

COMMENT

TRANSNATIONAL CORPORATE RESPONSIBILITY FOR INTERNATIONAL ENVIRONMENTAL AND HUMAN RIGHTS VIOLATIONS: WILL THE UNITED NATIONS' "NORMS" PROVIDE THE REQUIRED MEANS?

I. INTRODUCTION

Recently in Buyat Pantai, one of Indonesia's most impoverished coastal communities where people live with only a single dirt road and without electricity or running water, something went wrong.¹ Villagers were afflicted by a variety of illnesses that had never been seen before in this area.² They began complaining of dizziness, breathing difficulties, tumors, skin rashes, and diseases.³ Water and air quality tests, conducted to determine the source of the illnesses, revealed a dramatic increase in arsenic and mercury to levels never before seen in the region. What had changed in this tiny, isolated, and autonomous coastal village? The answer is the arrival of Newmont Mining Corporation (Newmont), a U.S.-based multi-billion dollar gold producer, and its gold mine near Buyat Bay.

The Indonesian government and its citizens have filed civil charges against Newmont for polluting the air and water, and for making its people sick.⁴ The company's executives deny any wrongdoing and insist that everywhere Newmont does business, it adheres to U.S. environmental laws, which are often more stringent than those of developing countries.⁵

1. Michael Casey, *Indonesian Villagers Sue Firm for Polluting: World's Largest Gold-Mining Company at Centre of Environmental Storm*, HAMILTON SPECTATOR, Nov. 29, 2004, at A16.

2. *Id.*

3. Patrick Goodenough, *US Mining Giant Faces Trial in Indonesia Over Pollution Claims*, CNSNEWS, Dec. 9, 2004, <http://www.cnsnews.com/ForeignBureaus/archive/200412/FOR20041209a.html>; Jane Perlez, *Mining Giant Told it Put Toxic Vapors into Indonesia's Air*, N.Y. TIMES, Dec. 22, 2004, at A1.

4. Goodenough, *supra* note 3.

5. See discussion of Newmont's environmental record *infra* Part III.A.

The tragedies at Buyat Bay draw attention to larger issues arising in international law. Specifically, there is a lack of certainty regarding what law controls transnational corporations (TNCs), and what regulations are in place to safeguard the people and natural resources of countries hosting TNCs.⁶ Each nation has its own set of laws to protect the environment and the health of its citizens. However, when a TNC exploits a host country's natural resources and harms its land, developing countries often fail to enforce these laws because they fear the company will leave and take its jobs and dollars with it. Today, developing countries are asked to trade health and safety for the progress and prosperity promised by the economic ventures of TNCs. Presently, without any binding international law to protect host countries, individual nations find themselves in a difficult situation.

In August 2003, the United Nations enacted the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms)*, a voluntary set of human rights principles, which include international environmental law guidelines.⁷ These principles provide non-binding guidelines for TNCs and other business enterprises to abide by while operating in any country.⁸ The critical question is whether this "soft law"⁹ will be enough to stop the environmental exploitation and degradation of developing countries.

Part II of this Comment examines the history and background of human rights and the environment. Part III describes the case against Newmont, including the allegations and procedural history. A detailed analysis of the *Norms* is set out in Part IV. Finally, Part V discusses how the *Norms* can be used and explains why binding legislation is desperately needed.

This Comment concludes by finding that the *Norms* offer guidelines that represent a step in the right direction, however, the *Norms* are simply not enough. TNCs exploit countries that are rich in natural resources but poor in economic vitality, polluting the air and water and damaging the health of indigenous people. TNCs do so free from

6. See discussion of the need for binding international regulation *infra* Part V.B.

7. U.N. Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), available at <http://www.umn.edu/humanrts/links/norms-Aug2003.html> [hereinafter *Norms*].

8. *Id.*

9. See discussion on the difference between hard and soft law *infra* Part IV.A.

prosecution and redress because binding international law governing how TNCs operate does not yet exist.

II. HUMAN RIGHTS AND THE ENVIRONMENT: BACKGROUND AND HISTORY

Degrading the environment has an adverse effect on the quality of life and can often lead to violations of human rights.¹⁰ The General Assembly of the United Nations has declared that preserving the earth's natural resources is "a prerequisite for a normal life of man."¹¹ These rights are vital for indigenous people because they often rely on every aspect of their immediate environment in its natural state for survival¹²—such as water, trees, food, health, housing, traditional livelihood, and culture.¹³ Harm to these natural resources is often both irreversible and life threatening, as these harms negatively impact the immediate health and safety of individuals.¹⁴

A critical dilemma in the international environmental and human rights arena involves developing countries, their indigenous people, and the exploitation of their environment. As established in the very first international environmental conference held in 1972, the primary concern of the "South"¹⁵ is economic development.¹⁶ This position

10. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1281 (2d ed. 2002).

11. ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 664 (3d ed. 2004) (citing G.A. Res. 35/7, U.N. Doc. A/RES/35/8 (Oct. 30, 1980)).

12. HUNTER ET AL., *supra* note 10, at 1283.

13. KISS & SHELTON, *supra* note 11, at 664 (quoting Klaus Toepfer, Executive Director of the United Nations Environment Protection in a statement to the Fifty-Seventh Session of the United Nations Commission on Human Rights in 2001).

14. Brief for Center for Human Rights and the Environment and Center for International Environmental Law, as Amici Curiae Supporting Plaintiffs, Ass'n of Lhaka Honhat Aboriginal Communities (Nuestra Tierra/Our Land) v. Argentina, Precautionary Measures Request, Inter-Am. C.H.R. (2000) (No. P12.094) (case ended in a settlement), available at <http://www.cedha.org.ar/docs/curiae2.htm>, reprinted in DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1281 (2d ed. 2002).

15. The "South" does not denote countries geographically located in the south, but rather is a way for environmentalists to classify a group with characteristics of high population, high poverty, and high biodiversity. *Id.* at 167. These are usually developing countries. *Id.* The "North" refers to nations that are relatively wealthy, and have substantial economic development, high literacy rates, and positive health indicators. *Id.* The "North" includes the United States, Canada, Europe, former Soviet Union, Japan, Australia, and New Zealand. *Id.* at 166-67.

Many developing countries are in the southern hemisphere, but not all, and visa-versa. The tendency to group North and South is helpful in distinguishing because the goals of most developing countries are the same when it comes to an environmental agenda. See generally Richard B. Stewart, *Environmental Regulations and International Competitiveness*, 102 *YALE L.J.* 2039, 2102-05 (1993) reprinted in *INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY*

was initially advanced at the U.N. Conference on the Human Environment at Stockholm¹⁷ and still held true at the Johannesburg World Summit of 2002.¹⁸ Regrettably, developing countries are frequently willing to sacrifice environmental and human rights to further development because creating a vigorous economy is a strong desire and goal.¹⁹ The international community attempted to respond to this trade-off by establishing “third generation rights,” which grant rights to a quality environment, development, and peace.²⁰ However, many developing countries have less stringent environmental standards than industrialized countries,²¹ as a result, TNCs can establish a more profitable business in developing countries, because they are not often forced to comply with the strict environmental standards of their home country.²²

In those developing countries that do have strict environmental laws, the laws are often not enforced. A research study in Brazil, Mexico, Indonesia, and the Philippines found that even if countries

452-53 (Anthony D’Amato & Kirsten Engel eds., 1996) (discussing how a variety of factors, including social, cultural, historic and economic, lead to varying governmental responses to environmental issues). The goals of most countries in the “North” are also the same, but sharply differ with those of the “South.” *Id.*; HUNTER ET AL., *supra* note 10, at 167.

16. HUNTER ET AL., *supra* note 10, at 166-67.

17. The United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972), available at <http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503>. The conference was the basis for the Stockholm Declaration. *Id.* Principle 8 states “[e]conomic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.” *Id.* Principle 9 declares that certain problems in developing countries can be remedied by the expedited development of those countries through assistance with finances and technology. *Id.*

18. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26 – Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, 9, U.N. Doc A/CONF.199/20 (Sept. 4, 2002) available at <http://www.johannesburgsummit.org/html/documents/documents.html> [hereinafter *Johannesburg Summit*]. Johannesburg World Summit on Sustainable Development, held in August and September of 2002, was the third major international environmental conference. *Id.* A key principle under Poverty Eradication is a goal to establish a world solidarity fund to “promote social and human development in the developing countries.” *Id.*

19. HUNTER, *supra* note 10, at 166-67.

20. VED P. NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21ST CENTURY 455 (2003) (citing S.P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 442 (1981)). Third generation rights are those which are required and that may be called upon against the state. *Id.* These differ from first, which define personal liberties that governments have assumed the right to respect. *Id.* at 454-55. They also differ from second-generation rights, which define social rights that call for affirmative action by governments. *Id.*

21. See Stewart, *supra* note 15, at 453.

22. *Id.* at 451 (reasoning that “requiring the polluter to pay ensures” costs are born by the polluter and not society at large).

