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ARTICLE

The Right to Know and the Duty to Disclose: Pathways to Effective Monitoring, Reporting, and Verification within the Constitutionalism of Climate Justice

TERESA THORP*

Amartya Sen once wrote: “In fact, the real ‘bite’ of a theory of *justice* can, to a great extent, be understood from its *informational base*: what *information* is—or is not—taken to be directly relevant.”¹ The relevancy of substantive guarantees may be the poignant element of an objective threshold of justice, but accountability, integrity, and temporality, discipline a subjective threshold. Development is freedom, but the “willingness and capacity” to discipline information for effective justice is the oxygen of that freedom.²

In certain *lex specialis* regimes, the right to information, public participation, and access to justice, form three pillars that guarantee the objectivity of effective justice. In the subjective or behavioral context of the right to information, the right to know and the duty to disclose are fundamental for mobilizing the legal

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1. AMARTYA KUMAR SEN, DEVELOPMENT AS FREEDOM 57 (1999) (emphasis added) (footnote omitted); *see also* AMARTYA KUMAR SEN, INEQUALITY REEXAMINED 73 (1995).

2. Calling of an International Conference on Freedom of Information, G.A. Res. 59(I), at 95, U.N. GAOR, 1st Sess., U.N. Doc. A/RES/59(I) (Dec. 14, 1946) [hereinafter Calling of an Int'l Conf. on Freedom of Info.].

principle of equity. Similarly, in international climate law, there is not only a need to guarantee rights. Fulfilling rights is also intrinsic to a unified legal theory of climate justice.

Notwithstanding these hard fought freedoms, the right to information is not always effective in international law. Custom may reinforce a maxim inherited from French civil law, “*donner et retenir ne vaut.*” (There is no point in giving with one hand and taking away with the other). If the legitimate donor of the right to information reserves the right to revoke the right at will, or even retains possession of the right without giving it any effect at all, then this renders the right virtually worthless in all but the rarest of occasions.

These concerns impinge on “elements” of normative validity. Just because a norm is “well-formed” does not mean it is valid. Even if the norm is valid, it may not be “well-formed.” A valid norm ought to conform to its specification. To focus on the quality of the normative specification, which is a question of justice, this Article concerns two elements that are prerequisites to validate *inter vivos* equity but considers them within the context of the right to information. First, rights and obligations must be legitimate. This is an objective element. It is a question of fact. Second, rights and obligations must be effective. Rights and obligations must come into effect at least at some point in time.

A question of effect entails a subjective element of fairness. The subjective test may incorporate a test of conduct or procedure but the test may not necessarily have to trigger in the present. In terms of validating equity for future generations, the legal norm may come into effect in the future. Consequently, it may not require a claim by an existing person with full capacity. Future beneficiaries may also hold an equitable title due to an entrusted fiduciary duty that links present and future generations.

Besides its objective context, an “effective” climate law ought to incorporate a subjective element of intra and inter-generational fairness as well. Care must therefore ensue in trying to delimit “procedural equity” from “substantive equity.” Giving effect to legal equity may not be purely procedural at all. It may also require the reconciliation of informational freedoms with proactive (anticipatory) and reactive (responsive) obligations. This Article demonstrates what these issues may

mean in practice for states and non-state actors. It engages with legal science and jurisprudence to compare and contrast some existing and some prospective climate disclosure obligations. It also flags the transposition of state attribution to shared responsibility from the perspective of the right to know and the duty to disclose. In drawing to a conclusion, the paper suggests that normative pathways that guarantee and fulfill the right to information as a normative derivative of legal equity may contribute to an evolving constitutionalism of the fundamental legal principles of international climate law.

The Article is in two parts. Part one sets the scene. It examines the dynamic interactions between the right to information, human rights, and environmental law from an objective perspective. It situates monitoring, reporting, and verification (MRV) within a new architecture of human rights as “people’s rights.” Part two then delves into how international human rights and environmental law may inform a “subjective” test of equity by mobilizing the “right to information” in international climate law. In doing so, it shows how a new approach to international legal architecture, one based on “people’s rights,” may help to improve the effectiveness of MRV in terms of multi-nodal and multi-level governance.

I. THE NEXUS BETWEEN INTERNATIONAL HUMAN RIGHTS LAW, INTERNATIONAL ENVIRONMENTAL LAW, AND THE RIGHT TO INFORMATION

A. International Human Rights and the Right to Information

Already at its very first session in 1946, the United Nations (U.N.) General Assembly considered that, “freedom of information is a fundamental human right . . . [It is] the touchstone of all the freedoms to which the United Nations is consecrated.”³ The U.N. General Assembly observed further that the, “[f]reedom of information requires as an indispensable element the willingness

3. *Id.*

and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent.”⁴ In 1948, by virtue of Article 19 of the U.N.’s Universal Declaration of Human Rights, the parties thereto declared, “[e]veryone [every individual and every organ in society] has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁵

By 1966, international treaties expressed the right to information as a fundamental first generation right. The global community framed the right to information as a civil and political right. By virtue of Article 19(2), State parties to the International Covenant on Civil and Political Rights (1966) agreed that, “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁶

In their normative context, international declarations proclaimed the right to information as a fundamental human right but international actors still did not necessarily consider international norms binding or effective. They could not be legally effective if they did not have legal force. A number of U.N. member states recognized that anchoring legal rules to protect individual rights to seek, receive, and impart information was one avenue that could facilitate the fulfillment of international norms. Discussions ensued. Dialogue within U.N. corridors raised the potential to put an international treaty on the freedom of information on the negotiating table, but such a treaty has never come to fruition.

4. *Id.*

5. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

6. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

In 1965, the U.N. General Assembly recognized that the right to information was important, but not important enough. It had, in its words, too “heavy [an] agenda” to consider either the submitted draft Convention on Freedom of Information or the draft Declaration on Freedom of Information, and “decide[d] to devote . . . as much time as it deems necessary to the consideration of the item on freedom of information” at its next session.⁷ In 1970, the U.N. General Assembly acknowledged that the draft Convention on the Freedom of Information had been sitting on its table for “eighteen years” and decided to give it priority at its next session.⁸ Future U.N. sessions were of a similar resolve. Diplomacy prevailed.

Parties to the U.N. recognize the emergence of a new world information order as a fundamental right but putting it into effect is difficult. The process is slow. In diplomatic parlance, it is an “evolving and continuous process.”⁹ In 2010, the U.N.’s General Assembly reaffirmed as much when it remarked that it had a “commitment to the principles of the Charter of the United Nations and to the principles of freedom of the press and freedom of information,” but limited that commitment to recommendations.¹⁰

Notwithstanding, the U.N.’s 2010 General Assembly resolution on “Questions Relating to Information, Information in the Service of Humanity, and the United Nations Public Information Policies and Activities” was an important step forward. The General Assembly urged all stakeholders, including countries, U.N. organizations, and the media to “cooperate and interact with a view to reducing existing disparities in information flows at all levels . . . and to ensure the free flow of information at all levels.”¹¹ The U.N. General Assembly reinforced this message in December 2011 when it requested

7. Freedom of Information, G.A. Res. 2061 (XX), U.N. Doc. A/RES/2061 (Dec. 16, 1965).

8. Freedom of Information, G.A. Res. 2722 (XXV), U.N. Doc. A/RES/2722 (Dec. 15, 1970).

9. G.A. Res. 65/107, A-B, U.N. Doc. A/RES/65/107 (Dec. 10, 2010).

10. *Id.*

11. *Id.*

the Department of Public Information and its network of United Nations information centres to pay particular attention to progress in implementing the internationally agreed development goals, including those contained in the Millennium Declaration, and the outcomes of the major related United Nations summits and conferences in carrying out its activities, and calls upon the Department to play an active role in raising public awareness of . . . the global challenge of climate change, in particular the actions taken within the framework of the United Nations Framework Convention on Climate Change, especially in the context of the principle of common but differentiated responsibilities¹²

Several crosscutting second-generation human rights' instruments also incorporate a right to information. For the purposes of this Article, second-generation human rights' instruments refer to legal instruments that give impetus to economic, social, and cultural equality. Certain treaties recognize the rights of women, children, and the disabled to information.

The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognizes the right of "[a]ccess to specific educational information to help to ensure the health and well-being of families"¹³ The 1989 Convention on the Rights of the Child provides for the right of the child to "receive and impart information and ideas of all kinds, regardless of frontiers"¹⁴ The 2006 Convention on the Rights of Persons with Disabilities endows people with extra needs with a right to information.¹⁵

Typically voiced as positive rights, the rights to information aforementioned prescribe social conduct. Positive rights oblige

12. Questions relating to information, G.A. Res. 66/81 A-B, at 4, U.N. GAOR, 66th Sess., U.N. Doc. A/RES/66/81 A-B (Dec. 9, 2011).

13. Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979).

14. Convention on the Rights of the Child, G.A. Res. 44/25, annex, at 167, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989).

15. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 9(2)(f), U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

action. Negative rights curtail action.¹⁶ To illustrate the distinction, consider the 2006 Convention on the Rights of Persons with Disabilities. Parties to the 2006 Convention agreed, *inter alia*, to “promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information.”¹⁷ The parties thereto also agreed to “take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information”¹⁸ “Promoting appropriate forms of assistance” and “taking all appropriate measures” are expressions of positive rights.

While the right to seek, receive, and impart information is a fundamental human right, that right is subject to certain limits. There is no right to incite racial divides or hatred. There is no right to use information as a vehicle for corruption. Informational relevancy is important, but so too is its discipline.

For the U.N. Educational, Scientific, and Cultural Organization (UNESCO) “information . . . is a vital factor in the strengthening of peace and international understanding”; but it should be subject to a certain degree of discipline.¹⁹ UNESCO’s 1978 Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, is illustrative. It provides in its very first article that, “[t]he strengthening of peace and international understanding, the promotion of human rights and the countering of racism, apartheid and incitement to war demand a free flow and a wider and better balanced dissemination of information.”²⁰

16. John Stuart Mill once spoke of positive and negative liberties. See generally JOHN STUART MILL, ON LIBERTY (1982).

17. Convention on the Rights of Persons with Disabilities, *supra* note 15, at art. 9(2)(f).

18. *Id.* art. 21.

19. Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, UNESCO Res. 4/9.3/2 (Nov. 28, 1978).

20. *Id.*

The U.N.'s 2003 Convention Against Corruption, which entered into force in 2005, also contains a number of provisions concerning the "right to information."²¹ In its hortatory language, the Convention provides for certain guidelines. Under "public reporting," the Convention Against Corruption provides support for public access measures on decision-making concerning public interests.²² On the issue of "participation of society," the Convention Against Corruption provides that the participation of non-state actors be strengthened by "ensuring that the public has effective access to information."²³

On February 3, 2010, a group of preeminent rapporteurs on the Freedom of Opinion and Expression, the Freedom of the Media, and the Access to Information issued a joint declaration identifying the central challenges to freedom of expression over the coming decade.²⁴ Rapporteurs from the U.N., the Organization of American States (OAS), the Organization for Security and Co-operation in Europe (OSCE), and the African Commission listed "Limits on the Right to Information" among the ten key challenges over the coming decade.²⁵ The U.N., the OAS, the OSCE, and the African Commission on Human and Peoples' Rights recognized further that "some 50 laws [have] been passed in the last ten years" but the right to information is often expressed without guarantee. In many States, right to

21. Convention Against Corruption, G.A. Res. 58/4, art. 10(a), U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/422 (Oct. 31, 2003); *see also* TRANSPARENCY INT'L, USING THE RIGHT TO INFORMATION AS AN ANTI-CORRUPTION TOOL (Nurhan Kocaoglu, et al. eds. 2006), *available at* http://www.oas.org/dil/access_to_information_human_Policy_Recommendations_Transparency_International_Right_to_Information_as_an_Anti-Corruption_Tool.pdf

22. Convention Against Corruption, *supra* note 21.

23. *Id.* art. 13(1)(b).

24. The rapporteurs included the U.N.'s Special Rapporteur on Freedom of Opinion and Expression, the Organization of American States (OAS) Special Rapporteur for Freedom of Expression, the Organization for Security and Co-operation in Europe's (OSCE) Representative on Freedom of the Media, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information.

25. Press Release, Org. of Am. States Inter-American Comm'n on Human Rights, Annual Report of the Inter-American Commission on Human Rights 2010: Ten Key Challenges to Freedom of Expression in the Next Decade, U.N. Press Release No. R18/10 (2010).

information laws are weak; and then there is “[t]he massive challenge of implementing the right to information in practice.”²⁶

Endeavors to transpose and bind the right to information also exist at regional and national levels. According to its website, the non-governmental organization Article 19 defends and promotes freedom of expression and freedom of information globally. Article 19 reported in 2010 that “over 90 countries have adopted RTI [right to information] laws.”²⁷ A similar impetus drives regional groupings. Developments in Africa, the Americas, and Europe are illustrative.

In terms of national endeavors, several countries have tailored freedom of information laws to address specific issues. The French law of July 17, 1978 recognizes the right for all persons to obtain administrative documents (the Commission d’Accès aux Documents Administratifs manages the process).²⁸ In England, Wales, and Northern Ireland, the Freedom of Information Act of 2000 gives citizens a right of access to information held by public authorities (the U.K.’s Office of the Information Commissioner regulates the implementation of the Freedom of Information Act and fulfills a proactive obligation of research, education, and public awareness).²⁹ The U.S. has adopted a Freedom of Information Act that provides agency rules for making public information available (the Department of Justice’s Office of Information Policy oversees agency

26. *Id.*

27. XIX ARTICLE 19, THE ARTICLE 19 GLOBAL RIGHT TO INFORMATION INDEX 1 (2010), available at <http://www.article19.org/data/files/pdfs/press/rti-index.pdf>.

28. Loi 78-753 du 17 Juillet 1978 Portant Diverses Mesures d’amélioration Des Relations Entre l’Administration et le Public et Diverses Dispositions d’ordre Administratif, Social et Fiscal, Titre Ier: De la Liberté d’Accès aux Documents Administratifs et de la Réutilisation des Informations Publiques [Law 78-753 of July 17, 1978 on Various Measure to Improve Relations Between the Administration and the Public and Various Administrative, Social and Fiscal, Title I: Freedom of Access to Administrative Documents and Reuse of Public Information], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1978. The Commission d’Accès aux Documents Administratifs manages the process.

29. Freedom of Information Act of England, Wales and Northern Ireland, 2000, c. 36 (U.K.). The U.K.’s Office of the Information Commissioner regulates the implementation of the Freedom of Information Act and fulfills a proactive obligation of research, education, and public awareness.

compliance).³⁰ These national laws typically reinforce the public's "right to know" subject to certain specified exceptions, such as public safety, public health, and defense.

In terms of regional endeavors, Article 9(1) of the African Charter on Human and People's Rights of 1981 provides for the right to information.³¹ In 2002, the African Commission on Human and Peoples' Rights, meeting at its thirty-second Ordinary Session, in Banjul, Gambia, reinforced this right.³² Principle IV of the Declaration of Principles of Freedom of Expression in African States declares: "Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law."³³

In the Americas, Article 13 of the American Convention on Human Rights of 1969 incorporates the right to information within provisions on the Freedom of Thought and Expression.³⁴ More recently, on January 13, 2004, the heads of state and government of the Americas adopted the Nuevo León Declaration. The parties thereto declared, *inter alia*, that "access to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation and promotes effective respect for human rights."³⁵

In Europe, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms provides for the freedom of expression. Article 10 of the Convention provides for a qualified right. Article 10(1) incorporates a right to the "freedom

30. Freedom of Information Act, 5 U.S.C. § 552 (2006 & Supp. IV 2012) (the Department of Justice's Office of Information Policy oversees agency compliance).

31. African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217.

32. *See* Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, Afr. Comm'n on Human & Peoples' Rights, 32d Sess., art. IV(1) (Oct.17-23, 2002).

33. *Id.*

34. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

35. Declaration of Nuevo León Special Summit of the Americas Monterrey, Mexico (Jan. 13, 2004), *available at* http://www.ftaa-alca.org/summits/montrey/nleon_e.asp.

to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”³⁶ Article 10(2) conditions the right, in accordance with laws that are

necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.³⁷

In 1970, the Council of Europe’s Parliamentary Assembly adopted a declaration on mass communication media and human rights. The Declaration establishes a European wide principle of transparency and reinforces the right to information.³⁸ The Declaration provides, *inter alia*, that the right to freedom of expression include “the freedom to seek, receive, impart, publish and distribute information and ideas” and that “[t]here shall be a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits”³⁹ Europeans annexed another Declaration on the right of access to information to the 1992 Treaty on European Union, known as the Treaty of Maastricht.⁴⁰

Further developments have also occurred at a treaty level. The 2000 Treaty of Lisbon conferred on the European Union’s Charter of Fundamental Rights the same value as a legally binding treaty when it entered into force on December 1, 2009.⁴¹ The Charter of Fundamental Rights of the European Union provides for the freedom of expression and information.⁴² Article

36. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, (entered into force Sept. 3, 1953), *available at* <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

37. *Id.*

38. Council of Europe Parliamentary Assembly, Res. No. 428 (1970).

39. *Id.*

40. Treaty on European Union, 1992 O.J. (C 191).

41. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364).

42. *Id.*

11 thereto stipulates, “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁴³

Supplementary instruments are also relevant. In 2009, for instance, the Council of Europe’s Convention on Access to Official Documents was opened for member state signature, for accession by non-member states, and for accession by any international organization.⁴⁴ The Convention on Access to Official Documents provides for rights of access subject to certain limitations, such as the necessity to protect national security, defense, and international relations.⁴⁵

The preceding instruments, many of which entail normative guarantees of a right to information, demonstrate the nature of objective equity. They illustrate the link between international human rights and the right to information but they do not give effect to equity in and of their own accord. Balancing contradistinctions between the relevancy and disciplines governing the right to information is also needed to inform a theory of justice for the global commons, collective human rights, and rights for future generations included. Giving effect to the right to information in international environmental law will also inform governance of the right to information in climate law. Before examining the nature of “effect” in more detail, the next section places the right to information within the framework of international environmental law.

43. *Id.* art. 11(1); *Id.* art. 11(2) (providing that the freedom and pluralism of the media shall also be respected).

44. Directive of the European Parliament and Council 2003/4/EC, art. 2(1)(c), 2003 O.J. (L 41) 26-32.

45. Council of Europe Convention on Access to Official Documents, CETS No. 205 (2009), *available at* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=1&CL=ENG>.

B. International Environmental Law and the Right to Information

1. To Give With One Hand . . .

Besides the framework context of international human rights law, environmental law also informs the right to information in international climate law. Parties to the Stockholm Declaration declared specific non-state actor rights to information (Principle 19), and they strengthened their resolve to technology transfer (Principle 20).⁴⁶ Principles 10 and 19 of the 1992 Rio Declaration reiterated and expanded on the Stockholm Declaration's provisions for the right to information by reinforcing individual and public rights (Principle 10).⁴⁷ Rio Principle 19 elaborates on state responsibility to provide timely environmental notifications and relevant environmental information.⁴⁸

Adopted at the United Nations Conference on Environment and Development (UNCED) in Rio, Section IV, Chapter 40, of Agenda 21, entitled "Information for Decision-Making," links the relevancy of information to disciplining the application thereof.⁴⁹ Agenda 21 grounded the right to information even further by setting out a number of relevant core activities. Amongst others, these actions include establishing a comprehensive information framework. Giving effect to such a framework requires making institutional changes at the national level, strengthening environmental assessments, and strengthening the capacity for traditional information and indigenous knowledge.⁵⁰

Advocates for a World Charter for Nature were also coming to the fore in the intervening periods between the Stockholm and Rio Declarations. In essence, humankind advances by protecting

46. United Nation 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 (June 16, 1972).

47. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Aug. 12, 1992).

48. *Id.*

49. *See id.* Agenda 21 is a non-binding policy statement adopted at the United Nations Conference on Environment and Development in Rio.

50. *Id.* §§ 40.10, 40.11.

and safeguarding nature's qualities. In 1982, the General Assembly proclaimed that "States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall: co-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations."⁵¹

By 1994, there was evidence of a growing momentum to recognize a formal link between the right to information in the domain of human rights and the right to information in the environmental domain. Attempts to discipline the right to environmental information are featured in the 1994 Draft Declaration of Principles on Human Rights and the Environment.⁵² The 1994 Draft recognizes the link between information, conduct, participation, and decision-making.⁵³ A further provision requires that, "information shall be timely, clear, understandable and available without undue financial burden to the applicant."⁵⁴

The intertwining of equitable rights as both human and environmental rights was to continue throughout the ensuing decade. In 2004, the Commission on Environmental Law of the International Union for Conservation of Nature (IUCN) presented a Draft International Covenant on Environment and Development to the U.N. General Assembly.⁵⁵ The Draft Covenant contained several provisions on the right to information. For example, Article 45 thereto, entitled "Information and Knowledge," provides for the exchange of

51. World Charter for Nature, G.A. Res. 37/7, ¶ 21(a), U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/RES/37/7 (Oct. 28, 1982).

52. U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Final Report Prepared by Fatma Zohra Ksentini, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994).

53. *See id.*

54. *Id.* pt. III(15).

55. *See* IUCN Env'tl. Law Programme, Comm'n on Env'tl. Law of IUCN-World Conservation Union, *Draft International Covenant on Environment and Development* (Env'tl. Policy & Law Paper No. 31, 3d ed. 2004), available at http://home.moravian.edu/public/infocus/NEW/Resources/11-08-30_St.John_draft_covenant.pdf.

publically available information.⁵⁶ In addition, the Covenant requires the parties to obtain “prior informed consent” from local communities before accessing traditional knowledge of indigenous communities.⁵⁷

The international community also made advances in development crosscutting sectoral rights to environmental information. As a result, equity and the inclusion of right to information provisions in international treaties grew in prominence. The Montreal Protocol on Substances that Deplete the Ozone Layer (1987),⁵⁸ the U.N.’s Convention to Combat Desertification (1994),⁵⁹ and the Convention on Biological Diversity (1992),⁶⁰ and its associated 2002 “Bonn Guidelines,”⁶¹ are symbolic of such headway.

At a regional level, the European Union’s Charter of Fundamental Rights binds member states to integrate a “high level of environmental protection and improvement of the quality of the environment” into Union policies and ensure this obligation in “accordance with the principle of sustainable development.”⁶² The U.N. Economic Commission for Europe’s (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (Aarhus Convention) establishes a European-wide right to give effect to equity in environmental matters by encompassing

56. *Id.* art. 45.

57. *Id.*

58. Montreal Protocol on Substances that Deplete the Ozone Layer, art. 9, Sept. 16, 1987, 1522 U.N.T.S. 29 (entered into force Jan. 1, 1989).

59. United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, 1954 U.N.T.S. 3 (entered into force Dec. 26, 1996).

60. *See* Convention on Biological Diversity, art. 17, June 5, 1992, 1760 U.N.T.S. 79.

61. *See* Conference of the Parties to the Convention on Biological Diversity, The Hague, Neth., Apr. 7-19, 2002, *Report of the Sixth Meeting of the Conference of the Parties to the Convention of Biological Diversity*, U.N. Doc. UNEP/CBD/COP/6/20 (May 27, 2002).

62. Charter of Fundamental Rights of the European Union, *supra* note 41, art. 37.

provisions for access to information, public participation in decision-making, and access to justice.⁶³

Kofi Annan also identified with the broader context of subjective equity. In speaking about the Aarhus Convention, the former Secretary-General of the United Nations (1997-2006), observed in 2000 that “[a]lthough regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen’s participation in environmental issues and for access to information on the environment held by public authorities.”⁶⁴ The Aarhus Convention may have global significance but is it robust enough to support a new architecture for third generation rights to information and “people’s rights” to information, in international climate law? This Article suggests that it may be robust enough to facilitate a more universal architecture provided it situates within an appropriate context: the constitutionalism of international climate law needs to account for both objective and subjective equitable thresholds.

To support implementation of the Aarhus Convention, the UNECE has prepared a comprehensive set of guidelines.⁶⁵ Three supplementary European instruments also facilitate implementation. Directive 2003/4/EC provides for access to environmental information.⁶⁶ Directive 2003/35/EC provides for public participation in environmental programs.⁶⁷ European Commission Regulation (EC Regulation) 1367/2006, or the “Aarhus Regulation,” extends EC Regulation No. 1049/2001 from providing for general public access to European Parliament,

63. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

64. U.N. Econ. Comm’n for Eur., *The Aarhus Convention: An Implementation Guide*, at v, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (2000).

65. *See id.*

66. Directive of the European Parliament and Council 2003/4/EC, 2003 O.J. (L 41) 26.

67. Directive of the European Parliament and Council 2003/35/EC, Providing for Public Participation in Respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, 2003 O.J. (L 156) 17.

