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# **LOOKING BEYOND THE CANOPY**

**THE INFLUENCE OF INTERNATIONAL PRINCIPLES, ACTORS AND VALUES IN EVOLVING  
FOREST RELATED LAW (CASE STUDY CHINA)**

**BY  
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Thesis submitted for the degree of PhD/MPhil

2015

School of Law  
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*Dedicated with love to the memory of*  
*Dr. Piotr Lesniewski my guide, mentor and inspiration*  
*&*  
*Evelyn Lesniewska a courageous fighter*

## Thesis Abstract

International law is increasingly developing and evolving through dynamic interactions between multiple actors across multiple levels, blurring the boundaries between global and localised processes. Such developments expand international legal research horizons beyond the traditional state-centric and institutional canopy. There is limited agreement amongst legal scholars on the scope, scale and significance decentered processes have on evolving international law.

This research's primary objective is to determine the contributions that different international law theories, primarily institutionalism, or socio-legal studies, can bring to improving understanding of the nature and outcomes of these processes. Forests, due to their multi-functionality, are implicated in a broad range of international legal fields so offer an excellent case study for such research.

This thesis focuses on two in-situ projects that draw on international law principles to articulate their objectives on conservation and bioenergy. Drawing on socio-legal studies methodologies the research includes fieldwork using qualitative discourse analysis of primary and secondary materials collected to identify the dynamics at play between international principles, actors and values involved in each case study. However the research places the projects within the traditional canopy of international forest-related law narrative in order to identify the linkages between ongoing developments within multilateral agreements.

China with the historical, philosophical, economic and political stature it wields as a case study at a time when the geo-political order is changing. The actors are Chinese, foreign and international. The research reveals the importance that context plays in how principles are interpreted by actors. It finds that actors employ certain international principles and values discourse when necessary. It demonstrates how some partnerships, at all levels, between knowledge-based power and political authority, marginalise other actors' participation in forest law-making processes. This perpetuates certain values, to the exclusion of others, resulting in distortions of the principle concepts to their detriment. Negotiating the legitimacy of outcomes appears to be dependent on the will of those who already have authority.

The research conclusions demonstrate that different approaches by international law scholarship provide important tools with which to dissect and understand the multilevel law-making processes taking place globally. This conclusion will benefit future research, especially in international forest related law.

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## Acronyms

**CBD** Convention on Biological Diversity

**CBDR** Common but Differentiated Responsibility

**CNCCP** China's National Climate Change Programme

**CDM** Clean Development Mechanism

**CIFOR** Center for International Forestry Research

**CITES** Convention on International Trade in Endangered Species of Wild Fauna and Flora

**CLS** Critical Legal Scholarship

**COP** Conference of the Parties

**COP/MOP** Conference of the Parties/Meeting of the Parties

**CMS** Convention of Migratory Species of Wild Animals

**CPF** Collaborative Partnership on Forests

**CSR** Corporate Social Responsibility

**EC** Epistemic Communities

**ECOSOC** United Nations Economic and Social Council

**EPL** Environment Protection Law

**EU** European Union

**EUCBP** European Union-China Biodiversity Program

**FAO** Food and Agricultural Organization of the United Nations

**FCPF** Forest Carbon Partnership Facility

**FECF** Forest Ecosystem Compensation Fund

**FLEG** Forest Law Enforcement and Governance

**FLEGT** Forest Law Enforcement, Governance and Trade

**FPIC** Free Prior and Informed Consent

**FSC** Forest Stewardship Council

**GEF** Global Environment Facility

**GHG** Greenhouse Gases

**GPA** Green Poverty Alleviation

**ICJ** International Court of Justice

**IFF** Intergovernmental Forum on Forests

**IIED** International Institute for Environment and Development

**ILC** International Law Commission

**IO** International Organisation

**IPCC** Intergovernmental Panel on Climate Change

**IPF** Intergovernmental Panel on Forests

**IPO** Indigenous Peoples Organisation

**IUFRO** International Union of Forest Research Organizations

**ITTA** International Tropical Timber Agreement

**ITTO** International Tropical Timber Organization

**IUCN** International Union for Conservation of Nature

**MEA** Multilateral Environmental Agreements

**MOST** Ministry of Science and Technology

**NGO** Non-Governmental Organisation

**NLBI** Non-Legally Binding Instrument on All Types of Forests

**NRDC** National Development and Reform Commission

**NSA** Non State Actor

**PES** Payment for Ecosystem Services

**PEFC** Programme for the Endorsement of Forest Certification

**PRC** Peoples Republic of China

**PSNR** Permanent Sovereignty over Natural Resources

**REDD** Reducing Emissions from Deforestation and Forest Degradation

**REL** Renewable Energy Law

**SFA** State Forest Administration

**SFM** Sustainable Forest Management

**SLCP** Sloping Land Conversion Programme

**SNEC** Shenyu New Energy Company

**TEEB** The Economics of Ecosystems and Biodiversity

**TNC** The Nature Conservancy

**TNN** Transnational Networks

**UN** United Nations

**UNCCD** United Nations Convention to Combat Desertification

**UNCED** United Nations Conference on Environment and Development  
**UNDP** United Nations Development Programme  
**UNDRIP** United Nations Declaration on the Rights of Indigenous Peoples  
**UNEP** United Nations Environment Programme  
**UNESCO** United Nations Educational, Scientific and Cultural Organisation  
**UNFCCC** United Nations Framework Convention on Climate Change  
**UNFF** United Nations Forum on Forests  
**VPA** Voluntary Partnership Agreement  
**WBCSD** World Business Council for Sustainable Development  
**WHC** World Heritage Convention  
**WRI** World Resources Institute  
**WTO** World Trade Organization  
**WWF** World Wildlife Fund for Nature

## C1 Introduction: Setting a Focus

Legal scholarship on international forest related law is dominated by research that focuses on its nature, form and content largely from a state centric perspective. This includes primarily documenting the relevant treaties and agreements that make-up the international forest regime, subsequent developments under these agreements and questions of conflict and fragmentation. As a consequence the research focus is on the institutional ‘canopy’ that traditionally is understood to determine international law-making rather than what lies beneath and beyond it. Although this classical institutionalist scholarship is not without importance it reveals little as to how the normative principles and values that guide the implementation and further development of law in practice actually evolves. Neither does such an approach include within its scope of inquiry the activities of non-state actors in influencing international law-making processes relating to forests.

In response to these changes in participation dynamics occurring in international law-making some legal scholars<sup>1</sup> advocate the need for a more multifaceted approach to understanding how normative principles and values evolve from the international to the local level.<sup>2</sup> Such scholarship invites

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<sup>1</sup> Different terms are used depending on the overall norms, methodologies and values adopted by scholars; critical legal scholars, legal pluralists, socio-legal scholars amongst others. Throughout this thesis I will refer to socio-legal scholarship as an all-encompassing category for such scholarship.

<sup>2</sup> See A. Perry-Kessaris (eds), *Socio-legal Approaches to International Economic Law: Text, Context and Subtext*, (2013), Routledge; W. Twining, *Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context*, (2005), Vol. 1, Issue 1, *International Journal of Law in Context*, pp. 5-40; A. Anghie, B. Chimni, K. Mickelson & O. Okafor (eds), *The Third World and International*

researchers to look beneath and/or beyond the international legal canopy. Socio-legal scholars encourage researchers to pursue unfamiliar pathways and form alliances with practitioners in other disciplines to deliver more robust and applied outputs. For instance, Berman, a legal pluralist, proposes a more applied approach to researching international law-making to capture dynamic multilevel and multi-actor processes occurring. He argues that by studying and comparing local settings, in which multiple actors normative interpretations become operative, researchers can gain a far more nuanced understanding of the international and transnational legal terrain and how it functions.<sup>3</sup> By doing so the dynamics between actors, principles and values across multiple governance levels can be identified in law-making processes. An important objective of socio-legal research is to expose the power dynamics that lie behind these law-making processes within social, economic and political arenas. Actively observing processes in-situ as a means to gain greater understanding on which to base analysis is a necessary part of this type of applied legal research.

This thesis' focus shifts away from the traditional institutional canopy, turning its gaze below the canopy to the national and local, as well as beyond; drawing on the dynamics between multiple transboundary actors and localised actors. It juxtaposes socio-legal approaches with institutional to determine what each offers in way of improving research on forest related law-making processes.

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*Order: Law, Politics and Globalization*, (2003), Martinus Nijhoff Publishers; M. Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities*, (2002), Butterworths.

<sup>3</sup> P. Schiff Berman, A Pluralist Approach to International Law, (2007), Vol. 32, *Yale Journal of International Law*, pp. 301- 328, p. 327.

## 1.1 Looking Beyond the Canopy: Objective

This research's primary objective is to determine which theoretical approach to interpreting forest-related international law-making processes: institutionalism, or socio-legal studies offers researchers the most useful analytical framework.<sup>4</sup> To meet this objective the research is broken down into a number of component parts.

These are to:

- 1) identify and analyse key normative principles that are intended to guide the development and interpretation of international forest related law and policy (Chapter 2);
- 2) examine the pathways adopted by actors to influence the development and interpretation of international principles within forest related law and policy (Chapter 3);
- 3) outline dominant values in international law and consider how these inform the design of regulatory mechanisms to realise normative principles in forest related matters (Chapter 4);
- 4) examine how legal principles and values are employed by actors in forest conservation and bioenergy production conducted in China through fieldwork research (Chapters 5,6,7);
- 5) provide conclusions, based on the lessons learnt from the case studies, about the analytical frameworks offered by different theoretical approaches to international law, actors, principles and values relationships. As well as identify different areas for further research on contemporary international law relating to forests (Chapter 8).

Through this research I trace the international normative principles relating to forests, as well as reveal the values that inform their interpretation by actors

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<sup>4</sup> I will differentiate between global legal pluralism and critical legal studies approaches when examining socio-legal scholarship.

throughout law-making processes. By analysing processes observed during fieldwork in Yunnan, South-West China relating to forest conservation and the forests energy/climate change nexus the thesis offers a reflection on the contribution that such approaches to research can make to developing more accountable, legitimate and appropriate law-making.

Numerous actors have in the past three decades engaged in forest related issues, directly and indirectly, via various international law and policy fields including trade, human rights and the environment. As a consequence the current relationship between forests, forest peoples and international law is multilayered, dynamic and complex. As such, any omission of non-state actors involvement via numerous spaces, formal and informal, will lessen the value of legal research outcomes.

## 1.2 Interpreting International Law's Structure: An Open vs a Closed Canopy

Classical institutionalist scholars look to one of international law's key foundational concepts as a guiding principle: universality. The principle of universality holds that international law is valid, and applicable, in all countries, whatever the cultural, economic or socio-political traditions.<sup>5</sup> All sovereign states fall under universalism's canopy.<sup>6</sup> However, it is recognised that universalism is incomplete, and, according to many legal scholars, its canopy is

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<sup>5</sup> R. Jennings, *Universal International Law in a Multicultural World*, in M. Bos & I. Brownlie, *Liber Amicorum for Lord Wilberforce* (1987) Oxford University Press, p. 341. cited in *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by M. Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, p. 105 [hereafter ILC Fragmentation of International Law Report 2006].

<sup>6</sup> Those who fall outside this universal canopy are labeled as either rogue or failed states. International law's goal is to fix these states and re/integrate them into the universal order.

not fully constructed.<sup>7</sup> To complete the canopy states need international institutions to promote the rule of law globally, through it universal principles and values can be implemented. Lawyers act as a-political technicians in such an international legal system. They primarily design appropriate regulatory mechanisms, and when necessary undertake 'repairs', to achieve international laws' universal objectives.<sup>8</sup> It is a shared view that in time, and with a collective commitment, the Western Modernist universal international legal project will be completed.<sup>9</sup>

For socio-legal scholars optimism in universalism's potential is misplaced. They highlight the limits of such a perspective of international law's structure.<sup>10</sup> Some claim universalism is grounded in unrealistic expectations of the power of law in itself. A consequence is the perpetuation of a dangerous utopian fiction in which international law's potential to create a single legal order to address the worlds' problems is overplayed.<sup>11</sup> This is particularly of misleading for international

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<sup>7</sup> R. Higgins, *Problems and Process: International Law and How We Use It*, (1995), Oxford University Press; A. M. Slaughter, A Real New World Order, (1997), Vol. 76, Issue 5, *Foreign Affairs*, pp. 183-197.

<sup>8</sup> M. Koskenniemi, The Subjective Dangers of Projects of World Community, in A. Cassese (ed), *Realising Utopia: The Future of International Law*, (2012), Oxford University Press, pp. 3-14.

<sup>9</sup> M. Deflem, (ed) *Habermas, Modernity and Law*, (1996), Sage Publishers.

<sup>10</sup> Various schools of thought include: realists - J. Goldsmith & E. Posner, *The Limits of International Law*, (2005), Oxford University Press; regionalist - T.O. Elias, *Africa and the Development of International Law*, (1972), Leiden Sijthoff; R.P. Anand, The Role of Asian States in the Development of International Law in R-J. Dupuy (ed.), *The Future of International Law in a Multicultural World*, (1983), The Hague: Nijhoff; reformists - W. Friedman, *The Changing Structure of International Law*, (1964), Cambridge University Press; H. Koh, How is International Human Rights Law Enforced?, (1999), Vol. 74, *Indiana Law Journal*, pp. 1397-1417; R. Higgins, *Problems and Process: International Law and How We Use It*, (1995), Oxford University Press; Slaughter. A.M, *supra* note; critics - M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005 reissue), Cambridge University Press; H. Charlesworth & C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (2000), Manchester University Press; A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, (2005), Cambridge University Press; B. de Sousa Santos, *Towards a New Legal Common Sense*, (2002), Butterworths Lexis Nexis; B. S. Chimni, Third World Approaches to International Law: A Manifesto, (2006), Vol. 8, *International Community Law Review*, pp. 3-27.

<sup>11</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005 reissue), Cambridge University Press, pp. 474-537; J. Goldsmith & E. Posner, *The Limits of*

environmental law when tackling global public goods problems, such as climate change and biodiversity degradation, that require collective action.

With an increasing recognition of the dynamic nature of international legal processes, contextualised within a broader transnational globalising environment with multiple actors participating beyond the state, the fiction of universal values is now difficult to maintain, although many still do.<sup>12</sup> This is exacerbated given that the volume and scope of international law has expanded rapidly since the 1950s. International law now includes a number of specialised regimes evolving under international criminal law, humanitarian law, trade law and environmental law. Most specialised regimes' *raison d'être* is to strengthen the law on a particular subject matter, to provide a more effective protection for certain interests or to create a more context-sensitive regulation of a matter than what is offered under the general law.<sup>13</sup> With such expansion comes an increased interest in any resulting fragmentation.

For universalists understanding the impacts of different, and evolving, rules under a special regime to achieving policy goals in another regime area is necessary to attaining a fully functioning, conflict-free, world legal order<sup>14</sup> The importance of this was reflected when the International Law Commission (ILC) was specifically mandated to report on the potential 'Difficulties arising from the

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*International Law*, (2005), Oxford University Press; S. Hopgood, *The Endtimes of Human Rights*, (2013), Cornell University Press.

<sup>12</sup> U. Baxi, What may the Third World expect from International Law? in R. Falk, B. Rajagopal & J. Stevens (eds), *International Law and the Third World: Reshaping Justice*, (2008), Routledge Cavendish, pp. 9-23 p. 20; F. Megret, International Law as Law, in J. Crawford & M. Koskeniemi, *International Law*, (2012), Cambridge University Press, pp. 64-93; W. Twining, *Global Jurisprudence: Understanding Law from a Global Perspective*, (2009), Cambridge University Press.

<sup>13</sup> ILC Fragmentation of International Law Report 2006, *supra* note 4, p. 97.

<sup>14</sup> J.P Trachtman, *The Future of International Law: Global Government*, (2013), Cambridge University Press, p. 2.

Diversification and Expansion of International Law.’<sup>15</sup> The ILC concluded in 2006 that fragmentation in international law was the outcome of the multiple formal and informal activities of lawyers, diplomats and pressure groups, etc. Any shifts in legal culture occur largely in response to practical needs of specialisation rather than as conscious acts of regime-creation.<sup>16</sup> Fragmentation then is viewed as a natural consequence of international law’s reach.

The ILC, however, did not seek to determine or interpret the actual impact fragmentation has on international law’s structure, design, development and implementation. It also did not specifically identify the scope of fragmentation in international law: whether it was limited to beneath the canopy, or was part and parcel of processes beyond it; ones that are inextricably connected through globalisation. Legal scholars, who consider international law as an important component in the global world order, recognise the need to increasingly understand the inter-linkages within a multi-level system, including within, and between, specialised regimes, in order to bring a greater functional harmony to this complex system.<sup>17</sup> Others see this as a fanciful goal.<sup>18</sup>

Thinking beyond the normative framework canopy that universalist international law constructs global legal pluralist scholars view fragmentation as an opportunity for different actors to be involved in law-making processes.<sup>19</sup> Benda-Beckmann sees globalisation as having provided an even wider platform

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<sup>15</sup> ILC Fragmentation of International Law Report 2006, *supra* note 4.

<sup>16</sup> *Ibid.*

<sup>17</sup> R. Wolfrum & V. Röben (eds.), *Developments of International Law in Treaty*, (2005), Springer, pp. 417-586.

<sup>18</sup> G. Teubner & A. Fischer-Lescano, Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, (2004), Vol. 25, No. 4, *Michigan Journal of International Law*, pp. 999-1046.

<sup>19</sup> B. de Sousa Santos, *Towards a New Legal Common Sense*, (2002), Butterworths Lexis Nexis.

beyond the 'international legal regime' upon which contestation can occur.<sup>20</sup> Yet without attention to the power dynamics that determine the possibilities of inclusion /exclusion of actors participation such a view is utopian at best.<sup>21</sup> Critical legal scholars claim powerful non-state actors transnational legal norm-making activities are reshaping any apparent democratic, international pluralist environment towards a 'legalised hegemony' that is preferential to a new global elites values.<sup>22</sup> Benvenisti and Downs raise this point when they contest the ILC's conclusions. They argue that fragmentation in international law needs to be understood as a phenomenon rooted in the political economy and control of power by an elite.<sup>23</sup> This is particularly the case given international laws' colonialist foundations; ones bounded in a history of appropriation of non-European territory and culture; usually on terms that disempowers colonised peoples who are prohibited from asserting their own rules, principles and values. <sup>24</sup> But there is also a need to recognise the changing geo-political power dynamics internationally, especially amongst developing nations with emerging economies of China, Brazil, India and South Africa engaging in south-south cooperation.

It is difficult to not conclude that international law today is formed through the

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<sup>20</sup> K. von Benda-Beckmann, Globalisation and Legal Pluralism, (2002), Vol.4, *International Law Forum du Droit International*, pp. 19-25.

<sup>21</sup> R. Falk, International Law and the Future, in R. Falk, B. Rajagopal & J. Stevens (eds), *International Law and the Third World: Reshaping Justice*, (2008), Routledge Cavendish, pp. 23-35.

<sup>22</sup> Chimni. B *supra* note 7; B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, (2003), Cambridge University Press; De Sousa Santos, (2002) *supra* note 19.

<sup>23</sup> E. Benvenisti & G. W. Downs, The Empire's New Clothes: Political Economy and the Fragmentation of International Law, (2007), Vol. 60, Paper 41, *Tel Aviv University Law School*, pp. 1-40.

<sup>24</sup> T.O. Elias, *Africa and the Development of International Law*, (1972), Leiden Sijthoff; R.P. Anand, The Role of Asian States in the Development of International Law, in R-J. Dupuy (ed.), *The Future of International Law in a Multicultural World*, (1983), Brill Academic Publishers.

actions of a diverse range of constituencies. It is a landscape in which there is multidirectional interaction of local, national and international norms occurring in dynamic, at times unpredictable, ways. As a result the process of law-making and implementation is increasingly fragmented vertically among supranational, international, national, and sub-national layers of authority (multilevel governance), as well as horizontally, among different parallel relations maintained by different groups of actors (multipolar governance).<sup>25</sup> This is especially the case where actors have 'values, identities and roles distinct from the geographic limitations of sovereign states', such as indigenous peoples and some international non-governmental organisations.<sup>26</sup> Given this situation a classical international law doctrine that only recognises the role of the state is not capable of explaining the complexities of contemporary international law-making drawing on classical conceptual boundaries.<sup>27</sup> However, recognition of this is not sufficient alone, researchers also need to be attuned to issues of power, exclusion and legitimacy amongst, and between, all actors to fully determine their influence on international law-making processes both within and beyond the canopy.

### 1.3 Principles and Norms: International Laws' Keystones

According to traditional institutionalist perspectives principles and norms are international laws' keystones under a universal system. International law serves

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<sup>25</sup> F. Bierman & P. Pattberg (eds), *Global Environmental Governance Reconsidered*, (2012), MIT Press, p. 13.

<sup>26</sup> R. McCorquodale, *Beyond State Sovereignty: The International Legal System and Non-state Participants*, (2006), Issue 8, *Revista Colombiana de Derecho Internacional*, p. 149.

<sup>27</sup> A. Bianchi, (eds), *Non-State Actors and International Law*, (2009), Ashgate, p. xvi.

an important process through which political, economic and social issues can be addressed in developing universal principles and norms. To serve this purpose Tomuschat claims that the international community needs a 'broad set of [shared] legal norms'.<sup>28</sup> Ideally a norm in international law is a principle that is agreed by consensus and subsequently guides the actions of all States. Yet this is misleading. It ignores the diverse interpretations associated with principles and why states at the international level agree to a 'consensus'. It also excludes any notion of principles and norms emerging and evolving within other fora other than within a fixed international legal system; beyond the canopy.

As noted in section 1.2 international law has since the 1950s undergone an enormous transformation. Not only has the quantity of international law exponentially increased, but also the subject boundaries within which law now operates are more diverse.<sup>29</sup> International environmental law is perhaps the most significant demonstration of this.<sup>30</sup> A proliferation of multilateral agreements means international environmental law now extends into every area of our lives.<sup>31</sup> This exponential growth in international law has resulted in a significant period of normative development with the increasing numbers of principles and rules. It has led, in Broude and Shany's opinion, to a situation of

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<sup>28</sup> C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, (1999), Vol. 281, Issue 9, *Recueil des Cours*, p. 86.

<sup>29</sup> H.C. Charlesworth & H. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (2000), Manchester University Press.

<sup>30</sup> The International Environmental Agreements database lists 1190 multilateral environmental agreements, 1500 bilateral environmental agreements, and 250 other (non-bilateral, non-multilateral) agreements. R. B. Mitchell, IEA Project Contents, International Environmental Agreements Database Project (Version 2013.2), available <http://iea.uoregon.edu/page.php?file=home.htm&query=static> .

<sup>31</sup> D. Bodansky, *The Art and Craft of International Environmental Law*, (2010), Harvard University Press, p. 4; P. Birnie, A. Boyle & C. Redgwell, *International Law and the Environment*, (2011), Oxford University Press, p. 2.

‘unprecedented normative density and intensity’.<sup>32</sup> International law scholars and practitioners are challenged by the need to interpret the inter-relationships between normative principles within, and between, fragmented specialised legal fields such as human rights, environmental law and economic law. That is even before considering the dynamics between them when researching beyond the canopy.<sup>33</sup>

How principles and norms are determined however is a contested issue, and increasingly so, with multiple actors having greater involvement horizontally and vertically across multiple levels and fields contributing to law-making processes. The classical approach to determining principles and norms in international law is to refer to the sources identified in Article 38(1) of the Statute of the International Court of Justice.<sup>34</sup> However Article 38(1) fails to recognise explicitly increasing source materials that contribute to the normative law-making process.<sup>35</sup> The quasi-legal status of much of this material is an anomaly that is not resolved either by the Vienna Convention on Law of Treaties as it falls out of its purview given its origins beyond any agreed international treaty.<sup>36</sup> By not casting the sources net wide these various normative interpreters and entrepreneurs go unrecognised and unaccounted for in international legal research. However adopting an all-inclusive approach can

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<sup>32</sup> T. Broude & Y. Shany, The International Law and Policy of Multi-Sourced Equivalent Norms, in T. Broude & Y. Shany (ed), *Multi-Sourced Equivalent Norms in International Law*, (2011), Hart Publishing, pp. 1-15.

<sup>33</sup> Schiff Berman. P, *supra* note 3, p. 326; *ibid*.

<sup>34</sup> For a comprehensive overview of Article 38 ICJ see M. Drumbl, Actors and Law-Making in International Environmental Law, in M. Fitzmaurice, D. Ong & P. Merkouris, *Research Handbook on International Environmental Law*, (2010), Edward Elgar, pp. 3-36.

<sup>35</sup> A. Wiersema, The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements, (2009), Vol. 31, *Michigan Journal of International Law*, p. 231.

<sup>36</sup> Article 31(3)(c) Vienna Convention on the Law of Treaties (1969); M. Fitzmaurice & O. Elias, *Contemporary Issues in the Law of Treaties*, (2005) Eleven International Publishing.

perpetuate, and even exacerbate, existing power imbalances within international law-making processes by failing to challenge the legitimacy of dominant normative discourses.<sup>37</sup> The spectrum of contrasting approaches to sources covers differing perspectives international law-making and structure; from classical institutionalists to global legal pluralist.

It is also important to determine if a hierarchy exists between norms, to consider how the hierarchy is formed and maintained and finally to understand what contributes to shifting any changes. According to classical international law theory, principles and norms are considered co-equal. A hierarchy nevertheless exists in practice. The form and nature of this hierarchy is contested. Where legal scholars do acknowledge a normative hierarchy it is often limited to a one-dimensional vertical construct.<sup>38</sup> Yet to merely conclude that there is a single one-dimensional vertical hierarchy is unsatisfactory. A hierarchy of norms is better understood as multi-dimensional. How principles and norms are developed and interpreted by actors, both state and non-state, is a matter that reaches beyond merely law and enters into political, cultural and economic values. It is this that makes discerning any clear 'hierarchy' and/or relationship of norms complex.

Focusing on broader sources of principles and norms necessitates researchers to familiarise themselves with the actors generating them. Doing so throws up challenges especially regarding definition, causation and interpreting power

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<sup>37</sup> Baxi, U, *supra* note 12, p. 14.

<sup>38</sup> M. Koskenniemi, Hierarchy in International Law: A Sketch, (1997), Vol. 8, *European Journal of International Law*, pp. 566-582, p. 567.

dynamics within different contexts. One of the most significant issues is the question of legitimacy and accountability of non-state actors within governance systems. The following section introduces divergent theories on the role of actors in international law-making processes and how legitimacy is explained.

#### 1.4 Actors and Pathways of Influence on International Law-making Processes

Traditionally the state was considered to be the only actor that had the authority to legitimately engage, or provide a mandate to others to do so, in the international law-making process.<sup>39</sup> Walter Friedman challenged this perspective in the 1960s. He drew attention to the potential importance of non-state actors and international organisations in international law-making processes. The increasing involvement of a diverse range of actors, he argued, was changing international law's structure.<sup>40</sup> Today many scholars share Friedman's perspective. However, some argue that the more complex nature of non-state involvement occurring today is altering international laws' structure more dramatically than Friedman originally described; shifting it from a state-privileging system and limiting the principle of sovereignty upon which it is based.<sup>41</sup>

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<sup>39</sup> Bianchi, A, *supra* note 27, p. xiv; I. Scobbie, Wicked Heresies or Legitimate Perspectives? Theory and International Law, in D. Evans (ed) *International Law*, (2006), Oxford University Press, pp. 83-115, p. 84.

<sup>40</sup> W. Friedman, *The Changing Structure of International Law*, (1964), cited in J.B. Trachtman, *The Future of International Law: Global Government*, (2013), Cambridge University Press, p. 1.

<sup>41</sup> A. Hurrell, *On Global Order: Power, Values and the Constitution of International Society*, (2007), Oxford University Press, p. 111 cited in N. Bhuta, *The Role International Actors Other than States can Play in the New World Order*, A. Cassese, *Realising Utopia: The Future of International Law*, (2012), Oxford University Press, pp. 61-76, p. 68; Berman, S, *supra* note 3, p. 312.

Views amongst legal scholars though do differ on how to interpret the increased non-state actors, and international organisations, activities, as well as the significance attributed to them. The differences reflect the competing theoretical approaches employed to determine international law's structure considered in section 1.2: institutionalism, global legal pluralism and critical legal studies. For institutionalists non-state actors activities are functional. They play a key role in ensuring the furtherance of the international legal order, especially by embedding international principles within sovereign jurisdictions through different pathways such as courts, policy, market-based intervention and education.<sup>42</sup> For global legal pluralists the institutionalist interpretation lacks a critical analysis of non-state actors. It views them too passively, as transmitters of international principles and rules as opposed to initiating and interpreting them according to their own values and interests.<sup>43</sup> Whilst critical legal scholars' advocate not abandoning the international legal framework which they see as holding significant normative discursive power to propose solutions and remedies for the weakest and least represented states and peoples.<sup>44</sup> They instead emphasise the need to focus on power when seeking to analyse the activities, agendas and strategies of non-state actors in the influencing law-making processes at all levels.<sup>45</sup>

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<sup>42</sup> A.M. Slaughter, *International Law in a World of Liberal States*, (1995), Vol. 6, Issue 1, *European Journal of International Law*, pp. 503-538, p. 504; H. Koh, *Transnational Legal Process*, (1996), Faculty Scholarship Series, Paper 2096 available [http://digitalcommons.law.yale.edu/fss\\_papers/2096](http://digitalcommons.law.yale.edu/fss_papers/2096) [last accessed 20 November 2014].

<sup>43</sup> I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, (2012), Oxford University Press.

<sup>44</sup> H. Charlesworth, *International Law: A Discipline in Crisis*, (2002), Vol. 65, Issue 3, *The Modern Law Review*, pp. 377-392, p. 381

<sup>45</sup> De Sousa Santos, (2002) *supra* note 19, pp. 439-489; Twining, W, (2009), *supra* note 8, p. 277.

The growth in interest amongst international legal scholars to research non-state actors' impacts on law-making processes reveals that amongst all schools of thought a belief that the phenomenon exists and is important.<sup>46</sup> Research should determine if significant changes, initially identified by Friedman, are taking place to the international law's structure; whether the principle of sovereignty is being undermined, and if this is due to the diverse activities of international actors. Berman advocates exploring interactions between all actors local, national, regional and international to observe and analyse feedback loops in the shaping and development of normative principles.<sup>47</sup> Such research can also contribute to identifying those marginalised in the multiple law-making processes, and understand the consequences of these exclusions on law and policy-making.<sup>48</sup> All actors possess values that inform their activities. Underpinning all international law-making processes are the values that those engaged in the process bring to it. Revealing this is necessary for researchers who are seeking to identify the dominant values, why they are dominant, and what the effects of their dominance has in terms of ensuring international law principles are achieved.

### 1.5 Values in International Law: From Ideals to Reality

Values have a great significance to how principles and norms are articulated and interpreted by different actors. They have a 'determining power on law as a

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<sup>46</sup> R. Cotterrell, Transnational networks of community and international economic law in A. Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext*, (2013), Routledge, pp. 133-151, p. 133.

<sup>47</sup> Schiff Berman, P, *supra* note 3, p. 327.

<sup>48</sup> Koskeniemi. M, (2005), *supra* note 11, p. 240.

conceptual scheme that controls our perception'.<sup>49</sup> Values are essentially abstractions of what humans consider to be important and right. As such they are central to developing any solution orientated law and policy. This is very much in need today. Increasingly scientists posit that the Earth has entered a new geological epoch, termed the 'Anthropocene'.<sup>50</sup> This is an era in which humans need to find the solutions to reverse the negative impacts of industrial scale global economies on ecosystems, including forests. Law is part of this, and it is integral that law is developed based on values that do not undermine efforts to develop a harmonious relationship between humans and all ecosystems.<sup>51</sup> To do so it is important to have a clear understanding of existing values that inform international law and its implementation within states by all actors.

A first step in developing understanding of values is to expose the two background values in all law. Anthropocentric and intrinsic values inform all areas of law from the international to the local level, including traditional customary law. Intrinsic values recognise that a thing is worth having for itself, rather than as a means to something else. An anthropocentric value is worth having as a means towards getting something else and reflects the difference that something makes to the satisfaction of human preferences. They are not

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<sup>49</sup> M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, (2001), Oxford University Press, p. 10.

<sup>50</sup> The term 'Anthropocene' was first used by Eugene Stoermer, and subsequently popularized by the atmospheric chemist and Nobel Prize laureate Paul Crutzen.

<sup>51</sup> L. Westra, K. Bosselmann & R. Westra, *Reconciling Human Existence with Ecological Integrity*, (2008), Edward Elgar, pp. 39-61; I. Lowe, Environmental Values in a Globalising World: Grounds for Cautious Optimism, in J. Paavola & I. Lowe, *Environmental Values in a Globalising World: Nature, Justice and Governance*, (2005), Routledge, pp. 236-246; R. Brooks; et al, *Law and Ecology: The Rise of the Ecosystem Regime*, (2002), Ashgate pp. 325-365. B. Weston & D. Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, (2013) Cambridge University Press, pp. 179-204, A. Philippopoulos-Mihaloupoulos, Looking for the Space between Law and Ecology in A. Philippopoulos-Mihaloupoulos (ed), *Law and Ecology: New Environmental Foundations*, (2011), Routledge, pp. 1-18.

necessarily mutually exclusive, however some scholars believe that the degree to which one dominates has important implications for how law approaches tackling ecosystem degradation. Some perceive international environmental law's close affiliation with Enlightenment Western philosophies on law, science and economics as being a fundamental flaw to addressing global challenges.<sup>52</sup> Perry-Kessaris though sees the dichotomy between intrinsic and anthropocentric values as an unnecessary distraction. She argues that differing values to develop the necessary tools and mechanisms to achieve solutions that work within the Anthropocene are needed.<sup>53</sup> It is difficult however to see what alternative exists other than to redefine the balance between anthropocentric and intrinsic values. The key question is how the rebalancing is to be achieved.

One way that international law recognises value is through awarding rights to subjects it values. The range of subjects recognised as having rights under international law has increased over time. Today rights are recognised for states, individuals and collective groups such as minorities and indigenous peoples. Extending Rights to Nature is increasingly being advocated in some quarters as a way in which to reconfigure humans' relationships with the planetary ecosystem using legal mechanisms.<sup>54</sup> Stone famously considered this issue in relation to the rights of trees.<sup>55</sup> These four sets of rights do not necessarily co-exist

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<sup>52</sup> T. Berry, *The Great Work: Our Way into The Future*, (1999), Bell Tower Publications, p. 48; A. Philippopoulos-Mihaloupoulos *ibid.*

<sup>53</sup> A. Perry-Kessaris, Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development, (2011), Vol. 7, Issue 4, *International Journal of Law in Context*, pp. 401-421, p. 407.

<sup>54</sup> C. Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law*, (2013), Cambridge University Press; C. Cullinan, A History of Wild Law, in P. Burdon, (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, (2011), Wakefield Press, p. 276 [Kindle Version].

<sup>55</sup> C. Stone, *Should Trees have Standing? Law, Morality and the Environment*, (2010, 3<sup>rd</sup> ed), Oxford University Press, pp. 1-23.

comfortably; there are tensions between them. For example a state's sovereign territorial rights, including that of statutory law-maker, is undermined to some degree by indigenous peoples rights to claim self-determination within their territories.<sup>56</sup> Some human rights lawyers have concern about collective rights trumping an individual's human rights, e.g. women's rights.<sup>57</sup> Finding a working balance between these different rights is an ongoing process.

Another way that international law allocates values is using economics. The incorporation of neo-liberalism into international environmental law especially means that economic valuation warrants attention in any discussion paper examining values and international law. This is increasingly the case as economic values are extended to aspects of Nature that previously legal philosophers like Kant considered to be 'infinitely above all price, with which it cannot be brought into comparison or competition at all without, as it were, assaulting its holiness'.<sup>58</sup> Economists' advise that modern civilisation will only survive if we reverse the thinking where 'infinite value was indistinguishable from zero value [such as a standing old growth forest] in a market economy'.<sup>59</sup> Achieving this

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<sup>56</sup> Art. 3 UNDRIP states 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' (2007), New York; S. Errico, *The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights* in S. Allen & A. Xanthaki, *Reflection on the UN Declaration on the Rights of Indigenous Peoples*, (2011), Hart Publishing, pp. 329-367; see also P. Piirmae, *The Westphalian Myth and the Idea of External Sovereignty* in H. Kalmo & Q. Skinner, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, (2010), Cambridge University Press, pp. 64-81; I. Ward, *The End of Sovereignty and the New Humanism*, (2003), Vol. 55, No.5, *Stanford Law Review*, pp. 2091-2112; H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, (1990), University of Pennsylvania Press.

<sup>57</sup> A. Xanthaki, *The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women?*, in S. Allen & A. Xanthaki, *Reflection on the UN Declaration on the Rights of Indigenous Peoples*, (2011), Hart Publishing, pp. 413-433, p. 420.

<sup>58</sup> Cited in S. Cornell, *Valuing Ecosystem Benefits in a Dynamic World*, (June 2010), Vol. 22, Issue 16, *Climate Research Special*, p. 2.

<sup>59</sup> D. Pearce, *Can Non-market Values Save the Tropical Forests?*, in B. Goldsmith (ed), *Tropical Rain Forest: a Wider Perspective*, (1998), Springer Publishing, p. 260.

means that a market value is assigned to all aspects of nature. Neo-liberal economics needs the appropriate institutional legal infrastructure and normative rules to facilitate such expansion. Perry-Kessaris argues that to meet these needs turns the legal system into a market game by making it a mere instrument of market values: efficiency; growth and profit.<sup>60</sup> An expanding faith in market economics places it as a core organising value within international law through which principles are to be met. This threatens to subordinate all values based on rights to those of economic value.

With an expansion in regulation, developed both by private and public actors, it is important to clarify which values and principles will be embedded through their use. This is particularly necessary because regulatory choice is based on the values and political ideologies that inform users beliefs.<sup>61</sup> All forms of regulation are conscious efforts to achieve set value based outcomes. They have a public purpose and/or effect regardless of whether they are initiated by public or private bodies.<sup>62</sup>

Different regulatory tools and mechanisms are used within international law relating to forests. As within other areas of law in recent decades there has been a rise in preferences for market-based instruments and reflexive approaches amongst certain actors. This development is not without criticism, especially as it is believed that market-based instruments promote neo-liberal legal agendas

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<sup>60</sup> Perry-Kessaris, A, *supra* note 53, p. 407.

<sup>61</sup> B. Barton, The Theoretical Context of Regulation, in B. Barton et al, *Regulating Energy and Natural Resources*, (2006), Oxford University Press, pp. 11 – 33, p. 30.

<sup>62</sup> R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory, Strategy and Practice*, (2012), Oxford University Press, p.3.

of privatisation and individual property rights over public interest.<sup>63</sup> However some claim that reflexive regulation, or smart regulation, can bridge the divides and get the best outcomes from all approaches.<sup>64</sup> Reflexive regulation uses non-direct legal intervention to achieve its goals. It is procedure orientated rather than working to a prescribed goal. It aims to create a regulatory space in which relationships between different actors result in developing innovative approaches to incentivise behavioral change based on diverse sets of values. Achieving this though requires effective governance systems, procedural rights ensuring the participation for all stakeholders and the rule of law. Especially with transboundary problems relating to global public goods like forests achieving this is an uphill struggle.

### 1.6 Approaches to International Forest Related Law Research

Forests are among the most complex environmental systems covering a variety of ecosystem services for the benefit of other ecosystems, species and human well-being world wide, which makes forests one of the most important and valuable ecosystems worldwide.<sup>65</sup> This makes forests a prime case study for undertaking comparative research of theoretical approaches regarding the structure of international law and law-making processes is forest related law. Research on the international forest related law has occurred in several stages.

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<sup>63</sup> S. West, 'Command Without Control': Are Market Mechanisms Capable of Delivering Ecological Integrity to REDD?, (2010), Vol. 6, Issue 3, *Law, Environment and Development Journal*; K. Bakker, Neo-liberalising Nature? Market Environmentalism in Water Supply in England and Wales, (2005), Vol. 95, Issue 3, *Annals of the Association of the American Geographers*; C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, (1990), Harvard University Press, p. 82.

<sup>64</sup> N. Gunningham, *Leaders and Laggards: Next Generation Environmental Regulation*, (2001), GreenLeaf Publications, p. 27.

<sup>65</sup> A. Eikermann, *Forests in International Law: Is There Really a Need for an International Forest Convention?*, (2015) Springer Publishing, p. 9.

These stages reveal the research priorities on forest and international law over the years by academics. They move from a singular focus on an international convention to the inter-relationship between differing elements within what is increasingly understood to be a fragmented regime complex. As with other international law scholarship outputs on forest-related law have often lacked a critique of the international legal project itself. This ultimately leaves significant gaps in understanding the multi-level aspects of international law and the dynamic interlinkages between principles, values and engaged actors in law-making processes.

Scholarship on international law and forests largely began after states reached a stalemate at the UN Conference on Environment and Development in Rio de Janeiro, Brazil 1992 over agreeing an international treaty on forests. As a consequence the issue of a forest convention has for many years dominated international forest law scholarship, and continues even today.<sup>66</sup> Mackenzie, for example, continues to interrogate the issue claiming in 2012 that ‘the principal argument for creating a global forest treaty is straightforward: a new legal

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<sup>66</sup> On the debate relating to an international forest convention see: K. Kunzmann, The Non-Legally Binding Instrument on Sustainable Management of All Types of Forests – Towards a Legal Regime for Sustainable Forest Management? (2008), Vol. 09 Issue 08, *German Law Journal*, pp. 981- 1007; D. Davenport & P. Wood, Finding The Way Forward For The International Arrangement On Forests: UNFF 5, 6 and 7, (2006), Vol. 15, Issue 3, *Review of European Community and International Environmental Law*, p. 316; D. Humphreys, The Elusive Quest for a Global Forest Convention, (2005) Vol. 14, Issue 1, *Review of European Community and International Environmental Law*, pp. 1–10; M. Steiner, After a Decade of Global Forest Negotiations, Where Are We Now?, (2001), Vol. 10, Issue 1, *Review of European Community and International Environmental Law*, pp. 98-105; B. Ruis, No Forest Convention but Ten Tree Treaties, (2006), Vol. 53, *Unasylva*, pp. 3–13; R. D. Lipschutz, Why is there no International Forestry Law? An Examination of International Forestry Regulation both Public and Private, (2001), Vol. 1, Issue, *Journal of Environmental Law and Policy*, pp. 153-179; D. Davenport, An alternative explanation for the failure of the UNCED forest negotiations, *Global Environmental Politics*, (2005), Vol. 5, Issue 1, pp. 105–130; M.C. Smouts, The Issue of an International Forest Regime, (2008), Vol. 10 Issue 3, *International Forestry Review*, pp. 429–432; D. Humphreys, *Forest politics — The evolution of international cooperation*, (1996), Earthscan, London; R. Tarasofsky, *Assessing the International Forest Regime*, (1999), IUCN, p. 168.

instrument would resolve ambiguities between existing agreements and so would provide a comprehensive international regime for forests.’<sup>67</sup> Yet Mackenzie acknowledges that many argue an international forest treaty is unlikely and unworkable for various political as well as international institutional reasons.

Given that a multilateral forest convention being agreed within the foreseeable future appears highly unlikely several researchers focus primarily on identifying which multilateral agreements apply to forests, and evaluating how and whether these provide an effective law and governance framework to secure the future of forests.<sup>68</sup> McDermott et al identified five themes that are cross-cutting within the international forest regime: sustainable development; biodiversity conservation; ecosystem conservation; poverty alleviation and forest governance.<sup>69</sup> These cross-cutting themes mean that different international legal fields including human rights, indigenous peoples rights, state rights, environmental law and economic law relate to forest law and policy issues.

The dominant research question is whether an international ‘forest regime’ exists, and if so how it can best be developed to realise effective global forest

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<sup>67</sup> C. Mackenzie, Future Prospects for International Forest Law, (2012), Vol. 14, Issue 2, *International Forestry Review*, pp. 249–257; J. Gupta et al, The Future of Forests in J. Gupta, N. van der Grijp & O. Kuik (eds), *Climate Change, Forests, and REDD: Lessons for Institutional Design*, (2013), Routledge, pp. 229-258.

<sup>68</sup> These include J. Brunnee & A. Nollkaemper, Between the Forests and the Trees: An Emerging International Forest Law, (1996), Vol. 23, Issue 4, *Environmental Conservation*, pp. 307-314; R. Tarasofsky, *The International Forests Regime: Legal and Policy Issues*, (1995), IUCN/WWF; R. Tarasofsky, R. (1999) *supra* note 64; F. Lesniewska, *Law for Forests: An Introductory Guide to International Forest and Forest-Related Legal Materials that Shape Forest Ethics and Practice*, (2005), IIED; C. McDermott, A. O’Carroll & P. Wood, *International Forest Policy - The Instruments, Agreements and Processes that Shape It*, (2007), UNDESA and UNFFF.

<sup>69</sup> McDermott, O’Carroll & P. Wood, *ibid*.

governance.<sup>70</sup> Some deny that a singular international forest regime exists arguing that a 'regime requires a multilateral legal framework overseen by an institution of some sort, such as an international organisation or treaty or a conference of parties'.<sup>71</sup> This 'non-regime' conclusion, although acknowledging international forest related treaties and agreements do exist individually, does not perceive normative coherence between them and does not foresee this being overcome.<sup>72</sup> In contrast, others see an international forest regime complex' composed of different laws, agreements and institutional structures that is evolving toward coherence.<sup>73</sup> Despite differences what unifies both interpretations is one main characteristic: the fact that laws applying to forests are 'fragmented'.<sup>74</sup> Many observers question the effectiveness of the (non) regime to address the multilevel cross-cutting issues that forests present to law and policy design.<sup>75</sup>

The research and interpretation of fragmentation of the forest (non) regime is guided by ones perspective on the nature, form and sources of international law itself. Institutionalist legal scholars who support the idea that law is moving

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<sup>70</sup> J. Rayner, A. Buck & P. Katila (eds.), *Embracing Complexity: Meeting the Challenges of International Forest Governance: A global Assessment Report*, prepared by the Global Forest Expert Panel on the International Forest Regime, (2010), IUFRO, World Series, Volume 28.

<sup>71</sup> L. Giessen, Reviewing the Main Characteristics of the International Forest Regime Complex and Partial Explanations for its Fragmentation, (2013), Vol.15, Issue 2, *International Forestry Review*, pp. 60-70, p. 62.

<sup>72</sup> Ibid p. 63.

<sup>73</sup> McDermott, O'Carroll & P. Wood, *supra* note 69; Mackenzie, C, *supra* note 67.

<sup>74</sup> see H, Van Asselt, Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes, (2011), Vol. 44, Issue 4, *New York University Journal of International Law and Politics*, pp. 1205-1278; C. McDermott, REDDuced: From Sustainability to Legality to Units of Carbon—The Search for Common Interests in International Forest Governance, (2014), Vol. 35 Issue 1, *Environment, Science and Policy*, pp. 12-19; Giessen. L, *supra* note 71.

<sup>75</sup> Giessen. L, *ibid*; R. Dimitrov, Hostage to Norms: States, Institutions and Global Forest Politics, (2005), Vol. 5, Issue. 4, *Global Environmental Politics*, pp. 1-24; Rayner, J, Buck, A, & Katila, P (eds.), *supra* note 70.

toward greater coherence focus on the international treaty agreements. Van Asselt, for example, restricts his paper on fragmentation within international law to focusing on horizontal linkages between the UNFCCC and the UN CBD relating to forests specifically.<sup>76</sup> Also Savaresi explores the synergies between human rights and the UNFCCC mechanism to reduce emissions from deforestation and degradation (REDD+).<sup>77</sup> Eikermann has recently proposed that with appropriate reflexive governance mechanisms between existing international forest related law a comprehensive working regime would exist.<sup>78</sup> Yet these approaches ignore the fact that the global-local nexus and, particularly the local practices (especially of those who actually influence and manage forests), are dimensions that influence the nature and form of international laws fragmentation.<sup>79</sup>

Critical legal scholarship has emerged recently on a specific issue that recognises the plurality of sources and multilevel complexity of international law and forests. Since 2007 the UNFCCC's REDD+ mechanism has received significant attention from legal scholars.<sup>80</sup> Much of the work draws on empirical legal research, often based on fieldwork, of particular countries. This has opened up thinking on the global/local nexus regarding international forest related law and

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<sup>76</sup> Van Asselt, H, *supra* note 74.

<sup>77</sup> A. Savaresi, REDD+ and Human Rights: Addressing Synergies between International Regimes, (2013) Vol. 18, Issue 3 *Ecology and Society*, p. 5.

<sup>78</sup> Eikermann. A *supra* note 65.

<sup>79</sup> B. Arts & I. Babili, Global Forest Governance: Multiple Practices of Policy Performance, in B. Arts et al, *Forest and Nature Governance: A Practice Based Approach*, (2013), Springer Publishers, pp. 111-133.

<sup>80</sup> See R. Lyster, C. MacKenzie, & C. McDermott, (eds) *Law, Tropical Forests and Carbon: The Case of REDD+*, (2013), Cambridge University Press, 2013; T. De La Fuente & R. Hajjar, Do Current Forest Carbon Standards Include Adequate Requirements to Ensure Indigenous Peoples' Rights in REDD Projects?, (2013), Vol. 15 Issue 4, *International Forestry Review*, 427-441; R. Lyster, REDD+, Transparency, Participation and Resource Rights: The Role of Law, (2011), Vol. 14 Issue 2, *Environmental Science & Policy*, pp.118-126; J. Costenbader, *Legal Frameworks for REDD. Design and Implementation at the National Level*, (2009), IUCN.

its interpretation by actors, including beyond the state amongst legal scholars. However, it is mainly political scientists who are undertaking research on the multilevel cross-cutting issues that forests present to law and policy design, including on REDD+.<sup>81</sup> Yet their outputs are limited as they rarely have a comprehensive critique of international law as a project itself and focus more on the institutional governance structures and their potential effectiveness in delivering various policy options.<sup>82</sup> Much of the focus of this work however, like many areas of global environmental discourse, is on trying to devise blue-prints that can be shared and then working to create appropriate prescriptions for implementation for local realities. These prescriptions are often inappropriate due to their often abstract and top-down design.<sup>83</sup> For example learning from in-country customary law has received little attention, except from a select number of scholars focusing on community based forestry or indigenous forest peoples' rights.<sup>84</sup>

Bernstein and Cashore note that a mere focus on international regime effectiveness is rather narrow and naïve as it fails to place attention on the wider influences on forest related governance developments.<sup>85</sup> To overcome these

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<sup>81</sup> Giessen, L, *supra* note 71; Dimitrov, R, *supra* note 75; Rayner, J, Buck, A, & Katila, P (eds.), *supra* note 70.

<sup>82</sup> See C. McDermott, B. Cashore, & P. Kanowski. *Global Environmental Forest Policies: An International Comparison*, (2010), Earthscan; C. Overdevest, & J. Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, (2014), Vol. 8 Issue 1 *Regulation & Governance* pp. 22-48.

<sup>83</sup> N. Adger, T. Benjaminsen, K. Brown & H. Svarstad, *Advancing a Political Ecology of Global Environmental Discourses*, (2001), Vol. 32, *Development and Change*, pp. 681-715.

<sup>84</sup> See A. Larson, (ed), *Forests for People: Community Rights and Forest Tenure Reform*, (2010), Earthscan; T. Griffiths, *Seeing 'REDD'? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities*, (2008), Forest Peoples Programme; D. Fitzpatrick, 'Best Practice' Options for the Legal Recognition of Customary Tenure, (2005), Vol. 36 Issue 3 *Development and Change*, pp. 449-475.

<sup>85</sup> S. Bernstein & B. Cashore, *Complex Global Governance and Domestic Policies: Four Pathways of Influence*, (2012), Vol. 88, Issue 3, *International Affairs*, pp. 585-604.

research limits Giessen's suggestion that future research should 'also complement existing material by more systematically addressing the politics of sub-national, national, and even international bureaucracies and the ways in which they, together with their societal non-state-actor clientele, influence such areas as the public and expert discourse surrounding forest politics and the resulting policies.'<sup>86</sup> Singer goes further by proposing that the most significant place to focus research is within the domestic jurisdiction as opposed to regional or international.<sup>87</sup> Such an approach though would lead to a series of disparate studies that unless undertaken using comparative research methods would fail to recognise multilevel interlinkages between local, national, regional and international law and policy-making processes. This thesis seeks to do this through two case studies undertaken in China.

### 1.7 Selecting a Focus Country and Case Studies

The emphasis placed on fieldwork by global legal pluralists like Berman as being necessary for developing a 'fine-grained, nuanced understanding of the way legal norms [and principles] are passed on from one group to the other and then transformed' requires researchers to consider where to focus their gaze and on what.<sup>88</sup> The context in which actors operate, in which international forest related law principles and values are interpreted can have an important effect on the research outcomes. For instance whether a country is in the global North or

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<sup>86</sup> Giessen, L, *supra* note 71, p. 63.

<sup>87</sup> B. Singer, Putting the National Back into Forest-related Policies: The International Forests Regime and National Policies in Brazil and Indonesia, (2008), Vol. 10 Issue 3, *International Forestry Review* pp. 523-537.

<sup>88</sup> Schiff Berman, P, *supra* note 3, p. 303.

South, is a least developed country or an emerging economy, whether indigenous peoples rights are recognised, whether forest land is primarily owned by the state or the private individuals. To each theoretical approaches being evaluated in this research: institutionalism, global legal pluralism and critical legal studies the importance of context is interpreted, and its significance understood, in different ways. For institutionalists country context is less significant than the development of appropriate regulatory mechanisms to realise a universal legal order. To global legal pluralists the local context, within a country, is at the core of the diversity between interpretations of international principles and values by all actors globally. Critical legal scholars see context as an important component in understanding the power relations between actors and the way that differing interpretations of international law can occur.

### 1.7.1 China

In focusing on China this research provides an opportunity to evaluate the significance of context, internationally, nationally and local, to the interpretation of principles and values by actors within international law-making processes. The rise of China in the last thirty years has thrown open many questions for all schools of international law scholarship.<sup>89</sup> It is evident that using the platform of international law, China has actively participated in international affairs.<sup>90</sup> Although China is now more enmeshed in international legal frameworks and processes its own world vision is one that sees global governance as one based on

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<sup>89</sup> J. Feinerman, Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?, (1995), Issue 141, *The China Quarterly*, pp. 186-210; Guo Ran, International Law in China: Past and Present: Study on the History of International Law, Yang Zewei, Review Essay, (2012), Vol. 14, Issue 1, *Journal of History of International Law*, pp. 147-156, p. 154; Xue Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law*, (2012), Hague Academy of International Law, p. 7.

<sup>90</sup> Zonglai Wang & Bin Hu, China's Reform and Opening-up and International Law, (2010), Vol. 9 Issue 1, *Chinese Journal of International Law*, pp.193-203, p. 194.

multi-polarity.<sup>91</sup> In the same time period that China has increased its engagement in international law processes it has become an economic super power.<sup>92</sup> By doing so it has contributed to a shift in geopolitical relations, having emerged as a centre of power amongst several other centres including America, Europe, India and Russia. The implications of this for how existing international forest related norms and values evolve requires research, including the role of non-state actors currently and in the future.

In the process of becoming a new superpower China has degraded its environment, and increasingly that of neighbouring states.<sup>93</sup> Despite the destruction of the environment China has one of the greatest percentage forest covers of any country in the world<sup>94</sup>, and a significant number of endogenous flora and fauna.<sup>95</sup> China has since 1971 on becoming a member of the UN become Party to all forest related treaties and other international agreements.

There is a growing interest in answering the question of whether China is an international norm-taker or maker has become one that more recently researchers are seeking to address.<sup>96</sup> Much of the current focus by researchers

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<sup>91</sup> Ibid; Xue, 2005, p. 136– 37 *supra* note 85

<sup>92</sup> A. Subramanian, *The Inevitable Superpower: Why China's Dominance is a Sure Thing*, (2011), *Foreign Affairs*, pp. 66-78; D. Scott, *China Stands Up: The PRC and the International System*, (2007), Routledge, [Kindle Version], p. 11.

<sup>93</sup> See E. Economy, *The River Runs Black: The Environmental Challenge to China's Future*, (2011), Cornell University Press; V. Smil, *The Bad Earth: Environmental Degradation in China*, (1984), Zed Press.

<sup>94</sup> W. Sunderlin et al. *Livelihoods, Forests, and Conservation in Developing Countries: An Overview*, (2005), Vol. 33 Issue 9 *World Development*, pp. 1383-1402.

<sup>95</sup> J. Studley, *Ecotourism in China: Endogenous Paradigms for SW China's Indigenous Minority Peoples*, Retrieved July 31 (1999): 2012 – available online <http://www.mtnforum.org/sites/default/files/publication/files/1228.pdf> [last accessed 14 November 2014]

<sup>96</sup> Shi Mingtao, *China and International Institutions: International Order Beyond Formal Rules?*, (2013), Vol. 4, Issue 3, *International Journal of Chinese Studies*, pp. 439-467, p. 456.

seeking to address this question is on international norm-internalisation.<sup>97</sup> Mushkat cautions that China's embrace of international law cannot be proxied by the number of its formal treaty commitments.<sup>98</sup> Doing so actually reveals little about the substantive contributions that China has actually made to the broader international norm making process. It certainly does not adopt a global legal pluralism approach to evaluating the contribution context based activities make to international law-making processes, as well as principle and value interpretation by different actors. This research provides an early contribution to evaluating different theoretical approaches to these questions. Rather than focus solely on examining the activities of the Chinese sovereign state within the international law-making fora, such as UN treaty bodies, the thesis explores the interlinkages between different actors in a law-making process in the field and their deployment of norms and use of valuation mechanisms. Doing so provides a greater understanding of the interlinkages between the international norms, actors and values embedded in the international forest regime and how these dynamically evolve within a multilevel global context.

### 1.7.2 The Case Studies

Subject is as important as context to consider in relation to the interrelationships between international forest related laws principles, values and actors when deciding on a research focus. The different issues and themes in forest-related matters is well documented by McDermott et al.<sup>99</sup> They identified five themes within the international forest regime: sustainable development; biodiversity

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<sup>97</sup> Ibid

<sup>98</sup> R. Mushkat, China's Compliance with International Law: What has been Learned and the Gaps Remaining, (2011), Vol. 20, *Pacific Rim Law and Policy Journal*, pp. 41-71, p. 43.

<sup>99</sup> McDermott, O'Carroll & P. Wood, *supra* note 68.

conservation; ecosystem conservation; poverty alleviation and forest governance.<sup>100</sup> Each is cross-cutting but also has its own individual characteristics. The differences between these themes can result in differing interpretations of values and principles even by the same actors as is evident in the frequently conflicting regulatory and legislative interventions made.

For the purposes of this study I chose to examine two significant contemporary themes that in themselves have cross-cutting issues with other aspects of forest governance: forest conservation and biofuels as part climate change mitigation through land use, land use change and forestry. Both of these case studies draw together a range of principles including sustainable development, equity and benefit sharing, and participation. They also highlight changes occurring in how forests are valued, and the different regulatory mechanisms adopted to do so. Each involves at least one international actor in the process of developing and implementing the project; and both receive funding from international sources, the first the European Union and the latter the UN.

- i) **Conservation** has in the modern international law era based its foundational principles upon those developed within colonial times in which indigenous peoples and marginalised communities were disempowered and often displaced as part of the establishment of protected areas.<sup>101</sup> More recently internationally combined approaches to conservation that seek to realise the twin goals of

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<sup>100</sup> Ibid.

<sup>101</sup> W. Sunderlin et al, Livelihoods, Forest and Conservation in Developing Countries: An Overview in D. Roe & J. Elliot (eds), *The Earthscan Reader in Poverty and Biodiversity Conservation*, (2010), Earthscan, pp. 48-67.

protection and sustainable development have received support, although not universally.<sup>102</sup> The case study examines the piloting of an internationally standardised National Park to protect forest ecosystems in south-west China. The Provincial authorities collaborated with an American conservation non-governmental organisation, The Nature Conservancy. The research focuses on the process to introduce the National Park, the principles and values that informed actors decisions regarding the form the it should take, and what the impacts of these were environmentally, socially and economically.

