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**THE COST OF DOING BUSINESS IN ASIA: A  
COMPARATIVE LEGAL STUDY OF  
ENVIRONMENTAL REGULATIONS IN THE  
EMERGING MARKETS OF THAILAND,  
MALAYSIA, AND INDONESIA**

Brooke R. Padgett, *Florida Coastal School of Law*



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**Brooke Padgett, a second year student at Florida Coastal School of Law**

*Abstract:* This article explores whether voluntary standards, customary law, or more binding bilateral investment treaties are best for corporations, the emerging markets of Thailand, Indonesia, and Malaysia, and the environment itself. While corporations, markets, and the environment facially seem to have divergent priorities, environmental disasters are more costly after the fact than they are to prevent so in reality their priorities may not be so different after all. Some of the potential issues the paper will examine and address are big picture macro level such as fairness to future generations, intergenerational rights; the actual cost through questions of polluter pays, who bears the risk, cost benefit analysis; prevention through avoidance as the main weapon, accountability, and compliance. This dilemma is three-dimensional regarding corporations, emerging market countries, and the environment; this paper will seek to explore those sides, and ultimately attempt to assist corporations in making the best choice to expand into these markets.

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## **I. INTRODUCTION**

International business investment and expansion is a significant driving force in the United States economy. Buying a cell phone or television from China or a car from Europe occurs daily across the United States, and our products sell to consumers throughout the world as well. Multinational corporations or smaller companies looking to expand overseas and enter international trade markets face the daunting task of navigating unfamiliar countries with unfamiliar regulations. A number of factors go into the decision making process in choosing where to locate a new subsidiary, factory, or manufacturing and production facility. The International Monetary Fund loans money to state governments and many of the factors they analyze are the same factors businesses weigh before choosing expansion into an emerging market.<sup>1</sup> That analysis includes some common costs such as converting currency, tariffs, government expenditures, interest rates, and other trade barriers.<sup>2</sup>

An aspect of this international trade expansion that has received almost no attention is the apparent or hidden costs to a company that environmental regulations place on it. Many companies, used to clear guidelines in the United States, find themselves on dangerous legal ground while on foreign soil. These environmental regulations can be difficult to find, understand, and navigate when emerging market countries may not be aware of their own regulations.

This article explores whether voluntary standards, customary law, or more binding bilateral investment treaties are best for corporations, the emerging markets of Thailand,

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<sup>1</sup> CHARLES W.L. HILL & WILLIAM HERNANDEZ-REQUEJO, GLOBAL BUSINESS TODAY, 36-7 (McGraw-Hill Co. Inc. eds., 7th ed. 2011).

<sup>2</sup> *See Id.*

Indonesia, and Malaysia<sup>3</sup>, and the environment itself. Corporations, markets, and the environment seem to have divergent priorities facially, but environmental disasters are more costly after the fact than they are to prevent so in reality their priorities may not be so different after all. Some of the potential issues this paper will examine and address are big picture macro level such as fairness to future generations, intergenerational rights; the cost through questions of polluter pays, who bears the risk, cost benefit analysis; prevention through avoidance as the main weapon, accountability, and compliance. This dilemma is three-dimensional regarding corporations, emerging market countries, and the environment; this paper will seek to explore those sides, and ultimately attempt to assist corporations in making the best choice to expand into these markets.

There is a growing trend for environmental regulations to become increasingly more customary or even expected by world leaders through bilateral treaties.<sup>4</sup> Corporations often push for innovations that both drive the market and improve the fundamental lives of people including ways to lessen the impact on the environment. Corporations, especially United States multinational corporations (“MNC”),<sup>5</sup> arguably have a great deal of power in deciding how much prevention to exert on environmental norms. Should Asian emerging market countries allow business to expand to their countries using voluntary standards of environmental management, such as ISO 14000,<sup>6</sup> the European Management Auditing System (“EMAS”),<sup>7</sup> eco-labels,<sup>8</sup>

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<sup>3</sup> See list of emerging markets. *The Top 20 Emerging Markets*, BLOOMBERG MARKET, (Jan 30, 2013 4:18 PM ET), <http://www.bloomberg.com/slideshow/2013-01-30/the-top-20-emerging-markets.html#slide21>.

<sup>4</sup> See Hill *supra* note 1, at 243.

<sup>5</sup> See Lisa Lambert, Comment, *At the crossroads of environmental and human rights standards: Aguinda v. Texaco, Inc. Using the alien tort claims act to hold multinational corporate violators of international laws accountable in U.S. courts*, 10 J. TRANSNAT'L L. & POL'Y n. 2 (2000-2001). BLACK'S LAW DICTIONARY 1015-16 (6th ed. 1990) (defining a MNC as a company "which has centers of operation in many countries," versus an international corporation which generally has one central nucleus of operation with activities crossing borders; however, the terms are used interchangeably).

<sup>6</sup> International Organization for Standardization (“ISO”) established a new Technical Committee, TC 207, to develop voluntary global standards for corporate environmental management. These standards, known as the ISO

sectoral programs,<sup>9</sup> technology management,<sup>10</sup> and customary international law.<sup>11</sup> Conversely, should they formally adopt and require business to follow the environmental provision of the 2012 U.S. Model Bilateral investment treaty (“BIT”),<sup>12</sup> pursuant to which States commit not to weaken their existing environmental and labor laws in order to encourage investment?