Council, and Commission documents and principles, and limits governing access thereto, to provisions regulating public access to information on environmental matters held by all community institutions and bodies.⁶⁸ The Aarhus Regulation requires that community institutions and bodies provide for public participation in the preparation, modification, or review of “plans and programmes relating to the environment.”⁶⁹ It also enables certified non-governmental organizations (NGOs) to request an internal review.⁷⁰

The “European Transparency Initiative,” launched on November 9, 2005, also supplements *de jure* rights to information. The European Transparency Initiative disciplines three aspects of the right to information: transparency and interest representation, minimum standards for consultation, and publication of data on beneficiaries of EU Funds.⁷¹ The initiative includes a review of EC Regulation No. 1049/2001 concerning general public access to specified institutions.⁷² However, in interpreting Europe’s transparency policy in environmental law, the Aarhus Regulation (EC Regulation 1367/2006) shall prevail in case of divergence.

In terms of disciplining the right to information, the Aarhus Convention contains provisions for integrity, transparency, and government accountability.⁷³ While the Aarhus Convention collates provisions on information, transparency, and accountability as already considered by international treaties—such as those aforementioned thresholds of subjective equity governing ozone depletion, desertification, and biodiversity—it

68. Commission Regulation 1367/2006, 2006 O.J. (L 264) 13, 14 (EC); *see also* Commission Regulation 1049/2001, 2001 O.J. (L 145) 43 (EU); Commission Decision 2008/50/EC, 2007 O.J. (L 13) 16; Commission Decision 2008/401/EC, 2008 O.J. (L 140) 30.

69. Commission Regulation 1367/2006, 2006 O.J. (L 264) 13, 14.

70. *Id.* at 15.

71. Comm’n of the European Communities, Green Paper: European Transparency Initiative 3-4 (2006).

72. Comm’n of the European Communities, Green Paper: Public Access to Documents Held by Institutions of the European Community 3 (2007).

73. Aarhus Convention, *supra* note 63.

builds on those provisions by incorporating several important modernizations.⁷⁴

As aforementioned, the parties to the Aarhus Convention acknowledge three main pillars that guarantee the objectivity of effective justice.

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.⁷⁵

Upholding the integrity of these three pillars is fundamental to fulfill equity in its subjective context.

The Aarhus Convention's implementing apparatus reinforces its recognition of access to information as a fundamental right. In 2008, at the third meeting of the parties to the Aarhus Convention, which culminated in the adoption of the Riga Declaration, the parties thereto elaborated on this fundamental right declaring:

Public access to information, as well as being a right in itself, is essential for meaningful public participation and access to justice. When properly implemented, the right to information leads on the one hand to more transparent, accountable government and on the other to a more informed, environmentally aware public.⁷⁶

In essence, conduct that gives effect to the Aarhus Convention's right to information is two-fold. First, there is an obligation on public authorities to respond to information

74. *See id.*

75. *Id.* art. 1.

76. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Riga, Lat., June 11-13, 2008, *Report of the Third Meeting of the Parties-Addendum to Riga Declaration*, § 9, ECE/MP.PP/2008/2/Add.1 (Sept. 26, 2008) [hereinafter *Addendum to Riga Declaration*]; *see also* Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2007).

requests.⁷⁷ Second, there is an obligation on the parties to collect and disseminate accurate environmental information.⁷⁸

The first obligation entails a responsive or reactive obligation on public authorities whereby external stakeholders are typically, but not always, the initiator of the request. Reactive obligations contrast with passive obligations insofar that they require some level of engagement with the actor initiating the request and a visible reaction that produces results. The second obligation entails an anticipatory or proactive obligation on public authorities whereby public authorities are typically, but not always, the initiator of the inquiry. As such, the second obligation facilitates the way for public authorities to control and manage their climate change mandate instead of responding on an ad hoc basis to an influx of requests.

In assessing this mix of reactive and proactive obligations, and as a forerunner for meaningful public participation and access to justice, it is useful to examine the relevancy and disciplines governing environmental information. The analysis proceeds by assessing the parameters of “environmental information.” It also examines the degree to which public authorities honor their proactive and reactive obligations in practice. In other words, it applies a subjective test.

The definition of “environmental information” establishes the parameters of the “environmental information” in question. Within the “Aarhus” context, “environmental information” means

any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water . . . ;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and

77. Aarhus Convention, *supra* note 63, art. 4.

78. *Id.* art. 5.

cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.⁷⁹

Subject to expressing justification for a delay due to the complexity of the subject, the main rule in terms of responding to requests for environmental information is that a public authority must provide environmental information to the applicant within one month of the submission of the request.⁸⁰ Public authorities may refuse to provide the requested environmental information if, amongst others, they do not hold the information requested; if the request is manifestly unreasonable or too general; due to a certain number of public interest, national defense or public security exceptions; due to a breach of personal confidentiality laws; or, due to breaches of intellectual property rights.⁸¹ In the event of not meeting the request, the public authority is obliged to inform the applicant of where the applicant may obtain the relevant information or the rationale for refusal.⁸²

To recall, collection and dissemination of data that will inform citizens of their rights is an anticipatory obligation intrinsic to the Aarhus Convention.⁸³ Each party thereto is to ensure that “public authorities possess and update environmental information which is relevant to their functions.”⁸⁴ There is a duty on the parties to provide a rapid alert system in response to environmental information that may adversely affect the environment or human health.

Another advantage of the Aarhus Convention is that it provides for a far more streamlined “ease of use” policy. Parties are encouraged to make use of electronic databases and publish

79. Aarhus Convention, *supra* note 63, art. 2(3).

80. *Id.* art. 4(2).

81. *Id.* art. 4(3)-(4).

82. *Id.* art. 4(5).

83. *Id.* art. 5.

84. *Id.* art. 5(1)(a).

information online.⁸⁵ The Riga Declaration (2008) recognizes that “[e]lectronic tools have dramatically increased the possibilities for putting environmental information in the public domain, but their potential has yet to be fully realized.”⁸⁶

These reactive and proactive obligations are not, however, isolated to state parties. Liability under the Aarhus Convention for the collection and dissemination of information and response to requests of course resides with the contracting parties. Notwithstanding, the Convention provides indirect rights of access for non-state actors. After all, non-state actors may have a significant impact on the environment. For instance, if an “operator’s” “activities” “have a significant impact on the environment,” then the contracting party is obligated to encourage those operators “to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.”⁸⁷

While not defining the term “operator,” the Convention is flexible enough to extend beyond state-to-state responsibility by encompassing guidelines for other actors in a state to non-state relation. As a result, activities of a non-state party may invoke responsibility on the contracting party via instruments, such as environmental impact assessments. To quote Sands,

[A]n environmental impact assessment describes a process which produces a written statement to be used to guide decision-making, with several related functions. First, it should provide decision-makers with information on the environmental consequences of proposed activities and, in some cases, programmes and policies, and their alternatives. Secondly, it requires decisions to be influenced by that information. And, thirdly, it provides a mechanism for ensuring the participation of potentially affected persons in the decision-making process.⁸⁸

85. Aarhus Convention, *supra* note 63, art. 5(3).

86. *Addendum to Riga Declaration*, *supra* note 76, § 10.

87. Aarhus Convention, *supra* note 63, art. 5(6).

88. PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 800 (2d ed. 2003).

These interactions support and strengthen shared responsibility. By linking the right to environmental information to environmental impact assessments, the Aarhus Convention supports this interpretation within its objective context (as a type of substantive guarantee) and subjectively (if conduct is timely and gives effect to normative guarantees).

Even if the proposed objective element of equity is right, the maxim *donner et retenir ne vaut* suggests that the norm may still not be valid. In certain circumstances equity may not be put into effect. In addition, and especially concerning the birthright of future generations, there needs to be some sort of safeguard to ensure that competent authorities issuing a legal norm do not take back what is given if there is later a regret, or if the relationship between the parties changes. Similarly, if competent authorities never make the legal norm effective then the outcome is precisely one of not validating the legal norm. One has given with one hand and taken away with the other.

2. . . . And to Take Away With the Other

A certain number of lessons drawn from the European context may perhaps be useful for developing an effective and universal right to information within the global commons, and, more precisely, within the constitutionalism of international climate law. In returning to Europe, it was somewhat doubtful prior to the Aarhus Convention (1998) whether Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) was a successful mechanism for disciplining the right to environmental information by the enforcement of proactive and reactive obligations. In application, the European Court of Human Rights seemed to distinguish between positive and negative rights. (To recall, a positive right obliges action and a negative right obliges curtail of an action).

It is important to make a distinction, however, between the framework that governs proactive and reactive obligations and that which governs positive and negative rights. To exhibit the practicalities of the “willingness and capacity” to discipline information for effective justice, insofar as a subjective test is concerned, this subsection will reference several cases of the European Court of Human Rights concerning environmental law.

Examples show that European jurisprudence is yet to harness a consistent recognition of proactive and reactive obligations regarding the right to information.

Bladet Tromsø & Stensaas v. Norway (Eur. Ct. H.R. 1999) is a case in point.⁸⁹ In *Bladet Tromsø*, the issue was whether the press should have the freedom of expression to publish a report commissioned by Norway's Ministry of Fisheries on seal hunting or whether the protection of a seal hunter's reputation should be the prevailing consideration.⁹⁰ Norway mooted that the protection of seal hunters' reputation should prevail.⁹¹ Whereas, the press considered that their interests and those of the seals were paramount.⁹²

While recognizing that the debate was of public interest, the Norwegian government claimed that the press launched the report in question in a sensationalist way. The government claimed that the press aimed to launch a personal attack against the hunters.⁹³ One famous headline even read, "Shock report . . . Seals skinned alive."⁹⁴ Norway was of the view that Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which provides for freedom of expression, should not extend to the degree of harming human livelihoods and private individuals.⁹⁵ The press leaned on animal right's interests, the public's right to know, and a duty to disclose.⁹⁶

In deciding the case, the European Court of Human Rights turned to the test of "necessity in a democratic society."⁹⁷ The Court remarked thus:

[W]hilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private

89. *Bladet Tromsø & Stensaas v. Norway*, App. No. 21980/93, 29 Eur. Ct. H.R. 125 (2000).

90. *See generally id.*

91. *Id.* at 128.

92. *See generally id.*

93. *Id.* at 165.

94. *Id.* at 134.

95. *Id.* at 153.

96. *Id.* at 167.

97. *Bladet Tromsø*, App. No. 21980/93, 29 Eur. Ct. H.R. at 125.

individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them.⁹⁸

Public interest was vital to ensure an informed public debate locally, nationally, and internationally, and trumped protecting the seal hunter's interests and their respective reputations. By extension, the European Court of Human Rights held that there had been a violation of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁹⁹ and that the public had a right to be aware and informed of the report commissioned by Norway's Ministry of Fisheries on seal hunting. In these circumstances, the Norwegian government could not invoke a negative right to curtail action by silencing the press and prohibiting publication. Further, there was no reactive (responsive) obligation on the government to inform. As to the press, however, a positive right was invoked obliging action, and a proactive (anticipatory) obligation was invoked on the mass media to collect and disseminate information. There was a positive right and proactive obligation incumbent on the press to inform.

Environmental information and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms had come under scrutiny by the European Court of Human Rights a year earlier. One may consider two relevant questions extracted from the 1998 *Guerra & Others v. Italy* dispute.¹⁰⁰ As a reactive (responsive) obligation, should public authorities respond to citizens' requests for information about the potential hazards of living near a high-risk fertilizer factory that released harmful toxins into the air and was prone to accidents? As a proactive (anticipatory) obligation, should public authorities inform local residents about the consequences of living near the factory? As both obligations would oblige action, they reflect the procedural enforcement of a positive right.

98. *Id.* at 126-27.

99. *Id.* at 130.

100. *Guerra & Others v. Italy*, App. No. 14967/89, 26 Eur. Ct. H.R. 357 (1998).

It was known through reports “that the emission treatment equipment was inadequate and the environmental-impact assessment incomplete.”¹⁰¹ Further, there was a record of prior accidents. To recall, on one occasion several tons of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped into the atmosphere resulting in the hospitalization of 150 people with acute arsenic poisoning.¹⁰² Did this ‘know-how’ invoke an extended proactive obligation on public authorities to inform about the “state of elements of the environment” following such disaster? Now, this question is somewhat complex because it invokes both anticipatory and responsive elements, i.e. action in anticipation of a future disaster and action in response to a preceding disaster.

“In circumstances such as those of the present case,”¹⁰³ did the local population have a right to be informed about the risk factors, the factors affecting or likely to affect the elements of the environment, and to be advised as to what to do in the event of future accidents? Did the public have the right to be informed about the state of human health and safety?

Public authorities were not proactive. There was no anticipatory action taken by the government to collect and disseminate information. There was therefore no action to inform the public.

Citizens were proactive. They requested information from the relevant public authorities about the risks of future disasters. Citizens thereby claimed a reactive obligation on public authorities to respond. The relevant public authorities refused the information requests.

Two questions delimiting proactive and reactive obligations come to bear. First, could the right for citizens to know ever invoke a reactive (responsive) obligation, and thereby a test of “necessity in a democratic society,” say, in the interests of public safety, in the interests of protecting human health, or in the interests of preventing a severe disruption to the functioning of a local community? Second, could the right to know ever invoke a

101. *Id.* at 363.

102. *Id.* at 362.

103. *Id.* at 359.

proactive (anticipatory) obligation on public authorities to impart information, and thereby a second test of “necessity in a democratic society,” say, in the interests of public safety, protecting human health, or preventing a severe disruption to the functioning of a local community?

The Court did not entertain such a complete analysis of Article 10’s rights and responsibilities. If it had, however, would the outcome have differed? In the alternative, and being more forward looking, could the Court see an evolution in the interpretation and application of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that will strengthen citizenship rights and society’s interests?

To answer these questions there is a need for further examination. Consider the duties and responsibilities on the right to information as provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 10 of the Convention provides for the “Freedom of expression” as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁰⁴

Now, compare the insights that one may draw from the actual findings of the Court. In terms of the merits of an Article

104. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 36, art. 10.

10 violation, the European Court of Human Rights held in *Guerra & Others v Italy* that

[f]reedom to receive information basically prohibited a government from restricting a person from receiving information that others wished or might be willing to impart to him - that freedom could not be construed as imposing on a State, in circumstances such as those of present case, positive obligations to collect and disseminate information of its own motion.¹⁰⁵

There was therefore no violation of Article 10. The Court invoked a negative right that curtails governments from restricting the receipt of information from third parties. In addition, the Court revoked any positive right in circumstances such as those of the present case that construes a proactive (anticipatory) obligation on governments to collect and disseminate information. Only a breach of reactive (responsive) obligations in terms of a third party duty to respond could invoke a breach of Article 10. The public had a right to receive information, but the government had no corresponding obligation by which to discharge that right.

It may be recalled of *Bladet Tromsø*, the “seal hunters” case, that the press was imputed with a positive proactive obligation to “impart information and ideas” about animal health to which the public had a right of receipt; and, the government was imputed with a negative charge of non-interference.¹⁰⁶ There was no positive charge and no proactive (anticipatory) obligation on the government to inform of its own motion. Similarly, in *Guerra*, the public had a right to receive information, but the government had no positive charge and no proactive obligation to impart information about the risks to human health and the mitigation of risk.

Extending one party a right of receipt but not obliging the other to give effect to that right may undermine the credibility of European human rights and even the development of such rights

105. *Guerra*, App. No. 14967/8926, 26 Eur. Ct. H.R. at 359.

106. *Bladet Tromsø & Stensaas v. Norway*, App. No. 21980/93, 29 Eur. Ct. H.R. 125, 168 (2000).

in international law.¹⁰⁷ In both European cases human rights to information existed, but they did not oblige the competent authorities to enforce a right to information. Human rights to know did not invoke a duty to disclose.

While Article 10 reinforced provisions of objective equity, the consequences of weak subjective equity led to other corollaries. Another important argument in *Guerra* recalled the Council of Europe's Parliamentary Assembly Resolution 1087 on the consequences of the Chernobyl disaster.¹⁰⁸ Adopted on April 26, 1996, Resolution 1087 states, "public access to clear and full information . . . must be viewed as a basic human right."¹⁰⁹ The counter-argument was that Resolution 1087 and Directive 90/313/EEC of the Council of the European Communities on the freedom of access to information on the environment

spoke merely of access, not a right, to information. If a positive obligation to provide information existed, it would be "extremely difficult to implement" because of the need to determine how and when the information was to be disclosed, which authorities were responsible for disclosing it and who was to receive it.¹¹⁰

These are precisely the issues that advances in subjective equity ought to try to address. On its own, an objective test of equity does not guarantee justice.

Some may argue that the Aarhus Convention should rectify these deficiencies. This may be true in certain circumstances. While the European Court of Human Rights in *Guerra* dismissed an obligation on public authorities to respond to information requests,¹¹¹ and was adamant that there was no proactive (anticipatory) obligation on public authorities to collect and disseminate accurate environmental information,¹¹² the Aarhus

107. See U.N. Int'l L. Comm'n, *Protection of Persons in Event of Disasters: Text of Draft Articles 1, 2, 3, 4, and 5 as Provisionally Adopted by the Drafting Committee*, U.N. Doc A/CN.4/L.758 (July 24, 2009) (assigning a duty for States and intergovernmental organizations to respect persons' rights while assisting after a disaster).

108. *Guerra*, App. No. 14967/8926, 26 Eur. Ct. H.R. at 367.

109. *Id.*

110. *Id.* at 381.

111. *Id.* at 359.

112. *Id.*

Convention was not invoked. It did not apply at that time. *Guerra* was a 1998 case and the Aarhus Convention did not enter into force until October 30, 2001.¹¹³

Although an Article 10, Freedom of Expression, provision could not invoke proactive (anticipatory) obligations for a state's public apparatus to impart information "of its own motion," the European Court of Human Rights considered that there might be positive obligations inherent in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹⁴ Article 8 provides for respect to private and family life.¹¹⁵ Concluding in *Guerra*, the Court held that the Italian authorities had failed in their positive obligations to secure respect for the applicants' private and family life and, by extension, violated Article 8 (but not Article 10).¹¹⁶ The Court thereby found that there was an indirect right to information albeit within an Article 8 argument.¹¹⁷

Is the finding in *Guerra* an isolated instance or could it be said that Article 8 now encompasses an indirect right to information? Moreover, what other human rights provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms incorporate an indirect right to information or do all articles incorporate an indirect right to information? Consequently, is subjective equity a universal human right? The following section will start to assess the potential answers to these questions.

3. Donner et Retenir ne Vaut

Under scrutiny, several other cases of the European Court of Human Rights evoke the same line of reasoning as that found in *Guerra & Others v. Italy*. *McGinley & Egan v. United Kingdom* (1998) illuminates the subject. The findings in *McGinley* pivot on

113. Jeremy Wates, *Aarhus Convention Starts Count-Down to Entry Into Force*, U.N. ECON. COMM'N FOR EUR., Aug. 9, 2001, <http://www.unece.org/press/pr2001/01env06e.html>.

114. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 36, art. 8, 10.

115. *Id.*

116. *Guerra*, App. No. 14967/8926, Eur. Ct. H.R. 357 at 360.

117. *Id.*

the United Kingdom's Christmas Island nuclear tests and the right of allegedly afflicted service personnel to the full benefit of government services thereafter.¹¹⁸ Here too, the Court decided in terms of applicability that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect private and family lives) embodied a right to information, but not necessarily a proactive (anticipatory) obligation on the government to fulfill that right.¹¹⁹

In unraveling this finding, recall that "[b]etween 1952 and 1967 the United Kingdom carried out a number of atmospheric tests of nuclear weapons in the Pacific Ocean and at Maralinga, Australia, involving over 20,000 servicemen."¹²⁰ A number of service personnel suffered dire health consequences subsequent to the tests.¹²¹ Whether or not they would have suffered the same health effects if they had not participated in the tests is moot. In any event, the servicemen believed that they were entitled to receive government support.¹²²

To give effect to their claim the servicemen sought information about the possible connections between the nuclear tests, human health, and their right to government services.¹²³ For the U.K. government, no such right was admissible unless a correct procedure was followed.¹²⁴ The servicemen struggled to work their way through the administrative process.¹²⁵ In this regard, a distinction must be made about the objective content (of the information or procedure) and the conduct (that which would fulfill or give effect to the intended object or purpose).

The Court found that the U.K. government had provided a procedure by which the servicemen could access documents

118. *McGinley & Egan v. United Kingdom*, App. Nos. 218725/93, 23414/94, 27 Eur. Ct. H.R. 1, 7-12 (1999) (revised on Jan. 28, 2000).

119. *Id.* at 44.

120. *McGinley*, App. Nos. 218725/93, 23414/94, 27 Eur. Ct. H.R. at 5.

121. Roff, S.R., *Mortality and Morbidity of Members of the British Nuclear Tests Veterans Association and the New Zealand Nuclear Tests Veterans Association and Their Families*, MED., CONFLICT, & SURVIVAL, July – Sept. 1999, at 1-51.

122. *McGinley*, App. Nos. 218725/93, 23414/94, 27 Eur. Ct. H.R. at 49.

123. *Id.* at 1.

124. *Id.* at 4.

125. *Id.*

relevant to the tests.¹²⁶ An objective test was met. As a result, there was no requirement for the U.K. to answer to the claim of a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹²⁷ The procedure may have been relevant, but there was no discipline as to ease of use or timeliness.¹²⁸

The finding in *McGinley & Egan v. United Kingdom* is not the same as saying that there was a positive obligation on the U.K. to avail servicemen of information pertaining to the health consequences of their participation in nuclear tests. Not everyone asserted this view.¹²⁹ Judges De Meyer, Valticos, and Morenilla dissented.¹³⁰ In their joint dissenting opinion the three judges opined that following what happened in Hiroshima and Nagasaki in August 1945 that no one could have any doubt that nuclear weapons were capable of causing long-term health implications and even death.¹³¹

Back in 1998, the dissenting judges in *McGinley* referred to a report issued before the nuclear tests in question: “[A] note entitled ‘Radiological Safety Regulations, Christmas Island’ of March 1958 [stated] that ‘the danger is insidious because the effects are not felt immediately and the damage may only become apparent after several years.’”¹³² Judges De Meyer, Valticos, and Morenilla opined that there was a positive right, and an obligation on the British state “to assume their responsibilities towards the people present in the test areas when the explosions took place” without the applicants having to ask.¹³³ Such a presumption of responsibility would have equated to the invocation of a proactive (anticipatory) obligation.

McGinley, *Guerra*, and *Bladet Tromsø* were all decided before the Aarhus Convention entered into force on October 30, 2001. The Aarhus Convention does not explicitly mention the European

126. *McGinley*, App. Nos. 218725/93, 23414/94, 27 Eur. Ct. H.R. at 4.

127. *Id.*

128. *Id.*

129. *Id.* at 46.

130. *Id.*

131. *Id.*

132. *McGinley*, App. Nos. 218725/93, 23414/94, 27 Eur. Ct. H.R. at 47.

133. *Id.*

Court of Human Rights as a dispute resolution body.¹³⁴ Even so, the question remains as to whether after October 30, 2001, the Aarhus Convention demonstrates to be such an impressive elaboration of the right to information. Developing and applying a framework for such analysis may assist with the answer.

A potential framework evokes three key issues. First, in embodying a *lex specialis* regime of equitable rights, does the Aarhus Convention isolate dispute resolution to mechanisms provided for by the Aarhus Convention? Second, has the entry into force of the Aarhus Convention reinforced Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Freedom of Expression and the Right to Information)? Or, does Article 8 (Respect for Private and Family Life) still incorporate the prevailing provisions on the right to information? Third, do parties to the Aarhus Convention, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, recognize the scope of the Aarhus Convention to facilitate a framework for invoking direct provisions for the subjective test of equitable rights in European Human Rights cases? In other words, what are the linkages between the Aarhus Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms; and, moreover, does the Aarhus Convention reinforce interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms?

In turning to the Aarhus Convention, Article 16 thereto provides for the Settlement of Disputes between the Parties.¹³⁵ The Parties to the Aarhus Convention “shall seek a solution by negotiation or by any other means of dispute settlement.”¹³⁶ If resolution is not possible by these means, the Parties agree to “one or both of the following means of dispute settlement: i) submission of the dispute to the International Court of Justice”; or, ii) arbitration constituted under the Aarhus Convention’s rules of procedure.¹³⁷

134. Aarhus Convention, *supra* note 63.

135. *Id.* art. 16.

136. *Id.*

137. *Id.*

To recall, by signing and ratifying the Aarhus Convention, the European Community agreed to be subject to its terms, which included provisions for dispute settlement.¹³⁸ “In accordance with the Treaty establishing the European Community, and in particular Article 175(1) thereof, the European Community is competent for entering into international agreements, and for implementing the obligations resulting therefrom.”¹³⁹ The Aarhus Convention is therefore part of EU law and binding on the European Community, its institutions that fall within the competence of the Convention, and its Member States.¹⁴⁰

There is recent case law on this interpretation. In *Stichting Natuur en Milieu & Pesticide Action Network Europe v. European Commission* (2012) and *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v. European Commission* (2012), the European Court of Justice found that “the Aarhus Convention was signed by the European Community and subsequently approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1). The institutions are accordingly bound by that convention, which prevails over secondary Community legislation.”¹⁴¹

By extension, the three pillars of the Aarhus Convention—the right to information, public participation, and access to justice—are also binding.¹⁴² The Aarhus Convention has a different place in EU law than regulations and directives. The

138. Aarhus Convention, *supra* note 63; *see also Aarhus: What is the EU Doing?*, EUR. ENVTL. BUREAU, <http://www.eeb.org/index.cfm/activities/governance-tools/aarhus/aarhus-what-is-the-eu-doing/> (last visited Nov. 9, 2012). The European Community signed the Aarhus Convention on June. 25, 1998 and ratified it on Feb. 17, 2005. *Id.*

139. The Decision on conclusion of the Aarhus Convention was adopted by the EC on February 17, 2005. Council Decision 2005/370, 2005 O.J. (L 124) 1 (EC); *see also* Aarhus Convention, *supra* note 63, art. 2(2)(d).