- ii) **Biofuels** production is promoted as an important measure to achieve climate change mitigation by replacing high carbon emitting fossil fuels. Certain bioenergy sources can also contribute to achieving mitigation by sequestering carbon temporarily and increasing the global forest stock. Efforts to do so are frequently understood to provide co-benefits to rural poor, and in some cases forest peoples.<sup>103</sup> In the case study a project, in collaboration with the UN Development Programme, seeks to help meet China's renewable energy law objectives targets on biodiesel by increasing afforestation and reforestation of *jatropha curcas* to produce both source materials as well as sequester carbon. The research examines the process undertaken to select the biodiesel source crop, the process to decide

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<sup>102</sup> R. Fisher et al, Linking Conservation and Poverty Reduction: Landscapes, People and Power in *ibid* pp. 27-42.

<sup>103</sup> L. Peskett et al, *Making REDD Work for the Poor*, (2008), Overseas Development Institute.

where to grow it, the actors involved, their motivations in terms of principles and values and finally the outcomes.

Each provides an in-situ case study to research how international principles are employed by different actors to advance project goals, the values that are prioritised and whether the regulatory tools employed to advance them will actually have positive outcomes. They also, given the context of China, provide an opportunity to understand how this country interacts with international forest related law principles, how it interprets them and what values it prioritises in furthering forest related laws and policy. To do so at a time when China has assumed such global economic prominence gives this research added significance.

## 1.8 Methodology

As noted in section 1.1 the primary objective of this research is to determine which theoretical approach to interpreting forest-related international law-making processes: institutionalism, global legal pluralism or critical legal studies offers researchers the most useful tools to understand how best to evolve law. Each of these schools of thought places a greater emphasis on certain research methods. Institutional legal scholars research tends to adopt a top-down analytical framework, often with little or no contextual understanding of its application to subsequent inquiry.<sup>104</sup> Even amongst some critical legal scholars, including those using a third world approach to international law (TWAIL) a

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<sup>104</sup> Falk. R, *supra* note 21.

similar state centric institutionalist model is adopted.<sup>105</sup> Such an approach gives no space for learning from the context and experience that occurs with in-situ research. Consequently it fails to study multiplicity, diversity and engage in a broader conversation as to how law and policy processes evolve. Koskenniemi has challenged this research approach. He observed that 'We live in a fragmented, pluri-legal globalised world where there is an ongoing process of normative articulation, adaptation, re-articulation, absorption, resistance, deployment, and on and on'.<sup>106</sup> This is a process that never ends. This dynamic, never-ending, non-linear process presents multiple challenges to anyone undertaking international law scholarship. Both global legal pluralism and critical legal studies place a greater emphasis on empirical legal research. Hoecke noted that 'empirical legal research is still in the process of establishing an adequate methodology or at least an adequate set of methods'.<sup>107</sup> As such these scholars are at the forefront of developing and trialing socio-legal research methodological techniques to help understand these non-linear processes.

With research that is multilevel, multifaceted drawing on diverse actors engagement it is important to have a clear methodological approach. The research was undertaken in a manner that could enable the thesis to be based on qualitative data gathered through fieldwork to develop a reflexive critique of leading international law theories as applied to forests. Over the course of this thesis the methodology was in the process of development through my own

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<sup>105</sup> O. Chinedu Okafor, *Critical Third World Approaches to International Law (TMAIL): Theory, Methodology, or Both?*, (2008), Vol. 10, *International Community Law Review*, pp. 371-378.

<sup>106</sup> ILC Fragmentation of International Law Report 2006 *supra* note 4 p. 84; Von Benda-Beckmann, *supra* note 20.

<sup>107</sup> M. van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, (2011), Hart Publishing, p. v.

reflexive learning. Although unsettling Flick argues this can maintain an open approach to interpreting the data and theoretical hypotheses being tested.<sup>108</sup> Like many legal academics I found myself drawing on a number of disciplines – historical, sociological, anthropological, political science as well as law.

This thesis adopts an empirically based critical legal studies approach that combines desk-based research and fieldwork. During research documents were collected from different actors where available in English. The qualitative data was collected using semi-structured interviews with actors engaged in the forest conservation and bioenergy projects in China. For each case study the number of people interviewed ranged from between fourteen (National Parks) to eight (Bioenergy) The cohort of people that I interviewed was selected using an initial technique to achieve a representative balance across different actor groups. The selection was also designed to provide a multi-level cross section of involved actors in the projects from the transnational, to the national and to the local level. This was followed up to deepen the research through applying the ‘snowballing’ technique when interviewed individuals proposed relevant actors that they considered would be able to provide useful information and perspectives.<sup>109</sup> A research assistant/interpreter assisted during fieldwork in China in 2008 where interviewees spoke Mandarin only.

The selection of China as the country presents a number of interesting scenarios to pursue and work with that are integral to understanding the in-situ normative

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<sup>108</sup> U. Flick, *An Introduction to Qualitative Research*, (2006 3<sup>rd</sup> edition), Sage Publications, pp. 97-105; ILC Fragmentation of International Law Report 2006 *supra* note 4 p. 84; Von Benda-Beckmann, *supra* note 20.

<sup>109</sup> See Appendix for a list of interviewees.

process of normative articulation, adaptation, re-articulation, absorption, resistance and deployment. Government, international organisations, non-governmental organisations and businesses alike all demonstrated a reticence to provide access to primary documents. As a result I have often had to depend on documents available online in English. Access to geographical locations was also restricted. Yunnan borders the autonomous region of Tibet. At the time of the research strict visa restrictions applied due to the Olympic Games as the Chinese authorities were anxious about potential protests in the region. This both limited my research time [only short-term visas were available] and the areas I could cover.

The qualitative data collected from the interviews using a recording device were uploaded to a computer. I spent time re-listening to the interviews several times. Where particular phrases and responses provided pertinent insights these were sampled and recorded in text form. The criteria for filtering the data sets drew on key normative terms that were identical or similar to those that were identified as being transplants from international agreements relating to forests. The data is triangulated with primary text sources produced by the relevant actors that were collected online or in hard copy while in the field. A final evaluation of the materials is undertaken to present the research outcomes. The author has the original recordings and transcribed interview texts.

## 1.9 Research Plan

The research for this thesis was conducted in three phases. Phase one was desk-based to develop theoretical understanding of each of the thematic areas: principles, actors and values within the context of international law and forests. Phase two was the fieldwork in China. This was undertaken in several stages. I made an initial visit to China to survey the region where the research was to be conducted in order to assess the suitability for the selected case studies. This took six weeks involving visits to Beijing, Kunming in Yunnan and Chengdu in Sichuan in summer 2006. While in China I made the necessary contacts with The Nature Conservancy, and the UNDP to agree to use projects that they were engaged in as case studies. It was on this visit that I decided to abandon pursuing a case study working with the Tropical Forest Trust due to resource constraints.<sup>110</sup> The second period of fieldwork was undertaken between June-September 2008. I conducted other fieldwork at international meetings of the UNFCCC, the CBD, UNFF and the UN Permanent Forum on Indigenous Issues between 2007-2009. Materials from the international research were to be used in interpretation of the in-country fieldwork, as well as the theoretical perspectives in Part 1 of the thesis. I also spent eight weeks undertaking further research at Yale, School of Forestry and Environmental Studies in 2009 whilst attending the UNFF and the UNPFII. This provided me with the opportunity to access a first class library, as well as to network with leading political economists working on forest governance issues, including Professor Benjamin Cashore and

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<sup>110</sup> TFT is an international non-profit organisation that works with companies and communities to help them deliver their products responsibly – details available <http://www.tft-forests.org/pages/?p=6040> [last accessed 20 November 2014].

Dr Constance McDermott. Phase three was the data analysis and writing up. The fieldwork material serves to support a critical reflection of how actors are involved in using international forest related norms in-situ and incorporating particular values through policy mechanism. During this time I remained up to date on international and Chinese forest related law developments as well as those relating to the projects specifically.

### **1.10 Structure**

This thesis is divided into three parts. Part One introduces theoretical approaches to international law on norms, actors and values. Firstly, Chapter 2 examines a number of key international legal norms that are argued to be organising norms around which other rules, principles and norms orbit. It examines how these are constructed and interpreted within treaties and agreements that relate to forest issues. Chapter 3 then examines the pathways that a range of actors use to influence the formation and distribution of international legal norms. The actors, which include the state, international organisations, the business sector (especially multi-national enterprises), and other non-state actors such as non-governmental organisations, are discussed with a specific focus on forest related activities. Chapter 4 concludes Part One by surveying theoretical approaches to value, and how these appear to have been applied to forests by different actors through the employment of different valuation mechanisms. It examines the design of regulatory mechanisms included in international forest related law and policies, and the normative discourse employed by actors who advocate their use. The final section

considers if safeguards can be employed to find a working balance between values when regulatory intervention is undertaken.

Part Two of the thesis is based on two cases studies. Chapter 5 provides the background for the subsequent two chapters. It discusses how international law scholars have perceived China's approach to engagement and implementation of international law, and questions whether China at the start of the 21<sup>st</sup> century is an agent of change on the global stage in international law-making processes. It also examines the domestic context in which international law implementation occurs and how norms, actors and values have specifically manifested in forest related law and policy in China. Chapter 6 analyses fieldwork that explored the role of an international non-governmental organisation, the US based The Nature Conservancy, in interpreting international norms relating to forest conservation through a National Park project in south-west China. The data collected through interviews, participant observation and primary sources is analysed using a critical theoretical approach to test the hypotheses presented in Part 1 as to how actors are engaged in the international law-making process, and to gain insights as to the values that underpin their activities. Chapter 7 offers a similar analysis of an international organisation, United Nations Development Programme, and its collaboration with the government of China and an international investor on a bioenergy project. Chapter 8 provides reflection on the fieldwork, analysis and conclusions.

## Part One: The Canopy: Dimensions and Scope

## C2 Principles and Norms in International Law on Forests: Sources, Meanings and Hierarchies

Within traditional jurisprudence principles and norms are considered to be international law's building blocks, however elusive they may seem.<sup>1</sup> Tomuschat suggests that 'ideally a norm in international law is a principle that is agreed by consensus and subsequently guides the actions of all States'.<sup>2</sup> Yet how states, as well as non-state actors, interpret the meaning of these shared principles and norms frequently differs. As a consequence any collective political, economic and social purpose the international community as a whole may have intended can be severely distorted in the implementation process. The fault lines of distortion have for many decades been especially pronounced between the global North and the South, that is the developed and developing countries. The priorities for developing countries tend to result in a difference in interpretation of principles: especially benefit sharing and sustainable development. The distortions though are never fixed. At the start of the 21<sup>st</sup> century emerging economies most notably China are reinterpreting principles, but not in alignment with existing developed countries.

In the last five decades, with the exponential growth in international law, more and more legal principles and norms have emerged. This presents international

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<sup>1</sup> See H. Kelsen, *Pure Theory of Law*, (2009), The Law Book Exchange; For recent works examining the application of Kelsen's theory to international law see; J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, (2014), Cambridge University Press; M. Garcia-Salmones Rovira, *The Project of Positivism in International Law*, (2013), Oxford University Press.

<sup>2</sup> C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, (1999), Vol. 281, Issue 9, *Recueil des Cours*, p. 86.

law scholars and practitioners with many challenges. These include understanding the inter-relationships between different principles both within and between fragmented specialised legal fields, such as human rights, environmental law and economic law.<sup>3</sup> And that is before one starts looking beyond international law's architectural canopy into how principles and norms are applied and interpreted by different actors from states to non-governmental organisations. To begin to address the challenges is it necessary to identify applicable principles and norms and their inter-relationships to one another to understand if there exists any hierarchy between them. This is particularly important where different actors demonstrate a preference for a particular hierarchy of principles in a given context.

This chapter begins by reviewing competing perspectives on what can be considered sources of international principles and norms. It then provides a summary of key international agreements relating to forests that contain selected principles and norms. The following section evaluates the inclusion of these selected principles and norms (sovereignty, sustainable development, common but differentiated responsibility, precaution and cooperation) in international forest related agreements and reflects on their purpose. The concluding section considers whether a hierarchy exists between these different principles and norms and, if so, what significance this holds for the way in which international forest related law develops and is interpreted in context.

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<sup>3</sup> P. Schiff Berman, *A Pluralist Approach to International Law*, (2007), Vol. 32, *Yale Journal of International Law*, pp. 301- 328, p. 327; T. Broude & Y. Shany, *The International Law and Policy of Multi-Sourced Equivalent Norms*, in T. Broude & Y. Shany (ed), *Multi-Sourced Equivalent Norms in International Law*, (2011), Hart Publishing, pp.1-15.

## 2.1 Principles and Norms in International Law: Sources

The classical approach to determining principles and norms in international law is to refer to the sources identified in Article 38(1) of the Statute of the International Court of Justice (ICJ).<sup>4</sup> ICJ Article 38(1) is formally accepted internationally as a universal standard guide to sources of international law.<sup>5</sup>

Article 38(1) identifies sources of international law to be:

- a) international conventions of general or particular nature, establishing rules expressly recognised by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>6</sup>

Article 38(1) according to Cassese offers 'a workable statement of the sources of international law'.<sup>7</sup> However, Article 38(1) is not without technical legal discrepancies and conflicts.<sup>8</sup> Interpretation of Article 38(1) is closely determined by how the law-making process itself is defined.<sup>9</sup>

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<sup>4</sup> For a comprehensive overview of Article 38 ICJ see M. Drumbl, Actors and Law-Making in International Environmental Law, in M. Fitzmaurice, D. Ong & P. Merkouris, *Research Handbook on International Environmental Law*, (2010), Edward Elgar, pp. 3-36.

<sup>5</sup> This was affirmed by the United States in 1987 who claimed that "the sources listed in Article 38 are 'sources' of international law, in the sense that they are the ways in which rules become, or become accepted as, international law." see Restatement (Third) of Foreign Relations Law of the United States, Reporters' Notes, § 102 (1987) cited in S. Estreicher, A Post-Formation Right of Withdrawal from Customary International Law?, Some Cautionary Notes, (2010), Vol. 21. *Duke Journal of Comparative & International Law*, pp. 57-92.

<sup>6</sup> Article 38 (1), Statute of the International Court of Justice, 1946.

<sup>7</sup> A. Cassese, *International Law*, (2004, 2<sup>nd</sup> ed), Oxford University Press, p. 185.

<sup>8</sup> A. D'Amato, New Approaches to Customary International Law, (2011), Vol. 105, *American Journal of International Law*, pp.163-167.

<sup>9</sup> A. Boyle & C. Chinkin, *The Making of International Law*, (2007), Oxford University Press, pp. 10-24.

Increasingly the limited scope of Article 38(1) is causing uncertainties as to the legal status and/or significance of activities and outcomes from law-making activities. One reason for this is that Article 38(1) fails to recognise explicitly increasing amounts of law related materials that contributes to the normative law-making process.<sup>10</sup> For example decisions by Conferences of the Parties (COPs) to multilateral environmental agreements (MEAs) and outputs by administrative bodies under a Treaty such as the UN Framework Convention on Climate Change's Clean Development Mechanism Executive Board.<sup>11</sup> The quasi-legal status of this material is an anomaly that is not resolved by the Vienna Convention on Law of Treaties either which allows for 'any relevant rules of international law applicable in the relations between the parties to be taken into account when interpreting a treaty'.<sup>12</sup> This still leaves it unclear if subsequent decisions are actually part of a treaty. The issue becomes even more of a challenge if the scope is broadened to recognise other sources as being part of law-making processes.

Twinning has proposed a more expansive approach to defining the sources of international law in order to capture the rapidly evolving changes occurring globally that contribute to normative developments.<sup>13</sup> Fox suggests 'to extend and widen the historical sources from which international law is drawn and to shun forcing such teeming sources of experience, ideas, political, economic and

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<sup>10</sup> A. Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, (2009), Vol. 31, *Michigan Journal of International Law*, p. 231.

<sup>11</sup> *Ibid*; Specifically relating to forests see F. Lesniewska, *UNFCCC REDD+ COP Decisions: The Cumulative Effect on Forest Related Law Processes*, (2012), Vol. 15, Issue 1, *International Community Law Review*, pp. 103-121 - p. 114.

<sup>12</sup> Article 31(3)(c) UN Vienna Convention on the Law of Treaties (1969); M. Fitzmaurice, & E. Olufemi, *Contemporary Issues in the Law of Treaties* (2005) Eleven International Publishing.

<sup>13</sup> See W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, (2009), Cambridge University Press.

social theories into the Procrustean narrow bed of legal concepts' as a way to overcome the limitations imposed by Article 38(1).<sup>14</sup> Casting the sources net wide would provide a greater chance of drawing on 'norm entrepreneurs' activities who are engaged in a creative process adding to, redefining and at times undermining, the international state centric legal architecture.<sup>15</sup> Yet it also poses numerous problems regarding the legitimacy of these sources and it is for this reason that some oppose such an approach. Baxi, a leading third world approach to international law scholar, argues that Article 38(1) is merely a 'normative ruse' by the Northern countries to maintain the power imbalances to the detriment of the interests of former colonial countries. As a result he argues any broadening of the power analysis of actors engagement to establish an all inclusive norm entrepreneurialism approach would merely extend this normative oppression and perpetuate inequity between colonial and former colonial states within the international fora.<sup>16</sup> This is similar to critiques of global legal pluralism more generally.

## 2.2 International Forest Related Treatises and Agreements: An Overview

Due to the multifunctional nature of forests, issues are often thematically cross-sectoral and as such can transcend any number of legal fields, including environmental, human rights and trade. McDermott et al have identified six goals that form the international agenda on forests:

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<sup>14</sup> H. Fox, Time, History, and Sources of Law Pre-emptory Norms, in M. Craven, M. Fitzmaurice & M. Vogiatzi (eds), *Time, History and International Law*, (2007), Martinus Nijhoff Publishers, p. 125.

<sup>15</sup> Broude. T & Shany, Y (ed), *supra* note 3, p. 7.

<sup>16</sup> U. Baxi, What May the Third World Expect from International Law?, in R. Falk, B. Rajagopal & J. Stevens, *International Law and the Third World: Reshaping Justice*, (2008), Routledge Cavendish, pp. 9-23, p.14.

1. maintaining the forest area,
2. the protection of ecosystems,
3. safeguarding biodiversity,
4. sustainable economic development,
5. social welfare (including poverty alleviation) and;
6. overall governance issues (including improving the rule of law).<sup>17</sup>

The individual specialised legal fields each have principles and norms that apply to forest issues directly and/or indirectly. Each field comes with its own principles, its own form of expertise, institutional structures, and its own 'ethos'. These can vary considerably.<sup>18</sup> As a consequence there has been a proliferation of forest-related instruments. The United Nations Treaty Series lists at least eighteen international treaties that relate to forests. Each overlap with each other, to varying degrees, but none deal with forests in a comprehensive manner.<sup>19</sup> This has resulted in the creation of what MacKenzie terms 'a smorgasbord of laws, institutions, and policies'.<sup>20</sup> Interpreting how these multifarious elements in international forest related law co-exist, relate and/or conflict depends on the theoretical perspective held by a researcher: institutionalist or socio-legal (global legal pluralism or critical legal studies).

The following two sections identify sources of international forest related laws principles and norms using Article 38(1) of the Statute of the International Law. The subsequent international forest related law overview only provides a limited introduction and does not include all decisions or guidelines developed by

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<sup>17</sup> C. McDermott, B. Cashore, & P. Kanowski, (eds), *Global Environmental: Forest Policies: An International Comparison*, (2010), Earthscan, p. 4.

<sup>18</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by M. Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, para 15, p. 14.

<sup>19</sup> C. MacKenzie, Future Prospects for International Forest Law, (2012), Vol. 14, Issue 2, *International Forestry Review*, pp. 249-259, p. 251.

<sup>20</sup> *Ibid* p. 253.

Parties to the agreements.<sup>21</sup> Other legal areas, particularly human and indigenous peoples rights and innovative agreements to prevent the illegal trade in timber products are also increasingly being understood to have implications for how the existing international forest related law is evolving. These specialised legal fields will be examined in greater detail in Chapter 4. This traditional institutionalist approach is adopted at this point to identify international forest law's canopy. The subsequent chapters and case studies will go broader, widening and deepening the canopy focus, incorporating socio-legal approaches.

### 2.2.1 Treatises

The Vienna Convention on the Law of Treatises defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'<sup>22</sup> The following sub-section includes an overview of multilateral environmental agreements relating to forests that meet this narrow definition.

#### i) International Tropical Timber Agreements (ITTA) 1983/1994/2006

The original 1983 International Tropical Timber Agreement (ITTA) commodity agreement provided rules between producer and consumer countries of tropical timber over trade.<sup>23</sup> The initial impetus for the creation of a trade agreement on

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<sup>21</sup> For a comprehensive overview including regional agreements see C. McDermott, A. O'Carroll & P. Wood, *International Forest Policy – the Instruments, Agreements and Processes that Shape It*, (2007), UNDESA and UNFF.

<sup>22</sup> Article 2(1)(a) UN Vienna Convention on the Law of Treatises (1969).

<sup>23</sup> The International Tropical Timber Organisation has sixty-five member countries that are signatories to the current ITTA (2006). Twenty-eight are from producer countries in Latin

timber emanated from the UN Conference on Trade and Development.<sup>24</sup> These agreements overall aim is to improve the tropical timber market's structure, and to assure equitable remuneration for tropical timber producers.<sup>25</sup> The International Tropical Timber Organisation (ITTO)<sup>26</sup> has worked to update the agreements with Parties to reflect changes in concerns and issues.<sup>27</sup> The scope of the Agreement has broadened over time. Under the 1983 ITTA the aims of the ITTO were to promote the trade in tropical timber, to encourage the sustainable use and conservation of tropical forests and their genetic resources and to maintain the ecological balance.<sup>28</sup> The 1994 Agreement incorporated the principle of sustainable forest management reflecting the developments internationally after the adoption of the 1992 Forest Principles at Rio de Janeiro, Brazil [section 2.2.2]. Subsequently the 2006 ITTA included issues relating to trade in non-timber forest products, non-timber forest values and ecosystem services, the illegal trade in timber and indigenous peoples and community rights.<sup>29</sup> Again this reflected additions to the international agenda via other channels such as the regional agreements on illegal logging.<sup>30</sup>

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America, Africa and Asia the other thirty-seven are from consumer countries throughout the world including China. It entered into force December 7 2011.

<sup>24</sup> D. Poore, *Changing Landscapes: The Development of the International Tropical Timber Organisation and its Influence on Tropical Forest Management*, (2003), Earthscan cited in A. Eikermann, *Forests in International Law: Is There Really a Need for an International Forest Convention?*, (2015) Springer Publishing, p. 72.

<sup>25</sup> Article 1(a) The International Tropical Timber Agreement (ITTA), 1983, 1994 and 2006; L. Flejzor, Reforming the International Tropical Timber Agreement, (2005), Vol. 14 Issue 1, *Review of European Community and International Law Review*, pp. 19-27, p. 19.

<sup>26</sup> The ITTO is an inter-governmental organisation established in 1983. Its members represent about 80% of the world's tropical forests and 90% of the global tropical timber trade.

<sup>27</sup> The 1983 ITTA was superseded by the 1994 agreement which itself was superseded by the 2006 ITTA.

<sup>28</sup> Article 1 (c) ITTA 1983.

<sup>29</sup> Articles 1 (q) and (r) ITTA, 2006.

<sup>30</sup> These included the East Asia Forest Law Enforcement and Governance (FLEG) Ministerial Conference, Bali, Indonesia, September 2001; EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan, May 2003; The Africa Forest Law Enforcement and Governance

The ITTO itself, however, has received criticism because of its voting structure. The dues and votes of individual members are calculated based on the tropical timber traded. This results in the biggest exporters and importers having the largest number of votes. The tensions remain, despite changes to the membership voting structure in the 2006 ITTA being adopted.<sup>31</sup> This raises questions whether there are sufficient incentives to reduce drivers of deforestation from within the timber industry.<sup>32</sup>

#### ii) Convention to Combat Desertification (UNCCD) 1994<sup>33</sup>

The UNCCD is the third of the so-called Rio Conventions coming after the Convention on Biological Diversity and the UN Framework Convention on Climate Change in 1994. The Convention's objective is 'to combat desertification and mitigate the effects of drought in countries --- using an integrated approach [to achieve] sustainable development in affected areas.'<sup>34</sup> The Convention introduces an integrated landscape approach to prevent and reverse desertification. Parties to the UNCCD recognise that sustainable forest management is a key component of an 'integrated landscape approach'.<sup>35</sup> At the Eighth COP in Madrid in September 2007, the UNCCD entered a new phase with the adoption of the 10-year strategic plan and framework to enhance the implementation of the Convention. One of the visions is to increase forest

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(AFLEG) Ministerial Conference, Yaoundé, Cameroon, October 2003; Europe and North Asia Forest Law Enforcement and Governance (ENA FLEG) Ministerial Conference, St. Petersburg, November 2005.

<sup>31</sup> Eikermann, A, *supra* note 24, p.76.

<sup>32</sup> M. Colchester, The International Tropical Timber Organisation: Kill or Cure for the Rainforests?, (1990), Vol. 20, Issue 5, *The Ecologist*, pp. 166-173.

<sup>33</sup> The UNCCD entered in to force on 26 December 1996. It has 195 Parties (November 2014). China ratified the UNCCD on 18 February 1997.

<sup>34</sup> Article 2.2 UNCCD 1994

<sup>35</sup> C. Saint-Laurent, Optimizing Synergies on Forest Landscape Restoration Between the Rio Conventions and the UN Forum on Forests to Deliver Good Value for Implementers, (2005) Vol. 14, Issue 1, *Review of European Community & International Environmental Law*, pp. 39-49.

cover.<sup>36</sup> All parties to the UNCCD are now obliged to report on the status of land cover, including grasses, crops, shrubs and trees, within their jurisdiction.

### iii) Convention on Biological Diversity (CBD) 1992<sup>37</sup>

The CBD aims to balance sustainable use and conservation with equitable benefits from exploitation of genetic materials to reducing biodiversity loss.<sup>38</sup> It has developed the ecosystem approach to achieve these objectives.<sup>39</sup> The Convention text itself does not explicitly refer to forests but is implicitly relevant given the significant role that they play in providing ecosystem habitat for biodiversity. It also provides legal recognition of the importance of indigenous peoples and traditional knowledge to achieving its objectives.<sup>40</sup> Some argue that given the CBD's centrality to forest issues it is a *de facto* international forest Convention.<sup>41</sup> This is not a view widely held however, especially since the expansion of forest related activities under the UNFCCC.

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<sup>36</sup> Strategic Objective 3, Indicator S-7 Decision 3/COP.8 (2007), UN Convention to Combat Desertification.

<sup>37</sup> The Convention on Biological Diversity (CBD) was opened for signature in 1992. By July 2013 there were 193 Parties to the Convention, 166 Parties to the Cartagena Protocol on Biosafety (2000) and 54 ratifications to the Nagoya Protocol – Kuala Lumpur Supplementary Protocol to the Cartagena Protocol on Biosafety (2010) that entered in to force on 12 October 2014.

<sup>38</sup> The CBD objective recognises the need for sustainable use, conservation and benefit sharing from the utilisation of genetic resources. - *'The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.'* Article 1 UN CBD 1992.

<sup>39</sup> Decision V/6 CBD - endorsed the description of the ecosystem approach and operational guidance and recommended the application of the principles and other guidance on the Ecosystem Approach – for further details see <https://www.cbd.int/ecosystem/>

<sup>40</sup> Article 8(j) CBD 1992.

<sup>41</sup> D. Humphreys, *Logjam: Deforestation and the Crisis of Global Governance*, (2006), Earthscan, p. 191.

CBD Parties recognises the significance of forest issues by incorporating them into thematic structured work programmes, cross-cutting issues<sup>42</sup> agenda and targets of the Convention.<sup>43</sup> In 1998 the Parties established a specific work programme on forests to promote the objectives of the convention.<sup>44</sup> The programme was expanded in 2002 to twelve goals adding institutional and a socio-economic enabling environment as well as knowledge assessment and monitoring to the goals of 1998.<sup>45</sup> A review in 2008 by the civil society organisation the Global Forest Coalition found implementation of the work programme to be limited.<sup>46</sup> Despite this at Nagoya, Japan in 2010 Parties further extended targets for forest related work programmes.<sup>47</sup> However close analysis highlights the lack of clarity in both products and purpose of these programmes under the CBD.<sup>48</sup>

#### iv) Framework Convention on Climate Change (UNFCCC) 1992<sup>49</sup>

The UNFCCC objective is to reduce anthropogenic climate change ‘within a time-frame sufficient to allow ecosystems to adapt naturally’ ... ‘to ensure that food production is not threatened and to enable economic development to proceed in

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<sup>42</sup> Cross-cutting issues within the CBD include protected areas, alien invasive species, traditional knowledge, tourism, climate change, development, ecosystem approach and gender see <http://www.cbd.int/programmes/> [last accessed 4 November 2014]

<sup>43</sup> The most recent Aichi Biodiversity Targets agreed by CBD COP Decision X/2 include several that aim to reduce pressure on forests, increase protected area coverage and ensure sustainability.

<sup>44</sup> CBD COP 4 Decision IV-7 May 1998.

<sup>45</sup> CBD COP 6 Decision VI/22 Expanded Work Programme of Forests April 2002.

<sup>46</sup> M. Lovera, (ed), *Forest and the Biodiversity Convention: Independent Monitoring of the Implementation of the Expanded Programme of Work*, (2008), Global Forest Coalition, available <http://www.cbd.int/doc/external/cop-09/gfc-summary-en.pdf> [last accessed 20 November 2014]

<sup>47</sup> CBD Decision X/36, 2010

<sup>48</sup> E. Morgera & E. Tsoumani, Yesterday, Today and Tomorrow: Looking a Fresh at the Convention on Biological Diversity, (2011), Vol. 21 Issue1 *Yearbook of International Environmental Law*, pp. 3-40.

<sup>49</sup> UNFCCC was opened for signature in 1992 at the Rio UNCED. By 2013 it had 195 Parties and the Kyoto Protocol had 191 Parties. Under the Kyoto Protocol’s second commitment period only it has fewer Parties due to the withdrawal of Canada, Japan and New Zealand.

a sustainable manner.’<sup>50</sup> Climate change will impact forests, potentially severely degrading biodiversity and ecosystem functions.<sup>51</sup> Forests’ capacity to be both sources of greenhouse gas emissions, as well as be sinks to hold them, mean they have a special role to play in addressing climate change. According to the UNFCCC text a sink ‘means any process, activity or mechanism which removes a greenhouse gas ... from the atmosphere.’<sup>52</sup>

The Convention text recognises forests importance for their capacity to store greenhouse gases, especially carbon dioxide and methane, to contribute to climate change mitigation as well as adaptation.<sup>53</sup> All Parties are encouraged to reduce deforestation and maintain net carbon sink coverage.<sup>54</sup>

Incentive based mechanisms to increase afforestation and reforestation, as well as reduce deforestation and degradation, were introduced by the 1997 Kyoto Protocol to the Convention and subsequently at COP/MOPs.<sup>55</sup> Developments to incorporate a specific Reduced Emissions from Deforestation and Degradation (REDD+) mechanism into a future legally binding agreement under the UNFCCC

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<sup>50</sup> Article 2 UN Framework Convention on Climate Change (UNFCCC), 1992.

<sup>51</sup> C. D. Allen et al.. A Global Overview of Drought and Heat-induced Tree Mortality Reveals Emerging Climate Change Risks for Forests, (2010), Vol. 259, Issue 4, *Forest Ecology and Management*, pp. 660-684.

<sup>52</sup> Article 1.8 UNFCCC 1992.

<sup>53</sup> Preamble paragraph 4 and Articles 4.1 (a), (b), (c), 4.2 (a), (b), (c), 7.2 (d), 12.1 (a) (b) UNFCCC 1992.

<sup>54</sup> Article 4.1 (a), (b) UNFCCC 1992.

<sup>55</sup> Under the Kyoto Protocol Annex 1 Parties are able to reduce forest emissions through the use of emissions trading and joint implementation mechanisms. All Parties can undertake afforestation and reforestation through the Clean Development Mechanism and exchange emission reduction certificates. Under the Bali Action Plan Parties agreed to explore the options to develop a mechanism to reduce emissions from deforestation and degradation (REDD+). Pilot projects were permitted. There is an extensive literature on forests and climate change. For an introduction see R. Lyster, C. MacKenzie & C. McDermott (ed), *Law, Tropical Forest and Carbon: The Case of REDD+*, (2013), Cambridge University Press; C. Streck, R. O’Sullivan & T. Janson-Smith, *Climate Change and Forests: Emerging Policy and Market Opportunities*, (2010), Brookings Institution.

has resulted in significant activity by actors including Parties, international organisations and non-state actors within various institutions. REDD+ remains a work in progress. The emphasis to create financial incentives though has resulted in conflicts between values of actors engaged in forest issues at all levels. The forest regime complexity at the international level has forced Parties to the UNFCCC to negotiate on wider range of issues, other than merely forests carbon sequestration capacity, to achieve advances in its emissions reduction mechanisms, especially REDD+.<sup>56</sup> This has resulted in the UNFCCC Secretariat working with the UNCCD, CBD, ITTO, as well as other international organisations such as the UN Permanent Forum on Indigenous Issues, FAO, the World Bank, and the UN Forum on Forests amongst others.

The Rio Conventions had already previous to REDD+ been working to coordinate outputs to a limited degree. In 2001 a Joint Liaison Group was established by the Rio Convention Secretariats in order to enhance coordination and to explore options of further cooperation, including the possibility of a joint work plan.<sup>57</sup> It continues to act as a meeting forum and to release reports, guidance and brochures on cross-cutting issues.<sup>58</sup>

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<sup>56</sup> Different aspects of forest issues including poverty alleviation, biodiversity conservation, illegal timber trade and indigenous peoples rights have been part of the REDD+ negotiations since the Bali Action Plan was agreed at UNFCCC COP 13 in 2007 – see L. Peskett, REDD+ and Development in R. Lyster, C. MacKenzie and C. McDermott (ed) *supra* note 51, pp. 230-251.

<sup>57</sup> CBD decision VI/20, UN CCD decision 12/COP.6, UNFCCC decisions 13/CP.8

<sup>58</sup> In 2013 it had its twelfth meeting in Bonn, Germany, 22 January 2013 – see <http://www.cbd.int/cooperation/liaison.shtml> [last accessed 20 November 2014].

v) Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS) 1979<sup>59</sup>

The CMS aims to conserve terrestrial, marine and avian migratory species throughout their migratory range. Its emphasis is on the transboundary nature of biodiversity protection includes range zones in Africa, Asia, Central and South America, Europe and Oceania. Currently the CMS has seven legally binding agreements for different migratory species. These agreements often require communication between multiple stakeholders, often across territorial sovereign borders. For example the 2007 Agreement on the Conservation of Gorillas and their Habitats (the Gorilla Agreement) covers ten range States (Angola, Cameroon, Central African Republic, Congo Republic, Democratic Republic of Congo, Equatorial Guinea, Gabon, Nigeria, Rwanda and Uganda).<sup>60</sup> The Gorilla Agreement, like other agreements, requires the Parties to cooperatively develop Action Plans. Protecting forest ecosystems is a key element of the conservation strategy. This necessitates communication with other institutions, departments, forest peoples and organisations directly working on other aspects of forests within each of the countries including climate change, timber industry, agriculture, resulting in the potential to achieve an integrated outcome.<sup>61</sup> Often however, as with other forest specific issues, interests are not aligned leading to conflicts between different stakeholders and negative impacts on forest based communities.

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<sup>59</sup> CMS has 120 Parties (April 2014); China is a range state rather than a Party.

<sup>60</sup> The Gorilla Agreement 2008 – see <http://www.cms.int/gorilla/en/legalinstrument/gorilla-agreement> [last accessed 4 November 2014].

<sup>61</sup> In several of these countries UNFCCC REDD+ initiatives are in the process of being negotiated.

vi) [Convention on International Trade in Endangered Species \(CITES\) 1973](#) <sup>62</sup>

CITES regulates the international trade in endangered plant and animal species.

It is an advancement on previous sectorial and regional approaches such as the 1970 Agreement on Polar Bears.<sup>63</sup> It operates a list-permit-system based on whether species are within one of three Appendices categories of the Convention: banned, restricted internationally or restricted domestically by a Party.<sup>64</sup> Approximately 200 species of trees are listed under the three CITES Appendices, with many more sub-species.<sup>65</sup> Six tree species are listed on Appendix 1, these are considered to be the most endangered species in the world but represent a very small proportion of tree species globally.

Implementation and compliance with CITES is a concern as many of these tree species appear to be traded illegally.<sup>66</sup> The flaws in the implementation and compliance mechanisms under CITES have received greater focus from forest law and policy experts, particularly with increased attention due to the efforts to tackle the trade in illegal timber products.<sup>67</sup> Advances in new technologies, including satellite monitoring and tracking, DNA coding and new software provide new medium to improve CITES enforcement.<sup>68</sup> However, new technologies also need effective governance systems and in many forest countries, especially in the tropics, these remain weak.

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<sup>62</sup> CITES as of July 2014 has 180 Parties. China ratified the Convention in 8 April 1981.

<sup>63</sup> Cited in Eikermann, A, *supra* note 24, p. 65.

<sup>64</sup> Article 3 CITES 1973.

<sup>65</sup> See CITES Trees available on [www.unep-wcmc.org](http://www.unep-wcmc.org) (last accessed 3 November 2014).

<sup>66</sup> D. Ong, International Environmental Law Governing Threats to Biodiversity, in M. Fitzmaurice, D. Ong & P. Merkouris, *Research Handbook on International Environmental Law*, (2010), Edward Elgar, pp. 450-471.

<sup>67</sup> S. Oldfield, The Evolving Role of CITES in Regulating the International Timber Trade, (2013), Vol. 22, Issue 3, *RECIEL*, pp. 291-300; D. Brack, K. Grey & G. Hayman, *Controlling the International Trade in Illegally Logged Timber and Wood Products*, (2002), Chatham House, p.12.

<sup>68</sup> A. Wiersema, Uncertainty, Precaution, and Adaptive Management in Wildlife Trade, (2014), Vol. 36, *Michigan Journal of International Law*, pp. 14-58.

vii) World Heritage Convention (WHC) 1972<sup>69</sup>

Despite being negotiated in 1972 the WHC has evolved and made links with more recent forest related multilateral agreements such as the CBD and the UNFCCC. The WHC places a responsibility upon current generations to identify, protect, and conserve, for present, and to transmit to, 'future generations cultural and natural heritage situated on its territory.'<sup>70</sup> The uniqueness of the Convention is that it inherently recognises the internationality of natural and cultural heritage. It underscores the principle of common concern in this sense. The establishment of the World Heritage Fund was a clear recognition by Parties that some countries required resources to assume the responsibility of conserving natural or cultural heritage within their jurisdiction.<sup>71</sup>

Today seventy five million hectares, over 13% of all IUCN category IV protected forests, worldwide are recognised under the WHC.<sup>72</sup> Criticism of WHC sites for undermining forest peoples rights led to the Man and Biosphere reserves system being established which incorporated the concept of integrated conservation and development.<sup>73</sup> An emphasis is now being placed on the amount of carbon sequestered within World Heritage site forests. This reflects the UNFCCC's focus on forests as carbon sinks.<sup>74</sup> It illustrates how an earlier multilateral forest related agreements has an evolving relationship within a wider international law forest regime.

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<sup>69</sup> As of 15 August 2014 the World Heritage Convention had 191 Parties. China ratified the Convention on the 12 December 1985.

<sup>70</sup> Article 4 The World Heritage Convention 1972.

<sup>71</sup> Eikermann.A, *supra* note 24, p. 93.

<sup>72</sup> See the World Heritage Forest Programme available <http://whc.unesco.org/en/forests> (last accessed 4 November 2014).

<sup>73</sup> Eikermann.A, *supra* note 24, p. 96.

<sup>74</sup> According to a report by the World Heritage Centre the total carbon stored in trees, leaves forest litter and soil for all 106 World Heritage forest sites is 10.5 billion tonnes – see <http://whc.unesco.org/en/news/937> [last accessed 4 November 2014].

viii) [Convention on Wetlands of International Importance \(Ramsar\), 1971](#)<sup>75</sup>

The Ramsar Convention set a precedent for focusing on habitat rather than a specific species for conservation. Wetland site designation is premised on the principle of 'wise use'.<sup>76</sup> The most recent definition in the 2013 edition of the Ramsar Convention Manual produced by the Secretariat determines 'wise use of wetlands [to be] the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development.'<sup>77</sup> The definition draws on both the CBD ecosystem approach concept as well as the Brundtland principle of sustainable development. Parties to the Convention have a duty to cooperate in ensuring wise use where a wetland extends across territories of more than one Contracting Party or where a water system is shared.<sup>78</sup>

The importance of the inter-linkages between forests and wetlands has received increased recognition with advances in ecosystems sciences.<sup>79</sup> An indication of this being the decision to dedicate the 2011 World Wetlands Day to forests.<sup>80</sup> There are no specific articles or programmes directed to forests however, except mangrove and other inland waterways. The importance in terms of the multilateral forest complex is that Ramsar Parties are explicitly responsible for

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<sup>75</sup> The Ramsar Convention has 168 Parties (July 2013). China ratified the Convention on 31 July 1992. It has forty-six Ramsar sites, one of the largest number for any country.

<sup>76</sup> The term 'wise use' was defined at COP 1 in 1980 in Cagliari but then subsequently redefined at the 1987 Regina COP as 'sustainable utilization for the benefit of human kind in a way that is compatible with the maintenance of the natural properties of the ecosystem.' - reference Ong, D, *supra* note 66, p. 532.

<sup>77</sup> Ramsar Convention Secretariat, *The Ramsar Convention Manual: A Guide to the Convention on Wetlands* (6<sup>th</sup> edition, 2013) Ramsar Convention Secretariat, Gland, Switzerland.

<sup>78</sup> Article 5 Ramsar Convention 1971.

<sup>79</sup> S. Blumfeld et al, *Water, Wetlands and Forests: A Review of Ecological, Economic and Policy Linkages*, (2009), Secretariat of the Convention on Biological Diversity and Secretariat of Ramsar Convention on Wetlands, Montreal and Gland, CBD Technical Series, No. 47.

<sup>80</sup> This was also the international year of forests so indicates how other multilateral conventions sought to recognise the interlinkages they had with related issues.

designating wetlands that often include forests. As such, it addresses and preserves a variety of forest functions, including particularly soil protection, biodiversity protection and climate regulation. This is an example where synergies between other international agreements and institutions relating to forests, such as the UNCCD, the CBD and the UNFCCC, are necessary.

This brief survey of legally-binding international multilateral environmental agreements has illustrated the fragmented nature of the legal canopy that relates to forests. It also highlights though the need for cross-sectoral collaboration to achieve effective implementation, build synergies and avoid conflicts between and within treaties. It is the need for knowledge sharing and communication that deepens and broadens the canopy covering forests as stakeholder numbers increase in law and policy-making. Soft law has contributed further to the normative framing of international law-making, and has informed the interpretation of principles and values by different actors.

### 2.2.2 'Soft Law' Multilateral Agreements

What constitutes 'soft law' is an unresolved, contentious issue. The term does not have a fixed legal meaning. According to Boyle and Chinkin it usually refers to any international instrument, other than a treaty, containing principles, norms, standards or other statements of expected behavior.<sup>81</sup> As such 'soft law' presents challenges to classical legal scholars who interpret the structure of international law as being constituted solely from legally-binding agreements, no matter how vague the content. The implications of 'soft law' are similarly disputed.

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<sup>81</sup> Boyle.A & Chinkin.C, *supra* note 9, pp. 211-229.

Lesniewska argues that 'soft law' offers potential leverage when constructing normative discourse.<sup>82</sup> Given the cross-sectoral nature of forest related law, 'soft law' can provide interpretative bridges for all stakeholders to link principles. The following forest related 'soft law' multilateral agreements do have an important place in the normative development of international forest related law through constant referral and subsequent inclusion in other treaty agreements and decisions.

#### i) UNFF Non-Legally Binding Instrument on All Types of Forests (NLBI), 2007

In 2000 the United Nations Forum on Forests (UNFF) was established with the main objective to 'promote the conservation and sustainable development of all types of forests and to strengthen long-term political commitment to this end ...' based on key milestones of international forest policy including the Rio Declaration, the Forest Principles and Chapter 11 of Agenda 21 [see below]. In 2007 the UNFF concluded a NLBI.<sup>83</sup> The NLBI is the closest attempt to agree a legally-binding forest convention since Rio in 1992 incorporating developments over the subsequent fifteen years. The NLBI recalls in the preamble the various multilateral agreements documents identified above and below.<sup>84</sup> It sets out four global objectives: reverse forest loss; enhance forest economic,

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<sup>82</sup> F. Lesniewska, *Laws for Forests, An Introductory Guide to International Forest and Forest Related Legal Materials that Shape Forest Ethics and Practice*, (2005), IIED Discussion Paper, p. 11, available <http://pubs.iied.org/pdfs/13505IIED.pdf> [last accessed 4 November 2014].

<sup>83</sup> The UNFF received criticism for focusing too much on advancing negotiations to develop a global Forest Convention prior to the NLBI being agreed - see T. Young, *A New Non-Binding Instrument on Forests?*, (2006), Vol. 36, Issue 2, *Environmental Policy and Law*, p. 194.

<sup>84</sup> The agreement cites the following 'soft law' sources in PP2 - "*Non-legally Binding Authoritative Statement of Principles for a Global Consensus on Management, Conservation and Sustainable Development of All Types of Forests; chapter 11 of Agenda 21; the Intergovernmental Panel on Forests/Intergovernmental Forum on Forests proposals for action; resolutions and decisions of the United Nations Forum on Forests; the Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development; the Monterrey Consensus of the International Conference on Financing for Development; and the internationally agreed development goals, including the Millennium Development Goals, the 2005 World Summit Outcome; and existing international legally binding instruments relevant to forests.*"

environmental and social benefits; increase the area of protected forests worldwide and; increase official development assistance. It also calls for an increase in new and additional financial resources. Twenty-five policies and measures at the national level are promoted to realise the global forest objectives. These draw on the previous proposals for action and developments within other multilateral agreements, as well as issues e.g. action to combat the harvesting and trade in illegal timber products.<sup>85</sup>

Given the limited mandate under the UN of the UNFF Young has questioned the NLBI's importance.<sup>86</sup> However, Kunzmann, claims that the NLBI lays the next foundations for an international forest convention.<sup>87</sup> Others see it more an important institutional hub that maintains a constant pressure on other treaty bodies to ensure coherence on forest related issues.<sup>88</sup> In 2015 after a review a new international arrangement on forests is due to be agreed to follow the existing UNFF.<sup>89</sup>

#### ii) Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles), 1992

Despite it's non-legally binding nature the 1992 Forest Principles have a special place in the international forest regime architecture, in part due to their historical legacy. The UN Forest Principles are the result of a compromise

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<sup>85</sup> Details on global and national objectives available <http://www.un.org/esa/forests/adhoc-nlbi.html> [last accessed 20 November 2014]

<sup>86</sup> Young, T, *supra* note 83.

<sup>87</sup> K. Kunzmann, *The Non-legally Binding Instrument on Sustainable Management of All Types of Forests - Towards a Legal Regime for Sustainable Forest Management?*, (2008), Vol. 9, Issue 8, *German Law Journal*, pp. 981-1006; C. MacKenzie, (2012), *supra* note 19, p. 253.

<sup>88</sup> R. Maquire, *Global Forest Governance Legal Concepts and Policy Trends*, (2013) Edward Elgar, pp. 95-132.

<sup>89</sup> The Workshop on the International Arrangement on Forests (IAF) beyond 2015, a Country-Led Initiative in support of the UN Forum on Forests was hosted in Beijing, China 29-13 October 2014 for further details see <http://cli2014china.forestry.gov.cn> [last accessed 5 November 2014].

reached when States were polarised and unable to agree to a negotiated text for a legally binding international Forest Convention at the UN Conference on Environment and Development (UNCED) in Rio in 1992.<sup>90</sup> The Principles are consequently a list of wide ranging recommendations that in reality are difficult to realise harmoniously. The principles recognise the ecological, cultural, social and economic values of forests. These have served as the foundation for subsequent, multilateral agreements on forests [included in this section] and a reference point for their further developments at all levels by both state and non-state actors.<sup>91</sup>

### iii) UN Earth Summit Declarations and Agenda 21, - 1972, 1992, 2002, 2012

Since 1972 four UN conferences on the environment have taken place.<sup>92</sup> Each conference produced documents that have fed into an expanding international environmental normative law and policy discourse. Key principles first included in the Stockholm Declaration were subsequently incorporated, although with various degrees of reinterpretation, into declarations at Rio de Janeiro (1992) and Johannesburg, South Africa (2002). At Rio Agenda 21 was also agreed to by participating countries. Chapter 11 on deforestation provided a clear survey of the challenges faced by forests and forest peoples.<sup>93</sup> The emphasis by the Johannesburg conference was on implementation of environmental agreements.

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<sup>90</sup> D. Humphreys, *Forest Politics: The Evolution of International Cooperation*, (1996), Earthscan pp. 83-102.

<sup>91</sup> After the UNCED several important documents were developed by forest institutions established to work towards a Forest Convention: these included the World Commission on Forests and Sustainable Development, *Our Forests: Our Future* (1999) and the IFF/IPF *Proposals for Action* (2000).

<sup>92</sup> The UN Conference on the Human Environment, Stockholm, 1972; The UN Conference on Environment and Development, 1992 Rio de Janeiro; The UN World Summit on Sustainable Development, 2002 Johannesburg; and the UN Conference on Sustainable Development, 2012 Rio de Janeiro.

<sup>93</sup> Agenda 21, 1992, UN Earth Summit.

A Plan of Implementation was adopted. The Plan included forest related issues and encouraged the development of partnerships between governments and non-state actors to incentivise initiatives to realise objectives.<sup>94</sup> This advanced further market orientated approaches with non-state actors, especially the business sector, to meet environmental objectives.<sup>95</sup>

At the most recent world conference on the environment in 2012, twenty years on from the original UNCED at Rio, market-based approaches were front and centre of the agenda, in the form of the Green Economy. Forests were recognised as significant in contributing to a new economics centered on sustainable management of the planet's 'natural capital'.<sup>96</sup> This overt emphasis upon forests as 'natural capital' is informing negotiations on forests in the UN Sustainable Development Goals, to be launched in September 2015, as well as other regional initiatives by governments and non-state actors.<sup>97</sup>

The survey of forest related environmental agreements provided above illustrate the range and diversity of agreements concluded by the international community. These agreements provide, according to ICJ Article 38(1), the sources for identifying principles and norms that apply to international forest law and policy. As critical legal scholars and legal pluralists observe however

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<sup>94</sup> UN, Johannesburg Plan of Implementation, 18-22 March 2002.

<sup>95</sup> See P. Pattberg et al, (eds), *Public-private Partnerships for Sustainable Development: Emergence, Influence and Legitimacy*, (2012), Edward Elgar Publishing, pp. 1-15.

<sup>96</sup> UN Rio +20, Rio de Janeiro, The Future We Want, Section III, A/RES/66/288, 2012

<sup>97</sup> S. Milledge et al, Sustainable Development Goals: a forest module for a transformative agenda, (July 2014), IIED, London; *UNEP, Forests in a Green Economy: A Synthesis*, (2011), UNEP; UNECE, Action Plan for the Forest Sector in a Green Economy (2013), available <http://www.unece.org/forests/greeneconomy.html> [last accessed 5 November 2014]; the New York Declaration on Forests, 23 September 2014, available <http://www.un.org/climatechange/summit/wp-content/uploads/sites/2/2014/07/New-York-Declaration-on-Forest---Action-Statement-and-Action-Plan.pdf> [last accessed 29 June 2015].

principles and norms emerge from a broader range of sources than state-based international agreements. This issue is examined in depth in Chapter 3.

### 2.3 Key International Law Principles and Norms Applied to Forests

This section provides an overview of selected international principles and norms. The selected principles are those that occur most regularly in international forest related law agreements: permanent sovereignty over natural resources; sustainable development; equity; and cooperation. I introduce the principles before discussing how they are incorporated into international legal treaties and other agreements relating to forests. The aim is to demonstrate the significance these principles play in the evolving development of international forest related laws. In Part 2 I explore how different actors interpret these normative principles in diverse ways to achieve specific objectives.

#### 2.3.1 Permanent Sovereignty over Natural Resources

At the core of international law relating to forests is the principle of permanent sovereignty over natural resources (PSNR). The principle was established by a United Nations General Resolution in 1962.<sup>98</sup> PSNR supports ‘the right of peoples and nations to permanent sovereignty over their natural wealth and resources’.<sup>99</sup> Today PSNR is recognised as an international customary legal norm.<sup>100</sup> Orthodox legal interpretations give it greater legal ‘weight’ than other principles covered in this section.

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<sup>98</sup> Permanent Sovereignty over Natural Resources, G.A. res. 1803, (XVII), (1962).

<sup>99</sup> Para 1, Permanent Sovereignty over Natural Resources, G.A. res. 1803, (XVII), (1962).

<sup>100</sup> N. Schrivjer, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties*, (1997), Cambridge University Press, pp. 390-92.

Under international law forests are primarily considered to be a natural resource over which states have sovereignty. As such PSNR is contained in all international forest related laws and other agreements from the 1971 Ramsar Convention on Wetlands to the 2007 UNFF NLBI. In the Rio Forest Principles PSNR is articulated to be a central organising norm for other principles.

*1 (a) States, in accordance with the Charter of the United Nations and the principles of international law, have the sovereign right to exploit their own resources pursuant to their own environmental policies and have the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states, or of the areas beyond the limits of national jurisdiction.*

*2 (a) States have the sovereign and inalienable right to utilise, manage and develop their forests in accordance with their development needs and the level of socio-economic development, and on the basis of national policies consistent with sustainable development and legislation, including the conversion of such areas for other uses within the overall socio-economic development plan and based on rational land-used policies.<sup>101</sup>*

It is clear from the use of this principle, in both hard and soft law documentation applicable to international forest law, that states remain committed to maintaining the customary legal norm of PSNR as the central tenant in any development of international forest related law.<sup>102</sup> The sovereign control over forest resources is particularly important to developing countries in

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<sup>101</sup> Principles 1(a) and 2(a) of the Non legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, UNCED, Doc A/CONF.151/26 (Vol.1) Annex II (1992).

<sup>102</sup> D. Tarlock, Exclusive Sovereignty versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management, (1997), Vol. 32, Issue 37, *Texas International Law Journal*, pp. 38-65.

negotiations.<sup>103</sup> Regaining jurisdictional control over forests in the post-colonial era was especially important for newly independent governments.<sup>104</sup>

The principle has had direct impacts on the outcome of international negotiations ranging from ones for an international forest convention<sup>105</sup> to current efforts to design a REDD+ mechanism under the UNFCCC.<sup>106</sup> However, as argued below, PSNR is increasingly being understood in a transnational context where other principles are interconnected which qualify it in order to achieve a sustainable development.<sup>107</sup> These increased qualifications on the PSNR principle have resulted in tensions between establishing forest governance mechanism based on their global public good value and that of the sovereign state's rights to resources. This tension has underpinned the conflicts, especially between the global North and South in forest related negotiations such as those at the UNFF.<sup>108</sup>

An important duty implied by PSNR according to Schrivjer is the equitable benefit from a nations natural resource use.<sup>109</sup> According to UN General Resolution 1803 (XVII), states and peoples have a duty to manage their natural

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<sup>103</sup> Globally over 70% of forests are under State ownership. This figure is greater in some developing regions for example in Africa some countries over 95% source - A. White & A. Martin, *Who Owns the World's Forests? Forest Tenure and Public Forests in Transition*, (2002), Forest Trends.

<sup>104</sup> G. Barton, *Empire Forestry and the Origins of Environmentalism*, (2002), Cambridge University Press, p. 22.

<sup>105</sup> Tarlock. D, *supra* note 102.

<sup>106</sup> D. Takacs, Measuring, Monitoring, Reporting, and Verifying (MMRV): Negotiating Trust in Transnational Contracts for REDD+, (2012), Vol. 106, *American Society International Law Proceedings*, p. 518.

<sup>107</sup> J. Lin & J. Scott, Looking Beyond the International: Key Themes and Approaches of Transnational Environmental Law, (2012), Vol. 1, Issue 1, *Transnational Environmental Law*, pp. 23-29.

<sup>108</sup> D. Humphreys, *Logjam: Deforestation and the Crisis of Global Governance*, (2006), Earthscan, pp. 91-116.

<sup>109</sup> N. Schrivjer, *supra* note 100, pp. 390-92.

resources in the interest of their national development and of the well-being of the people of the state concerned.<sup>110</sup> To realise this duty the state needs to implement appropriate laws, including procedural regulations to support the participation of citizens in decision-making, and implement them effectively, eliminating any corruption. In many countries this situation is far from realised. In many forest rich countries the forest estate is owned by the state and allocated to either foreign or domestic industrial timber companies threatening the livelihoods of forest based communities. The principle of PSNR can be particularly oppressive for indigenous peoples who have not benefitted from a post-colonial rule of law that has adopted the same natural resource legal framework as their former colonisers.

A qualification to the PSNR principle is that of 'no harm'. The principle of 'no harm' to neighbouring states referred to in the Rio Forest Principles 1(a) (see above) is one that has evolved since its first use back in the 1930's.<sup>111</sup> French argues that today 'no harm' is 'the most important principle of international environmental law [that] represents a balance between the territorial sovereignty of a State ... and a wider responsibility to the international community.'<sup>112</sup> Despite French's assertion in reality its application is limited in

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<sup>110</sup> Para 1 - Permanent Sovereignty over Natural Resources, G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962).

<sup>111</sup> G. Handl, Trail Smelter in Contemporary International Environmental Law: Its Relevance in the Nuclear Energy Context, in R.M. Bratspies & R.A. Miller (eds), *Transboundary Harm In International Law: Lessons from the Trail Smelter Arbitration*, (2006), Cambridge University Press, pp. 125-140; On case law developing the no-harm principle see *The Trail Smelter Arbitration (US v. Canada)*; *Corfu Channel (UK v. Albania)* (1949); *Lac Lanoux (Spain v. France)* (1957); *Nuclear Tests Case (New Zealand v. France)* (1995); The International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly for an Advisory Opinion) 1996.

<sup>112</sup> D. French, *International Guidelines and Principles*, UNESCO Encyclopedia of Life Support Systems, (2002), Oxford EOLSS Publishers, p. 14.

anything but the most serious situations. Consequently it fails to address day-to-day breaches of transboundary harm. The scope and content of the 'no harm' principle is however increasingly contested as the transnational nature of global environmental issues becomes ever more complex.<sup>113</sup> Other principles add to this complexity by placing further limits on a state's right to practice unrestricted exploitation and management of natural resources.

The principle of common concern also expands the legal obligation of no-harm from solely neighbouring states to the international community as a whole. The International Law Commission's articles on the law of state responsibility surmised that any state could bring an international claim in respect of the breach of an obligation owed to the international community.<sup>114</sup> For example forest fires in Indonesia in 1997 led to several countries seeking compensation using the principle of common concern rather than that of 'no harm'.<sup>115</sup> Simma, somewhat optimistically, claims that 'International law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between States, but also incorporates common interests of the international community as a whole ... In other words, it is on its way to being a true public international law.'<sup>116</sup> However, inclusion of the principle of common

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<sup>113</sup> See R.A. Miller, Surprising Parallels between Trail Smelter and the Global Climate Change Regime in R. M Bratspies . R, A & Miller, (eds), *supra* note 95. pp. 167-181; C. Carlarne & D. Farber, Law Beyond Borders: Transnational Responses to Global Environmental Issues, (2012), Vol. 1, Issue 1, *Transnational Environmental Law*, pp. 13-21.

