how funds would be spent.

Adaptation was one of the few areas in which measurable progress was made at Poznań. The parties agreed to “operationalize” the Adaptation Fund, the practical effect of which is to clear the way for developing countries to receive direct funding from the Fund for adaptation projects. Many viewed this development as a major victory. However, success was tempered by the failure to agree on a means to increase funding for adaptation projects. Currently, the Adaptation Fund is financed principally by a 2% levy on the revenues from the CDM, an amount estimated at approximately \$60 million per year, which many developing countries view as wholly inadequate to support the steps necessary for adaptation in the most vulnerable countries. Several developing countries expressed deep disappointment over the failure to increase adaptation funding.

#### Technology Transfer

Technology transfer, broadly defined as the flow of know-how, experience and environmentally sound technologies for mitigating and adapting to climate change among different stakeholders, was another area of hoped-for progress at Poznań. The Bali Action Plan calls for “[e]nhanced action on technology development and transfer to support action on mitigation and adaptation.” [Bali Action Plan § 1(d).]

Just before the Poznań meetings, the Expert Group on Technology Transfer (“EGTT”) -- a group established at the November 2001 COP 7 meetings in Marrakesh to identify and analyze ways to facilitate and advance technology transfer under the UNFCCC -- prepared reports addressing technology transfer issues. The EGTT introduced its preliminary findings during the Poznań meetings.

Many viewed the EGTT reports as an encouraging first step. But, there was no significant agreement reached in Poznań on the important technology transfer issues that will need to be resolved before a definitive agreement can be reached at Copenhagen.

These issues include:

- An agreed system to accelerate the transfer of critical technologies to those places where it is most needed.
- Agreement on intellectual property rights (although there is a growing recognition that IP rights may be best resolved among private parties, and addressed at the political level only where necessary).
- Whether carbon capture and sequestration technology will be a technology included in the CDM.
- Whether nuclear power technology will be a technology included in the CDM.

Nevertheless, some progress was made. The Conference of the Parties endorsed the Global Environment Facility’s Poznań Strategic Programme on Technology Transfer, a program designed to “scale up” the level of investment in technology transfer to help developing countries address their need for environmentally sound technologies. The program includes expanding support for new and existing public-private partnerships. [See 2008 United Nations Climate Change Conference, Fourteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), Poznań, Poland, Dec. 1-12, 2008, Development and Transfer of Technologies, Decision-/CP.14; 2008 United Nations Climate Change Conference, Fourteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC),

Subsidiary Body for Implementation, Poznań, Poland, Dec. 1-12, 2008, U.N. Doc. FCCC/SBI/2008/16.]

### Financing

Financing is possibly the most important building block of any post-Kyoto agreement, underpinning mitigation, adaptation and technology transfer issues. The financing debate is, in part, a debate about the extent to which developed countries are willing to accept financial responsibility for the mitigation actions to be undertaken by, and for the adverse climate change effects expected to occur in, developing countries. The Bali Action Plan makes that question clear when it emphasizes the responsibilities of the developed countries to finance the obligations of developing countries, calling for "enhanced action on the provision of financial resources and investment" to "support action on mitigation and adaptation and technology cooperation." The Bali Action Plan also calls for the consideration of the following:

- "[P]ositive [financing] incentives for developing country Parties for the enhanced implementation of national mitigation strategies and adaptation action."
  - "[I]nnovative means of funding to assist developing country Parties . . . in meeting the cost of adaptation."
  - "[M]obilization of public- and private-sector funding and investment."
- [Bali Action Plan §§ 1 (e)(ii)-(iii), (v).]

With the exception of "operationalizing" the Adaptation Fund, however, little progress was made toward agreement on financing issues at Poznań. Two important issues -- the source of financing and the identify and nature of the institution responsible for administering the funds -- were discussed but not resolved.