Part I of this article is a brief introduction to international trade and the relationship that corporations, emerging markets, and the environment share. Part II of this article examines the philosophical and theoretical background of environmental protection through voluntary standards such as fairness to future generations, intergenerational rights, and economic theories; such as the polluter pay’s principle, and the precautionary principle. Part II also describes Model BITs and the role that they play in environmental protection, from starting as voluntary to becoming binding on the states that sign them. Part III turns to the investigation of the legal precedent and history of cases related to environmental and corporate concerns. Part IV explores the current trade laws and practices of three emerging Asian market countries, Thailand, Indonesia, and Malaysia. Part V and Part VI complete this paper by giving a conclusion and a

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14000 series, quickly emerged as the most prominent EMS standardization initiatives. The publication of the series occurred between 1996 to 1999.

<sup>7</sup> Council Regulation 1836/93 Allowing for Voluntary Participation by Companies in the Industrial Sector in a Community Eco-Management and Audit Scheme, 1993 O. J. (L 168) 1. Eco-management is commonly referred to as European management because there are now subsequent other countries examining its use and adoption.

<sup>8</sup> See Renate Gertz, *Eco-Labeling--A Case for Deregulation? 4 Law, Probability, & Risk*, 127, 132 (2007). Eco-labeling systems follow three steps: establishing product categories; examining the harm products cause to the environment throughout their lifecycles; and determining standards that the products must meet to be eligible for the eco-label.

<sup>9</sup> Environmental Protection Agency “EPA’s” Sector Strategies Program was established in June 2003 to promote improvements in environmental performance through voluntary actions and cooperative efforts. In the program, EPA works with participating trade associations, states, and other groups to find solutions to sector-specific problems.

<sup>10</sup> Some examples of technology management include: (1) remediation or cleanup technologies; (2) pollution abatement or end-of-pipe technologies; (3) pollution prevention technologies, including waste minimization and source reduction technologies; and (4) sustainable and recycling technologies

<sup>11</sup> In the absence of a binding treaty, customary international law provides an additional source of international authority.

<sup>12</sup> Press Release, Office of the United States Trade Representative, *United States Concludes Review of Model Bilateral Investment Treaty* (Apr. 20, 2012), <http://www.ustr.gov/about-us/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves>.

recommendation to corporation as to which emerging Asian market country is best to expand to, for both environmental and business reasons.

## **II. PHILOSOPHICAL AND THEORETICAL BACKGROUND**

### **A. Voluntary Standards of Environmental Management**

Several topics provide a framework to the philosophical or theoretical reasons of why individuals, corporations, or emerging market countries should care about their present day impact on the environment. These topics include fairness to future generations, intergenerational rights,<sup>13</sup> and economic theories; such as the polluter pay's principle, and the precautionary principle.

#### **1. Fairness to future generations by preserving environmental integrity**

The issue of fairness surrounding the use of earth and its resources is seen not only as an investment opportunity, but as a trust passed to us by our ancestors for our benefit, to be passed on to our descendants for their use.<sup>14</sup> This notion conveys both rights and responsibilities.<sup>15</sup> Most importantly, it implies that future generations have rights too.<sup>16</sup> These rights have meaning only if we, the living, respect them, and in this regard, transcend the differences among countries, religions, and cultures.<sup>17</sup> Fortunately, the notion that each generation holds the earth as a trustee or steward for its descendants strikes a deep chord with all cultures, religions, and nationalities.<sup>18</sup> Nearly all human traditions recognize that we, the living are sojourners on earth

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<sup>13</sup> EDITH BROWN WEISS ET AL, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 53 (Aspen Publishers, 2nd ed. 2007).

<sup>14</sup> Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, AM. U. INT'L L. Rev. 8, No. 1 at 19 (1992). *See also*. EDITH BROWN WEISS, *INTERNATIONAL EQUITY: TOWARD AN INTERNATIONAL LEGAL FRAMEWORK*, Global Accord 332-353 (Nazli Choucri ed., 1993). (discussing the importance of intergenerational equity even in the face of inequities occurring today.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

and temporary stewards of our resources.<sup>19</sup> The theory of intergenerational equity states that we, the human species, hold the natural environment of our planet in common with other species, other people, and with past, present and future generations.<sup>20</sup> As members of the present generation, we are both trustees, responsible for the robustness and integrity of our planet, and beneficiaries, with the right to use and benefit from it for ourselves.<sup>21</sup> Two relationships must shape any theory of intergenerational equity in the environmental context.<sup>22</sup> The first is our relationship with our natural system of which we are a part, that of fairness and man's responsibility for nature.<sup>23</sup> The second is our relationship and responsibility with other generations, intergenerational rights.<sup>24</sup>

## **2. Intergenerational rights to have a future environment fit to live in**

The theory of intergenerational equity states that all generations have an equal place in relation to the natural system, and that there is no basis for preferring past, present or future generations in relation to the system.<sup>25</sup> This notion has deep roots in international law.<sup>26</sup> The preamble to the universal declaration of human rights begins with a reference to all members of the human family, and has a temporal dimension, which brings all generations within its scope.<sup>27</sup> The reference to equal and inalienable rights affirms the basic equality of such generations in the human family.<sup>28</sup> Every generation should use the natural system to improve the human

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* See for opposing viewpoint that future generations do not have rights. Bryan Norton, *Environmental Ethics and the Rights of Future Generation*, 4 ENVTL. ETHICS 19, 322-324 (1982).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 19-20.