have penalties, the probability of being charged and convicted is extremely low.²³ Very few perpetrators are even fined.²⁴ Indonesia, for example, has a long-standing reputation for being soft on regulating environmental issues.²⁵ The study also found that less than one percent of environmental crimes in these regions end in punishment.²⁶

Likewise, the Indonesian Center for Environmental Law claims that there are sufficient regulations and environmental laws; the real problem is that administrators are not motivated to enforce them.²⁷ In Indonesia, corporations regularly bribe government officials to escape penalties.²⁸ Weak enforcement results in TNCs engaging in illegal activity in biodiverse countries.²⁹ Environmental groups claim that if administrators continue to treat industry as paramount, officials will remain oblivious to corporations' role in destroying the environment.³⁰

Corporate analysts can easily calculate economic statistics to show the financial rewards of breaking environmental laws when operating in a developing country.³¹ The results show profits are larger when operating in developing nations, rather than in an industrialized country with established and enforced environmental laws.³² Furthermore, governments and TNCs often violate civil rights by harshly suppressing those who oppose ecologically destructive development.³³ This practice further supports treating environmental destruction as a human rights abuse.³⁴

As early as 1968, the U.N. General Assembly acknowledged the close relationship between human rights and the environment.³⁵ The relationship between a healthy environment and protection of human

23. *Environmental Crimes Go Unpunished in Biodiverse Countries, Report Says*, 42 CLEAN WATER REP. 244 (2004) [hereinafter *Environmental Crimes*].

24. *Id.*

25. Zakki Hakim, *Industry, Officials in Bed Together While Jakartans Choke*, JAKARTA POST, July 31, 2003, available at <http://www.pelangi.or.id/media.php?mid=86>.

26. *Environmental Crimes*, *supra* note 23.

27. Hakim, *supra* note 25 (quoting Senior Researcher at the Indonesian Center for Environmental Law, Sukanda Husin).

28. Hakim, *supra* note 25 (quoting Chairman of the Environmental Task Force, Ahmad Safrudin).

29. *Environmental Crimes*, *supra* note 23.

30. *Id.*

31. *Id.*

32. *Id.*

33. Richard Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000), reprinted in DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1282-83 (2d ed. 2002).

34. *Id.*

35. Problems of the Human Environment, G.A. Res. 2398 (XXII), U.N. Doc. A/L.553/Add. (Dec. 3, 1968).

rights is becoming an increasingly important issue on the international community's agenda.³⁶ These issues have emerged into the following four principles.³⁷ The first principle involves human rights that require effective protection of the environment.³⁸ The second focuses on environmental degradation that subsequently prohibits full realization of fundamental rights.³⁹ The third principle establishes a right to a safe and healthy environment.⁴⁰ Finally, current international environmental law creates legal and ethical duties that require such protection.⁴¹

The crucial question is whether the necessary means exist to hold corporations accountable in an increasingly global economy and society.⁴² Often when only one state drafts a code of conduct to regulate other states, the results may not be what were anticipated and hence compliance does not always follow.⁴³ However, when the international community joins together, with each country taking an active part in drafting a code of conduct, the document has a much greater chance of being a success. A healthy environment involves a multitude of private and government actors in many countries, therefore, the mechanism to properly implement the right must be created at the international level.⁴⁴

Today, the United Nations employs a Special Rapporteur on Human Rights and the Environment.⁴⁵ This post now performs crucial fact-gathering missions and details extensive reporting requirements for countries.⁴⁶ The function of the Rapporteur reflects a self-regulation that is also advanced in the *Global Compact*, recommended by U.N. Secretary-General Kofi Annan and established in 2000.⁴⁷ The *Global Compact* is defined as a "direct initiative" but asks volunteer companies to comply through "public accountability, transparency, and [their] enlightened self-interest."⁴⁸ The United Nations boasts

36. NANDA & PRING, *supra* note 20, at 453.

37. KISS & SHELTON, *supra* note 11, at 663.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Herz, *supra* note 33, at 1283.

43. KISS & SHELTON, *supra* note 11, at 98.

44. NANDA & PRING, *supra* note 20, at 455.

45. HUNTER ET AL., *supra* note 10, at 1285.

46. *Id.*

47. Troy Rule, Comment, *Using "Norms" to Change International Law: UN Human Rights Laws Sneaking in Through the Back Door?*, 5 CHI. J. INT'L L. 325, 327 (2004).

48. *Id.* (quoting The Global Compact, *About the Global Compact*, <http://www.unglobalcompact.org/Portal/Default.asp?>).

“that the Global Compact is ‘not a regulatory instrument’” with any policing or enforcement of its principles or any interference with countries.⁴⁹ Numerous non-profit organizations also monitor corporations’ activities by initiating their own fact-finding missions. Amnesty International⁵⁰ prides itself on “the impartial protection of human rights,” rather than supporting or opposing any government or political group and advocates establishing binding law.⁵¹ Considering that prior to the *Norms* the United Nations had not developed any legal obligations, its actions show it finds binding law is unnecessary. However, by creating the *Norms*, the United Nations appears to be heading in the other direction. The case of Newmont Mining Company highlights the results if this direction is followed.

III. INDONESIA v. NEWMONT MINING CORPORATION

A. *Newmont’s Environmental Record*

Newmont Mining Corporation is the world’s top gold producer,⁵² employing approximately 14,000 people around the world and generating annual revenue of \$3.2 billion.⁵³ Headquartered in Denver, Colorado, it produced more than 200 tons of gold in 2003.⁵⁴ With gold in high demand, Newmont is in a good position.⁵⁵ Newmont asserts as part of its corporate culture and values that safety is first, and the environment is second.⁵⁶ The company prides itself on being committed to “health and safety for its employees and neighboring communities.”⁵⁷ Newmont claims its corporate philosophy is to take the more stringent U.S. environmental standards with it around the

49. *Id.*

50. Peter Benenson created Amnesty International in Great Britain in 1961. Amnesty Int’l, Peter Benenson’s Biography, <http://www.amnesty.org.uk/amnesty/history/biography.shtml> (last visited Dec. 8, 2005).

51. Amnesty Int’l, About Amnesty International, <http://web.amnesty.org/pages/about-index-eng> (last visited Dec. 8, 2005).

52. Reuters, *Indonesia Court Says Newmont Detentions Illegal*, Dec. 24, 2005, available at <http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=28700> [hereinafter *Newmont Detentions Illegal*].

53. Newmont Mining Corp., Profile, <http://www.newmont.com/en/about/profile/index.asp> (last visited Oct. 3, 2005) [hereinafter Profile]; Michael Riley & Greg Griffin, *The High Cost of Gold*, THE DENV. POST, Dec. 12, 2004, at A01.

54. Riley & Griffin, *supra* note 53.

55. *Id.*

56. *Id.*

57. Profile, *supra* note 53.

world.⁵⁸ “We have an excellent environmental record worldwide,” said Wayne Murdy, CEO.⁵⁹

However, Newmont does not abide by the U.S. standards even in the United States. Newmont’s Lone Ranch Mine is Nevada’s second largest toxic chemical polluter.⁶⁰ The company’s own monitoring shows that Newmont has continually violated state and federal regulations.⁶¹ It is also highly doubtful that Newmont actually abides by U.S. standards around the globe. In December 2004, in response to the exposure of company reports evidencing Newmont’s release of mercury into the air, two top Newmont executives denied that they acted outside any law; they also denied ever harming anyone.⁶² However, in a 2001 company memorandum, the senior vice president, Lawrence Kurlander, wrote “that Newmont had ‘told the world’ it upheld American environmental” standards but admitted that the statement was in fact a lie.⁶³

Lawsuits, internal and government-mandated reports, and interviews uncovered substantial environmental violations at Newmont’s worldwide mines.⁶⁴ Former employees have complained that Newmont often minimizes or completely dismisses environmental concerns generated internally; the company has been accused of retaliating against employees who voiced their concerns.⁶⁵ Employees claim that Newmont makes a practice of pushing the limit of environmental laws and engaging in evaluating risks of being penalized.⁶⁶ An environmental compliance officer employed by Newmont at Lone Tree claimed that what Newmont alleges as its environmental standard is not what it practices.⁶⁷ Mounting lawsuits against Newmont support

58. Press Release, Newmont Mining Corp., Newmont Responds to New York Times Article of December 22 (Dec. 22, 2004), <http://www.newmont.co.id/buyat/pressdetail.php?lang=E&bpressid=ELWE12593354&bpresstipe=5> [hereinafter Newmont Responds].

59. *Environmental Hazard: Newmont CEO Admits Mercury Leaks in Indonesia Mine Projects*, MEDICAL LETTER ON THE CDC & FDA, Jan. 16, 2005, at 52 [hereinafter *Environmental Hazard*].