As to the source of funds, Norway offered a proposal that was generally supported by developed countries. Under the Norway Proposal the global carbon market would be used as a mechanism for funding. A portion of permits would be withheld from national allocations, and those permits would be auctioned off to generate revenues for use for specified financing.

As to the administration of the financing, the debate centered on whether an existing institution (the Global Environment Facility) should administer financing or, as urged by developing countries, a new mechanism should be developed under the auspices of and controlled by the COP. The developed countries expressed their support for administration by the Global Environment Facility ("GEF"), an independent financial organization that provides grants to developing countries for projects benefiting the global environment. (The GEF is the financial mechanism for the UNFCCC. The Parties to the UNFCCC assigned operation of the financial mechanism to the GEF on an on-going basis, subject to review every four years ([www.thegef.org](http://www.thegef.org))). The developing countries however expressed their "profound concerns" about "the performance of the financial mechanisms and the GEF as an operating entity." [Lim Li Lin & Juan Hoffmaister, Continuing Differences in Technology and Financial Mechanism Discussions, TWN Poznań News Update, Dec. 4, 2008 at 2.]

These two issues -- the source of funds and the identity and nature of the institution that will administer the funding -- are likely to remain the subject of debate and to continue to divide developed and developing countries as the Parties proceed to Copenhagen.

### The Road from Poznań to Copenhagen

Much remains to be done if the Parties are to reach an agreement in Copenhagen. Toward that end, an ambitious series of meetings are scheduled to take place in Bonn, Germany, the headquarters of the UNFCCC, from March 19 through April 8th and from

June 1st through June 12, 2009. At the Bonn meetings the Parties plan to continue to hammer out the details of an agreement, with the goal of publishing a draft text of a new treaty before leaving Bonn in June. Another two-week round of meetings may also take place in September and October in Bangkok, with the understanding that yet additional meetings prior to Copenhagen may be necessary. But the consensus is that agreement on a final treaty by December 2009 will require full engagement by the United States as well as the major developing countries of China, India and Brazil. It will also require a significant effort to bridge the wide gap between the current positions of the developed and the developing countries on the critical "building block" issues.

## **PROSPECTS FOR INTERNATIONAL ENGAGEMENT ON CLIMATE CHANGE BY THE OBAMA ADMINISTRATION**

By Kevin Haroff <sup>2</sup>

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During the first days of his administration, President Barack Obama made clear that the United States is now prepared to assert a leadership role in promoting international efforts to address global climate change. On the domestic front, the President signed executive orders directing the U.S. Department of Transportation to develop new fuel efficiency standards for the American automobile industry and requiring the U.S. Environmental Protection Agency to reconsider its previous decision to deny the State of California a waiver to allow state regulations on carbon dioxide emissions from motor vehicles. The Administration also has appointed a Special Envoy as the nation's principal advisor on international climate policy and strategy and the government's chief negotiator on future international agreements and protocols.

During the presidential campaign, then-Senator Obama promised to re-engage with the United Nations Framework Convention on Climate Change (UNFCCC) and to create a Global Energy Forum of the world's largest emitters to focus exclusively on global energy and environmental issues. The idea of creating a new global forum on climate change traces itself to an article written by Todd Stern and William Antholis in the June 2007 issue of the American Interest, entitled "Creating the E-8." Mr. Stern, then a senior fellow at the Center for the American Progress and a partner at WilmerHale in Washington, D.C., was tapped by Secretary of State Hillary Clinton as the State Department's new Special Climate Change Envoy. He previously coordinated the Clinton Administration's Initiative on Global Climate Change, and recently he has been critical of efforts by the international community to address climate change under the auspices of the United Nations.

A Global Energy Forum (the "E-8") could be based on the "G-8" model of bringing leaders of developed nations together to address international economic issues. A major difference would be the inclusion of major developing nations, such as China, India, and Brazil, in any forum focused on climate change and the environment. An E-8 forum could serve several related purposes - personal engagement of world leaders; establishment of a body able to operate outside the framework of United Nations'

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<sup>2</sup> Kevin Haroff is a partner with the Environmental and Climate Change Practice Groups at Sonnenschein Nath & Rosenthal LLP in San Francisco, California.

conventions; mobilization of public awareness and involvement; and more integrated treatment of global environmental issues both within and among national governments and multi-national organizations. The E-8 process would likely supplement rather than replace ongoing efforts under the UNFCCC and other international programs.