<sup>28</sup> *Id.* at 20.



condition.<sup>29</sup> However, when one generation severely degrades the environment, it violates its intergenerational obligations to care for the natural system.<sup>30</sup> It is hard for a corporation to argue the degradation of the environment is best for their business profits. This might be true if only looking at the current growth of today's profits, but arguably at some point, the degradation will reach a point of saturation and affect the entire planet in a theorized scenario much like the movie, *Escape from L.A.*<sup>31</sup> Looking to growth over time, that potentiality of profit is significantly higher in being able to continue conducting business across the globe for an untold number of future generations. It is general public knowledge that some environmental experts argue the Earth is already at the point of saturation, and the compromising over the quality of water, land, and air has already begun. There is not currently public or even scientific agreement on the exact status of the degree to which the environment is degraded. Corporations need to be aware of these issues during expansion because of the uncertainty of liability.

### **3. Voluntary economic theories of environmental policy**

Economic theory has played a pivotal role in shaping environmental policy across the international community.<sup>32</sup> Economic considerations provide strong policy considerations and arguments that lead to legal principles that then shape private and public actions over environmental damage and protections.<sup>33</sup> When environmental degradation occurs, who bears the cost of clean-up in the common areas shared by countries like the air and water or on the land of an affected country? The economic theories of polluter pays and the precautionary approach help

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> The environment has been at the forefront of pop culture since the 1970s. *See generally* CHARLES P. MITCHELL, A GUIDE TO APOCALYPTIC CINEMA (Greenwood Publishing Group 2001).

<sup>32</sup> *See* BROWN ET AL., *supra* note 13 at 83.

<sup>33</sup> *Id.*

demonstrate how legal principles constrain behavior of both private and public actors regarding environmental degradation.

**a. Polluter Pays Principle**

The polluter pays principle (“PPP”) is an environmental policy principle that requires that the costs of pollution be borne by those who cause it. In its original emergence, the PPP aims at determining the allocation of the costs of pollution prevention and control: the polluter must pay.<sup>34</sup> Its immediate goal is that of internalizing the environmental externalities of economic activities, so that the prices of goods and services fully reflect the costs of production.<sup>35</sup> Economically, it promotes efficiency; legally, it promotes justice; it promotes harmonization of international environmental policies; it defines how to allocate costs within a State.<sup>36</sup> The normative scope of the PPP has evolved over time to include also accidental pollution prevention, control, and clean-up costs, in *extended Polluter Pays Principle*.<sup>37</sup> Today the PPP is a generally recognized principle of International Environmental Law.<sup>38</sup> The most recent and large-scale corporate example of this principle can be seen through the BP Gulf oil spill. BP, the company that leased the Deepwater Horizon rig, became liable for a variety of multi-billion dollar claims, most of which they settled prior to trial. BP reached a plea agreement with the U.S. government for \$4.5 billion dollars. They also agreed to pay fines totaling \$1.25 billion.<sup>39</sup> This is a significant amount of money for a corporation to pay in damages and fines. It would be remiss of in-house corporate counsel or out of house counsel to not caution corporations that this

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<sup>34</sup> See Vito De Lucia, *Polluter Pays Principle*, THE ENCYCLOPEDIA OF EARTH (last updated April 4, 2013, 9:38 AM), <http://www.eoearth.org/view/article/155292/>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (citing H. C. BUGGE, THE PRINCIPLES OF POLLUTER PAYS IN ECONOMICS AND LAW, IN LAW AND ECONOMICS OF THE ENVIRONMENT (E. Eide & R. Van Der Bergh. eds), Oslo: Juridisk Forlag, (1996).)

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Department of Justice, Office of Public Affairs, *BP Exploration and Production Inc. Pleads Guilty, Is Sentenced to Pay Record \$4 Billion for Crimes Surrounding Deepwater Horizon Incident* (Tuesday, January 29, 2013 ), <http://www.justice.gov/opa/pr/2013/January/13-ag-123.html>.

scenario is a likely outcome and a perfect example of the polluter pays principle. This BP outcome sets a legal precedent because it demonstrates that States are no longer willing to shield corporations from liability in large international environmental disasters. Individual corporations are now much more likely to be held liable for the damages they are either wholly or partially responsible for. If BP had taken the time to create policies and procedures and implemented them consistently by using the precautionary principle, then they might have avoided the drastic amount of money damages and fines they had to pay out.

### **b. Precautionary Principle**

If the polluter pays principle defines who bears the risk of international liability, then how can corporations reduce their risk and keep the benefit of emerging market expansion? There can be significant gaps “between the identification of a potential risk and the degree of scientific proof that is likely to materialize.”<sup>40</sup> The precautionary principle can fill these gaps when waiting for more research and study is not prudent.<sup>41</sup> The precautionary principle has been included in a number of declarations throughout the international community, but is has yet to be codified, making it the ultimate voluntary standard to manage environmental issues.<sup>42</sup> The crucial point is reducing or preventing environmental impacts even before reaching the threshold of risk.<sup>43</sup> This means taking precautionary action to ensure that the loading capacity of the environment is not exhausted, and it requires action even if risks are not yet certain but only probable or, even less, not excluded.<sup>44</sup> Corporations would be able to avoid paying out huge sums of money for reparations and damage if they had well thought out plans in place before

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<sup>40</sup> See BROWN ET AL., *supra* note 13 at 102.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Lothar Gundling, *The Status in International Law of the Principle of Precautionary Action*, 5 INT'L J. ESTUARINE & COASTAL L. 23, 26 (1990) (emphasis added)

<sup>44</sup> *Id.*

they began projects. These policies and plans do require a detailed analysis of the project and the likely environmental risks of harm. It requires planning, attention to detail, and the ability to see the big picture. In-house counsel or out-of-house attorneys can easily fill this role for corporations. Precaution in the beginning can save corporations millions of dollars. The up-front cost of such plans and preparation is just that a cost, but that cost can pass on to clients or consumers while damage payouts cannot without an obvious increase to consumers and a likely outcry. It is not enough that these plans exist; corporations have to follow the plans they create and make sure there is adequate training of the personnel on the ground.