60. Riley & Griffin, *supra* note 53.

61. *Id.*

62. Perlez, *supra* note 3.

63. *Id.*

64. Riley & Griffin, *supra* note 53. These findings were part of an investigation performed by the *Denver Post*. *Id.*

65. *Id.*

66. *Id.* The Turkish mine’s former manager of government relations said Newmont used its political connections in exchange to sidestep Turkish law. *Id.*

67. *Id.*

these allegations. Around the world, suits have been filed in Nevada, Turkey, Peru, and Indonesia.⁶⁸

For example, Newmont understated cyanide levels in discharge water from its Turkish mine, where the cyanide is used to extract gold from the Aegean coast soil.⁶⁹ Since 1994, Newmont's operation of the mine has been hindered by a legal conflict with local citizens over its cyanide use.⁷⁰ The Turkish Supreme Court finally closed the mine in August 2004, holding that the government order under which Newmont was operating was illegal.⁷¹ Since then, Newmont applied for permits to restart the mine until it sold the mine on March 2, 2005, asserting that the mine no longer fit its asset portfolio.⁷²

Hasan Gokvardar, one of the mine's former managers, claimed he received death threats due to his readiness to publicly discuss issues concerning the mine.⁷³ Gokvardar claims Newmont evaded Turkish law by using its political connections.⁷⁴ In 2003, Gokvardar testified in a Turkish court regarding a Newmont internal lab analysis that showed cyanide levels twenty-eight times higher than previously reported and nine times than the government regulation permitted.⁷⁵ Newmont submitted a report to Turkish regulators showing that cyanide levels leaving its detoxification plant and entering its tailings dam were well under Turkish safety limits.⁷⁶ Newmont explained the inconsistency as a malfunction that caused cyanide levels to surge but then return to regulated levels; it claimed the internal report was accurate, though uncharacteristic.⁷⁷ This explanation seems somewhat perplexing.

Another lawsuit was filed against Newmont in Peru for allegedly poisoning 1100 local inhabitants.⁷⁸ The company is continuing settlement talks with plaintiffs and has already spent \$16 million to clean the site.⁷⁹ An internal company review stated that the company's sediment filters were immensely insufficient, allowing sediment con-

68. *Id.*; Casey, *supra* note 1; Perlez, *supra* note 3.

69. Riley & Griffin, *supra* note 53.

70. *Id.*; see also *Same (G)old Story*, EARTH ISLAND J., Mar. 22, 2005, at 8.

71. Gargi Chakrabarty, *Newmont Sells Disputed Gold Mine in Turkey*, DENV. ROCKY MOUNTAIN NEWS, Mar. 2, 2005, at 8B.

72. *Id.*

73. Riley & Griffin, *supra* note 53.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Casey, *supra* note 1.

79. *Id.*

taining heavy metals into rivers.⁸⁰ The company's cyanide treatment facilities were inadequate in size, causing the facilities to malfunction and exceed acceptable levels.⁸¹ In September 2004, after two weeks of protests, Peruvian officials retracted a permit that would have enabled Newmont to enlarge its mining operations.⁸²

B. Buyat Pantai Civil Suits

Three Buyat Bay residents filed civil suits against Newmont in Indonesia totaling \$543 million.⁸³ Newmont, in turn, filed a suit against a non-government organization (NGO) official over his accusations that Newmont's mine emissions caused mercury poisoning.⁸⁴ The villagers withdrew their suits when a settlement was reached, and as a result, Newmont withdrew its cross-suit against the NGO official.⁸⁵ As part of the settlement, Newmont insisted residents acknowledge that their claims were baseless.⁸⁶ However, after the settlement had been reached, plaintiffs said their attorneys conspired with Newmont and that they never agreed to the settlement.⁸⁷

The Indonesian government filed a separate civil suit against Newmont. In the suit, the government charged Newmont with discharging 5.5 million tons of waste containing arsenic and mercury into Buyat Bay from 1996 to 2004.⁸⁸ Environmentalists claim Newmont's waste caused 80% of the 300 inhabitants of Buyat Pantai to become ill, suffering from diseases that even the doctors cannot identify.⁸⁹ The suit names six Newmont officials and Newmont Minahasa Raya, Newmont's local subsidiary.⁹⁰ The Indonesian government claims

80. Riley & Griffin, *supra* note 53.

81. *Id.*

82. *Same (G)old Story*, *supra* note 70.

83. *US \$543m Suit Against Newmont Halted*, NAT'L POST, Dec. 29, 2004, at 10; Reuters, *Newmont Says Indonesian Civil Suit Withdrawn*, Dec. 29, 2005, available at <http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=28713> [hereinafter *Civil Suit Withdrawn*].

84. *Civil Suit Withdrawn*, *supra* note 83.

85. *Id.*

86. Settlement Agreement, *Newmont Minahasa Raya v. Pangememan*, at 2-3, available at [http://www.buyatbayfacts.com/pdfs_docs/Perjanjian%20Perdamaian%20\(Settlement%20Agreement\).pdf](http://www.buyatbayfacts.com/pdfs_docs/Perjanjian%20Perdamaian%20(Settlement%20Agreement).pdf) (last visited Dec. 8, 2005) [hereinafter *Settlement Agreement*].

87. Tony Hotland & Muninggar Sri Saraswati, *Lawyers Conspired with Newmont: Locals*, JAKARTA POST, Jan. 8, 2005, at 2. Neither Newmont's attorneys nor plaintiffs have a copy of the settlement with their signatures. *Id.*

88. Casey, *supra* note 1.

89. *Id.*

90. *Newmont Detentions Illegal*, *supra* note 52.

that Newmont is guilty of violating three laws, each carrying maximum ten-year jail terms.⁹¹

The first cause of action alleges that Newmont falsely reported the depth of the Buyat Bay thermocline layer in its environmental impact analysis report to the Indonesian Environmental Ministry.⁹² Newmont's vice president for environmental affairs, David A. Baker, said that the submerged pipe used for transporting waste into the bay had been installed as stated in its environmental impact statement to the government.⁹³ The Indonesian government appointed an integrated team to perform a study of pollution in the bay.⁹⁴ The team collected their findings and compiled a report (Government Report). The team found that Newmont had dumped its tailing above rather than below the thermocline layer, thereby causing mercury to dissolve into and contaminate the bay's water.⁹⁵ The Government Report showed seabed arsenic levels were "10 times the levels allowed in the U.S."⁹⁶ Research also showed arsenic levels 100 times higher in the sediment near Newmont's disposal site than in other parts of the bay.⁹⁷ A team comprised of personnel from various ministries and institutions concluded that the bay was polluted.⁹⁸

Newmont vigorously challenged the Government Report.⁹⁹ Baker claimed that when the Government Report was issued the arsenic was static, had not penetrated the food chain, and therefore was of no

91. Karima Anjani, Reuters, *Jakarta Says No Deal for Newmont in Pollution Case*, Sept. 12, 2004, available at <http://www.plantark.com/avantgo/dailynewsstory.cfm?newsid=28503>.

92. *Indonesian Govt to Monitor Buyat Bay Case*, ASIA PULSE, Dec. 16, 2004. The company's waste disposal system must be in accordance with Law 23/1997. Abdul Khalik, *Newmont Manager Named Suspect*, JAKARTA POST, Sept. 2, 2004, at 1.

93. Jane Perlez, *Indonesia to Press Pollution Suit Against U.S. Mining Company*, N.Y. TIMES, Dec. 2, 2004, at A4.

94. *Indonesian Govt to Monitor Buyat Bay Case*, *supra* note 92.

95. *Id.* The thermocline layer was 110 meters to 300 meters below sea level, however, Newmont Minahasa Raya disposed of its mercury waste far from the thermocline layer, at only 82 meters. *Id.* The waste must be dumped below the thermocline layer or the tailings, mercury in this case, can dissolve and therefore contaminate the water. Khalik, *supra* note 92.

96. Goodenough, *supra* note 3; see also Khalik, *supra* note 92 (where a test of 40 meters below the surface of Buyat Bay showed a level of mercury and arsenic at 5.5 microgram/liter and 50.70 microgram/liter, far above the legal standard of 1 microgram/liter for mercury and 12 microgram/liter for arsenic established in Decree No. 51/2004).

97. Casey, *supra* note 1.

98. *Newmont/Buyat Bay Verification Team Has No Doubt on the Finding by the Joint Technical Team*, MININGINDO, Nov. 25, 2004, <http://www.miningindo.com>. But see *Civil Suit Withdrawn*, *supra* note 83 (where previous reports issued by the World Health Organization and Indonesia's Environmental Ministry assert the bay is clean).