140. *See* Treaty on the Functioning of the European Union, art. 216(2), Mar. 25, 1957, 2010 O.J. 53, 83.

141. Case T-338/08, *Stichting Natuur en Milieu & Pesticide Action Network Europe v. Comm’n*, 2012 E.C.R. at para. 52; Case T-396/09, *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v. Comm’n*, 2012 E.C.R. II-00246, at para. 52.

142. *See* Case C-239/03, *Comm’n v. France*, 2004 E.C.R. I-09325 (demonstrating where the provisions of a Convention and Protocol concluded by the EU created rights and obligations on Member States).

Convention trumps regulations and directives. “It follows that the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with the Aarhus Convention.”¹⁴³

(Regulations and directives are binding sources of secondary legislation.¹⁴⁴ Regulations are directly applicable and binding in their entirety.¹⁴⁵ Member States have a degree of flexibility as to the choice and form of transposing directives and directives are applicable as to the result to be achieved).¹⁴⁶

EU law—primary legislation, secondary legislation, and case law—thereby needs to be interpreted in the light of the Aarhus Convention. The decisions are consistent with earlier findings. In consideration of environmental directives, the European Court of Justice found in *Commission v. Ireland* that, by merely publishing the procedures on the internet, Ireland had not fulfilled its obligations to inform the public in a sufficiently clear and precise manner about access to judicial review procedures in environmental matters.¹⁴⁷

If there is a contradiction in the interpretation of laws between national laws and the Aarhus Convention, then the Aarhus Convention prevails.¹⁴⁸ If there is contradiction between EU law, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Aarhus Convention, then there may be normative invalidity but this is unlikely. A solution ought to be found that is compatible with both conventions. For clarity, subject to ubiquitous provisions of general international law, e.g. good faith, the general provisions of the European Convention for the Protection of Human Rights

143. Case T-396/09, *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v. Comm’n*, 2012 E.C.R. at para. 52.

144. *Decision-Making in the European Union*, EUROPEAN UNION, http://europa.eu/about-eu/basic-information/decision-making/index_en.htm (last visited Nov. 1, 2012).

145. *Regulations, Directives, and Other Acts*, EUROPEAN UNION, http://europa.eu/about-eu/basic-information/decision-making/legal-acts/index_en.htm (last visited Nov. 1, 2012).

146. *Id.*

147. Case C-427/07, *Comm’n v. Ireland*, 2009 E.C.R. I-6277.

148. Aarhus Convention, *supra* note 63, art. 19(4).

and Fundamental Freedoms may be interpreted according to the more specific provisions provided for by the Aarhus Convention.

If the contracting party to the Aarhus Convention is not a member of the EU, then the provisions of Article 16 of the Aarhus Convention will still provide for the settlement of disputes between the parties thereto.¹⁴⁹ The UNECE website provides further details of relevant jurisprudence in its database on Aarhus Judgments.¹⁵⁰ Jurisprudence of the European Court on Human Rights provides some useful guidance and the Article refers to a number of relevant cases in the analysis that follows.

In *Öneryıldız v. Turkey*, the European Court of Human Rights rightly isolated consideration of the right to information to the European Convention on Human Rights and Fundamental Freedoms. (Turkey was not a member to the Aarhus Convention at that time).¹⁵¹ *Öneryıldız* disputed the question of responsibility for harm arising from a methane explosion. Thirty-nine people died when refuse engulfed inhabitants living in a Turkish slum on the edge of a rubbish tip following the explosion.¹⁵²

In reference to the European Convention on Human Rights and Fundamental Freedoms, the Court found a violation of the right to life (enshrined in Article 2), a violation of the right to peaceful enjoyment of possessions (Article 1 of Protocol number 1), and a violation of a right to a domestic remedy (Article 13).¹⁵³ Having regard to these findings, the Court did not consider it necessary to examine the allegations of a violation of the right to a fair trial (Article 6, section 1) or the right to respect for private and family life (Article 8). The Grand Chamber of the Court agreed that the right to information had already been recognized

149. *Id.* art. 16(1).

150. U.N. ECON. COMM'N FOR EUR., <http://www.unece.org> (last visited Feb. 14, 2012).

151. Georges-Stavros Kremlis, *The Aarhus Convention and Its Implementation in the European Community*, in SEVENTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 141 (Jo Gerardu at al. eds., 2005), available at http://inece.org/conference/7/vol1/22_Kremlis.pdf.

152. *Öneryıldız v. Turkey*, App. No. 48939/99, 41 Eur. Ct. H.R. 20, 34 (2005).

153. *Id.* at 80.

under Article 2 and, in principle, may be relied on for the protection of the right to life.¹⁵⁴

Roche v. United Kingdom (a case of October 19, 2005) considered the claim of another serviceman who incurred health injuries arising from weapons' testing.¹⁵⁵ This time around, servicemen participating in the United Kingdom's testing of chemical weapons allegedly sustained injuries from notorious mustard nerve gas tests.¹⁵⁶ The United Kingdom of Great Britain and Northern Ireland signed the Aarhus Convention on June 25, 1998 and, according to the U.N. Treaty Collection, ratified it on February 23, 2005.¹⁵⁷ At the time of the case the U.K. was therefore a member of the EU and a party to the Aarhus Convention.

Analogous to what happened in *McGinley*, the U.K. government had refused to provide the injured applicants with a service pension.¹⁵⁸ Again, the European Court of Human Rights linked the right to information to Article 8 of the European Convention on Human Rights and Fundamental Freedoms; but not to Article 10 or the *lex specialis* Aarhus regime.¹⁵⁹ The judgment in *McGinley* states the Court considered that the United Kingdom had not fulfilled its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information, which would allow him to assess any risk to which he had been exposed during his participation in the tests. There had therefore been a violation of Article 8.¹⁶⁰

154. *Id.*

155. *Roche v. United Kingdom*, App. No. 32555/96, 42 Eur. Ct. H.R. 30, 33 (2006).

156. *Id.*

157. Aarhus Convention, *supra* note 63, at 447; see also *Archive: Aarhus Convention on Environmental Diplomacy*, DEP'T FOR ENV'T FOOD & RURAL AFFAIRS, <http://archive.defra.gov.uk/environment/policy/international/aarhus/index.htm> (last updated Nov. 26, 2009).

158. *Roche v. United Kingdom*, App. No. 32555/96, 42 Eur. Ct. H.R. 30, 38 (2006).

159. *Id.* at 82.

160. *McGinley & Egan v. United Kingdom*, App. Nos. 218725/93, 23414/94, 27 Eur. Ct. H.R. 1, 7-12 (1999).

In the Court's view Article 10 was a *de jure* right but could not impose a positive obligation on the state to disseminate information (*donner et retenir ne vaut*).¹⁶¹ There had been no interference with the applicant's right to information as provided for by virtue of Article 10.¹⁶² There was therefore no consideration of the Aarhus Convention although it was a highly relevant instrument of EU law. Another perspective is that the European Convention on Human Rights and Fundamental Freedoms was sufficient to establish the finding.

In a more recent case, *Tatar v. Romania* aired a dispute relating to pollution and public health hazards resulting from the release of toxic sodium cyanide as part of a gold extraction process.¹⁶³ Romania entered the EU in 2007 but it had independently signed the Aarhus Convention on June 25, 1998 and ratified it on July 11, 2000.¹⁶⁴ Romania ratified the European Convention on Human Rights and Fundamental Freedoms in 1994.¹⁶⁵

The Court opined in *Tatar v. Romania* that public authorities had to ensure public access to environmental investigations and impact assessment studies.¹⁶⁶ The Romanian Government continued to refrain from providing information even after an accident in 2000 resulted in the release of large quantities of cyanide into the environment.¹⁶⁷ Industrial operations continued in violation of the precautionary principle.¹⁶⁸ Still, the European Court of Human Rights held that the violation of the right to information did not encapsulate an Article 10 violation.¹⁶⁹

161. *Roche*, App. No. 32555/96, 42 Eur. Ct. H.R. at 79.

162. *Id.*

163. *Tatar v. Romania*, App. No. 67021/01, 115 Eur. Ct. H.R. (2009).

164. *Romania*, PUB. PARTICIPATION CAMPAIGN, http://www.participate.org/index.php?option=com_content&view=article&id=134:romania&catid=51:countries&Itemid=121 (last visited Nov. 17, 2012).

165. *Romania: Treaties Signed and Ratified Or having been the Subject of an Accession as of 18/11/2012*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=ROM&MA=999&SI=2&DF=&CM=3&CL=ENG> (last visited Nov. 17, 2012).

166. *Tatar*, App. No. 67021/01, 115 Eur. Ct. H.R. at 11.

167. *Id.* at 2.

168. *Id.* at 4.

169. *Id.* at 7.

Instead, the breach of a right to information was embodied in an Article 8 violation. Respect for a person's private and family life was paramount.¹⁷⁰

If Article 8 of the European Convention on Human Rights and Fundamental Freedoms encapsulates a right to information, exactly when and where do Article 10 violations occur; or, are Article 10 rights given with one hand and taken away with the other (*donner et retenir ne vaut*)? Violations of Article 10 often seem restricted to striking a balance between non-state actors, such as journalists and authors,¹⁷¹ rights of expression *vis-a-vis* crossing a threshold into defamation or libel.¹⁷² Sample cases include regulating the choice of the medium for expression, e.g. broadcasting¹⁷³ and the expression of political views.¹⁷⁴ These applications differ to extending Article 10 to the duties and responsibilities of public authorities to receive and impart information.

Europe's tendency to shy away from a fundamental right to information that incorporates positive obligations on public authorities is not necessarily encountered elsewhere. The Inter-American case of *Claude Reyes & Others v. Chile* illustrates an alternative approach.¹⁷⁵ In 2006, the Inter-American Court of

170. *Id.* at 19.

171. *Editions Plon v. France*, App. No. 58148/00, 42 Eur. Ct. H.R. 36 (2006) (explaining that in *Kenedi v. Hungary*, the Court did find a violation of art. 10 (freedom of expression) when a historian was refused access to documents concerning Hungary's communist epoch); *Fressoz & Roire v. France*, App. No. 29183/95, 31 Eur. Ct. H.R. 2 (2001); *Jersild v. Denmark*, App. No. 15890/89, 19 Eur. Ct. H.R. 1 (1995) (violation of journalists' and author's freedom of expression).

172. *Gorelishvili v. Georgia*, App. No. 12979/04, 48 Eur. Ct. H.R. 36 (2009); *Lopes Gomes Da Silva v. Portugal*, App. No. 37698/97, 34 Eur. Ct. H.R. 56 (2002) (libel); *Thorgeir Thorgeirson v. Iceland*, App. No. 1377/88, 14 Eur. Ct. H.R. 843 (1992); *Lingens v. Austria*, App. No. 9815/82, 8 Eur. Ct. H.R. 407 (1986).

173. *See Meltex Ltd. & Mesrop Movsesyan v. Armenia*, App. No. 32283/04, 49 Eur. Ct. H.R. 40 (2009) (refusal of a broadcasting license).

174. *See Vajnai v. Hungary*, App. No. 33629/06, 50 Eur. Ct. H.R. 44 (2010) (breach of political expression); *Women on Waves & Others v. Portugal*, App. No. 31276/05, Eur. Ct. H.R. (2009); *Vogt v. Germany*, App. No. 17851/91, 21 Eur. Ct. H.R. 205 (1996).

175. *Claude-Reyes v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

Human Rights presided over Chile's refusal to provide information on a deforestation project.¹⁷⁶ The investment project was controversial due to its potential environmental impact.¹⁷⁷ There was no justification for the refusal and no access to an effective remedy.¹⁷⁸

Article 13 of the 1969 American Convention on Human Rights is similar to Article 10 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms insofar that it incorporates the right to information within provisions for the Freedom of Thought and Expression.¹⁷⁹ In *Claude-Reyes*, the Inter-American Court of Human Rights established that an Article 13 right to freedom of thought and expression includes the right to seek, receive, and impart information.¹⁸⁰ Article 13 of the 1969 American Convention on Human Rights "protects the right of the individual to receive such information and the positive obligation of the State to provide it."¹⁸¹

These rights exist without any need for an applicant to prove a direct interest or personal involvement. Exceptions are of course permitted where there is a legitimate restriction, for example, in situations that are necessary and satisfy a compelling public interest.¹⁸² The need to respect the rights or reputations of others or the protection of national security, public order, public health, or morals would fall under this category.¹⁸³ States have a general obligation to adopt domestic legal provisions that give effect to the right to information.¹⁸⁴ Similar lines of argument could also apply to protect the rights of future generations to an effective remedy.

176. *Id.* at 2.

177. *Id.*

178. *Id.* at 3.

179. American Convention on Human Rights, art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123.

180. *Claude-Reyes*, Inter-Am. Ct. H.R. (ser. C) No. 151, at 41.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 46.

Way before Europe has given effect to the Aarhus Convention's provisions to reconcile the rights to environmental information with corresponding obligations, or those embodied in Article 10 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the Inter-American Court of Human Rights has elevated the right to information to a discrete fundamental human right complete with attendant obligations. For parties to the American Convention on Human Rights, 1969, the right to information embodies both proactive (anticipatory) and reactive (responsive) obligations. The Aarhus Convention may present the most impressive substantive embellishment of the potential to fulfill equity, but elaboration of an ideal is not the same as adherence thereto (*donner et retenir ne vaut*).

While the aforementioned cases contrast geographical differences and priorities in terms of a human rights approach to environmental information, jurisprudence stemming from issue based sectoral treaties also provide a degree of sagacity on the subject. The 2003 *Ireland v. United Kingdom of Great Britain & Northern Ireland* dispute,¹⁸⁵ concerning access to information under Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention),¹⁸⁶ before the Permanent Court of Arbitration, is emblematic. (The dispute concerned "access to information" as defined by the 1992 OSPAR Convention).¹⁸⁷

The OSPAR Convention establishes a framework that obligates the Contracting Parties "to prevent and eliminate pollution and to take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been

185. Dispute Concerning Access to Information art. 9 of the OSPAR Convention (Ir. v. U.K.-N. Ir.), 23 R.I.A.A. 59 (2003).

186. Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 2354 U.N.T.S. 67 [hereinafter OSPAR Convention].

187. Dispute Concerning Access to Information art. 9 of the OSPAR Convention (Ir. v. U.K.-N. Ir.), 23 R.I.A.A. 59 (2003).

adversely affected.”¹⁸⁸ Article 1(a) of the Convention defines “maritime area” as “the internal waters and the territorial seas of the Contracting Parties, the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal state to the extent recognized by international law, and the high seas, including the bed of all those waters and its sub-soil,” situated within specified limits of the Atlantic and Arctic Oceans and their dependent seas.¹⁸⁹ Article 9 of the Convention provides for “access to information.”¹⁹⁰

Relying on its construction of Article 9(2) of the OSPAR Convention, Ireland sought information about a Mixed Oxide (MOX) Plant at Sellafield in the U.K.¹⁹¹ (Mixed oxide fuel is nuclear fuel produced from reprocessed plutonium and uranium).¹⁹² The U.K. argued that the information was commercially sensitive and mooted for derogation on the basis of commercial confidentiality as provided for by Article 9(3) of the Convention.¹⁹³

The dispute concerned three main provisions of the OSPAR Convention.¹⁹⁴ Article 9(1) of the OSPAR Convention requires the Contracting Party’s competent authorities to respond to reasonable information requests.¹⁹⁵ Article 9(2) defines the relevant information as “any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.”¹⁹⁶ Article 9(3) provides for certain exceptions, for

188. OSPAR Convention, *supra* note 186, art. 2(1)(a).

189. *Id.* art. 1(a).

190. *Id.* art. 9.

191. Dispute Concerning Access to Information art. 9 of the OSPAR Convention (Ir. v. U.K.-N. Ir.), 23 R.I.A.A. 59, 64 (2003).

192. *Mixed Oxide (MOX) Fuel*, WORLD NUCLEAR ASS’N, <http://www.world-nuclear.org/info/inf29.html> (last visited Feb. 14, 2012).

193. Dispute Concerning Access to Information art. 9 of the OSPAR Convention (Ir. v. U.K.-N. Ir.), 23 R.I.A.A. 59, 80 (2003).

194. *Id.* at 81.

195. OSPAR Convention, *supra* note 186, art. 9(1).

196. *Id.* art. 9(2).

example, that of “commercial and industrial confidentiality, including intellectual property.”¹⁹⁷

The Tribunal determined that Article 9(1) required an “outcome of result, namely information falling within the meaning of Article 9(2).”¹⁹⁸ Under investigation, Ireland’s request for information set out an inventory of commercial requests, including sales, prices, and the number of employees. In turning to whether information requests with respect to the commissioning and operation of the MOX Plant at Sellafield are “relevant information requests,” the Tribunal opined that Ireland had failed to demonstrate that the information was “on the state of the maritime area,” or that it “was likely to adversely affect the maritime area.”¹⁹⁹ As the information requested did not fall under the OSPAR Convention, there was no need to ascertain whether the U.K. could avail itself of an Article 9(3) exception.

Of note was that Ireland and the U.K. were both parties to the OSPAR Convention, but had not ratified the Aarhus Convention at the time of arbitration. Ireland signed the Aarhus Convention on June 25, 1998, but had not ratified it by the time of arbitration.²⁰⁰ (According to the U.N. Treaty register, Ireland ratified the Aarhus Convention on June 20, 2012).²⁰¹ The U.K. signed the Aarhus Convention on June 25, 1998 and ratified it on February 23, 2005.²⁰² Furthermore, at the time of the arbitration there was no EC directive in effect that adopted Aarhus provisions.

As signatories to the Aarhus Convention, one could argue that Ireland and the U.K. were demonstrating their intent to be bound. Intent must therefore have some weight. An interesting question arises as to what signifies intent. Issues concerning treaty signature and putting initials to a treaty or suggesting

197. *Id.* art. 9(3).

198. Dispute Concerning Access to Information art. 9 of the OSPAR Convention (*Ir. v. U.K.-N. Ir.*), 23 R.I.A.A. 59, 101 (2003).

199. *Id.* at 111.

200. *Ireland Ratifies the Aarhus Convention*, U.N. ECON. COMM’N FOR EUR. (Sept. 9, 2001), <http://aarhusclearinghouse.unece.org/news/1000432/>.

201. Aarhus Convention, *supra* note 63, at 447.

202. *Id.*

that a treaty has “legal force” in the absence thereof are sometimes less evident.

Situations such as those where ACP countries (countries of Africa, the Caribbean, and Pacific) put initials to, rather than signed, the ACP-EC Economic Partnership Agreements (EcPAs) are illustrative. Article 10(b) of the Vienna Convention on the Law of Treaties provides that in the failure of another agreement that the “signature, signature ad referendum or initialing” of the treaty “by the representatives of those states of the text of the treaty or of the Final Act of a conference incorporating the text” establishes the text of the treaty as authentic and definitive, which may infer that it provides an understanding.²⁰³ In certain circumstances, the object and purpose of that understanding is not to be defeated. By virtue of Article 18 of the Vienna Convention on the Law of Treaties,

[a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.²⁰⁴

A state may therefore enter into an obligation not to defeat a treaty’s object and purpose on initialing a treaty and before it enters into force.

Article 18(a) is not limited to signature.²⁰⁵ If state parties exchange instruments establishing the text of a treaty as authentic and definitive subject to approval, then the state parties are obliged to refrain from acts that would defeat the object and purpose of the treaty until they have made their

203. Vienna Convention on the Law of Treaties art. 10(b), May 23, 1969, 1155 U.N.T.S. 331.

204. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

205. For an alternative view, see Lorand Bartels, *The Legal Status of the Initialed EPAs and Legal Constraints on Renegotiation*, TRADE NEGOTIATIONS INSIGHTS, Apr. 2008, available at <http://ictsd.org/i/news/10682/>.

intention clear not to become a party to the treaty.²⁰⁶ Good faith is paramount in international relations. Good faith is a universally recognized principle of general international law. It also has significance within World Trade Organization (WTO) law.²⁰⁷ In the absence of meeting strict criteria, one could also ask whether discrimination against other developing countries is an act of good faith.

Parties initialing regional treaties that are already Members of the WTO have a concomitant obligation not to defeat the object and purpose of WTO treaty law. For these parties, one may ask whether a party initialed a treaty with the view to rely on the good faith of the other to continue to inject influxes of aid for trade and other derogated preferences. If this line of argument is followed then either initialing the EcPAs signified the parties' intended to be bound and, in return, they could receive special favors; or the parties did not intend to be bound and they ought to refrain from undue delay tactics and forfeit special preferences that discriminate against others.

Putting an initial to the EcPAs could still constitute a signature if it is established that the negotiating states so agreed.²⁰⁸ Within this regard, a thorough review of the preparatory works would be relevant before any legal opinion could ascertain whether there was consent to be bound by an "initial" that signified "signature." Other decisions have subsequently influenced the EcPA process.²⁰⁹ The point to be made in terms of the OSPAR case, and even in terms of future climate accords, is that the OSPAR case invoked no such consideration.²¹⁰ Moreover, it would be a dangerous precedent to

206. Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. 331.

207. Andrew. D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, n.2 (2006).

208. Vienna Convention on the Law of Treaties art. 12(2)(a), May 23, 1969, 1155 U.N.T.S. 331.

209. Sandra Bartelt, *ACP-EU Development Cooperation at a Crossroads? One Year after the Second Revision of the Cotonou Agreement*, 17 EUR. FOREIGN AFF. REV. 1, n.1 (2012).

210. Dispute Concerning Access to Information art. 9 of the OSPAR Convention (Ir. v. U.K.-N. Ir.), 23 R.I.A.A. 59 (2003).

usurp the recognized process of negotiation-signature-ratification without some just reason.

The International Court of Justice (ICJ) has considered similar issues although not on the same scale. The dictum in the merits of the ICJ case *Qatar v. Bahrain* (judgment of March 16, 2001) observed that there might be some evidentiary value in treaties signed but not ratified.²¹¹ As background, the Anglo-Ottoman “Convention relating to the Persian Gulf and surrounding territories” was signed on July 29, 1913, but was never ratified.²¹² Qatar contended that non-ratification was largely attributable to the outbreak of the first World War, but it also pointed to a treaty ratified in 1914 that contained the same intent as the 1913 Convention.²¹³ Bahrain argued from two main perspectives. First, Bahrain contended that non-ratification was due to “the complex set of interdependent proposals [that] . . . ultimately fell apart.”²¹⁴ Second, Bahrain observed that the text of the 1913 and 1914 treaties did not coincide.²¹⁵

In terms of the ICJ’s findings,

[t]he Court observes that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature. In the circumstances of this case the Court has come to the conclusion that the Anglo-Ottoman Convention does represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913.²¹⁶

What happened after signature, however, is something completely different.

Whether it could be argued that consideration to be bound possesses evidentiary value of a binding nature needs further reflection, particularly if the Aarhus Convention may contribute in the future to the universal constitutionalism of international

211. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahrain.*), 2001 I.C.J. 40 (Mar. 16).

212. *Id.* ¶ 45.

213. *Id.* ¶ 46.

214. *Id.* ¶ 47.

215. *Id.*

216. *Id.* ¶ 89.

law. The term “consideration” is an interesting one, particularly in terms of governing the international climate regime.

To proceed, the Article will address the following types of questions. Is it possible to distinguish between different types of consideration in international treaty law? Could one type of consideration be that of “democratic consideration,” say that of due parliamentary process within a dualist system? Alternatively, in the absence of such consideration, could some other type of consideration prevail, such as that of a monetary or economic nature? Within the domain of *lex specialis* regimes in particular, can exchanges of an economic nature, or equivalent thereof, be constructed as legally binding promises to comply with that which goes beyond a cruder intent to rally the troops?

Returning to the OSPAR dispute with these issues in mind, the tribunal decided not to take the European Council’s Directive 2003/4/EC on public access to environmental information into account.²¹⁷ Directive 2003/4/EC entered into force on February 14, 2003, with transposition by member states due by February 14, 2005 at the latest.²¹⁸ It is thereby rather stretching the point to try to argue that all public authorities in the U.K. were bound prior to the due implementation date and when the U.K.’s ratification of the Aarhus Convention did not take place until February 23, 2005, which was after the dispute.²¹⁹

The next question to ask is what would have been the finding if the Aarhus Convention and Directive 2003/4/EC on public access to environmental information were applicable and within the competence of the dispute settlement body? For that is surely a most interesting question in the view of future challenges to developing universal and effective rights to information in the global commons.