There are several lesser-known types of voluntary standards used to avoid environmental harm such as ISO 14000,<sup>45</sup> the EMAS,<sup>46</sup> eco-labels,<sup>47</sup> and sectoral programs,<sup>48</sup> technology management,<sup>49</sup> and customary international law.<sup>50</sup> Corporations can avoid many future problems by just employing any on these standards or the principle standards already discussed during any stage of development. These voluntary standards may not be the panacea of corporate or environmental protection, but they are a good place to start. The ideology that voluntary standards are a good place to start is where many emerging markets were over the past few decades. The issue historically, is that thinking about the environment and the harms corporations cause to it has not led to using these voluntary standards with any degree of consistency.<sup>51</sup> The fundamental problem with voluntary standards is that they are voluntary, and

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<sup>45</sup> See definition *supra* note 6.

<sup>46</sup> See definition *supra* note 7.

<sup>47</sup> See explanation *supra* note 8.

<sup>48</sup> See explanation *supra* note 9.

<sup>49</sup> See examples *supra* note 10.

<sup>50</sup> See explanation *supra* note 11.

<sup>51</sup> See Stepan Wood, *Environmental Management Systems and Public Authority In Canada: Rethinking Environmental Governance*, 10 BUFF. ENVTL. L. J. 134 (2003). Useful accounts of the history and rationales of environmental management systems and EMS standardization include Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1287-1311 (1995); Naomi Roht-Arriaza, *Shifting the Point of Regulation: The*

there is no real incentive for corporations to actually use them except for what are vague philosophical reasons to most people. It is because of this lack of voluntary compliance that the use of BITs is becoming more common.

### **B. 2012 U.S. Model Bilateral Investment Treaty**

A significant driver of America's economic growth and job creation is international investment and expansion.<sup>52</sup> The 2012 U.S. model BIT's primary focus is insuring U.S. companies benefit from a level playing field in foreign markets, providing effective mechanisms for enforcing the international obligations of U.S. economic partners, and creating stronger labor and environmental protections.<sup>53</sup> The Obama Administration initiated a review of the United States' model BIT in February 2009 to ensure that it was consistent with the public interest and the Administration's overall economic agenda.<sup>54</sup> The Administration sought and received extensive input from Congress, companies, business associations, labor groups, environmental and other non-governmental organizations, and academics. As an aside, while revisions to the model BIT do not require Congressional action, negotiated BITs require advice and consent of two thirds of the Senate. A BIT is an international agreement that provides binding legal rules regarding one country's treatment of investors from another international state.<sup>55</sup> The United States negotiates BITs through a high-standard "model" text that "provides investors with improved market access; protection from discriminatory, expropriatory, or otherwise harmful government treatment; and a mechanism to pursue binding international arbitration for breaches of the treaty."<sup>56</sup> High-standard BITs, such as those based on the U.S. model, attempt to improve

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*International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22  
ECOLOGY L.Q. 479, 489-515 (1995)

<sup>52</sup> See Press Release *supra* note 12.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

investment climates, promote market-based economic reform, and strengthen the rule of law.<sup>57</sup>

The United States currently has more than 40 BITs in force with countries around the world, and the investment chapters of free trade agreements contain similar rules and protections.<sup>58</sup>

Creating stronger environmental protections through obligations is the primary focus of Article XII. Part two of the text in Article XII is fundamentally important to the future partnership between corporations and Asian emerging market countries and reads as follows:

The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.<sup>59</sup>

In summation, article twelve binds signatory States to commit not to weaken their existing environmental and labor laws in order to encourage investment. However, some smaller countries have economies and regulatory systems that clash with American goals for a bilateral investment treaty.<sup>60</sup> The new model may not sufficiently address this set of challenges.<sup>61</sup> If fact, in addition to voluntary standards and model BITs that are ratified, there are legal responses that are more concrete in addressing real world environmental disputes.

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* Model Bilateral Investment Treaty, U.S., art. XII, revised and released by President Barack Obama on April 20, 2012. There are currently forty-one BITs that involve the U.S. and another seven not yet ratified by one country or another. See [http://tcc.export.gov/Trade\\_Agreements/Bilateral\\_Investment\\_Treaties/index.asp](http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp). There is currently no BIT involving the U.S. and any Asian emerging market country such as Thailand, Malaysia, or Indonesia. Please note this is a proposed Model treaty, there is no officially adopted treaty being cited

<sup>60</sup> Derek Scissors, *The New Model BIT: Necessary But Not Sufficient*, The Heritage Foundation (April 26, 2012), <http://www.heritage.org/research/reports/2012/04/bilateral-investment-treaties-trade-principles-and-the-new-model-bit>.