99. Perlez, *supra* note 93.

harm.¹⁰⁰ However, Newmont's critics disagreed and claimed the arsenic had dissolved and was absorbed by the benthos species¹⁰¹ that are eaten by the fish in Buyat Bay.¹⁰² The Government Report confirmed that due to contamination the benthos population had dramatically decreased; the density of benthos species in Buyat Bay was reduced from seven to fourteen to only one to four.¹⁰³ Newmont argued such conclusions were unattainable because standards did not exist for metals in benthos.¹⁰⁴ Newmont instead suggested the government use standards for fish consumed by humans, which are much closer to the top of the food chain, and are readily ascertainable.¹⁰⁵ Newmont claimed the fish were safe.¹⁰⁶

Newmont has adamantly denied polluting the bay; "[w]e have always maintained that Newmont has not polluted Buyat Bay."¹⁰⁷ In fact, Newmont denied using mercury in its operation at all.¹⁰⁸ It also denied violating U.S. or Indonesian law or harming anyone¹⁰⁹ and claimed the afflictions were caused by poor sanitation and nutrition.¹¹⁰ On another occasion, Newmont asserted that illegal miners who operated nearby polluted the bay by discharging mercury into waterways.¹¹¹

The second alleged violation is Newmont's failure to obtain a mandatory license for its detoxification process.¹¹² The third cause of

100. *Id.*

101. Goodenough, *supra* note 3. "Benthos" refers to the benthic invertebrate community that lives on the ocean floor including starfish, oysters, clams, sea cucumbers, brittle stars and anemone. New Hampshire Public Television, Nature Works: Benthos, <http://www.nhptv.org/natureworks/nwep6j.htm> (last visited Dec. 8, 2005); Chesapeake Bay Benthic Monitoring Program, What are Benthos?, <http://www.esm.versar.com/Vcb/Benthos/benthos.htm> (last visited Dec. 8, 2005). They primarily get their food as it floats by or by scavenging on the ocean floor. *Id.*

102. Goodenough, *supra* note 3.

103. *Indonesian Govt to Monitor Buyat Bay Case*, *supra* note 92.

104. Goodenough, *supra* note 3.

105. *Id.* But see *supra* Part III.B discussing studies which were conducted and verified and did not show normal levels of arsenic and mercury.

106. See Goodenough, *supra* note 3.

107. *Civil Suit Withdrawn*, *supra* note 83.

108. Casey, *supra* note 1.

109. Perlez, *supra* note 3.

110. *Same (G)old Story*, *supra* note 70. In a recent press release, Rick Ness, Newmont Minahasa Raya's President Director said, "the mine complied with regulations, caused no pollution and was never notified by the government that it had caused pollution." See Press Release, PT Newmont Minahasa Raya, PTMNR Disappointed in Decision Objects to President Director Unfairly Facing Trial, (Sept. 20, 2005), available at www.buyatbayfacts.com/pdfs_docs/05-09-20%20Final%20Press%20Release%20ENG.pdf?lang=E&bpresstipe=5.

111. *Id.*

112. *Indonesian Govt to Monitor Buyat Bay Case*, *supra* note 92.

action is a violation of environmental standards of hazardous and toxic materials.¹¹³ In addition, officials at Indonesia's Environmental Ministry claim that Newmont had breached its contract that promised to respect Indonesia's environment and its laws.¹¹⁴

Newmont denied violating environmental standards, even after Indonesia lowered its emission limit.¹¹⁵ Newmont's CEO, Wayne Murdy, says Newmont was well below Indonesian and U.S. standards when he admitted discharging thirty-three tons of mercury in the air and water over a five-year period.¹¹⁶ However, the U.S. Environmental Protection Agency claimed that thirty-three tons of mercury is an extremely disturbing amount to release into the air and water.¹¹⁷ Newmont simply would not be allowed to operate that way in the United States.¹¹⁸

Newmont stated that there were no Indonesian air quality standards in place at the time construction began on the Minahasa Raya plant.¹¹⁹ Newmont claimed it looked to Nevada's¹²⁰ standards for point source mercury pollution.¹²¹ However, no such standards existed in Nevada at the time.¹²² The company did use the ambient air quality standard derived from an occupational health exposure limit for mercury.¹²³ Because emissions from the Minahasa plant would have exceeded that limit, Newmont installed a scrubber, which was meant to act as an air purification system.¹²⁴ However, when the Indonesian government strengthened its emissions standards, detractors say Newmont never re-assessed its pollution-control equipment.¹²⁵

Newmont conducted a confidential company review in 2001 to evaluate the pollution caused by its mines and ultimately determined that the scrubber designed to clean mercury from the smokestack ex-

113. *Id.*

114. *Id.*

115. Newmont Responds, *supra* note 58.

116. *Environmental Hazard*, *supra* note 59.

117. *Id.*

118. *Id.*

119. Newmont Responds, *supra* note 58.

120. Nevada is the primary place of operation for Newmont in the United States. Profile, *supra* note 53.

121. Newmont Responds, *supra* note 58.

122. *Id.*

123. *Id.*

124. *Id.* Newmont also created air pollution models that suggested levels may exceed their self-imposed Nevada-based standards when ore containing higher mercury levels would be processed through a point source. *Id.*

125. Riley & Griffin, *supra* note 53.

haust was often turned off or malfunctioning.¹²⁶ This lack of pollution control caused toxic mercury fumes to be released into the air.¹²⁷ Critics claim the danger of airborne mercury alone should have been sufficient to prompt precaution.¹²⁸

To dispose of its waste, Newmont uses a practice known as submarine tailing disposal.¹²⁹ This technique has divided the mining industry and is not allowed in the United States because it violates the Clean Water Act.¹³⁰ This practice is also banned in Canada.¹³¹ “[T]he circumstances in which the technology could be considered acceptable are rare,” says BHB Billiton Ltd., the world’s largest mining company, in explaining why it does not utilize the practice.¹³² Newmont defended itself by saying that land-based disposal was risky because of the earthquake potential in Indonesia.¹³³ However, Friends of the Earth Indonesia argue that using the ocean to dispose of tons of mine waste “is irresponsible, outdated and unsustainable.”¹³⁴

Despite Newmont’s claims of innocence, Indonesian officials determined that Newmont would stand trial.¹³⁵ Indonesia’s Environmental Minister, Rachmat Witoelar, declared that Indonesia will not bargain with Newmont and the company will have to defend itself in court.¹³⁶ The Indonesian Anti-Corruption Coalition pressed the Indonesian Supreme Court to review the holding to guarantee Newmont’s corporate responsibility.¹³⁷ Witoelar had already begun trying the case publicly.¹³⁸ He claimed Newmont was trying to cut corners to boost its profits, Newmont knew all along about the release of mercury, and the company failed to properly report it.¹³⁹ Had Newmont reported it, Witoelar claims he could have warned citizens.¹⁴⁰

126. *Id.*

127. *Id.*

128. *Id.*

129. Jane Perlez & Evelyn Rusli, *Indonesia: Spurred by Illness, Indonesians Lash Out at Newmont Mining*, N.Y. TIMES, Sept. 8, 2004, at A1.

130. 33 U.S.C.A §1311(a) (2005) (prohibiting the discharge of any pollutant into navigable waters).

131. Casey, *supra* note 1.

132. *Id.*

133. *Id.*

134. *Id.*

135. Anjani, *supra* note 91.

136. *Id.*

137. *Indonesia Environment Group Says Newmont Must Stand Trial Despite Court Ruling*, AFX EUROPEAN FOCUS, Dec. 24, 2004.

138. Dorothy Kosich, *Newmont’s Buyat Bay Accusers Recant*, MINEWEB, Jan. 11, 2005, http://www.mineweb.net/sections/sustainable_mining/400922.htm.

139. *Id.*

140. *Id.*

In February 2005, after being investigated for nearly six months, the case encountered a major obstacle. Jane Pangemanan, the original doctor who helped prompt the testing of the bay due to illnesses she had seen in her patients in Buyat Pantai, retracted her statements.¹⁴¹ She claimed no one coerced or threatened her to withdraw her previous statements.¹⁴² Pangemanan also said her accusations claiming Newmont caused the diseases suffered by residents were premature and without conclusive data.¹⁴³

However, because of Pangemanan's claims, Newmont sued her for defamation.¹⁴⁴ A settlement has been reached between Pangemanan and Newmont.¹⁴⁵ As a result of Pangemanan's renunciation, the suit was delayed.¹⁴⁶ This defamation suit was the same type of SLAPP¹⁴⁷ suit Newmont brought against the Legal Aid Foundation for Health in response to civil suits filed by citizens suffering from skin diseases in Buyat Pantai.¹⁴⁸

Scientists developed additional evidence that supports Dr. Pangemanan's original claims. Robert Moran, a hydrogeologist and geochemist from Golden, Colorado, was on the verification team that concluded that the bay was polluted.¹⁴⁹ He found that the marine life in Buyat Bay contained arsenic and mercury at hazardous levels.¹⁵⁰ Moran's discovery supports Dr. Pangemanan's claim that fish from the bay caused the residents' illnesses. At this point, the Indonesian government has indicted both Newmont Minahasa Raya, and its President Richard Ness.¹⁵¹

141. *Newmont's Indonesian Unit Says Plaintiff in Pollution Case Dropped Her Charges*, AFX ASIA, Feb. 14, 2005.

142. Gargi Chakrabarty, *Newmont Waste Claims Dropped; Indonesian: Complaints Against Mine 'Premature'*, ROCKY MOUNTAIN NEWS, Feb. 16, 2005, at 1B.