The process of analysis pursued by the arbitral tribunal in the OSPAR dispute is an apt example to employ in the ensuing analysis. To do so, the analysis embraces three questions systematically. First, how do the Aarhus Convention and

217. Directive of the European Parliament and Council 2003/4/EC, 2003 O.J. (L 41) 26-32.

218. *Id.* art. 12.

219. Aarhus Convention, *supra* note 63.

Directive 2003/4/EC define environmental information? Second, does the data on the commissioning and operations of a nuclear fuel plant, like that requested by Ireland, fall into this all-inclusive definition as provided for by the Aarhus Convention and Directive 2003/4/EC; or, is the data too far removed from the definition of “environmental information”? Third, if commercial data could be interpreted as a type of environmental information, is there any derogation to which the U.K. could avail itself to protect commercial data?

The first task is to reach agreement on the terms. Comparing the meaning of environmental information as provided for by the Aarhus Convention with that provided for by Directive 2003/4/EC is useful in this regard. Environmental information under the Aarhus Convention and Directive 2003/4/EC includes any information in written, visual, aural, electronic, or any other *material form on the state of the elements of the environment*.²²⁰ To this definition, Directive 2003/4/EC specifies reports on the implementation of environmental legislation.²²¹ Environmental information must concern the elements of the environment, the “state” thereof, and be in a material form.²²²

Under both instruments, “elements of the environment” include air and atmosphere, water, soil, land, landscape, and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.²²³ For Directive 2003/4/EC, landscape and natural sites extends to include wetlands, coastal, and marine areas.²²⁴ The relevant information must pertain to these elements and, in addition, to the “state” thereof.²²⁵ The “state” of the elements of the environment may be interpreted to mean their environmental condition, environmental predicament, administrative form,

220. *Id.* art. 2(3).

221. *Id.* art. 2(1).

222. Directive of the European Parliament and Council 2003/4/EC, para. 10, 2003 O.J. (L 41) 26.

223. *Id.* art. 2(1)(a); Aarhus Convention, *supra* note 63, art. 2(3)(a).

224. Directive of the European Parliament and Council 2003/4/EC, art. 2(1)(a), 2003 O.J. (L 41) 26. Coastal and marine areas are elements of specific relevance to the OSPAR regulatory framework.

225. *Id.*

quantitative structure, or application in environmental decision-making.²²⁶

The definition of environmental information goes further to itemize “factors” affecting or likely to affect the specified elements of the environment. These factors may predicate the condition or the predicament of the environment. Such factors include, but are not necessarily limited to, energy, noise, and radiation likely to affect the elements of the environment.²²⁷ (Directive 2003/4/EC also includes waste, radioactive waste, emissions, discharges, and other releases into the environment).²²⁸

In terms of the Aarhus Convention, factors include activities of measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the specified elements of the environment, and cost-benefit and other economic analyses and assumptions used in environmental decision-making.²²⁹ Activities and measures may predicate the form and subject matter of environmental information. For example, Directive 2003/4/EC specifies “measures (including administrative measures), such as policies, legislation, plans, programs, environmental agreements, and activities affecting or likely to affect the elements” and factors, separately, as well as measures or activities designed to protect those elements.²³⁰

Like the Aarhus Convention, environmental information as defined in Directive 2003/4/EC includes cost-benefit and other economic analyses and assumptions used within the framework of the specified measures and activities.²³¹ *Prima facie*, cost-benefit and economic analyses is limited to that likely to affect environmental elements and other factors, but it is inclusive of both qualitative and quantitative data. For both instruments, environmental information includes information on the state of human health and safety, human life, cultural sites, and built

226. *Id.* para. 10.

227. *Id.* art. 2(1)(b).

228. *Id.*

229. Aarhus Convention, *supra* note 63, art. 2(3)(b).

230. Directive of the European Parliament and Council 2003/4/EC, art. 2(1)(c), 2003 O.J. (L 41) 26.

231. *Id.* art. 2(1)(e).

structures insofar as they are or may be affected by the state of the elements of the environment or through these elements by the factors, activities, or measures.²³² (Directive 2003/4/EC extends health and safety to include the contamination of the food chain).²³³

To all appearances, while there are some differences between the Aarhus Convention and Directive 2003/4/EC, the meaning of environmental information as defined in both instruments is intrinsically linked to the form of conveying information, the subject matter of the information and factors affecting, or likely to affect, that subject matter. As a directive, however, Directive 2003/4/EC on public access to environmental information is binding on member states as to the result to be achieved.²³⁴ Discretion lies with national authorities as to the choice of form and method of implementation.²³⁵ However, Directive 2003/4/EC on public access to environmental information also makes it clear that “provisions of Community law must be consistent with the Aarhus Convention.”²³⁶ European Human Rights law is a fundamental component of Community law and its interpretation and application must be consistent with the Aarhus Convention and vice-versa.

Seemingly, cost-benefit and other economic analyses and assumptions used in environmental decision-making may be considered environmental information, but only if their object and purpose is to determine the state of the elements of the environment. It is not therefore possible to define commercial data and economic analysis of any sort as simply environmental information within the construction of the Aarhus Convention and Directive 2003/4/EC.

Even if the first hurdle is passed and the commercial data in question is considered to be within the definition of

232. Aarhus Convention, *supra* note 63, art. 2(3)(c); Directive of the European Parliament and Council 2003/4/EC, para. 10, 2003 O.J. (L 41) 26.

233. Directive of the European Parliament and Council 2003/4/EC, para. 10, 2003 O.J. (L 41) 26.

234. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Mar. 30, 2010, O.J. (C 83) 47.

235. Directive of the European Parliament and Council 2003/4/EC, art. 10, 2003 O.J. (L 41) 26.

236. *Id.* para. 5.

environmental information, the Aarhus Convention and Directive 2003/4/EC provide for a number of other safeguards.²³⁷ These safeguards are formulated as exceptions to the rule. Directive 2003/4/EC specifies:

Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: [inter alia] (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy.²³⁸

The country concerned could of course claim an adverse effect on public security or national defense, but there must be some justification to this claim.²³⁹ Even if the Aarhus Convention fell within the domains of applicable law in the OSPAR dispute, the Convention itself provides for similar safeguards that aim to uphold the integrity of national sovereignty.

In another dispute, one on the admissibility of *Sdružení Jihoceské Matky v. Czech Republic*,²⁴⁰ the European Court of Human Rights considered the request by a non-governmental organization for information pertaining to a nuclear power station under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The genesis of the dispute evolved from the construction of a soviet engineered nuclear power station at Temelín as authorized by the ancient regime of Czechoslovakia. After the change in regime in 1989, it was decided to complete construction of the plant with the aid of American technology. Residents living within the proximity of Temelín founded a NGO (Sdružení Jihoceské Matky of České Budejovice). Sdružení Jihoceské Matky (South Bohemian Mothers) is a voluntary, independent, non-political, environmental organization with the primary mission of

237. Aarhus Convention, *supra* note 63, art. 4(3)-(4); see Directive of the European Parliament and Council 2003/4/EC, art. 4(2), 2003 O.J. (L 41) 26.

238. *Id.* art. 4(2)(d).

239. *Id.* art. 4(2)(b).

240. *Sdružení Jihoceské Matky v. Czech Republic*, App. No. 19101/03, 2006 Eur. Ct. H.R. 1205.

protecting nature and landscape.²⁴¹ Sdružení Jihoceské Matky, the applicant, sought information regarding the construction of the plant and condemned the omission of an Environmental Impact Assessment and the failure to be properly notified.

The applicant invoked Article 10 of the European Convention on Human Rights and Fundamental Freedoms and claimed a breach of freedom to receive information needed for the NGO's activities.²⁴² The Court's deliberations reopened the debate on Article 10 of the Convention. It recalled that Article 10 section 2 of the Convention "concerns before all else, the access to general sources of information and aims essentially to prohibit a State from refusing access to information."²⁴³ The Court "observed equally that it is difficult to deduct that the Convention conveys a right of general access to data and documents of an administrative character."²⁴⁴ And the Court observed that "the present case concerns the access to information relative to a central nuclear station, which is an installation of grand complexity exigent a very high level of security."²⁴⁵ The Court therefore considered that Article 10 does not give an absolute right to access all technical details relative to the construction of a central nuclear plant.

In contrast to environmental impact information, it is not in the general interest to disseminate this type of technical information. "When the law to exercise the right to receive information can impair the rights of others, public safety or public health, the extent of the right to access information in cause is limited by Article 10(2) of the Convention."²⁴⁶

241. *History of the Association*, S. BOHEMIAN MOTHERS CIVIC ASS'N, <http://translate.google.com/translate?hl=en&sl=cs&tl=en&u=http%3A%2F%2Fwww.jihoceskematky.cz%2F%3Fcl%3D1> (last visited Dec. 8, 2012).

242. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 36, art. 10(1) (providing for Freedom of Expression, which also includes, in its first clause, a right to the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers").

243. *Sdružení Jihoceské Matky v. Czech Republic*, App. No. 19101/03, 2006 Eur. Ct. H.R. 9.

244. *Id.* at 10.

245. *Id.*

246. *Id.* at 11.

Regardless of the importance of a right to information, a government's right to protect industrial secrets, manage the risk of potential terrorism, and protect the health and well-being of its citizens is paramount.

In the circumstances of the *Sdružení Jihoceské Matky* (South Bohemian Mothers) dispute, and taking into account the margin of appreciation left to states, an intervention in the application of Article 10 to receive information is not disproportionate to certain national objectives to be pursued. The grievance was thereby rejected for manifest default of substance.

Of interest to this paper is that the Court directed its analysis from an Article 10, right to information, provision. While the Court strengthened the application of Article 10, the right to information is still subject to national public interest. As stipulated in Article 10, section 2:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁴⁷

It should of course be pointed out that European Union member states are also state parties to the International Covenant on Civil and Political Rights and thereby agreed by virtue of Article 19, section 3, that the exercise of the right to seek, receive, and impart information

. . . carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of

247. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 36, art. 10(2).

national security or of public order (ordre public), or of public health or morals.²⁴⁸

Sdružení Jihoceské Matky's application was not deemed inadmissible because Article 10 was not applicable.²⁴⁹ Imparting such sensitive information could have been contrary to the national interest.

In the future, it is likely that many more disputes will leverage the Aarhus Convention to moot for the right to environmental information. As in *Sdružení Jihoceské Matky* and by virtue of the Aarhus Convention and its implementing directives, such information must be subject to certain limits. According to the Aarhus Convention, public authorities are under an obligation to respond to requests for information and to take reasonable steps to prevent harm to human life or the environment.²⁵⁰ There is a duty to inform, but that duty should not be disciplined by restricting proactive and reactive obligations encapsulated by the Aarhus Convention (*donner et retenir ne vaut*). Instead, the duty to inform ought to be disciplined by the integrity of the national courts in matters such as national security, public safety, and public health. International law will still have a defining role, especially when the information desired resides or relates to the law of the global commons.

It may still be left to the ICJ to "fill in the gaps." As observed by the ICJ in South West Africa, "[i]t may be urged that the Court is entitled to engage in a process of 'filling in the gaps,' in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes."²⁵¹ Likewise, in assessing the right to information in the climate change regime, or any other *lex specialis* regime, the right to information may be a fundamental right, but it is subject

248. International Covenant on Civil and Political Rights, *supra* note 6, art. 19(3).

249. *Sdružení Jihoceské Matky v. Czech Republic*, App. No. 19101/03, 2006 Eur. Ct. H.R. 1205.

250. *See generally* Aarhus Convention, *supra* note 63.

251. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6, ¶ 91 (July 18).

to condition and discipline by the framework within which it exists.

II. THE NEXUS BETWEEN INTERNATIONAL AND MUNICIPAL CLIMATE LAW AND THE RIGHT TO INFORMATION

Part one explained the nexus between international human rights law, international environmental law, and the right to information. The right to information also finds its relevancy and disciplines in international climate law. Part two uses the framework of proactive (anticipatory) and reactive (responsive) obligations set out in part one to examine the right to information about climate change and the adverse effects of climate harm. It does this in two main ways. First, the study examines the right to information as it applies to the right to know at an international level. Second, the analysis turns to the national level to examine the characteristics of the duty to disclose.

A. International Climate Law and the Right to Information

The degree to which participants in the climate change regime use information, or omit information from use, influences the conduct of equity. The formulation, implementation, and due process of subjective equity are issues of effect. Giving effect to equity sometimes includes but is not limited to procedural equity. A “conduct norm” may also incorporate a substantive norm.

Mitigating and adapting to extreme weather events, coping with climate stress, and learning how to deal with a public health crisis arising from climate injury demand timely and informed decision-making. Decision-making is a process that should consider both the guarantee and fulfillment of equity. An inclusive process will facilitate the participation of interested actors.

Effective implementation of the climate change treaty regime—namely the United Nations Framework Convention on Climate Change (UNFCCC), decisions of the UNFCCC Conference of the Parties (COP Decisions), and, for some, the

Kyoto Protocol—requires relevant and timely information.²⁵² There is also a need to discipline the right to information. The willingness to improve the quality of information, and the capacity of climate change actors to use that information to inform decision-making, should influence the evolution of future agreements to mitigate and adapt to climate harm.

The UNFCCC treaty incorporates broad-reaching normative provisions of the right to information.²⁵³ This section will focus on the invocation of positive rights and proactive (anticipatory) and reactive (responsive) obligations. It will highlight three main substantive provisions of the UNFCCC provided for by Articles 4, 6, and 12 of the UNFCCC.²⁵⁴

Article 4 of the UNFCCC includes both proactive obligations (anticipatory commitments to disseminate information) and reactive obligations (commitments to respond to information requests).²⁵⁵ Article 6 of the UNFCCC incorporates proactive obligations to educate, train, and raise public awareness.²⁵⁶ Article 6(a), for instance, stipulates that “the Parties shall promote and facilitate at the national and, as appropriate, sub regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: . . . public access to information on climate change and its effects.”²⁵⁷ Public access presumes the establishment of some response mechanism. In a sense, this provision informs a reactive obligation. If not, the mechanism would be ineffective. (*Donner et retenir ne vaut*). By requiring all parties to communicate information on greenhouse gas emissions (GHG emissions) to the COP through the secretariat, Article 12 of the UNFCCC also blends international

252. United Nations Framework Convention on Climate Change, May, 9 1992, U.N. Doc. A/AC.237/18, 31 I.L.M. 849 (1992) [hereinafter U.N. Framework Convention on Climate Change]; see Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/ [hereinafter Kyoto Protocol].

253. *Id.*

254. *Id.* art. 4, 6, 12.

255. *Id.* art. 4.

256. *Id.* art. 6.

257. U.N. Framework Convention on Climate Change, *supra* note 252, art. 6(a).

and municipal obligations of a proactive (anticipatory) and reactive (responsive) nature.²⁵⁸

Commitments under Article 4(1) of the UNFCCC oblige, either explicitly or indirectly, the formulation and publication of information in virtually every sub-clause.²⁵⁹ Article 4(1)(a) provides for information requests and publishing information concerning inventories of anthropogenic emissions.²⁶⁰ Article 4(1)(b) provides for measures to mitigate climate change.²⁶¹ Article 4(1)(c) provides for information on technology transfer.²⁶² Article 4(1)(e) provides for adaptation plans for coastal zone management.²⁶³ Article 4(1)(f) provides for climate change national impact assessments.²⁶⁴ Article 4(1)(g) provides for the development of data archives.²⁶⁵ Article 4(1)(h) provides for the exchange of relevant scientific, technological, technical, socio-economic, and legal information related to the climate system and climate change.²⁶⁶ Article 4(1)(i) provides for the promotion and cooperation in education, training, and public awareness related to climate change and encouraging the widest participation in this process, including that of NGOs.²⁶⁷ Article 4(1)(j) governs the communication of information concerning implementation in accord with Article 12.²⁶⁸

Article 12 of the UNFCCC obliges the Parties to inform the COP of climate change data. Communicating national inventories to the COP is mandatory. Article 12(1)(a) stipulates:

In accordance with Article 4, paragraph 1, each Party shall communicate to the Conference of the Parties, through the secretariat, the following elements of information:

258. *Id.* art. 12.

259. *Id.* art. 4(1).

260. *Id.* art. 4(1)(a).

261. *Id.* art. 4(1)(b).

262. *Id.* art. 4(1)(c).

263. *Id.* art. 4(1)(e).

264. *Id.* art. 4(1)(f).

265. *Id.* art. 4(1)(g).

266. *Id.* art. 4(1)(h).

267. U.N. Framework Convention on Climate Change, *supra* note 252, art. 4(1)(i).

268. *Id.* art. 4(1)(j).

(a) A national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, to the extent its capacities permit, using comparable methodologies to be promoted and agreed upon by the Conference of the Parties.²⁶⁹

Article 12 also obliges progress reports on implementing the Convention.

Some UNFCCC Article 4 commitments reconcile positive (actionable) rights with reactive (responsive) obligations, such as handling information requests. Other commitments reconcile positive (actionable) rights with proactive (anticipatory) obligations, such as promoting public awareness and communicating information regarding implementation.

The UNFCCC also incorporates proactive obligations by virtue of Article 6 obligations. Article 6 sets out obligations to educate, train, and raise public awareness as needed to fulfill Article 4 commitments.²⁷⁰ The scope of Article 6's fairness provisions also extend to public access to information, public participation, and international cooperation. In addition, Article 6 commitments link to Article 10(e) of the Kyoto Protocol, which provides obligations on all contracting Parties concerning international cooperation, implementation of education and training programs, capacity building, public awareness, and public access to information on climate change.²⁷¹

COP Decision 11/CP.8 (2002) adopted a five-year work program on Article 6 and encouraged Parties to make full use of the Global Environmental Facility to support implementation.²⁷² An intermediate review at COP 10 in Buenos Aires, 2004, (COP Decision 7/CP.10) further endorsed the New Delhi program and emphasized specific actions that the Parties could take, such as

269. *Id.* art. 12(1)(a).

270. *Id.* art. 6.

271. Kyoto Protocol, *supra* note 252, art. 10(e).

272. United Nations Framework Convention on Climate Change, New Delhi, India, Oct. 23-Nov. 1, 2002, *Conference of the Parties Report of the Conference of the Parties on its Eighth Session, Addendum, Part Two: Action Taken By the Conference of the Parties at its Eighth Session*, U.N. Doc. FCCC/CP/2002/7/Add.2 (March 28, 2003), available at <http://unfccc.int/resource/docs/cop8/07a01.pdf> [hereinafter UNFCCC, New Delhi].

collecting, analyzing, and disseminating information on climate change trends and increasing information exchange between states and non-state actors.²⁷³ Decision 9 of COP 13 (held in Bali in 2007) amended the New Delhi work program and extended it for another five years.²⁷⁴ In 2010, COP 16 (Conference of the Parties) / CMP 6 (Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol) recognized the importance of giving effect to equity as a driver of implementation even further when it adopted the decision entitled “Progress in, and ways to enhance, the implementation of the amended New Delhi work program on Article 6 of the Convention.”²⁷⁵

In addition, the UNFCCC’s COP Rules of Procedure, which govern participation, inherently contain provisions on the right to information. Rule 7(1) of the UNFCCC’s COP Rules of Procedure, and those of its subsidiary bodies, permits “any governmental or nongovernmental, national or international, body or agency qualified in matters covered by the Convention and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer may be so admitted unless at least one third of the Parties present at the session object.”²⁷⁶ Rule 7(2) provides that “such observers may, upon invitation of the President, participate without the right to vote in the proceedings of any session in matters of direct concern to the body or agency they represent, unless at least one third of

273. United Nations Framework Convention on Climate Change, Buenos Aires, Dec. 6-18, 2004, *Report of the Conference of the Parties on its Tenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at its Tenth Session*, U.N. Doc FCCC/CP/2004/10/Add.1 (Apr. 19, 2005), available at <http://unfccc.int/resource/docs/cop10/10a01.pdf>.

274. United Nations Framework Convention on Climate Change, Bali, Dec. 3-15, 2007, *Report of the Conference of the Parties on its Thirteenth Session, Addendum, Reporting on Global Observing Systems for Climate*, U.N. Doc FCCC/CP/2007/6 (March 14, 2008), available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a02.pdf>.

275. United Nations Framework Convention on Climate Change, *Progress In, and Ways to Enhance, the Implementation of the Amended New Delhi Work Programme on Article 6 of the Convention (2010)*, http://unfccc.int/files/meetings/cop_16/conference_documents/application/pdf/20101204_cop16_cmp_art6.pdf (last viewed Feb. 14, 2012).

276. *Id.*

the Parties present at the session object.”²⁷⁷ The UNFCCC Secretariat has also set out guidelines for participation, which incorporate the freedom of expression and the right to information.²⁷⁸

Like the UNFCCC, the Kyoto Protocol incorporates extensive provisions by which to govern the right to information. To give an example, Article 2(1)(b) of the Kyoto Protocol provides for sharing of information on policies and measures to quantify emission limitation and reduction commitments to promote sustainable development. Article 7 gives more precision to the submission of information, such as information to supplement annual GHG inventories (Article 7(1) Kyoto Protocol), information to demonstrate compliance (Article 7(2) Kyoto Protocol), and preparation of guidelines for the preparation of the required information (Article 7(4) Kyoto Protocol); whereas, Article 8 of the Kyoto Protocol provides for a review of Article 7’s informational requirements.

While the UNFCCC treaty regime governing climate law provides for the right to information, a number of other conditions discipline that right. Disclosure duties for developed versus developing countries differ. Developed countries encounter far more rigorous informational obligations than developing countries. Developed countries are to provide the COP with detailed descriptions of policies and plans that they have adopted with the view to implementing UNFCCC Article 4 commitments.

Besides the universal international treaty regime of the UNFCCC, which includes UNFCCC COP Decisions, other legal instruments also incorporate a right to climate change information. Each party to the Aarhus Convention is obligated to promote education and awareness amongst the public on environmental information, which includes promoting information on the air and the atmosphere and, arguably, climate change. Moreover, Article 7 paragraph 3 thereto provides that “[e]ach Party shall promote the application of the principles of

²⁷⁷. *Id.*

²⁷⁸. UNFCCC Secretariat, *Guidelines for the Participation of Representatives of Non-Governmental Organizations at Meetings of the Bodies of the United Nations Framework Convention on Climate Change* (Mar. 2003).

this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”²⁷⁹ Parties to the Aarhus Convention thereby endorse the application of the Aarhus provisions within the context of climate law.

Despite the Aarhus Convention providing a regulatory framework for giving effect to equity, it remains surprising just how seldom parties refer to the Aarhus Convention in climate change negotiations. As pointed out in a 2008 report published by the International Council on Human Rights entitled *Climate Change and Human Rights: A Rough Guide*, “It is surprising, given the essential role that information and participation must play in developing adaptation policies, that Aarhus 3(7) appears not to have been invoked or insisted upon in those negotiations.”²⁸⁰

The obligation to collate and disseminate “accurate” climate change information is a case in point. As with the aforementioned illustrative cases covering international human rights law and environmental law, climate change cases raise significant concerns about the discipline of climate law.

Svitlana Kravchenko’s study entitled *Procedural Rights as a Crucial Tool to Combat Climate Change* cites a good example in the Ukraine. According to Kravchenko,

the NGO coalition, *Climate of the Future Without Danger for Life in Ukraine*, knew before UNFCCC COP-14 in Poznan, that Ukraine’s commitment to reduce GHG emissions 20% by 2020 in reality meant an emissions increase by 70% due to economic decline after the collapse of the Soviet Union. The coalition tried to push the government to change its position and convey these revised statistics before COP-15 in Copenhagen. When the NGO coalition failed to convince Ukraine’s government, it made a statement at COP-15 revealing the real situation.²⁸¹

279. Aarhus Convention, *supra* note 63, art. 7(3).

280. THE INT’L COUNCIL ON HUMAN RIGHTS, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE 50 (2008).

281. Svitlana Kravchenko, *Procedural Rights as a Crucial Tool to Combat Climate Change*, 38 GA. J. INT’L & COMP. L. 613, 623 (2010).

Questions have also arisen in the search for the whereabouts of some 320 million euros in carbon trading monies that Ukraine was thereby able to raise selling hot air credits under the international emissions trading mechanism.²⁸²

Equally prevalent in climate law is a similar confusion relating to proactive (anticipatory) and reactive (responsive) obligations in international environmental law. Responding to requests for information about climate change is one thing. Proactively collating, disseminating, and improving public awareness on the adverse effects of climate change is something altogether different.

The UNFCCC establishes the legal architecture needed to discipline existing and future agreements. It also includes guidelines for measurement, reporting, and verification, which are vital to discipline accountability, integrity, and temporality. Even so, going into Rio 20 and UNFCCC COP 18, the landscape was murky as to which groups require what sort of information and whether stakeholders have relevant and timely information in order to make informed decisions. Using Rio 20, to consolidate the right to information and the duty to disclose would have been a step forward. In the future, other opportunities will arise through the UNFCCC COP. The parties could make progress by developing a cohesive architecture to benchmark monitoring, verification, and reporting internationally.