<sup>61</sup> *Id.*

### III. LEGAL BACKGROUND

#### A. Sub-normative Legal Response

Soft law is not the current norm in international law or binding on most entities, as such it is sub-normative, below the normal standard. As this law becomes more customary, it is highly likely to develop into a substantive and binding pro-normative legal response. It is on this gradient that much international law finds itself, poised to become “hard law” as more international states habitually comply with them.<sup>62</sup> The fundamental role of soft law is to raise expectations of conformity with legal norms, and to create uniformity in the creation of these norms.<sup>63</sup> Once there is compliance with a normative legal norm, the formation of binding hard law is a relatively simple although not automatic.<sup>64</sup> One specific example of a soft law instrument in international environmental law that is currently relevant for corporations is the ISO 14000.<sup>65</sup> The ISO 14000 develops voluntary global standards for corporate environmental management. ISO 14001 details the requirements a company must meet to have an efficient management system (EMS) and are becoming more commonplace by large multinational corporations.<sup>66</sup> These requirements are: “to create a defined policy to which the organization is committed; to devise a plan to meet the policy's objectives; to implement the plan; to continually monitor environmental performance and to take any appropriate corrective action; and to scrutinize the EMS through management review.”<sup>67</sup> Even though ISO 14001 certification is not a

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<sup>62</sup> See Layla A. Hughes, *Structure of International Law*, 10 GEO. INT'L ENVTL. L. REV. 243, 246 (1998).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See previous definition and explanation *supra* note 6, 42 respectively.

<sup>66</sup> Carey A. Mathews, *The ISO 14001 Environmental Management Standard: An Innovative Approach to Environmental Protection*, 2 ENVTL. LAW. 817, 822 (June 1996). These requirements are: “to create a defined policy to which the organization is committed; to devise a plan to meet the policy's objectives; to implement the plan; to continually monitor environmental performance and to take any appropriate corrective action; and to scrutinize the EMS through management review.” *Id.*

<sup>67</sup> *Id.*

binding environmental provision, it could affect the ability of a company to do business in an emerging global market in the future because they are becoming more widely utilized.

## **B. Pro-normative Legal Response**

The term pro-normative used here, refers to international legal norms that are currently more substantive and binding on States or State actors in establishing rights and obligations concerning the environment compared to sub-normative “soft law.” There are legal cases or official tribunal proceedings that exist to rely on as a solid reference for when international environmental disputes do occur.<sup>68</sup>

There is an obligation by States and other actors not to cause transboundary pollution<sup>69</sup> or environmental harm. In the seminal<sup>70</sup> *Trail Smelter Arbitration*,<sup>71</sup> a private mining and smelting company was enough for a finding that Canada was responsible for damages to private citizens and land in the United States.<sup>72</sup> The Tribunal relied on facts that air and water pollution was unique in nature, and there was a duty for States to protect against the private action across

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<sup>68</sup> There are also many large and important environmental treaties that already exist that are outside the scope of this paper because they are not directly relevant to emerging Asian markets and are not addressed here. There are five primary treaties regulating environmental matters: the Basel Convention, the Vienna Convention, the Montreal Protocol, the Kyoto Protocol, and the Convention on the Impact of Environmental Assessment. A few international laws actually limit the extent to which a country can implement or apply laws that protect the environment. Additionally, the General Agreement on Trade and Tariffs (“GATT”) requires a country to implement its environmental policy with the “least trade restrictive methods.” Therefore, when one country implements a law pursuant to an environmental treaty which imposes stricter standards than other countries, GATT has some authority to strike down the law as being discriminatory toward other nations with respect to trade but the scope of authority and enforcement is not always clear.

<sup>69</sup> Generally accepted definition of transboundary pollution is provided by Glossary of Environment Statistics, Studies in Methods, Series F, No. 67, United Nations, New York, 1997. Pollution that originates in one country but by crossing the border through pathways of water or air, is able to cause damage to the environment in another country.

<sup>70</sup> Prior to the decision made by the Arbitral Tribunal on *Trail Smelter*, disputes over air pollution between two countries was never before settled through arbitration, and the polluter pays principle had no application in an international context. Rebecca M. Bratspies & Russell A. Miller, eds., *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* (Cambridge: Cambridge University Press, 2010).

<sup>71</sup> See *United States v. Canada*, Ad Hoc International Arbitral Tribunal, 35 AM. J. INTL. L. 684 (1941). See also *United Kingdom v. Albania (Corfu Channel Case)*, International Court of Justice, 1949 I.C.J. Rep. 4. Holding of concept known as “harmless use of territory” and the more quoted attributed holding “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”

<sup>72</sup> *Id.*



international borders.<sup>73</sup> The Tribunal reasoned they needed “to reach a solution just to all parties concerned”<sup>74</sup> and gave consideration to the premise from Professor Eagleton that “A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.”<sup>75</sup> This Tribunal decision seems very much like the voluntary environmental management theory of the polluter pays principle turning into an actuality, and they awarded real monetary damages. Corporations that are committed to the benefits of arbitration need to take note because this is a very real likely outcome in environmental damage claims at least by other states. So far, most individuals have not had as much success with the polluter pays principle, but this is subject to change over time as more industrial damage is inflicted on the environment. Another arbitration panel also seemingly chose to use a voluntary environment management policy in its proceedings that involved the lucrative tuna trade in the Pacific Ocean.