<sup>114</sup> P. Birnie, A.Boyle, & C.Redgwell (eds), *International Law and the Environment*, (2009), (3<sup>rd</sup> ed), Oxford University Press, p. 131.

<sup>115</sup> N. Robinson, *Forest Fires as a Common International Concern: Precedents for the Progressive Development of International Environmental Law*, (2001), Pace Law Faculty Publications. Paper 375 available <http://digitalcommons.pace.edu/lawfaculty/375> [last accessed 20 November 2014]; A. Khee-Jin Tan, Forest Fires of Indonesia: State Responsibility and International Liability, (1999), Vol. 41, Issue 4, *International and Comparative Law Quarterly*, pp. 826-855.

<sup>116</sup> B. Simma, Universality of International Law from the Perspective of a Practitioner, (2009), Vol.

concern in forest related multilateral agreements is limited and/or indirect under international law. The preamble of the CBD and the UNFCCC both include common concern as a guiding interpretative principle to both framework conventions. However, the principle is not referenced again in the main text of either treaty. The omission of common concern in other key international forest related agreements such as Rio Forest Principles and the ITTA is indicative of the clear desire to underscore that forests are natural resources over which States have permanent sovereignty rather than global public goods.

As a result some see common concern as a mere fig leaf to the notion of collective responsibility that is easily circumvented.<sup>117</sup> Others argue that despite having limited legislative impact the principle of common concern underpins the normative rationale of administrative responsibilities for global environmental issues including international regulation and supervision, such as reporting.<sup>118</sup> Cullet and Kameri-Mbote however see the use of the principle in a more strategic political light. They have argued the common concerns rationale is applied to justify the introduction of global incentive market-based mechanisms, e.g. the Kyoto Protocol's Clean Development Mechanism.<sup>119</sup> Indeed, according to Brunnee common concern 'may, in the forest context, play more into the hands of resource exploitation interests than preservation and protection interests' which, she argues, explains the reluctance of developing countries particularly to

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20, *European Journal of International Law*, pp. 265–97, p. 268.

<sup>117</sup> P. Cullet, *Water Law in a Globalised World: the Need for a New Conceptual Framework*, (2011), Vol. 23, Issue 2, *Journal of Environmental Law*, pp. 233-54. For a Realist critique of International Law see J.K. Goldsmith & E. A. Posner, *The Limits of International Law*, (2005), Oxford University Press.

<sup>118</sup> P. Birnie, A. Boyle & C. Redgwell, *supra* note 114, p. 131.

<sup>119</sup> P. Cullet & A. Patricia Kameri-Mbote. *Activities Implemented Jointly in the Forestry Sector: Conceptual and Operational Fallacies*, (1997), Vol. 10, *Georgetown International Environmental Law Review*, p. 97.

eschew the principle.<sup>120</sup> Given nature of developments in forest economic valuation Brunnee may have identified an important point. It may though need to be qualified given the contestation over market-based forest regulation emerging, e.g. REDD+ within countries between different stakeholders with elites supporting such regulation often to the detriment of forest dependent peoples. Unless international law undergoes a paradigm shift in its understanding of collectivity things are unlikely to change soon so a limited interpretation of PSNR will prevail.<sup>121</sup> The on-going tension between PSNR and common concern will remain a feature of international law for the foreseeable future.

### 2.3.2 Sustainable Development

The principle of sustainable development is firmly embedded in international law and policy discourse.<sup>122</sup> In 1992 the UNCED Rio Declaration cited sustainable development three times<sup>123</sup>; the UNFCCC<sup>124</sup> and the CBD<sup>125</sup> also included it as a core objective giving the principle further legal weight. The normative legal significance was confirmed in 1997 in the *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* case ruling at the International Court of Justice. In a separate opinion Judge Weeramantry argued that sustainable development was ‘more than a mere concept,’ and warranted recognition as ‘a principle with

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<sup>120</sup> J. Brunnee, A conceptual framework for an international forests convention: customary law and emerging principles, in Canadian Council on International Law (ed.), *Global Forests and International Environmental Law*, (1996), Kluwer Law International, pp. 41–77 p. 45.

<sup>121</sup> P. Allott, *Eunomia: New Order for a New World*, (1990), Oxford University Press, pp. 296-340; A. Kotsakis, Heterotopias of the Environment: Law’s Forgotten Spaces, in A. Philippopoulos-Mihalopoulos, *Law and Ecology: New Environmental Foundations*, (2011), Routledge, pp. 193-214.

<sup>122</sup> See D. French, *International Law and Policy of Sustainable Development*, (2005), Manchester University Press; M. C. Cordonier-Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects*, (2004), Oxford University Press.

<sup>123</sup> Principles 1, 4 and 5 Rio Declaration on Environment and Development, (1992).

<sup>124</sup> Article 3.4 UN Framework Convention on Climate Change (1992).

<sup>125</sup> Article 1 UN Convention on Biological Diversity (1992).

normative value'.<sup>126</sup> The parameters of its normative value however have proven difficult to determine.

In 1987 the World Commission on Sustainable Development concisely defined sustainable development as: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'<sup>127</sup> For some this definition of sustainable development is merely an oxymoron that cannot be achieved. Arguably it was designed specifically to resolve conceptually the conflict within the international community between developed countries concerns relating to environmental protection and the needs of the developing countries, many who were newly independent, to achieve economic development.<sup>128</sup> Many newly independent states were tropical forest countries in Sub-Saharan Africa, Asia and Latin America. The interpretation of the concept though continues to be redefined, increasingly informed by modern sciences rather than traditional forest peoples' knowledge, many of whom are located in tropical forest countries.<sup>129</sup>

In a report for the newly established International Tropical Timber Organisation in 1988 Duncan Poore coined the term 'sustainable forest management' (SFM).<sup>130</sup> This term was intended to provide a normative framework to

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<sup>126</sup> Separate Opinion of Judge Weeramantry *Gabcikovo-Nagymoras (Hungary/Slovakia)* Case ICJ (1997), p. 90.

<sup>127</sup> World Commission on Environment and Development, *Our Common Future*, (1987), Oxford University Press, p. 43.

<sup>128</sup> D. Tarlock, *Ideas Without Institutions: The Paradox of Sustainable Development*, (2001), Vol. 9, Issue 1, *Indiana Journal of Global Legal Studies*, pp. 38-65.

<sup>129</sup> J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Conditions have Failed*, (1999), Yale University Press, p. 20.

<sup>130</sup> D. Poore, *No Timber without Trees: Sustainability in the Tropical Forest*, (1989), Earthscan.

challenge the existing concept of 'sustainable forest yield' that was devised in the late eighteenth century by Germany.<sup>131</sup> The 1992 Rio Forest Principles applied the principle of sustainable development to forests stating in its preamble that 'the guiding objective of these principles is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complimentary functions and uses.'<sup>132</sup> It continued by stating that

*'Forestry issues and opportunity should be examined in a holistic and balanced manner within the overall context of environment and development, taking into consideration the multiple functions and uses of forests, including traditional uses, and the likely economic and social stressed when the uses are constrained or restricted, as well as the potential for development of sustainable forest management can offer.'*<sup>133</sup>

Further incorporation of the terminology, with attempted definitions, occurred within the CBD which stated that: 'sustainable forest management should ensure that components of biological diversity are used in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs of present and future.'<sup>134</sup> In the 1994 renegotiated Tropical Timber Agreement members recognised the need to manage tropical forests in a way that will 'contribute to the process of sustainable development'.<sup>135</sup> A number of processes have attempted to develop criteria and indicators for SFM to be used as guidelines. The 1999 Santiago Declaration was a

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<sup>131</sup> The publication by Wilhelm Gottfried von Moser's *Principle's of Forest Economy* in 1757 saw a move towards a scientific economic resource management approach to forestry see J. Scott, supra p. 20.

<sup>132</sup> Preamble (b), UN Rio Forest Principles 1992.

<sup>133</sup> Preamble (c), UN Rio Forest Principles 1992.

<sup>134</sup> Annex to Decision II/9 CBD COP 2 Jakarta 6-17 1995.

<sup>135</sup> Article 1(c) International Tropical Timber Trade Agreement (1994).

‘Statement on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests’.<sup>136</sup>

Better known existing SFM definitions exist due to criteria developed by market-based mechanisms to certifying forest products, most frequently timber based products. Numerous schemes, including the Forest Stewardship Council (FSC) certification, the Programme for Endorsement of Forest Certification (PEFC), Malaysian Timber Council Certification and the Australian Forest Stewardship Scheme, exist which use different criteria and indicators within a variety of procedural systems to prove that products have come from sustainably managed forests.<sup>137</sup> Despite SFM being incorporated into international agreements alongside the principle of sustainable development its interpretation is inconclusive. This is in part due to ‘sustainable development’ being a ‘meta’ normative organising principle rather than a stand-alone one.<sup>138</sup>

Several scholars attribute a range of categories to the meta-norm of sustainable development. French divides sustainable development in to four categories: environment; economy; equity and empowerment.<sup>139</sup> Schrivjer adds to this claiming that sustainable development is more multifaceted highlighting seven main elements: sustainable use; sound-macro economic development;

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<sup>136</sup> The Santiago Declaration is one of a number of regional and international efforts to define standard criteria and indicators for sustainable forest management; including those of the International and Tropical Timber Organisation, the Ministerial Conference on Protection of Forests in Europe and the FAO criteria and indicators for details on these processes see

<sup>137</sup> For further discussion on whether these schemes result in ‘sustainable forestry’ see S. Ozinga, *Time to Measure the Impacts of Forest Certification on Sustainable Forest Management*, (2004) Vol. 55, *Unasylva*, p. 219; E. Meidinger, *Forest Certification as a Global Civil Society Regulatory Institution*, in E. Meidinger, C. Elliott & G. Osten (eds), *Social and Political Dimensions of Forest Certification*, (2003), p. 265.

<sup>138</sup> Tarlock. D, (2001), *supra* note 102.

<sup>139</sup> French. D, *supra* note 112, pp. 24-33.

environmental protection; temporality, promptness and longevity; public participation and human rights; good governance and; integration and interrelatedness.<sup>140</sup> Most recently Morrow observed that at the recent UN Rio+20 Conference in June 2012 there was greater emphasis on the integration element, based on respect for Mother Earth, for sustainable development, and that this emerged from a number of Latin American countries. This is a new twist in the metamorphosis of the normative conception of sustainable development.<sup>141</sup> This expanding list of normative categories illustrates that sustainable development is a multifaceted fluid meta-principle. However, Viñuales, claims this increasing layering and complexity being applied to the concept of sustainable development has undermined its usefulness.<sup>142</sup> For forest law and governance Viñuales argument is pertinent, research, including this thesis, demonstrates the selective way in which different elements of sustainable development as a concept are applied in different contexts.

### 2.3.3 Achieving Equity Amongst States: Common But Differentiated Responsibility

International law is traditionally based on the principle of sovereign equality of States. Yet the capacity and resources for all States to engage in the process and implementation of international legal obligations is far from equal.<sup>143</sup> Equity has been invoked in opposition to the basic rule of sovereign equality between states, to fill in gaps where new issues emerge and as a principle to govern the

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<sup>140</sup> Schrijver, N, *supra* note 100, p. 208.

<sup>141</sup> K. Morrow, Rio+20, the Green Economy and Re-orienting Sustainable Development, (2012), Vol. 14, No. 4, *Environmental Law Review*, pp. 279-297.

<sup>142</sup> J.E. Viñuales, The Rise and Fall of Sustainable Development, *Review of European, Comparative & International Environmental Law* (2013), Vol. 22 No.1, pp. 3-13.

<sup>143</sup> B. Richardson, Environmental Law in Post-colonial Societies: Straddling the Local- Global Institutional Spectrum, (2000), Vol. 11, Issue 1, *Colorado Journal of International Environmental Law and Policy*, pp. 1-58, p. 2.

interpretation of legal norms.<sup>144</sup> Differences between nation states at the international level require corrective measures to enable international law to achieve not only fairness but to be complied with.<sup>145</sup> Realising legitimacy and fairness is an ever-present challenge that needs to be addressed within the international legal system.<sup>146</sup> If inequalities and disparities between states are to be recalibrated then new legal tools are required.<sup>147</sup>

Many environmental problems around the world are often the result of modern industrialisation, a historical legacy of colonialism in developing countries and/or the on-going inequity in consumption of natural resources by the richest countries, as well as individual elites globally.<sup>148</sup> Also the resources available to address a range of environmental problems, including technological, financial and human, until relatively recently, are mainly located within developed countries. Given the scale of transnational environmental problems, especially climate change and ecosystem degradation due to their public goods nature, transfer of financial resources, skills, technology and know-how are necessary to developing countries, especially the least developed.

International environmental law, although not exclusively, has, to varying degrees, sought to address both these through mechanisms that provide differential treatment to Parties to particular agreements. Indeed according to

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<sup>144</sup> D. Shelton, Equity, in D. Bodansky, J. Brunnee and E. Hey, *The Oxford Handbook of International Environmental Law*, (2007), Oxford University Press, pp. 639-663 p. 645.

<sup>145</sup> D. McCraw, Legal Treatment of Developing Countries: Differential Contextual and Absolute Norms, (1990), Vol. 69, Issue 1, *Colorado Journal of International Law and Policy*.

<sup>146</sup> T. Franck, *Fairness in International Law and Institutions*, (1995), Oxford University Press, pp. 3-9.

<sup>147</sup> L. Rajamani, *Differential Treatment in International Environmental Law*, (2006), Oxford University Press, pp. 1-13.

<sup>148</sup> M. Drumbl, Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance, (2002), Vol. 27, *Columbia Journal of Environmental Law*, pp. 363-380 p. 364.

Stone international environmental law is proving to be a 'most fertile field for [the emergence of] non-uniform obligations' through this common but differentiated principle (CBDR) that recognises both contribution made to environmental degradation and the capacity/resources to take actions to address it as the basis to evaluate difference.<sup>149</sup> The extent of differential treatment has extended over the years.<sup>150</sup> However it was Principle 7 of the UNCED Rio Declaration when the international community first recognised CBDR explicitly as a principle stating that:

*States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to the global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.*<sup>151</sup>

The CBDR principle provides a differential rather than a preferential mechanism around which to recognise cooperation internationally specifically to address environmental problems.<sup>152</sup> However, there are serious ambiguities as to whom CBDR applies to, why and on what basis.<sup>153</sup> Addressing these increasingly causes tensions between nation states at international negotiations. This is especially the case as newly emerging developing countries such as China, India and Brazil

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<sup>149</sup> C. Stone, *Common but Differentiated Responsibilities in International Law*, (2004), Vol. 98, *American Journal of International Law*, pp. 276-304.

<sup>150</sup> Rajamani. L, *supra* note 147, p. 133.

<sup>151</sup> Principle 7 Rio Declaration on the Environment and Development, in Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992.

<sup>152</sup> P. Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations*, (1999), Vol.10, No. 3, *European Journal of International Law*, pp. 549-582, p. 549.

<sup>153</sup> French, D, (2002), *supra* note 112, p. 16.

continue to claim the principle of CBDR alongside the least developed countries. This adds a new dimension to addressing inequity, one where there is significant inequity between emerging economies and least developed countries, and considering the normative role the CBDR should play.

In relation to forests the CBDR principle has been accorded to developing countries, and in some cases economies in transition, in terms of reporting requirements, financial assistance, targets and technology transfer. This is particularly the case under the UNFCCC.<sup>154</sup> The Kyoto Protocol takes differential treatment further as legally binding emission reductions targets only apply to developed countries. However, tropical forest developing countries felt the CBDR operated in a perverse way by not providing them with an opportunity to benefit on forest emission reductions in any tradable or fund based emissions reductions mechanism under the Kyoto Protocol.<sup>155</sup> It was this that resulted in several tropical forest countries working to have REDD+ included in the 2007 UNFCCC Bali Action Plan, a mechanism that would fund sustainable forest management to improve and increase the sinks capacity of tropical forests.<sup>156</sup>

Inequity between people regardless of jurisdictional boundaries is also a significant component of injustice. International commitments to address the inequities that the poorest and most vulnerable peoples experience lie largely

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<sup>154</sup> Articles 3(2), 4(7) UNFCCC 1992.

<sup>155</sup> The Kyoto Protocol did allow afforestation and reforestation projects under the Article 12 Clean Development Mechanism. This did not though compensate countries for avoiding deforestation.

<sup>156</sup> The Coalition for Rainforest Nations, an intergovernmental organisation established to advocate on behalf on tropical forest countries, pushed for consideration of a mechanism for reduced emissions from deforestation at the UNFCCC COP in Montreal in 2006 see <http://www.rainforestcoalition.org/AboutTheCoalition.aspx> [last accessed 20 November 2014].

within human rights law. Differentiation is necessary within domestic and international law to support redistribution of resources and to create opportunities to redress inequity between people. Rajamani, however, claims that there exists a significant lack of ideological sympathy to address many of the gravest inequities internationally between states, as well as individuals.<sup>157</sup> The rising inequality in distribution of wealth globally, especially between individuals, can be seen to be both a symptom and a source of such ideological antipathy.<sup>158</sup> This is both in the North and the South amongst elites especially.

#### 2.3.4 Duty to Cooperate

Without cooperation there would be no international law-making process. The principle of cooperation is fundamental to international law. Although cooperation may be important to international law both in substance and process it is a duty that is highly politically charged, especially where international actors are involved.

Inter-state cooperation faces new demands due to new global challenges, especially transboundary environmental issues that test the limits of state capacity. The interlinkages between sovereignty and cooperation are tested where global public goods are the focus. For example the duty to cooperate is particularly clearly developed in the context of transboundary water law, including the 1971 Ramsar Wetlands Convention.<sup>159</sup> [see section 2.2.1] The ongoing reconfiguration of forest values has fed into this with growing concern over global public goods, such as ecosystem functions including soil formation

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<sup>157</sup> Rajamani. L, *supra* note 147, pp. 54-89.

<sup>158</sup> J. Stiglitz, *The Price of Inequality*, (2012), Penguin UK.

<sup>159</sup> P. Wouters, Dynamic Cooperation, in International Law and the Shadow of State Sovereignty in the Context of Transboundary Waters (Part 2), (2013), *Environmental Liability*, Vol. 4, pp. 131-144; Article 5 Ramsar Convention 1971

and biodiversity habitat. Many of these functions benefits transcend sovereign territorial borders. It is frequently argued that only through transboundary cooperation can threats to forest ecosystem functions be addressed. This is evident in the inclusion of references to cooperation within the international forest regime agreements.

The relationship between sovereignty and cooperation is fluid and ever changing. International law is evolving around the elastic concept of cooperation, a notion that is dynamic both in substantive content and procedural application.<sup>160</sup> New digital technologies challenge sovereignty for example. So although sovereignty will always figure in the concrete configuration and realization of the duty to cooperate, it will not and cannot, be controlling.<sup>161</sup> This opens up the international law-making process and implementation up to non-state actors. Wouters argues that a norm of 'dynamic cooperation' is emerging, with its origins at the very core of international law, and which provides a platform for the continued sustainable management in which multilevel actors are engaged.<sup>162</sup>

As the engagement in the norm-making process expands beyond merely state activities the cooperation between actors becomes of greater significance. Benvenisti argues that process of cooperation relies heavily upon institutions, from legal frameworks to institutional mechanisms and bodies, which are created by sovereign states as conduits for cooperation.<sup>163</sup> Yet this is an

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<sup>160</sup> Ibid.

<sup>161</sup> B. R. Roth, *Sovereign Equality and Moral Disagreement*, (2012), Oxford University Press, cited in *ibid.*

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

institutionalist prism through which to interpret the process of cooperation. It limits engagement to that which is sanctioned by the state feeding into the process of norm building. With increasing multilevel transnational networks and alliances engaged in normative activities such a restrictive view leads to an undue emphasis on a narrow range of actors distorting research findings. Researching and understanding the dynamics of cooperation across transnational networks is integral to gaining a fuller appreciation of what results from these new forms of collaboration.

#### 2.4 Principles and Norms: Hierarchies and Relationships

The International Law Commission concluded in its report on fragmentation and international law that:

*'[International laws'] rules and principles act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.'*<sup>164</sup>

This conclusion is significant at a time when there are increasing numbers of rules and principles. It is a conclusion that invites international law scholars to determine the nature of the relationships between these principles, how they form, why they change and what implications they have on the development of subsequent rules.

Relations between international principles have received limited attention in part due to traditional legal theory. According to classical international law

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<sup>164</sup> International Law Commission, Report on Fragmentation (2006), *supra* note 19, p. 105.

theory norms are considered co-equal [see section 2.2] yet there nevertheless exists in practice a hierarchy. The form and nature of this hierarchy is contested. Where legal scholars do acknowledge a normative hierarchy it is frequently limited to a one-dimensional vertical construct.<sup>165</sup> Within such a model customary international law with its norms of *jus cogens* and obligations of *erga omnes* has a more superior legal quality than other so-called 'twilight' norms such as intergenerational equity.<sup>166</sup> Such a model is unsatisfactory. Assuming a fixed hierarchy leads to multiple problems and limits the discourse regarding normative architectures to an atomistic modeling whereby individual norms are perceived in isolation. It fails to recognise the dynamic meaningful relations that co-exist between all principles, and excludes considering the implications these have on the further evolution of international law.

Adopting a multifaceted approach to identifying, interpreting and determining the relationships between normative principles relating to forests helps to understand the direction that international law is taking and why. As indicated above PSNR is a dominant principle relating to forests for most countries. It is through the prism of this principle that States interpret all other the other principles. However other actors place a greater emphasis on norms and principles associated with the transboundary implications of forest management, and/or the rights of forest based communities. For such matters the conditions of common concern and transboundary harm qualify activities, as well as human

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<sup>165</sup> M. Koskenniemi, *Hierarchy in International Law: A Sketch*, (1997), Vol. 8, *European Journal of International Law*, pp. 566-582, p. 567.

<sup>166</sup> U. Bayerlin, *Different Types of Norms in International Environmental Law: Policies, Principles and Rules*, in D. Bodansky, J. Brunnee and E. Hey, *The Oxford Handbook of International Environmental Law*, (2007), Oxford University Press, pp. 425-449, p. 425.

and indigenous peoples rights. So too does the broader prescriptive norm of sustainable development. It can be used to leverage the advancement of other principles.

## 2.5 Conclusion

Traditional legal theories argue that principles are the building blocks of international law. Indeed they are understood to be the foundations upon which the international community of states through a collective consensus constructs a coherent global legal order.

Such a perspective is open to dispute on a number of levels. Firstly the idea that principles represent an international consensus fails to recognise the significant differences that exist between states who agree to these principles within recognised official legal processes such as treaties. The principle of sustainable development offers a clear example. Developing countries continue to argue that development was more important than the environment.

Secondly an idea of consensus at the time of agreement does not account for the changes in interpretation that occur over time. With shifting geo-political and economic power relations previous agreed principles are open to reinterpretation. Common but differentiated responsibility, a principle at the core of the UNFCCC, has over time come to be reinterpreted by certain Parties to the Convention, especially as China's green house gas emissions have exceeded the United States, who previously was the largest emitter. The reinterpretation

of CBDR is not solely a North-South issue; it also has taken place between developing country states who now see a country like China as having responsibilities to assist them.

Thirdly traditional international legal scholarship restricts its focus to consensus amongst states over recognised sources of law according to the ICJs Art. 38(1). Critical legal scholars have argued that norm-making sources are generated from multiple 'norm-entrepreneurs' and importantly are interpreted by a broad range of actors not just the sovereign state. Failing to recognise this means that new initiatives that have 'legal effect' in terms of governance, such as forest certification within the private sector, are not incorporated into international legal scholarship. This leads to gaps in understanding how norms and principles develop and evolve.

Finally the relationship between principles is solely understood to be ordered in a hierarchy of legal authority recognised in traditional international law scholarship. This is a static vertical perception that does not recognise the selective nature in which principles are employed by different actors at different moments to achieve certain objectives. PSNR for example is commonly recognised as being more porous due to qualifiers limiting it, such as the no harm principle and common concern. Yet when threatened states will adopt a strict interpretation of PSNR, for example developing countries over forest resources at international forest convention negotiations or monitoring reporting and verification negotiations for REDD+ under the UNFCCC.

Traditional theories of how principles and norms are generated and evolve are state centric and static. Efforts to broaden the understanding of sources are challenged by arriving at a consensus as to what constitutes an authoritative source. The overview of the international forest regime and related principles provided in this chapter assumed a classical approach to sources. This commonly adopted approach by international legal scholars offers a one-dimensional survey of international forest law. To gain greater understanding it is necessary to enter new dimensions and move beyond the classical international law canopy.

The next chapter takes a first step by considering the role that actors play in developing and evolving international law-making processes.

### C3. Actors: Pathways of Influence on International Forest Law-Making Processes

International law is conceived around the notion of statehood. The state is considered to be the only actor that has the authority to legitimately engage, or provide a mandate to others to do so, in the process of normative development.<sup>1</sup> This traditional interpretation offers a neat framework for researchers to determine the influence actors have in the development of principles and values. Such a state-centric approach however limits scholars' research relating to international laws normative development and the related issues surrounding enforcement, implementation and governance. It narrows the focus to a field of interactions and outputs of states and other inter-governmental bodies, such as the United Nations. It justifies marginalisation; privileging particular voices, usually the most powerful, and silencing others, both within the international community and within states themselves.<sup>2</sup> Ultimately this confines analysis to developments within the canopy of the international legal order as opposed to beneath and beyond it.

Such a singular state-centric interpretative approach to how rules, principles and values evolve is no longer justifiable. Increasingly academics from various disciplines, including international law, recognise that a diverse range of actors beyond the state are involved in the process of developing rules, principles and

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<sup>1</sup> A. Bianchi, (ed), *Non-State Actors and International Law*, (2009) Ashgate, p. xiv; I. Scobbie, *Wicked Heresies or Legitimate Perspectives? Theory and International Law*, in D. Evans, (ed), *International Law*, (2006), Oxford University Press, pp. 83-115, p. 84.

<sup>2</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument – Reissue with a New Epilogue*, (2005), Cambridge University Press, p. 240.

values, in a wide variety of national, international and transnational settings.<sup>3</sup> This is due to law-making processes being increasingly fragmented vertically among supranational, international, national, and sub-national layers of authority (multilevel governance) and horizontally among different parallel rule-making systems maintained by different groups of actors (multipolar governance).<sup>4</sup> As Hurrell claims 'all of these changes have diluted and clouded the idea of international law as a state-privileging system.'<sup>5</sup> Berman highlights the significance of this noting that it is not only a response to conceptual ideologies but also, more importantly, recognition that international law's structure itself has changed.<sup>6</sup> Given that the interpretative community involved in law creation and implementation has significantly broadened legal research addressing questions associated with international laws evolution needs to look beyond the state-centric canopy and turn their gaze both beneath and beyond it.<sup>7</sup>

This chapter examines differing theoretical perspectives employed to explain actors' influence on law-making and implementation. The chapter then provides an outline of different actor groups assessing the pathways of influence employed by them in relation to evolving international forest related law. It also considers the growth in transnational networks and their contribution to international law-making processes beyond those of individual actors. The

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<sup>3</sup> A. Hurrell, *On Global Order: Power, Values and the Constitution of International Society*, (2007), Oxford University Press, p. 111 cited in N. Bhuta, *The Role International Actors Other than States can Play in the New World Order*, A. Cassese, *Realising Utopia: The Future of International Law*, (2012), Oxford University Press, pp. 61-76, p. 68.

<sup>4</sup> F. Bierman & P. Pattberg, (eds), *Global Environmental Governance Reconsidered*, (2012), MIT Press, p. 13.

<sup>5</sup> Hurrell. A, *supra* note 3.

<sup>6</sup> P. Schiff Berman, *A Pluralist Approach to International Law*, (2007), Vol. 32, *George Washington Law Faculty Scholarly Commons*, pp. 299-329, p. 312.

<sup>7</sup> R. Cotterell, *Transnational Networks of Community and International Economic Law* in A. Perry-Kessaris, (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext*, (2013), Routledge, pp. 133-151, p. 133.

concluding section focuses on issues of legitimacy. It examines issue relating to legitimacy amongst multiple actors in international law-making processes.

### 3.1 Interpreting Actors Influences on International Law's Evolution: Theory

Although legal scholars are increasingly focusing on the diverse roles non-state actors are playing in international laws development there are significant differences between them towards theoretical, conceptual and methodological approaches.<sup>8</sup> Despite various approaches being developed a division exists between those that perceive the international legal order to be an overarching universal system and those who understand it to be largely fragmented both horizontally and vertically. This section provides an overview of the different theoretical interpretations of actors' influences on international law processes within the context of forest related law. I begin with various institutionalist perspectives then follow on with global legal pluralism and critical legal studies.

Institutionalists perceive the international legal order is a Modernist project, a linear process steadily moving towards an end goal of freedom, democracy and peace based on the rule of law.<sup>9</sup> The vision is one of a single universal canopy founded upon liberal values and sustained by democratic governance. Institutionalism draws on the normative principles of common concern and cooperation between sovereign states as a rationale for its theory. Slaughter, a leading institutionalist scholar, claims that 'peoples and their governments

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<sup>8</sup> J.B. Trachtman, *The Future of International Law: Global Government*, (2013), Cambridge University Press, p. 1.

<sup>9</sup> Koskenniemi. *M supra* note 2.

around the world need global institutions to solve collective problems that can only be addressed on a global scale.’<sup>10</sup> According to this view global institutionalism is particularly appropriate for tackling transnational environmental problems such as climate change, biodiversity loss and deforestation.<sup>11</sup>

Institutionalists consider that non-state actors (NSA) and international organisations are essential to realising democratic governance within an international liberal legal order.<sup>12</sup> NSAs are seen to offer legitimacy and improve the implementation of rules within a universal system.<sup>13</sup> As such a progressive shift to a new international legal order that is based on liberal democratic values can only occur by coordinating the actions of actors operating through, alongside and within a ‘disaggregated state’.<sup>14</sup> This theory has met with criticism from a number of legal academics.

It is the idea of ‘coordination’ that critiques of institutionalism have focused on. Institutionalism advocates a top-down managed hierarchical approach to achieving its end goal. Harold Koh, although an institutionalist himself, understood that the international norm internalisation was more dynamic and

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<sup>10</sup> A.M. Slaughter, *A New World Order*, (2004), Princeton University Press, p. 3.

<sup>11</sup> P. Spiro, Non-Governmental Organisations and Civil Society in D. Bodansky, J. Brunnee & E. Hey, (eds), *The Oxford Handbook of International Environmental Law*, (2007) Oxford University Press, pp. 770-791, p. 770; A. Alkoby, Non-State Actors and the Legitimacy of International Environmental Law, (2003), Vol. 3, Issue 1, *Non-State Actors and International Law*, pp. 23-98.

<sup>12</sup> A.M. Slaughter, A. S. Tulumello & S. Wood, International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, (1998), *American Journal of International Law*, Vol. 92, pp. 367-396.

<sup>13</sup> R. Higgins, *Problems and Process: International Law and How We Use It*, (1994), Oxford Clarendon Press, p. 50.

<sup>14</sup> A.M. Slaughter, International Law in a World of Liberal States, (1995), Vol. 6, Issue 1, *European Journal of International Law*, pp. 503-538, p. 504.

fluid. He argued that 'public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organisations and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately internalize the rules of international law.'<sup>15</sup> Koh called this transnational legal process theory. However, ultimately transnational legal process theory is limited as it fails to examine non-institutional spaces in which other norms emerge that can challenge and/or influence the existing orthodox legal normative framework.<sup>16</sup> The emphasis lies on internalising norms from the international legal universal order via official, formal pathways such as courts and statutory laws, as opposed to explaining the process of formation across a fragmented landscape.<sup>17</sup> This again is an approach looking to frame its analysis within the window of the international legal project and its architecture per se as opposed to beyond it.

Scholars who reflect an ever-deepening pluralist orientation in the conceptualisation of international law-making processes expand Koh's transnational legal process theory.<sup>18</sup> Berman, for example, extends Robert Cover's hypothesis of United States national pluralist processes developing legal norms within multiple spaces to apply to international law in an era of globalisation. He argues that researchers should explore the multi-directional interaction of local, national and international norms observing and critically

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<sup>15</sup> H. Koh, *Transnational Legal Process*, (1996), Faculty Scholarship Series, Paper 2096 available [http://digitalcommons.law.yale.edu/fss\\_papers/2096](http://digitalcommons.law.yale.edu/fss_papers/2096) [last accessed 20 November 2014]

<sup>16</sup> See M. Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities*, (2002), Butterworths.

<sup>17</sup> I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, (2012), Oxford University Press.

<sup>18</sup> Schiff Berman. P, *supra* note 6, p. 327.

analysing feedback loops within and between the different levels. Berman concludes that adopting such approaches leads researchers to 'shift to the variety of normative assertions, the impact of such assertions on legal consciousness, and the way these norms are deployed by actors both within and without governmental bureaucracies.'<sup>19</sup> What then becomes important for such research is to determine the normative commitments as perceived by societies rather than the formal legal status of the international legal order within societies. By doing so the focus of research will shift from the vertical, top-down analytical models such as.<sup>20</sup> However, this global legal pluralist approach is not welcomed by all, including some of the most critical voices amongst academics of international law from the developing world.

Critical legal scholars (CLS), including feminists, socio-legalists and recent third world approaches to international law<sup>21</sup>, argue that conceding the entire arena of international law to a broad based legal pluralism of multiple actors operating in diverse locations as proposed by global legal pluralists is deeply flawed.<sup>22</sup> Although international law is a field of contestation over meanings, approaches, solutions, remedies in which many different actors voices are raised CLS argue that international law cannot not be simply surrendered to numerous fragmented plural encounters. CLS have developed critiques of international law,

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<sup>19</sup> Schiff Berman. P, *supra* note 6, p. 327.

<sup>20</sup> *Ibid* p. 312.

<sup>21</sup> Alston rightly raises concerns over the lack of precision of definition of 'Third World' especially with the differentiation between newly emerging economies and least developed countries in the changing geo-economic climate. However the critiques that have evolved under TWAIL continue to provide important theoretical prisms through which to view international law – see P. Alston, Remarks on Professor B.S. Chimni's A Just World Under Law: A View from the South, (2004), Vol. 22, Issue 2, *American University International Law Review*, pp. 222-235.

<sup>22</sup> M. Koskenniemi, *The Politics of International Law*, (2011), Hart Publishing, pp. 350-354; A. Anghie & B.S. Chimni, Third World Approaches to International Law and Individual Responsibility in Internal Conflicts, *Chinese Journal of International Law*, (2003), pp. 77-103

its processes of formation, perpetuation and also its colonising nature of developing country peoples through nation-building and large-scale appropriation of primary resources.<sup>23</sup> Consequently they recognise that international law also possesses an extraordinarily powerful language in which to frame problems, suggest fault and responsibility, and propose solutions and remedies for the weakest and least represented states and peoples.<sup>24</sup>

To CLS international law matters and, therefore, is an important forum for engagement to advance broader norms because it has 'a symbolic, as well as a regulative function.'<sup>25</sup> CLS interpret NSA and international organisations involvement in international law-making processes by drawing on analysis of power. Twining suggests that the research focus needs to be on how different legal orders and actors may 'complement each other; investigating if the relationship is one of cooperation, cooption, competition, subordination, or stable symbiosis; and whether the approaches converge, assimilate, merge, repress, imitate, echo, or avoid each other'.<sup>26</sup> By paying closer attention to the dynamics of interaction and the consequences it is possible to reveal which actors are actually influencing law-making processes within multiple fora.

Finding a middle way between the global legal pluralism Berman proposes adopting in international legal scholarship research and the institutionalists

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<sup>23</sup> For an introduction to TWAIL scholarship see A. Anghie, B. Chimni, K. Mickelson & O. Okafor (eds), *The Third World and International Order: Law, Politics and Globalization*, (2003), Martinus Nijhoff Publishers.

<sup>24</sup> H. Charlesworth, International Law: A Discipline in Crisis, (2002), Vol. 65, Issue 3, *The Modern Law Review*, pp. 377-392, p. 381.

<sup>25</sup> H. Charlesworth, The Women Question in International Law, (2011), Vol. 1, Issue 1, *Asian Journal of International Law*, pp. 33-38.

<sup>26</sup> W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, (2009), Cambridge University Press, p. 277.

international world order approach encouraged by Slaughter. Such an approach would meet with the needs outlined by CLS in interrogating the international legal systems, its norms and actors and how these work for justice for the most marginalized within global society. De Sousa Santos concept of inter-legality helps here. The term 'inter-legality' was devised by De Sousa Santos to refer the various strands of the processes that influence international law-making and the dynamic power relationships between different strands.<sup>27</sup> These strands could occur anywhere, woven between and amongst actors at any level from the international to the local. The challenge for any researcher though is to identify these threads and decode the power relationships that exist, then try to determine the influence these have upon law-making processes.

Political economists Bernstein and Cashore capture this fluid approach with the critical pathways concept they developed for forest governance. They advocate research to focus on pathways of influence, encouraging researchers to examine individual pathways used by actors and the inter-relationship between them. The four pathways they identify and apply to forest governance are: international rules; international norms and discourse; creation of or intervention in markets and; direct access to domestic policy process.<sup>28</sup> Using these pathway categories helps researchers determine the intention, form and nature of an actor's engagement in law-making processes at all levels. This approach is an alternative to legal scholars because it does offer a balance between competing international jurisprudence and how they approach the

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<sup>27</sup> B. de Sousa Santos, *Toward a New Legal Common Sense*, (2002), Butterworths, pp. 439-489.

<sup>28</sup> S. Bernstein & B. Cashore, Complex Global Governance and Domestic Policies: Four Pathways of Influence, (2012), Vol. 88, Issue 3, *International Affairs*, pp. 585-604.

question of actors influences on law-making processes. It is a framework that will be taken up throughout the remainder of this chapter.

### 3.2 The State

Despite disaggregation and delegation of powers Bhuta argues that states remain primary actors on the international scene.<sup>29</sup> Until relatively recently international law scholars' primarily focused on the role of the state in the evolution of the international forest related laws.<sup>30</sup> Orthodox scholars drew on the notion that statehood is the most complete expression of legal personality under international law and therefore the actor that confers the capacity to claim rights and duties on forest related issues. Such an approach results in scholarship that only analyses key legal regime texts, input by states to their ongoing development through international administrative governance channels

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<sup>29</sup> N. Bhuta, *The Role International Actors Other than States can Play in the New World Order*, in A. Cassese, *Realising Utopia: The Future of International Law*, (2012), Oxford University Press, pp. 61-76, p. 61.

<sup>30</sup> See K. Kunzmann, *The Non-Legally Binding Instrument on Sustainable Management of All Types of Forests – Towards a Legal Regime for Sustainable Forest Management?* (2008), Vol. 09 Issue 08, *German Law Journal*, pp. 981- 1007; D. Davenport & P. Wood, *Finding The Way Forward For The International Arrangement On Forests: UNFF 5, 6 and 7*, (2006), Vol. 15, Issue 3, *Review of European Community and International Environmental Law*, p. 316; D. Humphreys, *The Elusive Quest for a Global Forest Convention*, (2005) Vol. 14, Issue 1, *Review of European Community and International Environmental Law*, pp. 1–10; M. Steiner, *After a Decade of Global Forest Negotiations, Where Are We Now?*, (2001), Vol. 10, Issue 1, *Review of European Community and International Environmental Law*, pp. 98-105; B. Ruis, *No Forest Convention but Ten Tree Treaties*, (2006), Vol. 53, *Unasylva*, pp. 3–13; R. D. Lipschutz, *Why is there no International Forestry Law? An Examination of International Forestry Regulation both Public and Private*, (2001), Vol. 1, Issue, *Journal of Environmental Law and Policy*, pp. 153-179; D. Davenport, *An alternative explanation for the failure of the UNCED forest negotiations*, *Global Environmental Politics*, (2005), Vol. 5, Issue 1, pp. 105–130; M.C. Smouts, *The Issue of an International Forest Regime*, (2008), Vol. 10 Issue 3, *International Forestry Review*, pp. 429–432; D. Humphreys, *Forest politics — The evolution of international cooperation*, (1996), Earthscan, London; R. Tarasofsky, *Assessing the International Forest Regime*, (1999), IUCN, p. 168. J. Brunnee & A. Nollkaemper, *Between the Forests and the Trees—An Emerging International Forest Law*, (1996), Vol. 23, Issue 4, *Environmental Conservation*, pp. 307-314; C. MacKenzie, *Lessons from Forestry for International Environmental Law*, (2012), Vol. 21, Issue 2, *Review of European Community & International Environmental Law*, pp. 114-126; R. Maguire, *Global Forest Governance: Legal Concepts and Policy Trends*, (2013), Edward Elgar.

and the inter-relationship between each regime. Although this scholarship is important it forms only a part of the necessary research needed to gain a greater comprehension of the influences that actors have on the ongoing development of international forest law. It tends not to question the monolithic perspective of the state legal personality or the idea that the state is a unitary entity with a single, definable set of interests thereby excluding significant influences on the processes developing international forest law.

Individual state representatives influence the form and content of international law as much as any state policy. Research by political scientists and lawyers, has highlighted the diversity amongst state actors engaged within international related negotiations alone.<sup>31</sup> A state at any international level negotiations will often have different Ministries represented for trade, environment and human rights. There will be different departments covering each sub-theme (where the human resources are available). At the domestic level researchers have found that national and sub-national bureaucracies concerned with forest issues compete for influence. Such competition can feed into a state's international negotiations.<sup>32</sup> Hoffman proposes that national bureaucracies are gaining influence informally, due to the internationalisation of forest policy issues, and that those administrations that are directly involved with an international regime especially benefit, including through access to funds for capacity building

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<sup>31</sup> In relation to forests see Davenport. D, *supra* note 30, pp. 105–130; L. Giessen, Reviewing the Main Characteristics of the International Forest Regime Complex and Partial Explanations for its Fragmentation, (2013), Vol. 15, Issue 1, *International Forestry Review*, pp. 60-70;

<sup>32</sup> *Ibid* Giessen L, pp. 60-70; B. Singer, Putting the National Back into Forest-related Policies: The International Forests Regime and National Policies in Brazil and Indonesia, (2008), Vol. 10 Issue 3, *International Forestry Review*, pp. 523-537; Davenport. D *supra* note 30 pp. 105-130.

and technology transfer.<sup>33</sup> These findings stress the competitive nature of national bureaucracies, including at the local level, with regard to processes that are part of the ongoing evolution of the international forest regime and its interpretation by states. It also illustrates the challenge to an institutionalist approach to interpreting how international law evolves because it highlights the political, economic and cultural dynamics within state law and policy development.

Other scholarship, mainly by political economists, on transnational regulatory networks, inter-systemic regulation, and the role of non-governmental organisations and industry standards in shaping norms, reflect the growing disaggregation of state-based governance models.<sup>34</sup> The scale of disaggregation is now so significant in these theorists eyes that it is important to conceive of law-making beyond the state and research the quasi-public/quasi-private authorities that are involved.<sup>35</sup> The following section does this by reflecting on the involvement of other actors in the development of international forest related law processes.

### 3.3 International Organisations

Since the international legal system's early history international organisations

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<sup>33</sup> D. Kleinschmit, M. Bocher, & L. Giessen, Discourse and expertise in forest and environmental governance—an overview, (2009), Vol. 11, Issue 5, *Forest Policy and Economics*, pp. 309-312.

<sup>34</sup> P. Pattberg, Private Governance and the South: Lessons from Global Forest Politics, (2006), Vol. 27 Issue 4, *Third World Quarterly*, pp. 579-593; F. Biermann et al. The Fragmentation of Global Governance Architectures: A Framework for Analysis, (2009), Vol. 9 Issue 4, *Global Environmental Politics*, pp. 14-40.

<sup>35</sup> P. Zumbansen, Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism, (2012), Vol. 12, *Transnational Law & Contemporary Problems*, p. 305.

(IOs) have been a fixture.<sup>36</sup> However, in recent years there has been a proliferation of IOs.<sup>37</sup> In a changing geo-political there is an increase in IOs being created and/or situated in the Global South such as the UN Environment Programme (Kenya), the Green Climate Fund (South Korea) and the Asian Infrastructure Investment Bank (China), whereas previously most IOs had been from the North e.g. the World Bank (US). Traditional institutional definitions of IOs see them as ‘technical, non-political international institutions that assist with achieving the objectives of their membership, which usually includes States’.<sup>38</sup> Such a neutral, a-political definition is misleading though given the volume and nature of interventions that IO’s make within the international order.<sup>39</sup> IOs are much more than mere transmitters of international norms; they are norm entrepreneurs as well. Despite being ‘anchored in the state system’ IOs activities also reflect the expansion of issues on the global governance agenda.<sup>40</sup> As part of IOs *raison d’être* they frequently issue (publicly or internally) recommendations, guidelines, best practices, technical advice, findings, conclusions, committee rules, and other normative outputs. These outputs can have norm-making effects within the international multi-level regime.<sup>41</sup>

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<sup>36</sup> An international legal history of the growth of IOs and their functions is sketched by J.E. Alvarez, *International Organizations as Law-makers*, (2005), Oxford University Press, pp. 65-100.

<sup>37</sup> The number of international organizations (IOs) has been increasing steadily. In 2006 there were 7,530; in 1981, 1,039; in 1960, 154; in 1951, 123, Yearbook of International Organizations (2008), UIA cited in B. Kingsbury & L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, (2009), *International Law and Justice Working Papers*, No. 9, p.14.

<sup>38</sup> J. Klabbers, *International Institutions*, in J. Crawford & M. Koskeniemi, (eds), *International Law*, (2012), Cambridge University Press, pp. 228-245, p. 229.

<sup>39</sup> Definitions of international organisations are diverse amongst scholars and Alvarez cautions against proposing any universal term – Alvarez. J. E., *supra* note 37, , pp. 4-17.

<sup>40</sup> T. Weiss, R. Thakur & R. Ruggie, *Global Governance and the UN: An Unfinished Journey*, (2010), Indiana University Press, p. 121 [Kindle version].

<sup>41</sup> B. Kingsbury & L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, (2009), *International Law and Justice Working Papers*, No.9, p. 4.

IOs activities produce or entail a multiplicity of rules, principles, decisions, soft-law, and non-legal norms, which may be layered over each other historically and interpreted differently by other actors across various jurisdictions. These are now produced and administered in a variety of institutional settings and interpretive communities, in ways that are often fragmented and incompletely reconciled.<sup>42</sup> It is in this capacity that Weiss sees IOs as ‘primary vehicles for setting global agendas and framing global issues, creating and diffusing norms’ beyond the boundaries of the sovereign state.<sup>43</sup> This is evident in forest related issues where IOs have developed forest definitions<sup>44</sup>, guidelines<sup>45</sup>, and initiated negotiations.<sup>46</sup> It is in this way that the proliferation and differentiation of IOs has an impact on the forest-related issues norm-making and interpretation.<sup>47</sup> Two significant IOs, the World Trade Organisation (WTO)<sup>48</sup> and the World

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<sup>42</sup> M. Koskeniemi & P. Leino, Fragmentation of International Law? Postmodern Anxieties, (2002), Vol. 15, *Leiden Journal of International Law*, pp. 553-579.

<sup>43</sup> Weiss, T, Thakur, R & Ruggie, R *supra* note 40, p. 121 [Kindle version].

<sup>44</sup> The FAO, The Secretariat of the UNFCCC and the CBD each have different definitions for a ‘forest’ that have implications for sustainable forest management principles and criteria.

<sup>45</sup> The World Bank has a series of forest related operational policies: these include OP/BP 4.36 Forests, OP 4.01, *Environmental Assessment*, OP 4.04, *Natural Habitats*, OP 4.10 *Indigenous Peoples*, OP 4.11, *Physical Cultural Resources*, and OP 4.12, *Involuntary Resettlement* available <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,c ontentMDK:20064668~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> [last accessed 26 October 2014].

<sup>46</sup> UN ECOSOC established the IFF/IPF and UNFF; and the World Bank began the process of Ministerial meetings on Forest Law Enforcement and Governance (FLEG) in 1998 at the Birmingham, UK G8; the World Bank also established the Forest Carbon Partnership Facility that advanced REDD+ pilot projects under its own mandate – on the World Bank see R, Hajjar & J. Innes, The Evolution of the World Bank’s Policy Towards Forestry: Push or Pull?, (2009), Vol. 11, Issue 1, *International Forestry Review*, pp. 27-37.

<sup>47</sup> For a comprehensive evaluation of the different thematic areas that international institutions and organisations are engaged in see C. McDermott, Mapping the Core Actors and Issues Defining International Forest Governance, in J. Rayner, A. Buck & P. Katila, (eds), *Embracing Complexity: Meeting the Challenges of International Forest Governance*, (2012), IUFRO, pp. 19-37.

<sup>48</sup> The WTO has had important norm setting impacts on environmental law, including on forest related issues. Due to clauses in the General Agreement on Tariffs and Trade on non-discrimination countries are unable to establish their own certification schemes, or specify product harvesting and processing requirements for imports in procurement contracts for timber products. This resulted in voluntary as opposed to mandatory certification schemes being developed such as FSC and PEFC. The uptake of certification, especially in tropical forest countries is arguably significantly less than if mandatory labeling could have been incorporated into WTO agreements as this would have required changes to the formal trade sector in forestry

Bank<sup>49</sup>, are identified by academics, most commonly political economists, as having a significant influence on how norms, rules and values relating to forest issues develop.

Increasingly IOs collaborate either amongst themselves, with government agencies and/or with other non-state actors. For example the Global Environmental Facility which began as a World Bank pilot program in 1991 has subsequently become an IO structure that provides funding and seeks to maximize coherence and effectiveness in specific environment related project design across several multilateral agreements.<sup>50</sup> As with independent IOs these

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to meet the certification requirements - see A. Lang & J. Scott, *The Hidden World of WTO Governance*, *European Journal of International Law*, (2009), Vol. 20, pp. 575-614; J. Pauwelyn, *Conflict of Norms in Public International Law: How the WTO Law Relates to Other Rules of International Law*, (2003), Cambridge University Press; C. Haug & J. Gupta, *Global Forest Governance*, in J. Gupta, N. van der Grijp & O. Kuik, (eds), *Climate Change, Forests and REDD: Lessons for Institutional Design*, (2013), pp. 52-77, p. 57.

<sup>49</sup>The World Bank has since being established engaged directly in States forestry sectors, especially in developing countries. Most recently the World Bank launched the Forest Carbon Partnership Facility (FCPF) in Bali, Indonesia, in 2007 at the UNFCCC Conference of the Parties. At this Conference of the Parties REDD+ was incorporated into the Bali Action Plan. The FCPF was an initiative to incentivise the reduction of forest deforestation and degradation through forest carbon trading. The emphasis placed on a market-based forest carbon trading mechanism within FCPF project design received criticism from a number of actors for various reasons, especially non-governmental organisations and indigenous peoples organisations, including having had a determining impact on subsequent UNFCCC negotiations regarding the design of a REDD+ financial mechanisms should take.

D. Humphreys, *Logjam: Deforestation and the Crisis of Global Governance*, (2006), Earthscan, pp. 168-190; International Institute for Environment and Development, *Towards a Global Forest Partnership: Consultation, Assessment and Recommendations*, (2008), International Institute for Environment and Development, London, p. 4; UNFCCC Parties agreed to 'to explore a range of actions, identify options and undertake efforts, including demonstration activities, to address the drivers of deforestation relevant to their national circumstances, with a view to reducing emissions from deforestation and forest degradation and thus enhancing forest carbon stocks due to sustainable management of forests' - Decision2/CP.13 in the Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007 Addendum - Part Two: Action taken by the Conference of the Parties at its thirteenth session FCCC/CP/2007/6/Add.1(14 March) 2008 available <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf> [last accessed 20 November 2014]; In 1998-2005 the World Bank and WWF Alliance for Forest Conservation and Sustainable Use (which was extended later) to increase the amount of protected forest areas and increase the amount of FSC certified forest concessions and products - see D. Humphreys, *Logjam: Deforestation and the Crisis in Global Governance*, (2006), Earthscan, pp. 168-190.

<sup>50</sup>The initial group of international organisations implementing GEF projects were the United Nations Development Programme, the United Nations Environment Program, and the World

collaborations also often create specialized agencies or committees that develop standards, guidelines and codes of practice.

It is through such mechanisms that international principles and values are generated and/or incorporated resulting in ongoing evolution in interpretation. State membership of IOs provides them with resources, authority and legitimacy. This makes collaborating with IOs attractive to other non-state actors as pathways to advance values and objectives. For instance the WWF-World Bank Alliance, formed in 1998, sought to increase the global percentage of protected areas and Forest Stewardship Council (FSC) certified forests.<sup>51</sup> The international non-governmental organisation WWF founded the FSC and has directed it since 1996. It saw an alliance with the World Bank, the largest international funder of forestry in developing countries at the time, as a means to promote the new sustainable forest certification concept.<sup>52</sup> This is a clear example where an international principle, sustainable development, is being interpreted and advanced through mutual alliances amongst IOs and NSA to achieve sustainable forest management. De Sousa Santos's inter-legality approach, mentioned in section 3.1, invites legal scholars to focus more on the power relations between collaborators, to respond to questions about legitimacy, accountability and governance. I will return to this matter in section 3.6 below.

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Bank; on GEF institutional interlinkages see L. Boisson de Chazournes, *The Global Environment Facility Galaxy: On Linkages Among Institutions*, in J.A. Frowein & R. Wolfrum (eds.), (1999), Vol. 3, *Max Planck Yearbook of United Nations Law*, p. 243.

<sup>51</sup> In 1998-2005 the World Bank and WWF Alliance for Forest Conservation and Sustainable Use (which was extended later) to increase the amount of protected forest areas and increase the amount of FSC certified forest concessions and products – see D. Humphreys, *Logjam: Deforestation and the Crisis in Global Governance*, (2006), Earthscan, pp. 168-190.

<sup>52</sup> L. H. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forests and Fisheries*, (2010), Edward Elgar, p. 3.

### 3.4 Non-State Actors: Recognising Diversity and Identifying Strategies to Influence

Non-state actors (NSA) mirror the fragmentation found within international law in terms of issues that they engage in: economics, human and indigenous rights, science, and the environment. Consequently there is significant diversity amongst NSA. The catchall phrase often used in international legal scholarship is misleading and conflates a myriad of types as well as normative perspectives, values and strategies employed to advance these in practice.

Given the diverse range of NSA, and the variety amongst those working on similar issues, it is challenging to determine their influence on international law-making processes. There are important differences between NSA across the legal fields regarding norms and values; some more aligned to the dominant paradigm than others. The differences in access to resources, including those of decision-makers in government, technologies, knowledge and finances, contribute to the disparities between NSAs capacities to influence international law-making processes at all levels. Until relatively recently this was particularly stark between the global North and South. However, as with all NSA and IOs this is changing as the international geo-political and economic landscape shifts with emerging economies, China most notably become more prominent in processes.

This subsection offers a brief overview of different NSA categories including business, non-governmental organisations, indigenous peoples organisations and epistemic communities. It considers strategies adopted to influence the international forest law and policy-making processes. The following section will

discuss networks, especially transnational networks established by different actors before concluding by considering questions regarding legitimacy, accountability and governance as a whole.

#### 3.4.1 Business: Corporate Social Responsibility and Voluntarist Preferences

Increasingly states see business as a key player in resolving global collective environmental and human rights problems, by which they tend to mean transnational enterprises. The involvement of business in realising international environmental law objectives has been actively encouraged at international fora. In 2002 at the World Summit on Sustainable Development in Johannesburg public private partnerships were promoted as a mechanisms to entice investment by the private sector (as well as not for profit organisations) to participate in implementing environmental objectives.<sup>53</sup> Other multilateral environmental agreements incorporated market-based mechanisms to incentivise businesses to help realise treaty objectives. The UN Framework Convention on Climate Change for example has created the Clean Development Mechanism, under the Kyoto Protocol, and is working on a mechanism to reduce deforestation from deforestation and degradation, known as REDD+ as part of the 2015 Paris Agreement. The ongoing efforts to involve business actors as core partners in tackling environmental problems were further reinforced at the 2012 Rio+20 UN Conference on Sustainable Development where 'Green Economy' was one of the two key agenda items.<sup>54</sup> Subsequently the concept of

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<sup>53</sup> On the UN WSSD 2002 public-private partnerships and outcomes see P. Pattberg, F. Bierman, S. Chen & A. Mert (eds), *Public-Private Partnerships for Sustainable Development: Emergence, Influence and Legitimacy*, (2012), Edward Elgar Publishing.

<sup>54</sup> The Future We Want, Rio de Janeiro, Brazil, 22 June 2012 available <http://www.un.org/en/sustainablefuture/> [last accessed 28 October 2014].

'Green Economy' was employed at high-level multi-stakeholder forest meetings at which the business community was present.<sup>55</sup>

The forestry sector is globalised and complex due to the diversity of products that rely on forests for primary materials. The business sectors that are directly and indirectly involved in forests and forestry are therefore extensive. They range from extraction, production and processing to investment and conservation across a wide range of products and services.<sup>56</sup> Increased consolidation in production and processing of certain products, such as in the pulp and paper industry, has resulted in a growth of industrial scale complexes that require constant supplies of resources to meet economies of scale advantages.<sup>57</sup> Overall consumption of forest products has increased in both developed and developing countries and is set to continue to rise.<sup>58</sup> The scope of forest products on the market is also expanding due to technological advances and the development of new markets e.g. carbon sequestration services, bioenergy and ecotourism. Given this states have actively targeted the forest sector as having a key part to play in addressing forest related issues from trade and biodiversity to climate change.

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<sup>55</sup> See UN-REDD Forests Africa: Opportunities for a Green Economy - <http://www.un-redd.org/Home/tabid/565/Default.aspx> ; UNECE Green Economy: Forestry and Timber <http://www.unece.org/ro/forests/greeneconomy.html> [last accessed 24 October 2014].

<sup>56</sup> W. Hyde, *The Global Economics of Forestry*, (2012), Resources for the Future Press.

<sup>57</sup> S. Bernstein & B. Cashore, Examination of the Influences of Global Forest Governance Arrangements at the Domestic Level in J. Rayner, A. Buck & P. Katila, (eds), *Embracing Complexity: Meeting the Challenges of International Forest Governance*, (2012), IUFRO, pp. 111-137, p. 113.

<sup>58</sup> A. White et al, *China and the Global Market for Forest Products Transforming Trade to Benefit Forests and Livelihoods*, (2006), Forest Trends.

Transnational corporations often will locate operations in countries that offer incentives such as tax breaks, free trade zones, relaxed regulatory environments including on human rights.<sup>59</sup> Many forest product producer countries have a low rating on indicators on human rights, governance and environmental law. Corruption is frequently high with bribery between government officials and businesses common, with some businesses continuing in countries in the midst of civil war.<sup>60</sup> Given these challenges sustainable forest management is a pivotal normative principle for businesses dependent on forest resources to demonstrate they are supporting, particularly those vulnerable to consumer market boycotts.<sup>61</sup> There is though reluctance for mandatory regulation to achieve this amongst the business sector.

The transnational forestry business sector, like many others in the natural resources sector, has actively worked to promote self-regulation. Large-scale enterprises, often operating transnationally, dominate the interpretation of sustainable forest management in developing criteria.<sup>62</sup> Corporate social responsibility (CSR) policies developed by large-scale forest enterprises have incorporated sustainable development through sustainable forest management approaches a key principle. They have adopted voluntary standards, including certification, and codes of practice to achieve sustainable forest management

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<sup>59</sup> J. Dine, *Companies, International Trade and Human Rights*, (2005), Cambridge University Press, pp. 167-222.

<sup>60</sup> T. Boekhout van Solinge, *Eco-Crime: The Tropical Timber Trade*, in D. Siegel & H. Nelen (eds) *Organised Crime: Culture, Markets and Policies*, (2008), Springer, pp. 97-

<sup>61</sup> E. Morgera, *Corporate Accountability in International Environmental Law*, (2009), pp. 3-7; A. Clapham, *Human Rights Obligations of Non-State Actors*, (2006), Oxford University Press, pp. 195-266.