A needs based approach could segment the stakeholders and their relevant issues concerning the right to information and then analyze each cluster independently. Reference to the private sector provides an example. What levels of disclosure do private sector organizations require? Do all citizens need a comprehensive understanding of the technical scientific underpinnings of climate change? Should the impetus be on supporting citizens to enhance energy efficient activities at home? What role should the climate change constituencies have in channeling information to the right sectors? In terms of children and youth, for instance, should climate change information be

282. *Ukraine's AAU 'Black Hole'*, CLIMATE ACTION NETWORK INT'L (June 8, 2010), <http://www.climatenetwork.org/blog/ukraine%E2%80%99s-aau-%E2%80%A8%E2%80%98black-hole%E2%80%99>.

integrated within school curriculums? In terms of farmers, should support they receive for crop rotation also incorporate an informational campaign on the adverse effects of climate change? In terms of potential climate change refugees, or “climate migrant” in a preferred legal parlance, do they have a right to know and make informed decisions?

The issue of displaced persons is another good example as to where progress could be made. The African Union’s Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted October 22, 2009 (entered into force as of March 16, 2011),²⁸³ will perhaps be even more relevant albeit that the international treaty regime on refugee law has its gray areas and gaps in terms of climate change displacement.²⁸⁴ The Kampala Convention obligates the African Union to “share information with the African Commission on Human and Peoples’ Rights on the situation of displacement, and the protection and assistance accorded to internally displaced persons in Africa,” including those displaced due to natural or human made disasters, amongst which climate change is specifically listed.²⁸⁵

Article 10 of the Kampala Convention provides for “displacement induced by projects.”²⁸⁶ Article 10(2) provides that “States Parties shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects.”²⁸⁷ As an example of a relevant issue, a question could arise as to whether bilateral investment treaties should also incorporate provisions for the right to climate change under investment promotion and protection. These issues are of course

283. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Oct. 22, 2009, 40 I.L.M. 85 [hereinafter *Kampala Convention*] (the *Kampala Convention* shall enter into force thirty days after the deposit of the instruments of ratification or accession by fifteen Member States).

284. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; *see also* Protocol Relating to the Status of Refugees, Jan 31, 1967, 606 U.N.T.S. 267.

285. *Kampala Convention*, *supra* note 283, art. 8(3)(e).

286. *Id.* art. 10.

287. *Id.* art. 10(2).

controversial; but the task of policy makers and the international jurist is to solve problems not to avoid them.

Universally and interoperability requires finding the right balance between a differential needs based approach, a common “peoples” rights based approach, and respective capabilities at all levels, the national level included. Common but differentiated responsibilities and respective capabilities derive from the legal principle of equity but have an intrinsic link to other fundamental principles of international climate law, such as the principle of sustainable development. In accordance with Article 3(4) of the UNFCCC,

the Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.²⁸⁸

The following section addresses the normative context of integration as a right to know and a duty to disclose.

B. National Climate Law and the Right to Information

1. A Right to Know. . .

In parallel with advancing frameworks for the right to climate change information at the international level, endeavors to reinforce the right to information and improve the right to know and the duty to disclose must advance nationally. Comparisons of the right to climate change information in the four municipal jurisdictions of Germany, England, Wales, and the United States illustrate the practicalities. First, reference to the *Bund für Umwelt und Naturschutz Deutschland & Germanwatch v. Germany* dispute will illustrate developments of the right to climate change information in Germany. Second, analysis of the 2007 “Inconvenient Truth” case will exhibit interpretation of the

²⁸⁸ U.N. Framework Convention on Climate Change, *supra* note 252, art 3(4).

right to climate change information by the courts of England and Wales. Third, reflection on a series of interactions between federal and state law in the U.S. will demonstrate other pertinent issues.

In turning to Germany, applicants in the administrative dispute *Bund für Umwelt und Naturschutz Deutschland & Germanwatch v. Germany* sought information on export credit guarantees, but the relevant ministry refused the request.²⁸⁹ (Export credit guarantees provide financial support for climate change). Could the applicants invoke a reactive (responsive) obligation on the respondents to provide information?

In dispute was whether the request for climate-related information constituted “environmental information.”²⁹⁰ Energy projects supported by export credits certainly affect environmental elements, such as the atmosphere. Notwithstanding, did the actual granting of export credits constitute environmental information?

The German Access to Environmental Information Act (Umwelt Informations Gesetz or UIG) of December 22, 2004, as amended on February 14, 2005, was relevant. Section 3.1 of the UIG provides for the right of every person to have free access to environmental information held by or for public authorities.²⁹¹ The wording of section 3.1 is similar to like provisions of the Aarhus Convention and Directive 2003/4/EC; and the UIG itself permits broad interpretation to give effect to European wide law.

The primary purpose of Germany’s export credit support program was to aid Germany’s economy, but where an environmental impact assessment was required there was “an important secondary or intermediate purpose” to protect the environment.²⁹² In citing the OECD, the court viewed that “granting or denying export credit support/guarantees will positively or negatively affect the implementation of a project and

289. Verwaltungsgericht [VG] [Administrative Court Berlin] Jan. 10, 2006, 10 A 215.04, translated in Unofficial Translation of the German Original (Climate Justice Programme, Feb 3, 2006), available at <http://www.climatelaw.org/cases/country/germany/exportcredit/>.

290. *Id.*

291. *Id.* at 5.

292. *Id.* at 7.

therewith will, with some probability, also affect the environment.”²⁹³

The Ministry of Economics and Labor had already acknowledged that export credit supports considered environmental concerns. The request for information on export credit supports was therefore, in the circumstances of the present case, environmental information. Yet, could the government still request derogation?

The government pleaded for compromise. To be valid, such claims must reach a certain degree of “seriousness.”²⁹⁴ The request was not manifestly unreasonable. It was not commercially sensitive to the extent that justified a waiver of the public interest. The administrative order thereby required the government to disclose the relevant information requested, but in the interests of a fair and equitable compromise, not every tiny detail of that information required disclosure.²⁹⁵

In England and Wales, the *Stuart Dimmock v. Secretary of State for Education and Skills* case, or “Inconvenient Truth” case, was overtly mediatized. Like *Bund für Umwelt und Naturschutz Deutschland & Germanwatch v. Germany*, the case involved administrative law. The High Court of Justice, Queen’s Bench Division of the Administrative Court, heard the case in 2007.²⁹⁶

By way of background, Stuart Dimmock, the father of two sons at a state school and school governor, sought to revoke a decision, by the then Secretary of State for Education and Skills, to distribute a copy of former U.S. Vice-President Al Gore’s film, *An Inconvenient Truth*, to every state secondary school in England.²⁹⁷ *An Inconvenient Truth (AIT)* was part of a pack of short films supported by a guidance note.²⁹⁸ Dimmock mooted that climate change was a partisan political view and that the promulgation of a politically orientated film violated the law.²⁹⁹

293. *Id.* at 7-8.

294. *Id.* at 10.

295. *Id.* at 12.

296. *Id.*

297. *Id.* ¶ 1.

298. *Id.*

299. *Id.* ¶ 2.

Justice Burton considered the film political but not “party-political.”³⁰⁰ For Burton the government “understandably formed the view that *AIT* was an outstanding film, [it had won an Oscar, was professionally produced, and persuasively argued] and that schools should be enabled to show it to pupils.”³⁰¹ Simply facilitating the showing of the film, and issuing an accompanying guideline, was not in the court’s opinion “a promotion of partisan political views.”³⁰²

Notwithstanding, the film contained a number of “alarmist” errors, which supported Al Gore’s political crusade. Al Gore claimed that a “sea level rise of up to 20 feet (7 meters) will be caused by melting of either West Antarctica or Greenland in the near future.”³⁰³ “Think of the impact of a couple of hundred thousand refugees when they are displaced by an environmental event and then imagine the impact of a 100 million or more,” said Gore.³⁰⁴ For Justice Burton, this claim was “distinctly alarmist, and part of Mr. Gore’s ‘wake-up call.’” Justice Burton remarked:

It is common ground that if indeed Greenland melted, it would release this amount of water, but *only* after, and over, millennia, so that the Armageddon scenario he predicts, insofar as it suggests that sea level rises of 7 metres might occur in the immediate future, is not in line with the scientific consensus.³⁰⁵

It was also difficult to substantiate Gore’s claim that Pacific Islanders have all had to flee to New Zealand due to anthropogenic global warming that has inundated Pacific atolls.³⁰⁶ Justice Burton responded that there is simply no such evidence of evacuation happening yet.³⁰⁷ Seasonal work programs and sporting incentives—rugby perhaps—may provide

300. Verwaltungsgericht [VG] [Administrative Court Berlin] Jan. 10, 2006, 10 A 215.04, ¶ 3.

301. *Id.* ¶ 6.

302. *Id.* ¶ 12.

303. *Id.* ¶ 24.

304. *Id.*

305. *Id.* ¶ 25.

306. *Id.* ¶ 26.

307. *Id.*

some supplementary economic incentive to migrate but not climate change.

In reference to “Shutting down of the ‘ocean conveyor’” Al Gore remarked that:

At the end of the last ice age . . . that pump shut off and the heat transfer stopped and Europe went back into an ice age for another 900 or 1000 years. Of course that’s not going to happen again, because glaciers of North America are not there. Is there any big chunk of ice anywhere near there? Oh yeah [pointing at Greenland].³⁰⁸

In response, Justice Burton stated, “According to the IPCC, it is very unlikely that the ocean conveyor (known technically as the Meridional Overturning Circulation or thermohaline circulation) will shut down in the future, though it is considered likely that thermohaline circulation may slow down.”³⁰⁹ Arguments that there was a “direct coincidence between rise in CO₂ in the atmosphere and in temperature” establishing an “exact fit” were invalid.

Claims that Mount Kilimanjaro’s snows are vanishing, that Lake Chad is evaporating, and that polar bears are disappearing could simply not be substantiated as being attributable to human-induced climate change.³¹⁰ At the time of the film there had been no evidence to establish that retreating snowlines from Mt. Kilimanjaro were attributable to human-induced climate change.³¹¹ Justice Burton considered the drying up of Lake Chad to be “far more likely to result from other factors, such as population increase and over-grazing, and regional climate variability.”³¹² Likewise, Hurricane Katrina was not then attributable to a nexus between weather and climate change.³¹³

Other errors in the film related to the integrity of information disseminated about coral reefs. Gore argued:

³⁰⁸. Verwaltungsgericht [VG] [Administrative Court Berlin] Jan. 10, 2006, 10 A 215.04, ¶ 27.

³⁰⁹. *Id.*

³¹⁰. *Id.* ¶ 29-32.

³¹¹. *Id.* ¶ 29.

³¹². *Id.* ¶ 30.

³¹³. *Id.* ¶ 31.

Coral reefs all over the world because of global warming and other factors are bleaching and they end up like this. All the fish species that depend on the coral reef are also in jeopardy as a result. Overall species loss is now occurring at a rate 1000 times greater than the natural background rate.³¹⁴

In reference to the scientific view of the Intergovernmental Panel on Climate Change (IPCC), Justice Burton observed that “if the temperature were to rise by 1-3 degrees Centigrade, there would be increased coral bleaching and widespread coral mortality, unless corals could adopt or acclimatize, but that separating the impacts of climate change-related stresses from other stresses, such as over-fishing and polluting, is difficult.”³¹⁵

In conclusion, the Court determined that the film *AIT* could be shown, subject to certain conditions.³¹⁶ Apparent flaws in informational integrity were to be corrected.³¹⁷ Provided the apparent errors were corrected and the film shown under appropriate guidance, children should be stimulated into discussion and debate about climate change from the perspectives of science, geography, and citizenship.

A plethora of climate change related cases have also emerged in the United States. In his work on “Global Warming in the Courts,” Pidot identifies four main categories of litigation before U.S. state and federal courts.³¹⁸ First, Clean Air Act litigation considers whether GHG emissions are a type of pollutant subject to regulation under the Environmental Protection Agency (EPA).³¹⁹ Second, National Environmental Policy Act (NEPA) litigation results from inadequate disclosure of climate change consequences arising from projects addressing environmental quality.³²⁰ Third, a collection of climate change disputes may fall

314. Verwaltungsgericht [VG] [Administrative Court Berlin] Jan. 10, 2006, 10 A 215.04, ¶ 33.

315. *Id.*

316. *Id.* ¶ 44.

317. *Id.* ¶ 37.

318. Justin R. Pidot, *Global Warming in the Courts*, GEO. ENVT'L. L. & POL'Y INST. 1 (2006); see also MICHAEL B. GERRARD, *GLOBAL CLIMATE CHANGE AND U.S. LAW* (2007).

319. Pidot, *supra* note 318, at 1; Clean Air Act, 42 U.S.C. § 7401 (2006).

320. National Environmental Policy Act of 1969, 42 U.S.C. § 4344.

under the tort of nuisance.³²¹ Fourth, pre-emption litigation revolves around disputes concerning state *vis-a-vis* federal competence in climate change claims and the regulation of GHG emissions.³²²

Massachusetts v. Environmental Protection Agency (2007) was the first decision of the Supreme Court to consider the application of the Clean Air Act (CAA) to climate change.³²³

Calling global warming “the most pressing environmental challenge of our time,” a group of States, local governments, and private organizations alleged in a petition for certiorari that the Environmental Protection Agency (EPA) had abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide.³²⁴

On the issue of standing, the U.S. Supreme Court considered that the jurisdictional argument of requiring at least one practitioner to have standing was of a “serious character,” but in the “absence of any conflicting decisions . . . the unusual importance of the underlying issue persuaded [the Court] to grant the writ.”³²⁵

In April 2007, the Court held in *Massachusetts v. EPA* that the CAA gives the EPA statutory authority to regulate tailpipe emissions from new motor vehicles because tailpipe emissions are “greenhouse gases [that] fit well within the Clean Air Act’s capacious definition of ‘air pollutant.’”³²⁶ By authorizing the EPA to regulate GHG emissions, the decision in *Massachusetts v. EPA* results in regulation beyond motor vehicles. Smith points out that “the EPA can avoid promulgating such regulations only if it determines that greenhouse gases do not contribute to climate change.”³²⁷ In 2011, the Court clarified that “*Massachusetts*

321. Pidot, *supra* note 318, at 1.

322. *Id.*

323. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

324. *Id.* at 505 (internal footnotes omitted).

325. *Id.* at 505-06.

326. *Id.* at 532.

327. Don C. Smith, *Commentary: Landmark U.S. Supreme Court Decision Puts U.S. on Likely Path to Regulating Greenhouse Gas Emissions*, 15 UTIL. POL’Y 215 (2007).

made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the [Clean Air] Act.”³²⁸

The petition was significant for several reasons, two of which were prominent. The first reason related to non-state actors, in that a powerful public-private sector lobby supported the petition. Second, was the opinion that GHG emissions are pollutants to be regulated under the statutory authority of the CAA. (CAA litigation aims to compel a regulator to take a specific action, i.e. give effect to positive and negative rights).

In an injunctive form, another entire suite of climate change litigation aims to curtail a private company from acting, i.e. gives effect to a negative right. Polluting emissions from coal-fired plants have long been controversial and are arguably a contravention of the CAA. Such disputes concerning GHG emissions came under scrutiny by the U.S. Supreme Court in the 2007 decision *Environmental Defense v. Duke Energy Corp.* when a group of environmental NGO’s brought a claim against one of America’s largest power generation companies.³²⁹

Duke Energy made several construction modifications to its plants, which permitted the company to operate longer hours and thereby increase annual net emissions. The company argued that there was no change in hourly emissions. Duke Energy did not therefore obtain an EPA approval permit for the modifications. It was unclear though as to why the EPA should put such a gloss on whether information should be based on hourly emissions or an increase in emissions. Rabinowitsh points to the Washington Post’s take on this issue: “[i]t should not take the Supreme Court to determine what it means to ‘increase’ the air pollution put out by power plants.”³³⁰

Disclosure goals of NEPA were considered in line with the dictum of the U.S. Court of Appeals for the Ninth Circuit in *Idaho Sporting Congress v. Thomas*.³³¹ *Idaho Sporting Congress v.*

328. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

329. *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 570-71 (2007).

330. Nicholas H. Rabinowitsh, *Bringing New Source Review Back: The Supreme Court’s Surprise (and Disguised) Attack on Grandfathering Old Coal Plants in Environmental Defense v. Duke Energy Corp.*, 31 U.C. DAVIS L. REV. 251, 270-71 (2008) (internal footnote omitted).

331. *Idaho Sporting Congress v. Thomas*, 137 F.3d. 1146 (9th Cir. 1998).

Thomas concerned the potential impacts of a timber sale within the Targhee National Forest in Idaho. The court held that in preparing an assessment of the impacts of a timber sale under NEPA the United States Forest Service (USFS) must provide the data underlying its expert's opinion that the project will not result in significant environmental impacts.³³² In essence, disclosure goals of NEPA are responsive, i.e. "to insure the agency has fully contemplated the environmental effects of its action," and anticipatory, i.e. "to insure the public has sufficient information to challenge the agency."³³³

Justice Stevens delivered a relevant opinion in *Robertson v. Methow Valley Citizens Council* (1989). Stevens stated:

The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "hard look" at environmental consequences," and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.³³⁴

The Supreme Court gave weight to both proactive (anticipatory consequences) and reactive (responsive) obligations embodied in the right to information.

American Electric Power Co., Inc. v. Connecticut is a far more recent dispute that demonstrates even further the conspicuous position of non-state actors to influence climate law.³³⁵ It demonstrates the importance of "conduct norms" at the local level. It clarifies the relationships with federal common law.

In its original context the dispute concerned controls to be placed on corporate emitters of harmful carbon dioxide emissions.³³⁶ Did five electric power companies (American Electric Power, Duke Energy, Southern Company, Tennessee

332. *Id.* at 1154.

333. *Id.* at 1149.

334. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted).

335. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 314 (2d Cir. 2009).

336. *See id.* at 314.

Valley Authority, and Xcel) create a “public nuisance” by contributing to global warming? Plaintiffs asserted that the companies emitted “650 million tons per year of carbon dioxide,”³³⁷ which comprised “approximately ten percent of all carbon dioxide emissions from human activities in the United States.”³³⁸ Another important question was whether states and private parties could seek injunctive relief under the federal common law of nuisance to cap a company’s carbon dioxide emissions at judicially determined levels.³³⁹

The U.S. Court of Appeals for the Second Circuit identified two elements of public nuisance: (i) an “unreasonable interference,” and (ii) “a right common to the general public.”³⁴⁰ In determining “unreasonableness” the Second Circuit further cited three mutually exclusive circumstances when an interference with a common public right is unreasonable: (a) the conduct involves a significant interference with common public rights (health, safety, peace, comfort, or convenience), (b) the conduct is proscribed by law, and (c) “whether the conduct is of a continuing nature or has produced a permanent and long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”³⁴¹ Interestingly, the Second Circuit applied the same logical distinction between conduct and result that is so firmly entrenched in European civil law.

Environmental lobbyists pursuing the claim that carbon dioxide emissions are a nuisance, and should be capped or reduced, faced a setback in 2010 when the U.S. Acting Solicitor General (Neal Katyal) argued that the plaintiffs did not have standing.³⁴² For the U.S. Department of Justice, such disputes were more suited for Congress and the executive branch rather than judicial resolutions: the Courts were not *de facto*

337. *Id.*

338. *Id.* at 316.

339. *See id.* at 326.

340. *Id.* at 352 (citation omitted).

341. *Id.*

342. *See* Stephen Power, *Obama Stance on Climate Suit Stuns Allies*, WALL ST. J., Aug. 26, 2010, <http://blogs.wsj.com/washwire/2010/08/26/obama-stance-on-climate-suit-stuns-allies/>.

regulators.³⁴³ On December 6, 2010, the U.S. Supreme Court said it would issue a writ of certiorari granting review of the lower court's decision.³⁴⁴

In granting the petition, the Supreme Court was presented with three specific questions. Do states and individuals have standing to sue on the common law tort of nuisance for injuries allegedly caused by climate change?³⁴⁵ Are such arguments non-justiciable as political questions?³⁴⁶ Is the equitable tort of nuisance displaced by legislation regulating greenhouse gas emissions, notably that of the CAA or NEPA?³⁴⁷

American Electric Power Company Inc. et al. filed their respective briefs on January 31, 2011, and Connecticut et al. filed on March 11, 2011.³⁴⁸ In addition to these briefs, *amici curiae* briefs made public and private interests known.³⁴⁹

In deciding the case on June 20, 2011, the Supreme Court found that the CAA confers powers on the EPA to manage GHG emissions.³⁵⁰ The Court referred to the EPA's response to the decision in *Massachusetts v. EPA*: the EPA has started a rulemaking under § 7411 of the CAA.³⁵¹ Section 7411 addresses standards for limiting emissions of air pollutants from "new, modified and existing fossil-fuel fired power plants."³⁵² The Court put the spotlight on the EPA's obligations: "Pursuant to a settlement finalized in March 2011, EPA has committed to issuing . . . a final rule by May 2012."³⁵³

343. Greg Stohr, *Global Warming Claims Against AEP, Utilities to Get U.S. High Court Review*, BLOOMBERG, Dec. 6, 2010, <http://www.bloomberg.com/news/2010-12-06/aep-utilities-get-u-s-supreme-court-review-on-warming-suit.html>.

344. *See id.*

345. *See* Julia Ciardullo, *AEP v. Connecticut: A Comparison of the Briefs Filed by the Defendant Electric Utilities*, CLIMATE L. BLOG (Feb. 15, 2011), <http://blogs.law.columbia.edu/climatechange/2011/02/15/aep-v-connecticut-a-comparison-of-the-briefs-filed-by-the-defendant-electric-utilities/>.

346. *Id.*

347. *Id.*

348. *Id.*

349. *See* Stohr, *supra* note 343.

350. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011).

351. *See id.* at 2537.

352. *Id.* at 2533.

353. *Id.*

The Supreme Court held that “the Clean Air Act and the actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”³⁵⁴ Further, there is a new federal common law for subjects of national concern: “When we deal with air and water in their ambient or interstate aspects, there is a federal common law.”³⁵⁵ It is not a question of a “federal general common law” but a question of an emerging “new federal common law.”³⁵⁶ The decision is therefore critically important to the broader study that informs this Article insofar that a universal “new federal common law” is emerging to regulate the global commons. A *jus gentium* may emerge *ad hoc* or it may emerge through good governance.

In making its decision the Supreme Court endorsed a new constitutional model of international climate law, one that derives from the object and purpose of the legislation. When a competent authority confers powers on a third party the mandate of the third party is to be legally binding, i.e. valid because it is legitimate and effective. Rather than displace equity, legislative codification gives effect to equity if it facilitates the fulfillment of rights and obligations through, *inter alia*, accountability, integrity, and temporality conferred on competent agencies. For the Supreme Court, “[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute ‘speak[s] directly to [the] question’ at issue.”³⁵⁷ The CAA clarifies that it is for the EPA to set emission standards and therefore “speaks directly to the question at issue.”³⁵⁸ Indeed, in comparison to federal judges, it makes sense that a specialized agency ought to be more equipped to leverage scientific, economic, and technological competence in deciding how to regulate emissions.

The agency can no longer argue that it does not have authority to regulate GHG emissions. In the event the EPA fails to be effective, i.e. “does not *set* emission limits for a particular pollutant or source of pollution,” then “States and private parties

354. *Id.* at 2537.

355. *Id.* at 2535 (internal citation omitted).

356. *See id.*

357. *Id.* at 2537 (internal citation omitted).

358. *See id.*

may petition for a rulemaking, and EPA's response will be reviewable in federal court."³⁵⁹ Simply stated, if the EPA does not carry out its statutory duties, the plaintiffs could end up back in the Supreme Court via a Court of Appeals review, and, ultimately, a petition for certiorari. However, "were EPA to decline to regulate [CO₂] emissions altogether at the conclusion of its . . . rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination."³⁶⁰ The decision thereby blocked states and non-state actors from going to the federal courts to file for public nuisance; but they could go to court to request a determination as to the scope and application of the CAA, subject to exhausting their avenues via the EPA first.

While the EPA currently "occupies the field" for making determinations under the CAA, a far more interesting question relates to the nature of the EPA's take on the rulemaking. To date, environmental lobbyists have been concerned about EPA's indecision, but EPA now knows that if it does not follow the nod of the Supreme Court that it could soon find itself in court again and be subject to review.

In addition, there are likely to be some complex multidimensional issues involved. With respect to trade, what will be the take on powerful private actors benefiting from states with weaker climate laws and then trading energy to stronger states, e.g. those that have adopted climate change norms through regional cap-and-trade programs?

The equitable tort of public nuisance is not closed. There is an evolving federal common law of the commons. Another interesting question concerns state nuisance, which depends on, *inter alia*, the preemptive effect of the CAA.³⁶¹ (A state law could be invalid if it contradicts a federal law). If a federal common climate law confers on the EPA then it could be argued that the EPA also has a duty to ensure that the CAA preempts any

359. *Id.* at 2538 (internal citations omitted).

360. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. at 2539.