The Bluefin Tuna cases demonstrate the probable legal outcomes of the precautionary principle, dealing with threats of environmental harm when there is scientific uncertainty.<sup>76</sup> Australia and New Zealand filed for arbitrational proceedings against Japan alleging that Japan had been catching more Bluefin Tuna than was earlier agreed upon by the countries. The Tribunal ruled against Japan, and allowed an injunction limiting the amount of tuna Japan could take even in the absence that catching more tuna would adversely affect the fish population or the fishing industry. This Tribunal readily applied the precautionary principle even if they did not name it as such, against Japan, citing UNCLOS<sup>77</sup> approach that caution is best when dealing

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> CLYDE EAGLETON, *RESPONSIBILITY OF STATES IN INTERNATIONAL LAW*, 20 (New York 1928).

<sup>76</sup> *See New Zealand v. Japan; Australia v. Japan*, Requests for provisional measures, International Tribunal for the Law of the Sea, 1999, Cases Nos. 3 and 4. Also, in support of international recognition of the need for binding international law, *See Rio Declaration on Environment and Development, Principle 15*, Adopted by the United Nations Conference on Environment and Development, 31 I.L.M. 874 (1992).

<sup>77</sup> Arbitral proceedings brought under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

with environmental concerns. Again, corporations need to take note of the current and changing trends in environmental protection policies. As these policies becoming more known and prevalent or custom, they become more and more binding. The evolution of these voluntary economic management policies used in binding legal proceedings shows that corporations need to be aware that they might also govern in any arbitration proceeding they are involved in. Is not enough protection for a corporation to be dismissive and justify to themselves that these principles have never before been legally binding in regards to an individual person's claim against a corporation, but only another sovereign state to another sovereign state. In fact, this application of voluntary environment management is likely to evolve to the corporations themselves. The BP case has already set a major precedent because the United States Justice Department legally acknowledged their negligence or fault for the Gulf oil spill, an international environmental disaster.

Additionally, there exists long held normative case law for United States corporations that indicates they must comply with in their business practices and decision-making. *Dodge*<sup>78</sup> v. *Ford Motor Company*, is a pivotal case in corporate law, and it is still good law although distinguished in its use in the mutual insurance industry.<sup>79</sup> The Michigan Supreme Court held that a business corporation organization is primarily for the profit of the stockholders, as opposed to the community or its employees.<sup>80</sup> The discretion the directors exercise is in the choice of means to attain that end, and does not extend to the reduction of profits or the non-distribution of profits among stockholders in order to benefit the public, making the profits of the stockholders

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<sup>78</sup> Action brought by shareholders John F. Dodge and Horace E. Dodge, not ironically by the Dodge Auto Manufacturer.

<sup>79</sup> See Distinguished by *Churella v. Pioneer State Mut. Ins. Co.*, 671 N.W.2d 125 (Mich. Ct. App. 2003).

<sup>80</sup> See *Dodge v. Ford Motor Company*, 204 Mich. 459, 507 (Mich. 1919).

incidental thereto.<sup>81</sup> Because this company was in business for profit, Ford could not turn it into a charity, this amounted to spoliation of the company's assets.<sup>82</sup> The court therefore upheld the order of the trial court requiring that directors declare an extra dividend of \$19.3 million, and disperse it back to the shareholders.<sup>83</sup> This Michigan case has had almost a century of influence over all United States corporations, afraid to act in a manner that may be contrary to any action that does not make profits for their shareholders.<sup>84</sup> Even though this case is only binding in Michigan, corporations have taken to the ideology as if it is legal gospel. A valid argument could be made that corporations of today can donate money or give to worthy causes like environmental protection. Because in the end, that goodwill is also giving a benefit to the company and its investors and is likely on its own to increase future dividends for shareholders.

#### **IV. ASIAN EMERGING MARKET TRADE LAWS AND PRACTICES**

The opening of certain equity markets in emerging Asian countries in the early 1980s led to an increased demand for the United States to begin trading there. Corporations in the United States saw an opportunity to expand into these trade markets for increased revenue and profits. During this time, there was very little attention given to the idea of environmental protection on the international stage because although the establishment of the Environmental Protection Agency (EPA) occurred in December 1970, its early purpose and focus was purely domestic.<sup>85</sup> The 1980s, well known in American corporate culture as a decade of indulgence and extravagance, focused more on making the almighty dollar rather than leaving the world a better place. This stance has changed with time, however, "Pollution doesn't stop at international borders, and neither can our environmental and health protections. The local and national

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> United States Environmental Protection Agency, *EPA History*, <http://www2.epa.gov/aboutepa/epa-history>.

environmental issues of the past are now global challenges.” Lisa P. Jackson, Former EPA Administrator.<sup>86</sup> The trade statistics discussed in the next section clearly illustrate how lucrative trade is currently in Asian emerging markets. Corporations as well as the U.S. government make hefty profits trading in Asia. Going forward in future expansion and trade, there is a great deal more profit possible. Environmental concerns are not usually considered in the decision making process but they should be because they are costly when environmental disasters do occur, in this way they are a hidden cost to all parties of the deal.

### **A. Thailand**

“Thailand is an important trading partner and ally of the United States, with the treaty basis to the relationship dating back to the establishment of diplomatic ties in 1833 through the original Treaty of Amity and Commerce.”<sup>87</sup> Under a Trade and Investment Framework Agreement (“TIFA”) signed in 2002, officials from U.S., and Thailand meet on trade and investment issues such as the World Trade Organization (“WTO”) Doha negotiations, APEC and ASEAN agendas, Thailand’s interest in the Trans-Pacific Partnership Agreement (“TPP”), intellectual property rights, and customs issues.<sup>88</sup> The United States and Thailand launched Free Trade Agreement negotiations in 2004 but had to suspend them in 2006 following the fall of the Thai Parliament and the subsequent military-led coup.<sup>89</sup>

The United States’ goods and services trade with Thailand totaled \$40 billion in 2011.<sup>90</sup> Exports totaled \$13 billion; Imports totaled \$27 billion.<sup>91</sup> The U.S. goods and services trade

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<sup>86</sup> United States Environmental Protection Agency, *International Programs*, <http://www.epa.gov/international/>.