143. *Newmont's Indonesian Unit Says Plaintiff in Pollution Case Dropped Her Charges*, *supra* note 141.

144. Julie Bresnick, *Accuser Nixes Pollution Claim vs. Newmont*, AM. METAL MARKET, Feb. 17, 2005, at 1; *World Watch: Asia/Pacific: Indonesian Doctor Retracts Newmont Accusation*, WALL ST. J., Feb. 16, 2005, at A13.

145. Settlement Agreement, *supra* note 86.

146. *World Watch Asia Pacific: Indonesian Doctor Retracts Newmont Accusation*, *supra* note 144.

147. SLAPP stands for Strategic Lawsuit Against Public Participation. Black's Law Dictionary (8th ed. West 2004). "The hallmark of a SLAPP suit is that it lacks merit, and is brought with the goal of obtaining an economic advantage over a citizen party by increasing the cost of litigation." *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2005).

148. *See generally* Kosich, *supra* note 138.

149. Chakrabarty, *supra* note 142.

150. *Id.*

151. Jonathan Hopfner, *Indonesia Court Rejects Newmont's Bid to Have Criminal Pollution Case Dismissed*, 28 INT'L ENV'T REP. 681 (2005).

On March 10, 2005, the Indonesian government filed formal civil charges against Newmont, charging it with polluting Buyat Bay and causing \$134 million worth of damage.¹⁵² Rachmat Witoelar said environmental destruction, for example the cost of restoring the coast, was the key factor in calculating damages.¹⁵³ A Newmont spokesperson asserted that the suit and damages were not based on scientific data.¹⁵⁴

Newmont Minahasa Raya filed a motion to have the case dismissed because it was flawed.¹⁵⁵ Ness claimed there was no Indonesian law that could hold him personally liable for the corporation's activities.¹⁵⁶ Furthermore, Ness claimed that the indictment lacked sufficient evidence.¹⁵⁷ Nevertheless, in August 2005 an Indonesian court refused to dismiss the case.¹⁵⁸ Based on the tremendous amount of persuasive evidence confirming that the bay was polluted, the Indonesian government should be aggressively pursuing litigation. Moran says the lack of substantive science is disappointing.¹⁵⁹

Earthworks, an NGO, is actively involved in the case.¹⁶⁰ Earthworks' International Campaign Manager, Radhika Sarin, met with Buyat Bay residents last year and claimed the case was not over yet.¹⁶¹ She added that the community and organizations such as her own can ensure "that the pressure is still on."¹⁶² However, Sarin went on to say that Earthworks lacked the capability to take legal action due to economic disparities.¹⁶³

152. Shawn Donnan & Taufan Hidayat, *Indonesia Files Suit Minahasa Raya Mine*, FINANCIAL TIMES UK, Mar. 11, 2005. *But see* Gargi Chakrabarty, *Newmont Sued Over Pollution Charges Indonesia Seeks \$117 in Suit*, DEN. ROCKY MOUNTAIN NEWS, Mar. 10, 2005 (claiming the damages were \$117 million); *Govt to Seek \$100m from Newmont*, JAKARTA POST, Mar. 10, 2005, at 4, available at 2005 WLNR 3713671 (claiming the damages were \$100 million). Prior to Dr. Pangemanan's retraction of her accusations, she estimated damage to the bay could have been as high as \$700 million. *Govt May Ask for \$700m from Newmont*, JAKARTA POST, Feb. 3, 2005, at 4.

153. *Govt to Seek \$100m from Newmont*, *supra* note 152.

154. Chakrabarty, *supra* note 152.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Chakrabarty, *supra* note 142.

161. *Id.*

162. *Id.*

163. *Id.*

IV. UNITED NATIONS' NORMS ON THE RESPONSIBILITIES OF
TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH
REGARD TO HUMAN RIGHTS

A. History

TNCs have historically self-regulated their international operations regarding human rights and the environment.¹⁶⁴ Today, there is little international law that clearly states the human right to a healthy environment.¹⁶⁵ There is even less international law regulating corporations.¹⁶⁶ Some of the most overlooked and powerful non-governmental actors in the human rights arena are TNCs and other business enterprises.¹⁶⁷

There is no applicable “hard law” and little “soft law” pertaining to transnational corporate accountability. The most notable “soft law” is the single principle that calls for the promotion of corporate responsibility in the Johannesburg Summit.¹⁶⁸ Nearly all “non-binding” aspiring declarations are “soft law.”¹⁶⁹ “Hard law” is what lawyers use at a domestic level.¹⁷⁰ Skeptics of “soft law” often call it “moralizing without consequences.”¹⁷¹

Efforts to develop criminal law to punish international war crimes have led to an increased awareness of the need to ensure individual responsibility for violating human rights in other countries.¹⁷² This awareness has even led to the acknowledgment of the right to a sus-

164. Rule, *supra* note 47, at 325.

165. *See id.*; *see also* Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. INT'L L.J. 103, 103-11 (1991) *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 66 (Anthony D'Amato & Kirsten Engel eds., 1996) (stating that a right to environment is not often explicitly stated).

166. *Id.*

167. David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

168. *Johannesburg Summit*, *supra* note 18, at 38. This principle calls to “actively promote corporate responsibility and accountability, including the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations.” *Id.*

169. NANDA & PRING, *supra* note 20, at 14. These non-binding statements can eventually make a profound contribution to international law. *Id.*

170. *Id.*

171. *Id.*

172. Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 355-59 (1993), *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 61 (Anthony D'Amato & Kirsten Engel eds., 1996). Genocide committed during World War II sparked this idea of human rights provisions in international law. *Id.*

tainable global environment.¹⁷³ An increasing number of human rights activists have requested that the United Nations establish uniform legal obligations for TNCs regarding human rights.¹⁷⁴ Until the U.N. *Norms* were adopted, the activists' efforts were unsuccessful.

An initiative from Sub-Commission Resolution 1997/11 formed a Working Group on Working Methods and Activities of Transnational Corporations and requested a working document on human rights and TNCs.¹⁷⁵ The Sub-Commission established a three-year period to allow a working group to evaluate TNCs and their operations.¹⁷⁶ The group gathered data regarding the effects of TNCs on human rights, the environment, state obligations to regulate TNCs, and reconciling investments and development with human rights.¹⁷⁷

After many drafts, the working group presented the final working draft to the Sub-Commission at its 55th Session.¹⁷⁸ The document included both human rights obligations and environmental requirements for TNCs.¹⁷⁹ With some minor changes, on August 13, 2003, the Sub-Commission approved the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* in its Resolution 2003/16.¹⁸⁰

B. Obligations Under the Norms¹⁸¹

Some say the *Norms* represent the *opinio juris* of the world community, as "soft law" often does.¹⁸² The *Norms* address the increasing international anxiety about TNCs' indifference towards sustainable

173. *Id.*

174. Rule, *supra* note 47, at 325.

175. Weissbrodt & Kruger, *supra* note 167, at 902-03. Prior to the Sub-Committee's initiative, many other attempts were made to develop some sort of program in this area. *Id.* at 902. In the 1970s and 1980s, the United Nations set out to draft an "international code of conduct for businesses," which was unsuccessful. *Id.* In 1976, the Organization for Economic Cooperation and Development established its first *Guidelines for Multinational Enterprises* to promote corporate responsibility. *Id.* The International Labor Organization established the *Tripartite Declaration of Principles Concerning Multinational Enterprises* in 1977. *Id.* at 902-03. The *Global Compact* was then established. *Id.* at 903; see *supra* Part II.

176. Weissbrodt & Kruger, *supra* note 167, at 903-04.

177. *Id.* at 904.

178. *Id.* at 906.

179. *Id.* at 921.

180. *Id.* at 906.

181. The discussion of the *Norms* is limited to those that apply to human rights and the environment. For a full listing of all of the *Norms*, see *Norms, supra* note 7.

182. Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 432 (1991), reprinted in DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 349, 356 (2d ed. 2002).

development.¹⁸³ The *Norms* assert both the primary responsibility of states and the obligation of TNCs to “promote, secure the fulfillment of, respect, ensure respect of and protect human rights.”¹⁸⁴ This statement is implicit in all the requirements set forth in the *Norms*.¹⁸⁵ Further, the commentary explains that the document applies to all TNCs and other business enterprises and their activities in either the home or host country.¹⁸⁶

The *Norms* also address the need for TNCs to respect indigenous people.¹⁸⁷ This includes rights to “own, occupy, develop, control, protect, and use their lands, other natural resources, and cultural and intellectual property.”¹⁸⁸ Moreover, Principle 12 of the *Norms* requires TNCs to contribute to such rights as “development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing”¹⁸⁹ The language in the *Norms* represents a shift in what the international community considers the proper role and requirements of corporations regarding human rights.¹⁹⁰

The *Norms* also require TNCs to abide by international agreements, principles, and standards regarding the environment in order to “contribut[e] to the wider goal of sustainable development.”¹⁹¹ In order to fulfill this goal, TNCs must use their best management practices and appropriate technologies.¹⁹² Furthermore, when TNCs cause ad-

183. Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493, 509 (2004).