<sup>62</sup> N.G. Vidal & R. Kozak, *The Recent Evolution of Corporate Responsibility Practices in the Forestry Sector*, (2008), Vol. 10, Issue 1, *International Forestry Review*, pp. 1-13.

rather than work with the government to craft regulation that intervenes in the market. International financial investors also developed CSR to establish criteria for investment in natural resources, including certain forest-based businesses.<sup>63</sup>

Whether such an approach is beneficial for forest governance is open to debate. The effectiveness of CSR has been questioned on a number of counts: it's voluntary self-regulatory nature, the lack of accountability mechanisms<sup>64</sup>; negative impacts on small and medium scale enterprises who are priced out of premium markets due to the cost of getting certification accreditation<sup>65</sup>; changing geo-economic demographic of consumer power away from so-called 'mature markets' with a concern for CSR; and it's potential brake effect on developing alternative binding regulation.<sup>66</sup> By promoting voluntarism some argue that transnational business actors undermine any efforts to regulate in the domestic market. They argue for non-differential treatment in compliance with WTO norms in all countries.<sup>67</sup> This is in accordance with an overall trend to

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<sup>63</sup> The Equator Principles 'is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making' see <http://www.equator-principles.com/index.php/about-ep/about-ep> ; For a critical analysis see J. Conley & C. Williams, Global Banks as Global Sustainability Regulators? The Equator Principles, (2011), Vol. 33, Issue 4, *Law and Policy*, pp. 542-575.

<sup>64</sup> International efforts to agree on principles and guidelines on CSR have resulted in the 2011 revised OECD Guidelines for Multinational Enterprises and the UN Global Compact which has over 10,000 corporate participants and other stakeholders from over 130 countries – which makes it the largest voluntary corporate responsibility initiative in the world – information available <http://www.unglobalcompact.org/AboutTheGC/index.html> [last accessed 26 October 2014].

<sup>65</sup> F. Lesniewska & C. McDermott, FLEGT VPAs: Laying a Pathway to Sustainability via Legality Lessons from Ghana and Indonesia, (2014), *Forest Policy and Economics*, p.1-15.

<sup>66</sup> M. Monshipouri, C.E. Welsh, & E.T. Kennedy, Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities, (2003), Vol. 25, *Human Rights Quarterly*, pp. 965-989, p. 989; Dine. J, *supra* note 59 pp. 222-250.

<sup>67</sup> S. Bernstein & B. Cashore, Examination of the Influences of Global Forest Governance Arrangements at the Domestic Level in J. Rayner, A. Buck & P. Katila, (eds), *Embracing Complexity: Meeting the Challenges of International Forest Governance*, (2012), IUFRO, pp. 111-137, p. 113.

deregulate in the natural resources sector, particularly on environmental aspects.<sup>68</sup> The overall impact of this can be that forest governance is subsumed into a broader value set that prioritises free-trade and neo-liberalism as opposed to forest peoples rights. I pursue this argument further in chapter 4.

### 3.4.2 Non-Governmental Organisations

Non-governmental organisations (NGOs) operating in the international law and policy-making fields numbers have risen exponentially in recent decades.<sup>69</sup> As a result the question of the influence NGOs have on law-making processes has become a popular research theme. It is no surprise that NGOs, like other non-state actors, significance in the process of international law norm-making and interpretation is contested. Posner and others argue that NGOs are insignificant in the greater scheme of international process.<sup>70</sup> Whereas Institutionalists argue that NGOs ‘deserve credit for helping to humanize modern international law’ and that through transnational activities embed international norms in domestic settings.<sup>71</sup> This perspective interprets NGOs activities as ones of norm diffusers and not so much norm entrepreneurs strengthening the international global order. This is not the perspective held by legal pluralists and critical legal scholars. In their eyes NGOs are integral to the daily process of asserting competing interpretations of international rules and norms, thereby contributing

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<sup>68</sup> R. Eckersley, *Markets, the State and the Environment: An Overview*, in R. Eckersley (ed) *Markets, the State and the Environment: Towards Integration*, (1995). MacMillan Education Australia, pp. 8-9.

<sup>69</sup> Comparing data from 2001 and 2006: registered NGOs rose from 48,202 and 53,815, UN, Basic Information on United Nations System Organizations. Mission, Structure, Financing, and Governance available <http://imas2010.files.wordpress.com/2010/07/un-fact-sheets-6-oct-08.pdf> [last accessed 27 October 2014]. There remains however a significant inequity between both the quantitative and qualitative capacity of most NGOs in the global North to their counterparts in the South.

<sup>70</sup> R. Posner, *The Limits of International Law*, (2009), Chicago University Press, p. 27.

<sup>71</sup> S. Charnovitz, *Non-governmental Organisations and International Law*, (2006), Vol. 100, *American Journal of International Law*, p. 348; R. Higgins, *The Reformation in International Law*, in R. Rawlings, (ed) *Law, Society and Economy*, (1997), pp. 214-15.

to the on-going evolution of its normative landscape. It may however be more accurate to adopt a middle way that recognises NGOs, like other NSAs, as playing differing roles in the processes of international law-making.

Analysis of NGOs engagement in processes relating to norm formation and interpretation is problematised by the fact that there is no single definition of an NGO.<sup>72</sup> The lack of an NGO definition results in various organisations with different aims, types of activities and structures being labeled the same.<sup>73</sup> Alkoby proposes seeing NGO's as 'associations of individuals or groups of individuals with an organizational structure, who are engaged in legal, political, and/or social action to promote different goals and objectives.'<sup>74</sup> However, this definition results in the category of NGOs as being a wide-ranging catch all for a huge diversity of actor organisations including transnational business associations who may act on behalf of multinational enterprises e.g. the World Business Council for Sustainable Development.<sup>75</sup> Overcoming this problem requires qualifiers. Because of the difficulty in defining what constitutes an NGO, they are often defined by what they are 'not. They are, for example, 'not' governmental and 'not' profit making organizations.<sup>76</sup> These qualifiers still result

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<sup>72</sup> P. Spiro, Non-Governmental Organisations and Civil Society, in D. Bodansky, J. Bruneel & E. Hey, *The Oxford Handbook of International Environmental Law*, (2007), Oxford University Press, pp. 770-791, p. 774.

<sup>73</sup> A. Alkoby, Globalising a Green Civil Society in G. Winter (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law*, (2006), Cambridge University Press, pp. 106-147, p. 111.

<sup>74</sup> *Ibid* p. 110.

<sup>75</sup> The World Business Council for Sustainable Development was founded prior to the UN Conference on Environment and Development at Rio de Janeiro, Brazil in 1992. Its members include some of the world's largest corporations including those from the forestry sector for further details see <http://www.wbcsd.org/about.aspx> [last accessed 27 October 2014].

<sup>76</sup> P. Willetts, What is a Non-Governmental Organization?, (2002), *UNESCO Encyclopedia of Life Support Systems, Section 1: Institutional and Infrastructure Resource Issues*, Article 1.44.3.7, *Non-Governmental Organizations*.

in a very broad definition that does not distinguish between community-based organisations and international NGOs. As a result scholarship on international law and NGOs continues to be somewhat unsatisfactory as it lacks differentiation.

NGOs have actively engaged in the normative evolution of forest related laws across environment, human rights and development thematic fields. Over the past few decades NGOs have initiated and contributed to developments in law and policy on forest conservation issues, illegal timber trading, indigenous peoples community rights, and climate change. These have occurred at multiple levels from the international to the local. Their contributions fall into one, or several, of the five roles Gemmill and Bamidele-Izu identified for environmental NGOs more generally:

- (1) collecting, disseminating, and analysing information;
- (2) providing input to agenda-setting and policy development processes;
- (3) performing operational functions;
- (4) assessing environmental conditions and monitoring compliance with environmental agreements; and
- (5) advocating environmental justice including undertaking.<sup>77</sup>

NGOs are not homogenous and frequently differ in their advocacy and strategic approaches. There is a divide between NGOs who embrace financial market-based trading within their toolbox of initiatives to use in campaigns and project, for example WWF and large conservation organisations like Conservation International. Other NGOs support community based empowerment and self-

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<sup>77</sup> B. Gemmill & A. Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, in D. Esty & M. Ivanova, *Global Environmental Governance: Options and Opportunities*, (2002), Yale University Press, p. 87.

determination. This has clearly manifested in approaches taken by forest NGOs over REDD+.<sup>78</sup> Although Arts argues that ‘the current hegemonic discourses tend to exclude specific types of actors, such as those NGOs with more radical perspectives and political critiques. They are increasingly being replaced by (more) moderate NGOs, whose strategies better match the current discourses on sustainable development and global governance.’<sup>79</sup> Given this there are degrees of influence depending on access and resources with those who receive greater funding often, though not always, having greater roles in norms evolution and implementation.

As some NGOs, like other non-state actors and IOs, assume an increased role in the functions of international governance, such as setting standards<sup>80</sup> and acting as third party monitors to oversee compliance, more academics are asking questions about legitimacy, accountability and governance more generally.<sup>81</sup> Much of the international NGO and transnational activities undertaken, within tropical foreign countries particularly, is dominated by Northern organisations, often funded by developed country overseas development assistance budgets or

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<sup>78</sup> For examples of this difference see Global Witness, *Pandering to the Loggers*, (2011), which accused WWF’s Global Forest Trade Network for lacking in transparency and insufficient monitoring of members.

<sup>79</sup> B. Arts, Discourses, Actors and Instruments in International Forest Governance in Rayner, J., Buck, A & Katila, P (eds), *supra* note 67 pp. 57-75, p. 69.

<sup>80</sup> On forest certification and standard setting see S. Gueneau, Certification as a New Private Global Forest Governance System: The Regulatory Potential of the Forest Stewardship Council in A. Peters, L. Koechlin, T. Forster & G. Fenner Zinkernagel, (eds) *Non-State Actors as Standard Setters*, (2009), Cambridge University Press, pp. 379-409.

<sup>81</sup> M. Beisheim & K. Dingwerth, The Link between Standard Setting NGOs Legitimacy and Effectiveness: An Exploration of Social Mechanisms, in J. Steffek & K. Hahn, *Evaluating Transnational NGOs: Legitimacy, Accountability and Representation*, (2010), Palgrave MacMillan, pp. 74-100.

private foundations such as the Ford Foundation.<sup>82</sup> These donors, both government and private, often have pre-set values for the agency that they are supporting. Critical legal scholars note the dominance of well-funded Northern based NGOs working at times with selected allies or subsidiaries in developing countries arguing that NGOs in themselves are indicators of disparities of power in terms of being able to participate in processes.<sup>83</sup> A growing trend amongst authoritarian regimes appears to result from a similar sentiment that challenge Western democratic governance models, e.g. Russia.<sup>84</sup> Such conclusions are perhaps somewhat more politically motivated. Researchers continue to struggle to evaluate the actual impact of NGOs on actual law and policy-making processes. For researchers capturing the impact of NGO activities remains methodologically challenging, especially as much is undertaken informally.<sup>85</sup> Formal sources of NGOs inputs do exist, such as briefings, reports, press releases, funding reports, and statements to official forums such as working groups, subsidiary bodies, and plenaries under multilateral environmental agreements.<sup>86</sup> As Humphreys concluded though, when examining NGOs effectiveness in international forest negotiations, the direct impact of such inputs is difficult to determine.<sup>87</sup>

Some academics contend that concerns about inequities in access to knowledge,

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<sup>82</sup> On government donor influence see seminal article by M. Edwards & D. Hulme, Too Close for Comfort? The Impact of Official Aid on Nongovernmental Organisations, (1998) Vol.1 Issue 1, *Current Issues in Comparative Education*, pp. 1-21.

<sup>83</sup> Alkoby. A *supra* note 73, p. 107.

<sup>84</sup> BBC World News, Russia: Controversial NGO Bill becomes Law (21 July 2012) article available <http://www.bbc.co.uk/news/world-europe-18938165> [last accessed 19 July 2015].

<sup>85</sup> See E. Corell & M. Betsill, Analytical Framework: Assessing the Influence of NGO Diplomats in M. Betsill & E. Corell (eds), *NGO Diplomacy: The Influence of Non-Governmental Organizations in International Environmental Negotiations*, (2008), MIT Press, pp.19-43.

<sup>86</sup> D. Tarlock, The Role of Non-governmental Organisations in the Development of International Environmental Law, (1992), Vol. 68, *Chicago-Kent Law Review*, p. 63.

<sup>87</sup> D. Humphreys, Redefining the Issues: NGO Influence on International Forest Negotiations, (2004), Vol. 4, Issue 2, *Global Environmental Politics*, pp. 51-74.

resources and capacities etc. will be addressed in time while technology will level the playing field.<sup>88</sup> Although capacity building of developing country civil society, including NGOs and community based organisations, has caught the attention of some governments, IO's and private donors<sup>89</sup> socio-legal scholars are sceptical of the feasibility and/or the motives of programmes to address the problems effectively.<sup>90</sup>

### 3.4.3 Indigenous Peoples Organisations<sup>91</sup>

IPOs face distinct challenges in engaging within an international legal system founded upon a culture of Western jurisprudence.<sup>92</sup> IPOs represent indigenous peoples who did not participate in the development of international law.<sup>93</sup> As a consequence it is largely more reflective and constitutive of norms that were imposed upon them, especially state sovereignty over their customary territories.<sup>94</sup> Despite this representation of indigenous peoples within the UN international and other law and policy-making fora has grown gradually in

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<sup>88</sup> K. Conca, *Ecology in an Age of Empire: A Reply to (and extension of) Dalby's Imperial Thesis*, (2004), Vol. 4, Issue 2, *Global Environmental Politics*, pp. 12-19; J. Bach & D. Stark, *Link Search, Interact: The Co-Evolution of NGO's and Interactive Technology*, (2004), Issue 21, Issue 3, *Theory, Culture and Society*, pp. 101-117, p. 101.

<sup>89</sup> For example in 2012 the UN Food and Agriculture Organisation launched the ACP-FLEGT Support Programme (a Trust Fund of approximately 12,500,000 euros) to, amongst other things, increase capacity of civil society working on the forest sector for details see <http://www.fao.org/forestry/eu-flegt/78024/en/> [last accessed 27 October 2014].

<sup>90</sup> U. Mattei & L. Nader, *Plunder: When the Rule of Law is Illegal*, (2008), Blackwell; B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, (2003), Cambridge University Press, pp. 233-271.

<sup>91</sup> A distinction should be made between an indigenous peoples organisation (IPO) that is formed by indigenous peoples and one that advocates for the rights of indigenous peoples. Although both are working to advance indigenous peoples rights the former are seen by some as more legitimate because they emanate directly from indigenous peoples. This thesis will refer to the latter unless otherwise stated.

<sup>92</sup> J. Anaya, *Indigenous Peoples In International Law*, (2nd ed. 2004), Oxford University Press, pp. 56-57.

<sup>93</sup> L. Miranda, *Indigenous Peoples as International Lawmakers*, (2010), Vol. 32, Issue 1, *University of Pennsylvania International Law Journal*, pp. 203-250.

<sup>94</sup> J. Firestone et al, *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, (2005), Vol. 20, Issue 2, *American University International Law Review*, pp. 219-292, p. 240.

recent decades. IPOs increasingly pursue various pathways to influence law-making processes that impact their livelihoods and cultures.

At the international level two developments within the UN have specifically aided this increase in engagement. Firstly the establishment in 2000 by ECOSOC of the annual the UN Permanent Forum on Indigenous Issues provided a platform for IPOs to address a broad range of issues.<sup>95</sup> Although, despite the effort to have proportional representation on the panel, the Permanent Forum is dominated by IPOs from regions where IP rights are actively on the national agenda due to a strong political movement.<sup>96</sup> China for instance, as it does not legally recognise its ethnic minorities as indigenous peoples, and as such is largely absent from the proceedings.<sup>97</sup> Secondly the twenty-year process to negotiate the UN Declaration on Rights of Indigenous Peoples (UNDRIP) provided an important focus around which advocacy capacity could build and strengthen amongst indigenous peoples.<sup>98</sup>

Multilateral environmental agreements have also provided important leverage opportunities for IPOs on a range of issues, especially relating to forests. Under

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<sup>95</sup> See the UN Permanent Forum on Indigenous Issues – available [http://www.unutki.org/default.php?doc\\_id=57](http://www.unutki.org/default.php?doc_id=57) [last accessed 27 October 2014]

<sup>96</sup> The forum has a membership of sixteen, eight of which are indigenous peoples. The eight indigenous nominated members must be from the seven socio-cultural regions determined to give broad representation to the world's indigenous peoples. The regions are: Africa; Asia; Central and South America and the Caribbean; the Arctic; Eastern Europe, Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific. The 8th member is nominated from one of the three largest indigenous populated regions (Latin America, Asia and Africa). This member position is rotated every three years. Latin America had an extra member for the term (2011 – 2013) – see [http://www.un-ngls.org/spip.php?page=article\\_s&id\\_article=1815](http://www.un-ngls.org/spip.php?page=article_s&id_article=1815) [last accessed 27 October 2014]

<sup>97</sup> Based on personnel observations and discussions with IPOs during the UN Permanent Forum on Indigenous Issues, May 2009.

<sup>98</sup> A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, (2007), Cambridge University Press; C Charters, L Malezer & V Tauli-Corpuz (eds) *Indigenous Voices: The UN Declaration on the Rights of Indigenous Peoples*, (2011), Hart Oxford.

the multilateral environmental agreements, the UNFCCC and the CBD, IPOs have focused their inputs in recent years on thematic issues ranging from REDD+, conservation and genetic exploitation seeking to have their customary land tenure recognised, processes conducted using free prior informed consent, as well as benefit sharing and recognition of traditional knowledge. IPOs have worked systematically under the CBD to advance respect and protection for traditional knowledge in the Article 8(j) Working Group.<sup>99</sup>

Indigenous peoples organisations (IPOs) participation in international forest related law and policy-making processes are focused on advancing four normative objectives. These are indigenous peoples self-determination, recognition of their custodianship of their lands and resources<sup>100</sup>, effective participation in decision-making through free, prior informed consent and equitable benefit sharing.<sup>101</sup>

Other pathways of influence have opened up for IPOs internationally. The recognition of indigenous peoples as subject of international law, rather than objects, has provided increasing opportunities for IPOs to seek their rights through international organisations such as the UN agencies including a

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<sup>99</sup> Work has resulted in COP decisions on Elements of sui generis systems for the protection of traditional knowledge (Decision X/41) and the Tkarihwaíeri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities (Decision X/42). In 2010 The CBD Nagoya Protocol on *Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* which included provisions for communities to be directly involved in decisions on benefits sharing was adopted.

<sup>100</sup> M. Blaser, H. Feit & G. McRae, Indigenous People and Development Processes: New Terrains of Struggle in M. Blaser, H. Feit & G. McRae, *In the Way of Development: Indigenous Peoples, Life Projects and Globalisation*, (2004), Zed Books, pp. 1-26.

<sup>101</sup> B. Richardson, Indigenous Peoples International Law and Sustainability, (2001), Vol. 10, Issue 1, *Review of European Community and International Environmental Law*, pp1-10.

dedicated UN Special Rapporteur, the World Bank<sup>102</sup> and the WTO. With an increased recognition by some leading international organisations and donor agencies of the need to recognise the importance of ‘non-state’, ‘informal’ and ‘customary’ norms to achieve equity and sustainable development IPOs are being provided with greater opportunities to engage on issues directly relevant to them e.g. traditional knowledge, cultural heritage. Some perceive these as providing the source of norms for a future paradigm, centered on nature, or Earth Mother, rights, in all areas of law.<sup>103</sup> This is a departure from past approaches that focused on formal state institutions perpetuating state centric normative institutionalism.<sup>104</sup>

Reflecting on these developments it appears that the international legal system has provided the means to for IPOs to challenge discriminatory sovereign state laws and policies that are a barrier to indigenous peoples self-determination.<sup>105</sup> These advances in claiming and defending indigenous peoples rights have occurred under both international and regional law.<sup>106</sup> Despite successes,

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<sup>102</sup> T. Kim, ‘Unlikely Formation: Contesting and Advancing Asian/African “Indigeness” at the World Bank Inspection Panel’, (2008), *International Law and Politics*, Vol. 41, pp131-157, p131.

<sup>103</sup> P. Burdon, The Ecocentric Paradigm, in P. Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, (2011), Wakefield Press, pp. 1810-2080, [Kindle Edition].

<sup>104</sup> H. Kyed, Legal Pluralism and International Development Interventions, (2011), Vol. 63, *Journal of Legal Pluralism*, pp. 1-23.

<sup>105</sup> J. Anaya, *Indigenous Peoples In International Law*, (2nd ed. 2004), Oxford University Press, pp. 56-57.

<sup>106</sup> The 2007 UN Declaration on Rights of Indigenous Peoples has added to the embedding of self-determination, free prior informed consent and equitable benefit sharing with indigenous peoples as international legal norms. A number of important cases have set important precedents relating to indigenous peoples rights these include African Commission on Human and Peoples’ Rights, Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria. Cited as: Communication No. 155/96. (May 27, 2002); African Commission, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003; Inter-American Court of Human Rights, Sawhoyamaya Indigenous Community v. Paraguay (March 29, 2006); *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Judgment of November 28, 2007, Series C No. 172 – for a full list of case law relating to indigenous peoples see the database of the

however, the perceived threat by indigenous peoples to the sovereign state integrity, as well as the argument that they undermine efforts to achieve SFM, continue to give legitimacy to discriminatory law in many countries despite being signatories to the UNDRIP, including China. These compound the disparities in access due to the limited resources that IPOs have in arenas of influence, regardless of issues relating to trust of a system that up until recently explicitly sought to appropriate their cultures. Ultimately these opportunities to engage in norm-making remain discretionary as they are only available to IPOs from states that recognise indigenous peoples and accord them some rights or at least status as indigenous, and access to influencing international law norms.

#### 3.4.4 Epistemic Communities

In the 1990s Haas defined epistemic communities (ECs) as networks 'of professionals with recognised expertise and competence in a particular domain, and an authoritative claim to policy-relevant knowledge within that domain or issue-area.'<sup>107</sup> Stone notes that 'within these networks key knowledge institutions and actors can be development agencies, foundations, think-tanks, universities, consultancy firms as well as individual experts and academics.'<sup>108</sup> It is argued that these 'knowledge brokers' and 'entrepreneurs' can play a vital role in the interactions that result in the normative development of environmental

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International Network for Economic, Social and Cultural Rights - available at [http:// www.escr-net.org/caselaw](http://www.escr-net.org/caselaw) [last accessed 20 November 2014]

<sup>107</sup> P. Haas, Introduction: Epistemic Communities and International Policy Coordination, (1992), Vol. 46, *International Organisation*, p. 27.

<sup>108</sup> D. Stone, Global Knowledge Networks, (2002), Vol. 2, Issue 1, *Global Networks*, pp. 1-11.

law and policy specifically.<sup>109</sup> They also can actively frame the agenda of what is considered to be possible.<sup>110</sup>

The scientific community is perhaps the most important EC in relation to generating the necessary data for advocacy on forest related issues.<sup>111</sup> Although the relationship between science and other ECs knowledge brokers, such as think tanks and large-scale donor agencies, is being scrutinised by civil society the power of a well-funded scientific community remains dominant on such issues as sustainable forest management, climate change, biodiversity, ecosystem functions and genetic technologies.<sup>112</sup> Scientific experts, such as International Union of Forest Research Organisations, Intergovernmental Panel on Climate Change and the recently established Intergovernmental Platform on Biodiversity and Ecosystem Services play a central role in data collection and policy development in international environmental law through work for the UNFCCC and the CBD. These two Conventions have subsidiary bodies dedicated to scientific and technological matters that have both been the forum for developing materials to feed into negotiations on forest related matters.<sup>113</sup>

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<sup>109</sup> A. Antoniadou, Epistemic Communities, Epistemic and the Construction of (World) Politics, (2003), Vol. 17, Issues 1, *Global Society*, pp. 21-38; J. Brunnee & S. Toope, *Legitimacy and Legality in International Law: An Interactional Account*, (2010), Cambridge University Press, p. 841, (Kindle Edition).

<sup>110</sup> Chatham House has since 2003 hosted DFID funded twice yearly meetings on illegal logging bringing together different actor groups. They established a website and have produced a number of key briefing papers on policy options that have influenced the direction of action in Europe and other countries – see <http://www.illegal-logging.info> [last accessed 20 November 2014].

<sup>111</sup> It would be misleading to claim there is only one scientific community however here reference is made to the wider community and the dominant discourse that emerges from it into policy on environmental issues and forests.

<sup>112</sup> F. Berkhout. Reconstructing Boundaries and Reason in the Climate Debate, (2010), Volume 20, Issue 4, *Global Environmental Change*, pp. 565–569.

<sup>113</sup> The Subsidiary Body for Scientific and Technological Advice (SBSTA) is a permanent body established to provide timely information and advice on scientific and technological matters as they relate to the UNFCCC or its Kyoto Protocol. The Subsidiary Body on Scientific, Technical and

Specifically with respect to forests, scientists have advised on issues to assist in the development of REDD+ and the CDM flexibility mechanism, as well as contributing to technology systems for monitoring reporting and verifying forest carbon emissions.<sup>114</sup> For instance, scientific papers, particularly from the public/private funded US based Woods Hole Research Institute, on the capacity for successful carbon data mapping provided evidence for supporters of a REDD+ carbon trading based mechanism.<sup>115</sup>

The financial links between science and business often result in conflicts of interests.<sup>116</sup> As increasingly global environmental governance is sub-contracted out and networks are established between ECs and other actors, including the state, it is more challenging to identify conflicts of interest.<sup>117</sup> This formation of elites, who act as gate-keepers to 'expert knowledge', can determine the discourse that frames normative developments. The agenda setting process and the release of information is a contested question regarding a number of EC.<sup>118</sup> Use of scientific information can be selective. Giessen notes that 'existing information on such topics as the state of forests, their biodiversity and carbon stocks is highly diverse and political actors can select which of the competing

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Technological Advice (SBSTTA) to provide the Conference of the Parties (COP) and, as appropriate, its other subsidiary bodies, with timely advice relating to the implementation of the Convention.

<sup>114</sup> The relationship between science and economics will be examined further in Chapter 4.

<sup>115</sup> S. Goetz, *Mapping and Monitoring Carbon Stocks with Satellite Observations: An Update*, (2008), A Report for the United Nations Framework Convention on Climate Change Conference of the Parties Fourteenth Session, Poznan, Poland, (1-12 December 2008), Woods Hole Research Center, Falmouth, MA.

<sup>116</sup> L. Giessen, *supra* note 31 pp. 60-70

<sup>117</sup> See P. Levine, Collective Action, Civic Engagement and the Knowledge Commons in C. Hess & E. Ostrom. *Understanding Knowledge as a Commons: From Theory to Practice*, (2007), MIT Press, pp. 3025-3413, (Kindle Edition); M. Hulme, Problems with Making and Governing Global Kinds of Knowledge, (2010), Vol. 20, Issue 4, *Global Environmental Change*, pp. 558-564.

<sup>118</sup> D. Cogburn, Partners or Pawns? The Impact of Elite Decision Making and Epistemic Communities in Global Information Policy on Developing Countries and Transnational Civil Society, (2005), Vol.18, Issue 2, *Knowledge, Technology and Policy*, pp. 52-81.

sets of information and expertise they use, hence granting the information selected a central role in the politics surrounding fragmented global governance arrangements.<sup>119</sup> ECs, especially scientific and political ones, are criticised for their dominance in issue formation by the well-funded Northern ECs over the Southern counterparts. The international environmental agenda has for a long time been criticised for privileging Northern issues over and above those that concern developing countries.<sup>120</sup> In a conscious effort to take steps to redress this issue regarding forest research the Centre for International Forest Research was located in Indonesia, however the reality is that most staff are from developed countries, or university educated in Europe or America. This is not a static situation. ECs, especially from Brazil, China and India, are increasingly collaborating internationally and bi-laterally, including on forest related issues. As the geo-political and economic distribution of wealth shifts this is a situation that is more likely to occur.

Scholarship on the influence of NSAs on international law-making processes is distorted, with an over emphasis on NGOs and business. Problems exist in terms of definitions regarding all NSA. These problems result in research outcomes that fail to differentiate between large, small, developing country and developed country actors amongst other factors such as resource matters, and how they impact law-making processes. Institutional scholars continue to focus largely on the roles NSAs play within the international legal system whilst global legal

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<sup>119</sup> A. Perry-Kessaris, What Does it Mean to Take a Socio-legal Approach to International Economic Law? in A. Perry-Kessaris, (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext*, (2013), Routledge, pp. 3-19, p. 10.

<sup>120</sup> S. Karlsson, The North – South Knowledge Divide: Consequences for Global Environmental Governance, in D. Esty & M. Ivanova, *Global Environmental Governance: Options and Opportunities*, (2002), Yale University Press, p. 74.

pluralists turn their gaze elsewhere, away from international processes to activities in the regions and countries. Critical legal scholars, including De Sousa Santos, encourage an alternative approach to researching NSA that recognises multiple roles across multiple levels; research that enquires into the relationships and power dynamics amongst all actors in law-making processes. This applies more so perhaps with increasingly emerging networks between actors as discussed below.

### 3.5 Transnational Networks: Collective Approaches to Influence

Transnational advocacy networks are seen by some international relations theorists to play an important role in global law and public policy making. Keohane and Nye first drew attention to the contemporary significance of these cross-border transactions and networks in the early 1970s, which they defined as ‘...contacts, coalitions, and interactions across state boundaries that are not controlled by the central foreign policy organs of governments.’<sup>121</sup> Since the 1990s with the advent of globalisation however, there has been a renewed vigour in the study of transnational actors and networks. Ausberg et al interpret this increase in what are often referred to as transnational networks (TNN) as an indication that traditional institutions, particularly the state, are unable to meet the global challenges.<sup>122</sup>

Collaboration and cooperation between all actors engaged in law and policy-

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<sup>121</sup> R. Keohane & J. Nye, *Transnational Relations and World Politics*, (1973), Harvard University Press, p. 21.

<sup>122</sup> I. Ausberg, L. Viellechner & P. Zumbansen, *The Law of the Network Society. A Tribute to Karl-Heinz Ladeur*, (2009), Vol.10, Issue 4, *German Law Journal*, p. 305.

making processes from the international to the local occur in many different forms. New public, private, hybrid and networked forms of governance are emerging alongside and, frequently interwoven into existing multilateralism between States.<sup>123</sup> The reach of many of these networks is transnational, transcending the borders of the sovereign state, often working directly within local areas.

Networks are 'based on complex communication channels, and so are able, not only to communicate information but also, to generate new meaning and interpretations of the information transmitted.'<sup>124</sup> Networks will also ensure coordination as actors within the network seek to advocate positions for a mutually agreed platform. The broad range of activities undertaken by TNN including setting standards and developing voluntary codes, monitoring, reporting information gathering, dissemination, and issuing guidelines of best practice are expanding significantly. Coordination of activities now reaches beyond identifiable alliances, coalitions and networks working through international organisations. Given the range of activities, especially materials with normative content, there is an increasing interest amongst researchers on the influence TNNs are having upon law and policy-making at all levels.

Networks, coalitions, partnerships operate within the international forest law regime serving many different functions and pursuing a range of goals. They form for a variety of reasons. Some are established with the aim of coordinating

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<sup>123</sup> S. Bernstein, Power, Social Purposes, and Legitimacy in Global Governance in S. Bernstein & L. Pauly, *Global Liberalism and Political Order: Toward a New Grand Compromise*, (2007), State University of New York Press, pp. 3-23, p. 8.

<sup>124</sup> A. Slaughter & T. Hale, Trans-governmental Networks and Emerging Powers in A. Alexandroff & F. Cooper, *Rising States, Rising Institutions: Challenges for Global Governance* (Brookings Institution Press 2010), p. 714 [Kindle version]

information and strategies on specific or general forest law and policy issues such as such as the Collaborative Partnership on Forests.<sup>125</sup> Others networks are also formed to achieve particular objectives. These can be specific such as developing and implementing certification, e.g. FSC or promoting new ecosystem markets like the International Katoomba Group.<sup>126</sup> Yet others act as information sharing and advocacy platforms e.g. REDD Monitor, the Community Rights Network's Logging Off web-platform.<sup>127</sup> Each is interpreting and reinterpreting norms found in international law through these different mediums.

Institutionalists see TNNs as a positive contribution to achieving global objectives in a new world order. Slaughter and Hale argue that through networks a form of socialisation – the transfusion of norms, values, and identities among actors - occurs.<sup>128</sup> Streck believes that this phenomenon, similar to Koh's transnational legal pluralism concept, might help to close the current gap

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<sup>125</sup> The Collaborative Partnership on Forests was established in 2001 as an informal coordination mechanism between 14 international forest-related organisations. Its aim was to support the UNFF and enhance collaboration between member organisations. It has received recognition for its effectiveness; for further details see <http://www.cpfweb.org/en/> [last accessed 27 October 2014].

<sup>126</sup> The Katoomba Group was established in 2003 to address the challenge of building capacity for institutionalizing Payment for Ecosystem Services. It began working within China in 2008. For further details see <http://www.katoombagroup.org/about.php> [last accessed 27 October 2014]

<sup>127</sup> REDD-Monitor aims to facilitate discussion about the concept of reducing deforestation and forest degradation as a way of addressing climate change. It is supported by a coalition of NGOs - more information available <http://www.redd-monitor.org/about/> [last accessed 20 November 2014]; Logging Off is a website all those involved or interested in Forest Law Enforcement, Legality and Trade (FLEGT) negotiations. It has been set up to exchange clear, concise and up to date information, including joint North-South civil society position papers on the FLEGT (Forest Law Enforcement, Governance and Trade) Voluntary Partnership Agreement (VPA) negotiations; Chatham House and the UK Department for International Development support this civil society initiative.

<sup>128</sup> Slaughter, A. M. & Hale, T, *supra* note 124, p. 750 [Kindle version].

between needs and results in global environmental governance.<sup>129</sup> She claims that:

*'networks function autonomously; parallel to the traditional international institutions and that the networks distinguish themselves by offering participatory decision-making, innovative implementation mechanisms, transparency, efficiency, speed, and flexibility [and as such] international organisations acting as conveners, as fora for negotiations, and as leaders or network managers have a significant role in the development of a more extended, and effective multilevel environmental governance.'*<sup>130</sup>

Building on this Arts argues that TNNs, both public and private, are among the winners in current global forest policy, because they have attained discursive power and bring crucial resources, such as information, to the political process of norm setting at all levels from the international through into the local via pilot projects for example.<sup>131</sup> Bernstein however claims that the growth in TNNs is a situation that is more a consequence of an underlying ideological aim [neoliberalism] to deregulate and reduce the role of the state than a mere outcome of global environmental problems.<sup>132</sup> This is a perspective that is explored in more detail in chapter 4.

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<sup>129</sup> C. Streck, Global Public Policy Networks as Coalitions of Change, (2002), *Global Environmental Governance*, pp. 121-140.

<sup>130</sup> Ibid.

<sup>131</sup> B. Arts, Discourses, Actors and Instruments in International Forest Governance in J. Rayner, A. Buck & P. Katila (eds), *supra* note 67 pp. 57-75, p.71.

<sup>132</sup> S. Bernstein, Power, Social Purposes, and Legitimacy in Global Governance in S. Bernstein & L. Pauly, *Global Liberalism and Political Order: Toward a New Grand Compromise*, (2007), State University of New York Press, pp. 3-23, p. 8.

With greater deregulation and the assumption of increased roles by TNNs it is important to disclose the nature and effect of their activities on law and policy making processes. It is necessary to reveal the power dynamics that operate where TNNs become gatekeepers to law and policy-making processes, often aligning to the dominant normative agenda rather than those advanced by excluded actors.<sup>133</sup> Although some would suggest that through TNNs local knowledge can be 'translated' into a global normative discourse in reality more often local communities are disempowered and can only participate in law and policy-making processes with the assistance of experts and the approval of authorities, usually the government.<sup>134</sup>

Gauging the impacts of TNNs activities on law-making processes and norm interpretation is difficult, as with each category of actor when operating alone. In a world in which there is an increasing emergence of 'hybrid modes of governance across the state-market-community divisions; co-management, public-private partnerships and social-private partnerships' it is challenging for researchers to identify agency and causal effects.<sup>135</sup> There is increasing interest in systems theory approaches to law emphasising the evolution of the relationship between social systems in the wake of globalisation as a means to

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<sup>133</sup> S. Bernstein & B. Cashore, Can Non-State Global Governance be Legitimate? A Theoretical Framework, (2007), Vol. 1, Issue 4, *Regulation and Governance*, pp. 347-371.

<sup>134</sup> D. Dumoulin, *Local Knowledge in the Hands of Transnational NGOs Networks: a Mexican Viewpoint*, (2003), UNESCO; An example of this is considered regarding NGOs working with Indigenous Peoples in D. Desai, *A Qui L' Homme Sauvage? The Text, Context and Subtext of Agreements between Mining Corporations and Indigenous Communities*, in A. Perry-Kessaris, *Socio-Legal Approaches to International Economic Law: Text, Context and Subtext*, (2013), Routledge, pp. 153-167.

<sup>135</sup> M. C. Lemos & A. Agrawal, Environmental Governance, (2006), Vol. 31, *Annual Review of Environmental Resources*, pp. 297-325.

interpret TNNs.<sup>136</sup> However the interaction among the various institutions, state agencies, other actors, norms, ideas, values, policy choices, motivations, and influences on behavior, is not readily reducible to a simple system.<sup>137</sup> Herkenrath opposes notions of systems arguing that 'in the aggregate these interactions may seem earthshaking, they can also be dissected and mapped in a way that reveals great indeterminacy at most points of the process. There is nothing inevitable about this story: it is the composite of thousands of decisions that could have been decided otherwise.'<sup>138</sup> In other words, the (globalised) world involves too many actors to think of global social change as being somehow predictable. Yet Herkenrath's position offers little for those trying to gain an understanding of the impact of TNN's on law and policy making processes other than alluding to chance. It is necessary to reveal how the dice are loaded, who wins and who loses in the multiple games taking place across multiple fora, and if it results in injustice can it be changed. In relation to forests Giessen observes that a comprehensive evaluation of the reasons for, and the impact of, these TNN on law-making processes and implementation still needs to be researched.<sup>139</sup>

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<sup>136</sup> Graf-Peter Calliess & Moritz Renner, *From Soft Law to Hard Code: The Juridification of Global Governance*, available at: <http://ssrn.com/abstract=1030526> [last accessed 18 October 2014].

<sup>137</sup> B. Kingsbury & L. Casini, Global Administrative Law Dimensions of International Organizations Law, *International Law and Justice Working Papers* (2009/9), p. 14.

<sup>138</sup> M. Herkenrath et al, A Brief History of the Future of World Society, (2005), Vol. XI, Special Issue 2, *Journal of World Systems Research*, pp. 158-162.

<sup>139</sup> L. Giessen, *supra* note 31 pp. 60-70.

### 3.6 Legitimacy Matters

Regulations by private international standard-setting bodies and by hybrid public-private organizations that may include, variously, representatives of businesses, NGOs, national governments, and intergovernmental organizations have created an accountability deficit in the growing exercise of transnational regulatory power.<sup>140</sup> With the significant increases in NSA involvement in processes that feed into law-making internationally Bodansky predicted in 1999 that the question of legitimacy would ‘emerge from the shadows and become a central issue in environmental law’ has proven to be correct, and equally applicable to all other fields of international law.<sup>141</sup> A postmodern overlay on the modern territorial system of global governance has emerged. It is characterised by an extensive trans-nationalisation of issues, transactions flows, and actors that cuts across familiar boundaries between external and internal spaces, and intermingles the public, private and civil in novel ways.<sup>142</sup> However what constitutes legitimacy and how it is constructed can result in disenfranchisement of the most vulnerable.

When the issue of power and resources is considered in relation to such ‘postmodern and non-territorial’ dimensions of all levels of governance today it is vital to ask the question about legitimacy. Legitimacy and governance are intimately connected to

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<sup>140</sup> B. Kingsbury, Benedict, N. Krisch, & R. B. Stewart. The Emergence of Global Administrative Law, (2005), Vol. 14, Issue 3, *Law and Contemporary Problems*, pp. 15-61.

<sup>141</sup> D. Bodansky, (1999) Vol. 93, Issue 3, The Legitimacy of International Governance: A Coming Challenge for International Environment Law? *American Journal of International Law*, pp. 596-624.

<sup>142</sup> T. Weiss, R. Thakur & J. Ruggie, *Global Governance and the UN: An Unfinished Journey*, (2010), Indiana University Press, p.135. [Kindle version]

power and the wider political community within which it is exercised. As Brunnee and Toope observe cooperation and interaction between actors within the context of norms and institutions they have created, makes rules understandable, creates expectations and ‘thick’ acceptance of norms. This approach redefines legitimacy as ‘the stronger the adherence to the criteria, the more legitimate and this, the more persuasive and influential – the more legal – are rules likely to be.’<sup>143</sup> When criteria become embedded they garner greater legitimacy regardless of whether they actually are the best rules, standards or guidelines in a given context. The effort to develop new natural capital markets to trade forest carbon internationally as financial commodity units has only gained legitimacy due to the persuasive and influential nature of those involved in developing them: large scale emitters, authoritarian tropical forest countries, investment banks, new climate change technical consultants and conservation organisations.

Legitimacy ideally requires that decisions rest on ‘good arguments’ made under conditions in which free and equal autonomous actors can challenge validity claims, seek a reasoned consensus and justification for norms, and are open to being persuaded.<sup>144</sup> To further improve “democratic” decision-making in global governance, complementary sources of process-based legitimacy have been explored including participation of non-participation of state actors requires transparency in international decision-making processes, as these actors need access to information to effectively engage in decision-making. Backstrand

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<sup>143</sup> J. Brunnée & S. J. Toope. *Legitimacy and Legality in International Law: An Interactional Account*, (2010), Cambridge University Press, p. 67.

<sup>144</sup> J. Dryzek, Legitimacy and Economy in Deliberative Democracy, (2001), *Political Theory*, pp. 651-669.

argues that in the absence of electoral and representative legislative processes, processes that systematically involve stakeholders' range of voices and perspectives create ownership of outcomes and can draw upon principles protecting the vulnerable.<sup>145</sup> Whereas other forms of standard setting tend to favor expert-driven decision-making as a source of legitimacy (a move towards international administrative law). Due to this situation there needs to be transparency and accountability to avoid risks of legitimacy problems.<sup>146</sup>

To achieve this procedural rights campaigners have pushed for deliberative and democratic mechanisms – transparency, accessibility, participation, deliberation and fairness to be included in norm making processes, both within the public and private sector. One initiative where efforts were made to be inclusive were the procedures for negotiating Voluntary Partnership Agreements under the EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan which sought to foster an approach where all stakeholders on forest issues were included in the process. The outcome has met with measured acclaim from campaigners<sup>147</sup>

Many are optimistic about dynamic governance where opportunities to engage in processes, and create norm-setting ones, occur at multiple levels. It is

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<sup>145</sup> K. Bäckstrand, *Democratizing Global Environmental Governance? Stakeholder Democracy After the World Summit on Sustainable Development*, (2006), Vol. 12 Issue 4, *European Journal of International Relations*, pp. 467-498.

<sup>146</sup> S. Bernstein & B. Cashore, *Can Non-state Global Governance be Legitimate? An Analytical Framework*, (2007), Vol. 1, Issue. 4, *Regulation & Governance*, pp. 347-371.

<sup>147</sup> Claudine Léger, *Community Representation and Participation in the VPA Process: How Communities from Nine VPA Countries are Represented in the FLEGT VPA Process*, (2014), FERN, Brussels available online at [http://www.fern.org/sites/fern.org/files/participationENG\\_internet.pdf](http://www.fern.org/sites/fern.org/files/participationENG_internet.pdf) [last accessed 28 June 2015]

important though to emphasise just how differentiated the nature of the system is in actuality in the field, where certain actors have very little engagement if any with any of the processes and discourse with which is taking place. This process of cosmopolitanisation of global legal norm formation through participation is for many a long way off, especially the poorest in the developed and developing countries.

### 3.7 Conclusion

Viewing international law-making processes as solely state based enterprises can no longer be justified. Recognition that IOs and NSAs, including TNNs, are involved is today universally acknowledged. Disagreement though exists over the scope and significance of their roles in processes that contribute to evolving international law. Traditional institutionalists assign a perfunctory functional role to NSAs as they serve to transmit principles and norms within international law. Koh takes this further by lengthening the reach of their activities beyond borders, contributing to the internalisation of norms down to the local level. Socio-legal scholars are more prone to view IOs and NSAs as norm entrepreneurs. Recognition of this dynamic is tempered though by scholars like de Sousa Santos. He advises that researchers should be astute and delve into the relations amongst states, IOs and NSAs to understand the power dynamics of why certain actors are norm entrepreneurs and others are not. His concept of 'inter-legality' is one that encourages a researcher to focus on the dynamics of a law-making process as actors follow particular pathways of influence.

All actors, state, IOs and NSA, are involved in an on-going process that is feeding into international forest law and policy development. This chapter has outlined each group and highlighted the different pathways adopted. It has emphasised the problems in academic literature that often categorises one set of actors as uniform, e.g. NGOs. There are often significant and fundamental differences that increase or decrease the opportunities for an actor to set and advance a normative agenda that is incorporated into the broader international forest law-making processes. Certain actors are effectively gatekeepers due to resources including finances, knowledge and networks. This affects all actors including states; many least developed countries are under resourced and unable to effectively be involved in international forest law-making negotiations within the UN. Often in least developed tropical forest countries IOs and NSAs, including MNEs, have more input into the interpretation of international forest related law than the Ministry of Forests, or equivalent. This is even more the case with the increased disaggregation of state powers through decentralisation in forest management.

Friction over the influence of IOs and NSAs exists amongst all actors. This can range from attributing the displacement, physically and economically, of indigenous peoples by conservation NGOs to sovereign states perceiving NGOs foreign agents introducing Western ideologies such as transparency and accountability to overcome illegal timber trading. The mere fact that such friction exists is indicative that IOs and NSAs are perceived at the very least to influence the way in which forest related law and policy is interpreted, enforced

and further developed. It is because of this perception that matters of legitimacy, are important in regards to actors. Ultimately how these issues are addressed depends on the values actors hold and operate under in any given context.

The next chapter considers why certain actors draw on certain values and regulations to influence forest related law and policy at all levels, and what the implications of these may be for other actors and forests.

## C4 Differing Value Concepts in International Law: Finding Equilibrium on Forests

Values can be defined as abstractions of what humans consider to be important and right. They are though broader than simply responses to specific problems or situations. They inform the development of law as a whole having a 'determining power on law as a conceptual scheme that controls our perception'.<sup>1</sup> Values inform our views of the world. All actors work using certain values that shape their particular world view. This makes values central to developing any solution orientated law and policy. Ultimately this is an iterative process linking values to law and law to values.

Today a diverse range of value concepts co-exist within a fluid dynamic world. Their interactions, synergies and conflicts ultimately determine what constitutes 'right' and 'important' in law.<sup>2</sup> Today we find ourselves at a junction in human history when the search for a set of values at 'a durable scale' is once again on.<sup>3</sup> Values and how they influence laws' development will be critical in the 21<sup>st</sup> century to how humanity addresses transboundary, international, regional, national and local environmental, economic and social problems.

This chapter begins by considering the need for a change in the foundational

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<sup>1</sup> M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, (2001), Oxford University Press, p. 10.

<sup>2</sup> R. Benakar & M. Travers, Systems Theory in R. Benakar & M. Travers (eds), *Law and Social Theory*, (2013), Hart Publishing, pp. 52-70, p. 57.

<sup>3</sup> 'The shallow minded modern who has lost his rootage in the land assumes that he has already discovered what is important ... all history consists of successive excursions from a single starting point to which man returns again and again to organize yet another search for a durable scale of values.' - A. Leopold, *A Sand County Almanac*, (1919), Oxford University Press, p. 200.

values in international law to address transboundary environmental problems. It considers how newly emerging ontologies are challenging and forcing a reappraisal of existing values. I then provide an introduction to values adopted within international law and examine how these are applied to forests. A critical examination follows of how regulatory mechanisms and how their use can advance or restrict certain values and principles. The chapter concludes by questioning the use of safeguards to avoid perverse outcomes. It considers whether safeguards are an effective means through which to achieve equilibrium between competing ontologies that can address the challenges to forests in the 21<sup>st</sup> century.

#### 4.1 Values in International Law: New Challenges

Values that inform international law-making need to be fit for purpose in order to meet the global challenges of the 21<sup>st</sup> century. Since the 1970s, neo-Malthusian environmentalists have warned about planetary limits and natural resource scarcity.<sup>4</sup> Discourse on global deforestation is frequently communicated using this perspective. Numerous international scientific reports document that humans as a species are having an increasingly significant effect on the environment at a global scale.<sup>5</sup> Some scientists go so far as to posit that the Earth has entered a new geological epoch, termed the 'Anthropocene.'<sup>6</sup> This is a time in which anthropogenic activities are having impacts, usually negative,

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<sup>4</sup> See P. Ehrlich, *The Population Bomb*, (1971), MacMillan; D. Meadows, *Limits to Growth*, (1972), Signet Publishers.

<sup>5</sup> Key international reports illustrating this include *The UN Millennium Ecosystem Assessment*, (2005); The Intergovernmental Panel on Climate Change reports and UNEPs Global Environment Outlook reports published since 1997 with the latest GEO-5 released in 2012.

<sup>6</sup> The term 'Anthropocene' was first used by Eugene Stoermer, and subsequently popularized by the atmospheric chemist and Nobel Prize laureate Paul Crutzen.

on the planetary ecosystem.<sup>7</sup> According to numerous scientific reports climatic nor biogeochemical stability is likely to continue in the Anthropocene, and the Earth systems we rely on to provide a livable environment for human society are likely to become much less predictable.<sup>8</sup> Continued, unlimited exploitation of natural resources like forests could lead to tipping points as we surpass 'planetary boundaries'.

The more extreme predictions put forward about 'planetary boundaries' for a range of reasons including technical, political and moral are questioned.<sup>9</sup> Despite this there is growing interest in ecological law, amongst academics and policy-makers alike, focused on the concept of 'planetary boundaries'.<sup>10</sup> Some see it as opening up a new phase in environment related law, one in which law and policy-making needs to address unpredictability, uncertainty and incalculable outcomes across time and space.<sup>11</sup> Given that the concept of 'planetary boundaries' crosses environmental, social and economic systems it is

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<sup>7</sup> N. Robinson, *Beyond Sustainability: Environmental Management for the Anthropocene Epoch*, (2012), Vol. 12, Issue 03, *Journal of Public Affairs*, pp. 181-194, p. 182.

<sup>8</sup> M. Gillings & E. Hagan-Lawson, *The Cost of Living in the Anthropocene*, (2014), Vol. 1, Issue 2, *Earth Perspectives*, pp. 2-11.

<sup>9</sup> See B. Lomborg (ed) *How Much Have Global Problems Cost the World?*, (2013), Cambridge University Press; L. Mehta, *The Scare, Naturalization and Politicization of Scarcity* in L. Mehta (ed), *The Limits to Scarcity: Contesting the Politics of Allocation*, (2010), Cheltenham: Edward Elgar, pp. 13-31; E. Boserup, *Population and Technological Change: A Study of Long-Term Trends*, (1983), University of Chicago Press.

<sup>10</sup> see G. Garver, *The Rule of Ecological Law: The Legal Complement to De-growth Economics*, (2013), Vol. 5, *Sustainability*, pp. 316-337; K. Ott, *A Modest Proposal About How to Proceed in Order to Solve the Problem of Inherent Moral Value* in L. Westra, K. Bosselmann & R. Westra, *Reconciling Human Existence with Ecological Integrity*, (2008), Edward Elgar, pp. 39-61; I. Lowe, *Environmental Values in a Globalising World: Grounds for Cautious Optimism*, in J. Paavola & I. Lowe, *Environmental Values in a Globalising World: Nature, Justice and Governance*, (2005), Routledge, pp. 236-246; R. Brooks; et al, *Law and Ecology: The Rise of the Ecosystem Regime*, (2002), Ashgate, pp. 325-365.

<sup>11</sup> U. Beck, *Incalculable Futures: World Risk Society and its Social and Political Implications*, in U. Beck, *Pioneer in Cosmopolitan Sociology and Risk Society*, (2014), Springer, pp. 78-89; B. Weston & D. Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, (2013), Cambridge University Press, pp. 179-204, A. Philippopoulos-Mihaloupoulos, *Looking for the Space between Law and Ecology* in A. Philippopoulos-Mihaloupoulos (ed), *Law and Ecology: New Environmental Foundations*, (2011), Routledge, pp. 1-18.

diffusing into a range of policy arenas.<sup>12</sup> The foundational contention is that business as usual, including development pathways, is no longer feasible and that values involving nature and ecology need to be radically reconfigured by humanity as a whole in order to address these global threats.<sup>13</sup>

Faced with these challenges international law seeks both to maintain an institutional state-based system and to enable diverse values to co-exist and interact throughout it. It is largely recognised that international laws' fundamental values lie in the roots of Western philosophical traditions: sovereignty of the state, free trade and democracy.<sup>14</sup> Other values are grafted on these roots. This can result in forms of value hybridisation, such as the morphing of indigenous peoples' collective rights to accommodate the expectations of international law. This is not a one-way street; as I will show, the foundations of international law are themselves constantly challenged and/or re-interpreted by other value concepts.

Before I discuss the differing values that are currently evident in international law, including those newly emerging ones, it is necessary to set out the primary values, anthropocentric and intrinsic, as these two values provide the background to all other values.

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<sup>12</sup> See F. Biermann, Planetary Boundaries and Earth System Governance: Exploring the Links, (2012), Vol. 81, *Ecological Economics*, pp. 4–11; V. Galaz, Global Environmental Governance and Planetary Boundaries: An Introduction, (2012), Vol. 81, *Ecological Economics*, pp. 1-3.

<sup>13</sup> J. Fairhead, M. Leach & I. Scoones, Green Grabbing: A New Appropriation of Nature?, (2012), Vol. 39 Issue 2, *The Journal of Peasant Studies*, pp. 237-261, p. 245.

<sup>14</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, (2004), Cambridge University Press, pp. 17-23.

## 4.2 A Primary Values Spectrum between Intrinsic and Anthropocentric

Intrinsic values recognise that a thing is worth having for itself, rather than as a means to something else. The philosopher Aldo Leopold stated the importance of intrinsic values when he claimed that 'something is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.'<sup>15</sup> According to this argument intrinsic values are crucial to nature and humanity's relationship to it. For example, a forest has intrinsic value not because of timber values or its carbon sequestration capacity but simply because it exists. In other words all actions, including law-making, should maintain the intrinsic value of the Earth, the biotic community.

Some philosophers though deny that intrinsic values can even exist. Dewey argues that any intrinsic value is 'nothing more than an illusory product of our continuous evaluative activity as purposive beings'.<sup>16</sup> Essentially, humans always reconfigure the world according to their own needs and preferences. Ultimately humans are always, and can only be, anthropocentric. This may well be true but adopting a concept that deliberately prioritises the biotic community's value above, or equal to, all else would, however much a human construct, require lawyers to design law differently to how it is largely undertaken today by sovereign states.

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<sup>15</sup> Cited in R. Knight & S. Riedel, *Aldo Leopold and the Ecological Conscience*, (2002), Oxford University Press, p. 21.

<sup>16</sup> J. Dewey, Theory of Valuation cited in J. S Dryzek, *Foundations and Frontiers of Deliberative Governance*, (2010), Oxford University Press, p. 28.

Anthropocentric values, the opposite of intrinsic values, include: self-interest, economics, religion, aesthetics, culture, and preserving the environment for future generations. Despite the range of argumentation possible for anthropocentric values it is the instrumental form that has been the basis for Western law since the late eighteenth century.<sup>17</sup> An instrumental value is worth having as a means towards getting something else and reflects the difference that something makes to the satisfaction of human preferences.

Anthropocentric and intrinsic value concepts inform all areas of law from the international to the local level, including traditional customary law. They are not necessarily mutually exclusive, however it is the degree to which one dominates the other that matters for legal development. Arguably there is an inherent imbalance in values toward almost an unfettered anthropocentrism within dominant legal systems globally. As a result, given international environmental law's close affiliation with Enlightenment Western philosophies on law, science and economics is, according to Berry, fundamentally flawed and therefore not fit for the purpose of addressing global challenges.<sup>18</sup>

Instrumentalism was formative to the crafting of early national environmental law in a number of European countries.<sup>19</sup> It subsequently provided the conceptual frame for international environmental law.<sup>20</sup> The 1972 Declaration of the United Nations Conference on the Human Environment reflected this

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<sup>17</sup> A. Gillespie, *International Environmental Law Policy and Ethics*, (1997), Oxford University Press, p. 18.

<sup>18</sup> T. Berry, *The Great Work: Our Way into The Future*, (1999), Bell Tower, p. 48.

<sup>19</sup> S. Coyle & K. Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature*, (2004), Hart Publishing.

<sup>20</sup> Gillespie, A, *supra* note 17, pp. 13-18.

anthropocentric approach when it concluded that that of 'all things in the world, people are the most precious'.<sup>21</sup> The subsequent 1992 Rio Declaration on Environment and Development reaffirmed this purely anthropocentric approach in stating that: 'Human beings are at the centre of concerns for sustainable development'.<sup>22</sup> The logic being that humanity will only conserve Nature within the anthropocentric paradigm on account of its instrumental value rather than because of its own intrinsic value.

Berry argues that the legal establishment and structures in all nation states are now so closely aligned with natural resource extraction that they cannot protect the natural world but rather legitimise its destruction.<sup>23</sup> Bernstein echoes this analysis in his observations of the development of international law in recent decades. After the Johannesburg World Summit on Sustainable Development Bernstein spoke of the 'compromise of liberal environmentalism' claiming that neo-liberalism was largely determining international legal and policy responses to environmental issues, and consequently domestic too.<sup>24</sup> He noted that the values that underpin international environmentalism predicate the 'promotion and maintenance of a liberal economic order'.<sup>25</sup> Consequently by adopting these values, especially regarding free trade, responses to 'global environmental

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<sup>21</sup> Para. 7, Chapter 1, Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF 48/14. 1972.

<sup>22</sup> Principle 1, Rio Declaration on Environment and Development, 14 June 1992.

<sup>23</sup> *Ibid.*

<sup>24</sup> S. Bernstein, *Liberal Environmentalism and Global Environmental Governance*, (2002), Vol. 2, Issue 3, *Global Environmental Politics*, pp. 464-512.

<sup>25</sup> *Ibid.*

problems support particular kinds of values and goals' that arguably are implicit in the causes of environmental destruction.<sup>26</sup>

It can be argued that intrinsic values are increasingly informing anthropocentric instrumentalism.[see section 4.3.4] Although the priorities remain meeting humanity's needs the approaches to doing so are increasingly met by developing a new 'green' rather than the old industrial 'brown' economic opportunities. The international policy community does appear to be shifting its primary values away from purely anthropocentric towards one more informed by intrinsic values. The UN Convention on Biological Diversity adopted an ecosystem approach that recognised 'humans, with their cultural diversity, [as] an integral component of many ecosystems' rather than separate and superior to them.<sup>27</sup> [see section 2.2.1] The ecosystem approach has informed developments in management and within other parts of the international forest regime, such as REDD+ under the UN Framework Convention on Climate Change (UNFCCC). Although the principles guiding the approach's implementation are fundamentally anthropogenic, this shift in emphasis towards integration is important as it opens up new scope for interpretation of existing economic and rights-based values [see sections 4.3 and 4.4].<sup>28</sup> It is clear that the international community has not adopted the intrinsic values of deep ecologists such as Arne Naess, nevertheless they could be seen to be showing a nuanced shift in the values being championed in order to adapt to new challenges.<sup>29</sup>

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<sup>26</sup> Ibid.

<sup>27</sup> CBD, Ecosystem Approach COP 5 Decision V/6, 2002.

<sup>28</sup> CBD/UNEP, The Ecosystem Approach: Guidelines, (2004) CBD/UNEP available <https://www.cbd.int/doc/publications/ea-text-en.pdf> [last accessed 20 November 2014].

<sup>29</sup> A. Naess, *Ecology, Community and Lifestyle*, (1989), Cambridge University Press.