Despite Administration statements supporting greater international engagement by the U.S. on climate change, it is not yet clear where that support may lead as a practical matter. Old obstacles to progress, such as the lack of commitment by China to reduce its own carbon dioxide emissions from power plants and other sources, are likely to continue. In addition, the potential adverse impacts of multi-national emissions reduction requirements on the U.S. economy may be too much for the Administration to accept at a time it is trying to help the country move out of the most severe and persistent economic recession seen in decades. Nevertheless, there seems to be a shared belief within the Administration that viable international strategies (including market-oriented strategies) can and must be implemented in the near term to respond to climate change within a framework of restoring the overall national and global economies.

## **A NEW PRESIDENT AND CONGRESS: OUTLOOK FOR 2009**

By Karen Bridges<sup>3</sup>

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On January 6, 2009, the 111<sup>th</sup> Congress was sworn in, with increased majorities for Democrats in both the House and Senate. On January 20<sup>th</sup>, Barack Obama took the oath of office and became the 44<sup>th</sup> President of the United States. These events promise rapid change in the field of international environmental law, including a dramatic shift in how the U.S. approaches the related issues of climate change and energy security and potential ratification by the United States of key international environmental treaties.

Congressional leaders have proposed aggressive action on comprehensive domestic climate change and energy legislation. Representative Henry Waxman, Chairman of the House Energy and Commerce Committee, stated his intention to send legislation to the House floor by Memorial Day and has set an ambitious schedule of hearings in an effort to meet that goal. Senator Barbara Boxer (D-CA), Chairman of the Senate Committee on Environment and Public Works, was more circumspect but indicated at a February 3 press conference her desire to report out a bill as quickly as possible, preferably before the next round of climate talks in Copenhagen in December. Chairman Waxman also stated his preference for combining climate legislation with comprehensive energy legislation that would address such issues as a Renewable Electricity Standard (RES) and energy efficiency. The Senate has resisted combining climate and energy, with the Senate Energy Committee proceeding on a separate and faster track, but Senate Majority Leader Harry Reid (D-NV) recently stated his support for Waxman's approach.

Other Committees will still have to address areas within their jurisdiction, including the Senate Committee on Finance, which will consider the revenue and international competition aspects of climate legislation. And, it does not appear, at least for now, that supporters of climate change legislation have the 60 votes they need to pass a

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<sup>3</sup> Karen Bridges is a Staff Attorney with the Environmental Law and Policy Center in Chicago, IL.

climate bill in the Senate. This has led to speculation that the 111<sup>th</sup> Congress is not likely to act on climate change legislation or send a bill to President Obama's desk until 2010, at the earliest, after the Copenhagen talks have concluded. It has also led to speculation by some members of the Administration and Congress, including Chairman Boxer, that the Democratic majority should consider using the filibuster-proof budget reconciliation process to move a bill.

President Obama and key members of his Administration, including Secretary of Energy Stephen Chu, Administrator of the Environmental Protection Agency Lisa Jackson, and White House climate change advisor Carol Browner, have also pledged a quick and coordinated response to climate change through executive action, support for domestic cap and trade and other legislation, and international engagement. To many, the mere fact that President Obama brought Browner into the White House to coordinate his administration's response to energy and climate across the executive branch is an indication of the high priority he places on the issue. The recently enacted economic stimulus package, supported by the President, contained approximately \$100 billion for so-called "green" initiatives, including about \$63 billion in spending and tax breaks for energy programs such as smart-grid technology, renewable energy, weatherization and energy efficiency.