183. *Norms*, *supra* note 7, pmb., para. 1.

184. *Id.*

185. This is a theme first asserted in the preamble and then reasserted in various Principles. *Id.*

186. U.N. Comm'n on Human Rights, U.N. Sub-Comm'n on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003), available at <http://www1.umn.edu/humanrts/links/commentary-Aug2003.html> [hereinafter *Commentary*].

187. *Norms*, *supra* note 7, para. 1.

188. *Commentary*, *supra* note 186, para. 10 cmt. c.

189. *Norms*, *supra* note 7, para. 12. These are all basic essentials the “North” has at their disposal.

190. Deva, *supra* note 183, at 507.

191. *Norms*, *supra* note 7, para. 14.

192. *Commentary*, *supra* note 186, para. 14 cmt. g. *The Commentary* describes best management practices as those that “enable their component entities to meet these environmental objectives through the sharing of technology, knowledge and assistance, as well as through environmental management systems, sustainability reporting, and reporting of anticipated or actual releases of hazardous and toxic substances.” *Id.*

verse conditions that may have endangered health, safety, or the environment, they shall promptly alert anyone who may be affected.¹⁹³

The *Norms* also call for TNCs to make periodic assessments of the impact of their activities on human rights and prepare impact statements.¹⁹⁴ These statements must declare actions affecting human rights and the environment, and any mitigating factors.¹⁹⁵ Where an assessment shows a violation of the *Norms*, the commentary requires the business to include an action plan for reparation and redress.¹⁹⁶ The commentary discusses further action that may be required for any violating claims, such as investigation.¹⁹⁷

Principle 14 states that TNCs shall operate in accordance with national laws, practices, and policies on preserving the environment of the host country, in addition to any applicable international agreements.¹⁹⁸ This requirement addresses the previous dilemma of which standard should be followed—that of the home country, host country, or international standards.¹⁹⁹

C. Implementation of the Norms

In addition to the obligations created, the *Norms* created a set of guidelines to implement those obligations. As adopted, the *Norms* are not an entirely voluntary initiative of corporate social responsibility.²⁰⁰ The tone of voluntary compliance shifts midway through the *Norms* to become more authoritative.²⁰¹ The provisions discussing implementation show they do more than merely suggest a desired or model conduct.²⁰² The *Norms* take a stance in the middle between strictly volun-

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at para. 16 cmt. h.

197. *Id.* para. 16 cmt. f.

198. *Norms*, *supra* note 7, para. 14.

199. See generally *supra* Part II. Additionally, many past international agreements have very vague wording, therefore, it is easy for companies to comply with the wording rather than the intentions. Deva, *supra* note 183, at 509.

Some critics argue the *Norms* could go one step further and require countries to comply with the higher of the two standards: home or host. *Id.* (citing Surya Deva, *Human Rights Standards and Multinational Corporations: Dilemma Between "Home" and "Rome,"* 7 MEDITERRANEAN J. HUM. RTS. 69, 87-89 (2003)).

Others suggest the corporation should always follow the home country's laws, which are often the higher of the two sets of standards. *Id.*

200. Rule, *supra* note 47, at 329.

201. *Id.*

202. Weissbrodt & Kruger, *supra* note 167, at 913.

tary programs like the *Global Compact* and “hard law” desired by human rights organizations such as Amnesty International.²⁰³

The implementation methods are both indirect and direct.²⁰⁴ The indirect obligations aim at allowing individual states to incorporate the document and its ideas.²⁰⁵ Direct obligations of TNCs, as exhibited in Principles 15 and 16, are established through both internal and external means.²⁰⁶

The indirect implementing measures in Principle 17 require states to “establish and reinforce the necessary legal and administrative framework for ensuring that the Norms” are implemented by TNCs.²⁰⁷ The *Norms* call on companies to disseminate these adopted rules internally.²⁰⁸ The United Nations requests that all relevant stakeholders, including all people affected by the company’s actions, understand the meaning of the *Norms* and know about the responsibilities.²⁰⁹ They also publicize the responsibilities of the company,²¹⁰ which further inflicts and legitimizes their commitment.²¹¹ The commentary stresses that governments should not merely make this document known; rather, they should use it as a model and integrate it into each country’s culture.²¹² However, this arrangement leaves the impact of the document entirely up to individual states.²¹³ The *Norms* expect individual states to establish the legal framework to force TNCs to comply with the human rights standards established in the document.²¹⁴ Although this theory is sound, states often align with their TNCs for various reasons,²¹⁵ including economic growth.²¹⁶

The direct obligations consist of internal mechanisms meant to develop a corporate culture of respect for the rights of citizens in host countries.²¹⁷ The *Norms* also exhibit external means by proposing in-

203. Rule, *supra* note 47, at 328.

204. Deva, *supra* note 183, at 514.

205. *Id.*

206. *Id.*

207. *Norms*, *supra* note 7, para. 17.

208. *Id.* para. 15.

209. *Commentary*, *supra* note 186, para. 15 cmt. a.

210. *See generally Norms*, *supra* note 7.

211. Weissbrodt & Kruger, *supra* note 167, at 916.

212. *Commentary*, *supra* note 186, para. 17 cmt. a.

213. *See generally* Deva, *supra* note 183, at 517.

214. *Id.* at 518.

215. *Id.* at 518-19. One reason many states feel compelled to support TNCs is their influence in the economy. *Id.* These companies are often a huge influence of national economy, growth and development. *Id.*

216. *See* discussion of the pressures of economic growth *infra* Part V.B.

217. Deva, *supra* note 183, at 515.

dependent and transparent periodic monitoring and verification by the United Nations and other international and national mechanisms.²¹⁸ Sub-Commission Resolution 2003/16 called for NGOs and others to adopt a method of reporting corporations' failure to comply with the standards established in the *Norms*.²¹⁹ Principle 18 asserts TNCs must issue prompt and adequate damages to persons and communities adversely affected by failure to comply with responsibilities.²²⁰

The *Norms* consider multiple monitoring and verifying methods at both the international and national level.²²¹ The ideas proposed in the document are still not completely developed and some argue there is no definitive framework.²²² Nevertheless, there is no reason the *Norms* cannot be made more definite and "more binding in the future."²²³

D. Effect of the Norms

The *Norms* establish a rather comprehensive set of obligations. Yet, critics argue that the *Norms* will not have a substantial effect on the international community and TNCs.²²⁴ However, there are several key indications that show the Sub-Commission's degree of seriousness and its commitment to changing how TNCs operate.²²⁵

Detractors say the *Norms* are nothing more than a summary "of existing international human rights laws."²²⁶ However, existing international human rights laws were not intended to directly apply to non-state actors.²²⁷ Therefore, enforcement mechanisms were not provided to compel TNCs to comply with requirements of existing human rights laws.²²⁸ Creating a code of conduct aimed specifically at the actions of TNCs operating in another country is an unprecedented step.²²⁹

218. *Norms*, *supra* note 7, para. 16.

219. Weissbrodt & Kruger, *supra* note 167, at 913.

220. *Norms*, *supra* note 7, para. 18.

221. *Id.*

222. Deva, *supra* note 183, at 520.

223. Weissbrodt & Kruger, *supra* note 167, at 915.

224. Rule, *supra* note 47, at 326.

225. Deva, *supra* note 183, at 499.

226. Rule, *supra* note 47, at 326.

227. Deva, *supra* note 183, at 498. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

228. Deva, *supra* note 183, at 498.

229. *Id.* at 499.

Another major difference between the *Norms* and previous efforts is its terminology. When discussing compliance, the *Norms* substitute standard terms like “should” with “shall.”²³⁰ Therefore, the *Norms* are not merely a restatement of existing obligations, but rather an effort to fill the voids of previous agreements and mandate certain aspects of international corporate responsibility.

The conclusion of the Preamble proclaims “that every effort be made so that [the Norms] become generally known and respected.”²³¹ Critics will argue that this language is not binding or is at best unclear.²³² The Danish Institute on Human Rights claims the *Norms* are not fully operational at their current state of development.²³³ Regardless, the spirit of “soft law” is that while it is not legally binding, it is still significant.²³⁴

The *Norms* are both a departure from previous agreements and a sign of progress, however subtle.²³⁵ The inclusion of implementing provisions represents a notable shift. This shift may signify the international community’s unstated conclusion: the voluntary compliance called for in previous documents is proving to be inadequate,²³⁶ just as human rights groups have asserted.²³⁷ Voluntary compliance means that there are few incentives or sanctions to demand adherence, there is no common body of enforcement, and negotiation and diplomacy are the primary ways of handling violations.²³⁸ As a result, many nations refuse to consider themselves bound by “soft” rules that only modestly protect human rights and the environment.²³⁹

230. *Id.*

231. *Norms*, *supra* note 7, pmbl.