For many though fundamental values underpinning multilateral environmental law, including those relating to forests, remain primarily infused by dominant instrumentalist anthropocentric values, largely expressed through neo-liberal economic systems [see section 4.4].<sup>30</sup> Perry-Kessaris argues that today continuing to focus on the dichotomy between intrinsic and anthropocentric is an unnecessary distraction for those working on law and the environment.<sup>31</sup> Inspired by Luhman's theory of autopoietic<sup>32</sup> systems she advocates for differing values to develop the necessary tools and mechanisms to achieve solutions that work within the Anthropocene.<sup>33</sup> Exactly what these should be though remains unanswered.

The next two sections introduce both rights based and economic based values. It discusses how these are constructed and explores how they are employed in relation to international forest related law. This is followed by an evaluation of new reflexive regulatory approaches and mechanisms adopted to achieve a balance between values.

### 4.3 Rights Based Values

One way to recognise value is to award rights to objects and/or subjects.

Different values underpin the rights held by these different entities. Within

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<sup>30</sup> For an excellent perspective on this approach see D. Esty & A. Winston, *Green to Gold: How Smart Companies Use Environmental Strategy to Innovate, Create Value, and Build Competitive Advantage*, (2009), Yale University Press.

<sup>31</sup> A. Perry-Kessaris, Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development, (2011), Vol. 7 Issue 4, *International Journal of Law in Context*, pp. 401-421, p. 407.

<sup>32</sup> "Autopoiesis" (from Greek *αὐτο-* (*auto-*), meaning "self", and *ποίησις* (*poiesis*), meaning "creation, production") refers to a system capable of reproducing and maintaining itself.

<sup>33</sup> Perry-Kessaris, A, *supra* note 31, pp. 401-421, p. 407.

international law rights are held by different legal entities. This section examines the values that lie behind the rights of states, individual humans, collectives, in this instance indigenous peoples, and nature.

#### 4.3.1 State

International law's central value is a sovereign state's right to rule a recognised jurisdictional territory without interference from other states [see section 2.3.1].<sup>34</sup> One implication of this is permanent sovereignty over natural resources (PSNR). This principle informs all international forest related law and policy. Although, as outlined in section 2.3.1, PSNR is increasingly qualified by transboundary state responsibilities such as no harm, human and collective rights, as well as many aspects of private international law, territorial sovereignty nevertheless remains a fundamental value for how states exercise governance over wealth and citizens.<sup>35</sup>

Yet the reality, especially for many tropical forest developing countries, is that governments sell citizens' user rights to business, frequently multinational enterprises, ostensibly to raise development revenue.<sup>36</sup> Increasingly these rights are being sold to governments and companies from emerging economies such as China and Brazil, rather than solely those from the global North. This has often occurred to the detriment of forest communities in developing countries who do

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<sup>34</sup> J. Klabbers, *International Law*, (2011), Cambridge University Press, p. 12.

<sup>35</sup> P. Piirmae, The Westphalian Myth and the Idea of External Sovereignty in H. Kalmo & Q. Skinner, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, (2010), Cambridge University Press, pp. 64-81; I. Ward, The End of Sovereignty and the New Humanism, (2003), Vol. 55, No.5, *Stanford Law Review*, pp. 2091-2112.

<sup>36</sup> D. Humphreys, *Public Goods, Neoliberalism and the Crisis of Deforestation*, (2006), Paper presented at the Annual Conference of the British International Studies Association, 18-20 December 2006, University of Cork available <http://www.ibcperu.org/doc/isis/7575.pdf> [last accessed 20 November 2014].

not have secured access or user rights under statutory law.<sup>37</sup> This outsources forest management beyond the state, providing potential opportunities for international non-state actors to influence law and policy development. So although state sovereignty is a core value in international law in reality the management of forest natural resources in an inequitable globalised world results in many countries needing to work with external international organisations and non-state actors in ways that influence domestic laws development.

#### 4.3.2 Individual

The concept of situating individual human values within a rights-based framework comes from seventeenth and eighteenth century Western philosophy, particularly Thomas Paine.<sup>38</sup> It was introduced into international law after the Second World War through the Universal Declaration of Human Rights in 1948.<sup>39</sup> Numerous covenants, treaties and declarations have followed that have advanced rights for individuals across a range of issues from political, economic and cultural rights, including to children and women, and countering discrimination.<sup>40</sup>

Human rights have consequently become an important tool for forest peoples to advance their grievances using international law. They have provided

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<sup>37</sup> J. Pritchard, F. Lesniewska & T. Lomax, *Securing Community Land and Resource Rights in Africa*, (2013), ClientEarth, FERN, Forest Peoples Programme.

<sup>38</sup> J. Griffin, Human Rights and the Autonomy of International Law in S. Besson & J. Tasioulas (eds) *The Philosophy of International Law*, (2010), Oxford University Press, pp. 339-357, p. 342; N. Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, (2012), Haymarket Books, Chicago, pp. 19-63.

<sup>39</sup> The Universal Declaration of Human Rights, 1948 available <http://www.un.org/en/documents/udhr> [last accessed 9 November 2014].

<sup>40</sup> Key documents are the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966).

recognition of important political, social, cultural and economic rights upon which forest dependent peoples have been able to advocate as well as to challenge the activities of states and transnational corporations in courts.<sup>41</sup> Forest peoples have drawn on rights against discrimination, participatory rights, and cultural rights to protect their livelihoods. However, in many tropical forest countries forest peoples' rights have not been fully recognised in law, or are poorly enforced making it more challenging to benefit from their existence.<sup>42</sup>

It should be noted though that neither forest peoples nor states have always welcomed or adopted individual rights as a value framework, some seeing it as a form of cultural imperialism.<sup>43</sup> This is particularly the case with matters that continue to be fought over such as ethnicity, gender, religion and sexuality.<sup>44</sup> The International Council for Human Rights Policy emphasised in 2009 that there is 'no single paradigm of law that is applicable to the regulation of human rights, [just] as there are no straightforward prescriptions that can be applied on a universal basis'.<sup>45</sup> Despite such assurances a range of academics and actors continue to claim that individual rights remain fundamentally embedded within their historical, philosophical colonial origins and therefore advance Universalist

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<sup>41</sup> For example *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Case no. 11.555P, (31 August 2001); *Inter-American Court of Human Rights, Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*, (June 27, 2012); *Saramaka People v. Suriname*, *Inter-American Court of Human Rights, Judgment of November 28, 2007, Series C No. 172*; *Inter-American Court of Human Rights, Sawhoyamaxa Indigenous Community v. Paraguay*, (March 29, 2006).

<sup>42</sup> J. Campese & G. Borrini-Feyerabend, *Human Rights-Based Approaches to Conservation: Promise, Progress ... and Pitfalls* in T. Sikor & J. Stahl (eds), *Forests and People: Property, Governance and Human Rights*, (2011), Earthscan, pp. 47-63.

<sup>43</sup> S. Allen, *The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project*, in S. Allen & A. Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, (2011), Hart Publishing, pp. 225-259.

<sup>44</sup> S. Hopgood, *The Endtimes of Human Rights*, (2013), Cornell University Press; S. Benhabib, *Dignity in Adversity: Human Rights in Troubled Times*, (2011), Polity Press, pp. 57-77.

<sup>45</sup> International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, (2009), Versoix, Switzerland, p. 52 available [http://www.ichrp.org/files/reports/50/135\\_report\\_en.pdf](http://www.ichrp.org/files/reports/50/135_report_en.pdf) [last accessed 9 November 2014].

values in a diverse world no matter how benign their intentions.<sup>46</sup> The result of this is a resistance to international human rights on the basis that they appropriate cultural values of justice. However, given the need to evolve the relationship between existing values, as well as to adapt them to global environmental and social challenges ahead, this argument is static and lacks creativity. It fails to take account of the important developments occurring within the human rights framework, as well as under collective and emerging Nature rights [see sections 4.3.3 and 4.3.4]. Before looking at the latter two it is important to outline the rapid emergence of the concept of a human right to the environment and consider the importance of this for forest peoples.

Given that anthropocentric values are the foundation to environmental law there are clear links between the fields of human rights and environmental law [see section 4.1.1]. Human rights advocates have adopted environmental norms, such as sustainable development, to further advance human rights, especially economic, social and cultural rights.<sup>47</sup> Environmental lawyers also recognise the potential of using human rights, especially procedural rights, to achieve environmental law objectives.<sup>48</sup> For a number of years the right to a healthy

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<sup>46</sup> E. Said, *Orientalism*, (1978), New York, Vintage Books; S. Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (2011), Cambridge University Press; B. de Sousa Santos (ed), *Another Knowledge is Possible: Beyond Northern Epistemologies*, (2007), London and New York, Verso; A. Griffiths, Reviewing Legal Pluralism, in R. Benakar & M. Travers (eds), *Law and Social Theory*, (2013), Hart Publishing, pp. 286-355 p. 270.

<sup>47</sup> L. Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal perspectives*, (2011) Martinus Nijhoff, Leiden; K. Woods, *Human Rights and Environmental Sustainability*, (2010), Cheltenham: Edward Elgar.

<sup>48</sup> The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (usually known as the Aarhus Convention) (1998), grants the public rights regarding access to information, public participation and access to justice, in governmental decision-making processes on matters concerning the local, national and transboundary environment – see E. Morgera, An Update on the Aarhus Convention and its Continued Global Relevance, (2005), Vol. 14, Issue 2, *Review of European Community & International Environmental Law*, pp. 138-147; B. W. Cramer, The Human Right to Information,

environment has been the focus of debate. It is not recognised as a specific international human right.<sup>49</sup> Yet the right to a healthy environment, especially in developing countries where it is frequently linked to the right to development, is included in numerous state constitutions.<sup>50</sup> These commitments reflect, and are reflected in, regional human rights agreements that have supported the interconnections between human rights and a healthy environment.<sup>51</sup> International, regional and national courts have drawn on human rights in environmental law cases, and vice versa.<sup>52</sup> In one of the most significant cases Judge Weeramantry at the International Court of Justice emphasised the fundamental interconnections between human rights and the environment in a separate opinion in the Case Concerning the Gabčíkovo-Nagymaros Project stating that:

*The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal*

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The Environment and Information about the Environment: From the Universal Declaration to the Aarhus Convention, (2009), Vol. 14, Issue 1, *Communication Law and Policy*, pp. 73-103.

<sup>49</sup> A. Boyle, Human Rights or Environmental Rights - A Reassessment, (2006), Vol. 18, *Fordham Environmental Law Review*, pp. 471-494; L. Rodriguez-Rivera, Is the Human Right to Environment Recognized under International Law - It Depends on the Source, (2001), Vol.12, *Colorado Journal of International and Environmental Law and Policy*; D. Shelton, Human Rights, Environmental Rights, and the Right to the Environment, (1991), Vol. 28, *Stanford Journal of International Law* pp. 103-135.

<sup>50</sup> For a comprehensive survey see D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, (2011), University of British Columbia Press.

<sup>51</sup> See Art. 24 "all peoples shall have the right to a general satisfactory environment favourable to their development", African Charter on Human and Peoples Rights, adopted Nairobi, Kenya, 27 June, 1981; Art. 11 (1) "Everyone shall have the right to live in a healthy environment and to have access to basic public services" Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, adopted in San Salvador, El Salvador, 17 November, 1988.

<sup>52</sup> See S. Kravchenko & J. Bonnie, *Human Rights and the Environment: Cases, Law and Policy*, (2008), Carolina Academic Press.

*Declaration and other human rights instruments.*<sup>53</sup>

Other notable cases linking human rights and the environment include claims relating to forest and natural resource exploitation.<sup>54</sup>

It can be argued though that by linking human rights and the environment ultimately reduces all environmental values to an instrumental use for humanity and impedes a shift toward intrinsic values.<sup>55</sup> Doing so provides no incentive to address the underlying problems of over-consumption and the unsustainable exploitation of resources. Zarsky argues that there should be less focus on defining human rights to a clean environment and more on recognising responsibilities in law, particularly those of government and business enterprises, to care for the environment.<sup>56</sup> This emphasis on responsibility is termed environmental stewardship. This concept of stewardship itself is not new, it can be understood as a modern equivalent of natural law and many indigenous peoples customary legal values.<sup>57</sup> Yet optimism about the potential of stewardship to deliver better resource management perhaps needs to be tempered. Stewardship as a concept is not averse to appropriation by anthropocentric instrumentalism and economic values.<sup>58</sup> Criticisms of corporate social responsibility initiatives and other standards such as forest

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<sup>53</sup> Case Concerning the Gabčíkovo-Nagymaros Project [1997] I.C.J: Rep. 7, 91-92.

<sup>54</sup> Examples include the following African Commission, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003; Saramaka People v. Suriname, Inter-American Court of Human Rights, Judgment of November 28, 2007, Series C No. 172; Inter-American Court of Human Rights, Pueblo Indígena Kichwa de Sarayaku vs. Ecuador June 27, 2012.

<sup>55</sup> L. Zarsky (ed), *Human Rights and the Environment: Conflicts and Norms in a Globalising World*, (2002), Earthscan, p.1.

<sup>56</sup> *Ibid.*

<sup>57</sup> J. Fairhead, M. Leach & I. Scoones, Green Grabbing: A New Appropriation of Nature?, (2012), Vol. 39, Issue 2, *The Journal of Peasant Studies*, pp. 237-261 p. 345.

<sup>58</sup> J. Houghton, Stewardship for the Twenty-First Century in R. J. Berry (ed), *Environmental Stewardship: Critical Perspectives – Past and Present*, (2006) T&T. Clark Ltd, p. 327.

certification have illustrated the flaws in voluntary efforts of 'stewardship'.<sup>59</sup> The form any stewardship ultimately takes will reflect other values and normative priorities. The push and pull factors on this are very much part of a wider debate on how the multiple actors within a multilevel global legal world address global environmental problems such as climate change and ecosystem degradation.

#### 4.3.3 Collective: Indigenous Peoples

Developments in individual rights have, moreover, had a positive affect on the acknowledgement of collective rights' for indigenous peoples. Indigenous peoples have cooperated globally to create opportunities to correct historical injustices, discrimination and disrespect within the UN system and under international law.<sup>60</sup> Despite these developments indigenous peoples have been, and continue to be, denied ownership and access to life-sustaining resources, as well as having their cultural and political institutions suppressed within their territories.<sup>61</sup> This is a serious challenge for forest dependent indigenous communities who constitute 40% of the forest dependent population globally.<sup>62</sup> To correct this International Labour Organisation's Convention 169<sup>63</sup> and UN Declaration on the Rights of Indigenous Peoples (UNDRIP) both assert

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<sup>59</sup> S. Bell & A. Hindmoor, Governance without Government? The Case of the Forest Stewardship Council, (2012) Vol. 90, Issue 1, *Public Administration*, pp. 144-159.

<sup>60</sup> A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, (2007), Cambridge University Press, p. 2.

<sup>61</sup> S. J. Anaya, *Indigenous Peoples in International Law*, (2004), Oxford University Press, p. 61.

<sup>62</sup> S. Chao, *Forest Peoples: Numbers Across the World*, (2012), Forest Peoples Programme, p. 12, available [http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/forest-peoples-numbers-across-world-final\\_0.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/forest-peoples-numbers-across-world-final_0.pdf) [last accessed 9 November 2014]

<sup>63</sup> ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), 27 June 1989, (9 July 2014 -20 signatories) available <http://www.ilo.org/indigenous/conventions/no169/lang--en/index.htm> [last accessed 20 November 2014]

indigenous peoples' right to self-determination.<sup>64</sup> Collective rights provide 'recognition of the ongoing effects on indigenous peoples of historical forces linked to colonialism or other similar invasive settlement'.<sup>65</sup> Nevertheless using international and national statutory law as a strategy to secure indigenous peoples own cultures did not come without its drawbacks. State supremacy and ongoing non-recognition of indigenous peoples territorial rights, a legacy from colonialism, continue to undermine the fulfillment of international rights.<sup>66</sup>

Collective rights can conflict with both sovereign rights and human rights.<sup>67</sup> Firstly, indigenous peoples continue to be seen as a threat to sovereign states' self-determination, not only to the sovereign integrity of the nation state but also to state control over natural resources.<sup>68</sup> UNDRIP negotiations over this issue were fraught. Representatives of indigenous peoples sought to assure state negotiators that full self-determination to identity, land and culture would not result in a separate sovereign existence for indigenous territories within nation states.<sup>69</sup> Indeed the inclusion of Article 46(1) to the UNDRIP offers a clear commitment to not undermining sovereign territorial integrity.<sup>70</sup> Many

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<sup>64</sup> UN Declaration on the Rights of Indigenous Peoples (UNDRIP) available [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [last accessed 20 November 2014]

<sup>65</sup> Anaya, S. J, *supra* note 61, p. 28.

<sup>66</sup> R. Niezen, *Public Justice and the Anthropology of Law*, (2010), Cambridge University Press, p. 67.

<sup>67</sup> S. Wiessner, Rights and Status of Indigenous Peoples: a Global Comparative and International Legal Analysis, (1999), Vol. 12, Issue 57, *Harvard Human Rights Journal*.

<sup>68</sup> S. Errico, The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights in S. Allen & A. Xanthaki, *Reflection on the UN Declaration on the Rights of Indigenous Peoples*, (2011), Hart Publishing, pp. 329-367; see also H, Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, (1990), University of Pennsylvania Press.

<sup>69</sup> Anaya, J, *supra* note 61, p. 60.

<sup>70</sup> UNDRIP 2007 Article 46 (1) states 'Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to International Charter of the United Nations or construed as authorizing or

indigenous peoples were unsupportive of this clause seeing it as weakening the value of collective self-determination thereby perpetuating oppression initiated through colonialism.<sup>71</sup>

Secondly, some human rights lawyers view the impact of collective rights on individual human rights with a certain degree of concern. Some authors have noted that collective rights may lead to the oppression of indigenous individuals in the name of group interests, on grounds such as their gender, sexuality, or disability.<sup>72</sup> Many of these individual rights issues remain taboo to indigenous rights advocates who prioritize self-determination.<sup>73</sup> Indeed some states have used human rights critiques of indigenous cultural practices as a reason not to extend indigenous rights further.<sup>74</sup> Until the late 1980s indigenous peoples' advocates themselves viewed human rights as an obstacle to achieving their goals of self-determination. Human rights were seen as inseparable from the civilizing mission of colonial days or of the globalising liberalising mission of neo-colonialism.<sup>75</sup> However, by the 1990s indigenous rights advocates saw potential in using human rights frameworks to advance indigenous peoples

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encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.'

<sup>71</sup> Art. 3 UNDRIP states 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development', (2007), New York.

<sup>72</sup> A. Xanthaki, The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women?, in S. Allen & A. Xanthaki, *Reflection on the UN Declaration on the Rights of Indigenous Peoples*, (2011), Hart Publishing, pp. 413-433, p. 420.

<sup>73</sup> Ibid.

<sup>74</sup> B. Richardson, S. Imai & K. McNeil, Indigenous Peoples and the Law – Historical, Comparative and Contextual Issues, in B. Richardson, S. Imai & K. McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, (2009), Hart Publishing, pp. 3-21.

<sup>75</sup> K. Eagle, On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights, (2011), Vol. 22, No. 1, *European Journal of International Law*, pp. 141-163, p. 151.

issues.<sup>76</sup> Arguably this repositioning resulted in the UNDRIP accommodating the multiplicity of cultural [value] frameworks that indigenous individual enjoys: as an individual, a member of the indigenous group and as a member of a state.<sup>77</sup>

Xanthaki claims that recognition of collective rights is a natural progression of human rights and offers a positive interpretation of UNDRIPs approach.<sup>78</sup> She proposes that by recognising collective rights various other rights that have not been explicitly included in general human rights instruments can receive more support.<sup>79</sup> These include so called 'third generation rights': the right to development, the right to co-ownership of the common heritage of mankind; the right to a healthy environment and the right to the culture of humankind, all of which are fundamentally collective rights. Although all of these rights existed prior to UNDRIP the Declaration has, by being based on collective values, opened up new spaces to creatively interpret individual rights.

#### 4.3.4 Nature Rights

Certain developments in rights are contributing to a more inclusive application beyond solely humans. Interest in Nature Rights, frequently referred to as Earth Jurisprudence or Wild Law, has increased in the past couple of decades. Wangari Maathai, the Kenyan founder of the Green Belt Movement, has said that Earth Jurisprudence 'recognises humans as inseparable from the planetary ecosystem and that for it to function properly, human societies must regulate their behaviour in a way that supports rather than undermines the integrity and

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<sup>76</sup> Ibid.

<sup>77</sup> Xanthaki, A, *supra* note 72, pp. 413-433, p. 425.

<sup>78</sup> Ibid p. 418.

<sup>79</sup> Ibid p. 413.

health of the community of life on earth.’<sup>80</sup> This philosophy of law and human governance is based on the idea that humans are only one part of a wider community of beings and that the welfare of each member of that community is dependent on the welfare of the Earth as a whole.<sup>81</sup> This is not dissimilar to the CBD ecosystem approach.[see section 2.2.1] Woods argues that it is ‘with these limits in mind that actors need to be recognising the interconnectedness of humans with each other, including nature, as well as boundaries of sustainability. [This] needs to be the starting point for reinterpreting human rights.’<sup>82</sup> Arguably this is the shift required to find a ‘durable scale of values’ that Aldo Leopold alluded to in 1919 but in the conceptual context of the Anthropocene and planetary boundaries.<sup>83</sup>

Advocates on the international stage as well as within individual countries have begun to lobby for the further extension of rights to Nature. On 22 April 2009 President Evo Morales Ayma of Bolivia called on the General Assembly of the United Nations to develop a Universal Declaration of the Rights of Mother Earth. In the Rio+ 20 outcome document *The Future We Want* paragraph 39 stated that:

*We recognize that the planet Earth and its ecosystems are our home and that Mother Earth is a common expression in a number of countries and regions and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance*

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<sup>80</sup> W. Maathai – Resolution proposed at 7<sup>th</sup> World Wilderness Congress in November 2011.

<sup>81</sup> C. Cullinan, A History of Wild Law, in P. Burdon, (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, (2011), Wakefield Press, p. 276 [Kindle Version].

<sup>82</sup> K. Woods, *Human Rights and Environmental Sustainability*, (2010), Edward Elgar, p. 72.

<sup>83</sup> Leopold. A, *supra* note 3, p. 200.

*among the economic, social and environment needs of present and future generations, it is necessary to promote harmony with nature.*<sup>84</sup>

Both a right to a healthy environment, and the more expansive Rights of Mother Nature, are yet to be recognised within the mainstream international law. Despite this these approaches are having impacts on the forming of normative discourse surrounding the interpretation of other value concepts including state and human rights.<sup>85</sup> The arguments further add to momentum away from anthropocentric values towards more intrinsic values. The recognition of Nature Rights could lead to a new generation of environmental law-making and implementation that works with, rather than against, Nature.<sup>86</sup>

Rights based values have, and continue to, evolve in relation to each other, as well as to political, environmental, economic and cultural dynamics. As this section has illustrated all rights are interconnected. The influence rights have though on the formation of forest related law and policy depends on the value given to particular rights over others. The influence also depends though on the privilege given within the value fora to economic based values; to understand why I now turn to explore these.

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<sup>84</sup> UN GA Resolution, The Future We Want: Our Common Vision, (27 July 2012) A/RES/66/288 available <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/476/10/PDF/N1147610.pdf?OpenElement> [last accessed 20 November 2014].

<sup>85</sup> C. Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law*, (2013), Cambridge University Press.

<sup>86</sup> P. Crabbe & J. Manno, Ecological Integrity as an Emerging Global Public Good, in L. Westra, K. Bosselmann & R. Westra, *Reconciling Human Existence with Ecological Integrity*, (2008), Edward Elgar, pp. 73-87.

## 4.4 Economic Based Values

Economics influence the norms and style of legal rules by providing a hierarchy of preferences within which to order values.<sup>87</sup> However, there can be a disconnect between economic valuation and other values that can result in perverse outcomes if incorporated wholesale into law and policy developments, especially in relation to the environment. For this reason it is important for lawyers and policy-makers to be familiar with the economic values informing contemporary laws' development. This section outlines the economic theoretical approaches adopted and applied to valuing the environment and highlights the resulting challenges to rights-based value concepts.

### 4.4.1 Measuring Value: The Dominance of Money and Markets

Since the early 19<sup>th</sup> century as a discipline economics has increasingly focused on instrumental utilitarianism to determine value.<sup>88</sup> Classic utilitarianism relies on the criteria of achieving the highest level of human happiness as a measure for the success of instrumental values. Money is the dominant medium used by economists to measure a person's or group's (including a state's) happiness.<sup>89</sup> Money is the 'measure value' used so that all goods and services can be a tradable commodity.<sup>90</sup> Money in and of itself has no value: a 'dollar's worth' may be a working unit of value, but 'a dollar' itself has no value—there needs to be a connection between money (a conceptual abstraction, or contract) and the

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<sup>87</sup> W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, (2009), Cambridge University Press, p. 23.

<sup>88</sup> G. Dale, *Karl Polanyi*, (2010), Polity Press, p. 19.

<sup>89</sup> W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, (2009), Cambridge University Press, pp. 116-163.

<sup>90</sup> L. Lohmann, Toward a Different Debate in Environmental Accounting: The Cases of Carbon and Cost Benefit, (2009), Vol. 34, *Accounting, Organisation and Society*, pp. 499-534.

physical world for there to be value.<sup>91</sup> A market economy assumes that all humans [and states] behave in such a way as to maximize their personal utility; or in other words, that 'gain' is the central principle of social organization.<sup>92</sup>

Market-based liberalism has dominated economics as a discipline since the late 1980s, a time when international environmental law was becoming firmly established. It emphasises the primacy of the individual, and holds that the collective common good will be maximised if people and firms are free to pursue their own interests in the market place. In theory, a 'market economy' can be defined as an economic system that is controlled, regulated and directed by market prices; where production and distribution are entrusted to a self-regulating market system.<sup>93</sup>

Market-based liberalism though needs particular features to be successful. Firstly, growth is fundamental to a market-based economy, especially under contemporary neo-liberalism.<sup>94</sup> Fine and Milonakis refer to this as 'economics imperialism' which has expansion, access and appropriation as its hallmarks.<sup>95</sup> Secondly, market-based economics needs appropriate institutional legal infrastructure and normative rules to facilitate such expansion. Polanyi noted

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<sup>91</sup> H. Daly & J. Farley, *Ecological Economics: Principles and Applications*, (2011), Island Press, p. 420; S. Farber, R. Costanza & M. Wilson, Economic and Ecological Concepts for Valuing Ecosystem Services, (2002), *Ecological Economics*, Vol. 41, pp. 375-392 p. 378.

<sup>92</sup> K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (2001 [1944]), Beacon Press, p. 75.

<sup>93</sup> S. Castles et al, *Karl Polanyi's Great Transformation as a Framework for Understanding Neo-Liberal Globalisation*, (August 2011), Social Transformation and International Migration in the 21<sup>st</sup> Century Working Paper 1, University of Sydney p7 - available [http://sydney.edu.au/arts/transformation\\_migration/downloads/STIM\\_WP1\\_Final.pdf](http://sydney.edu.au/arts/transformation_migration/downloads/STIM_WP1_Final.pdf) [last accessed 20 November 2014].

<sup>94</sup> Neo-liberalism is 'a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets, and free trade' D. Harvey, *The Neoliberal State. A Brief History of Neoliberalism*, (2005), Oxford University Press, p. 64.

<sup>95</sup> B. Fine & D. Milonakis, *From Economics Imperialism to Freakonomics*, (2009), Routledge.

that the success of a market economy depends on the market's capacity to control, regulate and direct the entire economic system.<sup>96</sup> To achieve this Perry-Kessaris argues that market-based liberal economics turns the legal system into a game by making it a mere instrument of market values: efficiency, growth and profit.<sup>97</sup> As a result non-market values become subordinate in the value hierarchy of neo-liberalism.<sup>98</sup> Polanyi warned that the implications of this are that society will be subordinate to the law, and by default the values, of the market.<sup>99</sup> He concludes that an economic system 'born as a mere penchant for non-bureaucratic methods, [had] evolved into a veritable faith in man's secular salvation through a self-regulating market'.<sup>100</sup> This notion of salvation has now filtered into law and policy to address global environmental problems.

#### 4.4.2 Market Environmentalism: Valuing Natural Capital

Today the market economy is expanding to incorporate nature in ways previously considered culturally sacrosanct. In the 18<sup>th</sup> century economic philosophers like Kant, held nature to be unsubstitutable and untradeable. He argued that nature should not be given a market price, that it should be 'infinitely above all price, with which it cannot be brought into comparison or competition at all without, as it were, assaulting its holiness'.<sup>101</sup> Kant's essentially intrinsic values are akin to those of deep ecologists, certain religious belief systems and many indigenous peoples cultural value systems. Increasingly economists however argue that classical economics ignores both the intangible

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<sup>96</sup> Polanyi. K, *supra* note 92, pp. 74-75.

<sup>97</sup> Perry-Kessaris. A, *supra* note 36 pp. 401-421, p. 407.

<sup>98</sup> P. Burkett, *Marxism and Ecological Economics: Toward a Red and Green Political Economics* (2005), Brill Publications, p. 43.

<sup>99</sup> Polanyi. K, *supra* note 92, pp. 74-75.

<sup>100</sup> *Ibid.*

<sup>101</sup> Cited in S. Cornell, Valuing Ecosystem Benefits in a Dynamic World, (June 2010), Vol. 22, Issue 16, *Climate Research Special*, p. 2.

intrinsic values and fails to account for long-term costs resulting from resource misallocation, unnecessary externalities and environmental degradation.<sup>102</sup> Pearce added to this by recognising the need to allocate value to finite resources, as 'infinite value was indistinguishable from zero value in a market economy'.<sup>103</sup> This approach is now captured in the concept of 'planetary boundaries'.

For these economists, usually referred to as ecological economists, economic tools to determine the real market value of the Earth's water, forests, biodiversity, carbon, and other ecosystem functions, offer the most viable solution to addressing global environmental problems. Ecosystem functions collectively became termed 'Natural Capital'.<sup>104</sup> As Perring's argues 'if all natural resources could somehow be marketised and monetised the problem of unobservability and uncontrollability of the processes of the environment through the price system could be resolved'.<sup>105</sup>

In 1997 Robert Costanza attempted to calculate the real market value of ecosystem services essential for human welfare.<sup>106</sup> His categorisation of ecosystem functions laid a foundation separating each ecosystem service provision (watershed, soil formation, habitat, carbon sequestration) so each

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<sup>102</sup> Daly, H & Farley, F, *supra* note 91, p. 165-192.

<sup>103</sup> D. Pearce, Can Non-market Values Save the Tropical Forests?, in B. Goldsmith (ed), *Tropical Rain Forest: a Wider Perspective*, (1998), Springer Publishing, p. 260.

<sup>104</sup> The term 'natural capital' was first used by E.F. Schumacher in his classic economic book *Small is Beautiful: A Study of Economics as if People Mattered*, (1973), Abacus Press.

<sup>105</sup> C. Perrings, *Economy and Environment*, (1987), Cambridge University Press, pxii cited in Burkett, P, *supra* note 98, p. 42.

<sup>106</sup> The value of such services was placed in the range of US\$16-54 trillion dollars, most of which lay outside the market. By comparison, at that time the global gross national product was US\$18 trillion, R. Costanza & C. Folke, Valuing ecosystem services with efficiency, fairness and sustainability as goals, in: G. Daily (ed.), *Nature's Services: Societal Dependence on Natural Ecosystems*, (1997), Island Press, pp. 49-70.

could be valued as an isolated unit.<sup>107</sup> By applying marginal utility theory of value to ecosystem services valuation it can be used to measure use values, not just exchange values, in monetary units.<sup>108</sup> Subsequent reports have followed since Costanza's. The most significant in relation to international environmental law is 'The Economics of Ecosystems and Biodiversity' (TEEB), undertaken by Deutsche Bank and Partners. TEEB was presented at the High-Level Segment of the Ninth Conference of the Parties to the CBD COP-9 in Bonn, Germany in May 2008. It sought to lay the foundations for advancing a market-based approach to valuing ecosystem services that Parties to the Convention could incorporate into implementation mechanisms.<sup>109</sup> TEEB represented a further effort to introduce payments for ecosystem services as a mechanism under a multilateral environmental agreement. The UNFCCC had already laid the pathway for this with the Kyoto Protocol flexibility mechanisms, especially the Clean Development Mechanism, which allowed trading in certificates for emission reductions for afforestation and reforestation between developed and developing countries.<sup>110</sup>

This new market environmentalism incorporating natural capital is a mode of resource management, according to Bakker, that promises 'a virtuous fusion of economic growth, efficiency and environmental conservation' via market

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<sup>107</sup> Lohmann, L, *supra* note 90.

<sup>108</sup> S. Farber, R. Costanza & M. Wilson, Economic and Ecological Concepts for Valuing Ecosystem Services, (2002), Vol. 41, *Ecological Economics*, pp. 375-392, p. 378.

<sup>109</sup> P. Sukhdev et al, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A Synthesis of the Approach, Conclusions and Recommendations of TEEB*, (2010), UNEP; K. Mullan & T. Swanson, *An International Market-Based Instrument to Finance Biodiversity. Conservation: Toward a Green Development Mechanism – A Proposal for a Green Development Mechanism*, (26 January 2009), Report for the CBD Expert Workshop on Green Development Mechanism, 9-10 February 2009, Amsterdam.

<sup>110</sup> Article 12, UNFCCC Kyoto Protocol, (1997).

means.<sup>111</sup> The promise has inspired a significant rise in efforts to place a market value on nature. Increasingly natural capital valuation modeling outputs inform how economists, lawyers and policy-makers develop solutions to problems like deforestation and degradation, climate change, biodiversity loss and alleviating poverty amongst forest based communities [see section 4.3].<sup>112</sup>

Critiques of the extension of market-based liberal economics to valuing nature exist both regarding the technical methodologies as well as the underlying ethics. Perrings is critical, arguing that 'not all resources ... are subject to rights and property; specifically, [...] some natural resources have the status of commodities and some do not.'<sup>113</sup> Market-based liberalism's usurpation of other values has implications for the design and implementation of regulatory mechanisms to facilitate meeting an array of shared values. Bernstein argues that dominant neo-liberal economic values act as a cipher through which all other values are themselves reconfigured to fit with the regulatory and governance structures required for realising the dominant values objects.<sup>114</sup> The international law and governance of forests provide an example through which to consider whether a reconfiguration of values to nature and ecology is occurring or if dominant economic values are extending their reach and maintaining exploitative value concepts to nature. If it is the case that all other values are subordinated then the rationalisation for any law, including meeting

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<sup>111</sup> K. Bakker, Neo-liberalising Nature? Market Environmentalism in Water Supply in England and Wales, (2005), Vol. 95, Issue 3, *Annals of the Association of the American Geographers*, p. 543.

<sup>112</sup> The term 'Natural Capital' is an abbreviation for 'Natural Capitalism' first used in P. Hawken, A. Lovins & H. Lovins, (2000), *Natural Capitalism: Creating the Next Industrial Revolution*, Black Bay Books.

<sup>113</sup> Perrings. C, *supra* note 105 cited in Burkett. P, *supra* note 98, p. 42.

<sup>114</sup> Bernstein. S, *supra* note 24, p. 456.

other values such as human, collective and Nature rights, will be to fulfill neo-liberal market values. If this is the case then, as Humphrey's argues, a market-based approach to valuing forest ecosystems cannot capture a forest's full public goods value, and therefore cannot be the route to its salvation.<sup>115</sup>

Values are manifested through regulatory intervention. The following section examines the regulatory tools and mechanisms employed, by both the public and private sector, to realise the values discussed in sections 4.3 and 4.4 in relation to forest governance. It assesses efforts to achieve a balance between various values using new regulatory intervention formats.

#### **4.5 Finding Equilibrium Between Values: Regulatory Tools and Mechanisms**

The regulatory tools and mechanisms designed to induce the necessary behavioural change to achieve normative goals and substantive obligations required under international law are becoming more complex and interconnected. Some of the most innovative regulatory approaches being promoted are seen in the field of environmental law.<sup>116</sup> There is a need to achieve a working equilibrium between competing social, economic and ecological values with these different tools and mechanisms. Well-designed regulatory tools can produce, ensure and protect synergies that contribute to achieving an effective equilibrium between values. However such regulatory

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<sup>115</sup> D. Humphreys, *Public Goods, Neoliberalism and the Crisis of Deforestation*, Paper presented to the Annual Conference of the British International Studies Association, 18-20 December 2006, University of Cork, Ireland available <http://ibcperu.org/doc/isis/7575.pdf>. [last accessed the 14th November 2014]

<sup>116</sup> E. Brousseau & T. Dedeurwaerdere, *Global Public Good: The Participatory Governance Challenges* in E. Brousseau et al, (eds), *Reflexive Governance for Public Goods*, (2012), MIT Press, pp. 21-37.

tools are not only difficult to design they are equally hard to implement especially in situations where there is weak governance.

Values inform the choice of governance solutions. These solutions in turn can determine which values and principles dominate the implementation of law. Regulatory mechanisms play an important part in realising governance outcomes. Regulation can be facilitative and instrumental in shaping behaviour in order to promote particular values; it can also institutionalise values through the creation of interaction and discourse.<sup>117</sup> In reality regulation is introduced in diverse contexts, contexts that are the result of geography, history, culture, economics and politics. Ultimately regulatory intervention is unpredictable, as well as at times contentious and risky, especially for disempowered actors.

This section examines different regulatory approaches: command and control, market-based instruments and reflexive instruments used within the context of the international forest regime. It concludes by exploring whether new regulatory approaches are successfully providing spaces for multilevel, dynamic regulation in which diverse, at times competing, values on forests can be successfully accommodated.

#### 4.5.1 Regulation: Purpose and Types

All forms of regulation are conscious efforts to achieve a set of value-based outcomes. They have a public purpose and/or effect regardless of whether they

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<sup>117</sup> B. Morgan & K. Yeung, *An Introduction to Law and Regulation*, (2007), Cambridge University Press, p. 16.

are initiated by public or private bodies.<sup>118</sup> Regulatory choice is based on the values and political ideologies that inform users beliefs.<sup>119</sup> Black proposes that regulation be understood as ‘the intentional, goal-directed, problem solving attempt to alter behaviour or activity, or to carry out an ordering ... that would otherwise not have taken place using tools and mechanisms by both state and non-state actors’.<sup>120</sup> This could mean rules designed to achieve the objectives of a legal agreement or allow a broader definition that would include rule-making processes, such as market-based certification.<sup>121</sup> Defining regulation requires clarity as to the scope to which it is applied.<sup>122</sup> Without this clarity Black warns of being consumed by a ‘definitional chaos’ in which all things become regulation of sorts.<sup>123</sup> This section adopts the broader interpretation to include rule-making processes in order to capture the different regulatory mechanisms developed by a range of state and non-state actors.

Traditionally two classifications for regulation have been used: command and control and market-based instruments.<sup>124</sup> In reality command and control regulation and market-based instruments rarely occur in isolation. With a complex problem, such as forest governance, the regulatory approaches may include a range that draws on command and control as well as market-based

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<sup>118</sup> R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory, Strategy and Practice*, (2012), Oxford University Press, p. 3.

<sup>119</sup> B. Barton, The Theoretical Context of Regulation, in B. Barton et al, *Regulating Energy and Natural Resources*, (2006), Oxford University Press, pp. 11 – 33, p. 30.

<sup>120</sup> *Ibid*, p. 176.

<sup>121</sup> C. Redgwell, International Soft Law and Globalization, in B. Barton et al, *Regulating Energy and Natural Resources*, (2006), Oxford University Press, pp. 89-106, p.93.

<sup>122</sup> B. Morgan & K. Yeung, *An Introduction to Law and Regulation*, (2007), Cambridge University Press.

<sup>123</sup> J. Black, Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World, (2001), Vol. 54, Issue 1, *Current Legal Problems*, pp. 103-146, p. 105.

<sup>124</sup> B. Barton et al, Conclusions, in Barton. B et al, *supra* note 119, pp. 401 – 417, p. 411.

instruments. Other new reflexive modes of regulation, in the form of voluntary agreements and other new environmental policy instruments, have also emerged to tackle complex problems, especially those relating to global public goods challenges such as biodiversity loss, forests, oceans and climate change.<sup>125</sup> They are seen to be an important element in achieving a balance between competing values, and will be discussed in section 4.5.2.

#### i) Command and Control Instruments

Traditionally governments preferred command and control regulation to address environmental problems.<sup>126</sup> To a large degree this was because environmental related problems were seen to be matters of public interest that required instrumental intervention to change behaviour for everyone's welfare.<sup>127</sup> Intervention was to correct failures, especially of the market.

Command and control is characterised as centralised state controlled regulation. The form that it can take though varies. Ayres and Braithwaite use a pyramid structure to illustrate the relationship between differing degrees of command and control regulation. These are based on 1) the level of central government control and 2) the corresponding techniques used to realise the regulation.<sup>128</sup> At the top of the pyramid is command regulation with non-discretionary punishment. Descending through levels of command regulation and ending at the base with pure self-regulation monitored in some form by the state. The latter is a decentered or delegated government response that only works if the

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<sup>125</sup> N. Gunningham, *Leaders and Laggards: Next Generation Environmental Regulation*, (2001), GreenLeaf Pub, p. 23.

<sup>126</sup> B. Yandle, Public Choice at the Intersection of Environmental Law and Economics, (1999), Vol. 5, Issue 2, *European Journal of Law and Economics*, p. 14.

<sup>127</sup> R. Baldwin. M. Cave & M. Lodge, *supra* note 118.

<sup>128</sup> I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (1992), Oxford University Press, p. 39.

government has a credible response should the regulated fail to act according to the rules they establish. The inter-relationship between these different levels of command and control result in different governance environments within which actors engage in law and policy processes.

Governments have traditionally used command and control regulatory approaches to establish rights for users and access in relation to forests. Sunstein argues that command and control intervention through substantive regulatory mechanisms can ensure that public-goods, like forests, are managed to benefit all actors.<sup>129</sup> In this case public interest is understood as all non-economic goals. With a growing emphasis on forest protection, sustainable management and equity, arguably command and control provides the regulatory tools to deal with public interest. However, this fails to take into account clashes between different actors pushing conflicting 'public interest' values. It epitomises the tensions between framing solutions to global environmental problems using the principle of common concern or PSNR. This division is pronounced in relation to forests as the 1992 UNCED Rio negotiations on a Forest Convention revealed. [see sections 1.6 and 2.2.2] Globally most forests remain under state ownership.<sup>130</sup> Yet numerous examples exist where public interest is controversially interpreted by a state, for where a government claims deforestation followed by afforestation with palm oil plantations is in the public interest. As a result, state based command and control intervention has been beset by problems regarding effective conception and implementation of regulation. A major critique of

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<sup>129</sup> C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, (1990), Harvard University Press, p. 82.

<sup>130</sup> A. White & A. Martin, *Who Owns the World's Forests*, (2002), Forest Trends, Washington, DC.

command and control is that it does not ascribe a current day economic value to forests so informed policy and law decisions can be made.<sup>131</sup> Advocates of market-based instruments have used this critique to push for their preferred regulatory approach.

#### ii) Market-based Instruments

In the past decade, at both national and international levels, there has been a significant expansion in the use of market-based instruments by both governments and non-state actors. The conditions for the deployment of market-based instruments have been made significantly more favorable by the growing influence of neoliberal interventions in environmental policy and natural resource management. [see section 4.4.2] This shift from state control (through command and control mechanisms) to the promotion of markets is embedded in neo-liberal governance.<sup>132</sup> An important driver of the growth in the preference for market-based instruments is the argument of diminishing effectiveness and spiraling costs of direct command-and-control regulations. According to Bakker this trend is radically altering the values determining environmental policy, focusing on cost-efficiency, competitiveness, and the prioritization of self-or co-steering market processes.<sup>133</sup>

Regulators developing market-based mechanisms not only critique the cost of command and control but also the perceived inefficiencies associated with large-scale bureaucracies. The argument is premised on the basis that the market is

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<sup>131</sup> C. Taylor et al, Selecting Policy Instruments for Better Environmental Regulation: A Critique and Future Research Agenda, (2012), *Environmental Policy and Governance*, Vol. 22 Issue 4, pp. 268-292.

<sup>132</sup> B. Barton et al, Conclusions, in Barton. B, et al, *supra* note 124, pp. 401 – 417, p. 407.

<sup>133</sup> Bakker. K, *supra* note 111.

less interventionist than command and control by government. Yet the regulatory architecture required to enable the market is interventionist; ironically greater privatisation requires more regulation not less.<sup>134</sup> Market-based instruments often require extensive intervention by government with supportive regulatory infrastructure that also monitors the impacts of the market, addressing any negative impacts through state intervention.

Governments also play a key role in the process of marketization through opening up new areas in which the market can freely operate and creating new investment opportunities for business. Market regulation requires guaranteed property rights, a flow of market information, oversight by monitoring and reporting, and dispute resolution mechanisms. The establishment of a flexibility mechanism, the Clean Development Mechanism (CDM), under the UNFCCC's Kyoto Protocol demonstrated the regulatory complexity associated with creating new market infrastructure.<sup>135</sup> Parties needed to develop appropriate domestic regulations to create legal procedures for CDM projects.<sup>136</sup> When these were applied to forests the significant technical, legal and institutional problems became apparent both in the period during negotiations to establish necessary rules and guidance, as well as subsequently once projects were taking place.<sup>137</sup> Concerns over the CDM's effectiveness, especially in relation to forest related projects, and questions relating to fairness, environmental integrity and equity

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<sup>134</sup> Castles. S, *supra* note 93, p12.

<sup>135</sup> C. Voigt, Is the Clean Development Mechanism Sustainable? Some Critical Aspects, (2008), Vol. 7, Issue 2, *Sustainable Development Law & Policy*, pp. 15-21

<sup>136</sup> Ibid

<sup>137</sup> D. Takacs, Carbon into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law, (2009), Vol. 15, *Hastings Journal of Environmental Law and Policy*, p. 39.

reflected similar concerns directed towards market-based regulation generally.<sup>138</sup>

The belief that public goods can be provided by the injection of market forces into new domains has proved a powerful one.<sup>139</sup> Yet the process of instituting effective ecosystem service market mechanisms is exceedingly unpredictable, expensive, and often unsuccessful.<sup>140</sup> Even in the most developed countries, with highly developed technology and scientific know how, functioning democracies with low corruption levels, strong civil societies, clearly defined property rights, and complex and developed financial markets, problems exist. The structures necessary for such schemes to work, including advanced measurement, reporting and verification of natural processes, defined property rights, a strong civil society and participatory democratic rights, do not currently exist in many developing countries in which UNFCCC forest carbon trading projects from the CDM and pilots for REDD+ are currently being implemented or are anticipated.<sup>141</sup> The establishment of a market-based forest carbon-trading scheme requires significant long-term investment and management of an

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<sup>138</sup> C. Okereke & K. Dooley, Principles of Justice in Proposals and Policy Approaches to Avoided Deforestation: Towards a Post-Kyoto Climate Agreement, (February 2010), Vol. 20, Issue 1, *Global Environmental Change*, pp. 82-95; C. Voigt. C *supra* note 135, pp. 15-21.

<sup>139</sup> S. West, 'Command Without Control': Are Market Mechanisms Capable of Delivering Ecological Integrity to REDD?, (2010) Vol. 6, Issue 3, *Law, Environment and Development Journal*; L. Lohmann, 'Carbon Trading – A Critical Conversation on Climate Change, Privatisation and Power', (2006), No. 48 *Development Dialogue*, p. 87; This over-allocation has been amplified by the European recession. See D. Morris & B. Worthington, 'Cap or Trap? How the EU ETS Risks Locking in Carbon Emissions', Sandbag, September 2010, available at <http://sandbag.org.uk/files/sandbag.org.uk/caportrap.pdf> [last accessed 12 October 2014].

<sup>140</sup> R. Muradian & L. Rival, (eds), *Governing the Provision of Ecosystem Services*, (2012), Springer Science, pp. 465-473.

<sup>141</sup> A. Karsenty, The Architecture of Proposed REDD Schemes after Bali: Facing Critical Choices, (2008), Vol. 10, Issue 3, *International Forestry Review*, pp. 3 – 10; S. West. S, *supra* note 139, p. 298 ; D. Takacs. D, *supra* note 137, p. 39.

infinitely complex set of externalities.<sup>142</sup> In the same time frame command-and-control legislation could potentially have provided continuous ecological and social benefits.<sup>143</sup>

Some environmental economists are consequently skeptical of the potential of market-based and private-orientated fiscal mechanisms to address global public goods problems, like the destruction of forest ecosystems functions, in a manner that reflects the diverse values held by multiple stakeholders.<sup>144</sup> [see section 4.4.2] An argument critical of market-orientated reforms is that they fail to address underlying injustice, especially relating to poverty.<sup>145</sup> Fiscal policies are designed to favour investment, and thus benefit those with the capital to invest, rather than providing incomes and security for the poor. National and international investors are encouraged by state policies that make assets available to profit-making investments, including land and other marketable natural resources. For states with limited fiscal resources, especially in the developing world, the incentives for such redistributions towards investors are large because otherwise they fear they would not get the foreign investment. To encourage investment, policies are driven through which encourage the leasing of land, as well as schemes which generate payments for environmental resources: for land, water, biodiversity and carbon, among other natural assets.<sup>146</sup> However as Stiglitz has pointed out, without strong and reliable

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<sup>142</sup> Lohmann. L, *supra* note 90, p. 87.

<sup>143</sup> West. S, *supra* note 139, p. 298

<sup>144</sup> J. N. Sanchirico & J. Siikamaki, *Natural Resource Economics and Policy in the 21st Century: Conservation of Ecosystem Services*, (2007), Vol. 8, *Resources*, p. 165.

<sup>145</sup> S. Johnson, *Economics v. Equity: Do Market-based Environmental Reforms Exacerbate Environmental Injustice?*, (1999), Vol. 56, *Washington & Lee Law Review*, p. 114.

<sup>146</sup> Fairhead. J, Leach. M, & Scoones. I, *supra* note 57, pp. 237-261 p. 346.

governance structures, markets often work against the poorest and least powerful communities in developing countries.<sup>147</sup> This is contrary to those who argue that market-based instruments are key legal tools to achieve social justice.<sup>148</sup> With such a concern over the impact of non-market based economic values new reflexive approaches are increasingly being advocated to provide safeguards.

#### 4.5.2 Safeguarding Values: Procedural Feedback Loops

Reflexive governance that draws on a range of regulatory models is seen to offer a fresh approach to governance. It transcends old dichotomies in law and policy discourse that have focused on either market-based instruments or command and control.<sup>149</sup> It is seen by advocates to offer ongoing procedurally based safeguards of regulatory intervention, either in the public or private sector, that is flexible enough to address problems such as value imbalances, e.g. breaches to indigenous peoples rights, as and when they arise.

Reflexive governance builds on Ostrom's thinking on the global commons, in which she argues that research beyond the usual policy approaches of regulatory command and control, government intervention in market pricing systems, and formal agreement among national sovereigns, was necessary in order to address

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<sup>147</sup> J. E. Stiglitz, *Globalization and its Discontents*, (2002), Penguin.

<sup>148</sup> H. De-Soto, *The Mystery of Capital*, (2001), Black Swan Publications.

<sup>149</sup> Weston. B & Bollier. D, *supra* note 11, pp. 179-204; S. Clark & D. Cherney, Ecosystem Management: A Policy Orientated Jurisprudence Perspective in K. Robbins (ed), *The Laws of Nature: Reflections on the Evolution of Ecosystem Management Law and Policy*, (2013), University of Akron Press, Ohio, pp. 97-122, p. 99; Philippopoulos-Mihaloupoulos. A, *supra* note 11; B. McCay, Emergence of Institutions for the Commons: Contexts, Situations and Events, in National Research Council (ed), *The Drama of the Commons*, (2002), National Academy Press, Washington DC, pp. 361-403, p. 364.

multi-level, complex problems with multiple stakeholders.<sup>150</sup> This is particularly pertinent to forest governance that needs to address multilevel, complex problems, often transcending sovereign jurisdictional parameters.

Reflexive regulation uses non-direct legal intervention to achieve its goals. It is procedure orientated rather than working to a prescribed goal. It aims to create a regulatory space in which relationships between different actors result in developing innovative approaches to incentivise behavioral change based on diverse sets of values. The EU FLEGT Voluntary Partnership Agreements approach to tackling illegal logging and trade is seen by advocates as an example of reflexive regulatory approaches.<sup>151</sup> This establishes a new meta-regulation with a reliance on process, system, and management-based standards that aims for continuous improvements. As opposed to prescriptive or performance standards through mandatory rules based regulation with check-box compliance. Supporters of reflexive governance add that it enables adaptations to address problems be they substantive or procedural as they arise.<sup>152</sup>

Reflexive regulation is indicative of the changes occurring due to non-state actors increasingly being involved in developing regulation. Reflexive regulation

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<sup>150</sup> P. Stern, Design Principles for Global Commons: Natural Resources and Emerging Technologies. (2011), Vol. 5 (2.), *International Journal of the Commons*, pp. 213-231, p. 218.

<sup>151</sup> C. Overdevest & J. Zeitlin, Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector, (2012), *Comparative Research in Law and Political Economy*, Research Report No. 16 available [http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1018&context=clpe&sei-redirect=1&referer=http%3A%2F%2Fscholar.google.co.uk%2Fscholar%3Fq%3DVPA%2Bforest%2Bregulation%26btnG%3D%26hl%3Den%26as\\_sdt%3D0%252C5#search=%22VPA%20forest%20regulation%22](http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1018&context=clpe&sei-redirect=1&referer=http%3A%2F%2Fscholar.google.co.uk%2Fscholar%3Fq%3DVPA%2Bforest%2Bregulation%26btnG%3D%26hl%3Den%26as_sdt%3D0%252C5#search=%22VPA%20forest%20regulation%22) [last accessed 20 November 2014]

<sup>152</sup> Gunningham. N, *supra* note 125, p. 91.

sees the state moving from 'rowing the boat to steering it'.<sup>153</sup> Gunningham argues that reflexive regulatory governance is reconfiguring the regulatory landscape in which the divisions between command and control public regulation and private market-based forms are less significant. Meidinger identifies environmental management and audit systems, voluntary regulation, (Forest Stewardship Council, Roundtable on Sustainable Palm Oil), Third Party Regulation (Extractive Industries Transparency Initiative) and information measures such as product labeling as emanating from such a shift in state policies.<sup>154</sup> In relation to certification Gulbrandsen claims 'that these have been innovative venues for non-state rule-making and governance'.<sup>155</sup> Teubner sees these as 'self-referential systems' in which reflexive regulation occurs with a light touch from the state.<sup>156</sup> This recognition that regulation and regulatory systems are fluid by nature informs 'decentred' regulatory models.<sup>157</sup> Indeed traditional regulation and reflexive regulation can be complimentary if designed appropriately.

Such de-centered regulation is prone to 'elite capture' and issues relating to legitimacy, accountability and transparency. The proceduralisation of regulation needs to be addressed in order to overcome these concerns. As such participation becomes a central pillar to the success of reflexive regulation in both the design and implementation phases. Interventionist command and

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<sup>153</sup> Ibid p. 27.

<sup>154</sup> E. Meidinger, The Administrative Law of Global Private-Public Regulation: The Case of Forestry, (2006), Vol. 17, Issue 1, *European Journal of International Law*, pp. 47-87.

<sup>155</sup> L. H. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forests and Fisheries*, (2010), Edward Elgar, p. 3.

<sup>156</sup> G. Teubner, After Legal Instrumentalism? Strategic Models of Post-Regulatory Law, in G. Teubner (ed) *Dilemmas in Law in the Welfare State*, (1986), European University Institute, pp. 18-34.

<sup>157</sup> Baldwin. R, Cave, & Lodge. M, *supra* note 118, 135 p.3.

control regulation through laws supporting rights to participation, access to information and access to justice is necessary to achieving effective reflexive regulatory engagement.<sup>158</sup> New digital communication and satellite technologies are seen to be key to facilitating this shift to 'smart' reflexive regulation to enabling participation. In respect of forests this ranges from training forest communities in GIS systems monitoring to facilitating satellite imaging of deforestation on open access global web-platforms.<sup>159</sup> But participation procedures need to be fair, accessible and open; the process must be broader than select elites either within government or within elite non-state actors groups, as well as international organisations. Often technologies for participation result in the exclusion of certain groups and/or they set the agenda around which regulation is developed.

Procedural rules need to take on substantive concerns regarding representation not merely technical issues.<sup>160</sup> Concepts like deliberative democracy, frequently used in relation to reflexive governance concepts, that describe the necessary frameworks need to guard against the realities experienced by different actors where inequities in power, knowledge and resources result in sham procedural exercises.<sup>161</sup> There has been a particular problem when participatory approaches are incorporated into regulatory design on forests, for instance regarding free, prior and informed consent of forest peoples in REDD+

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<sup>158</sup> For example UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, (Aarhus Convention), 2001.

<sup>159</sup> In June 2014 the World Resources Institute launched an internet based forum that participants can contribute to track using satellite technologies deforestation globally. For details see Global Forest Watch -<http://www.globalforestwatch.org> [last accessed 20 November 2014].

<sup>160</sup> J. Black, *Proceduralizing Regulation: Part 1*, (2000), Vol. 20, Issue 4, *Oxford Journal of Legal Studies*, pp. 597-614.

<sup>161</sup> *Ibid.*

projects.<sup>162</sup> Efforts to address these problems has led to building the capacity of different groups to engage by increasing knowledge and information skills.<sup>163</sup> But there still remains a significant gap in resources and power between different actors that can only be addressed through redistributive interventions.

Reflexive regulation advocates also recognise in theory that accountability and representation are integral to effectiveness. Measures put in place to monitor and report on processes and outcomes need to be independently audited. This can increase regulations costs resulting in reduced engagement and/or greater non-compliance. Concerns raised by some actors about REDD+ safeguards included in the UNFCCC Cancun Agreements have cited the compliance costs as a potential obstacle to effectiveness thereby undermining their objective to balance competing values held by different stakeholders.<sup>164</sup> Without addressing these issues, along with those cited above reflexive regulation will be impotent to ensure that non-economic values are embedded within international forest law and policy, and the governance decisions adopted to implement it.

#### 4.6 Conclusion

It is argued that there needs to be a new configuration of values to address the environmental problems that beset the planet in the Anthropocene era. Berry, amongst others, argues that the values that underpin law today are part of the

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<sup>162</sup> R. Lyster, REDD+, Transparency, Participation and Resource Rights: The Role of Law, (2011), Vol. 14, Issue 2, *Environmental Science & Policy*, pp. 118-126.

<sup>163</sup> Forest Peoples Programme, *Safeguards in REDD+ Finance Schemes*, (April 2013) available <http://www.forestpeoples.org/sites/fpp/files/publication/2013/04/e-newsletter-april-2013-colour-english.pdf> [last accessed 20 November 2014].

<sup>164</sup> C. McDermott et al, Operationalizing Social Safeguards in REDD+: Actors, Interests and Ideas, (2012), Vol. 21, *Environmental Science & Policy*, pp. 63-72.

problem. One primary issue is that all values are largely informed by anthropocentrism. Increasingly ecological lawyers believe that to overcome global environmental problems law needs to have intrinsic values at its core, with Nature rights becoming a key feature in international laws values. Although Dewey argues the anthropocentric-intrinsic values question is a false dichotomy (because human essentially create intrinsic values) reconfiguring law around the needs of other elements of the planetary ecosystem, other than humans, would alter priorities and hierarchies resulting in real sustainable development.

In this chapter I have discussed two existing value sets: rights and economic. Sets of values need to work together. They need to support principles to achieve respect for territorial integrity, equitable power and wealth distribution, sustainable development and cooperation. Conflicts between values, either within or between these two sets are recognised. Prioritising certain values over others can undermine the realisation of these international norms. For example non-recognition of collective rights is arguably an obstacle to indigenous peoples claiming their territorial, economic and cultural integrity. This, some argue, ultimately undermines efforts to achieve sustainable forest management as traditional knowledge and customary laws, which have over centuries developed through learning by doing in real time, are lost. Others see human rights, especially political, as a threat to sovereign rights of territorial control. China is a case in point. It is a country that has argued that economic and social rights can be exercised by a state that is unified. Lifting people out of poverty through forest tenure reforms is of more value than democracy. [see section 5.2.2] These

tensions between rights values are at times exacerbated by the dominance of economic values.