Additionally, the budget blueprint that President Obama submitted to Congress calls for mandatory caps on U.S. emissions of 14% below 1990 levels by 2020, and 83% below 1990 levels by 2050. The blueprint also assumes approximately \$650 billion in revenue from a 100% auction of emissions allowances, a provision that has sparked lively debate on and off the Hill about the wisdom of a 100% auction and how the money would be used.

On January 26, President Obama directed Administrator Jackson to reconsider the Bush Administration's denial of California's request for a waiver under the Clean Air Act (42 U.S.C. 7543(b)) that would allow California and thirteen other states to implement new limits on vehicle greenhouse gas emissions. During her Senate confirmation hearing, Administrator Jackson indicated her support for reversing her predecessor's denial of the waiver. Her office is also preparing a new response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, which directed the EPA to determine whether greenhouse gases endanger human health and welfare and should be subject to regulation under the Clean Air Act. Based on comments made by Jackson and other Administration officials, it appears likely that the agency will make such an endangerment finding, prompting a new wave of regulation and litigation. It is not clear at this point how such a finding may impact Congressional negotiations on climate change legislation.

The President and Senate leaders have also indicated the U.S. will take an active leadership role in international negotiations on a post-Kyoto climate treaty. During Secretary of State Hillary Clinton's confirmation hearing before the Senate Foreign Relations Committee, the Committee Chairman, Senator John Kerry (D-MA) stated:

*A resounding message from the recent Climate Change Conference in Poland was that the global community is looking overwhelmingly to our leadership. This committee will be deeply involved in crafting a solution that the world can agree to and that the Senate can ratify, and, as we proceed, the lesson of Kyoto must remain clear in our minds: All countries must be part of the solution.*

Secretary Clinton expressed similar sentiments during the hearing, saying that it's time to "recognize that climate change is an unambiguous security threat," and "[w]e will participate in the upcoming UN Copenhagen climate conference and a global energy

forum and will pursue an energy policy that reduces our carbon emissions while reducing our dependence on foreign oil and gas, fighting climate change and enhancing our economic and energy security.”

Soon after her confirmation as Secretary of State, Secretary Clinton appointed Todd Stern as a special envoy for climate change, an appointment that she said sends “an unequivocal message that the United States will be energetic, focused, strategic and serious about addressing global climate change and the corollary issue of clean energy.” Stern, a former climate negotiator in the Clinton Administration, will serve as the chief U.S. negotiator at United Nations talks on climate change, including the crucial Copenhagen session in December. Secretary Clinton and Stern recently traveled to China, where a possible bilateral agreement on climate change was a prominent topic.

On the international trade front, the Administration has announced its intention to depart significantly from the Bush Administration’s policies, including incorporating concerns about international environmental issues like climate change in future trade negotiations. The President’s nominee for U.S. Trade Representative, Ron Kirk, indicated during his confirmation hearing before the U.S. Senate Finance Committee that the Administration would pursue tough environmental and labor standards when negotiating trade agreements and that “[w]e should aim to make trade a part of the tool kit of solutions for addressing international environmental challenges.”

Finally, President Obama appointed Harvard University physicist John Holdren as the presidential science advisor, and Oregon State University marine biologist Jane Lubchenco to head the National Oceanic and Atmospheric Administration (NOAA), both prominent scientists and strong proponents of curbing greenhouse gas emissions.

It is unclear how much the current recession and turmoil in the financial markets will affect the debate in Congress over climate legislation, and in turn the ability of the international community to finalize and implement a new climate treaty. There are still many lawmakers in the U.S. who express skepticism about imposing stringent caps on U.S. greenhouse gas emissions without concrete pledges by China to do the same by 2020, and who are still concerned about the costs of climate legislation. See, for example, Senator Evan Bayh’s (D-IN) comments during Secretary Chu’s confirmation hearing, where he said that “without China participating” in a global regime to reduce greenhouse gas emissions “it’s (a U.S. climate bill) not going to work, and I don’t think it will get enacted.”