361. *Id.* at 2540; *see generally* KENNETH STARR ET AL., *THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE*, AMERICAN BAR ASSOCIATION 27-29 (1991).

inconsistent state law.³⁶² In *American Electric Power*, the Supreme Court left the question of relief under state law open for consideration on remand.³⁶³ But the Court also referred to the Clean Water Act as not precluding plaintiffs from bringing a case for nuisance at the state level.³⁶⁴ The aforementioned trade-related cases that are at the nexus of competition law and climate law may well reappear as nuisance claims at the state level.

While the issue will be reviewed in conformity with the decision of the Supreme Court, it is still to be seen whether a Court of Appeals or the Supreme Court (if it gets that far) will consider the preemption of public nuisance claims. If so, will the relevant court look beyond causation to ascertain, first and foremost, whether emitting excessive carbon-dioxide pollutants is an equitable nuisance per se? If so, there will be no need to confine the hearing to statutory interpretation of a plethora of crisscrossing laws or to prove that such activity impinges on the enjoyment of life. Liability would be absolute and injury to the public, perhaps even injury to future generations, would be presumed by the nature of the very action of emitting excessive carbon dioxide. As a result, the right to relief would be established by averment and proof of the mere activity would be all that is needed. Even if the dispute on standing does move to incorporate causation, and causation is proved, there is always the issue of redressability with which to contend. The petitioners could counter-argue that the relief sought by the plaintiffs will not slow global warming or prevent future harm without much heavier commitments by the U.S. and other states to reductions in GHG emissions.

In terms of public nuisance, the flooding of a small Alaskan village may be the next major decision in climate law.³⁶⁵ In question is whether energy companies contributed to GHG emissions and rising sea levels that flooded and destroyed a

362. Cf. *Altria Group, Inc. v. Good*, 555 U.S. 70, 78-79 (2008) (explaining that the Public Health Cigarette Smoking Act of 1969 contains two express preemption provisions).

363. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011).

364. See *id.* (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987)).

365. See generally *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

native Alaskan village of Kivalina and displaced local villagers.³⁶⁶ Any future developments ought to be watched with keen interest, not only from the U.S. and common law countries, but also by the international community.

2. . . . And a Duty to Disclose

Advancing agreed guidelines at the global level remains important because climate change crosses borders and invokes a new law of the global commons. Giving effect to these guidelines is both an individual and collective responsibility. It also concerns state and non-state actor accountability. To bring these dynamics into the fold, this section provides an overview of some of the international framework issues for reporting under the UNFCCC. It introduces the role of corporate responsibility as a lead in to the following section, which compares and contrasts climate disclosure obligations in the U.S. with those in the U.K.

a. International Guidelines for National Communications

The UNFCCC COP adopted guidelines for the preparation of national communications by Annex I countries (decision 17/CP.7) and Non-Annex I countries (decision 17/CP.8) in 2002.³⁶⁷ In December 2011, the UNFCCC COP 17 reinforced in Durban that a shared vision for long term cooperation “should be guided by the principles of equity and common but differentiated responsibilities and respective capabilities,” an Article 3 (1) UNFCCC provision.³⁶⁸ In line with this direction, the COP meeting in Durban adopted new national guidelines for enhanced action on mitigation from developed and developing countries. These actions, which cover biennial reporting guidelines for both

366. *See id.* at 853.

367. UNFCCC, New Delhi, *supra* note 272.

368. United Nations Framework Convention on Climate Change, Durban, South Africa, Nov. 28-Dec. 11, 2011, *Report of the Conference of the Parties on its Seventeenth Session Addendum, Part Two: Action Taken by the Conference of the Parties at its Seventeenth Session: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, ¶ 160, U.N. Doc. FCCC/CP/2011/9/Add.1 (March 15, 2012).

developed and developing countries, and a registry for international support to developing countries, will be subject to international scrutiny.³⁶⁹

Besides obligations on developed countries, there is a legitimate expectation that developing countries will also honor their commitments consistent with their respective capabilities. Factors for consideration include needs assessments, the capacity to report on national greenhouse gas inventories, the capacity to inventory mitigation actions, and the capacity to report on all the aid received and dispensed from state and non-state actors. Whether the support received has been effective and produced results also requires examination by the entire global community. In short, work towards a common and effective accounting framework applicable to all will be essential to reinforcing a law of the global commons and strengthening a right to information as a fundamental “peoples” right.

At the end of 2012, the UNFCCC COP meeting in Qatar recognized this proposed approach to identifying “common elements” for developed countries insofar that the COP

decided to establish a work programme under the Subsidiary Body for Scientific and Technological Advice to continue the process of clarifying the quantified economy-wide emission reduction targets of developed country Parties, particularly in relation to the elements contained in decision 2/CP.17, paragraph 5, with a view to: (a) Identifying common elements for measuring the progress made towards the achievement of the quantified economy-wide emission reduction targets; (b) Ensuring the comparability of efforts among developed country Parties, taking into account differences in their national circumstances.³⁷⁰

369. *Id.* at 6-11.

370. United Nations Framework Convention on Climate Change, Doha, Nov. 26 - Dec. 8, 2012, *Report of the Conference of the Parties on its 18th Session Advance Unedited Version, Draft Decision*, ¶ 8, U.N. Doc. /CP.18 (Dec. 8, 2012) (discussing the agreed outcome pursuant to the Bali Action Plan, “(b) Enhanced national/international action on mitigation of climate change . . . (i) Measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country Parties, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances”). For information on national adaptation plans and least developed countries, see *id.*

Proper reporting is a critical aspect of the right to information. It will help to ensure a robust common accounting framework in order to facilitate transparency in counting emission reductions, avoid the double provision of national and international aid to developing countries, and help to measure and verify the tangible results of aid provided by a plurality of international actors. These issues lead naturally to a discussion on corporate responsibility.

b. Corporate Responsibility

Private companies gained a victory in *American Electric Power*. However, so-called procedural equity, which in this context is really a type of subjective equity, does not automatically foreclose liability. A recent vitality in the duty to disclose has sparked a series of obligations for non-state actors. Private companies are no longer immune to climate change regulations and disclosure of activities.

Indeed, for many companies there is an increasing concern with respect to reporting requirements—and rightly so. The world's largest companies are some of the main contributors to GHG emissions. According to the Carbon Disclosure Project's (CDP) 2011 Supply Chain Report, "the emissions of about 2,500 of the largest global corporations account for roughly 20-25% of the world's GHG emissions."³⁷¹ Writing in 2012, the CDP went further to say that "climate change has become a mainstream business issue."³⁷²

Not surprisingly, a number of companies seem to have little difficulty in quantifying the harm others cause them, yet these same companies often seem to be in a state of denial as to their concomitant obligations. When it comes to risk management and disclosure many companies are able to pinpoint precise geographical regions where harm occurs and set in place programs for compensation (albeit not necessarily in Alaska).

371. A.T. KEARNEY, CARBON DISCLOSURE PROJECT, SUPPLY CHAIN REPORT 2011: MIGRATING TO A LOW CARBON ECONOMY THROUGH LEADERSHIP AND COLLABORATION 1 (2011).

372. ACCENTURE, CDP SUPPLY CHAIN REPORT 2012: A NEW ERA: SUPPLIER MANAGEMENT IN THE LOW-CARBON ECONOMY ii (2012).

The 2012 CDP Supply Chain Report provides a number of examples. “PepsiCo estimates its total potential exposure to ingredients and agriculture from changes in climate at \$12 billion per year.”³⁷³ In response, PepsiCo helped its suppliers in Southern Chile to “upgrade their irrigation systems, leading to a 35% reduction in water use.”³⁷⁴ Walmart “estimated that its 60,000 suppliers contributed 72% of the company’s total emissions as of 2006.”³⁷⁵ In response, it focused on setting new energy targets in its top 200 factories in China.”³⁷⁶

While recognizing geographic self-harm from climate change and devising corrective solutions, companies acknowledge the difficulty in “determining a clear return on investment for supply chain measures.”³⁷⁷ In parallel, as companies take even more resolute strides to manage climate risk, investors ought to demand more rigorous accounting standards in GHG emissions disclosure. Improved legal standards could address traceability and exposure to water risk throughout the climate value chain. As CDP points out, not only do conglomerates have to be able to measure, quantify, and report their GHG emissions, but their suppliers must be able to do so also.³⁷⁸

For investors, the report launched by Mercer’s Responsible Investment team in February 2011, titled “Climate Change Scenarios - Implications for Strategic Asset Allocation,” observes that “climate policy could contribute as much as 10% to overall portfolio risk” over the next twenty years.³⁷⁹ Risk exposure is also prominent at the climate-water nexus. Recent disasters in Pakistan and Thailand are illustrative. “Hennes & Mauritz (H&M) reported a surprise 30% fall in profits in the first quarter of 2011, largely because the price of cotton doubled in the previous 12 months as a result of increased global demand and disruption to supplies caused by drought and floods in cotton

373. *Id.* at 7.

374. *Id.*

375. *Id.*

376. *See id.*

377. *Id.*

378. *See id.* at 9.

379. MERCER, CLIMATE CHANGE SCENARIOS - IMPLICATIONS FOR STRATEGIC ASSET ALLOCATION 1 (2011), available at <http://www.mercer.com/climatechange>.

producing countries like Pakistan.”³⁸⁰ Outsourcing to low-cost Thailand also came at a cost: “severe floods in this region in October 2011 caused a shortage in the supply of hard disks around the world.”³⁸¹ “In 2011 the Yangtze delta, which supports 400 million people and 40% of China’s economic activity, experienced its worst drought in 50 years . . . [and] led to power cuts that dampened manufacturing output, and disrupted distribution channels by closing river networks, including hundreds of kilometers of the Yangtze and its tributaries.”³⁸² While isolating a single root cause is near impossible, part of the problem is due to climate change.

A 2008 U.S. Securities and Exchange Commission (SEC) study flagged an additional investor concern when it “listed climate change as the number one risk facing the insurance industry.”³⁸³ The IPCC advances further and declares that there is a lack of insurer appetite to cover climate losses. As a result, investors are left with restricted, or non-existent, flood insurance due to the “high concentration of losses due to catastrophic floods.”³⁸⁴

On March 17, 2009, the National Association of Insurance Commissioners adopted a compulsory requirement for insurance companies to disclose financial risks from climate change to regulators.³⁸⁵ In addition, insurance companies have to report the actions they are taking to respond to those risks.³⁸⁶ An extract from the press release reads, “All insurance companies with annual premiums of \$500 million or more will be required to

380. ACCENTURE, *supra* note 372, at 14.

381. *Id.*

382. *Id.*

383. SEC Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010) (codified at 17 C.F.R. Parts 211, 231 & 241), *available at* <http://www.sec.gov/rules/interp/2010/33-9106fr.pdf>.

384. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE AND WATER, IPCC TECHNICAL PAPER ON CLIMATE CHANGE 75 (Bryson Bates et al. eds., 2008).

385. *See* Press Release, Nat’l Ass’n of Insurance Comm’rs, Insurance Regulators Adopt Climate Change Risk Disclosure (Mar. 17, 2009) (on file with author), *available at* http://www.naic.org/Releases/2009_docs/climate_change_risk_disclosure_adopded.htm.

386. *Id.*

complete an Insurer Climate Risk Disclosure Survey every year, with an initial reporting deadline of May 1, 2010.”³⁸⁷

Climate risk is an investment risk. Managing climate risk exposure gives impetus to the growing rise in socially responsible investment law. In March 2011, the Financial Times reported, “Twenty U.S. companies have agreed to take more account of environmental issues, such as water use and greenhouse gas emissions, as a result of investor resolutions, in a sign of increased pressure on industries, such as power generation and oil and gas production.”³⁸⁸ Ceres cites four climate change risks that will influence investment and impinge on investor decisions: physical risks, regulatory risks, litigation risks, and risks to reputation.³⁸⁹ Investors have a right to know about the extent of the climate risks. Companies have a duty to disclose.

Incumbent upon many companies is the duty to reveal information and to establish and maintain disclosure controls. It is equally important to ensure that information collection and dissemination is not an exercise for the sake of exercising. Companies should not be set under such pressures to search for unproven or unknown information simply to appease investor appetite.

Some companies are providing information about climate risk, their carbon footprints, and their initiatives to reduce them. Others are uncertain about their obligations and probably worry about the integrity of the data to be released. What is certain is that investors around the world are clamoring for relevant information. What is uncertain is how to discipline an information provision to uphold the subjective tests of equity, which are tests of effect. Such concerns may be unwarranted provided one may lift the corporate veil to discipline the right to

387. *Id.*

388. Ed Crooks, *US Companies Yield to Environmental Push*, FIN. TIMES, Mar. 7, 2011, <http://www.ft.com/intl/cms/s/0/ccc960a2-48eb-11e0-af8c-00144feab49a.html#axzz2B0UOefgO>.

389. See BERKLEY ADRIO, CERES, CLEARING THE WATERS: A REVIEW OF CORPORATE WATER RISK DISCLOSURE IN SEC FILINGS (June 2012), available at www.ceres.org/resources/reports/clearing-the-waters-a-review-of-corporate-water-risk-disclosure-in-sec-filings/view.

information by way of employing the proposed objective and subjective tests of equity.

3. Piercing the Veil

The following section compares and contrasts climate disclosure obligations in the U.S. with those in the U.K. Lifting the veil of incorporation may be just and equitable when it reveals that a constituent's freedoms and duties extend beyond its obligations to traditional stakeholders. A constituent with conferred powers may have common but differentiated obligations to the global community as a whole. It may play a pivotal role in giving effect to the universal constitutionalism of international climate law. This section thereby includes but goes beyond state responsibility. It demonstrates how mobilizing the right to information as a normative derivative of equity may affect shared responsibility and a unified architecture of human rights in the global commons.

a. Climate Disclosure Obligations in the U.S.

Controversies concerning climate change disclosure requirements are emerging at a rapid pace. Examples from the U.S. and the U.K. are illustrative. Controversies surround the Kyoto Protocol and instruments for "cap-and-trade." The U.S. has never ratified the Kyoto Protocol while Canada denounced the Protocol in December 2011.³⁹⁰ Conversely, the U.K. ratified the Kyoto Protocol. The U.S. has seen a number of recent cap-and-trade bills collapse before Congress. The U.K. has seen its climate change bill succeed before Parliament. Despite these radical departures, the duty to disclose climate change information remains equally pressing on both sides of the Atlantic.

In the U.S., the Waxman Markey cap-and-trade bill, also known as the American Clean Energy and Security Act of 2009,

390. *Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/items/3145.php (last visited Nov. 17, 2012); *Canada Pulls Out of, Denounces Kyoto Protocol*, CBSNEWS.COM, Dec. 13, 2011, http://www.cbsnews.com/8301-202_162-57341907/canada-pulls-out-of-denounces-kyoto-protocol/.

H.R. 2454,³⁹¹ passed in the House on June 26, 2009. However, it did not pass in the Senate insofar as it was placed on the Senate Legislative Calendar (July 7, 2009) and did not come up for a vote.³⁹²

The energy bill aimed “to create clean energy jobs, achieve energy independence, reduce global warming pollution and transition to a clean energy economy.”³⁹³ A cap-and-trade system would have introduced a broad range of carbon tariffs to foreign imports that did not comply with U.S. regulatory requirements for climate change. For the U.S., however, there would have been a broad range of export exceptions, rebates, and allowances. The bill foresaw derogations for developing countries; however, for foreign companies operating in the U.S., the U.S. would have in essence regulated their climate change regimes on a *de facto* basis through U.S. disclosure requirements.³⁹⁴ It would have been for the U.S. Administration to notify foreign countries of products that would not be exempted from certain aspects of the regulatory regime.³⁹⁵

In some ways the American Clean Energy and Security Act of 2009 (a bill) was a spin on the European Union’s Emission Trading Scheme. (Some of the proposed disclosure provisions gave rise to similar controversies in the context of regulating cross border aviation emissions, issues that will be discussed below). Given the structure of the bill’s discriminatory privileges, however, meant that it could have provided an even greater incentive to maximize rent seeking and minimize state responsibility for emission trading.

The Clean Energy Jobs and American Power Act is another relevant bill that introduces an economy-wide cap-and-trade

391. Related bills include H.R. RES 587, 111th Cong. (2009), American Clean Energy and Security Act of 2009, H.R. 2998, 111th Cong. (2009), and Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2010).

392. See *Bill Summary & Status, 111th Congress (2009 - 2010), H.R.2454*, THE LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.2454>: (last visited Nov. 17, 2012).

393. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

394. See *id.*

395. *Id.* § 765(c)(1).

program.³⁹⁶ Also known by its sponsor as the “Kerry-Boxer” bill, the bill was introduced September 30, 2009 and placed on the U.S. Senate’s Legislative Agenda under general orders on February 2, 2010.³⁹⁷ The “Kerry-Boxer” bill aims to “create clean energy jobs, promote energy independence, reduce global warming pollution, and transition to a clean energy economy.”³⁹⁸ By virtue of Economy-wide Emission Reduction Goals (Section 3; S.1733), the bill provides for the steady reduction in GHG emissions such that:

- (1) [I]n 2012, the quantity of United States greenhouse gas emissions does not exceed 97 percent of the quantity of United States greenhouse gas emissions in 2005; (2) in 2020, the quantity of United States greenhouse gas emissions does not exceed 80 percent of the quantity of United States greenhouse gas emissions in 2005; (3) in 2030, the quantity of United States greenhouse gas emissions does not exceed 58 percent of the quantity of United States greenhouse gas emissions in 2005; and (4) in 2050, the quantity of United States greenhouse gas emissions does not exceed 17 percent of the quantity of United States greenhouse gas emissions in 2005.³⁹⁹

Put differently, the bill sets goals to reduce U.S. GHG emissions below a 2005 baseline year.⁴⁰⁰ The goals are progressive: a reduction of three percent below the 2005 baseline by 2012,⁴⁰¹ twenty percent below the 2005 baseline by 2020,⁴⁰²

396. See Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. §§ 702, 703(a) (2009) (amended 2010); Victor B. Flatt, “Offsetting” Crisis? - Climate Change Cap-and-Trade Need Not Contribute to Another Financial Meltdown, 39 PEPP. L. REV. 619 (2012).

397. *Bill Summary & Status, 111th Congress (2009-2010), S.1733*, THE LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S1733>: (last visited Nov. 17, 2012).

398. Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) (amended 2010).

399. *Id.* § 3.

400. See *id.* § 3(1).

401. *Id.*

402. *Id.* § 3(2).

forty-two percent below the 2005 baseline by 2030,⁴⁰³ and eighty-three percent below the 2005 baseline by 2050.⁴⁰⁴

In sum, the Waxman Markey cap-and-trade bill did not manage to secure a Senate vote and the “Kerry-Boxer” bill remains on the Senate Legislative Calendar but has not progressed any further. A Congress reluctant to “cap-and-trade” is not, however, to say that Congress is reticent on the entire climate law issue. Congress has a long established history of recognizing climate rights. (The National Climate Program Act of 1978, the Global Climate Protection Act of 1987, the Global Change Research Act 1990 are pertinent examples; and, of course, the Bush Administration signed the UNFCCC in 1992).

Back in 2008, Congress found that there was a difference between regulating GHG emissions and studying the issues more thoroughly. The Consolidated Appropriations Act 2008 established a Climate Change Study Committee to investigate and study issues relating to global climate change, make recommendations as to needed steps, and facilitate a declaration of Congress’s existing findings.⁴⁰⁵ Section 430 of the Consolidated Appropriations Act 2008 stipulates clearly:

- (a) The Congress finds that - (1) greenhouse gases accumulating in the atmosphere are causing average temperatures to rise at a rate outside the range of natural variability and are posing a substantial risk of rising sea-levels, altered patterns of atmospheric and oceanic circulation, and increased frequency and severity of floods, droughts, and wildfires; (2) there is a growing scientific consensus that human activity is a substantial cause of greenhouse gas accumulation in the atmosphere; and (3) mandatory steps will be required to slow or stop the growth of greenhouse gas emissions into the atmosphere.
- (b) It is the sense of the Congress that there should be enacted a comprehensive and effective national program of mandatory, market-based limits and incentives on emissions of greenhouse gases that slow, stop, and reverse the growth of such emissions at a rate and in a manner that: (1) will not significantly harm the

403. *Id.* § 3(3).

404. *Id.* § 3(4).

405. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 114(a), 121 Stat. 1844, 1897 (2007).

United States economy; and (2) will encourage comparable action by other nations that are major trading partners and key contributors to global emissions.⁴⁰⁶

At an agency level the EPA's endangerment finding of December 2009, effective January 14, 2010, is important. "The Administrator finds that greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare."⁴⁰⁷ If the second circuit in *AEP v. Connecticut* were to be followed, an argument could be made that the endangerment finding establishes a de facto test of unreasonableness if a company continues to harm a public right. Proponents of this view might suggest that a company wrongfully causes an injury by wrongfully omitting to curb GHG emissions.

Giving legal security to the right to information through enhanced disclosure duties imposes a far more burdensome obligation on companies. It is rather peculiar that the failure to do so may open the door to hold non-state actors accountable anyhow. Companies will have to be ever more vigilant. U.S. companies with commercial presence in member states ratifying the Kyoto Protocol may of course fall under the ambit of Kyoto Compliance.⁴⁰⁸ Internally though, U.S. companies also have a number of disclosure obligations under federal security laws and regulations.

The SEC published interpretative guidance for public companies on climate change disclosure on February 8, 2010.⁴⁰⁹ The Commission's guidance regarding U.S. rules of disclosure refer, *inter alia*, to the framework of the requisite forms regulated by Regulation S-K and Regulation S-X,⁴¹⁰ and to certain material

406. *Id.* § 430.

407. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66495, 66497 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1).

408. See Kyoto Protocol, *supra* note 252.

409. SEC Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010) (codified at 17 C.F.R. Parts 211, 231 & 241), available at <http://www.sec.gov/rules/interp/2010/33-9106fr.pdf>.

410. *Id.* at 6293.

information required of Securities Act Rule 408 and Exchange Act Rule 12b-20.⁴¹¹

As early as the 1970s, the SEC issued guidance on the disclosure of material climate change information that could impact on a company's financial condition.⁴¹² The SEC considered the Supreme Court's referral in *Basic Inc. v. Levinson* to the materiality test evoked in *TSC Industries, Inc. v. Northway* (1976): "[T]o fulfill the materiality requirement, 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"⁴¹³ Any examination of the facts demands a systematic evaluation within the relevant regulatory context as to which facts are material.

The SEC briefly outlines specific disclosure requirements under Regulation S-K.⁴¹⁴ U.S. companies may disclose climate change information when describing their business under Item 101 of Regulation S-K;⁴¹⁵ but they must disclose capital costs, earnings, and competitive influences of a contingent, known, or certain material effect.⁴¹⁶ Item 101 is therefore focused on the economic and financial costs of compliance.⁴¹⁷ It is for the company to disclose whatever environmental information is material to future reporting cycles.⁴¹⁸

Item 103 of Regulation S-K provides for disclosure of climate change related litigation of a material effect.⁴¹⁹ To illustrate, if the dispute concerns environmental law, then the company must disclose an administrative or judicial proceeding if it is material

411. *Id.*

412. *Id.* at 6292-93.

413. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *see also* *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

414. Sec. & Exch. Comm'n, Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6293 (Feb. 8, 2010) (codified at 17 C.F.R. Parts 211, 231 & 241), *available at* <http://www.sec.gov/rules/interp/2010/33-9106fr.pdf> [hereinafter Sec. & Exch. Guidance].

415. *Id.*

416. *Id.*

417. *See id.*

418. *Id.*

419. *Id.*

to a company's business or financial condition. Item 103 also designates disclosure thresholds, which are indicative of information of a material effect.⁴²⁰

Item 303 of Regulation S-K requires a management discussion and analysis of the company's financial condition and operational results.⁴²¹ It provides the opportunity for investors to see a company through the manager's eyes and through a qualitative and far more subjective discussion of the business. The enquiry is two-fold. First, is the uncertainty of a trend or event reasonably likely to occur or is there a conjecture of a knowable possibility?⁴²² (There is an assumption of uncertainty unless management can conclude otherwise).⁴²³ Second, if the trend or event is reasonably likely to occur, or a knowable possibility could be of a material effect, then the company must disclose.⁴²⁴ (Non-disclosure can only be justified when management can determine that the occurrence of the trend or event is not reasonably likely to have a material effect on the company).⁴²⁵

Significant climate change factors may well lead to relevant industry, company, or investment risks, and there is a growing tendency for companies to abide by disclosing specific risks rather than simply using boilerplate templates. Climate change disclosure may therefore also concur with the disclosure of risk factors by virtue of Item 503(c) of Regulation S-K.⁴²⁶

In sum, the SEC identifies Items 101, 103, 303, and 503(c) of Regulation S-K as potential "triggers" of climate change disclosure.⁴²⁷ In addition, certain states have their own particularities. Some require CO₂ emissions reporting, such as for electricity companies.⁴²⁸

420. Sec. & Exch. Guidance, *supra* note 414.

421. *Id.* at 6294.