Economic rights, the right to determine the value of things using money as a measure, is being put forward as a main solution for global environmental problems by ecological economists. It is indicative of utilitarian economic valuation. Determining the value of the planets natural capital will, it is claimed, help achieve sustainable development. Concerns exist though not only over the reality of this claim but also that this approach, that requires the creation of new capital markets, will work against other values, especially human and indigenous peoples rights. Preventing this from happening, getting the balance right between values, requires well-designed effective regulation.

Values are made manifest by policy, regulation and legislation. However, the tools and mechanisms employed are not always dependable to achieve win-win outcomes for all stakeholders. Regulation previously based upon largely direct command and control intervention has become dominated by market-based approaches. Problems with market-based regulation are that other values can be subsumed into an economic value rationale resulting in them being usurped. For example UNFCCC market model REDD+ mechanism met with strong opposition because it challenged sovereign rights, indigenous and human rights on a number of levels.

Developing reflexive regulation with safeguards is seen to be a solution that will ensure a balance between values. The iterative relationship between law and

values implies a process, one that requires engagement. Reflexive regulation offers this potential relationship with its need for monitors, verifiers and communication to maintain feedback that is necessary for it to be adaptive should an imbalance arise. In the abstract reflexive regulation and safeguards are attractive but in reality they require strong effective governance that is transparent, accountable and participatory. Political economists have argued that reflexive regulation and safeguards for REDD+ in many tropical forest countries is unachievable due to weak governance. It highlights the disparity between the global North, often the advocates of reflexive market based regulation and safeguards, and the South.

The complexity of regulatory intervention, the values that underpin it, the principles it purports to support, and the outcomes that it results in, needs close scrutiny by legal scholars. Regulatory intervention in international forest governance has increased, especially the use of market type instruments, to achieve key principles especially sustainable development. This is set to increase once REDD+ is formally adopted at Paris UNFCCC COP 21 in December 2015.

The interlinkages between values, principles and law require comparative applied research for them to be revealed more accurately. Part 2 of this thesis is based on fieldwork in China in an effort to expose the interlinkages when intervention occurs in forest related law and policy-making processes.

## **PART 2: MOVING BEYOND THE CANOPY**

In Part 2 the case studies provide two examples of international forest law making processes. Both case studies involve a range of actors including government, international organisations and other non-state actors. The actors include Chinese, foreign and international transnational organisations. The case studies provide an opportunity to trace the processes that are undertaken to realise aspects of international forest related law in-situ. I specifically focus on the use of international principles discourse in framing the projects. The case studies also evaluate the values that are advocated and realised by the regulatory interventions that are adopted to achieve the project objectives, and consider whether attention is made to ensuring a balanced outcome. The first chapter begins by introducing China and proposes key questions as to how it engages with international law, specifically on forests, what differences this has made to its own forest law and policy, and how international actors have operated in the country to find pathways of influence in processes. The final section considers the different philosophical traditions that inform Chinese thinking on values, especially rights and economics.

## C5 China: Providing a Context for International Forest Law Interpretation and Evolution

Since 1971 China has grown to be a leading player in international affairs. This increased involvement could lead to the conclusion that there was willingness to play by international principles, norms and rules despite their perceived Eurocentric origins.<sup>1</sup> However, Xue reminds us that research on how, or even whether, China incorporates principles from international law into its own law and policy activities, both internationally and domestically, is in its infancy.<sup>2</sup> So to draw such a conclusion would be premature at this stage.

How research on this issue is framed and conducted will determine to a degree the conclusions. Most research to date on China and international law adopts an institutionalist approach, as section 5.1 will demonstrate. However, to capture multi-level complexity, especially incorporating socio-legal aspects, future research should be devised to recognise the multiple actors roles in law-making processes within China. This research needs to examine processes that occur horizontally and vertically in law-making and the implementation processes that China is engaged with internationally, regionally and domestically for it to be of value.<sup>3</sup> This chapter and the subsequent case studies provide an initial attempt

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<sup>1</sup> R. Mushkat, *China's Compliance with International Law: What has been Learned and the Gaps Remaining*, (2011), Vol. 20, *Pacific Rim Law and Policy Journal*, pp. 41-71, p. 68.

<sup>2</sup> Xue Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law*, (2012), Hague Academy of International Law, p. 7.

<sup>3</sup> Mushkat. R, *supra* note 1 p. 69.

at mapping out such an approach in relation to international forest-related law how it is embedded within China.

The chapter provides the necessary background as a foundation for the subsequent two case study chapters. It outlines how international principles and values are embedded into broader law-making processes by a range of actors in China. I begin by providing a brief background to China's evolving engagement in international law-making processes. This is followed by a survey of elements of China's domestic forest law examining how different principles and values manifest, considering to what degree international processes have informed them. I then outline the context for engagement by different international actors in law-making processes within China, and consider ways in which this has impacted the evolution and implementation of forest-related laws and policies. The final section provides a brief evaluation of how international and Chinese values inform regulatory choice in forest related policies.

### 5.1 China and International Law: An Evolving Engagement

China's approach to international law and its institutions were shaped to a significant degree by its initial encounter. European commercial, military and colonial power was 'unfairly imposed' by a 'western [international] legal order' on China.<sup>4</sup> It was categorised as a colonial subject under international law in the

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<sup>4</sup>The period, termed by China as the Century of Humiliation (*bainain guochi*), began in the aftermath of the defeat in the First Opium War (1839-1842), and lasted until the end of the Second World War. To the Chinese the Westphalian model of the law of nations, brought by European expansion, was felt as a political and cultural humiliation, involving the forcible imposition of unequal treaties; Zonglai Wang & Bin Hu, *China's Reform and Opening-up and*

nineteenth century. This led to a sense of ‘humiliation, impotence, and rage felt by China’s elites [that] knew no political boundaries,’ and deeply affected China’s stance toward the outside world.<sup>5</sup>

Due to civil war and ideological differences with the West China did not immediately participate fully in the 1945 postwar new world order. Indeed it was not a player in multilateral law-making processes for more than two decades after the war.<sup>6</sup> However, since taking up its seat at the UN in 1971, China has sought to assume what it perceives as its ‘rightful place’ within the international world order. Mushkat notes that the striking feature of contemporary Chinese engagement is not how aloof China remains from international legal norms, but how quickly it has integrated itself into them.<sup>7</sup> The divergence perhaps lies more in the interpretation of the values and principles, but this needs to be researched more extensively.

China has a different perception of relations between states than Western countries. Chinese traditional philosophy views the country as Earth’s ‘Middle Kingdom’ (*Zhongguo*). According to this tradition ‘it is a measure [symbolically]

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International Law, (2010), Vol. 9, Issue 1, *Chinese Journal of International Law*, pp. 193-203, p. 200; B. Saul, China, Natural Resources, Sovereignty and International Law, (2013), Vol. 37, Issue 2, *Asian Studies Review*, pp. 196-214, p. 198.

<sup>5</sup> D. Scott, *China Stands Up: The PRC and the International System*, (2007), Routledge, [Kindle Version], p. 11.

<sup>6</sup> The one important exception however was China’s contribution to the founding of the UN Charter. The principle of settling disputes by peaceful means in conformity with the principles of justice and international law, no threat or use of force against the territorial integrity or political independence of any state, and the codification of international law, were matters amended to the Dumbarton Oaks Proposals under the request of the Chinese delegation, and later listed in Article 1, Article 2(4), and Article 13(1) of the Charter of the United Nations. Emphasis on sovereignty-oriented principle originated from China’s urge to maintain its own sovereignty and was extended to the world by making it a “constitutional” law - Guo Ran, *International Law in China: Past and Present: Study on the History of International Law*, (2012), Vol. 14, Issue 1, *Journal of History of International Law*, pp. 147-156, p. 154.

<sup>7</sup> Mushkat, R, *supra* note 1 p. 43

of a world in disequilibrium if China does not have a place of respect commensurate with its size and history.’<sup>8</sup> This view of China’s place in the world is reflected in its ‘world multi-polarity’ (*shijie duojihua*) strategy adopted in international diplomacy. In 1990 China’s Vice-Premier Deng Xiaoping explained to the Central Communist Committee ‘in the future when the world becomes three polar, four polar or five polar ... in the so called multi-polar world China will be counted as a pole.’<sup>9</sup> Multi-polarity is an alternative world-view to the idea of universalism that has informed the Western philosophical foundations of international law-making. The significance this perspective to international law-making processes is only beginning to receive the research attention by legal scholars that it warrants.

This long-term strategy was part of China’s broader Modernisation Programme. Deng Xiaoping’s understanding of the long-game towards multi-polarity was clear in a maxim he composed on how China should handle itself in international matters: ‘observe calmly; secure our position; cope with affairs calmly; hide our capacities and bide our time; be good at maintaining a low profile; and never claim leadership’.<sup>10</sup> China’s approach to engaging in international law has adhered to Deng’s advice in the last few decades. The changing geo-political world since China began to engage in international law supports the perspective of an emerging multipolarity. When it comes to interpreting the impacts of multilevel and international actors activities within China it is necessary to consider how multipolarity affects law-making processes. It is important to

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<sup>8</sup> Gungwu Wang, *China and Southeast Asia: Myths, Threats, and Culture*, (1999), Number 13, East Asian Institution Occasional Paper, p. 46 cited in Mushkat. R, *supra* note 1 p. 57.

<sup>9</sup> Scott. D, *supra* note 5 p. 86.

<sup>10</sup> *Ibid.*

explore how shifting power balances between dominant States is reflected in non-state actors engagement strategies in international law-making processes.

After China was admitted to the UN in 1971 it accelerated its engagement with the development of international law through participating in major multilateral initiatives. China engaged enthusiastically with international environmental law-making processes. The UN Conference on the Human Environment that was held in Stockholm in 1972 presented China with its first opportunity to participate in a major meeting of states after the inclusion of China in the UN. Subsequently, China acceded to all of the international environmental law conventions during the 1980s and 1990s (in addition to the conventions it had signed in the 1970s, e.g. the World Heritage Convention, CITES and Ramsar). By 2011, China was a member of more than one hundred and thirty international organizations and a party to over three hundred international treaties (more than 90% of which were adopted after 1978), whereas before the reform and opening-up it joined only twenty international organizations and acceded to just over thirty international treaties.<sup>11</sup>

China is now increasingly entwined in international legal frameworks and processes, however opinions differ as to how it actually operates and influences legal processes within the international UN system. Mushkat cautions that China's positive embrace of international law cannot be 'proxied' by the number of its formal treaty commitments.<sup>12</sup> Relying on the number of treaties signed

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<sup>11</sup> Zonglai Wang & Bin Hu, *supra* note 4, p. 194; Hanqin Xue, China's Open Policy and International Law, (2005), Vol. 4, Issue 1, *Chinese Journal of International Law*, p. 133- 39.

<sup>12</sup> Mushkat, R, *supra* note 1, p. 43.

reveals little about the substantive contributions that China has made to the broader international norm-making process. Determining China's individual influence in the international norm-making process is a challenge as it often, especially on environmental law issues, operates through the coalition of nations known as the G77.<sup>13</sup> Xue claims that China, like other Asian countries, has shown limited influence in the making and shaping of international law, both procedurally and substantively. She consequently argues that their voices in 'legal dialogues are minimal'.<sup>14</sup> In support of this analysis Wang and Hu purport that China generally remains a passive actor when it comes to participating in, and taking advantage of, the international legal system.<sup>15</sup> They propose that China lacks theoretic innovation and creativity when it comes to international law-making and policy. In contrast, Saul argues that China is increasingly an active and constructive participant in contemporary international law-making. Since 2010, China has cooperated with Brazil, India, Russia and South Africa (BASIC) within several negotiating forums, most significantly the UNFCCC.<sup>16</sup> While on forest related matters such as REDD+ it continues to maintain support of G77 positions. Saul concludes that in common with most countries, developed countries, China also seeks to instrumentally use or change international law 'to increase its international status and promote its interests'; and over time its

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<sup>13</sup> The Group of 77 is the largest intergovernmental organization of developing countries in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development. There were 77 founding members of the organization, but by November 2013 the organization had since expanded to 133 member countries – information available <http://www.g77.org/doc/> [last accessed 6 November 2014]

<sup>14</sup> Hanquin Xue, *Meaningful Dialogue Through Common Discourse: Law and Values in a Multi-Polar World*, (2011), Vol. 1 Issue 1, *Asian Journal of International Law*, pp. 13-19, p. 18.

<sup>15</sup> Zonglai Wang & Bin Hu, *supra* note 4, p. 199.

<sup>16</sup> L. Blaxekjær & T. Nielsen, *Mapping the Narrative Positions of New Political Groups under the UNFCCC*, (2014), Vol. 14, Issue 3, *Climate Policy*, pp. 1-16, p. 4.

engagement has become 'deeper [and] more meaningful'.<sup>17</sup> Saul perhaps captures the most relevant approach required for researching China's engagement with international law at the current time. As the international axis of power changes revealing a more multi-polar landscape China's interpretation and approach to international and regional legal processes becomes more significant. Understanding these norms and values that China brings to these processes is necessary for the international community as a whole. This understanding is particularly important for developing countries as they enter into south-south cooperation agreements with Chinese actors, both state and non-state.

China's increased engagement in international law since the 1970s has occurred during an extended period of dramatic national economic, cultural and – to a lesser degree – political developments. Both international and domestic developments have required reforms of a legal system that was not geared towards the new demands being placed upon it for China to be part of the global economy. Establishing an effective legal architecture was necessary in order to address the changes that globalised development brought to China. In the early 1970's, at the beginning of the post-Mao era, China began to create the foundations of a more orthodox legal system, one based on a rule of law as opposed to a rule by law.<sup>18</sup> However China has sought to create this rule of law

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<sup>17</sup> Saul, *supra* note 4, p. 198.

<sup>18</sup> See R. Peerenboom, *China's Long March Towards the Rule of Law*, (2002), Cambridge University Press; M. Palmer, Environmental Regulation in the People's Republic of China: The Face of Domestic Law, (1998), Issue 156, *China Quarterly*, pp. 788-808.

system within its own political ideological system.<sup>19</sup> This has resulted in a dynamic hybrid legal order that draws on elements of Western legal systems and combines it with Chinese legal cultural characteristics. This hybridisation has important implications for how international principles and values are interpreted within China.

According to Xue international standards have increasingly influenced China's domestic law in practice, not just on paper, in areas such as public and administrative law, criminal law, judicial cooperation in civil and commercial matters and world trade law.<sup>20</sup> Adding to this Chan argues that international environmental law has been a particularly important positive avenue for transforming China's legal system, both substantively and procedurally.<sup>21</sup> One of the most significant challenges for the legal system lay in controlling the impact that development was having on China's environment. To determine the degree and nature of any influence it is necessary to examine domestic laws, and compare these with the developments internationally. In the following sections I provide a survey of domestic forest laws and policies, then consider the degree to which international principles have informed their development. This is followed by a brief overview of international actor engagement within China on forest related issues to outline the pathways of influence that are available and to whom. In the following two case studies I take this approach further by evaluating the influence of actors in the law and policy processes.

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<sup>19</sup> See Jianfu Chen, *Chinese Law: Context and Transformation*, (2008), Martinus Nijhoff; Peerenboom, *ibid*; S. Lubman, *Bird in a Cage: Legal Reform in China After Mao*, (1999), Stanford University Press.

<sup>20</sup> Hanqin Xue, *supra* note 14 p. 137.

<sup>21</sup> G. Chan, *China's Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights*, (2006), World Scientific Publishing, pp. 143-173, p. 155.

## 5.2 China's Forest Related Laws and Policies: Drawing on International Approaches

External influences have informed China's forest related law and policy since the late 1970s with its Open Door Policy. This occurred at a time when China itself needed to reform its own forestry practices. It had to address the consequences resulting from over-harvesting the national forest stock. The following section focuses on the current regulatory framework largely established since 1950 in China. This brief survey of forest related laws explores how international principles began to inform reforms and also how the Chinese government interpreted these to meet its own values. Before doing so the following subsection provides a background on forests in China.

### 5.2.1 China's Forest Estate: A Changing Landscape

China's native forests are concentrated in the north-east, south and south-west. Approximately 50% are coniferous and the rest deciduous, with tropical forest in Hainan Island and the south-west provinces.<sup>22</sup> For centuries the forest estate covered approximately 52% of China's land mass.<sup>23</sup> By 1949, largely due to deforestation during World War I, II and the Communist Revolution, this figure had dramatically fallen to only approximately 9%.<sup>24</sup>

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<sup>22</sup> FAO, *State of the World's Forests 2005*, (2006), UN FAO.

<sup>23</sup> For a detailed history of China and its forests see M. Elvin, *The Retreat of the Elephants: An Environmental History of China*, (2004), Yale University Press; N. Menzies, *Forest and Land Management in Imperial China*, (1994), Palgrave MacMillan.

<sup>24</sup> Ibid Elvin. M., p. 420.

China's forests are a source of fuel, medicines, herbs, nuts, fruits, fungi and other foods, as well as having an important aesthetic value to millions of Chinese and other non-Chinese people.<sup>25</sup> This places great pressure on forest resources, both those legally accessible and those where access is prohibited such as certain categories of protected areas.<sup>26</sup> Another impact is soil erosion. Almost 40% of China in 1998 experienced soil erosion. Deforestation and unsustainable farming practices caused the loss of 10,000 square kilometres soil per annum.<sup>27</sup> This contributed to mudslides in 1998 due to flooding in the Yangtze in Sichuan and Yunnan, in South West China (a particularly biotic rich region of China). The official death toll was 3,000 people and cost the Chinese government around \$20 billion.<sup>28</sup> The Chinese government responded to these problems within the forest sector with various laws, regulations and programmes.

Over the past twenty years China's forest cover has increased significantly from around 12% to more than 21%.<sup>29</sup> The increase is due to large-scale afforestation and reforestation programmes, especially those instigated following the 1998 floods.<sup>30</sup> The quality of the increased forest coverage is poor in many provinces though due to species selection for mono-cultural plantations under these afforestation and reforestation programmes. This degrades biodiversity habitat

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<sup>25</sup> W. Hyde, B. Belcher & Jintao Xu, *China's Forests: Global Lessons from Market Reforms*, (2003), Resources for the Future Press, p. 21; N. Menzies, *Our Forest, Your Ecosystem, Their Timber: Communities, Conservation, and the State in Community-Based Forest Management*, (2007), Columbia University Press.

<sup>26</sup> Ibid Menzies. N

<sup>27</sup> K. Morton, *Surviving an Environmental Crisis: Can China Adapt?* (2006), Vol. 13, Issue 1, *Brown Journal of World Affairs*, pp. 63-75.

<sup>28</sup> Ibid.

<sup>29</sup> FAO, *State of the World's Forests 2007*, (2008), UN FAO.

<sup>30</sup> China now has the largest plantation area in the world (46.7 million hectares), which accounts for 31% of its total forest area; figure cited in S. Demurger & Yang Weiyong, *Economic Changes and Afforestation Incentives in Rural China*, (2006), Vol. 11, Issue 5, *Environment and Development Economics*, pp. 629-649, p. 632.

and ecosystem functions such as carbon sequestration, water filtration, and soil formation.<sup>31</sup> Despite this China has received widespread praise from the international community for reversing forest estate depletion at such a scale.<sup>32</sup>

### 5.2.2 China's Forest Related Laws and Policies

China's Constitution and its basic laws does not set forth a general provision on the status of treaties in the domestic legal system. However since the founding of the People's Republic of China in 1949, implementation of its international obligations in good faith has been not only one of China's basic policies of foreign affairs, but also a fundamental principle of Chinese law. All international treaties shall be concluded in accordance with the provisions of the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, promulgated in 1990 and fulfill necessary domestic legal procedures. Therefore, subject to the nature of the relevant treaty and the mandate of the contracting governmental department, international treaties to which China is a party in principle have binding force in domestic law, except for those provisions to which China has made reservations.<sup>33</sup> As such the Chinese government has incorporated international principles and values into Chinese forest related law and policy since the late 1980s on different issues including biodiversity conservation, forest management, and ecosystem functions especially carbon sequestration capacity.

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<sup>31</sup> H. Weyerhaeuser et al, *Biofuels in China: An Analysis of the Opportunities and Challenges of *Jatropha Curcas* in Southwest*, (2007), ICRAF available <http://www.icraf.org/downloads/publications/PDFS/WP07259.PDF> [last accessed 13 October 2014]; Yuxing Zhang & Conghe Song, Impacts of Afforestation, Deforestation and Reforestation on Forest Cover in China from 1949-2003, (2006), Vol. 104, Issue 7, *Journal of Forestry*, pp. 383-387.

<sup>32</sup> W. Hyde, F. William, B. Belcher & Jintao Xu. *China's Forests: Global Lessons from Market Reforms*, (2003) Resources for the Future.

<sup>33</sup> Hanqin, Xue, and Jin Qian. International Treaties in the Chinese Domestic Legal System, (2009), Vol. 8, Issue 2, *Chinese Journal of International Law*, pp. 299-322.

The main legal instruments are the 1998 Forestry Law of the People's Republic of China, with the associated 2000 Regulation for Implementation.<sup>34</sup> These provide the regulatory framework for forest resources, both regarding matters concerning utilisation and conservation. Subsequent regulations, especially the 2008 Guidelines on Fully Promoting Collective Forest Tenure Reform System, have made important substantive and procedural changes to the 1998 Forestry Law. Other important laws and regulations compliment the Forestry Law in its objectives or, in some cases, undermine the effectiveness (in particular, laws on mining)<sup>35</sup> such as the 1991 Law on Water and Soil Conservation and the 1994 Nature Reserve Regulation.<sup>36</sup> There are also many local laws and regulations.<sup>37</sup>As a result China's forest governance framework is a complex mix of national laws, implementing decrees, plans, programmes and promulgations.

This section examines China's forest law and policy approach and considers the influence from the international agenda on the way in which it has developed. I specifically focus on the changes to forest governance and the incorporation of the principle of sustainable development. These lay the foundations for understanding other areas of Chinese forest related law and policy. Chapters 6

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<sup>34</sup> Forest Law of the PRC (1998). The Law was passed by the Standing Committee of the Sixth National People's Congress on September 20 1984 and Revised in Line with the Decision on the Revision of the Forest Law of the People's Republic of China of the Second Session of the Ninth National People's Congress on April 29 1998.

<sup>35</sup> Palmer. M, *supra* note 18, pp. 788-808.

<sup>36</sup> PRC Water and Soil Conservation Law (1991); the PRC Nature Reserve Regulation (1994) superseded the PRC Provision on the Management of Nature Reserves for Forests and Wild Animals (1985).

<sup>37</sup> Xi Wang, *Forest Policy, Law and Public Participation in China*, available online <http://pub.iges.or.jp/modules/envirolib/upload/1503/attach/3ws-25-wang.pdf> [last accessed 6 October t 2014] – no date provided.

and 7 provide more detailed coverage of biodiversity conservation and climate change related forest law and policy as they relate specifically to the case studies.

#### i) Governance: China's Decentralisation of Forest Lands

China upholds the PSNR over forest resources. Like many developing countries it has had until relatively recently exercised state control over forest governance. Recent reforms to decentralise tenure and management over forest resources has opened up the opportunity for non-Chinese actors to engage with forest farmers directly. This section traces the development of China's forest governance decentralisation and considers its impact.

Centralised ownership of forest resources was introduced with China's first statutory forest law. The 1915 Forest and Hunting Law appropriated all China's forest land setting a precedent for absolute State ownership.<sup>38</sup> Prior to this user and access rights to forest and forest lands were recognised and enforced by local communities through informal institutions established by customary norms, conventions, beliefs, religions and ethics <sup>39</sup>

China's 1982 Constitution clearly reiterates a centralised governance approach. Article 9 stipulates that 'all mineral resources, waters, forests, mountains, grassland, unrelieved land, beaches and other natural resources are owned by the state, that is by the people, with the exception of the forest, mountains,

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<sup>38</sup> Yaoqi Zhang & Shashi Kant, Collective Forests and Forestland: Physical Asset Rights versus Economic Rights, in P. Ho (ed), *Developmental Dilemmas: Land Reform and Institutional Change in China*, (2005), Routledge, pp. 283-308, p. 288.

<sup>39</sup> Jintao Xu, A. White & U. Lele, *China's Forest Tenure Reforms: Impacts and Implications for Choice, Conservation and Climate Change*, (2010), Rights and Resources Initiative, Washington DC, available [http://www.rightsandresources.org/documents/files/doc\\_1403.pdf](http://www.rightsandresources.org/documents/files/doc_1403.pdf) [last accessed 6 October 2014].

grasslands and unrealised land and beaches that are owned by collectives in accordance with the law.’<sup>40</sup> The 1998 Forestry Law in alignment with the Constitution states that ‘the forest resources shall belong to the state.’<sup>41</sup> Although the state owns forest land tenure rights have changed dramatically in the past forty years, especially in the 21<sup>st</sup> century.

In the mid-1980s some form of forest management decentralisation was being undertaken in many regions of the world, especially in developing countries. International organisations, such as the World Bank, CIFOR and the FAO, were promoting the decentralisation of some aspects of forest management as an alternative to centralised state management in order to achieve development objectives.<sup>42</sup> China was at the forefront of this new trend in land governance. In 1978, as part of Deng Xiaoping’s approach to economic development, China’s Household Responsibility System was adopted. This devolved some degree of autonomy to village households over which crops grow and to incentivise a market-based approach to commodity supplies and increase rural incomes.<sup>43</sup>

In 1981 China divided non-agricultural land into ‘state owned forest’, under the jurisdiction of national forest and land management agencies; ‘collective forest’ under the jurisdiction of local government [‘the collective’]; and, freehold forest for which households have management responsibilities. Decentralisation in

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<sup>40</sup> Article 9 PRC Constitution (1982); ‘Collectives’ at the time had leasehold rights over forest resources not freehold ownership.

<sup>41</sup> Article 1 PRC Forest Law (1998).

<sup>42</sup> Liu Dachang, Policies and Programme to Make Decentralization Effective: A Case Study of China in C. Pierce Colfer, G Ram Dahal & D. Capistrano, (eds) *Lessons from Decentralization: Money, Justice and the Quest for Good Governance in Asia-Pacific*, (2008), Earthscan, pp. 83-101.

<sup>43</sup> Jianchu Xu & D. R. Melick, Rethinking the Effectiveness of Public Protected Areas in South-Western China, (2007) Vol. 21, No. 2, *Conservation Biology* p. 319.

China firstly focused on collective forests, which in the early 1980s constituted 55% of all of China's forests, as opposed to State forests.<sup>44</sup> In 1983 the proclamation of the 'Decisions on the Issues of Forest Conservation and Forestry Development' by the State Council, known as the Three Fixes (*San Ding*), aimed to stabilise ownership of forest and forest land by clarifying user rights on collective forest land, and to establish a system of management responsibility and greater individualisation.<sup>45</sup> This regulatory intervention sought to incentivise forest farmers to increase output, thereby raising household income. Unfortunately the measure had unexpected perverse outcomes.

This first phase in the government's drive for forest decentralisation ultimately resulted in a period of unprecedented forest degradation and increases in illegal logging.<sup>46</sup> This was partly due to forest government agencies continuing to regard collective forests as state economic resources to which they imposed categorisation and zoning that criminalised collective activities.<sup>47</sup> Many national or provincial government agencies continued to exert tight control over access to and use of lands, forestlands, and wastelands.<sup>48</sup> The rationale for such close supervision has always been that only the state is capable of the scientific management needed to produce sufficient forest products for the nation and to ensure an adequate level of environmental protection for the greater good of

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<sup>44</sup> Liu Dachang *supra* note 42, p. 84.

<sup>45</sup> Yaoqi Zhang & Shashi Kant, *supra* note 31, p. 293.

<sup>46</sup> Liu Dachang *supra* note 42, p. 84.

<sup>47</sup> C. McDermott, B. Cashore & P. Kanowski, *Global Environmental Forest Policies: An International Comparison*, (2001), Earthscan Publishing, p163; Yaoqi Zhang & Shashi Kant, *supra* note 38, p. 302.

<sup>48</sup> Liu Dachang, Tenure and Management of Non-State Forests in China Since 1950: A Historical Review, (2001), Vol. 6, Issue 2, *Environmental History*, pp. 239-63; N. Menzies & N. Peluso, Rights of Access to Upland Forest Resources in Southwest China, (1992), Vol. 6, Issue 1, *Journal of World Forest Resource Management*, pp. 1-20.

society. This is despite evidence that state management has at best failed to ensure adequate environmental protection and has at worst been the principal agent of environmental degradation and forest loss.<sup>49</sup> A change in approach was clearly needed by the Chinese government.

In an attempt to improve the situation the national government undertook further forest decentralisation. The 2002 Rural Land Contracting Law introduced contracts enabling transfer, inheritance and mortgaging of user rights to non-agricultural land.<sup>50</sup> Decentralisation of collective forests, other than state forests, began in 2003 when the State Council issued 'Decisions regarding speeding up forestry development', known as No. 9 Policy. The new decentralisation model was piloted in Fujian, Jiangxi and Liaoning province.<sup>51</sup> Certificates with clearly defined forest tenure rights over forest land were issued.<sup>52</sup> By 2004, 80% of collective forests had been devolved to individual households under a variety of contractual arrangements.<sup>53</sup> Feedback from the pilots informed the State Council's 2008 'Guidelines on Fully Providing Collective Forest Tenure Reform System.'<sup>54</sup> This laid out substantive and procedural guidelines to achieve greater transfer of forest use rights to individualized holders. The reform sought to

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<sup>49</sup> See L. Ross, *Environmental Policy in China*, (1988), Bloomington, University of Indiana Press; J. Shapiro, *Mao's War Against Nature: Politics and the Environment in Revolutionary China*, (2001), Cambridge University Press; V. Smil, *China's Environmental Crisis: An Inquiry into the Limits of National Development*, (1993), Armonk, Sharpe.

<sup>50</sup> Jintao Xu, A. White & U. Lele, *supra* note 39.

<sup>51</sup> Liu Dachang *supra* note 42, p. 85.

<sup>52</sup> State Forestry Administration Announces Statistics, February 28, 2006, available <http://www.chinacsr.com/en/2006/02/28/330-state-forestry-administration-announces-statistics/> [last accessed 20 November 2014].

<sup>53</sup> Guangping Miao & R. West, Chinese Collective Forest Land: Contributions and Constraints, (2004), Vol. 6, *International Forestry Review*, pp. 282-298, p. 284.

<sup>54</sup> In 2003 the State Council issued 'Decisions regarding speeding up forestry development', known as No. 9 Policy. A new decentralisation model was piloted in Fujian, Jiangxi and Liaoning province – cited in Liu Dachang *supra* note 42, p. 85.

separate the ownership and the management right of the forest land, and leave the management to the household or individual while ownership remained with the state. A forest land right certificate legally guaranteed forest-related farmers' disposal right and benefits. Under the new system villages could choose to reallocate to individuals, establish partnerships between households, transfer user rights to private contractors or to maintain collective management. Decisions to reallocate were to be agreed by a two-thirds majority by the entire village assembly, or a committee of village representatives.<sup>55</sup> Despite this oversight concerns over households leasing tenure at reduced rates to multinational companies resulted in 'Amendments to the 2008 Guidelines'.<sup>56</sup>

In 2009, the government abolished forest collectives as the forest household responsibility system was finally fully established throughout China.<sup>57</sup> Within the course of three decades China has undertaken the largest ever decentralisation of forest management in the world. The intention is to provide economic opportunities for farmers, including leasing tenure to foreign actors, but also to motivate more sustainable forest management.

#### ii) Incorporating Sustainable Forest Management

The conceptual principle of sustainability has increasingly informed China's national forest law and policy discourse. A duty of care already rests with the state under the 1982 Constitution to 'protect and improve the environment in

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<sup>55</sup> Jintao Xu, A. White & U. Lele, *supra* note 39.

<sup>56</sup> Cited in Jiang Song et al, The Reform of Collective Forest Rights in China and its Implementation in the Fushun City Region, (2014), Vol. 57, Issue 2, *Annals of Forest Research*, available <http://www.afrjournal.org/index.php/afr/article/viewFile/210/315> [last accessed 13 October 2014]

<sup>57</sup> *Ibid.*

which people live and the ecological environment.’<sup>58</sup> China adopted terminology encouraging intelligent use of natural resources into its Constitution before ‘sustainable development’ became a recognised norm in international law. In 1982, Article 9 of the 1978 Constitution was amended to include the concept of ‘the rational use of natural resources.’<sup>59</sup> Although no definition was provided for ‘rational use’, the term was already extant in international law.<sup>60</sup> Following the 1992 Rio UN Conference on Environment and Development (UNCED) the concept of sustainable development was included into China’s 1996 ‘Ninth Five Year Plan of National and Social Development and the Outline of the Long-term Targets up to 2010’. The concept of *xietlaofazhan* (harmonious development) was included in the 11<sup>th</sup> Five Year Plan.<sup>61</sup> Subsequent Five Year Plans continue to incorporate the concept broadening the understanding of environment, development and sustainability each time.<sup>62</sup>

After participating in the UNCED at Rio in 1992, during which the UN CBD, UNFCCC and Forest Principles were agreed, the Chinese government produced a national Agenda 21 ‘Action Plan for Environmental Protection of China’.<sup>63</sup> In

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<sup>58</sup> Article 26 PRC Constitution (1982 Amendment).

<sup>59</sup> Ibid Article 9. ‘... the State ensures the rational use of natural resources’

<sup>60</sup> Article 3.1 Ramsar Convention (1971), promoted the ‘wise use’ of wetlands.

<sup>61</sup> 11<sup>th</sup> Five Year Plan for national Economic Social Development of the People’s Republic of China (2006-2010), 2006.

<sup>62</sup> Originally the concept, which appeared at the 1973 First national Conference on Environmental Protection, simply referred to the need to balance development with nature. This first appeared over thirty years ago at the First National Conference on Environmental Protection in 1973. It simply referred to the need to balance development with nature. At the Third Plenary Session of the Sixteenth Party Central Committee in 2003, the interpretation was further expanded to include four more balancing aspects: urban and rural, economy and society, coastal and inland regions, and domestic and international – Morton. K, *supra* note 27, p. 69.

<sup>63</sup> Agenda 21 was a non-legally binding document that was adopted at the UNCED 1992. All countries were encouraged to devise a national Agenda 21 to implement the objectives. The rapid production of the PRC’s Agenda 21 can be seen as a positive indicator of China’s commitment to reverse the environmental degradation that was hastening due to rapid industrial based development.

drafting this legislation China drew on the recommendations for an integrated ecological approach for forest management as articulated in the Rio Conventions, especially the CBD, as well as the Forest Principles. The 'Action Plan' recognises that historically 'China's traditions of exploitation and management [have tended] to ignore ... [the] multiple-functional character of forest resources [and] completely overlook[ed] the ecological value.'<sup>64</sup> Acknowledging previous failings in forest management approaches is an important step in moving towards sustainable ones. On paper China did, although inconsistently, start to make these moves after this initial step.

To implement China's Agenda 21 the Ministry of Forestry <sup>65</sup> adopted the 'Forestry Action Plan for China's Agenda 21' and the 'Program for the Comprehensive Development of Forests in Mountain Areas'. This included targets for forests between 1991-2000 regarding conservation and sustainable utilisation. The area of afforestation was to reach 57.16 million hectares, the annual growth of timber to reach 345 million cubic meters, and forest coverage to rise to 16%.<sup>66</sup> Despite the language of integration the Programmes were essentially an extension of existing afforestation and reforestation projects.<sup>67</sup> [section 7.3.3] More importantly the 1998 Forest Law failed to reverse a sectoral approach. It establishes five separate categories for forest management:

- 1) protection forests;
- 2) timber stands;

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<sup>64</sup> PRC Agenda 21, Chapter 14, Section E, paragraph 14.5, (1994).

<sup>65</sup> The PRC Ministry of Forestry became the State Forest Administration in 1998.

<sup>66</sup> National Environmental Protection Agency of China, *National Report on the Implementation of the Biodiversity Convention of China*, (1998), China Environmental Science Press, Beijing, p. 20.

<sup>67</sup> Jintao Xu, White. A & U. Lele. U, *supra* note 39.

- 3) economic forests (trees mainly aimed at the production of fruits, edible oils, soft drinks, industrial raw materials and medicinal materials);
- 4) firewood forests and;
- 5) forests for special use (forests and trees aimed at national defence, environment protection, scenic beauty).<sup>68</sup>

These categories applied to state and collective forest land. China's subsequent forest laws and policies continued to also adopt land use management planning that categorized forest use sectorally.<sup>69</sup> This failure to incorporate in practice the concept of multi-functionality into forest law and policy has ramifications. It continues to cause tensions at the community level especially with greater decentralisation, as both case studies will demonstrate.

### 5.3 International Actors and Chinese Forest Law and Policy: Pathways of Influence

In the decades since the late 1970s international actors including other states have become increasingly active in China. However, China has historically had anxiety regarding non-Chinese operating in the country. This sentiment was captured when Deng Xiaoping, despite supporting an 'open door policy', believing it necessary to the success of his Modernisation Programme for China, noted that 'when you open the windows flies and mosquitoes come in'.<sup>70</sup> Although the opening up enabled China to engage internationally, rather than leading to a one-way flow of external actors into the country, the focus of this

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<sup>68</sup> PRC Forest Law 1998 Article 4

<sup>69</sup> S. Demurger & Yang Weiyong, Economic Changes and Afforestation Incentives in Rural China, (2006), Vol. 11, *Environment and Development Economics*, p636.

<sup>70</sup> Deng Xiaoping cited in Scott. D, *supra* note 5, p. 82.

thesis is on the impacts of international actors on forest law and policy-making processes operating within the jurisdiction of China.

This section firstly outlines China's forest administrative architecture. I then turn to discuss international organisations and non-Chinese NSA involvement in the country, identifying the different pathways that they have been able to exploit in forest related law and policy-making processes. I conclude by evaluating the different regulatory mechanisms that international actors have advocated through their engagement, the values these have advanced, and the impact they have had on forests and forest peoples in China. This is by no means intended to be a comprehensive survey but aims to provide a framework for analysis. It raises issues that are taken up further in the two case studies that follow in Chapters 6 and 7.

### 5.3.1 The Chinese State

Officially in China the government is the primary actor in developing and implementing forest law and policy. Although laws give a degree of autonomy at the provincial level, as well as to autonomous areas, in reality this is highly circumscribed.<sup>71</sup> This is in part due to an appropriately hierarchical governance structure.<sup>72</sup> China has a complex regulatory structure and administration, the head being the National Peoples' Congress There are six levels of government

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<sup>71</sup> Article 5 - The organs of self-government of national autonomous areas must uphold the unity of the country and guarantee that the Constitution and other laws are observed and implemented in these areas, *Law of the People's Republic of China on Regional National Autonomy*, Adopted at the Second Session of the Sixth National People's Congress, promulgated by Order No.13 of the President of the People's Republic of China on May 31, 1984, and effective as of October 1, 1984.

<sup>72</sup> Xiaoying Ma & L. Ortolano, *Environmental Regulation in China: Institutions, Enforcement and Compliance* (2006) Rowman and Littlefield Publishers, pp. 33-55; Jianchu Xu & J. Ribot, Decentralisation and Accountability of Forest Management: A Case from Yunnan, South West China, (2004), Vol. 16, Issue 1, *The European Journal of Development Research*, pp. 153-173.

jurisdiction: national, provincial, prefecture, county, township and administrative village. The administrative villages supervise a number of 'natural villages'. The main provincial government departments maintain representative offices at the prefecture level, and also within the county and township government structure. Townships are the lowest level of government structure in the official administration.<sup>73</sup> The scale of government in China means that officials and bureaucrats can exercise at the most local levels authority and power we a certain degree of autonomy.<sup>74</sup>

A number of different Ministries, bureaus and departments are responsible for governance of matters affecting forest use and management. The main authority is the State Forest Administration (SFA). The SFA was formed in 1999 following the Yangtze and Yellow River disasters. [see section 5.2.1] It replaced the Ministry of Forestry that had operated since 1949. The SFA operates at the central governmental level. It is also the agency with which bi-lateral and multilateral initiatives on forests with external actors, such as USAID, the European Union and the World Bank, will mainly work. Forestry departments are located within the provinces, autonomous regions and municipalities. Forestry bureaus are based in prefectures and cities as well as in counties, provinces and small cities. Finally, what are known as forestry stations cover

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<sup>73</sup> The administrative and governance structure of the People's Republic of China is defined in Article 30 of the 1982 PRC Constitution states that - *The 'administrative division of the People's Republic of China is as follows: (1) The country is divided into provinces, autonomous regions and municipalities directly under the Central Government; (2) Provinces and autonomous regions are divided into autonomous prefectures, counties, autonomous counties and cities; (3) Counties and autonomous counties are divided into townships, nationality townships and towns. Municipalities directly under the Central Government and other large cities are divided into districts and counties. Autonomous prefectures are divided into counties, autonomous counties, and cities. All autonomous regions, autonomous prefectures and autonomous counties are national autonomous areas.'*

<sup>74</sup> Understanding the impact this has on how law and policy is developed an interpreted requires much greater comparative legal anthropological research.

towns and townships, whilst forestry representatives operate at the village administrative levels. At the provincial level, and especially from the prefecture down to the county level, the number of departments at any one forestry bureau will depend on the local geography and resources available.<sup>75</sup> As chapter 6 will explain through a case study the resources available depend on how forests are valued politically and economically amongst local government officials across Ministries and departments.

The SFA is composed of multiple departments including: Tree Planting and Afforestation, Forest Resources Management, Wildlife Conservation, Forest Police, Forest Policy and Legislation, Development, Science and Technology and International Cooperation. Associated with domestic and foreign forestry development projects, a large number of agencies have also been created such as, Nature Forestry Protection Programme Management Office nationwide, Conversion Sloping Farmland into Forestry and Pasture Management Office, Forestry Ecological Benefit Compensation Management Office.<sup>76</sup> The SFA is independent and answerable only to the State Council and the National People's Congress. As the SFA is directly under the control of the State Council it is not answerable to any other Ministry and had its own budget.<sup>77</sup>

It is this vast web of institutional bodies that are responsible for developing and implementing forest related laws and policies. Problems occur, due to a lack of coordination, communication, overlapping and conflicting objectives, as well as

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<sup>75</sup> See [www.sfmchina.cn](http://www.sfmchina.cn) for details [last accessed 20 November 2014].

<sup>76</sup> Liu Jinlong, *Forests in the Mist: Livelihoods and Responses to the Natural Forest Protection Program in China*, (2006), Thesis Wageningen University, pp. 141-164.

<sup>77</sup> SFM, *supra* note 75.

budgetary constraints.<sup>78</sup> This is exacerbated by competition between Ministries and departments is an ongoing obstacle to an integrated approach on forest related issues. Strong and influential government agencies such as planning commissions (jiwei), economic commissions (jingwei), construction commissions (jianwei), and industrial and commercial authorities are known to be reluctant to endorse and enforce stringent environmental measures for fear that they might slow down economic growth. With a strong pro-growth orientation, both central and local governments have usually sided with these economic bureaus and have subordinated environmental protection to economic interests when the two have been in conflict.<sup>79</sup> This transfers to the international level where different Ministries and departments within the SFA are assigned to participate in different issues relating to forests. Unlike many developing countries China has sufficient resources to participate fully at international forest related meetings, including the various conferences of the parties.<sup>80</sup>

The situation for IOs and international NSA in China is complex due to the political context, as well as the administrative framework outlined above. Bernstein and Cashore identified four pathways that IOs and NSA could pursue to influence forest governance matters, including law and policies normative

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<sup>78</sup> B. van de Rooj, Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns, in P. Ho and E. Vermeer, *China's Limits to Growth: Greening State and Society*, (2006), Blackwell Publishing, pp. 43-71.

<sup>79</sup> C. Wing Hung Lo & Sai Wing Leung, Environmental Agency and Public Opinion in Guahgzhou: The Limits of a Popular Approach to Environmental Governance, (2000), Issue 163, *The China Quarterly*, pp. 677-704; R. Edmonds, *Patterns of China's Lost Harmony* (1994), Routledge, pp. 255-56; Smil, , *supra* note 45; L. Ross, *Environmental Policy in China*, (1988), Indiana University Press; B. Sinkule & L. Ortolano, *Implementing Environmental Policy in China*, (1995), Praeger, p. 68; A. R. Jahiel, The Contradictory Impact of Reform and Environmental Protection, (1997), Issue 159, *The China Quarterly*, pp. 81-103; and A. R. Jahiel, The Organization of Environmental Protection in China, (1998), Issue 156, *The China Quarterly*, pp. 757-787.

<sup>80</sup> K. Morton, The Emergence of NGOs in China and their Transnational Linkages: Implications for Domestic Reform, (2005), Vol. 59, Issue 4, *Australian Journal of International Affairs*, pp. 519-532.

framework.<sup>81</sup> [section 3.1] These included direct access to domestic policy processes and creating or intervening in new markets. The following sections will examine how IOs and NSA have sought to use these pathways to influence Chinese forest related law and policy.

### 5.3.2 International Organisations

The number of international organisations (IOs) that China works with has risen exponentially in the last few decades. As a signatory to numerous UN Treatises China works within a vast array of UN treaty Secretariats and administrative bodies e.g. the UNFCCC Kyoto Protocol's CDM Executive Board. UN agencies, including UNDP, UNESCO, UNEP and the FAO, as well as international financial institutions, especially the World Bank<sup>82</sup>, have funded projects and programmes in China to assist the government to improve forestry practice and overall governance. IOs initiatives have influenced the type of forest laws and policies, and how they are implemented, in China through finance and capacity building, including for policy and legal reforms, especially since the 1990's.<sup>83</sup> Other IOs have acted as facilitators for bi-lateral funding such as UNDP, which coordinated the activities and distribution of funding for the EU-China Biodiversity

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<sup>81</sup> S. Bernstein & B. Cashore, Complex Global Governance and Domestic Policies: Four Pathways of Influence, (2012), Vol. 88, Issue 3, *International Affairs*, pp. 585-604.

<sup>82</sup> In 1998, the year that mountain deforestation resulted in the Yangtze and Yellow River flooding disasters, the World Bank financed the Forestry Development in Poor Areas Project that supported afforestation and reforestation programmes. The project ran between 1998-2002 and had a fund of US\$364 million. For details of the project and it's implementation see Liu Jinlong et al, *supra* note 76, pp. 111-121. The World Bank closed its office in China in 2008 as the country no longer qualified as a developing country according to it's criteria.

<sup>83</sup> Liu Jinlong, Wu Junqi, Yuan Juanwen & Zhou Pidong, Enhancing Community Participation: Participatory Forestry Management in China, in J. Plummer & J. Taylor (eds), *Community Participation in China: Issues and Processes for Capacity Building*, (2004), Earthscan, pp. 93-139. P. 95.

Programme 2008-11 [see chapter 6].<sup>84</sup> UNDP itself has directed funding towards poverty alleviation in forest regions in collaboration with the Chinese government. [see chapter 7]. Also the adoption of international standards can result in close collaboration with particular organisations e.g. IUCN on protected areas designation criteria [see chapter 6] and the Global Bioenergy Partnership [see chapter 7].

According to institutionalist international law theory it is the introduction of China's government, especially its forestry related bureaucracy, to international IOs guidelines, standards and working procedures that provides opportunities for the Internationalisation of the country's forest governance.[see section 3.1] IOs working in China must respect state sovereignty. However their presence changes the governance landscape in a country. Many IOs know that there is an opportunity while working within a country to influence the interpretation of international normative principles and promote certain values, especially UN agencies and IFIs dominated by developed countries.<sup>85</sup> The process though of influence is not one-way, as institutionalist legal scholars would argue, it is a complex interaction between actors with differential access resources and power as the case studies will illustrate in chapters 6 and 7.

### 5.3.3 Transnational Enterprises

The business sector works specifically to intervene in existing markets as well as encourage the development of new ones. Transnational enterprises (TNE) have

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<sup>84</sup> The EU-China Biodiversity Programme is a 30 million euros fund for technical assistance and cooperation in the field of biodiversity policy between 2005-2011 further information available [http://www.welcomeurope.com/european-funds/eu-china-biodiversity-programme-663+563.html#tab=onglet\\_details](http://www.welcomeurope.com/european-funds/eu-china-biodiversity-programme-663+563.html#tab=onglet_details) [last accessed 20 November 2014].

<sup>85</sup> J. E. Alvarez, *International Organizations as Law-makers*, (2005), Oxford University Press.

become important players within the economy of China. During China's Modernisation Programme it encouraged foreign direct investment through regulatory and financial incentives. In 2001, when China became a member of the international organisation the WTO, the country became more open to foreign investment and was perceived by investors and business enterprises to be less risky as international legal standards were incorporated into commercial and banking laws.<sup>86</sup>

Forest products were one sector that attracted foreign investment in China. Today China is one of the largest importers of unprocessed round wood timber.<sup>87</sup> As a consequence several forest related transnational enterprises (TNEs) have opened operations in China, both from Northern and Southern countries, ranging from planting, harvesting, production and processing, such as Asia Pulp and Paper, up to businesses in the retail sector, such as IKEA and B&Q.<sup>88</sup> Domestic enterprises have also flourished in China with large-scale companies like Sino-Forest and the state run China National Forest Product

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<sup>86</sup> R. Yearwood with R. Davis, How the World Trade Organization Law Makes Itself Possible: 'Every time I describe a city, I am saying something about Venice', A. Perry-Kessaris, (eds) *Socio-Legal Approaches to International Economic Law: Text context and subtext*, (2013), Routledge, pp. 53-64.

<sup>87</sup> See Xiufang Sun & K. Canby, *FLEGT Asia, Baseline Study 1, China: Overview of Forest Law Enforcement, Governance and Trade*, (June 2011), Forest Trends, Washington DC and the European Forest Institute available [http://www.euflegt.efi.int/files/attachments/euflegt/baseline\\_study\\_china\\_report\\_en.pdf](http://www.euflegt.efi.int/files/attachments/euflegt/baseline_study_china_report_en.pdf) [last accessed 7 October 2014]; Xiufang Sun, Katsigri. E & A. White, Meeting China's Demand for Forest Products: An Overview of Import Trends, Ports of Entry, and Supplying Countries, with Emphasis on the Asia-Pacific Region, (2004), Vol. 6, Issue 4, *International Forestry Review*, available [http://147.202.71.177/~forestrtr/documents/files/doc\\_1433.pdf](http://147.202.71.177/~forestrtr/documents/files/doc_1433.pdf) [last accessed 6 October 2014].

<sup>88</sup> Shuguang Wang, Foreign Retailers in Post-WTO China: Stories of Success and Setbacks, (2009), Vol. 15, Issue 1, *Asia Pacific Business Review*, pp. 59-77.

Industry Company dominating, many of which are now operating in other countries, especially in the Congo Basin.<sup>89</sup>

International developments on specific forest issues can also have influences on TNE's practices in a country. For example the focus on illegal trade in forest products over the last decade within policy circles internationally has impacted the China's forestry businesses, both domestic and foreign enterprises operating in the country.<sup>90</sup> Efforts in other jurisdictions to reduce the trade in illegal timber and forest products have met with disquiet amongst the Chinese government. For example the Chinese government viewed the extension of the US Lacey Act to include illegal timber products as a protectionist measure.<sup>91</sup> However one outcome from engagement on illegal logging was to fast-track forest certification in China.

To meet the growth in demand for certified sustainable forest products internationally; especially within the European and US markets several TNEs, pressurised by timber trading associations and non-government organisations, encouraged the Chinese government to promote international certification

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<sup>89</sup> K. Canby, J. Hewitt, L. Bailey, E. Katsigris, Xiufang Sun, *Forest Products Trade Between China & Africa: An Analysis of Imports & Exports* (2008) Forest Trends; Washington, USA available [http://www.forest-trends.org/publication\\_details.php?publicationID=515](http://www.forest-trends.org/publication_details.php?publicationID=515) [last accessed 6 October 2014].

<sup>90</sup> Cao, Xiaozhi, *Does it Pay to be Green? An Integrated View of Environmental Marketing with Evidence from China*, (2011), Dissertation, University of Washington, US available <https://dlib.lib.washington.edu/dspace/handle/1773/16366> [last accessed 6 October 2014].

<sup>91</sup> This was the case despite the first prosecution under the Lacey Act (Amended) being imports from China of baby cribs made from illegally harvested timber imports; the US government consequently worked with Chinese and MNE on the Lacey Act – see Amendment to the U.S. Lacey Act: Implications for Chinese Forest Products Exporters (Chinese and English) available <http://www.sidley.com/laceyactbriefchina/> [last accessed 21 August 2013].

standards in the forest sector.<sup>92</sup> Initially China worked with WWF to meet the FSC international standards within state forests. However in 2012 the government introduced its own national standard that was endorsed by PEFC.<sup>93</sup> These SFM standards contained fewer social safeguard requirements to be met by companies seeking certification.<sup>94</sup> However, PEFC has endorsed similar certification schemes with limited social safeguards in Canada, the US and Europe.<sup>95</sup>

TNEs have sought to promote new market initiatives in China forest carbon trading and bioenergy, resulting from international climate change negotiations. TNEs have worked with other actors, especially the state, to see law and policy developments that will make such markets feasible. [see chapter 7]. But TNEs are not the only international NSA to advocate for changes to China's forest practices through certification, and the development of new markets like forest carbon trading. International non-governmental organisations (NGOs) have also been engaged, as both the case studies will illustrate.

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<sup>92</sup> K. Buckingham & P. Jepson, Forest Certification with Chinese Characteristics: State Engagement with Non-state Market-driven Governance, (2013) Vol. 54, Issue 3 *Eurasian Geography and Economics*, pp. 280-299.

<sup>93</sup> *ibid.*

<sup>94</sup> M. Stone, China and Certification: A Questionable Future, (2006), Vol. 10, Issue 6, *Journal of Forestry*, pp. 332-334.

<sup>95</sup> L. H. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forests and Fisheries*, (2010), Edward Elgar, p. 16.

### 5.3.4 Other NSA: Non-Governmental Organisations, Indigenous Peoples Organisations, Epistemic Communities and Transnational Networks

Other NSA, aside from TNEs, have to varying degrees had opportunities to engage in processes feeding into law and policy-making. In this section I discuss each individually.

#### **i) Non-Governmental Organisations**

With its Open Door policy the Chinese government cautiously granted access to foreign and international NGOs to contribute to law and policy development. These areas were restricted to non-sensitive issues, conservation being one. As a result NGOs, both domestic and international, are playing an increasing role in China, especially on environmental issues.<sup>96</sup> Several large international environmental NGOs, including most notably WWF, Conservation International and The Nature Conservancy, have come to dominate work on forest related issues with the Chinese government's official endorsement. WWF, has for instance, worked closely with the Chinese government since the 1980s to advance conservation objectives.<sup>97</sup> In some way this is similar to Chinese NGOs. Domestic NGOs in China are largely state sponsored, hence the name GONGOs, government organised NGOs.<sup>98</sup> The government primarily sees them as civil servants, employed to help the government achieve policy. When they go beyond the mandate the government permits individuals and organisations are

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<sup>96</sup> P. Ho, Greening without Conflict? Environmentalism, NGOs and Civil Society in China, (2001), Vol. 32 Issue 5, *Development and Change*, pp. 893-921.

<sup>97</sup> Jie Chen, Transnational Environmental Movement: Impacts on Green Civil Society in China, (2010), Vol. 65, Issue 19, *Journal of Contemporary China*, pp. 503-523, p. 509. The Chinese government endorses WWF China's annual work plan – interview with WWF Director of Conservation Programme, Beijing office, China, 2 July 2008.

<sup>98</sup> T. M, Salmenkari, Encounters between Chinese NGOs and the State: Distance, Roles and Voice, (2014), Vol. 50, *Issues and Studies*, pp. 35-52.

silenced.<sup>99</sup> This environment within which to campaign affects international NGOs operating in the country.

The manner in which international NGOs choose to work in China has a direct correlation with the success of their outcomes.<sup>100</sup> Although an international NGO can be registered many find that their legal status is somewhat ambivalent.<sup>101</sup> Most international NGOs quickly realise the advocacy strategies when operating in China need to be adapted to the 'Chinese way'. Like their domestic counterparts international NGOs need to avoid protests and human rights issues if they are to not be banned. For example when Greenpeace (usually perceived as confrontational NGO) began working in China it adopted a campaign strategy that down played its foreign nature and emphasised working for the national interest assisting the government to attain its environment related plans. This was evident in its campaign against the actions of Asia Pulp and Paper's illegal harvesting of timber in south-west China when it framed the issues in a way that made the foreign company undermining national sovereignty.<sup>102</sup>

The Chinese state is not monolithic. It is composed of multiple layers of administration and bureaucracy. International NGOs try to strategically use the conflicts between the national government and local authorities to their advantage. Indeed it is arguable that this is a two-way process in which the

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<sup>99</sup> Although both case studies are environmental in nature no GONGO was involved directly in the projects being discussed.

<sup>100</sup> M. Gunter, Jr & A. Rosen, Two-Level Games of International Environmental NGOs in China, (2012), Vol. 3, *William and Mary Policy Review*, pp. 270-294, p. 289.

<sup>101</sup> *Ibid* p. 273.

<sup>102</sup> W. Ford, NGOs from Overseas are a Growing Force, (8, June 2012), *China Daily Europe* available [http://europe.chinadaily.com.cn/epaper/2012-06/08/content\\_15486242.htm](http://europe.chinadaily.com.cn/epaper/2012-06/08/content_15486242.htm) [last accessed 22 November 2014].

national authorities, including the SFA, use international NGOs to achieve improved law and policy implementation, as well as initiate reforms in the provinces who are often reluctant due to the need to use precious budget reserves on new implementing and enforcing new regulation. This synergistic relationship is evident from the work with the US/UK NGO Global Witness by the national government to tackle corruption and improve transparency within China on the timber trade, as well as other natural resources, an issue that has a high priority within the current administration.<sup>103</sup>

It is important, as the number of international NGOs in China increases, especially environmental ones, to analyse how they contribute to the Chinese advocacy community.<sup>104</sup> Ho believes international NGOs have a positive influence on Chinese governance and domestic civil society. He argues that international NGOs play an important role in embedding a different kind of activism which drip feeds western democratic concepts, including participation, into political and civil society.<sup>105</sup> However the need to not be confrontational with the Chinese authorities and to foster good 'guanxi' (relations) could be seen as a form of cooption of international NGOs along with their expertise, technical knowledge and funding, to fulfilling the interests of the State. This colluding develops an environment of 'normative chess' in which many voices are

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<sup>103</sup> P. Ho, *Greening Industries in Newly Industrializing Countries: Asian-style Leapfrogging?*, (2007), Kegan Paul, p. 197.

<sup>104</sup> See C. Wing Hung Lo & Sai Wing Leung, *Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance*, (2000), Vol. 163, *The China Quarterly*, p. 679; R. Weller, *Alternate Civilities: Democracy and Culture in China and Taiwan*, (2001), Westview Press; P. Ho, *Greening without Conflict? Environmentalism, Green NGOs and Civil Society in China*, (2001), Vol. 32, Issue 5, *Development and Change* 893–921 cited in P. Ho, *Embedded Activism and Political Change in a Semi-Authoritarian Context*, *China Information*, (2007), Vol. XXI Issue 2, The Documentation and Research Centre for Modern China, Sinological Institute, Leiden University, Netherlands.

<sup>105</sup> *Ibid*, P. Ho.

excluded and as a consequence a hegemonic authoritarianism is perpetuated. Indigenous peoples are one group whose voices are not heard effectively within China.