Recently, U.N. Secretary-General Ban Ki-moon invited President Obama to attend new climate “mini summit” in New York, scheduled for late March. The Secretary-General has indicated he organized this summit ahead of talks in London on the global financial crisis because he is concerned about how the crisis will impact climate negotiations and investments to fight global warming. He wants the new President to confirm that climate is at the top of the U.S. agenda, believing strong U.S. leadership is the only way a new climate treaty will result in long-term commitments by the global community to dramatically reduce greenhouse gas emissions. President Obama did not attend the summit, but told the Secretary General at a White House meeting on March 10 that the U.S. would take action on global warming despite the financial crisis.

Given the intense speculation surrounding the debate over climate change in the U.S. and abroad, other important international environmental issues will compete for attention, even linked as many are to global warming, including ratification of the U.N. Convention on the Law of the Sea.

Ratification of the Law of the Sea treaty has been repeatedly blocked in the U.S. Senate, despite support from the Clinton and Bush Administrations, by concerns about increased international interference with U.S. commercial interests and that the treaty would allow international bodies to exercise too much influence over U.S. domestic affairs. Arctic changes wrought by melting sea ice have intensified interest in the treaty in part because it sets up an independent body to regulate mining rights in marine areas beyond the exclusive areas controlled by individual states.

Senate leaders and key members of President Obama's Cabinet, including Secretary of State Clinton, have voiced their support for the treaty. Secretary Clinton, in response to a question from Senator Lisa Murkowski (R-AK) about whether the treaty would be a priority for the Obama Administration, stated:

*Yes, it will be, and it will be because it is long overdue, Senator. . . . You know, if people start drilling in areas that are now ice free most of the year, and we don't know where they can and can't drill or whether we can, we're going to be disadvantaged. So I think that you will have a very receptive audience in our State Department and in our administration.*

The treaty also addresses important issues of navigational rights and protection of the marine environment. Candidate Obama told the American Society of International Law that he would support ratification of the Law of the Sea treaty.

Other international environmental treaties that the U.S. has yet to implement or ratify include the Convention on Biodiversity, the Stockholm Convention on Persistent Organic Pollutants, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and the International Treaty on Plant Genetic Resources for Food and Agriculture. To date, the Administration has said little about these treaties. Many of the issues covered by these agreements, such as the accelerating loss of biodiversity on the planet attributable, in part, to global warming, may soon become hard to ignore.

Another area that may see some activity in Congress is reform of the domestic Toxic Substances Control Act (TSCA), in response to a recent report by the U.S. Government Accountability Office (GAO) sharply criticizing the law as inadequate to protect human health and the environment, and the European Union's implementation of Registration, Evaluation and Authorization of Chemicals (REACH) legislation, which unlike the American law, places the burden on individual companies to provide safety data and risk assessments on the chemicals they produce. (See GAO, High Risk Series, An Update, January 2009, GAO-09-271) Bills to reform TSCA along the lines of REACH were introduced in the House and Senate during the last Congress, and are expected in the 111<sup>th</sup>.

## The Right to Clean Air and Water? An Examination of China's Human Rights Laws under the Cloud of Pollution

By Elizabeth Jean-Pierre<sup>4</sup>

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### Introduction

The opulence of breathable air and clean drinkable water is often unrecognized throughout the world. As an ancient society, China has one of the world's oldest and continuous civilizations, consisting of states and cultures dating back more than six millennia. In addition to its historical and cultural richness, China is renowned for its advancements in technology and industrial growth. Along with the unique developments, there are severe negative consequences of industrial growth which affect the Chinese population in a number of ways. For example, polluted water supplies have contributed to over a million premature deaths each year. BBC News, "Pollution Turns Chinese River Red."