<sup>87</sup> Office of the United States Trade Representative, Executive Office of the President, *Thailand*, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/thailand>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

deficit with Thailand was \$14 billion in 2011.<sup>92</sup> Thailand is currently the United States' 25th largest goods trading partner with \$37.1 billion in total bilateral goods trade during 2012.<sup>93</sup> Goods exports totaled \$11.0 billion; goods imports totaled \$26.1 billion.<sup>94</sup> The U.S. goods trade deficit with Thailand was \$15.2 billion in 2012.<sup>95</sup> Trade in services with Thailand, exports and imports, totaled \$4.1 billion in 2011. Services exports were \$2.2 billion; services imports were \$1.9 billion.<sup>96</sup> The U.S. services trade surplus with Thailand was \$291 million in 2011.<sup>97</sup> Environmental concerns have not been the topic of much conversation, but the U.S. Model BIT may now become a more important component because of the U.S. desire for corporations to have protection from discriminatory, expropriatory, or otherwise harmful government treatment.

## **B. Malaysia**

In October 2010, Malaysia also joined the ongoing TTP negotiations.<sup>98</sup> In this negotiation, the United States was seeking to develop a high standard, 21st-century regional trade agreement that “will support the creation and retention of jobs in the United States, and promote economic growth.”<sup>99</sup> In addition to the United States and Malaysia, the TPP negotiating partners include Australia, Brunei, Canada, Chile, Mexico, New Zealand, Peru, and Singapore, and Vietnam.<sup>100</sup> The goal is to expand the agreement to include countries across the Asia Pacific, which together represents more than half of global output, and over 40 percent of world trade.<sup>101</sup> In addition to working together on TPP, the United States and Malaysia meet frequently to

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Office of the United States Trade Representative, Executive Office of the President, *Malaysia*, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/malaysia>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

discuss bilateral trade and investment issues, and to coordinate approaches on APEC, ASEAN, and the WTO.<sup>102</sup>

The United States' goods and services trade with Malaysia totaled \$43 billion in 2010, the latest data available.<sup>103</sup> Exports totaled \$16 billion; imports totaled \$27 billion.<sup>104</sup> The U.S. goods and services trade deficit with Malaysia was \$11 billion in 2010.<sup>105</sup> Malaysia is currently the United States' 24th largest goods trading partner with \$38.8 billion in total bilateral goods trade during 2012.<sup>106</sup> Goods exports totaled \$12.8 billion; goods imports totaled \$25.9 billion.<sup>107</sup> The U.S. goods trade deficit with Malaysia was \$13.1 billion in 2012.<sup>108</sup> Trade in services with Malaysia, exports and imports, totaled \$4 billion in 2011, the latest data available.<sup>109</sup> Exports were \$2.6 billion; imports were \$1.4 billion.<sup>110</sup> The U.S. services trade surplus with Malaysia was \$1.2 billion in 2011.<sup>111</sup> Much like Thailand, environmental concerns have not been the topic of much conversation, but the U.S. Model BIT may now become a more important component because of the U.S. desire for corporations to have protection from discriminatory, expropriatory, or otherwise harmful government treatment.

### **C. Indonesia**

Officials from the United States and Indonesia meet regularly under the auspices of a TIFA, signed in July 1996.<sup>112</sup> Under the TIFA, Indonesia and the United States signed a

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Office of the United States Trade Representative, Executive Office of the President, *Indonesia*, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/indonesia>.

Memorandum of Understanding to Combat Illegal Logging and Associated Trade in 2006.<sup>113</sup> U.S. goods exports in 2012 were \$8.0 billion, up 8.1 percent from the previous year.<sup>114</sup> Corresponding U.S. imports from Indonesia were \$18.0 billion, down 5.8 percent. Indonesia is currently the 34th largest export market for U.S. goods.<sup>115</sup> The U.S. goods trade deficit with Indonesia was \$10.0 billion in 2012.<sup>116</sup> U.S. exports of private commercial services (i.e., excluding military and government) to Indonesia were \$1.7 billion in 2011, the latest data available, and U.S. imports were \$437 million.<sup>117</sup> Sales of services in Indonesia by majority U.S.-owned affiliates were \$2.7 billion in 2010, the latest data available, while sales of services in the United States by majority Indonesia-owned firms were \$87 million.<sup>118</sup> The stock of U.S. foreign direct investment (“FDI”) in Indonesia was \$11.6 billion in 2011, down from \$15.5 billion in 2010.<sup>119</sup> U.S. FDI in Indonesia is primarily concentrated in the nonbank holding companies, and mining sectors.<sup>120</sup>

In Indonesia, a new law on environmental protection and management went into effect in 2010.<sup>121</sup> The law also regulates standards for waste, including liquid, gas, and solid waste.<sup>122</sup> A process that produces liquid waste is required to have a wastewater treatment facility if the waste does not meet certain standards.<sup>123</sup> The new law also imposes several obligations.<sup>124</sup> Environmental impact assessments (“AMDAL”) are required for any business that will have a "substantial" impact on the environment or alternatively an "Environmental Management