## **ii) Indigenous Peoples Organisations**

China does not welcome foreign indigenous peoples organisations to campaign within its jurisdiction. This is in part due to its own perspective on the indigenous peoples in China. Under Chinese law ethnic peoples are not recognised as indigenous which closes down avenues to claim rights under international law.<sup>106</sup> The Chinese government's perspective on the concept of indigeneity has meant that indigenous peoples organisations have less political scope for leverage on the basis of indigeneity in China. Although China voted in 2007 to adopt the UN Resolution Declaration on the Rights of Indigenous Peoples it, like many Asian and African countries, resists the concept of indigeneity and its applicability within their own national jurisdiction.<sup>107</sup> There is by default in the minds of the Chinese government therefore no need to campaign for the rights, especially self-determination, of any indigenous peoples in China, so no need for the advocacy of foreign indigenous peoples organisations in the country.

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<sup>106</sup> There are fifty-six officially recognised ethnic peoples groups throughout China.<sup>106</sup> Although China's Han peoples constitute 91.6% of the population, the remaining fifty-five ethnic groups, despite being a small percentage, are large in numbers given the size of China's population - 2000 National Population Survey of China

<sup>107</sup> M. Hathaway, The Emergence of Indigeneity: Public Intellectuals and an Indigenous Space in Southwest China, (2010), Vol. 25, Issue 2, *Cultural Anthropology*, pp. 301-333, p. 304, available [http://michaeljhathaway.org/emergence\\_of\\_indigeneity.pdf](http://michaeljhathaway.org/emergence_of_indigeneity.pdf) [last accessed 6 October 2014].

Despite this international norms relating to indigenous peoples, especially self-determination and free, prior informed consent over decisions taken relating to natural resources extraction on land used by indigenous peoples have fed into how law and policy is implemented in China, including in relation to forests, by creating an 'indigenous space'.<sup>108</sup> International actors, including international organisations like the World Bank and UNDP, as well as international NGOs, funded by northern donors like the Ford Foundation, often have made ethnic peoples involvement in forest related projects conditional on community participation [see chapters 6 and 7].<sup>109</sup> When this is successful ethnic communities have an opportunity to use the space to articulate their own norms and values. The success of this however depends on how the process is designed and by whom. It can be argued that it is more the concept of indigeneity that is used as a vehicle to advance other objectives by actors, such as getting international funding, rather than empowering the indigenous peoples of and by themselves in China in regard to forest law and policy.

### **iii) Epistemic Communities and Transnational Networks**

A further avenue for engagement for NSA is through epistemic communities and transnational networks. With China's growing participation in international law the associated epistemic communities relating to environmental, economic and human rights related issues became open to Chinese involvement. Also epistemic communities are vehicles through which international actors can collaborate with others in China to circumvent restrictions imposed elsewhere, such as on

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

NGOs. With the restrictions on establishing NGOs in China many people formed epistemic communities as research centres or associations to raise funding and have access to international networks.<sup>110</sup> A number of key Chinese forestry academics worked closely with international epistemic bodies, such as Forest Trends, the World Resources Institute, CIFOR and the Rights and Resources Initiative to produce reports, briefings and articles that could hide behind the veil of technical neutrality but were important contributions to critiquing and evaluating the design and implementation of Chinese forest law and policies. International epistemic communities draw on international literature, which is often in a privileged position in shaping norm-setting agendas on forest related issues.

The Chinese government adopts a strategic engagement with non-Chinese actors to achieve its own national priorities. Often the national government works with international actors to push for changes at the local level. The recent permission granted to the NGO, Global Witness to have an office in Beijing indicates the national governments' interest in tackling corruption at the provisional level. Yet numerous international actors, including state representatives such as the EU, work in China with different cultural interpretations of international norms relating to sustainable development, equity and participation and often try to assert these through their work either covertly or overtly. Many see the opportunity of being in China as a means to help change the culture to one that is more 'Western' in its cultural understandings of these norms. International

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<sup>110</sup> M. Schroeder, *The Construction of China's Climate Politics: Transnational NGOs and the Spiral Model of International Relations*, (2008), Vol. 21, Issue 4, *Cambridge Review of International Affairs*, pp. 505-525.

actors require a nuanced strategic approach when working in the country, which often results in compromises that collude with the agenda of the authorities, arguably undermining the values and principles they aspire to advance. However, further research is needed before concluding the positive and negative impacts of these strategies. The two cases studies for this thesis will contribute to this area of scholarship.

#### 5.4 Values: Different but Converging Around a Common Purpose

The Western origins of international law are reflected in fundamental values of the sovereign territorial rights and the right of the individual. In the post-colonial era the rights of minorities, especially those of indigenous peoples, known as collective rights gained prominence within the international arena, primarily to redress historical abuses during the colonial period by European states. China's engagement with international law does not, as Mushkat indicates, mean that the values underpinning its interpretation are the same as its Western European philosophical origins.<sup>111</sup> China, a significant country in world history, has its own extensive philosophical cannon that informs its worldviews. This section considers how these different worldviews and philosophical traditions relate in terms of the international values embedded in international law, and how these may feed into the development of law and policy relating to forests.

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<sup>111</sup> Mushkat. R, *supra* note 1.

#### 5.4.1 China's Harmonious Anthropocentrism for the Anthropocene

China has in recent years acknowledged the need to achieve 'harmonious development'.<sup>112</sup> The country has experienced extreme environmental degradation and has recognised that certain values need to be revised to ensure that future generations inherit a healthy environment.<sup>113</sup> Incorporation into long-term planning of environment related themes such as water, land use planning and energy illustrate the Chinese states response to the Anthropocene.

China's laws and policies are informed by more anthropocentric than intrinsic values. China has historically bent nature to it's own needs.<sup>114</sup> In May 1958 when launching the Three Gorges Dam project, Mao stated that he would 'make the high mountain bow its head; make the river yield its way.' This captures a deeply anthropocentric value toward nature that informed the Communist era.<sup>115</sup> This continues today. In addressing the environmental problems it faces China's response is one guided by top-down planning to achieve specific outcomes. These often involve significant interventions in the environment such as large-scale tree planting, or super-size hydro-dam projects such as the Three Gorges Dam. China bases its intervention in the environment on the supremacy of man.<sup>116</sup> However it is important to put these observations in context. In the modern era all major superpowers (Russia, US and several European countries) have acted in a similar fashion constructing bridges, dams, roads, railways,

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<sup>112</sup> China's Eleventh Five-Year Plan, (2006-2010).

<sup>113</sup> E. Economy, *The Great Leap Backward? The Costs of China's Environmental Crisis*, (2007), *Foreign Affairs*, pp. 38-59.

<sup>114</sup> Elvin. M, *supra* note 23, p. 173.

<sup>115</sup> Mao Zedong, *Speeches at the Second Session of the Eighth Party Congress (8-23 May 1958)*, The First Speech (8 May 1958), in Joint Publications Research Service, *Miscellany of Mao Zedong Thought (1949-1968)* cited in J. Shapiro, *Mao's War Against Nature: Politics and the Environment in revolutionary China*, (2001), Cambridge University Press, p. 68.

<sup>116</sup> *Ibid.* p. 21.

skyscrapers and dams at a large-scale.<sup>117</sup> Anthropocentrism is the value that dominates all countries. Yet recent rhetoric from the Chinese government is emphasising harmony and balance within ecological limits.

Since the end of the Maoist era China has reconnected with two key philosophers: Lao Tzu and Confucius. Each promotes a harmony between heaven and earth; albeit they offer different approaches to achieve this. Confucianism fosters a managerial approach that is more attractive to the current Chinese authorities.<sup>118</sup> Both now inform national approaches to the environment, especially in the discourse adopted by the State to communicate policy to varying degrees.<sup>119</sup> Harris argues that Confucianism in the past has been appropriated and distorted by Imperial authorities to promote environmental destruction.<sup>120</sup> The modern Chinese authorities may well appropriate Confucianism for the benefit of the planetary ecosystem. A managed, planned harmony with the environment using science and technology are advocated as the ways forward.<sup>121</sup> In the Anthropocene different value traditions may be directed towards an end purpose to support action within particular cultures, a direction that moves more towards intrinsic ally orientated anthropocentrism.

#### 5.4.2 Rights as Values: China's Priorities

In chapter 4 rights were disaggregated into four categories: state, human, collective and nature. [see section 4.3]. Although China is signatory to all

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<sup>117</sup> J. Diamond, *Collapse: How Societies Choose to Fail or Survive*, (2011), Penguin, pp. 358-378.

<sup>118</sup> Tu Weiming, The Ecological Turn in New Confucian Humanism: Implications for China and the World, (2001), *Daedalus*, pp. 243-264.

<sup>119</sup> Scott., *supra* note 5, p. 182.

<sup>120</sup> P. Harris, 'Getting rich is glorious': Environmental values in the People's Republic of China, (2004), Vol. 13, Issue 2, *Environmental Values*, pp. 145-165.

<sup>121</sup> R. E. Grumbine & Jianchu Xu, Creating a 'Conservation with Chinese Characteristics', (2011), Vol. 144 Issue 5, *Biological Conservation*, pp. 1347-1355.

treatises that endorse sovereign rights, human rights, collective including indigenous rights it has a different perspective on how to prioritise these rights as values within its own governance model. The right of the state is supreme in China. The relationship of citizens with the state is similar to that developed in imperial China. In many ways China has a social contract with its citizens. This arrangement extends well before the period of the Communist era. It has a determining power over how human and collective rights, such as indigenous peoples, are interpreted and exercised in China.<sup>122</sup> China, in 2004, amended the Constitution so guaranteeing that the 'State respects and protects human rights'.<sup>123</sup> Despite this, the international community, specifically Europe and America, frequently singles out China for non-compliance of human rights. This happens despite issuing statistics to demonstrate it is fulfilling many rights, normally social and economic rights.<sup>124</sup> Biddulph concludes that Chinese human rights are advanced with maintaining national stability a primary objective.<sup>125</sup> Due to this political rights, those that liberal democratic human rights advocates see as indivisible from all rights, are not prioritised.

Self-determination for groups in China is non-negotiable, as they are understood to be part of the wider Chinese collective. For ethnic peoples China has established a working relationship. China secures the collective rights of ethnic peoples within the framework of statutory national law. The 'autonomy' of the

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<sup>122</sup> R. Weatherley, *Making China Strong: The Role of Nationalism in Chinese Thinking on Democracy and Human Rights*, (2014), Palgrave Macmillan, Chapter 5.

<sup>123</sup> Article 33, Peoples Republic of China Constitution 1982 (Amendment 2004).

<sup>124</sup> R. Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, (2005), Vol. 38, *Cornell International Law Journal*, pp.71-172.

<sup>125</sup> S. Biddulph, *The Stability Imperative: Human Rights and Law in China*, (2015), UBC Press, pp. 237-252.

ethnic peoples is circumscribed by the requirement that laws and policy are consistent with the constitution. In reality there is little real scope for divergence from the ideological values underpinning the State.

#### 5.4.3 Economic Values the China Way

The global economy operates according to law constructed around economic values that can be traced back to 18<sup>th</sup> century Europe. Chinese economic thought has its origins within a number of schools of thought, the most significant being Confucianism and Taoism.<sup>126</sup> It, like many other countries, adopted, in the mid-20<sup>th</sup> century under Mao, Marxist economic theory and tried to organise law and regulation for the economy around a different value set. In the late 1970s Deng Xiaoping along with US President Regan and UK Prime Minister Thatcher adopted policies that were informed by market-based liberal economics in the late 1970s and 1980s.<sup>127</sup> China's model is one that is supported with significant state intervention and is therefore different to both the US and UK who emphasised the reduction of state involvement. Chinese economic history has resulted in a hybridised version of market-based liberalism. But it is more complex than simply being socialist. There is a link between the value of the state and the economy, this is evident with the scale of commitment the Chinese government appears to be providing to address the environment.

The environment is one aspect of China's economy that is seeing the state adopt public schemes to reverse the impacts of externalities of production. China has

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<sup>126</sup> Cheng Lin, T. Peach, & Wang Fang (ed), *The History of Ancient Chinese Economic Thought*, Routledge, 2014.

<sup>127</sup> D. Harvey, *A Brief History of Neoliberalism*, (2005), Oxford University Press, pp. 12-36.

increasingly sought to apply market-based valuation of the environment in its regulatory policies albeit within a market-socialist system in which the state continues to have a significant influence. The largest payment for ecosystem services in the world is the Chinese states compensation mechanism to farmers under the SLCP. [see section 7.2.3] China continues to explore opportunities to extend payment for ecosystem services in relation to water and carbon. In 2016 China's national carbon trading scheme will officially be launched.<sup>128</sup> The Chinese government intention is to manage and control state disaggregation when opening up markets by appropriate regulation in order to balance competing values.

#### **5.4.4 Regulation to Balance Values: Appearances and Reality**

The Chinese state, nationally at least, appears to be keen to balance economic values with those of economic and social rights within its own ideological political culture. As outlined in section 4.5.2 this needs some kind of reflexive procedural regulation.

In recent years China has fostered the development of national civil society that particularly acts as a feedback on environmental and social policy. This is heavily circumscribed and has limited scope for political critique. Nevertheless, Ho notes this is an important feedback loop on environmental issues that contributes to improved compliance on regulation.<sup>129</sup> The government's Open Government Information Regulations and the Environmental Information Disclosure

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<sup>128</sup> *China confirms 2016 national carbon market plans*, (2014) BioRes - available <http://www.ictsd.org/bridges-news/biores/news/china-confirms-2016-national-carbon-market-plans> [last accessed 28 November 2014].

<sup>129</sup> Ho, P, *supra* note 96 p. 919.

Measures in 2008 are important initial step towards some level of transparency.<sup>130</sup> This again provides some possibility for oversight within an authoritarian regime.<sup>131</sup> The Chinese also have established Green Courts as a judicial mechanism through which to enforce environmental legislation.<sup>132</sup> Through meeting international monitoring and reporting obligations under international forest related law obligations such as under the UNFCCC, the CBD and Ramsar China collects data on the effect of policies. The degree to which the information can be trusted is a different matter. What is important is that there exist feedback processes through which policies can be revised if not meeting intended objectives all levels of the law-making process.

Despite the above mechanisms for feedback significant criticisms exist of the Chinese authorities for failing to provide independent participation, monitoring and reporting on law and policy.<sup>133</sup> Participation by civil society is necessary for accountable, legitimate and transparent sustainable development. How this is achieved differs in China. Although overtly encouraging disclosure and transparency in regulation it is according to the political culture in China. The Chinese government prioritises collective responsibility over democracy to develop, and enforce, law and policy in its governance culture. Any state

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<sup>130</sup> Zhang, Lei, A. P. J. Mol & Guizhen He, Transparency and Information Disclosure in China's Environmental Governance, (2015), Vol. 18, *Current Opinion in Environmental Sustainability*, pp. 17-14.

<sup>131</sup> Tan, Yeling, Transparency without Democracy: The Unexpected Effects of China's Environmental Disclosure Policy, (2014) Vol. 27, Issue 1, *Governance*, pp. 37-62; B. Van Rooij, People's Regulation: Citizens and Implementation of Law in China, (2012), Vol. 25, *Columbia Journal of Asian Law*, pp. 116-52, p. 148.

<sup>132</sup> D. Goetz, China's Environmental Problems: Is a Specialized Court the Solution, (2009), Vol. 18, *Pacific Rim Law and Policy Journal*, p.155.

<sup>133</sup> G. Kostka, Barriers to the Implementation of Environmental Policies at the Local Level in China, (2014), *World Bank Policy Research Working Paper*, available <https://wdronline.worldbank.com/bitstream/handle/10986/20345/WPS7016.txt?sequence=2> [last accessed 20 June 2015].

disaggregation through regulation is targeted at realising a collective goal; this includes participation, be it through market-based mechanisms or reflexive procedural regulations.

The balancing of values may not be working as government regulators may have intended. This is because the necessary mechanisms to ensure governance are not in place. Those in power; reflecting national cultural values and priorities agree safeguards that fit their overall political ideology. The idealism of those advocating reflexive regulation and safeguards need to recognise the political and power aspects in practice.

## 5.5 Conclusion

Since China has engaged with international law-making process after taking a seat at the UN it has grown in political and economic stature. Its worldview of multipolarity is becoming a reality in international relations. This in itself is beginning to have an impact on the approach to interpreting international law domestically. It also has ramifications for global relations, especially between the south where China has emerged as a significant voice in regional affairs.

As a signatory to all international forest related conventions, and also soft law declarations and agreements, China has had opportunities to influence the development of norms through domestic action, engagement with international actors both within and beyond its own jurisdiction. Although China has adopted regulations to incentivise market-based activities, especially its historic forest land decentralisation programme, it remains a country that exercises command

and control regulation to achieve its objectives. This, however, is changing. Increasingly the Chinese government is working with non-state actors, including international ones, to develop markets for forest products and ecosystem services, most recently carbon.

Chinese values, which inform its political economy and jurisprudence, differ to that of the Western values that guided the development of the international legal and economic system. Yet given the global and domestic environmental challenges a convergence may be underway drawing on different philosophical traditions to rationalize the regulatory interventions adopted to address them.

China's extension of market-based approaches to the environment has set challenges to its governance structures. More reflexive procedural mechanisms that feed back information require greater transparency and participation. In an authoritarian state such flexible governance can be difficult to deliver. However China has cultural values whereby the collective good is prioritised over the needs of individuals. This can be a basis for collaborative reflexive regulation albeit largely prescribed by the state.

The following two case studies illustrate the various pathways adopted by actors within a multilevel world to achieve particular norms and values in forest related law and policy in a localised context.

## C6: Forest Protected Areas: Piloting National Parks in Yunnan, South-West China

Conservation is a core concept in international forest related law discourse, especially in-situ.<sup>1</sup> Forest conservation is a recognised commitment under a number of multilateral environmental agreements (MEAs).<sup>2</sup> These commitments have led to a significant increase in statutory legally protected forests throughout the world.<sup>3</sup> The approaches to conservation that have been adopted within MEAs have changed over time, moving away from species specific to habitats, and most recently to a broader ecosystem approach.<sup>4</sup> This broader approach to forest ecosystems conservation is often referred to in the literature as a 'landscape approach' The concept is developing rapidly in conjunction with advances in the ecological sciences.<sup>5</sup> As of the 1990s, many countries have sought to incorporate new landscape approaches contained in MEAs into their domestic conservation laws through legal reform and policy changes. Doing this in reality though is challenging for countries, especially developing ones.

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<sup>1</sup> C. McDermott, A. O'Carroll & P. Wood, *International Forest Policy - The Instruments, Agreements and Processes that Shape It*, (2007), UNDESA/UNFFF.

<sup>2</sup> Including The Convention on Biological Diversity (1992); Convention on the International Trade in Endangered Species (1974); World Heritage Convention (1972); The Ramsar Convention on Wetlands (1971).

<sup>3</sup> In 2009 13.5% of all forests were officially protected under IUCN categories - C. Schmitt et al, *Global Ecological Forest Classification and Forest Protected Area Gap Analysis. analyses and recommendations in view of the 10% target for forest protection under the Convention on Biological Diversity*, (2009, 2<sup>nd</sup> ed.), Freiburg University Press, Germany, p. ii, available [https://www.cbd.int/forest/doc/forest-gap-analysis\\_2009\\_2nd%20ed.pdf](https://www.cbd.int/forest/doc/forest-gap-analysis_2009_2nd%20ed.pdf) [last accessed 11 November 2014].

<sup>4</sup> See S. Lyster, *International Wildlife Law*, (1985), Cambridge University Press; The original edition that documented these phases was revised and published as M. Bowman, D. Davies & C. Redgwell, *Lyster's International Wildlife Law*, (2012), Cambridge University Press.

<sup>5</sup> E. Barrow et al, *Forest Landscape Restoration: Building Assets for People and Nature: Experience from East Africa*, (2002), IUCN.

How countries implement commitments under MEAs is changing the law and policy strategies on forest conservation. The interface between competing values and norms requires skillful law and policy design and implementation. International actors, especially international organisations and non-state ones, are playing increased roles. This opens up pathways to influence forest conservation related law and policy. But questions need to be asked as to who benefits from these processes, especially where international actors have a traction within them that local communities do not.

China is Party to all international forest related conservation agreements. Both before, and for a period since, the signing of these agreements China's laws and regulations for protected areas, as in numerous other countries, have evolved in an ad hoc fashion. As a consequence of this many overlaps, gaps and inconsistencies have developed between the regulations. Since 2004, the Chinese government has worked with various actors, both domestic and transnational, to design a new comprehensive biodiversity legal framework in order to address these problems. However, to date, the complexity of competing interests over natural resources law and policy has meant that no law has yet been agreed.

During this reform process though proposals for new approaches to protected areas were put forward. These included ones for National Parks based on international standards developed by IUCN. In June 2007 China's first national park to be designed incorporating IUCN's internationally recognised standards, Pudacao National Park, was opened. It sought to combine sustainable development with conservation in one of China's most culturally and biodiverse

rich Provinces. Multiple actors, from international to local, were involved in the process, though not all were in favour of the National Park.

This chapter provides a detailed account of the establishment of Pudacao National Park in Yunnan Province, South West China, the normative objectives that different actors sought to influence, and the regulatory tools employed to advance perceived priority values. The chapter begins with an overview of forest conservation in China, the regulatory framework prior to 2008 and identifies where reforms were needed. This is followed by a survey of the introduction of the National Park concept to Yunnan Province, the overall challenges that existed and the strategies employed by actors to advance the National Park through drawing on international norms and values. The chapter then turns to examine the process undertaken to establish Pudacao National Park, China's first such protected area. It examines the values and principles that informed the management plans. The chapter concludes by evaluating the mechanisms employed to achieve a balance between competing values for the realisation of sustainable outcomes for tourism, conservation and ethnic communities cultures.

This case study draws on qualitative research materials collected over the course of four years in China.<sup>6</sup> The primary materials for the case study were gathered during a three-month field research visit.<sup>7</sup> During this period in Yunnan key actors involved in the National Park's development, including local government

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<sup>6</sup> These were between 2005-2009.

<sup>7</sup> In Yunnan, China between June-September 2008.

officials, international and local NGOs, epistemic groups, some community representatives<sup>8</sup> and businesses, were interviewed. Interviews were semi-structured and conducted in English where possible or through an interpreter.<sup>9</sup> Secondary sources on further developments are used to provide updates to the reform process and actors' roles in it.

## 6.1 Forests, Protected Areas and Law

The following section outlines the historical development of China's protected areas laws relating to forests. It then provides an overview of the legal and administrative framework, focusing on the designation and zoning of protected areas. This is followed by an analysis of the finance and regulatory mechanism employed by China in order to achieve normative and substantive conservation objectives for in-situ forest conservation. It concludes by considering the gaps, overlaps and issues needing reformed.

### 6.1.1 Background

International law incorporated in-situ conservation into its agenda in the early 20<sup>th</sup> century.<sup>10</sup> Although people have developed in-situ conservation practices for centuries those embodied in contemporary international law drew upon approaches developed under Western colonialism in the late 18<sup>th</sup> century until the mid-20<sup>th</sup> century.<sup>11</sup> These conservation techniques prioritised protecting certain species, often mega-flora and fauna, for instrumentalist, anthropogenic

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<sup>8</sup> Due to fears of the potential consequences of speaking with a non-Chinese researcher the local community representatives, especially those for ethnic groups, who were approached declined to be interviewed. This means that their voices are not included directly in this research.

<sup>9</sup> All interviews are available on audio file with the author.

<sup>10</sup> P. Sands et al, *Principles of International Environmental Law*, (2012 2<sup>nd</sup> ed), Cambridge University Press, p. 449.

<sup>11</sup> G. Barton, *Empire Forestry and the Origins of Environmentalism*, (2002), Cambridge University Press.

reasons such as hunting.<sup>12</sup> Other conservation approaches, promoting more intrinsically orientated anthropogenic values, sought to protect wilderness intact; early examples of this approach include Yellowstone National Park in the United States.<sup>13</sup>

Protected areas were frequently forced upon indigenous peoples and communities. Under colonialism the legal concept of *terra nullis* denied indigenous peoples territorial rights to their customary lands.<sup>14</sup> This colonial legacy continues to linger within conservation practice despite efforts to develop more participatory approaches.<sup>15</sup> The introduction of conservation laws in many post-colonial countries through statute continues to make many indigenous peoples and communities squatters on their own land and liable to eviction.<sup>16</sup> Since the 1970s certain actors, especially those representing forest based and indigenous peoples communities, have advocated for human and collective rights to be incorporated into in-situ conservation. With the growing recognition of indigenous peoples rights in the past decade, as well as a number of court cases setting important precedents<sup>17</sup>, actors engaged in in-situ conservation law and policy development are aware of the advocacy to adopt more rights based

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<sup>12</sup> Ibid.

<sup>13</sup> M. Colchester, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation*, (1994), Diane Publishing, p. 28.

<sup>14</sup> P. West, J. Igoe, & D. Brockington, Parks and Peoples: The Social Impact of Protected Areas, *Annual Review of Anthropology*, (2006), pp. 251-277.

<sup>15</sup> There is a growing concern amongst environmentalists that conservation promoted through the UNFCCC REDD+ mechanism is undermining community and indigenous peoples rights – see for example B. Beymer-Farris & T. Bassett, The REDD Menace: Resurgent Protectionism in Tanzania's Mangrove Forests, (2012) Vol. 22 Issue 2, *Global Environmental Change*, pp. 332-341.

<sup>16</sup> L. Alden Wily, From Meeting Needs to Honouring Rights: The Evolution of Community Forestry, in Jeffrey Sayer (ed) *Forestry and Development*, (2005), Earthscan, pp. 388-94.

<sup>17</sup> For example on participation and user rights see S. J. Anaya & C. Grossman, The Case of *Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, (2002), Vol. 19, Issue 1, *Arizona Journal of International and Comparative Law*.

participatory approaches, but more importantly secure land titles.<sup>18</sup> China's protected area history is one not immersed in that of Western colonialism. However as this chapter will demonstrate the transplant of international conservation law concepts has resulted in similar negative impacts on forest dependent peoples.

China's earliest 'protected areas' such as imperial hunting reserves served ritual and/or recreational purposes for royal families and the elites of society.<sup>19</sup> Other protected areas were established by ethnic communities for spiritual cultural reasons, but would also often have positive social distributive benefits and ecological feedbacks.<sup>20</sup> The diverse values that motivated different actors to protect nature were indicative of the plural multi-layered nature of societies that co-existed in what is now contemporary China. However, subsequently in the late 19<sup>th</sup> century, many of these forest protected areas, especially those of ethnic communities, were lost due to an unprecedented rate of appropriation under the Qing Dynasty. The levels of forest destruction driven by demand for fuel and agriculture conversion rose exponentially with post-World War II industrialization, particularly the Iron and Steel Campaign in the 1950s under

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<sup>18</sup> L. Siegele et al, *Conservation and Human Rights—Who Says What?*, (2009), IIED, p. 47.

<sup>19</sup> For a comprehensive introduction to conservation during China's Imperial era see N. Menzies, *Forest and Land Use Management in Imperial China*, (1994), St. Martin's Press, New York; M. Elvin, *The Retreat of the Elephants: An Environmental History of China*, (2004), Yale University Press; R. Edmonds, *Patterns of China's Lost Harmony: A Survey of the Country's Environmental Degradation and Protection*, (1994), Routledge; Li Jung. The Development of the Evolution of Chinese Modern Landscape Architecture, (2002), Vol. 4. *China Landscape*, pp. 3–4; Jianchu Xu & D. R. Melick, Rethinking the Effectiveness of Public Protected Areas in South-Western China, (2007) Vol. 21, Issue. 2, *Conservation Biology*, p. 319.

<sup>20</sup> Luo Yaofeng, Liu, Jinlong & Zhang Dahong, Role of Traditional Beliefs of Baima Tibetans in Biodiversity Conservation in China, (2008), Vol. 257, Issue 1, *Forest Ecology and Management*, pp. 1995-2001.

the Maoist regime.<sup>21</sup> During this period of forest loss the modern concept of official state designated public protected areas was introduced.

Concerns over the loss of traditional community protected areas were raised at the Third Session of the National People's Congress in 1956. However Party members 'hoped the government [would] designate specific areas in all provinces where the felling of trees is prohibited in the interest of conservation of natural plant life and scientific research.'<sup>22</sup> Communist party members did not seek to salvage the traditional community values that had previously underpinned forest protection. Instead they supported modern science-based approaches to designating and maintaining protected areas. This was an important shift in the values that informed Chinese conservation law and policy-making. Immediately after the 1956 National People's Congress the Ministry of Forestry authorised a 'Draft Plan for the Designation of Areas (National Forestry Reserves) where the Felling of Natural Trees is Prohibited' and 'The Draft Plan for Methods of Hunting Control'.<sup>23</sup> The same year the State Forestry Department implemented 'The Role of the Natural Forest Logging Ban Area (Nature Reserve)'. Within a year the Dinghu Shan Nature Reserve was established in Guangdong Province. This was the first official statutory designated protected area in the new Peoples Republic of China.<sup>24</sup> It instigated a state monopoly over biodiversity and ecosystems conservation governance, ending a pluralistic

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<sup>21</sup> Xiu Yang & Xu Ming, Biodiversity Conservation in Changbai Mountain Biosphere Reserve, North-Eastern China: Status, Problem and Strategy, (2003), Vol. 12, *Biodiversity and Conservation* pp. 883-903, p. 894.

<sup>22</sup> G. Murray & J. Cook, *The Greening of China*, (2004), China International Press, pp. 28-34.

<sup>23</sup> *Ibid.*

<sup>24</sup> J. Yang & S. Xu, Recent Protected Area Designation in China; an evaluation of administrative and statutory procedures, (2004), Vol. 170, *The Geographical Journal*, pp. 39-50; J. Shapiro, *Mao's War against Nature; Politics and the Environment in Revolutionary China*, (2001), Cambridge University Press.

approach in which ethnic and local communities' use of traditional knowledge and techniques and customary laws were recognised.

Few protected areas were established prior to the late 1970's. By the time of Mao's death in 1978 only 34 nature reserves existed in China. This scenario changed rapidly over the coming years (see Graph 1 below) coinciding with China becoming Party to conservation related multilateral environmental agreements. New domestic pressures such as increasing tourism, both national and international, in China, as well as the imposition of a strict logging ban in certain Provinces in 1998 after the Yangtze and Yellow River disasters saw a rapid rise in the designation of Forest Parks by the State Forest Administration.<sup>25</sup> This rise has continued into the early 21<sup>st</sup> century with ambitious plans to expand the area of land dedicated to conservation.

By 2005 there were a total number of 2538 nature reserves in China, accounting for over 15% of it's territory, this already exceeded the world average of 10%.<sup>26</sup>

In December 2001, the State Forestry Administration implemented the National Programme for Wildlife Protection and Nature Reserves. It aims to establish

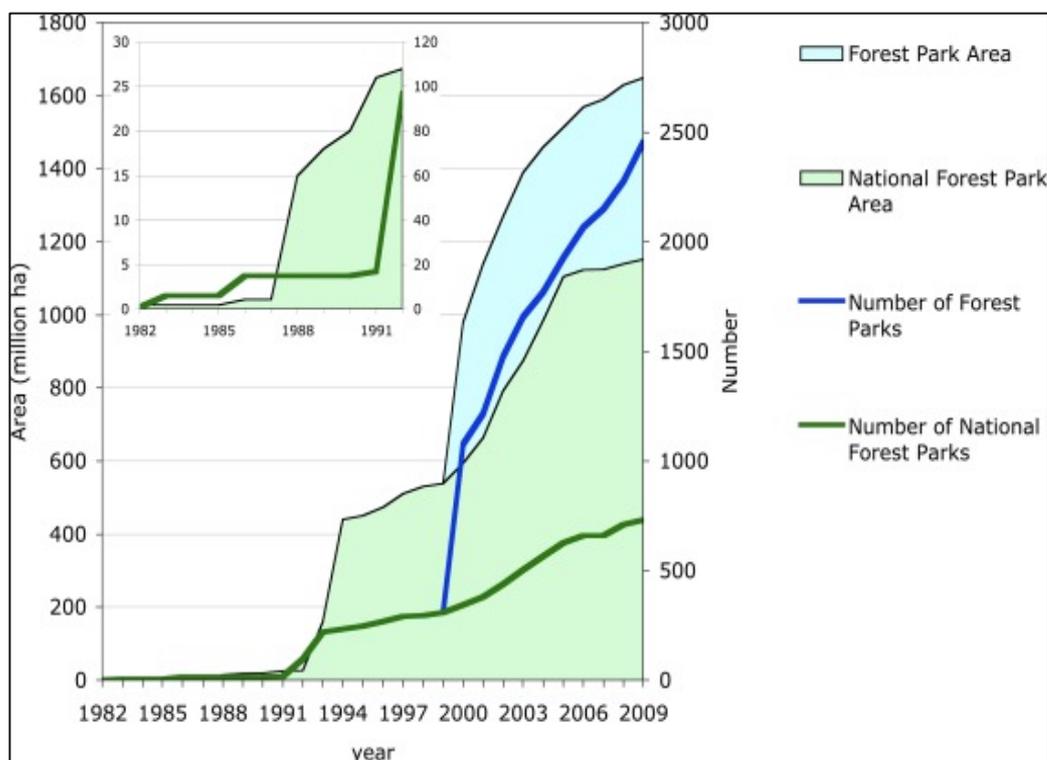
2500

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<sup>25</sup> The State Forest Administration established more than 1000 Forest Parks during 2000–2008. The total area of forest parks has reached to 16.5 million ha, and several large national parks are currently under development - Guangyu Wang et al, National Park Development in China: Conservation or Commercialization? (2012), Vol. 41, Issue 3, *Ambio: A Journal of the Human Environment*, pp. 247-261, p. 249.

<sup>26</sup> Ministry of the Environment, Report in the State of the Environment 2008 (2008) MEP Beijing <http://english.mep.gov.cn/download/Documents/201104/P020110411532104009882.pdf> [last accessed 16 November 2014]; – available J. MacKinnon & Yan Xie, *Regional Action Plan for the Protected Areas of East Asia 2006-2010*, (2008), IUCN, Gland Switzerland.

**Graph 1 - The increase in area and number of Forest Parks and National Forests Parks in China since 1982.**



Source: Guangyu Wang et al, National Park Development in China: Conservation or Commercialization? (2012), Vol. 41, Issue 3, *Ambio : A Journal of the Human Environment*, pp. 247-261, p. 249.

nature reserves covering 172.8 million hectares by 2050, constituting 18% of China's land area.<sup>27</sup> If completed this would ensure China meets the latest CBD 2020 Targets for protected area terrestrial coverage of 17% set at the Conference of the Parties in Nagoya, Japan in 2010.<sup>28</sup> China's ambition to achieve

<sup>27</sup> By 2010, the area of nature reserves will account for 14% of the total land area of the country, and by 2030, for 16.8%, and by 2050, for 18%. (National Programme for Wildlife Protection and Nature Reserves) cited in *China: National Biodiversity Targets for 2010 and Beyond 2010*, Regional Workshop for East, South and Southeast Asia on the Updating of the Strategic Plan of the Convention for Post-2010 Period, Tokyo, (15-18 December 2009), UNEP/CBD/SP/ASIA/1/INF/1, 2 December 2009 available [www.cbd.int/doc/meetings/sp/...2010.../wssp-2010-seasi-01-inf-01-en.doc](http://www.cbd.int/doc/meetings/sp/...2010.../wssp-2010-seasi-01-inf-01-en.doc) [last accessed 20 November 2014]

<sup>28</sup> CBD COP 10, Decision X/2, Strategic Plan for Biodiversity 2011-2020, Annex Aichi Biodiversity Targets, para: 13 Target 11 <http://www.cbd.int/decision/cop/?id=12268> [last accessed 20 November 2014]

high levels of conservation through ever increasing protected areas is clearly evident. However, if it is to be successful the government needs well-designed and effectively implemented laws and supporting regulations. To date these have not been in place.

### 6.1.2 National Conservation Laws

Particularly since the 1970's when it participated in international legal processes, including the 1972 Stockholm Conference, China has sought to develop legal frameworks that ensure the conservation of forest ecosystems. Laws concerning ecosystem and biodiversity conservation include the Forestry Law (1984), Grassland Law (1985), Wild Animal Conservation Law (1988), Water Law (1988), and Water and Soil Conservation Law (1991). There are also a number of other laws (and the associated regulations) whose primary objectives are not aimed at ecosystem and biodiversity conservation but whose design and implementation has a significant influence on them, such as the Environmental Protection Law (1989)<sup>29</sup>, the Land Management Law (1986) and also the Criminal Law (1997).<sup>30</sup> Further administrative regulations for implementation have added, both directly and indirectly, to the complex body of laws related to ecosystem and biodiversity conservation. By 2009, China had over thirty national government administrative decrees. Added to these are the local governments' enactments and promulgations, approximately more than six hundred local laws on environmental protection alone.<sup>31</sup>

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<sup>29</sup> The PRC Environmental Protection Law was introduced on trial basis in 1979 and entered fully into force in 1989 cited in M. Palmer, Environmental Regulation in the People's Republic of China: The Face of Domestic Law, (1998), Issue 156, *China Quarterly*, pp. 788-808, p793

<sup>30</sup> Xiaouha Li, *The Implementation of the Biodiversity Convention in China*, (1999), Program Office, Environmental Protection Committee, National People's Congress, pp. 449-462.

<sup>31</sup> J. Allan, People and Pandas in Southwest China, (2008) Vol. 33, Issue 11, *Journal of International Wildlife Law and Policy*, p.156.

These numerous laws and policies are comprised of four levels 1) constitutional provisions;<sup>32</sup> 2) biodiversity related laws including environmental regulation; 3) related regulations; 4) normative documents promulgated by Ministries. China's in-situ biodiversity protection laws and regulations have overtime been developed in an ad hoc manner. As a result there are significant 'variations in the quality of laws and that many of them [would be] conflicting.'<sup>33</sup> After becoming a Party to the CBD in 1992 the Chinese government sought to harmonise and update conservation laws in line with the Convention. The result was the 1994 Peoples Republic of China (PRC) Regulations on Nature Reserves.<sup>34</sup>

The 1994 PRC Regulations on Nature Reserves stated objective was to strengthen reserves construction and management.<sup>35</sup> It sought to revise the 1986 PRC Nature Reserve Law and to introduce international categories and standards to in-situ conservation practice in China. Similar to many countries China had initially focused its conservation efforts on charismatic flora and fauna within a region when designating protected areas.<sup>36</sup> China's most prominent charismatic protected species is the Giant Panda.<sup>37</sup> Although protecting

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<sup>32</sup> Article 9, Article 22, and Article 26 of China's Constitution provide that the State protects the utilization of natural resources and rare animals and plants; protects places of scenic and historical interest; protects and improves the living environment; and forbids any organization and individual from appropriating or damaging natural resources.

<sup>33</sup> Interview with Wang Qiliang, Research Fellow, School of Law, Yunnan University, Kunming, 18 July 2008.

<sup>34</sup> PRC Regulations on Nature Reserves, adopted at the 24<sup>th</sup> Executive Meeting of the State Council on September 2, 1994 [here-in-after referred to as 1994 PRC Regulations on Nature Reserves].

<sup>35</sup> Article 3 1994 PRC Regulations on Nature Reserves.

<sup>36</sup> PRC Regulation on Forest and Wild Animal Nature Reserves Management, 1985; PRC Temporary Regulations on Scenic Resources 1985 and PRC Law of Wild Animal Protection 1992.

<sup>37</sup> China's 1993 Conservation Plan for the Giant Panda and its Habitat was developed specifically to advance both in-situ and ex-situ conservation programmes. In 2004 the PRC National Wildlife

endangered species habitat informed the 1994 PRC Regulations on Nature Reserves scope to include 'natural ecological systems' was also included.<sup>38</sup> This change in perspective towards in-situ conservation mirrored that embodied within the UN CBD, and its Protected Areas Work Programme.<sup>39</sup> China has subsequently incorporated the term 'ecosystem approach' in the 2006 the PRC Landscape Scenery Management Regulation.<sup>40</sup> This Regulation however is awaiting the necessary implementing regulations.

The failure to implement is, according to Zhao Yaqiao, an associate professor on rural development in Yunnan Province, due to the cultural inappropriateness of international approaches to conservation., He claims that international forest conservation law and norms were a significant negative influence in China's own laws and standards, arguing that the 'trend of borrowing in China [was] too great as the gap with social reality expands' and adding that ' provincial and the national level are not prepared before taking on developed binding legal concepts.'<sup>41</sup> He adds that the difficulties China experienced in developing a new Regulation on Protected Areas was also due to international influences. <sup>42</sup> This is essentially a socio-legal critique that highlights the need to understand the

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Protection Law was revised incorporating further initiatives demonstrating the country's ongoing commitment to the Giant Panda's survival - *Panda Primer: The Facts in Black and White*. (December 2001) US Embassy Report, Beijing cited in Allan, *supra* note 32, 156.

<sup>38</sup> The Regulations defined nature reserves as '*areas, on land, inland water bodies, or marine districts, which represent various types of natural ecological systems, or with a concentrated distribution of rare and endangered wild animal or plant species, or where natural traces or other protected object being of special significance are situated, and so delimited out for special protection and administration according to relevant laws*' Article 2, 1994 PRC Regulations on Nature Reserves .

<sup>39</sup> Art. 2 CBD (1992) defines "In-situ conservation" as 'the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings ... in the surroundings where they have developed their distinctive properties.'

<sup>40</sup> Art, 24 (2006) PRC Landscape Scenery Management Regulation.

<sup>41</sup> *Ibid.*

<sup>42</sup> Interview with Associate Professor Zhao Yaqiao, Deputy Director, Rural Development Institute, Yunnan Academy of Social Sciences, Kunming, Yunnan, 18 July 2008.

complex interactions between different elements and actors in law and policy development to realise effective outcomes.

The Chinese authorities are more institutionalist in their interpretation of the problems with conservation law. They focused on reforming administrative structures as the answer to overcoming implementation obstacles. The government felt that for the 1994 PRC Regulations in Nature Reserves to be effective it needed to address administrative fragmentation that had resulted from the ad-hoc development of conservation related law over the past few decades, and it needed to develop a coherent designation categorisation criteria. The next two subsections examine the administrative framework of the Regulations, and the designation criteria adopted. The final section outlines and comments on the financial regulations adopted to realise new nature reserve law and policy in China.

### 6.1.3 Administrative Framework

The administrative structures established under the 1994 PRC Nature Reserve Regulations were intended to simplify what had become an inefficient, cumbersome bureaucratic system responsible for the implementation of in-situ conservation law.<sup>43</sup> The 1994 Regulations sought to create ‘a system which combines integrated management with separate departmental management for the management of nature reserves.’<sup>44</sup> Yet realising such cross-ministerial integration whilst supporting departmental independence is a difficult task to achieve for several reasons.

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<sup>43</sup> Wenxuan Yu & J. Czarnezki, Challenges to China’s Natural Resources Conservation and Biodiversity Legislation, (2013), Vol.43, *Environmental Law Journal*, p. 125.

<sup>44</sup> Article 8, 1994 PRC Regulations on Nature Reserves .

Firstly, numerous ministries and departments are involved in protected area governance in China. Although officially the Ministry for Environmental Protection oversees the comprehensive management of Nature Reserves, a further nine agencies including the State Forestry Administration, Ministry of Science and Technology and Ministry of Construction have different responsibilities for implementing nature reserve regulations.<sup>45</sup> International actors can often find this system confusing and frustrating. For example, an EU official working on conservation projects in China stated in an interview in 2008 that “the complexity of the Ministries is a problem. They do not talk to each other. We ... have found this a big headache.”<sup>46</sup> Ministries and departments are frequently motivated by different values and norms, with some possessing far greater financial and political resources than others. This can depend on the region, for example the department of tourism, responsible for certain reserve parks planning including forests, holds greater power in areas that are recognised as biodiversity hotspots, such as Yunnan.<sup>47</sup> These inequities can result in power struggles and a lack of willingness to cooperate on implementing law and policy.

This situation is further exacerbated by the different international bodies associated with protected areas within China who work through different

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<sup>45</sup> D.Q. Zhou & R.E. Grumbine, National Parks in China: Experiments with Protecting Nature and Human Livelihoods in Yunnan province, People’s Republic of China (PRC), (2011), Vol. 144, *Biological Conservation*, pp. 1314-1321, p. 1315.

<sup>46</sup> Interview with Richard Hardiman, Director EU-China Cooperation Programme, 1 September 2008, Beijing, China.

<sup>47</sup> Bixia Chen & Yuei Nakama, Thirty Years of Forest Tourism in China, (2013), Vol. 18, Issue 4, *Journal of Forest Research*, pp. 285-292, p. 289.

ministerial departments from the national to the local e.g. Ramsar environment and water, CITES trade and environment, CBD and protected areas. In terms of international engagement different Ministries are delegated to represent China at negotiations on in-situ conservation issues between the various related MEAs that can result in inconsistencies in messaging, both internally and externally.

Secondly, a decentralisation of powers by central government under the 1994 Regulation<sup>48</sup> delegated central government powers to provincial governments, autonomous regions and municipalities. These regional and provincial level authorities can decide on the establishment and responsibilities of the administrative departments of nature reserves. Arguably this has led to a disconnection between national agencies and China's provincial governments, and the array of prefectures, counties and municipalities within the decentralised administrative structure that oversee implementation of protected areas regulations. Broader legal concerns including weak procedural rights, lack of transparency and corruption. These problems compound the obstacles to realising the regulatory frameworks currently in place.<sup>49</sup>

The administrative and institutional fragmentation that surrounds China's conservation makes it difficult to achieve synergistic law and policy enforcement. Efforts to reverse this through the 1994 Regulation have met with limited success. One interviewee commented that 'while the elaboration of law is unclear' China's 'implementation organisation is [also] very complex.'<sup>50</sup> He went

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<sup>48</sup> Article 17 1994 PRC Regulations on Nature Reserves.

<sup>49</sup> Wenxuan Yu & Czarnecki, J, *supra* note 43.

<sup>50</sup> Interview with Wang Qiliang, *supra* note 33.

on to claim that addressing this problem no amount of substantive reform will improve China's conservation performance.

#### 6.1.4 Designation: Access, Use and Actors

All in-situ protected areas law needs to include designation categories and clear rules on access and use activities for it to be effective. Fair, realistic and enforceable designation categories are fundamental to the success of *in-situ* conservation. The preference for particular designation categories, ranging from strict exclusion of any human activity to community based development conservation, is arguably informed more by values and norms within a political economy than science.<sup>51</sup> This makes protected areas designation especially fraught as different users interests are at stake.

China's initial, state level protected area designation approaches in the 1950s emulated those developed by the Soviet Union, its neighbour and ideological ally at the time. The Soviet Union promoted strict exclusionary management without any zoning, prohibiting all forms of access and user rights to people.<sup>52</sup> This was fine for most areas of the Soviet Union given its low population density, although it impacted indigenous tribal nomadic peoples. However, in 1950s China the rural population density was high and strict exclusion protected areas undermined forest peoples user rights and legal opportunities for sustainable livelihoods.<sup>53</sup>

Developing access and user rights that protect both biodiversity, as well as the

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<sup>51</sup> West, P, Igoe, J, & Brockington, D, *supra* note 14, pp. 251-277.

<sup>52</sup> J. Yang & S. Xu, *supra* note 24, pp. 39-50, p. 42.

<sup>53</sup> Interview with Yang Yuming, Deputy Director of the South West Forestry College, 23 August 2008, Kunming, Yunnan Province; Guangyu Wang et al, *supra* note 25, p. 246.

livelihoods of forest dependent communities, in China requires a more nuanced approach. Under the 1994 Regulations protected areas were divided into National and local level Nature Reserves (also known as Landscape Scenery or National Parks).<sup>54</sup> These protected areas could include different categories of designated territory such as nature reserves, scenic landscapes, forest parks, wetland parks, watershed protected areas, geological parks, water parks and small nature reserves.<sup>55</sup> The 1994 Regulations drew upon international protected area designation categorisation developed by the IUCN [See Fig. 1].

Fig. 1 The six IUCN Management Categories of Protected Areas (IUCN, 1994)

Category	Description
<i>Ia</i>	<b>Strict Nature Reserve:</b> Protected area managed mainly for science.
<i>Ib</i>	<b>Wilderness Area:</b> Protected area managed mainly for wilderness protection.
<i>II</i>	<b>National Park:</b> Protected area managed mainly for ecosystem protection and recreation.
<i>III</i>	<b>Natural Monument:</b> Protected area managed mainly for conservation of specific natural features.
<i>IV</i>	<b>Habitat/Species Management Area:</b> Protected area managed mainly for conservation through management intervention.
<i>V</i>	<b>Protected Landscape/Seascape:</b> Protected area managed mainly for landscape/seascape conservation and recreation.
<i>VI</i>	<b>Managed Resource Protected Area:</b> Protected area managed mainly for the sustainable use of natural ecosystems.

This was the first time that the categorisation of protected areas was so closely linked to international guidelines as they were included in national law. Again this initiative occurred once China was a signatory to the UN CBD indicating the informal influence they wielded on the countries conservation law

<sup>54</sup> Article 4 1994 PRC Regulations on Nature Reserves.

<sup>55</sup> Forest parks were subsequently defined in PRC Forest Park Management Regulation as ‘a specific forest area of scenic forest landscape with intense historic and cultural heritage.’ China State Forestry Administration Clause 6, 1994 PRC Forest Park Management Regulation.

developments.<sup>56</sup> Under the IUCN categories 'nature reserves can be divided into three parts: the core area, the buffer zone and the experimental zone'.<sup>57</sup> Within these core areas different user and access rights can be allocated. This revised previous categories to provide greater options for community based conservation approaches; an approach that several international non-governmental organisations and indigenous peoples organisations had lobbied for over a number of years.<sup>58</sup>

Under the 1994 Regulations most Chinese protected areas should comply with the IUCN categories I-IV ('hard' protected areas).<sup>59</sup> However, in practice there is great variation in the actual protection on the ground. Most of China's existing Nature Reserves fall into IUCN Category VI ('soft' protected areas) for managed resource protected areas where intervention through access by different users, including extractive industries, needs to be coordinated.<sup>60</sup> A failure to do so weakens the Regulations intended outcomes. An example is permitted tourism in forest parks that, due to poor management, is leading to increased degradation in many areas in China.<sup>61</sup>

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<sup>56</sup> The IUCN categories were adopted by the CBD Conference of the Parties in 1994.

<sup>57</sup> Article 18 1994 PRC Regulations on Nature Reserves .

<sup>58</sup> Campaigning resulted in Outcome 5. The Rights of Indigenous Peoples, Mobile peoples and Local Communities Recognized and Guaranteed in Relation to Natural Resources and Biodiversity

Conservation, *The Durban Action Plan*, (2002), V<sup>th</sup> IUCN World Parks Congress, Durban, South Africa available <http://www.danadeclaration.org/pdf/durbanactioneng.pdf> [last accessed 20 November 2014]

<sup>59</sup> N. Dudley, *Guidelines for Applying Protected Area Management Categories*, (2008), Gland, Switzerland: IUCN.

<sup>60</sup> N. Menzies, Integrating Conservation and Development, (2006), Vol.14, Issue 4, *The Journal of Environment and Development*, p. 385.

<sup>61</sup> 'A forest park is defined as a specific forest area of scenic forest landscape with intense historic and cultural heritage for the purposes of tourism, recreation, and scientific, cultural, and educational activity. It is further classified into three ranks of national, provincial, and municipal levels. A national park forest is one with exceptional scenic beauty of forest landscape, high value as cultural landscape, representative of a region and well-known nationwide, and provided with

A number of China's protected areas are designated using international categories developed within MEAs, such as World Natural and Mixed Heritage Sites, Wetlands of International Importance, and Global Geoparks, Biosphere Reserves. Although these all apply IUCN designation categories there can be incoherence and inconsistencies between different regimes due to differing priorities. The overlaying of multiple zones when international, regional, national and local protected areas are designated compounds governance problems. To ensure that such designation can realise the internationally agreed multiple normative objectives of conservation, sustainable development including equitable benefit sharing and not result in conflict procedural administrative frameworks are necessary whereby all stakeholders are involved. Community-based conservation management that combines the twin objectives of conservation and community-based sustainable development requires the full participation of all stakeholders. Achieving this in China is a challenge particularly given the lack of political will towards extending procedural rights to ensure full, transparent participation in the design and implementation of law and policy.<sup>62</sup>

Within China another key issue is that of community participation in the designation process. Since between 30-60 million people live in or around nature reserves in China developing appropriate designations that account for their

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sufficient tourism facilities.' China State Forestry Administration Clause 6, PRC Forest Park Management Regulation, 1994 [emphasis added]- see Bixia Chen & Yuei Nakama, *supra* note 47, p. 287.

<sup>62</sup> Wenxuan Yu & Czarnezki. J, *supra* note 43, p. 139.

needs is vital to achieving effective conservation.<sup>63</sup> One interviewee asserted that the designation of zones in protected areas where the ‘regulations are too strict, limiting use,’ was the key problem to making in-situ conservation successful. Rather it forced ‘people [to] just try to work on the edge of the law’.<sup>64</sup> McBeath and Leng cite a State Environmental Protection Administration official who claimed that: ‘Generally what happens is that the central or provincial government establishes a protected area without local participation, and then expects the local people to deal with it.’<sup>65</sup> Local government authorities that may want to access land within a protected area can manipulate such disempowerment of forest people’s communities to their advantage by offering disadvantageous deals, including apparently attractive compensation packages.<sup>66</sup>

Forest based communities living in areas under inappropriate and ineffective designation are effectively criminalised for activities that are necessary for their basic livelihood, such as the gathering of wood for fuel, mushrooms and medicinal herbs. It can also fracture the relationship that communities have with sacred cultural sites irreparably. Communities may also not benefit equitably from initiatives that add economic value to ecosystem services when new

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<sup>63</sup> Cited in Menzies. N, *supra* note 60, p. 380.

<sup>64</sup> Interview with anonymous legal researcher, 25 July 2008, Zhongdian County, Dequin Prefecture, Yunnan, China.

<sup>65</sup> G. McBeath & Tse-Kang Leng, *Governance of Biodiversity in China and Taiwan*, (2006), p. 115 cited in J. Czarnezki, *Challenges to China’s Natural Resources Conservation and Biodiversity Legislation*, (2013), Vol. 43, *Environmental Law Journal*, pp. 125-144, p. 136.

<sup>66</sup> D.Q Zhou & Grumbine. R.E, *supra* note 45, p. 1315.

regulations introduce market-based instruments, e.g. including ecotourism and forest carbon trading under the UNFCCC CDM.<sup>67</sup>

China has not incorporated the key participatory aspects of people centered conservation that has become part of the international discourse on in-situ approaches especially since the 2002 Durban IUCN Parks Conference.<sup>68</sup> Moreover, the UNDRIPs principle of free, prior informed consent, which is considered the fairest, most equitable and most inclusive participatory approach from the perspective of indigenous peoples, has received no consideration by the Chinese authorities.<sup>69</sup> China's position on its indigenous peoples suggests that this is unlikely to change domestically in the near future. [see section 5.3.5]

#### 6.1.5 Finance and Regulatory Mechanisms

Financing conservation is undertaken in two forms. National Nature Reserves that received funding directly from central government, Provincial Nature Reserves are dependent on local government for finance, or international funding via international organisations, states or other non-state actors including NGOs.<sup>70</sup> As local government pursued economic growth Nature Reserves were seen as an obstacle to, and a drain on, valuable natural resources.<sup>71</sup> Given the restrictions on commercial activities within both provincial and national nature reserves in China including hydroelectric

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<sup>67</sup> Bixia Chen & Yuei Nakama, *supra* note 47, p. 286; D. Tackas, Carbon in to Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law, (2009), Vol. 15, *Hastings North-West Journal of Environmental Law and Policy*, pp. 39 – 87.

<sup>68</sup> *The Durban Action Plan*, *supra* note 58.

<sup>69</sup> See Arts. 10, 11(2), 19, 28(1), 29(2) and 32(2), UNDRIP (2007)

<sup>70</sup> Article 24 1994 PRC Regulations on Nature Reserves.

<sup>71</sup> Although various fines, royalties and taxes from Nature Reserves could be collected these were insignificant compared to development opportunities - Bixia Chen & Yuei Nakama, *supra* note 47, p. 289.

investment, mineral extraction and forestry provincial governments have become reluctant to designate more Nature Reserves.<sup>72</sup>

In an effort to broaden funding opportunities, the 1994 National Nature Reserve regulations permitted administrative agencies and their competent administrative departments to accept grants directly from both internal and external organisations and individuals for the establishment and management of nature reserves.<sup>73</sup> This merely officially clarified an avenue for the financial collaboration between provincial level authorities with international actors, including governments, international NGOs, international organisations and business that had already existed in China.<sup>74</sup>

After 2001, investment in environmental protection and biodiversity conservation was substantially increased, with the total investment in pollution control and key forestry projects exceeding 1% of China's GDP.<sup>75</sup> However, according to the Chinese government there continues to be a shortfall in finance and resources to fulfill activities.<sup>76</sup> Funding nationally, including through international funding via UN agencies such as UNDP, GEF and the World Bank, as well as the European Union, has provided an important alternative source of

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<sup>72</sup> 1994 PRC Regulations on Nature Reserves *Supra* note 70, Article 14.

<sup>73</sup> *Ibid* Article 6.

<sup>74</sup> For instance, since 1991, GEF alone has approved a total grant of 99.06 million US dollars to China's biodiversity projects, for details see GEF website: <http://www.gefweb.org> cited in 2008 China CBD Biodiversity Report. p. 29; EU-China Biodiversity Programme channeled 49,140,000 euros to finance the strengthening of national policy and institutional framework for biodiversity conservation between 2005-2011, further details available [http://ec.europa.eu/europeaid/documents/case-studies/china\\_biodiversity\\_ecbp\\_en.pdf](http://ec.europa.eu/europeaid/documents/case-studies/china_biodiversity_ecbp_en.pdf) [last accessed 20 November 2014].

<sup>75</sup> 2008 China CBD Biodiversity Report (2009) CBD Secretariat, p. 30 available

<https://www.cbd.int/reports> [last accessed 20 November 2014].

<sup>76</sup> *Ibid*.

resources for protected areas conservation.<sup>77</sup> However, several scholars argue, (in agreement with Professor Zhao Yaqiao cited in section 6.1.2) that this has resulted in an over reliance and dependency on international financial resources and support. And that this leaves China exposed to external influences on the development of protected areas regulations law and policy.<sup>78</sup>

One option to generate revenue lost through natural resource extraction is tourism within protected areas. Although tourism was permitted only within 30% of the experimental zone in some areas it provided a significant source of income for the government. Even in Nature Reserves back in 1998, when tourism was heavily restricted by regulations, 'the net income for tourism service accounted for 54% of whole revenue in nature reserves on an average of seventy seven reserves.<sup>79</sup> Many reserves developed tourism services and corresponding facilities such as accommodation, transportation and exhibition museums, etc. to satisfy increasing tourist expectations.<sup>80</sup> Concerns though grew as to the environmental impact of what was essentially a poorly monitored nascent tourism industry. Tourism can be as much as a curse to the environment and indigenous ethnic communities as an opportunity to achieve sustainable development and poverty alleviation along with conservation of ecosystems.<sup>81</sup>

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<sup>77</sup> Bixia Chen & Yuei Nakama *supra* note 47.

<sup>78</sup> J. McBeath & J. Huang McBeath, Biodiversity Conservation in China: Policies and Practices, (2006) Vol. 9, *Journal of International Wildlife Law and Policy*, pp. 293-317, p. 297; Wenxuan Yu & Czarnecki, J, *supra* note 43, p. 125; for example see EU-China Biodiversity Programme channeled 49,140,000 euros to finance the strengthening of national policy and institutional framework for biodiversity conservation between 2005-2011, further details available [http://ec.europa.eu/europeaid/documents/case-studies/china\\_biodiversity\\_ecbp\\_en.pdf](http://ec.europa.eu/europeaid/documents/case-studies/china_biodiversity_ecbp_en.pdf) [last accessed 20 November 2014].

<sup>79</sup> Dayuan Xue, Resources Management within Nature Reserves in China, Working Paper, (October 2000), No. 51, *Economic, Ecology and the Environment*, University of Queensland.