The People's Republic speedy industrial growth has also degraded many of China's natural resources. A report released by China's State Oceanic Administration indicates about 83% of China's total sea area suffers from pollution (according to the Xinhua News Agency's newscast titled "Over 80% of China's Sea Areas Suffer from Pollution," Jan. 17, 2009). This is an increase of around 5% from last year. *Id.*

Yet beyond the smoggy haze, there appears to be a silver lining along the clouds that loom over China. With the assistance of many international non-governmental organizations (NGO), the ubiquitous Chinese government has decided to effectuate laws which can truly change the face of both human rights and environmental laws.

The question that remains unanswered is whether the People's Republic of China will truly be able to relinquish its control in an effort to promote environmental laws which coincide and affect their intra-national human rights laws. This article briefly examines China's plight with human rights and environmental laws and narrowly predicts the possibility to fresh future for the people of China.

### Chinese Human Rights Laws

To its detriment, China is infamously recognized for its oppressive government that lacks enforced human rights regulations for its citizens. As human rights advocates have strengthened their positions internationally, the People's Republic of China has attempted to implement institutions and newly adopted standards that address and advance better human rights laws in China.

The various regulations implemented may add a slight change to the populations' sentiments towards its government; however, various NGOs are adamant to ensure China's compliance with its own human rights laws. For example, the President of the China Constitutional Law Association believes that "China's human rights development needs efforts of both the government and the public." The United Nations (UN) conveys a robust understanding that that true human rights efforts begin with the government. As such, China has undergone a comprehensive review of its human rights practices in a

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<sup>4</sup> **Elizabeth Jean-Pierre** is a third year law student at Stetson University College of Law. She is also a Student Member of the ABA International Environmental Law Committee.

procedure called the Universal Periodic Review (UPR) conducted by the UN's Human Rights Council on February 9, 2009.

Under UPR, all UN member states are subjected to a uniform process according to a rotating schedule. NGOs and other stakeholders were required to submit China reports to the UN last August, and these have been collated by the OHCHR into a single document that, along with China's own report, form the core of the formal review process

Unfortunately, China has not specifically created legislation that seeks to equalize the issues of human rights violations and environmental injustice. Human rights laws are fundamental to sustaining local environmental laws. Even though properly regulated human rights laws appear grim in China, newly proposed environmental laws looks promising.

#### Environmental Protection Laws

Environmental degradation often leads to violation of human rights, including the right to life, health, habitation, culture, equality before the law, and the right to property. Hunter, Et Al., *International Environmental Law and Policy*, 1367, (Foundation Press ed., 2007) (1998). At the start of the new millennium, China adopted numerous laws including the "Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution" which looks to improve the environment and safeguard human health. Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution., (adopted August 29, 1995. Amended April 4, 2000, effective September 1, 2000). China also implemented the Ministry of Environmental Protection (MEP). The mission of MEP is to assist China's environment and organize environmental protection. This and similar laws provided a mechanism for the Chinese government to express its desires for a better environment. However, neither explicit nor implicit expressions have provided officials (governmental or NGO sponsored) with a method to apply and enforce existing regulations to the betterment of the environment.

Recently, China has recognized that there are a number of financial implications to enhancing environmental laws. Rosenzweig, Joshua, *International Environment Daily*, Jan. 8, 2009. Yet, China's Minister of Environmental Protection did not permit the potential financial burden impede on the enforcement of environmental laws. *Id.*

China has finally implemented Circular Economy Promotion Act (CEPA) which was originally passed in August 2008. This law is a rare because it intertwines human rights and environmental law. Specifically, many of taken of CEPA's provision mirror provisions of democratic nations. One provision of the law provides the public with the right to access environmental information to help promote environmental protection. This new provision also includes an "unrestricted access to; regulations, rules, standards relating to environmental protection, environmental protection plans, quality status, statistics and environmental investigation information." Only time will tell whether China will truly be able to enforce this law with a Human Rights System.

Many regions have created a Human Rights System; however, Asia has not created a regional human rights system. Although there have been few attempts to implement a regional human rights system, there has not been a significant political momentum. Beyond the UN's attempts to enforce human rights compliance, no other method exist to assist with enforcement and regulation of environmental laws.