422. *Id.* at 6295.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.* at 6295-96.

427. Jeffery M. McFarland, *Warming Up to Climate Change Risk Disclosure*, 14 *FORDHAM J. CORP. & FIN. L.* 281, 290 (2009).

428. *Id.* at 304.

A 2011 Ceres report evaluated the degree to which U.S. companies reporting is consistent with SEC guidelines. The report entitled, “Disclosing Climate Risks: A Guide for Corporate Executives, Attorneys & Directors” reads, “Despite the SEC guidance, this report’s review of companies’ most recent 10-K filings shows that improvements in climate risk disclosure have been incremental at best. And while voluntary reporting on climate risks is helpful, it is not sufficient.”⁴²⁹ The SEC points out too that voluntary company disclosure can in no way become a substitute for a cohesive *de jure* governing framework of conformity and compliance regulation.⁴³⁰ Such pitfalls have already been observed at the international level.

While there are critics, the U.S. has not only long recognized the importance of climate rights, but also of building a comprehensive national policy and *de jure* frameworks for climate change disclosure. The National Environmental Policy Act of 1969 establishes a national policy for the environment,⁴³¹ provides for the establishment of a Council on Environmental Quality,⁴³² and sets out detailed information and impact assessment requirements.⁴³³ The Environmental Impact Statement required by NEPA is an environmental disclosure document.⁴³⁴

Moreover, the Mandatory Reporting of Greenhouse Gases Rule (40 C.F.R Part 98) was an EPA response to the Consolidated Appropriations Act 2008 and has legal authority under its existing CAA authority.⁴³⁵ In its summary, the “Part 98” Rule reads:

429. JIM COBURN ET AL., CERES, DISCLOSING CLIMATE RISKS & OPPORTUNITIES IN SEC FILINGS: A GUIDE FOR CORPORATE EXECUTIVES, ATTORNEYS & DIRECTORS 2 (2011) (“Ceres is a national coalition of investors, environmental groups[,] and other public interest organizations working with companies to address sustainability challenges such as global climate change.”).

430. *Id.* at 4.

431. 42 U.S.C. § 4331 (1970).

432. 42 U.S.C. § 4342 (1970).

433. *See* 42 U.S.C. §§ 4321-4347 (1970).

434. 42 U.S.C. § 4332(C)(i) (1975); *see also* *Climate Change*, US EPA, <http://epa.gov/climatechange/index.html> (last visited Feb. 26, 2012).

435. 40 C.F.R. § 98 (issued by the EPA in response to the Consolidated Appropriations Act of 2008).

EPA is promulgating a regulation to require reporting of greenhouse gas emissions from all sectors of the economy. The final rule applies to fossil fuel suppliers and industrial gas suppliers, direct greenhouse gas emitters and manufacturers of heavy-duty and off-road vehicles and engines. The rule does not require control of greenhouse gases, rather it requires only that sources above certain threshold levels monitor and report emissions.⁴³⁶

The Greenhouse Gas Reporting Program (GHGRP) under Part 98 requires reporting of GHG data and other relevant information from large sources and suppliers in the US. The EPA's achievement in releasing 2010 nationwide GHG emissions data for large facilities and suppliers on January 11th 2012 is significant. For the first time, comprehensive GHG emissions information was publically available across nine industry groups, including twenty-nine source categories, which directly emit GHG emissions in large quantities.⁴³⁷

Part 98, as operated under EPA's GHGRP, has also given rise to business concerns regarding the business impact from disclosure and the use of confidential data.⁴³⁸ These concerns pushed the consideration of three deferral actions into 2011.⁴³⁹ Determinations remained on proposals to change reporting dates for certain data elements, to defer the reporting date for certain data elements, and to extend the comment period on inputs to emission equations.⁴⁴⁰

The EPA made further progress in 2012. On February 24, 2012, the EPA issued a proposal to determine which data elements reported under subpart W of Part 98 (petroleum and natural gas) would or would not be entitled to confidential

436. Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56260 (Oct. 30, 2009) (to be codified at 40 C.F.R. pts. 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1051, 1054, 1065).

437. Press Release, US EPA, 2010 Greenhouse Gas Emissions Data from Large Facilities Now Available / First Release of Data Through the National GHG Reporting Program (Jan. 11, 2012) (on file with author).

438. *Id.*

439. *Id.*

440. *Id.*

treatment under the CAA.⁴⁴¹ These data elements were to be reported to EPA for the first time in September 2012. In addition, this proposed rule proposes to defer the deadline for reporting some recently added subpart W data reporting elements that are “inputs to emission equations” until 2015. An EPA notice of October 26, 2012, informs that certain named contractors will be permitted to access confidential business information submitted to EPA under the GHGRP “no sooner than November 6, 2012.”⁴⁴² Materiality (an objective test) and access (a subjective test) have thereby become the linchpins of U.S. climate disclosure.

EPA’s obligatory reporting rule reinforces the duty to a reasonable investor. It should therefore come as no surprise that shareholder activism for companies to disclose information is mounting. Concerns arise about how companies manage climate litigation risk. Whether a company’s information disclosure is keeping up with its peers is another factor that affects share price.

Enacting positive shareholder rights with concomitant proactive (anticipatory) and reactive (responsive) obligations on private companies is another pathway to meet the subjective tests of equitable rights to information. Rule 14a-8 of the U.S. Securities Exchange Act of 1934 provides an opportunity for a shareholder to have his or her proposal included in the company’s proxy materials for presentation to a vote at an annual or special meeting.⁴⁴³ In general, the company is to include the shareholder’s proposal as long as it is valid and follows certain procedures.⁴⁴⁴ The proposal may be excluded if it falls within one of the substantive bases for exclusion.⁴⁴⁵

441. Proposed Confidentiality Determinations for the Petroleum and Natural Gas Systems Source Category, and Amendments to Table A-7 of the Greenhouse Gas Reporting Rule, 77 Fed. Reg. 11039 (proposed Feb. 24, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/pdf/2012-4320.pdf>.

442. Access by EPA Contractors To Confidential Business Information Related to the Greenhouse Gas Reporting Program, 77 Fed. Reg. 65377 (Oct. 26, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-10-26/pdf/2012-26425.pdf>.

443. 17 C.F.R. § 240.14a-8 (2011).

444. *See id.*

445. *Id.* § 240.14a-8(f).

On November 15, 2011, the National Centre for Public Policy Research submitted its climate change risk disclosure proposal to General Electric (GE).⁴⁴⁶ The proposal reads: “The shareholders request that the Board of Directors prepare by November 2012, at reasonable expense and omitting proprietary information, a report disclosing the business risk related to developments in the scientific, political, legislative and regulatory landscape regarding climate change.”⁴⁴⁷ The sticking point for the National Centre for Public Policy Research is that GE may omit the proposal under Rule 14a-8(i)(12) if it “relates to substantially the same subject matter as three previously submitted proposals and the most recently submitted of those proposals did not receive the support necessary for resubmission.”⁴⁴⁸

Demands on ExxonMobil are also illustrative of a similar argument of a proposal falling into an excluded category due to prior submission of a similar proposal. The Corporate Responsibility Agent of the Province of St. Joseph of the Capuchin Order and supporters filed a resolution for inclusion in the proxy statement for the next annual meeting of ExxonMobil shareholders on December 6, 2011. The proposal if resolved and not withdrawn, would have required

ExxonMobil’s Board of Directors create a Climate Future Task Force including outside climate change experts to study how, like the insurance industry, ExxonMobil, at all levels, will “factor climate change into their models for measuring, pricing, and distributing risk” and other alternatives to its existing business model that depends on continued fossil fuel production and marketing. Barring competitive information, its conclusions shall

446. Letter from Amy Ridenour, Chairman, Nat’l Ctr. for Pub. Policy Research, to Brackett B. Denniston, Sec’y, Gen. Elec. Co. (Nov. 14, 2011) (on file with SEC at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/nationalcenter011912-14a8.pdf>).

447. *Id.* at 21.

448. E-mail from Ronald O. Mueller, Gibson, Dunn & Crutcher LLP, to Office of Chief Counsel, Div. of Corp. Fin., Sec. & Exch. Comm’n (Dec. 12, 2011) (on file with SEC at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/nationalcenter011912-14a8.pdf>).

be shared with requesting shareholders at reasonable cost within a year of the annual meeting.⁴⁴⁹

However, all indications in correspondence of the SEC as at February 10, 2012, suggested that Exxon Mobile would include a proposal submitted by The Sisters of St. Dominic of Caldwell, New Jersey in its proxy materials for its upcoming annual meeting of security holders.⁴⁵⁰ The St. Dominic Proposal provides:

Resolved: Shareholders request that the Board of Directors adopt quantitative goals, based on current technologies, for reducing total greenhouse gas emissions from the Company's products and operations; and that the Company report to shareholders by November 30, 2012, on its plans to achieve these goals. Such a report will omit proprietary information and be prepared at reasonable cost.⁴⁵¹

Collective action eventually led to ExxonMobil including Greenhouse Gas Emissions Goals in its Notice of 2012 Annual Meeting and Proxy Statement (item 9).⁴⁵² While recommending a vote against the proposal, the ExxonMobil Board did make several relevant statements. To quote, "As ExxonMobil seeks to increase production of oil and gas to meet growing global energy demand and to maintain leadership in return to shareholders, the Company will continue taking steps to improve efficiency, reduce

449. Email from Elizabeth A. Ising, Gibson, Dunn & Crutcher LLP, to Office of Chief Counsel, Div. of Corp. Fin., Sec. & Exch. Comm'n (Jan. 23, 2012) (on file with SEC at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/provinceofstjoseph021012-14a8.pdf>).

450. Letter from Michael J. Reedich, Special Counsel, Div. of Corp. Fin., Sec. & Exch. Comm'n, to Elizabeth A. Ising, Gibson, Dunn & Crutcher LLP (Feb. 10, 2012) (on file with SEC at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/provinceofstjoseph021012-14a8.pdf>).

451. Letter from Gwendolen Noyes, to David Rosenthal, Corp. Sec'y, Exxon Mobil Corp. (Dec. 14, 2011) (*see* Encl. Reduce Greenhouse Gas Emissions), *available at* <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/sistersofstdominic021012-14a8.pdf>.

452. EXXONMOBIL, NOTICE OF 2012 ANNUAL MEETING AND PROXY STATEMENT 71-72 (2012), *available at* http://www.sec.gov/Archives/edgar/data/34088/000119312512160085/d277949ddef14a.htm#toc277949_23.

emissions, and contribute to effective long-term solutions to manage climate risks.”⁴⁵³

To summarize, it would in fact be difficult for the SEC to decide that study groups and quantitative goals are similar when Congress believes otherwise. In terms of climate adaptation and mitigation, it is likely that socially responsible investing will grow in populism if company’s negotiations with investors fold. Companies therefore have an added incentive to respond. The issues tabled illustrate not only the relevancy of a right to information but also the capacity and willingness of people to leverage a public concern through private international law. Indeed, if existing human rights architecture in public international law is found wanting in the era of climate change, and is not yet developed sufficiently to respond to the subjective test of equity, third generation rights, peoples’ rights or a *jus gentium*, then private international law may be a more responsive avenue for collective action and the enforcement of extraterritorial human rights. Climate justice movements are yet to seize this opportunity.

b. Climate Disclosure Obligations in the U.K.

Turning to the U.K. case study, not only did party manifestos commit to rigid targets and a low-carbon economy, but Parliament did as well. Rigorous emissions reduction mitigation targets and a framework for adaptation were made law when the U.K. enacted the Climate Change Act by Royal Assent on November 26, 2008 (CCA 2008).⁴⁵⁴ The CCA 2008 establishes the framework for the U.K.’s low carbon economy. It sets legally binding GHG emission reduction targets,⁴⁵⁵ provides impetus for climate change adaptation,⁴⁵⁶ establishes an institutional structure, including the establishment of a body corporate to be known as the Committee on Climate Change,⁴⁵⁷ confers powers to

453. *Id.*

454. U.K. Climate Change Act, 2008, c. 27.

455. *Id.* pt. 1.

456. *Id.* pt. 4.

457. *Id.* pt. 2.

create and regulate trading schemes,⁴⁵⁸ and provides financial incentives to reduce domestic waste and improve recycling and other connected purposes.⁴⁵⁹

In terms of carbon target and budgeting, the CCA 2008 establishes a duty on the Secretary of State “to ensure that the net UK carbon account for the year 2050 is as least 80% lower than the 1990 baseline.”⁴⁶⁰ “[F]or the budgetary period including the year 2020,” the U.K. commits to reductions in the net carbon account (the carbon budget) of “at least 26% lower than the 1990 baseline.”⁴⁶¹ (The “1990 baseline” is the aggregate amount of net U.K. carbon dioxide emissions in 1990, and net U.K. emissions for other targeted greenhouse gases for their respective base years).⁴⁶² Other targeted GHG include methane, nitrous oxide, hydroflourocarbons, perfluorocarbons, sulphur hexafluoride, and any “other greenhouse gas designated as a targeted greenhouse gas by order made by the Secretary of State.”⁴⁶³ Under strict conditions, such as changes in scientific knowledge or changes in international or EU law, a government order and affirmative Parliamentary procedure may amend both the baseline and the target.⁴⁶⁴ U.K. reduction targets therefore govern a robust legal duty albeit subject to amendment under rigorous conditions.

Carbon budgets govern the attainment of the targets.⁴⁶⁵ The first three carbon budgets, which cap emissions over five-year periods, were set in law following the 2009 Budget.⁴⁶⁶ The U.K. committed to cut the U.K.’s greenhouse gas emissions, compared to 1990 levels, by twenty-two percent in the current period [2008-2012], twenty-eight percent in the period centered on 2015 [2013-2017], and thirty-four percent in the period centered on 2020 [2018-2022].⁴⁶⁷ While the U.K.’s legally binding target sets

458. *Id.* pt. 3.

459. *Id.*

460. *Id.* pt. 1, § 1(1).

461. U.K. Climate Change Act, 2008, c. 27, pt. 1, § 5(1)(a).

462. *Id.* pt. 1, § 1(2).

463. *Id.* pt. 1, § 24(1).

464. *Id.* pt. 1, § 2.

465. *Id.* pt. 1, § 4.

466. *Id.*

467. HM GOV’T, THE UK LOW CARBON TRANSITION PLAN: NATIONAL STRATEGY FOR CLIMATE AND ENERGY 36 (2009).

emissions reduction targets to be at least twenty-six percent lower than the 1990 baseline in 2020,⁴⁶⁸ the key interim target is for a thirty-four percent reduction by 2020.⁴⁶⁹

In terms of reporting, the Government must prepare and report to Parliament on policies and proposals to meet the established carbon budgets pursuant to sections 13 and 14 of the CCA 2008.⁴⁷⁰ The Committee on Climate Change established pursuant to Part 2, section 32(1) of the Climate Change Act, also has broad responsibilities for reporting and information dissemination.⁴⁷¹ The Committee's proactive (anticipatory) obligations include submitting annual reports to Parliament on the U.K.'s progress towards the targets and budgets,⁴⁷² providing advice in connection with carbon budgets,⁴⁷³ and engaging in consultation with national authorities.⁴⁷⁴ The Committee also has ancillary anticipatory powers, such as to conduct and publish research and analysis.⁴⁷⁵ In terms of reactive obligations to respond to information requests, the Committee is to report on carbon targets and budgeting.⁴⁷⁶

At a sectoral level, the Committee on Climate Change, established as an independent body under the CCA 2008, is to advise government as to whether international aviation and shipping emissions should fall under the ambit of the Act or explain to Parliament why not by December 31, 2012.⁴⁷⁷ If the government excludes aviation and shipping then other sectors will have to compensate accordingly. It is hard to imagine that other sectors could compensate for the entire shortfall. This position was taken into consideration in April 2012 when the CCC advised Government to include international aviation and shipping. A decision has to be made by the end of the year.

468. U.K. Climate Change Act, 2008, c. 27, pt. 1, § 5(1)(a).

469. HM GOV'T, *supra* note 467, at 36.

470. U.K. Climate Change Act, 2008, c. 27, pt. 1, §§ 13, 14.

471. *Id.* pt. 2, § 32(1).

472. *Id.* pt. 2 § 36(1).

473. *Id.* pt. 2 § 34(1).

474. *Id.* pt. 2 § 33(4).

475. *Id.* pt. 2 § 39(3).

476. *Id.* pt. 2 § 36.

477. *Id.* pt. 1 § 30(3).

Publication of a Sustainable Framework for U.K. Aviation is also relevant in this context.⁴⁷⁸ According to the Secretary of State for Transport, the framework could be adopted by March 2013.⁴⁷⁹

The U.K. government published a response to the 2009 Aviation Report on August 25, 2011. Pursuant to the CCA 2008 (Section 30),⁴⁸⁰ the U.K. Government is revising its regulations implementing aviation EU Emissions Trading System (ETS),⁴⁸¹ to ensure all aircraft operators that meet the criteria for regulation by the U.K. can come under the umbrella of U.K. regulators. The challenge is that U.K. law no longer resides in isolation from EU law or international law. Controversies arise at the nexus of other regimes, climate and trade law being a prime example.

At a European level, the “Aviation directive” (2008/101/EC), was due for transposition into national legislation by February 2010.⁴⁸² Collection of annual emissions data for aircraft operators also began in 2010. Aircraft operators covered by the EU’s ETS were to apply to their “competent authority” (regulator) for a share of free CO₂ allowances available from the 2010 benchmarking process by March 31, 2011.⁴⁸³ Each aircraft operator is to submit allowances to the “competent authority” to

478. DEP’T FOR TRANSP., GOVERNMENT RESPONSE TO THE COMMITTEE ON CLIMATE CHANGE REPORT ON REDUCING CO₂ EMISSIONS FROM UK AVIATION TO 2050 1 (2011).

479. Dep’t for Transp., *Written Statement: Developing a Sustainable Framework for UK Aviation: Scoping Document*, GOV.UK (Mar. 29, 2011), <https://www.gov.uk/government/speeches/developing-a-sustainable-framework-for-uk-aviation-scoping-document>; DEP’T FOR TRANSP., DEVELOPING A SUSTAINABLE FRAMEWORK FOR UK AVIATION: SCOPING DOCUMENT, SUMMARY OF RESPONSES (2012).

480. U.K. Climate Change Act, 2008, c.27, pt. 1, § 30.

481. Directive 2003/87, of the European Parliament and of the Council of 13 October 2003, 2003 O.J. (L 275) 1 (EC) (amending Directive of the European Parliament and Council 96/61/EC(5), as amended by Directive 2004/101/EC); Directive 2009/29/EC, of the European Parliament and of the Council of 23 April 2009, 2009 O.J. (L 140/63) (EC) (amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community).

482. Directive 2008/101/EC, of the European Parliament and of the Council of 19 November 2008, 2008 O.J. (L 8/3) (amending Directive 2003/87/EC to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community).

483. *Id.*

cover annual emissions by April of the following year.⁴⁸⁴ Similar requirements exist for other emitters covered by the EU's ETS. In terms of shipping, on November 3, 2011, a CCC review recommended that the U.K.'s share of international shipping, which could account for up to eleven percent of total emissions permitted under the Climate Change Act by 2050, be included in the 2050 target.⁴⁸⁵

The CCC's 2012 progress report is consistent with these earlier opinions but it is yet to consider the extraterritorial effect of such decisions. Trying to regulate international operations, such as aviation and shipping, is certain to attract mounting criticism of discrimination and breach of sovereignty if such laws try to extend outside of their territorial jurisdiction or apply domestic measures with extraterritorial implications.⁴⁸⁶ (The Article will highlight some of these complications concerning the law of the global commons after providing some further background).

Returning to the U.K., the CCC concluded in April 2012 that there is no longer any reason to account for international aviation and shipping emissions differently to those from other sectors (e.g. power, buildings, and surface transport). To do so, would create uncertainty. According to the CCC,

[t]here are no additional costs associated with inclusion of international aviation and shipping, given that these reflect commitments that have already been made (i.e. to currently legislated budgets, to inclusion of aviation in the EU ETS, and to the IMO's policy for reducing shipping emissions). The overall costs associated with meeting a 2050 target that includes international aviation and shipping emissions, of the order of 1-

484. *Id.*

485. *CCC Review Suggests that the UK's Share of International Shipping Emissions Should be Included in Climate Targets*, COMM. ON CLIMATE CHANGE (Nov. 3, 2011), <http://www.theccc.org.uk/news/press-releases/1104-ccc-review-suggests-that-the-uks-share-of-international-shipping-emissions-should-be-included-in-climate-targets-3-nov-20>.

486. Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change*, 2011 E.C.R., available at <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=117193&occ=first&dir=&cid=306423>

2% of 2050 GDP, were accepted at the time the Climate Change Act was legislated.⁴⁸⁷

Yet, at the same time, there is a great deal of controversy. The EU's measures, and those of the U.K., must be WTO compliant. If not, they could potentially be open to challenge in the WTO (perhaps as a claim of discriminatory treatment under the GATT or in consideration of a potential GATS claim). In defense, there may be justification for an inconsistent measure by relying on an Article XX GATT exception or even by invoking international law and the novel idea of an Article XI security exception now that the U.N. has linked climate change to a potential global security crisis. An international boycott could also put an end to the scheme in its intended format.

In the U.S. a bill (H.R. 2594), entitled "European Union Emissions Trading Scheme Prohibition Act of 2011," intends to prohibit U.S operators of civil aircraft from participating in the European Union's emissions trading scheme, and it has other purposes. The bill was received in the Senate October 31, 2011 and referred to the Committee on Commerce, Science and Transportation December 17, 2011.⁴⁸⁸ Senator John Thune's bill, also entitled "European Union Emissions Trading Scheme Prohibition Act of 2011," was introduced in the Senate July 12, 2011. It found more success. It was presented to the President November 16, 2012, signed November 27, 2012, and became public law No: 112-200.⁴⁸⁹ According to *The Economist*, reports of February 6, 2012, indicated that China had provisionally barred its airlines from participating in the EU's ETS scheme.⁴⁹⁰ Then at the end of the year, on November 12, 2012, Connie Hedegaard, the European Commissioner for Climate Action, "announced that

487. UK COMM. ON CLIMATE CHANGE, MEETING CARBON BUDGETS – 2012 PROGRESS REPORT TO PARLIAMENT 77 (June 2012), *available at* http://hmccc.s3.amazonaws.com/2012%20Progress/CCC_Progress%20Rep%202012_bookmarked_singles_1.pdf.

488. European Union Emissions Trading Scheme Prohibition Act of 2011, H.R. 2594, 112th Cong. (2011).

489. European Union Emissions Trading Scheme Prohibition Act of 2011, Pub. L. No. 112-200, 126 Stat. 1477 (2011).

490. J.A., *China and Europe's Emission-Trading Scheme, Not free to fly*, *ECONOMIST* (February 8, 2012, 06:55 PM), <http://www.economist.com/blogs/schumpeter/2012/02/china-and-europes-emission-trading-scheme>.

the European Union would defer the requirement under the EU Emissions Trading System for airlines to surrender allowances for flights into and out of Europe.”⁴⁹¹

These controversies illustrate yet again that governance of international climate law urges the need for a new legal architecture to regulate the global commons. The Kyoto Protocol provides some guidance but it is a plurilateral agreement that does not include all parties.⁴⁹² The UNFCCC framework is a universal framework and could perhaps serve as a better lever to find a multilateral solution in accord with common but differentiated responsibilities and by working with the International Civil Aviation Organization and the International Maritime Organization, respectively. Decisions of the UNFCCC COP 17 meeting in Durban support this direction. Under “Cooperative sectoral approaches and sector-specific actions, in order to enhance the implementation of Article 4, paragraph 1(c), of the Convention,” the “Parties agreed to continue [their] consideration of issues related to addressing emissions from international aviation and maritime transport.”⁴⁹³

Finding appropriate solutions to these polemics will impinge on the implementation of the U.K’s climate change legislation and implementing instruments. The U.K’s CCA 2008 also provides for trading schemes and sets out the scope for devolved authorities to create two types of trading regulations.⁴⁹⁴ Cap-and-trade schemes limit activities that consist of, cause, or

491. *Connie Hedegaard: “EU Willing to ‘Stop the Clock’ on Aviation in the EU ETS for Flights Into and Out of Europe Until After the ICAO General Assembly Next Autumn,”* EUR. COMM’N NEWS (Dec. 11, 2012), http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2012-11-12_01_en.htm.

492. Kyoto Protocol, *supra* note 252, art. 10(2)2 (“The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.”).

493. United Nations Framework Convention on Climate Change, Durban, South Africa, Nov. 28-Dec. 11, 2011, *Report of the Conference of the Parties on its Seventeenth Session, Decision 2/CP.17 Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, para. 78, U.N. Doc. FCCC/CP/2011/9/Add.1.

494. U.K. Climate Change Act, 2008, c. 27, pt. 3, § 44.

contribute to GHG emissions.⁴⁹⁵ Incentive schemes aim to reduce or remove GHG emissions and any cause thereof or contribution thereto.⁴⁹⁶ Schedule 2 to the CCA 2008 sets out information that must be incorporated within the regulations.⁴⁹⁷

Part 4 of the CCA 2008 pertains to adaptation. It includes comprehensive reporting and information obligations. The Secretary of State is to lay climate change risk assessment reports before Parliament at least once every five years and a program setting out how the Government will respond to those risks.