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

Program and Environmental Monitoring Program" also called as "UKL-UPL," are required for those who fall outside the need for an assessment such as mining exploration.<sup>125</sup> Environmental permits in addition to the AMDALs for certain entities, such as mining production companies, and revocation may occur if the holder fails to meet the requirements in the AMDALs.<sup>126</sup> Also required, are periodic environmental audits for holders of environmental permits.<sup>127</sup> Stricter standards for air pollution, water quality, and sea water quality.<sup>128</sup> Heavy fines will be levied, and imprisonment up to a maximum of fifteen years for anyone convicted of either intentionally or unintentionally of causing environmental damage.<sup>129</sup> Penalties will be assessed for illegal importation, production, and dumping of toxic waste, and for violating waste standards.<sup>130</sup> There is included a prohibition against using fire to clear land.<sup>131</sup> Certain industries, such as the oil and gas sector, have expressed concerns that the new provisions will add to bureaucratic and regulatory delays.<sup>132</sup> A well-known upstream regulator has requested an additional two years for oil companies to install the technology to lower the temperature of its wastewater to forty degrees Celsius to comply with the law, and warned that production was likely to be cut in half until the industry adjusts to the new regulations.<sup>133</sup>

Though the new law brings harsher penalties, Indonesia has a weak history of enforcing environmental protection laws.<sup>134</sup> Illegal logging is common, and smoke from fires used to clear land for plantations often covers much of Singapore and Malaysia in haze.<sup>135</sup> There is strong

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*



criticism of palm oil plantation investors in particular by environmental organizations for their practices.<sup>136</sup> Indonesia's Sinar Mas was the first company censured by an industry body for sustainable palm oil for its land use practices.<sup>137</sup> In February 2011, the world's second largest palm oil producer, Golden Agri-Resources, a subsidiary of Sinar Mas, bowed to pressure, and agreed to halt deforestation in Indonesian forests deemed "valuable."<sup>138</sup> These are clear signs that emerging market countries are no longer willing to have corporate advancement and profit come in at the expense of the environment because companies now carry some of the responsibility.

### **I. RECOMMENDATION**

Emerging market countries give corporations a unique opportunity for expansion and increased profit. These states, in most cases are not untouched by industrialization, but there is much more future development that is possible there. Corporations should avoid using voluntary environment management strategies in the future. The growing trend is for BITs to be signed and ratified. There is too much risk in leaving corporations without clear environment regulations. Law enables, promotes, and shapes competition, and how it performs these tasks for global markets will be critical to their development.<sup>139</sup> Laws can make markets work more effectively and enhance their value.<sup>140</sup> Laws such as a signed and ratified U.S. Model BIT, perform two main functions in relation to markets. They provide background rights and obligations.<sup>141</sup> Laws enable corporations to calculate the risks and opportunities of transactions and courses of conduct, and they provide stability for investments.<sup>142</sup> Legal constructs help shape markets and

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION, 2-3 (Oxford Scholarship Online May 2010).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

enhance their productive capacity because there is more reliability and less risk.<sup>143</sup> Secondly, they create a fabric of norms, practices, and understandings that formulate the way markets operate, influence the outcomes they produce, and shape consequences for those affected by them.<sup>144</sup> Law represents a state's values and interests and demonstrates its desired relationship to the market, by identifying and enforcing conduct standards for market participants.<sup>145</sup>

Finally, Asian emerging market countries should not allow business to expand to their countries using voluntary standards of environmental management because more binding environmental management measures are more precautionary, cost effective, and less risky. Conversely, Asian emerging market countries should formally adopt and require businesses to follow the environmental provision of the 2012 U.S. Model Bilateral investment treaty pursuant to which States commit not to weaken their existing environmental and labor laws in order to encourage investment for the same reasons. All three entities, corporations, emerging market countries, and the environment receive more protection from damages by using binding BIT laws.

As it stands now, the specific emerging Asian states addressed in this paper do not have a current BIT with the United States. If a corporation were going to pick only one country to expand into it between Thailand, Malaysia, and Indonesia, the best choice would be Indonesia in relation to environmental regulations because there is more reliability and less risk. Despite the weak history of enforcing those laws, what Indonesia has going for it is that it does have a laws on environmental protection and management that went into effect in 2010. Thailand and Malaysia have not demonstrated any movement towards joining Indonesia in passing any environmental regulations. If a corporation is most interested in profits and avoiding up-front

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

costs, then they might choose Thailand and Malaysia on purpose. They need to be aware in an environmental disaster, however, they likely could incur an even higher cost and be paying out exorbitant amounts for damages and fines.

## **VII. CONCLUSION**

This article explored whether voluntary standards, customary law, or more binding bilateral investment treaties are best for corporations; the emerging markets of Thailand, Indonesia, and Malaysia, and the environment itself. While corporations, markets, and the environment facially seem to have divergent priorities, the occurrences of environmental disasters are much more costly after the fact than they are to prevent. In reality, after examining this issue thoroughly, their priorities are not so different after all. Some of the potential environmental issues investigated and addressed in this paper were big picture macro level topics such as fairness to future generations, intergenerational rights, the economic cost through questions of polluter pays, who bears the risk, cost benefit analysis, prevention through avoidance as the main weapon, accountability, and compliance. Ultimately, this paper is an attempt to assist corporations in making the best environment management choices when expanding into these emerging Asian markets, both for their business and for the planet.