### Conclusion

It is evident that where human rights are feeble in a society, regardless of its ancient history, environmental concerns are not raised effectively. China is advancing yet, as seen, environmentalists throughout the world argue for rights based on the fundamental human needs for clean air and water. Yet assessing China's political structure and notorious history of sweeping away human rights concerns, it is unlikely that a major change and enforcement to environmental and human rights laws will happen in the near future.

## **Committee Announcements**

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### **Committee co-sponsors International Wildlife Law Conference and Stetson International Environmental Moot**

This March, the International Wildlife Law Conference and the Stetson International Environmental Moot Court Competition will be held in conjunction for the first time. Both events, which are co-sponsored by the International Environmental Law Committee, will take place on Stetson's Gulfport, Florida campus (in the Tampa/St. Petersburg area). We encourage Committee members to consider serving as memorial or oral round judges and attending the conference.

### **11<sup>th</sup> International Wildlife Law Conference (March 26-27)**

The Conference's four sessions focus on biofuel production and biodiversity impacts, sustainable ecotourism, regional fisheries management organizations, and the Antarctic ecosystem. Speakers from six countries include:

- **Johannes Huber**, Executive Secretary, Antarctic Treaty Secretariat
- **Julia Jabour**, Institute of Antarctic & Southern Ocean Studies, University of Tasmania
- **Gunther Handl**, Tulane University
- **Andi Pearl**, Antarctic Krill Conservation Project, The Pew Charitable Trusts
- **Patricia Farnese**, University of Saskatchewan
- **Clay Henderson**, Holland & Knight LLP
- **Laurie MacDonald**, Defenders of Wildlife
- **Richard Caddell**, Swansea University
- **Annecoos Wiersema**, The Ohio State University
- **Irini Papanicolopulu**, University of Milan-Bicocca

The complete agenda and registration information is available at <http://www.law.stetson.edu/tmpl/news/events/conf/internal-1-sub.aspx?id=4716>.

### **13<sup>th</sup> Annual Stetson International Environmental Moot Court Competition (March 25-28)**

In honor of the 50th anniversary of the Antarctic Treaty, the moot involves alleged excessive krill harvesting in the Antarctic region and a related enforcement action on the high seas. Regionals have been held (or will soon be held) in north and south India, Ireland, Latin America, and Southeast Asia. The University of Maryland School of Law is hosting the North American (Atlantic) Rounds, and Santa Clara University School of Law is hosting the North American (Pacific) Rounds. The top teams from these regionals, along with teams from China, Nepal, Nigeria, and Ukraine, have been invited to participate in the International Finals at Stetson. The final round judges will be Dr. Wil Burns, editor-in-chief of the Journal of International Wildlife Law and Policy, Johannes Huber, executive secretary of the Antarctic Secretariat, and Andi Pearl, manager of the Pew's Antarctic Krill Conservation Project.

*Memorial judges:* Memorials will be available for grading after February 15, 2009, and judges will have approximately one month to submit their scores. As in the past, there is a word limit, and the memorials are typically 25 pages in length. Stetson will email to memorial judges a copy of the problem and eight to ten memorials to grade. Judges will receive a grading sheet that explains the scoring process. If you wish to review the problem in advance, it is available at <http://justice.law.stetson.edu/environmental/> — click on “Record” and “Clarifications to the Record.” If you’d like to judge memorials, please contact Prof. Brooke Bowman at [bowman@law.stetson.edu](mailto:bowman@law.stetson.edu).

*Oral round judges:* Oral round arguments are scheduled before and after the conference sessions to provide the opportunity for conference attendees to judge the moot and to allow moot court students to attend the conference. If you would like to judge one of the oral rounds, please contact Peggy Gordon at [mcgordon@law.stetson.edu](mailto:mcgordon@law.stetson.edu).

Thanks for your consideration, and we hope to see you in Florida in March (which is a nice time to visit)!