232. Rule, *supra* note 47, at 328.

233. Letter from Christina Schultz, Project Manager, The Human Rights & Bus. Project, The Danish Inst. for Human Rights, to Dzidek Kedzia, Chief of the Research and Rights Dev. Branch, Office of the High Comm’r for Human Rights, *available at* <http://www.ohchr.org/english/issues/globalization/business/docs/danishinstitute.doc> (last visited Dec. 8, 2005).

234. Dupuy, *supra* 182, at 254.

235. Deva, *supra* note 183, at 501.

236. *Id.* at 496.

237. *See supra* Parts II, III.A discussing the position of human rights organizations in more detail.

238. NANDA & PRING, *supra* note 20, at 19.

239. Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT’L L. 259, 264-66 (1992), *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 13 (Anthony D’Amato & Kirsten Engel eds., 1996); Harvard Law Review Association, *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1504-506 (1991), *reprinted in* INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 15 (Anthony D’Amato & Kirsten Engel eds., 1996).

Although the *Norms* may seem somewhat inconsequential and non-binding, they may be more powerful than a mere request for voluntary conduct. Often a “soft” norm can help shape the model of good behavior, which the world has come to expect from a “well-governed [s]tate.”²⁴⁰ “Soft law” alone can have tremendous influence and force.²⁴¹ Regional human rights commissions and courts can make use of the *Norms* and cite them as persuasive authority in determining states’ obligations.²⁴²

The legal authority of the *Norms* is now somewhat derivative from current sources in international law.²⁴³ In the future, however, this could be expanded to become more binding.²⁴⁴ Often “soft law” is the first step to becoming customary international *binding* law. It is apparent that an extensive part of “soft law,” which makes a substantial impression, often defines what eventually becomes “hard law.”²⁴⁵

The crucial question is whether these *Norms* are enough. Clearly, they represent a step in the right direction—especially with direct focus on TNCs. The *Norms* definitely have the potential to be an interim stride toward becoming binding law, which controversial international law often does. Human rights organizations argue that “hard law,” which would bind TNCs and other businesses, is needed – and quickly.²⁴⁶ They claim this is the only adequate way of protecting international human rights.²⁴⁷ They insist that only binding law with ex-

240. Dupuy, *supra* note 182, at 357.

241. NANDA & PRING, *supra* note 20, at 14.

242. See *infra* Part V.A discussing the *Norms* as persuasive authority when determining state’s obligations.

243. Weissbrodt & Kruger, *supra* note 167, at 915.

244. *Id.*

245. Dupuy, *supra* note 182, at 357.

246. But see Gunther Handl, *Human Rights and Procreation of the Environment: A Mildly “Revisionist” View*, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117, 119-20, 133, 135, 137-38 (A. Cancado Trindade ed.), reprinted in INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 68-69 (Anthony D’Amato & Kirsten Engel eds., 1996) (arguing the possible negative effects of creating a generic environmental human right and proposing instead that the laws be based on “recogniz[ing] the intrinsic merit of protecting nature for nature’s sake”).

247. See Rule, *supra* note 47, at 325. Currently without using international agreements, which are not binding, a host country has a limited number of options to pursue legal justice. The government may file a criminal lawsuit, or its citizens may file a civil suit in the host country.

If the TNC is based in the United States, a suit may also be filed in the United States under the Alien Tort Claims Act, established in 1789. Jonathon Zittrain, Alien Tort Claims Act, <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> (last visited Dec. 8, 2005) (Zittrain is a professor at Harvard University Law School).

In 1991, Congress passed the Torture Victim Prevention Act, which specified what the original Act implicitly stated. *Id.* The Act allows aliens to sue TNCs, based in the United States,

PLICIT enforcement mechanisms, will stop these TNCs from abusing human rights and the environment.²⁴⁸ In light of the case against Newmont, they seem to be correct. "Soft law," like the *Norms*, is just not enough to stop corporations from the grave abuse that occurs globally.

V. IMPACT OF THE *NORMS* ON THE GLOBAL ECONOMY AND ENVIRONMENT

A. *Using the Norms in Their Current State*

Whatever the inadequacies may be in the current *Norms*, Indonesia and other countries can still make use of the *Norms* as persuasive authority when filing suit. In the case against Newmont, the Indonesian government could have made reference to the *Norms* in its briefs. Courts and regional human rights commissions can also cite to the *Norms*.²⁴⁹ Although the *Norms* may not be concrete,²⁵⁰ countries can reference them just as they are until more binding authority exists. Though binding international law is needed, the *Norms* can have a considerable effect in their current state. States have been found to view "soft law" as having at least some political significance.²⁵¹ Some states even consider it necessary to abide by such obligations, just as if "soft law" were a binding legal requirement.²⁵² Furthermore, in the absence of precise legal standards in international cases, there is an increasing trend for national courts to apply international "soft law," provided it has sufficient state support.²⁵³

Regional courts can cite to the *Norms* when determining the requirements of states and encouraging them to scrutinize corporations' conduct within their jurisdiction.²⁵⁴ Often "soft law" is considered too

for violations of international law against human rights as a violation of U.S. domestic law. *Id.*

Today, this legal avenue, though not always practical because filing a lawsuit in a foreign country presents its own obstacles, does provide an additional option. Furthermore, an applicant cannot even bring an environmental law complaint in an international forum because there is not one. KISS & SHELTON, *supra* note 11, at 682.

248. See Rule, *supra* note 47, at 325.

249. Weissbrodt & Kruger, *supra* note 167, at 919.

250. See Deva, *supra* note 183, at 520.

251. Dupuy, *supra* note 182, at 354.

252. *Id.*

253. NANDA AND PRING, *supra* note 20, at 15 (citing George Pring et al., *Trends in International Environmental Law Affecting the Minerals Industry*, 17 J. ENERGY & NAT. RESOURCES L. 39, 163 (1999)).

254. Weissbrodt & Kruger, *supra* note 167, at 919.

vague to provide any authority when applying these rules to disputes;²⁵⁵ however, this is not the case with the *Norms*. They can be cited as persuasive legal authority when a TNC violates the environmental rights of indigenous people in developing countries, which is the case with Newmont in Indonesia.²⁵⁶

The *Norms* deal directly with indigenous people and their environment,²⁵⁷ which could help establish responsibility for TNCs like Newmont. Principle 12 specifically gives the right to adequate food and drinking water,²⁵⁸ something citizens of Buyat Pantai no longer have because their fish and drinking water have been contaminated. Principle 12 further asserts that TNCs shall refrain from activities that "obstruct or impede the realization of those rights."²⁵⁹ In its current suit against Newmont, Indonesia could use Principle 12 as support when it asserts Newmont was aware of the damage it was causing.²⁶⁰

The *Norms* also compel TNCs to abide by international principles with regard to the environment and human rights and conduct their activities in a way that contributes to sustainable development.²⁶¹ When Newmont allegedly polluted Buyat Bay, it destroyed land and potentially the life and livelihood of the Indonesian indigenous people, thereby undermining sustainable development. Newmont also failed to abide by Indonesian law²⁶² as mandated by the *Norms* when they assert that TNCs must conform to national laws and regulations relating to preserving the environment of the states in which they operate.²⁶³

Two recent decisions²⁶⁴ of the European Court of Human Rights have held states liable for failing to abide by international regulations.²⁶⁵ They also charged states for failing to follow through with inspections, which can often avert corporate misbehavior.²⁶⁶ Both

255. Harvard Law Review Association, *supra* note 239, at 14-15.

256. Weissbrodt & Kruger, *supra* note 167, at 919-20.

257. See *supra* Part IV.B discussing the *Norms'* obligations.

258. *Norms*, *supra* note 7, para. 12. This could also apply in the Peruvian case against Newmont. See *supra* Part III.A for a discussion on Newmont's alleged improprieties in Peru.

259. *Id.*

260. Newmont denies any wrongdoing and subsequently being aware of any damage it was causing. See *supra* Part III discussing the allegations against Newmont.

261. *Norms*, *supra* note 7, para. 14.

262. See *supra* Part III.B discussing the charges against Newmont.

263. *Norms*, *supra* note 7, para. 14.

264. Guerra v. Italy, App. No. 14967/89, 26 Eur. Comm'n. H.R. Dec. & Rep. 357 (1998); Lopez Ostra v. Spain, App. No. 16798/90, 20 Eur. Comm'n. H.R. Dec. & Rep. 277 (1994).