Sections 83, 84, and 85 of the CCA 2008 provide very specific provisions about company reporting and an action plan for government.⁴⁹⁸ Section 83 of the Climate Change Act mandated the U.K. government to provide guidance on GHG emission reporting by October 1, 2009.⁴⁹⁹ The U.K.'s Department for Environment, Food and Rural Affairs (DEFRA), in partnership with the Department for Energy and Climate Change (DECC), published guidance for U.K. organizations in September 2009.⁵⁰⁰ The report sets out guidelines on measuring GHG emissions and setting targets by which to reduce GHG emissions.⁵⁰¹ In the spirit of multi-nodal governance, a small business user guide was also produced.⁵⁰² The U.K.'s reporting guidance is based on World Resources Institute and World Business Council for Sustainable Development's standard entitled the "GHG Protocol's Corporate Standard," which provides guidance for organization on preparing inventories of GHG emissions and targets for their reduction.⁵⁰³

495. *See id.*

496. *See id.*

497. *Id.* pt. 3 § 46.

498. *See id.*

499. *Id.* pt. 5 § 83.

500. *See* DEP'T FOR ENV'T, FOOD & RURAL AFFAIRS, GUIDANCE ON HOW TO MEASURE AND REPORT YOUR GREENHOUSE GAS EMISSIONS (2009).

501. *Id.*

502. *See* DEP'T FOR ENV'T, FOOD & RURAL AFFAIRS, SMALL BUSINESS USER GUIDE: GUIDANCE ON HOW TO MEASURE AND REPORT YOUR GREENHOUSE GAS EMISSIONS (2009).

503. *Corporate Standard*, GREENHOUSE GAS PROTOCOL, <http://www.ghgprotocol.org/standards/corporate-standard> (last visited Feb. 26, 2012).

Pursuant to Section 84 of the Climate Change Act 2008, the U.K.'s Secretary of State was tasked with laying a report on the "contribution of reporting to climate change objectives" to the U.K. Parliament before December 1, 2010.⁵⁰⁴ In accord with its obligations, DEFRA published the report in November 2010.⁵⁰⁵ The report includes an assessment on disclosure duties and assesses how investors use climate change information but it does not go as far to recommend mandatory disclosure.⁵⁰⁶

Other issues arise when considering whether company disclosure should be voluntary or mandatory. In 2010, a U.K. report on "the contribution that reporting of greenhouse gas emissions makes to the UK meeting its climate change objectives: a review of the current evidence" found that "62% of FTSE all-share companies reported quantified figures on climate change or energy use in their 2009 annual reports and 22% are disclosing absolute figures on their total GHG emissions, showing improved performance since 2004."⁵⁰⁷ Thus akin to the U.S., market dynamics and investor demands seem to be pushing for greater transparency in any event. These sentiments are reflected in section 85 of the CCA 2008.

Section 85 (1) of the CCA 2008 obliged the Secretary of State, by no later than April 6, 2012, to:

- (a) make regulations under section 416(4) of the Companies Act 2006 (c. 46) requiring the directors' report of a company to contain such information as may be specified in the regulations about emissions of greenhouse gases from activities for which the company is responsible, or
- (b) lay before Parliament a report explaining why no such regulations have been made⁵⁰⁸

504. U.K. Climate Change Act, 2008, c. 27, pt. 5, § 84.

505. See DEP'T FOR ENV'T, FOOD & RURAL AFFAIRS, THE CONTRIBUTION THAT REPORTING OF GREENHOUSE GAS EMISSIONS MAKES TO THE UK MEETING ITS CLIMATE CHANGE OBJECTIVES: A REVIEW OF THE CURRENT EVIDENCE (2010) [hereinafter A REVIEW OF THE CURRENT EVIDENCE], available at <http://www.defra.gov.uk/environment/business/reporting/pdf/corporate-reporting101130.pdf>.

506. *Id.*

507. A REVIEW OF THE CURRENT EVIDENCE, *supra* note 505, at 7.

508. U.K. Climate Change Act, 2008, c. 27, pt. 5, § 85.

DEFRA launched a public consultation on the “Further Promotion of Consistent Corporate Reporting of Greenhouse Gas Emissions” on May 11, 2011, and invited views by July 5, 2011, on how to promote widespread and consistent reporting by U.K. companies.⁵⁰⁹ An impact assessment was made publically available on May 20, 2011.⁵¹⁰ Besides business as usual with no policy change, the assessment identified four specific options: enhanced voluntary reporting (option 1), mandatory GHG reporting under the Companies Act for all quoted companies (option 2), mandatory GHG reporting under the Companies Act for all large companies (option 3), and mandatory GHG reporting for all companies meeting an energy use criteria (option 4).⁵¹¹ DEFRA published a summary of the consultation responses in June 2012.⁵¹² The Article presents an overview of the main findings below.

In general, participants responding to the consultation consider that option 1, enhanced voluntary reporting, will not level the playing field or improve consistency in reporting.⁵¹³ Besides, many voluntary schemes are already available. As to option 2, mandatory reporting for quoted companies, there is a general view that quoted companies should be held to account but the disadvantages include missing large private companies, the number is too few and it targets those who are already likely to report.⁵¹⁴ Option 3, mandatory reporting for large companies, was clearly a favorite although the majority of trade associations and professional bodies and a sizeable minority of companies supported voluntary reporting rather than regulation.⁵¹⁵ An

509. Letter from Alice Douglas, Dep’t for Env’t Food & Rural Affairs, to Consultee (May 11, 2011) (on file with author), *available at* www.defra.gov.uk/consult/files/110511-ghg-emissions-letter1.pdf.

510. See DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, IMPACT ASSESSMENT OF OPTIONS FOR COMPANY GHG REPORTING (2011), *available at* <http://www.defra.gov.uk/consult/files/110511-ghg-emissions-ia1.pdf>.

511. *Id.* at 1.

512. See DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, MEASURING AND REPORTING OF GREENHOUSE GAS EMISSIONS BY UK COMPANIES, SUMMARY OF CONSULTATION RESPONSES (2012), *available at* <http://www.defra.gov.uk/consult/files/20120620-ghg-consult-sumresp.pdf>.

513. *Id.* at 5.

514. *Id.* at 5-6.

515. *Id.* at 6.

added advantage of company reporting was to facilitate companies to monitor and manage supply chain emissions.⁵¹⁶ There would therefore be a trickle-down effect to smaller companies. Disadvantages include disproportionate administrative costs and a heavy burden on new reporters. Option 4's focus on energy intensive businesses is material but these companies are likely to be reporting already.⁵¹⁷ Option 4 is also complex. It is not consistent with the Companies Act and participants responding to the consultation believed that numerous exclusions and derogations could potentially weaken reporting anyhow.⁵¹⁸ Besides these four options, participant's put forward other suggestions for improvement, including more targeted reporting, sectoral commitments, a phasing in, leveraging the assistance of NGO's, and building on best practices.⁵¹⁹

Following the public consultation, the Government has agreed with the majority of respondents to introduce regulation to require some companies to report their GHG emissions in the directors' report of their annual report. The Government is committed to reducing the regulatory burden on companies and so has decided to introduce Option 2 (regulation for all quoted companies) which has the lowest regulatory cost of the regulatory options. Experience of this introduction will be used to update the cost and benefit information contained in the final impact assessment. In 2016, the Government will take a decision, based on this updated information, whether to extend the requirement to all large companies.⁵²⁰

More targeted reporting is sensible. Going forward, the government will need to ensure that information is relevant. Attention is required to structure the modalities by which to discipline climate change information. Accountability, integrity, timeliness, and transparency determine, *inter alia*, the subjective

516. *Id.*

517. *Id.*

518. *Id.*

519. *Id.* at 7.

520. *Id.* at 22.

test of a right to information and ought to support the objectivity of relevant information.

National directions also need to reflect emerging international and regional guidelines for monitoring, reporting, and verification (MRV). (Some of these were referred to earlier under the respective treaty framework of the UNFCCC and the plurilateral Kyoto Protocol). “PricewaterhouseCoopers (PwC), ERM, and the Institute of Environmental Management and Assessment (IEMA) concur with the prevailing international view that emission reporting demonstrates the current business situation, enables target setting and progress tracking and is therefore central to the commitment of the company to action.”⁵²¹

Current reporting structures, however, are often unwieldy, fragmented, and leave little room for investors (or government) to make useful comparisons. In part, this is due to the absence of a common accounting regime, which is an objective criterion. However, there are also divergences concerning the effectiveness of any substantive agreement.

While promoting voluntary reporting may be a good way forward, at least in terms of the numbers issued by the SEC in the U.S. and DEFRA in the U.K., there is still the issue of how to make the best use of the data to reinforce proactive (anticipatory) obligations and reactive (responsive) obligations governing the right to information. Comparisons may not be meaningful without some degree of conformity to reporting guidelines. An enhanced “template-based” reporting mechanism could be developed online; but without employing appropriate qualitative techniques, a lot of important yet more subjective information that influences decisions will simply be foregone. Developing completely different guidelines at national levels may not be that helpful anyhow. Climate harm crosses borders.

The U.S. approach to climate change disclosure provides some solutions that could carry through internationally. Voluntary company disclosure in the U.S. leads to the provision of far more extensive information, but voluntary disclosure is in no way a substitute for a cohesive *de jure* governing framework of conformity and compliance regulation. Such pitfalls of failing to

521. *Id.*

collate and compare relevant information have already been observed at the international level where a mishmash of reporting structures have resulted in procedural and implementation difficulties. Moreover, information needs not only to be relevant, it needs to be disciplined for effect. An examination of the modalities that discipline information is far more likely to give direction to effective regulatory options. As identified above, these issues are equally identified within the U.K. and require further consideration as the U.K. turns to implement option 2 (mandatory reporting for quoted companies).

There are still other issues for the U.K. government to consider before 2016. Turning to an extension of the proposed mandatory regulatory options, any such reporting for incorporated companies would still fall under the ambit of regulations under Section 416(4) of the Companies Act 2006.⁵²² These regulations would thereby apply to U.K. incorporated companies required to prepare a director's report as part of their annual reporting obligations.⁵²³

For many small businesses, the cost of even more weighty reporting could prove unsustainable. Larger businesses contribute more to GHG emissions. They should therefore contribute more to the adverse effects of climate change. Even for listed companies it is uncertain as to what degree their contributions to the U.K. economy ought to be offset by their contributions to planetary environmental harm. What sort of tax breaks, if any, should be set in place to support heavier reporting burdens? What types of other support mechanisms will be considered? What will be the design of these mechanisms so as not to impose an unfair restriction on trade? These are tough but important questions.

Regulating the right to information and the duty to disclose does not reside in isolation from other bodies of international law. To be prepared for such eventualities, companies should seek to understand their respective business plans behind the reinforcement of the right to information. Government also needs to comprehend the extraterritorial effects of its decisions.

522. *See* Companies Act, 2006, c. 46, § 416(4) (U.K.).

523. *See id.*

Participants responding to the U.K.'s government consultation also identified with questions of equity and fairness in the sense of common but differentiated responsibilities. Differentiating the scale of obligations owed by unlisted companies *vis-a-vis* quoted companies does not mean that loopholes should exist ad infinitum. Establishing stricter disclosure requirements for quoted companies and voluntary reporting for unlisted companies is a move in the right direction. Notwithstanding, this option still lets large private companies and significant trusts slip through the loop. Larger companies and trust holdings are likely to contribute more to climate change than small enterprises and many will already have solid investor relations teams in place.

Distinguishing between reactive and proactive reporting obligations for larger companies may be helpful. However, as aforementioned, reporting obligations should not restrict trade or competition. A high degree of rigorous regulations could emerge as reinforcing non-tariff barriers to trade and keep the U.K. economy in abeyance. Any attempt to impose regulations on other countries is likely to do the same. Imposing stricter regulations on companies that consume more energy may evolve as a form of productivity capping that impedes local competition and simply encourages companies to go offshore and take all the economic benefits of steady jobs, local livelihoods, and government income with them.

Supply chains are global so local decisions should not exist in isolation from the broader context within which national law resides. It is likely that U.K. reporting will have to align far more with EU and international developments in meeting objective and subjective tests of equity at some stage. Some U.K. companies already report on their GHG emissions, either voluntarily or due to obligations under the EU's ETS, the Carbon Reduction Commitment (CRC) Energy Efficiency Scheme, and other climate change agreements, which are discussed below.

As aforementioned, the ETS is a central component of the U.K.'s policy for delivering emissions reductions in the U.K. and across the EU. The EU's ETS Directive (Directive 2003/87/EC, as amended by Directive 2009/29/EC, which had a deadline for transposition by Member States by December 31, 2012) governs

the EU's cap-and-trade scheme.⁵²⁴ Directive 2003/87/EC, introduced in 2005 by the U.K's Greenhouse Gas Emissions Trading Scheme 2005,⁵²⁵ provides for access to information subject to Directive 2003/4/EC. It sets a "cap" on the total amount of certain greenhouse gases that factories, power plants, and other installations in the system can emit. In addition, provisions for MRV are mandated to European Member States for certain specified activities holding GHG emissions permits. Commission Decision 2007/589/EC of July 18, 2007, establishes guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council.⁵²⁶ The Monitoring and Reporting Guidelines (MRG) are to be used for the 2008-2012 phase. New Regulations concerning EU ETS monitoring, reporting, verification and authentication will apply to emissions from January 1, 2013. In accordance with the revised ETS Directive (2009/29/EC), phase III of the EU Emissions Trading System will be from 2013-2020.⁵²⁷

In 2009, Commission Decision 2009/339/EC of April 16, 2009, amended Decision 2007/589/EC as regards to the inclusion of monitoring and reporting guidelines for emissions and ton-kilometer data from aviation activities.⁵²⁸ Aviation activities were included in the scheme by virtue of Directive

524. Directive 2003/87, of the European Parliament and of the Council of 13 October 2003, 2003 O.J. (L 275) 1 (EC) (amending Directive of the European Parliament and Council 96/61/EC(5), as amended by Directive 2004/101/EC); Directive 2009/29/EC, of the European Parliament and of the Council of 23 April 2009, 2009 O.J. (L 140/63) (EC) (amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community).

525. The Greenhouse Gas Emissions Trading Scheme Regulations, 2005, S.I. 2005/925 (U.K.).

526. *See id.*

527. Directive 2009/29/EC, of the European Parliament and of the Council, 2009 O.J. (L 140/63) (EC), art. 11 (amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community).

528. Directive 2009/339, of the European Parliament and Council, 2009 O.J. (L 103) (EC).

2008/101/EC.⁵²⁹ In addition, the ETS scheme was further improved and extended by virtue of Directive 2009/29/EC.⁵³⁰

A draft Commission Regulation on the approval of a simplified tool developed by the European organization for air safety navigation (Eurocontrol) to estimate the fuel consumption of certain small emitting aircraft operators is also under negotiation.⁵³¹ The draft version was approved by the Climate Change Committee on February 17, 2010, and was sent to the European Parliament for scrutiny.⁵³² The U.K. could also consider reinforcing the alignment of measurement, reporting and verification of GHG emissions by U.K. companies by industrial sector.

The U.K.'s Carbon Reduction Commitment (recently renamed the CRC Energy Efficiency Scheme) is an energy saving and carbon emissions reduction scheme that requires mandatory reporting of emissions for all organizations using more than 6,000 MWh per year of electricity (equivalent to an annual electricity bill of about £500,000) not covered by the EU ETS or certain other Climate Change Agreements.⁵³³ The CRC Energy Efficiency Scheme Order 2010 came into force on March 22, 2010.⁵³⁴ The Scheme started on April 1, 2010. With the view to simplify the CRC Energy Efficiency Scheme, DECC undertook a consultation between March 27, 2012 and June 18, 2012. The results showed broad support for a simplification package and in response the Government intends to make an order to come into force on June 1, 2013 with the second phase starting in April

529. Directive 2008/101, of the European Parliament and Council, 2008 O.J. (L 8) (EC); *see also* Decision 2009/450/EC, of the European Parliament and Council of 8 June 2009, 2009 O.J. (L 149) 69 (explaining the interpretation of the aviation activities listed in Annex I to Directive 2003/87/EC).

530. Directive 2009/29, of the European Parliament and Council, 2009 O.J. (L 140) (EC).

531. EUROPEAN COMM'N, DRAFT COMMISSION REGULATION ON THE APPROVAL OF A SIMPLIFIED TOOL DEVELOPED BY THE EUROPEAN ORGANISATION FOR AIR SAFETY NAVIGATION (EUROCONTROL) TO ESTIMATE THE FUEL CONSUMPTION OF CERTAIN SMALL EMITTING AIRCRAFT OPERATORS 1 (2009), *available at* <http://www.lne.be/en/ets-aviation/overview-legislation/100217small-emitter-regulation-post-isc-4.pdf>.

532. *Id.*

533. *Carbon Reduction Commitment*, CRC MAGAZINE (Oct. 20, 2010), <http://www.carbonreductioncommitment.info/>.

534. CRC Energy Efficiency Scheme Order, S.I. 2010/768 (U.K.).

2014.⁵³⁵ The Chancellor of the Exchequer, George Osborne made an announcement to this effect to the House of Commons in his autumn statement of December 5, 2012 concerning carbon taxes. He said, “[T]he Government will simplify the CRC energy efficiency scheme from 2013.”⁵³⁶ The Government will review the effectiveness of the CRC Energy Efficiency Scheme in 2016.⁵³⁷

The climate change levy (CCL), introduced as Climate Change Levy Agreements and a type of pricing mechanism under the 2000 Finance Act in 2001, could also perhaps be reviewed at this time.⁵³⁸ The CCL is a type of levy that targets energy-intensive industries and specified energy products (taxable commodities) permitting up to a 65% discount (90% on electricity from April 2013) provided the companies meet targets to improve energy efficiency or reduce their carbon emissions.⁵³⁹ Following another consultation in 2012, a new Climate Change Agreement (CCA) scheme will start in April 2013 (the current scheme expires in March 2013).

There are some issues to be worked through. In 2008 the House of Commons reported that,

The CCL has not worked quite as expected. According to economic theory, businesses should have acted rationally by seeking to reduce their costs through increased energy efficiency. In practice, they appear to have needed an extra stimulus to change their approach to energy use. This has profound implications for climate change policy more widely. If even large companies require additional policies to drive behavioural change, this must be all the more true for small businesses,

535. U.K. DEP'T OF ENERGY AND CLIMATE CHANGE, GOVERNMENT RESPONSE TO THE CONSULTATION ON SIMPLIFYING THE CRC ENERGY EFFICIENCY SCHEME 13 (2012).

536. HM TREASURY, AUTUMN STATEMENT 70 (2012).

537. GOVERNMENT RESPONSE TO THE CONSULTATION ON SIMPLIFYING THE CRC ENERGY EFFICIENCY SCHEME, *supra* note 535, at 14; HM TREASURY, AUTUMN STATEMENT 70 (2012).

538. Malcolm Hill et. al., *Impacts of Climate Change Agreements on British Small and Medium-Sized Enterprises*, 22 ENERGY & ENV'T 343 (2011).

539. *Climate Change Agreements: Policy and Legislation*, DEP'T OF ENERGY & CLIMATE CHANGE, http://www.decc.gov.uk/en/content/cms/emissions/ccas/ccas_policy/ccas_policy.aspx (last visited Dec. 15, 2012); *Climate Change Levy*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/climate-change-levy/index.htm> (last visited Dec. 15, 2012).

public bodies, and private households. The Government should report on how it is applying this lesson the across the whole of the UK Climate Change Programme.⁵⁴⁰

The implications are equally relevant at the international level considering the challenges in developing subjective or behavioral tests to fulfill objective guarantees.

At some stage, it would be useful to undertake a comprehensive review of all the U.K.'s reporting instruments. 2016 may be a good year. 2016 was mentioned above concerning a decision on extending Consistent Corporate Reporting of Greenhouse Gas Emissions. Other reporting requirements could be brought into the 2016 review. Given parallel discussions taking place in the EU and internationally, and the complexity of the overall reporting regime, government may consider keeping the voluntary regime but support it by firming up the reporting structures so that it can make useful comparisons. Appropriate business incentives could also enhance reporting. Regulating disclosure obligations through bilateral negotiations and voluntary agreements on a company-by-company basis in line with predetermined regulatory guidelines could also supplement this overall package. While this latter option may appear expensive, the higher upfront costs should be balanced by lower back end costs. The analysis may be far more robust and useful, and duplications and misinterpretations, which are inevitable with yes or no quantitative scales, may be avoided.

To summarize, companies are already overburdened with reporting requirements, so any reporting system should aim to find a balance between facilitating companies to pursue their profit agendas and their obligations to present and future generations. The right to information is a fundamental human right that invokes a reactive obligation to respond and a proactive obligation to collect and disseminate information. The evolution of the duty to disclose reinforces these legal obligations and raises serious issues for private sector enterprises. Not only could liability arise due to fraudulent representation but also due to the failure to disclose climate information or even inadequate

540. HOUSE OF COMMONS, SELECT COMMITTEE ON ENVIRONMENTAL AUDIT SECOND REPORT (2008).

disclosure thereof. Similar to the U.S., the U.K. leverages corporate action through broad consultation processes that engage a plurality of stakeholders, media awareness, investor pressure, sectoral regulation, corporate and finance laws, and multi-level governance. Both rely on a global framework and a universal approach to the right to information.

If U.K. regulation evolves in isolation from the supporting framework of regional and international law it is likely to fragment the right to information even more and merely place a higher burden on U.K. companies. Any decision made in the U.K. may therefore benefit by considering streamlining the U.K.'s entire reporting ambit (locally, regionally, and globally). A common international accounting regime is required but this will not have good effect if local regimes are fragmented. Helping higher users to analyze their inputs and outputs and find alternative and more efficient energy solutions should link to the overall package of reinforcing effectiveness at the local level. A far more cohesive right to know and duty to disclose could consider harmonizing new instruments to regulate quoted companies with those requirements already set out under existing instruments, including the EU's ETS, the Carbon Reduction Commitment (CRC), and other Climate Change Agreements.

III. A PATHWAY TO PROVIDENCE

To conclude, this Article has demonstrated how general international public law, human rights law, and environmental law inform the right to information about the adverse effects of climate change. Whether at the national or international level, the right to climate change information hinges on guaranteeing and enforcing both proactive and reactive obligations. In advancing climate law and the right to information, actors need to align their respective obligations (locally, regionally, and within the context of the constitutionalism of international climate law). Drawing on the willingness and capacity of all parties to negotiate and reach consensus on extraterritorial agreements will serve as an impetus for this alignment.

The findings show that the right to know and the duty to disclose rely not only on the relevancy of information, but also on

how the law disciplines that information. Accountability, integrity, timeliness, and transparency embellish “what *information* is - or is not - taken to be directly relevant” and strengthen a theory of justice by the employ of both objective and subjective tests of equity.

Balancing contradictions between the relevancy of information and the disciplines governing the right to information remain at the heart of many controversies. States and non-state actors, individuals, communities, and businesses are often unable to exercise their right to effective justice unless they have an objective understanding of the relevant information within the context of a disciplined universal framework. In turn, the quality of the right to information will inform actor’s means to participate in decision-making processes and access effective remedies. Likewise, such actions need to be put into a unified and universal context.

The UNFCCC is a binding universal treaty that establishes the legal architecture by which to underpin rules, and other norms, that will, *inter alia*, regulate GHG emissions and facilitate agreed outcomes that have legal force. Deep uncertainty means that the informational inputs that support such a system can never be completely reliable. They are forever changing. Leaving aside the scientific debate and perpetually changing imperfect information about future costs and benefits, there is still a need to give effect to a robust system for monitoring, reporting, and verification that resides within a universal constitutionalism of international climate law. All countries, not just the developing, require accountability, integrity, and temporality of comparative accounting rules and effective processes.

Upholding the integrity of the UNFCCC is far more dependent on reaching consensus on universally agreed normative processes within the constitutionalism of international climate law than introducing more ad hoc institutional restructuring arrangements or deep structural adjustments. The later sometimes even serve as engines of destabilization and fragmentation and they do little to build a systematically coherent architecture of human rights for the global commons. As disputes about reporting aviation emissions show, the former

depends on reaching a unified normative accord, a *jus gentium*, at the global level before being able to implement it nationally.

Going forward, climate law negotiators could make significant strides in advancing the right to information by finding a better balance between substance and form and between the relevancy and disciplines of the right to know and the duty to disclose. Governments and non-governmental organizations could help facilitate the process of universal constitutionalism by making clear statements in this regard, perhaps at the next UNFCCC COP to be held in Warsaw, Poland, at the end of 2013, if not before. Consolidating a framework for the right to climate information could be a helpful step forward; but, to do so, there needs to be a breath of fresh air and the “willingness and capacity” to discipline information for climate justice.⁵⁴¹

541. Calling of an Int’l Conf. on Freedom of Info., *supra* note 2, at 95.