265. Weissbrodt & Kruger, *supra* note 167, at 919, n.119.

266. *Id.*

cases involved corporations that polluted the environment, a violation of family and private life under the European Convention on Human Rights.²⁶⁷ The courts can refer to the *Norms* in deciding corporate accountability.²⁶⁸ Furthermore, the African Commission on Human and Peoples' Rights could have cited to the *Norms* in holding the Nigerian government liable²⁶⁹ for its involvement with regional oil companies.²⁷⁰ The court held the government responsible for "its involvement in, and failure to limit, the activities of oil companies that were violating . . . environmental rights of the Ogoni residents."²⁷¹

B. *The Need for Binding International Regulation*

Business analysts are watching the Indonesian situation closely.²⁷² Foreign miners are concerned about the "difficulty" of operating in Indonesia and the region due to the recent prosecution against Newmont.²⁷³ The U.S. Embassy in Jakarta even warned that the Indonesian government's role in this case would deter investors.²⁷⁴ Again, there is the demand that developing countries trade health for development. The case places Indonesian President Susilo Bambang, who has repeatedly emphasized the need to attract foreign investors to the country, in a delicate position.²⁷⁵ Indonesia's Mining Association chairman, Benny Wahyu, questions how a country can "invite people to invest if the government is pursuing cases like this[.]"²⁷⁶ However, this hesitation may simply be a way to influence the Indonesian government and its prosecution of Newmont. TNCs are multi-billion-

267. *Id.*

268. *Id.*

269. *Id.* See generally Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria, Comm. No. 155/96, 2001-2002 Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V, at 31 (detailing various reasons for the Nigerian court's decision).

270. Weissbrodt & Kruger, *supra* note 167, at 920.

271. *Id.*

272. *Civil Suit Withdrawn*, *supra* note 83. See generally Donnan & Hidayat, *supra* note 153. Some business analysts have sharply criticized the Indonesian government's pursuit of the case "as unduly harsh and likely to discourage investment." *US \$543m Suit Against Newmont Halted*, *supra* note 83.

273. Anjani, *supra* note 91.

274. Goodenough, *supra* note 3. The Sierra Club responded by saying that the Embassy's standpoint is a "dangerous example of . . . misguided foreign policy." Press Release, Sierra Club, Sierra Club Criticizes Embassy Defense of Mining Company (Sept. 27, 2004), http://www.sierraclub.org/human-rights/press_release_mining.asp [hereinafter Sierra Club Press Release].

275. Timothy Mapes, *Jakarta Adopts Report Charging Newmont with Polluting Ocean*, WALL ST. J., Nov. 26, 2004, available at http://www.infid.be/buyat_newmont.htm.

276. *Id.*

dollar companies with enough money to threaten developing countries that rely on investments for growth. With the money that TNCs have, they can influence poorer countries by offering them development in exchange for their environment and health.

Indonesia has an abundance of natural resources,²⁷⁷ which are prime targets for TNCs like Newmont. Unfortunately, many corporations are willing to deplete another country's resources before depleting their own.²⁷⁸ Furthermore, although international standards are becoming more common, most are still "soft law" and developing countries' standards are less stringent than those regulating industrialized countries.

Companies such as Newmont seem to dismiss even binding national law. Newmont has a record of violating the U.S. Environmental Protection Agency's standards in its local operations and apparently disregards any sort of voluntary obligations.²⁷⁹ The international community should not assume Newmont will quietly acquiesce to "soft law" like the *Norms*.

This problem is one significant reason why an international set of binding regulations is absolutely necessary. Governments confronting economic power and pressure of multibillion-dollar companies can be assisted by the *Norms* in identifying and applying the minimum international standards for corporate contact on their land.²⁸⁰ The *Norms* are a step in the right direction, but they are not binding. The *Norms* do not have adequate monitoring and verifying methods, however, they could easily be, and need to be, strengthened.

Furthermore, there is still no mandatory enforcement other than what states choose. There are multiple mechanisms available to aid in enforcement. Technology such as satellite surveillance can spot illegal activity, which would help countries stop illegal water dumping.²⁸¹ A study of Brazil, Mexico, Indonesia, and the Philippines found that countries need more stringent methods to detect, arrest, prosecute, fine, and convict perpetrators.²⁸² The *Norms* could fill this void by creating stricter monitoring and more severe penalties. In order to

277. Perlez, *supra* note 93.

278. The U.S. reliance on Middle Eastern oil versus tapping into Alaska's oil reserves or drilling off the California coast are good examples of a country's reluctance to use their own recourses, when a cheaper alternative is available.

279. See *supra* Part III.A for a discussion of Newmont's environmental record in the United States.

280. See generally Weissbrodt & Kruger, *supra* note 167, at 922 (articulating the development and application of the *Norms* as an effective means of monitoring TNCs).

281. *Environmental Crimes*, *supra* note 23, at 244.

282. *Id.*

protect developing nations from being exploited, a set of international regulations is crucial.

The *Norms* give state governments a stronger foundation on which to stand when demanding businesses stop harming the environment. However, the *Norms* cannot protect indigenous people in developing countries when they seldom see their day in court. Many potential plaintiffs never have an opportunity to present their case due to lack of resources—primarily, the finances it takes to go up against a TNC. With economic pressure and threats by TNCs, many plaintiffs never get to present their claims. TNCs are powerful and can coerce citizens to drop any claims against them. The executives at TNCs also have the ability to easily persuade people because they appear to be educated, successful individuals. For the *Norms* to be most effective, it must be presumed that individual TNCs will adopt the *Norms* and cases will actually be brought to enforce them. To make such presumptions is not very realistic; therefore, binding law that protects people and enables cases to be pursued is essential.²⁸³

If every nation is forced to abide by the same laws, investors will not be able to pick and choose a country to invest in based on whether or not that country prosecutes companies who destroy the environment. TNCs would not be able to evaluate which country would allow for the largest profit based on its weak environmental standards, lack of prosecution for polluting the environment, or harm to the health of its people. Countries would no longer be forced into trading health for economic development. Furthermore, it is not reasonable to require non-governmental organizations, like Earthworks, to file suit. Multibillion-dollar companies have an unfair advantage over non-profit organizations. A uniform set of binding principles is necessary to level the playing field.

Once a set of binding law is available, countries will be alleviated of the pressure to determine whether or not *they* should prosecute. Such laws would place the responsibility and enforcement in the hands of the international community. Developing countries searching for employment opportunities, development, and better lives for

283. Clearly, there are very real obstacles to such binding rules, which is one reason they do not exist today. Several major hurdles include state sovereignty, jurisdiction, political power of TNCs, defining international environmental human rights and addressing cultural relativism. See Diana Ayton-Shenker, *United Nations Background Note: The Challenge of Human Rights and Cultural Diversity*, U.N. DEP'T OF PUB. INFORMATION, Mar. 1995, <http://www.un.org/rights/dpi1627e.htm>; see also David A. Taylor, *Is Environmental Health a Basic Human Right?*, 112 ENV'TL. HEALTH PERSP. A1006 (2004), available at <http://ehp.niehs.nih.gov/members/2004/112-17/spheres.html>.

their citizens would no longer be forced to choose jobs and economic development over health and the environment.

VI. CONCLUSION

The U.N.'s *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ask that TNCs act in ecologically responsible ways rather than causing undue harm to the air, water, and land of their host countries. Because the *Norms* are the first code of conduct to address TNCs directly, the *Norms* represent a significant stride and will have an impact on international environmental law.

However, the *Norms* are simply not enough. For-profit degradation of the natural resources on which indigenous people depend for sustenance must be stopped. Only the creation and enforcement of binding international laws will stop the degradation. Mere voluntary obligations are not sufficient to compel environmentally responsible behavior from a corporation that consistently demonstrates a marked disregard for the health and safety of indigenous people in pursuit of its own bottom line. The actions of Newmont Mining Corporation in Buyat Pantai clearly show the need for more than non-binding guidelines and discretionary state enforcement.

The *Norms* are insufficient in several areas. They allow states to set their own standards and enforcement mechanisms. States should not be put in the unfair position of feeling compelled to trade clean air and water for the economic "progress" TNCs bring. A set of binding international principles is necessary to ensure states act in the best interest of their people and environment. TNCs must be prevented from using their substantial economic influence and political pressure to persuade individual states not to enforce environmental guidelines or prosecute infractions. Choice should not be involved in situations with such dire costs.

Instead, the international community must unite to develop a set of regulations that are binding on TNCs. A binding set of law would alleviate pressure on individual developing countries and mandate that all states follow a uniform set of standards, rather than one set for industrialized countries and one for developing nations. TNCs should not have the option to choose to operate in one country versus another based on its weak environmental standards.

The *Norms* lead activists closer to their ultimate goal. However, it is binding international environmental regulation that will have the power to truly protect human rights and benefit every citizen of every

nation, including those of Buyat Pantai. Only then will nations be able to both protect their environment *and* foster their economy. As Stephen Mills, the director of the Sierra Club's International Program expressed, "[n]o country or community should be pressured into accepting that its children will be poisoned in exchange for development."²⁸⁴

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284. Sierra Club Press Release, *supra* note 274.

* J.D. candidate, December 2005, California Western School of Law; B.S. 2000, University of Wisconsin. I thank Professor Richard Finkmoore, Tiffany Hawkins, and William Schmidt for their thoughtful comments on draft versions of this Comment. I dedicate this Comment to the people of Buyat Bay: to give them a voice, to tell their story, and to hopefully help to prevent such tragedies in the future.