<sup>80</sup> *Ibid.*

<sup>81</sup> Bixia Chen & Yuei Nakama, *supra* note 47.

The Chinese government needed to legislate to ensure that tourism in protected areas did not exacerbate degradation. Efforts to do so were being made at the same time as the negotiations seeking to harmonise national conservation law [see section 6.3.2].

Even by 1998, the State Environment Protection Agency had already acknowledged that conservation laws were mainly substantive and lacked effective implementing regulations.<sup>82</sup> Given this situation China's conservation laws have offered little or no guarantee of protection for biodiversity or communities who are dependent on it.<sup>83</sup> Despite China's extensive legal framework there is, in reality, a statutory vacuum due the absence of an overarching law.<sup>84</sup> Nelson claimed this results in a situation in which weak and vague legislation, '[c]ombined with national directives and quotas to create more [nature reserves], regardless of local conditions,' collectively subvert conservation values by 'enabl[ing] local governments to create 'paper parks' based on unrealistic boundaries or land availability.'<sup>85</sup> It was clear to both domestic and international observers that China's conservation regulatory framework needed to be reformed.

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<sup>82</sup> Ministry of Environmental Protection of China, *The 2009 Report on the State of the Environment in China*, (2010), [http://cn.chinagate.cn/infocus/2011-06/14/content\\_22778913.htm](http://cn.chinagate.cn/infocus/2011-06/14/content_22778913.htm) cited in J. Liu, Complex Forces Affect China's Biodiversity in S. Navjot et al, S. Sodhi, *Conservation Biology: Voices from the Tropics*,(2013) John Wiley & Sons,.

<sup>83</sup> L. Glacy, China's Nature Reserves: Protecting Species or Generating Profits? (unpub) 2002 cited in Allan, *supra* note 31, p. 156.

<sup>84</sup> D.Q Zhou & Grumbine. J, *supra* note 45, p. 1316.

<sup>85</sup> R. Nelson, Regulating Grassland Degradation in China: Shallow-Rooted Laws?, (2006), Vol. 7, *Asian- Pacific Law and Policy Journal*, pp. 385-396 cited in Wenxuan Yu & Czarnezki.J, *supra* note 43, p. 136.

In its 2008 National Biodiversity Plan, submitted to the CBD Secretariat, the Chinese state was explicit about the shortcomings in its conservation laws that needed to be attended to through regulatory reform.<sup>86</sup> China's reform efforts to deliver a comprehensive conservation legal framework at the National level included initiatives at the Provincial level. Yunnan Province, a biologically, culturally diverse region but one of the poorest economically was an ideal choice to undertake a pilot initiative. The following section examines the regulatory initiatives piloted in Yunnan to introduce new approaches to in-situ conservation in China nationally.

## 6.2 Piloting Reform: Yunnan's New National Park Programme

At the start of the 21<sup>st</sup> century China began reviewing existing protected area related laws. A lack of integration prompted a review of protected areas regulations and governance. The main goal was to achieve clarity and coherence to this area of law.<sup>87</sup> The Ministry of Environmental Protection (formally State Environment Protection Agency) was tasked with reviewing China's existing nature reserve protection regulations in 2004 as part of a process to draft a new China Nature Protection Law.<sup>88</sup> The EU-China Biodiversity Program provided

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<sup>86</sup> CBD China's Fourth National Report on Implementation of the Convention of Biological Diversity (2008), PRC Ministry of Environmental Protection, available <https://www.cbd.int/doc/world/cn/cn-nr-04-en.pdf> [last accessed 11 November 2014].

<sup>87</sup> Interview with Associate Professor Zhao Yaqiao, Deputy Director, Rural Development Institute, Yunnan Academy of Social Sciences, Kunming, Yunnan, 18 July 2008.

<sup>88</sup> *ibid.*

funding for the negotiations.<sup>89</sup> Among the actors were numerous international bodies and individuals who sought to advance the international values and norms embodied in multilateral environment agreements.<sup>90</sup> Aside from coherence, both administratively and in terms of designation categories, the Chinese government also sought to develop a more market-based regulatory structure to fund protected areas. One issue not explicitly addressed however was how to realise communities' participatory rights in law reform processes. Overall progress on negotiations was fraught with difficulties. After four years, the People's National Congress, the main Chinese legislature, decided to suspend negotiations on a draft Regulation on Protected Areas due to ongoing disagreements amongst different Ministries and departments.<sup>91</sup> However there were developments that occurred despite the suspension.

One component of the new draft framework legislation on protected areas was to be the establishment of a new state level National Park Law. Some Ministries were keen to develop this, despite the difficulties in negotiations. As national level negotiations stalled over a National Park Law and a comprehensive Protected Areas Regulation, local pilot initiatives to open national parks in two provinces (Yunnan and Heilongjiang) nonetheless went ahead. These were to be learning-by-doing pilots that could provide inputs for future negotiations on the

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<sup>89</sup> The EU-China Biodiversity Programme is a 30 million euros fund for technical assistance and cooperation to increase compliance with CBD work programmes and assist in realising targets between 2005-2011 further information available [http://www.welcomeurope.com/european-funds/eu-china-biodiversity-programme-663+563.html#tab=onglet\\_details](http://www.welcomeurope.com/european-funds/eu-china-biodiversity-programme-663+563.html#tab=onglet_details) [last accessed 20 November 2014].

<sup>90</sup> *Ibid.*

<sup>91</sup> Interview with Conservation International (US non-governmental organisation with offices in Beijing and Kunming) representative in Kunming, Yunnan July 2008; confirmed by Associate Professor Zhao Yaqiao, *supra* note 42.

national laws. One such demonstration project is the Pudacao National Park in Yunnan Province in south-west China, which officially opened in 2008.

### 6.2.1 Yunnan: Background Context

Yunnan, located in south-west China, is one of the country's most biologically diverse Provinces [see Map 1].<sup>92</sup> As a result it is one of the country's most environmentally protected regions with provincial, national and international conservation areas under existing laws and regulations.<sup>93</sup>

## Map 1: Administrative Provinces of China

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<sup>92</sup> Although the Province comprises only 0.7% of China's land area it contains more than a fifth of the country's plant species, about one-third of its mammal and bird species and almost 100 endangered species TNC website -

<http://www.nature.org/wherewework/asiapacific/china/work/pudacuo.html>: It is also the location for a number of international centres and international mechanisms including a Centre of Plant Diversity; a Global 200 List Priority Eco-region for Biodiversity Conservation; an Endemic Bird Area and a Global Biodiversity Hotspot as a part of the Hengdu Mountain Ecosystem Reserve - R.A. Mittermeier, P. Robles-Gil, & C.G. Mittermeier. (Eds.), *Megadiversity: Earth's Biologically Wealthiest Nations*, (1997), Monterrey, Mexico: CEMEX; J. Donaldson, Tourism, Development and Poverty Reduction in Guizhou and Yunnan, (2007), Issue 190, *China Quarterly*, pp. 333-351.

<sup>93</sup> Yunnan Province has 190 Nature Reserves (70 National and 45 Provincial) -



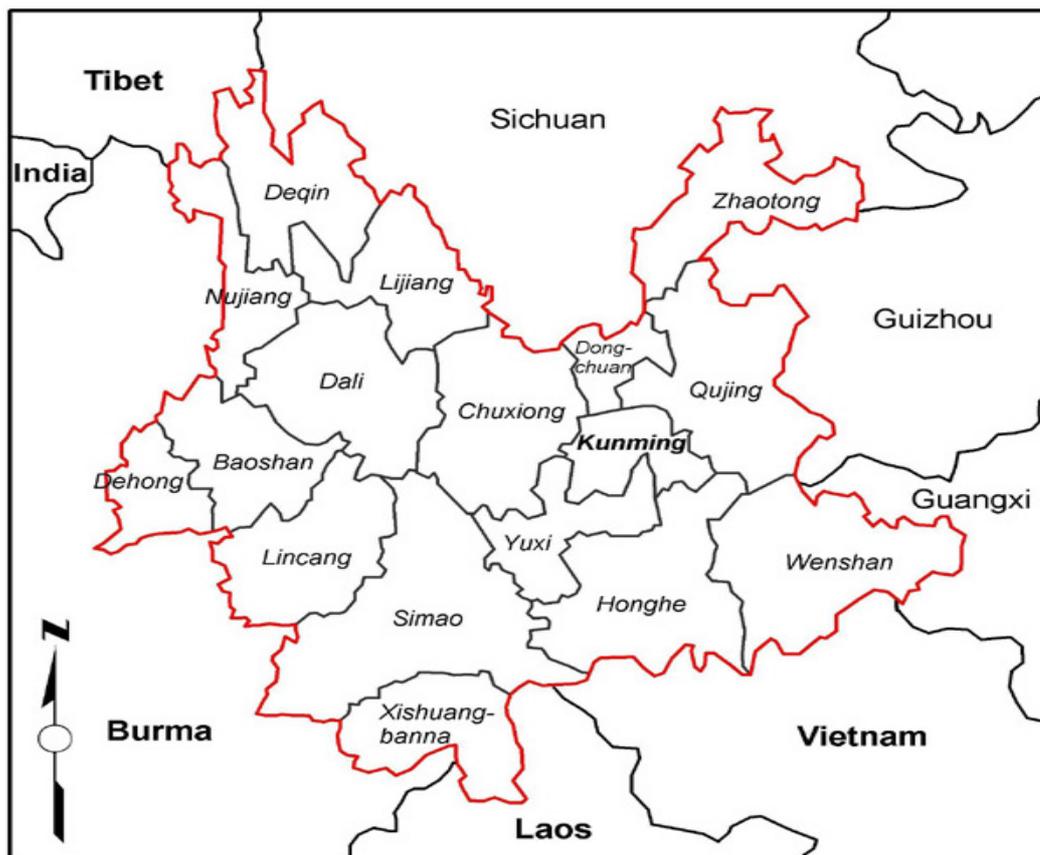
Yunnan is also culturally diverse; it has the largest concentration of ethnic peoples among all of China's provinces and autonomous regions.<sup>94</sup> Of China's fifty-six recognised ethnic groups, twenty-five live in Yunnan [see Map 2].<sup>95</sup> Consequently eight of Yunnan's sixteen Prefectures are autonomous.<sup>96</sup> All twelve of Yunnan's proposed national parks are to be located within autonomous ethnic territories.

### Map 2. Administrative County Districts of Yunnan Province

<sup>94</sup> China does not recognise these people as 'indigenous peoples' and consequently they are unable to claim related international indigenous peoples rights – see section 5.3.5.

<sup>95</sup> In 2000 these ethnic peoples (including the Yi, Bai, Hani, Dai, Miao, Lisu, Lahu, Yao, Tibetan, Nu, and Naxi) constituted 14.33 million of Yunnan's population. Several other groups are represented, but they do not reach the required threshold of five thousand to be awarded the official status of being 'present' in the province – see <http://www.unescap.org/esid/psis/population/database/chinadata/yunnan.htm> [last accessed 16 August 2013].

<sup>96</sup> Autonomous prefectures officially permit a degree of independence over certain governance aspects, although this is highly prescribed by senior levels of authority and frequently undermined by National law and policy priorities.



Source: Zhao Dinghan (ed), Atlas of Yunnan Province (1999) China Cartographic Publishing House.

Poverty levels are high in Yunnan, presenting the Provincial government with major challenges. The region's GDP depends on three primary sectors: agriculture (mainly tobacco), mining and tourism.<sup>97</sup> After the 1998 logging ban imposed by the national government, forestry, a previously important economic sector, lost its financial significance to Yunnan's economy. It was from this point onwards that the Yunnan government sought to exploit the economic potential of tourism from protected areas, including forest parks.<sup>98</sup> Yunnan is one of the 'jewels in the crown' of China's growing tourism industry.<sup>99</sup> By 2001, tourism

<sup>97</sup> Donaldson, *supra* note 92.

<sup>98</sup> Bixia Chen & Yuei Nakama, *supra* note 47, p. 286.

<sup>99</sup> China today is the most popular destination throughout Asia and the Pacific for foreign tourists. Receipts from foreign tourism constituted 7% of China's GDP in 2007 source UN ESCAP,

had a greater share of the Provincial governments annual income than forestry.<sup>100</sup> In 2004, tourism revenues accounted for 12.6% of the provinces gross domestic product. It is now one of China's major tourist destinations. The challenge for the Provincial government was to achieve sustainable development through balancing ecosystem conservation and resource exploitation, including tourism.<sup>101</sup>

### 6.2.2 Introducing the Concept of National Parks to Yunnan Province

Since the late 1990's the concept of a new type of national park based upon models from other countries, especially the United States, was advocated in Yunnan as a way to achieve more sustainable conservation in China. The leading advocates were mainly international actors, especially conservation NGOs and donor organisations, such as the European Union. The claim by advocates is that national parks adapted to conditions in China can better preserve natural, cultural, historical and land resources while allowing for development, such as eco-tourism, that would fund conservation management.

In practice definitions of national parks vary. Professor Yang Yuming, Deputy Director of the South West Forestry College, Kunming, Yunnan, stated that national parks are a conservation-based approach that can combine tourism, cultural and biodiversity protection to ensure sustainable development.<sup>102</sup> In Yunnan, the specific definition of a national park adopted closely follows the

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*Statistical Yearbook for Asia and the Pacific*, (2009), Section 25 Tourism, details available <http://www.unescap.org/stat/data/syb2009/25-Tourism.asp> [last accessed 20 November 2014].

<sup>100</sup> D.Q Zhou & Grumbine. R.E, *supra* note 45, p. 1315.

<sup>101</sup> In conjunction with the UNDP China has developed the Western Development Plan, Phase II of which aims to use mineral resource exploitation as a source of revenue to lift the Yunnan out of poverty.

<sup>102</sup> Interview with Professor Yang Yuming, *supra* note 53.

IUCN Category II standard aspiration which states ‘the purpose of national parks is to protect nationally or internationally significant natural resources, cultural resources, and magnificent landscapes while providing opportunities for scientific research, recreation, community development, etc.’<sup>103</sup> Provincial documents also specify that national parks should provide “social benefits” that are “higher than those of a nature reserve” as well as ecological benefits that “far exceed those of scenic and historic areas”.<sup>104</sup> Yunnan’s provincial authorities placed a greater emphasis on local community economic development than in the IUCN national park definition. Realising these multiple objectives for Yunnan’s national parks would require cross-cutting integrated planning and management using effective regulatory tools.

In 2001 the provincial government published the regional Conservation and Development Action Plan for Northwest Yunnan that included proposals to produce several national parks, including Pudacao National Park in Shangri-La county, Diqing Autonomous Prefecture [see 6.3].<sup>105</sup> It also happened to coincide with efforts to reform national conservation laws that included proposals to develop national parks.

One of the leading advocates of the National Park, which subsequently received EU/UNDP funding, was the US conservation NGO The Nature Conservancy (TNC).

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<sup>103</sup> J. Zinda, Making National Parks in Yunnan: Shifts and Struggles within the Ecological State, in E. Yeh, & C. Coggins, (eds). (In press) *Mapping Shangri-La: Nature, Personhood, and Sovereignty in the Sino-Tibetan Borderlands*. Seattle: University of Washington Press available [http://www.ssc.wisc.edu/~jzinda/documents/MakingNPs\\_forWS.pdf](http://www.ssc.wisc.edu/~jzinda/documents/MakingNPs_forWS.pdf) [last accessed 20 November 2014].

<sup>104</sup> Ibid.

<sup>105</sup> Conservation and Development Action Plan for Northwest Yunnan, Joint Project Office, (2001).

TNC actively promoted various park models to Chinese officials, administrators, and managers.<sup>106</sup> In 1998, TNC opened an office in Yunnan staffed with people from Hong Kong, China and the US. It immediately began seeking support amongst key stakeholders for the development of the 'Big River National Park' in the North West of the Province. Despite enthusiasm in certain quarters, the Provincial government rejected the proposal believing the region already had a satisfactory protected area system.<sup>107</sup> Undeterred, several international and domestic actors continued to try to promote the national park in the region, focusing especially on the potential of tourism revenue for the Province. Their efforts did not go to waste. By 2001, the North-West Conservation Work Plan was completed. This formed the basis for a submission to UNESCO's World Heritage Committee for World Heritage Status of the Three Parallel Rivers by the Chinese government, part of the World Heritage Convention.

The Three Parallel Rivers protected area lies within the watershed areas of the upper reaches of the Yangtze, Mekong and Nujiang rivers, in the Yunnan section of the Hengduan Mountains. The site covers 1.7 million hectares and consists of 15 protected areas in 8 clusters, including the Bithai Lake Nature Reserve, the Baima Meili Snow Mountain Reserve, the Hongshan Scenic Area, the Laojunshan Scenic area [see Map. 3 below].<sup>108</sup> It was designated using the IUCN criteria (i), (ii), (iii) and (iv) by the 1994 Nature Reserve Regulations. The regulations stipulate the prohibition of logging, grazing, hunting, fishing, collection of

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<sup>106</sup> UNDP administered 27.5 million euros between 2005-2011 of the 30 million euros European Union and China Biodiversity Programme (EUCBP) which funded technical assistance and cooperation in the field of biodiversity policy further information available [http://www.welcomeurope.com/european-funds/eu-china-biodiversity-programme-663+563.html#tab=onglet\\_details](http://www.welcomeurope.com/european-funds/eu-china-biodiversity-programme-663+563.html#tab=onglet_details) [last accessed 20 November 2014].

<sup>107</sup> Interview with Professor Yang Yuming, *supra* note 47.

<sup>108</sup> Each of these were to be proposed as individual National Parks

medicinal materials, land reclamation for agriculture, slash and burn, mining, quarrying, and sand extraction. Tourism and education have a more prominent role and human presence and resource use is handled less restrictively.<sup>109</sup> Direct economic benefits from tourism are an explicit objective of these categories.<sup>110</sup>

UNESCO's World Heritage Committee described the Three Parallel Rivers area as 'maybe the most biologically diverse temperate region on earth.'<sup>111</sup> However, from the outset the World Heritage Committee raised concerns over resident human populations, the allocation of prospecting and mining licenses<sup>112</sup>, illegal mining activities, hydro development<sup>113</sup> and the extent of future tourism.<sup>114</sup> The Chinese government in their application to the World Heritage Committee also

**Map. 3 Three Parallel Rivers within Administrative Region**



noted that “rapid [tourism] growth plus fragile ecosystems, backward transport conditions, basic facilities and insufficient receiving capacity have posed pressures to ecological and social environment.”<sup>115</sup> Despite these concerns, on July 2 2003, the Three Parallel Rivers was inscribed on the World Heritage List as a natural property at the 27th session of the UNESCO’s World Heritage Committee.<sup>116</sup> The site extended the Three Parallel Rivers protected area.<sup>117</sup> Problems however did continue. In its own 2008 CBD country report China claimed “the promotion of ecological tourism to prevent adverse impacts on

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<sup>115</sup> Before its designation as a World Heritage Site numbers rose from 300,000 in 1990 to 1,5 million in 1999 - Three Parallel Rivers World Heritage, Yunnan, China, nomination file, (2003) p 160 - available <http://whc.unesco.org/en/list/1083/documents/> [last accessed 23 November 2014].

<sup>116</sup> See <http://whc.unesco.org/en/list/1083> [last accessed 23 November 2014].

<sup>117</sup> The original proposed name was the Three Parallel Rivers National Park but the Chinese authorities decided to change this to protected areas. The property is comprised of two formally very different protected area categories, 5 Nature Reserves and 10 National Scenic Areas. China’s 1994 Regulations apply to these 15 protected areas causing complexities for management coordination. – see UNESCO World Heritage Committee 30 June- 5 July 2003, Nominations of properties to the World Heritage List, WHC-03/27.COM/8C p. 5 available <http://whc.unesco.org/archive/2003/whc03-27com-08ce.pdf> [last accessed 23 November 2014].

biodiversity caused by tourism activities” as the answer to this threat.<sup>118</sup> Ongoing institutional complexity and overlap were undermining coordination, decision-making and leadership as late as 2013. IUCN highlighted that these problems needed to be resolved to ensure the survival of biodiversity in a Management Effectiveness Assessment.<sup>119</sup>

With the designation of the Three Parallel Rivers to World Heritage status, developments on the National Park concept began to move quickly. In 2003, the South West Forestry College (based in Kunming, Yunnan’s capital) encouraged the Yunnan Provincial government to set up a National Park. Yang Yuming, who was involved in the submission to the Provincial government with TNC, claimed “the existing legal system for forestry established by central and local governments does not work” and that “national parks provided the necessary [financial] incentive for conservation”<sup>120</sup> At a 2005 Provincial Workshop on Tourism in Kunming, Yunnan the National Park concept was formally introduced as a government policy.<sup>121</sup> The launch underscored the link between conservation and tourism in the National Park model being developed in Yunnan.

In 2005, in a move that gave further impetus to the Yunnan project, a National Park Research Institute was established at the South West Forestry College, Kunming, Yunnan. The State Forest Administration, the Research Institute and Yunnan’s Provincial government discussed the possibility of a National Park pilot

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<sup>118</sup> CBD China Biodiversity Report 2008, p. 31

<sup>119</sup> T. Jaeger & B. Jeffries, *Report on the Mission to the Three Parallel Rivers of Yunnan Protected Areas, P.R. of China*, (N 1083bis), (May 2013), IUCN.

<sup>120</sup> Yang Yuming, *supra* note 53.

<sup>121</sup> *Ibid.*

project in the region. This was part of the national process to draft a new Nature Protection Law. In 2006, TNC took the Yunnan's Provincial Governor Chi to visit the famous National Parks in Australia, Nepal, New Zealand, Thailand, and the United States including Yosemite and Yellowstone.<sup>122</sup> Representatives from Yunnan's National Development and Reform Commission, the Ministry of Science and Technology, the Finance Department and the Environmental Protection Bureau accompanied the Provincial Governor.

After this tour Governor Chi signed the agreement establishing a demonstration site in which a National Park would be established in North West Yunnan.<sup>123</sup> The first National Park in Yunnan was to be Pudacao and two more were to follow Laojunshan, in Lijang County and Meili in Deqing County.<sup>124</sup> Yunnan's Provincial authorities pressed ahead with planning future national parks developing an ambitious plan for twelve by 2015.<sup>125</sup> Although Laojunshan and Meili were in the process of being developed at the time of field research for this thesis, Pudacao was already operational. It therefore is the focus of this case study.

### 6.3 Pudacao: China's First National Park

In 2001, the regional Conservation and Development Action Plan for Northwest Yunnan included proposals to develop several national parks, including the

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<sup>122</sup> Zhou & R.E. Grumbine, *supra* note 45, p. 1316.

<sup>123</sup> Yang Yuming, *supra* note 53.

<sup>124</sup> Others have now been added to the list of potential National Park sites in Yunnan Province - *Shangri-La Grand Canyon* National Park, *Nu-Chiang Grand Canyon* National Park, *the Rain Forest* National Park in Xishuang Banna, *Cai yanghe River* National Park in Si-Mao and *Da-Wei Hill* National Park in Pin-Bian cited in Yang, Shi-Long, Li, Na, *Legal System of National Park in China: History, Practice and Change*, Paper presented at IUCN-IEL, 17 June 2007, Faculty of Law, Kunming University of Science and Technology, Kunming, Yunnan,

<sup>125</sup> Yang Yuming, *supra* note 53.

Pudacao National Park in Shangri-La county in Diqing Autonomous Prefecture.<sup>126</sup> This economic plan was part of a national initiative to increase development in autonomous ethnic regions within China to achieve sustainable development throughout the country and reduce wealth inequality.<sup>127</sup> As in many other areas in China, access to Diqing Tibetan Autonomous Prefecture used to be restricted for foreigners. Central government imposed strict regulations to limit business and other social exchange activities that may have threatened state control over the economy. Certain counties within the Prefecture were entirely closed to foreigners; Zhongdian was one of these.<sup>128</sup>

In 1994, these restrictions were partially lifted and were subsequently completely removed by 1997.<sup>129</sup> In the same period, the imposition of the 1998 logging ban negatively impacted Diqing's economy. By the mid-1990s, timber was the largest industry for the area, generating more than 80% of the prefecture's GDP.<sup>130</sup> The rural population, who had relied on income generated from farming, pastoralism and forest products, following the logging ban had very limited income as a result.<sup>131</sup>

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<sup>126</sup> Conservation and Development Action Plan for Northwest Yunnan, Joint Project Office, (2001).

<sup>127</sup> Part of the Chinese government's plan for *xibu dakaiifa*, (Great Western Development Plan) partly funded by UNDP.

<sup>128</sup> Administratively, Zhongdian county consists of two townships, with five village committees and forty three natural villages. It has a total of six thousand six hundred residents, largely from two major ethnic groups: Tibetan and Yi people.

<sup>129</sup> B. Hillman, Paradise Under Construction: Minorities, Myths and Modernity in Northwest Yunnan, (2003), Vol. 4, Issue 2, *Asian Ethnicity*, pp. 175-188.

<sup>130</sup> Ibid.

<sup>131</sup> The annual per capita income in 2011 was 3400 RMB (540 USD). Compared with the national level of 23,979 RMB (3,806 USD) per capita and 6977 RMB (1,107 USD) per capita for rural households in the same year (CPG) cited in Jing Li, *Formation of China's First National Park: Interaction among International NGOs, Prefectural Government and Local Communities*, MA Thesis, Department of Anthropology, San Jose State University, May 2013 available <http://www.sjsu.edu/anthropology/docs/projectfolder/Li-Jing-project.pdf> [last accessed 24 November 2014], p. 26.

From the outset Pudacao, as well as other national parks, needed to meet the twin goals of sustainable development and conservation that benefitted the poorest ethnic peoples in China. Advocates for conservation based tourism regularly cited the need to develop the region as a key objective for action.<sup>132</sup> TNC, who were invited by the Chinese government to establish Pudacao China's first pilot National Park, stated that the aim of Pudacao was to 'advance both protection and sustainable development of this ecologically significant section of Yunnan Province.'<sup>133</sup> The Diqing Autonomous Prefecture aligned itself with the objective of converting cultural and natural resources into tourism attractions as part of its economic development plans.<sup>134</sup> It believed that tourism should be prioritised because 'tourism revenue [could] potentially be kept entirely within the prefecture'.<sup>135</sup> The Diqing authorities were located next to Dali and Lijang, two Autonomous Prefectures that had already successfully invested in tourism. Perspectives differed as to whether a balance could be achieved between development and conservation through National Parks.

This section examines the normative, institutional and regulatory developments behind the establishment of Pudacao, and considers the degree to which a balanced approach was put in place. Moreover it discusses how the approaches are informed by, and/or informing law reforms nationally and internationally in relation to forest related conservation.

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<sup>132</sup> In 1997 Diqing Prefecture released plans for the Development of Zhongdian (later changed to Shangri-La) Ecotourism Demonstration Area – interview with Jerry Chen, TNC Director, Yunnan Office 16 July 2008

<sup>133</sup> TNC website <http://www.nature.org/wherewework/asiapacific/china/work/pudacuo.html> [last accessed 20 November 2014].

<sup>134</sup> Zinda. *J supra* note 103, p. 146

<sup>135</sup> Diqing Development and Reform Commission Report, (2008), cited in Zinda. *J. supra* note 103.

### 6.3.1 From Bithai to Pudacao: Establishing the National Park

The decision to establish Pudacao National Park was taken in November 2005.

It was officially opened on 25 June 2007, although it had already been receiving visitors for a year with no management plan in place.<sup>136</sup> Pudacao was China's first IUCN category National Park meeting Category II standards combining the shared objectives of conservation and tourism. TNC proposed that 70% of the park area be designated to strict protection accessible solely for scientific purposes and 30% used for tourism.<sup>137</sup> Ensuring these ratios in practice proved to be difficult.

The Diqing government had decided that the National Park should be built on existing tourist attractions: Bithai Lake (a provincial nature reserve) and Shudu Lake that lay within the Three Parallel Rivers World Heritage Site. According to Jerry Chen, TNC's Director in Yunnan, Pudacao National Park is 'significant [because] more [land] is protected through this new model than could have been done before.'<sup>138</sup> It is 80% primary forest whilst lakes and wetlands constitute the remaining 20%.<sup>139</sup> The National Park increased the size of Bithai tenfold.<sup>140</sup> This ratio, Chen argued, would increase sustainable development opportunities for communities through tourism. He also believed that the institutional administration established under the Three Rivers Parallel World Heritage site would provide an integrated management approach to planning to support this.

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<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Interview Ding Wendong, Director of Pudacao National Park, (22 July 2008), Zhongdian County, Yunnan.

<sup>140</sup> Ibid.

The Yunnan Three Parallel Rivers Management Bureau has offices in Diqing, Nujiang and Lijiang prefectures, as well as representation in offices and stations in more than twenty counties. It is responsible for the overall revision and improvement of the master plan of the entire heritage site.<sup>141</sup> As I outlined in 6.2.2 the Three Parallel Site incorporated fifteen different protected areas, all of which have a range of different legal conservation designations. These include national and provincial level nature reserves and national scenic areas, and are therefore subject to different national and provincial laws and regulations. Actors involved in the establishment of the Pudacoo National Park needed to ensure that developments were consistent with those detailed within the Three Parallel Site management plans.

Academics from Kunming-based Southwest Forestry University, along with other actors including government and international NGOs, formed expert teams to develop a master plan and management plan for Pudacoo National Parks. Ding Wendong, Director of Pudacoo National Park claimed the Park could ‘promote forest resource protection, biodiversity protection, non-timber forest products harvesting, domestication of wild animals, forest ecotourism, adjustment in the forest industry, regional economic development, reduce the reliance on forestry in terms of development, increase the participation of farmers in the management of the National Park, and change the living and working habits of communities to reduce the negative impact on forestry.’<sup>142</sup> After six months in 2008, after Pudacoo had already opened unofficially, *The Eyes of Shangri-La:*

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<sup>141</sup> Three Parallel Rivers of Yunnan Protected Areas, UNESCO, World Heritage List, <http://whc.unesco.org/en/list/1083> [last accessed 4 September 2014].

<sup>142</sup> Ding Wendong, *supra* note 136.

*Planning and Construction of Pudacuo National Park* was published outlining the needs that plans had to address.<sup>143</sup> According to this report planning work in Pudacuo needed to focus on three aspects of the park's management:

- 1) resource assessment and evaluation, the orientation of development, function zone mapping and land-use planning;
- 2) analysis on resources development in relation to market's prospect;
- 3) security system design, including management system, environmental protection measures, commercial plan and infrastructure planning.

Without these plans being developed and implemented Pudacuo National Park would add to challenges within the World Heritage site outlined in 6.2.2 for the authorities.

In 2006, plans for hydro-electric dams along the Three Rivers resulted in the World Heritage Commission issuing a 'yellow card' warning to the Chinese government.<sup>144</sup> In spite of this the National Park managers linked their own management plans with the perceived benefits of hydro-power which they envisaged as having a role in helping set up an alternative source for fuel than firewood, used by ethnic peoples in and around Pudacuo, adding to conservation goals.<sup>145</sup> Although management needs were identified around which to develop comprehensive plans according to the Director of the

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<sup>143</sup> Jing Li, *Formation of China's First National Park: Interactions Among International NGO, Prefectural Government and Local Communities*, (2013), San Jose University, Masters Thesis available <http://www.sjsu.edu/anthropology/docs/projectfolder/Li-jing-project.pdf> [last accessed 4 September 2014].

<sup>144</sup> Wang Yongchen, A Yellow Card for the Three Parallel Rivers, (3 August 2007), China Dialogue available <https://www.chinadialogue.net/article/1200-A-yellow-card-for-the-Three-Parallel-Rivers> [last accessed 4 September 2014].

<sup>145</sup> Shangri-La Pudacuo National Park Handbook – the national park is located in the Three River Parallel World Heritage Site – the 5<sup>th</sup> World Heritage Site amongst 140 in the world [5<sup>th</sup> 2008]

Zhongdian County Forestry Bureau resources by 2008 were not invested to complete these nor implement them.<sup>146</sup> Zinda proposed that the fact that Pudacao, and indeed subsequent National Parks in Yunnan, were not grounded in law, resulted in there being no leverage to ensure management plans were complied with.<sup>147</sup> However this conclusion fails to recognise the many laws that did apply to Pudacao's management, most notably the World Heritage Site management governance requirements.

### 6.3.2 Achieving a Sustainable Balance Between Tourism and Conservation

Tourism was meant to be a key means by which revenue would be raised for conservation at Pudacao. TNC in Yunnan saw one of its contributions to the national parks projects as helping:

*'the Chinese government properly plan for and manage tourism ... providing the government with an opportunity to reduce the impacts of tourism and other threats to biodiversity in one of the world's most ecologically valuable natural areas.'*<sup>148</sup>

It was integral that any management plan ensured this was undertaken in a sustainable manner.

Tourism numbers were rising in the region. Since the early 1990s, the original Bithai Nature Reserve, around which Pudacao was located, had capitalised on permissible tourism under IUCN categories. Tourism revenue steadily rose over the years as visitor numbers increased. Initially the revenue went to the Forestry

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<sup>146</sup> Interview, Director of the Zhongdian County Forestry Bureau, Zhongdian, Prefecture, Yunnan, 22 July 2008.

<sup>147</sup> J. Zinda, *supra* note 103.

<sup>148</sup> TNC website *supra* note 133.

Bureau who administered the Reserve. In 1993, the Forestry Bureau received 400,000 rmb from tourism in Bithai.<sup>149</sup> Entrance fees increased as different bodies managed the site. In 1998 the entrance fee to the Bithai Nature Reserve was 6 rmb, in 2002 it 30 rmb; the Pudacao National Park Bureau raised this under the Tourism Bureau to 190 rmb.<sup>150</sup> Revenues were no longer channeled into the Forestry Bureau to undertake conservation management rather they went to the National Park Bureau. What is now 'The National Park Bureau' used to be 'The Tourism and Scenery Association' whose focus was tourism not nature protection.<sup>151</sup> In 2007 Pudacao Company was established to run the business affairs of the National Park with the former Head of the Tourism Bureau as its Director. Not only did the rise in revenues illustrate increased numbers of tourists, but also the change in administration demonstrated a shift in focus away from prioritising conservation management to tourism management. Perhaps unsurprisingly Zhongdian's Forestry Bureau Director believed the National Park was 'one hundred percent about tourism ... [and only] ... time will tell of the economic, social and environmental impacts.'<sup>152</sup> Given the close links with the former Tourism Bureau, and the exclusion of the Forestry Bureau from the process of both planning and undertaking management. This clear priority by the local government to use the national park to regenerate revenue sent a clear message to observers about the purpose of national parks.

Political investment into tourism accompanied the growth in revenue procured from it. In January 2006 Diquing Prefecture held an international workshop on

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<sup>149</sup> 1 rmb is equivalent to 0.10 GBP.

<sup>150</sup> Director of the Zhongdian County Forestry Bureau, *supra* note 146.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

Shangri-La National Park and 'sustainable tourism' development. Discussions focused on the advantage and disadvantage of 'sustainable tourism', especially on how to resolve the conflict between the development of national parks and tourism, and the establishment of national parks and community development.<sup>153</sup> TNCs Director Jerry Chen highlighted the co-dependency between tourism and conservation noting that in "Deqin and Lijang tourism is a major industry [and] so we need to protect biodiversity as part of [the] tourism industry." He claimed "the idea of the National Park was introduced to balance sustainable development."<sup>154</sup> Yet other bureaus, such as the Forestry Bureau who previously benefitted from tourism in Nature Reserves', claimed, "as the tourism concept developed ... people go to the Local Government and want to grab a share of the Nature Reserve [for tourism]. You see this happening in Lijang and Sichuan by calling for National Parks."<sup>155</sup>

Although Pudacao Company's Director claimed that the existing "Nature Reserve model of ecotourism law destroys areas of ecosystems"<sup>156</sup> neither he nor any of the collaborating partners appeared to have proposals for alternative plans.<sup>157</sup> Despite Pudacao's National Parks claim that sustainable development must be ensured by controlling the numbers of tourists and having appropriate management regulations that promote the ecotourism method' no formal

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<sup>153</sup> Yang Yuming, *supra* note 53.

<sup>154</sup> Jerry Chen, TNC Director, Yunnan Office, 24 July 2008.

<sup>155</sup> Director of the Zhongdian County Forestry Bureau, *supra* note 146.

<sup>156</sup> Ding Wendong, *supra* note 139.

<sup>157</sup> TNC's Director Jerry Chen noted that: 'We are trying to introduce new methodologies. Many of the governments at the provincial level accept the new methodologies as we are trying to promote conservation as well as tourism.' 24 July 2008. No further details were available from TNC.

management plan was in place or regulations before or immediately after its official opening.<sup>158</sup>

Another big challenge for management is providing the facilities expected by tourists. According to Professor Ye, who established South West Forestry College's Ecotourism Faculty in Yunnan that was involved in developing Pudacao's management plans, Chinese people have a different relationship with nature. Most tourists are Chinese on a package holiday spending two hours in the park. A stepwise approach from mass tourism to ecotourism is required.<sup>159</sup> In reality, ecotourism should be defined as a tourism activity different from mass tourism in terms of destinations, goals, participants and responsibility. China has as yet not formulated a national standard system that not only benefits the ecology of national parks, but also can regulate tourism activities in protection areas, and lessen potential eco-hazards brought by commercial abuse.

### 6.3.3 Benefit Sharing and Participation for Communities

In establishing Pudacao both the Prefectural government and TNC were keen to emphasize the importance of Tibetan Buddhism because of its association with harmony with Nature. Studies have demonstrated that 'in many regions of the world, sacred sites have been shown to have a major effect on conservation, ecology and environment due to the special precautions and restrictions associated with them.'<sup>160</sup> Without Tibetan Buddhism's spread into Northern Yunnan there might not have been an ecologically important area to protect and

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<sup>158</sup> Shangri-La Pudacao National Park Handbook (2008) – copy available from author.

<sup>159</sup> Interview Professor Ye, Ecotourism Faculty, South West Forestry College, Kunming, Yunnan, 23 August 2008.

<sup>160</sup> "China: Pudacuo National Park." The Nature Conservancy. Protecting Nature. Preserving Life. 23 Nov. 2012 cited in Martin, *supra* note 165, p.13.

turn into a Pudacao National Park because it could have been degraded many years before. The Mandarin name Pudacao is a derivation of the Tibetan name Bithai, which also means Boat Lake. After the park was established, park officials took the name from the famous Tibetan Holy Lake and translated it into Mandarin.<sup>161</sup> Despite the apparent concerns regarding preserving cultural integrity of local ethnic peoples in reality the establishment of the National Park undermined their cultural, social and spiritual livelihoods. Direct incorporation into discourse regarding Pudacao National Park of indigenous and ethnic communities' rights as outlined in international law, to which China is Party, did not occur.

Pudacao occupies a large part of local, ethnic people's land, and Bitahai Lake has been a popular tourist attraction since the mid 1990s. Nearby Tibetan peoples had self-organised tourist services, such as horseback-riding, which were abolished by the government once the National Park project was initiated. This resulted in a loss of income for villagers. One approach adopted to tackle the loss of income in Pudacao was that of compensating those households affected by the National Park.<sup>162</sup> This increased and extended a compensation system that was already in place through the National Forest Protection Programme.<sup>163</sup>

Pudacao National Park launched the first round of financial compensation to

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<sup>161</sup> E. Martin, *Manifestations of Tibetan Buddhism in Pudacuo National Park and its Effectiveness as an Environmental Education Tool*, (2012), Independent Study Project Collection, Paper 1461 pp. 1-45, p. 15-16 available [http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2472&context=isp\\_collection](http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2472&context=isp_collection) [last accessed 20 November 2014].

<sup>162</sup> Zhang, Yiqun, Junming Sun, Yuejun Tang & Guihua Yang Investigation on Community Eco-compensation of POTATSO National Park, (2012), Vol. 32, Issue 2, *Issues of Forestry Economics*, pp. 301-332.

<sup>163</sup> Associate Professor Zhao Yaqiao, *supra* note 42.

local community members from June 18, 2005 to June 18, 2008, but only to households who had provided horseback-riding programmes to tourists before park construction.. Each household was given 5000 rmb. The Director of Zhongdian County Forestry Bureau, who doubted the sustainability of the tourism numbers, was largely supportive of the compensation scheme. He explained: “The good thing is the compensation of 5,000 rmb per annum paid to households. All four villages that have community forestry in and around the National Park are compensated. It has happened the past two [2006-2008] years. The villagers support the National Park due to the compensation scheme. It is good for community livelihoods.”<sup>164</sup> This view was not wholly shared. Others observed that the compensation scheme led to conflicts between the community members over who had directly provided horse-riding services and was being compensated.<sup>165</sup> When asked why they thought they were provided compensation by the park, the residents offered three reasons: 1) compensating the lost income due to abolishment of horseback-riding program in addition to which the park is actually protected by “us”; 2) the park is our land; 3) we have collectively-owned forestry and pasture in the park. Residents also believe that compensation is allocated unequally among communities.<sup>166</sup> To address this, in 2008, Diqing prefecture government set up the Pudacao Community Working Committee to coordinate the compensation from the national park project to the local community.

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<sup>164</sup> Director of the Zhongdian County Forestry Bureau, *supra* note 146.

<sup>165</sup> Associate Professor Zhao Yaqiao, *supra* note 42.

<sup>166</sup> Zhang, Yiqun, Junming Sun, Yuejun Tang & Guihua Yang Investigation on Community Eco-compensation of POTATSO National Park, (2012 ), Vol. 32(2), *Issues of Forestry Economics*, pp. 301-332.

In addition to the monetary compensation, those involved directly in the establishment of the national park are keen to highlight other economic and social benefits to local ethnic communities specifically employment opportunities. There are approximately ninety-nine households surrounding the National Park, and a village of thirty-three households within it.<sup>167</sup> Ding Wendong, the park's Director, said that a third of households are employed by the National Park.<sup>168</sup> The figures though are somewhat misleading. Currently there are fifteen full time officials employed in the National Park. Each year the Tourism Service Company hires villagers from the community within the national park as temporary workers to collect trash and keep the park clean. In terms of salaried employment though there are only six full-time positions in Pudacao set aside for residents, but one hundred and sixty-two people live in Lojung village within the national park. These six employees are largely employed to do cleaning. The better-paid jobs require skills that many ethnic peoples do not have; for example they cannot drive the buses and are unable to be tour guides as need to speak Mandarin or English.<sup>169</sup> Whilst visiting the national park in 2008 I spoke with Tibetan teenagers who explained that the job that revolved between family members in their household was toilet cleaning. To increase their income resident communities have resorted to establishing barbeques at mandatory bus stops in the Park, selling non-timber forest products, and demanding payment for photographs of children in 'traditional ethnic costume'.<sup>170</sup> I was told that the money that was made would be used to send children to school. However at the National Park Research Institute efforts

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<sup>167</sup> Jerry Chen, *supra* note 154.

<sup>168</sup> Ding Wendong, *supra* note 139.

<sup>169</sup> Associate Professor Zhao Yaqiao, *supra* note 42.

<sup>170</sup> Personnel observation Pudacao National Park, Yunnan, 24 July 2008

are being made to deal with the 'problem' of ethnic peoples barbeques and moneymaking initiatives. This is perceived as a problem by management and ecotourism advisors who have sought assistance from TNC to develop a mechanism to deal with it.<sup>171</sup> The reasons given were that they threatened the conservation objectives of Pudacao.<sup>172</sup>

Planned future developments within and around the park will have a significant impact on communities. Over the next few years, the park intends to build hotels in the ecotourism resort area, and to construct trekking trails and trekking areas. There will be areas for driving tourists as well as scientific research in the park.<sup>173</sup> The only Tibetan village within the national park is planned to open to tourists in the form of a Tibetan household style hostel in 2013. Tibetan culture is clearly appropriated in ways that benefits the Park management, both businesses and government, more than it does the villagers. This is in contrast to Pudacao promotional materials produced by TNC that claimed 'we are also working with communities inside and outside of the park to build participation through co-management, alternative energy, green building and ecotourism. We want to abate the threats to biodiversity in this region and help communities benefit from the establishment of a national park.'<sup>174</sup>

Several local community leaders were highly sceptical of TNCs close association with the Provincial government. In one anonymous comment a community organiser talked how TNC 'come here with all their money, 4x4 cars and branded

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<sup>171</sup> Professor Ye, *supra* note 159.

<sup>172</sup> Ding Wendong, *supra* note 139.

<sup>173</sup> Martin. E, *supra* note 161.

<sup>174</sup> TNC website, *supra* note 133.

base-ball caps trying to get us all to help them make the Park a success.’<sup>175</sup> At the core lies the need to make the national park a commercial enterprise. Local communities rarely challenge this government discourse openly. It is difficult to get members of the local community to speak openly about the grievances they have over the loss of revenue from their own tourist initiatives, as well as the loss of a sacred cultural site.

#### 6.3.4 Funding Pudacao National Park: New Ecosystem Service Valuation

Fiscal and market-based instruments were seen by the Chinese authorities as a means by which to raise revenue from ecosystem services to finance in-situ conservation. This was a move away from the nationally funded protected areas regulatory fiscal approach that existed under the Nature Regulation Law 1994. It was a clear example of the national government seeing nature as having sufficient economic value that could be harnessed using market-based regulatory tools to pay for its own maintenance.

From the outset Pudacao National Park was also an experiment in realising new initiatives to fund conservation. The model approach drew on the one outlined in China’s 2003 nomination file submitted for the Three Parallel Rivers World Heritage site. It stated that ‘an ecological benefit compensation and compensable resource use mechanism ... opening more investment and fund raising channels ... to provide capital guarantee for the sustained protection and development of

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<sup>175</sup> Interview with anonymous, community organiser, Zhongdian, Yunnan, 23 July 2008

the property' was needed.<sup>176</sup> Emphasis was placed on the need to develop the region using non-government funding. Since

*'1993 the central and local governments as well as management institutions in scenic areas have put 460 million yuan in to the protection of forest, geological and scenic resources and environmental and residential conditions. As the property area [the Three Parallel Rivers World Heritage Site] is located in a less-developed area, more than 85% of the funds come from central and provincial finance. In the future, while increasing state's financial support, active measures will be taken to develop local economy and green industry so that local governments could also invest more. Preferential conditions will also be offered to attract foreign funds to participate in environmental protection projects.'*<sup>177</sup>

Funding for Pudacao specifically targeted establishing a market-based protected area model. The Pudacao National Park in Yunnan benefitted from a grant from the multi-million US dollar EU-China Biodiversity Programme (EUCBP) established in 2005. The EUCBP contributed US \$ 1,594,318 to the establishment of the National Park Policy Research Office within Yunnan's Forestry Bureau.<sup>178</sup> The focus of this funding was 'to facilitate transformation of local economic

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<sup>176</sup> Three Parallel Rivers World Heritage, Yunnan, China, nomination file, (2003) available <http://whc.unesco.org/en/list/1083/documents/>

<sup>177</sup> Ibid, p.159.

<sup>178</sup> The majority of the funds, which were matched by the Chinese government, were earmarked for the development of two National Parks in Meili Snow Mountain Scenic Area, Diqing Tibetan Autonomous Prefecture and Laojun Mountain Conservation, Yulong Naxi Autonomous County - details available <http://www.ecbp.cn/en/project.jsp?autoid=196> [last accessed 20 November 2014].

sectors like tourism into sustainable initiatives [and] to provide economic incentives and mechanisms for local communities and government to conserve biodiversity'.<sup>179</sup> The Pudacao promotional literature claimed that the park 'aim[s] to gain more support from central government, investors, international NGOs and national NGOs to realise environmental protection and management of the National Park. [There is a] need to look at improving investment mechanisms for government, developers, NGOs and civil society'.<sup>180</sup> This laid out a comprehensive vision that could attract investors in a natural capital ecotourism business enterprise.

China had already been pursuing payment for ecosystem services (PES) efforts under public initiatives, rather than private, through the sloping land conversion programme and several watershed projects. [see section 7.2.3] Also the introduction of the UNFCCC's Kyoto Protocol's Clean Development Mechanism created new opportunities to raise revenue through trading forest carbon sequestration certificates internationally. [see section 7.2.2] The Chinese government was keen to upscale these opportunities. At the time Pudacao National Park was established the Chinese government was developing a national carbon trading programme, several pilots included carbon sequestered through land use, land use change and forestry. It was thought that protected areas could be used as reservoirs of sequestered carbon to offset industrial carbon emissions in other regions of China. The payments would be raised

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<sup>179</sup> EU-China Biodiversity Programme: Protecting Globally Critical Biodiversity in Yunnan Province of China Project Focus - details available <http://www.ecbp.cn/en/project.jsp?autoid=196> [last accessed 20 November 2014].

<sup>180</sup> *Shangri-La Pudacao National Park Handbook*, (2008).

through taxation of provincial regions for their emissions that could be used to purchase sequestration credits.<sup>181</sup> This it is argued would offset pollution but also redistribute wealth to the poorer regions of the country. It would also help to finance in-situ conservation. The offsetting of carbon emissions within China, and internationally, was part of the vision of those involved in Pudacao as a source of revenue although those involved in its establishment prioritised in the short-term tourism as the main source of income. The new forest carbon market-based models do not include any benefit-sharing mechanisms for villagers in and around the Pudacao over and above the fixed compensation already provided to a limited number of households.

#### 6.4 Conclusion

The Pudacao National Park pilot provided an excellent case study to explore competing theories on how principles, actor and values are intertwined in law-making processes in practice at a local level. The project involved international organisations, funding, epistemic actors, ethnic minorities, business and government at both national and local levels. It drew on international forest related law principles to justify the project itself and the approaches adopted. And finally competing values were juxtaposed against one another in ways that in the end a clear winner appeared.

International law principles were important and used in different ways by the various actors as and when necessary. A key principle was that of sustainable

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<sup>181</sup> Guoyi Han et al, *China's Carbon Emissions Trading: An Overview of Current Developments*, (2012), Stockholm Environment Institute.

development. TNC emphasised the environmental and economic, whereas Chinese actors (government, business and epistemic communities) focused on development. This reflects an international pattern where in which it is claimed the North emphasises sustainability and the South development. Pudacao was development within a green landscape. The failure to have in place a management plan prior to opening was indicative of where the priorities lay for the powerful Chinese actors in the process. TNC was impotent to make a difference; it assumed an epistemic role towards the end before being excluded from further national park processes. TNC had not fulfilled the role often ascribed to large scale international NGOs completely. It did introduce the technical and conceptual aspects of commercial market based national parks to the Chinese authorities but it failed to ensure the proper regulatory frameworks to deliver social, environmental and long-term economic sustainability. Concerns that Pudacao is not being managed sustainably form part of the World Heritage Commissions ongoing concerns regarding protected areas management within the Three Parallel Rivers World Heritage Site in which Pudacao lies. This remains the only body that can from an international perspective hold the Chinese government to account.

Cooperation with developed countries came in the form of EU funding to undertake national conservation law reforms intended to create a coherent, homogenous legal regime that incorporated international standards and guidelines. China had already incorporated international guidelines for protected areas. Yet the process that was funded met with resistance, as it required the consensus amongst and between numerous Ministries and departments who had

different vested interests in the environment. This was indicative of the challenge that is made to an institutionalist approach to interpreting the embedding of international norms into national contexts. Rather than international actors entering a country and technically assisting to create the appropriate regulatory frameworks to realise the principles. In reality a power struggle occurs between vested groups within a country at all levels, and this occurs within a cultural and political context. Pudacao was a consolation to the international funders for the derailment of the process. As a pilot the promise made was that it would be learning by doing exercise in how to move forward in creating a coherent biodiversity legal regime in the country, to replace decades of ad hoc fragmented reforms.

The benefits from the establishment of Pudacao were not equally divided. Pudacao though became a source of income to different actors in the process. The people that received the least were the villagers in households outside the park they did not even receive compensation for lost livelihood income. Certain village households within the park benefitted from a fixed rate compensation scheme after they could no longer offer horse-riding tours that had been part of the tourist economy of the smaller protected area when managed by the Forest Bureau. The Director of the Pudacao, former Director of the Tourism Bureau, was indicative of the marketization of protected areas for the benefit of private business. Once Pudacao was seen to be a success plan for increasing numbers of similar parks were proposed in Yunnan. Without proper regulation these new business enterprises were attractive to local government, especially those with an eye to become businessmen and women. There was little feeding back in

terms of law-making from Pudacao. The national biodiversity reform negotiations appear to have permanently stalled. Protected areas, including forests, are now discussed more within law-making processes on climate change mitigation and the development of carbon-trading regulatory mechanisms. This mirrors international trends linking forests, conservation and climate change mitigation through a private sector market-trading mechanism that values the carbon sequestration capacity service. The next chapter examines in greater detail how priorities in forest management are changing to capture this new value resource further.

## C7. Bioenergy, Forests and Law: Implementing the Renewable Energy Law in Yunnan, South-West China

Two significant global issues that relate directly to forests are climate change and renewable energy. Forests are important to climate change mitigation efforts because they are both sources and sinks for greenhouse gases (GHG). Increasing sinks capacity, through afforestation and reforestation, and reducing emissions from deforestation and degradation, is a priority issue in international climate change negotiations. It is also necessary to reduce GHG emissions, including from the transport sector. One means to do so is developing transport fuels from non-fossil fuel sources, commonly referred to as biofuels.

Biofuels can be produced from a number of feedstock, ranging from agricultural residues, both animal and plant based, to specific biofuel crops such as sugar cane, palm oil and *jatropha curcas*.<sup>1</sup> Biofuel production can however result in land competition, deforestation, biodiversity loss, water stress, pollution, food insecurity and ironically GHG emissions. For bioenergy production to be sustainable a complex legal and regulatory framework involving different levels (international, regional, national) and different legal regimes (e.g. climate, environment and trade regimes) needs to be in place.

In recent years for a number of reasons, which are not only environmental, including: energy security; economic competitiveness; and human well-being,

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<sup>1</sup> Several crops such as *jatropha curcas* (tree crop whose berries provide oils that can be processed for biodiesel) are classed as trees thereby falling under a forest-land based definition that has significance in land use planning as this case study will demonstrate in relation to China.

China has sought to diversify its energy portfolio.<sup>2</sup> China recognises the need to increase the proportion of renewable energy sources in its overall energy portfolio, including those produced with biofuels. In an attempt to do so China, in 2005, enacted the Renewable Energy Law (REL), which set clear national targets for renewable energy production up to 2030.

This chapter explores the challenges faced in China of expanding a biofuel sector to produce biodiesel, especially in relation to forest land use planning.<sup>3</sup> The case study focuses on a UN joint project with the Chinese government that aims to ensure implementation of bioenergy related laws to achieve both sustainable development and contribute positively towards a transition to a low carbon economy locally, nationally and globally. The project targets farmers, especially amongst minority ethnic peoples, in the south-west region, including Yunnan Province.

The chapter begins with an overview of the international law and policy issues relating to biofuels. This is followed by an overview of laws in China relevant to biodiesel production: renewable energy laws, climate change law and policy and forestry law and policy. This section also traces the administrative governance in place to implement the laws and policies, and the regulatory tools adopted to do so considering the impact these have on achieving sustainable biodiesel production. After this I discuss the promises and pitfalls of China's choice to develop biodiesel from *jatropha curcas*. The second half of the chapter

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<sup>2</sup> E. Thomson & N. Horii, China's Energy Security: Challenge and Priorities, (Nov/Dec 2009), Vol.50, Issue 6, *Eurasian Geography and Economics*, pp. 643-664.

<sup>3</sup> This chapter is primarily concerned with production of biofuels on land designated as forest land.

introduces the case study of a joint UN Development Programme (UNDP) and Government of China green energy programme. I offer a detailed analysis of the project's normative priorities and particularly of how the project partners intend to ensure sustainable and equitable outcomes for the different actors involved in the process of delivering biodiesel at scale from forest lands using *jatropha curcas*. The chapter concludes by evaluating how successful the project was in meeting its aims and how it interpreted international norms and values in practice. As with the case study in chapter 6, I will also return to discuss this case study in relation to the broader theoretical concepts raised in Part 1 in chapter 8.

The research materials for this case study are the result of fieldwork in China between June-September 2008. The primary location on which the chapter focuses is Nasha Township, in Yuanyang County, Yunnan where site visits of *jatropha curcuas* plantations were undertaken accompanied by government representatives.<sup>4</sup> Where possible key actors were interviewed, other materials came from e-mail exchanges and the internet.

### 7.1 Biofuels: International Law and Policy Issues

In recent years, there has been a rapid rise in biofuel production, especially since adoption of the UNFCCC Kyoto Protocol Marrakech Accords that endorsed the use of bioenergy as a means to reduce GHG for Parties.<sup>5</sup> World fuel ethanol production has increased reaching 1.5 million barrels a day in 2010, up from

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<sup>4</sup> Due to heavy rains in Yunnan province at the time of the research access to a number of project sites was not possible. The research methodology is the same as that undertaken for chapter 6 and all interviews are on audio file with the author.

<sup>5</sup> UNFCCC Decision 11/CP.7, (2001).

about 300,000 in 2000.<sup>6</sup> In 2009, ethanol production reached 10.6 billion gallons in the US, 6.6 billion gallons in Brazil, 1.04 billion gallons in the EU and 0.54 billion gallons in China.<sup>7</sup> Such a rapid increase has placed the production and use of bioenergy at the centre of a fierce debate. On the one hand it is promoted as part of a sustainable energy future, and yet first-generation<sup>8</sup> liquid biofuels have given rise to a number of major controversies associated with climate change<sup>9</sup>, food security, land tenure rights, biodiversity, deforestation, water stress and desertification.<sup>10</sup> Each of these issues has resulted in international meetings, reports, negotiations, guidelines and commitments to the development of a range of sustainability criteria.

Competition for land and the resulting impacts on food security as well as driving deforestation are perhaps the headline problems resulting from increased production. Production of feedstock for industrial scale biofuel is by its very nature best suited for large tracts of land. It is normally achieved through monoculture production, with all its negative implications such as soil erosion,

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<sup>6</sup> J. Witcover, S. Yeh, & D. Sperling, Policy Options to Address Global Land Use Change from Biofuels, (2013), Vol. 56, *Energy Policy*, pp. 63-74.

<sup>7</sup> Renewable Fuel Association, *Climate of Opportunity: Renewable Energy Outlook 2010*, (2010), Renewable Fuel Association, p. 16.

<sup>8</sup> First generation biofuels are made from the sugars and vegetable oils found in arable crops, which can be easily extracted using conventional technology. In comparison, second generation biofuels are made from lignocellulosic biomass or woody crops, agricultural residues or waste, which makes it harder to extract the required fuel.

<sup>9</sup> Reducing GHG emissions due to biofuels production through carbon sequestration during plant growth is one of the main reasons for replacing fossil fuels by biofuels. However the diversity of feedstock, large number of biofuel pathways and their complexity lead to a high uncertainty over the GHG performances of biofuels, in terms of GHG emission reductions compared to the fossil fuels, especially if land use change is involved. Additional uncertainties occur if indirect effects are considered, such as the indirect land use changes or the impact on food and feed, local energy supply, bio-materials, etc – see N. Scarlat & J.F. Dallemand, Recent Developments of Biofuels/Bioenergy Sustainability Certification: A Global Overview, (2011), Vol. 39, Issue 3, *Energy Policy*, pp.1630-1646.

<sup>10</sup> C. Gamborg et al, Ethical and Legal Challenges in Bioenergy Governance: Coping with Value Disagreement and Regulatory Complexity, (2014), Vol. 69, *Energy Policy*, pp. 326-333; Scarlat & Dallemand, *ibid.*

biodiversity loss and water stress.<sup>11</sup> Although biofuels use only about 1% of arable land this percentage is projected to expand. Estimates of the global area needed for biofuel feed-stocks vary widely, depending on assumptions made about land productivity and technical change. One study, assuming reliance on dedicated energy crops, estimates feedstock as comprising 15% or more of global (not just arable) land.<sup>12</sup> These figures have led to a revaluation of the end value of bioenergy land based feedstock given the sheer scale of the land use required to meet targets. It has also raised doubts about biofuels, pointing out that they would have a large impact on the agricultural sector and a relatively small impact on contributing to a low-carbon energy sector.<sup>13</sup>

Today's biofuels, known as first generation biofuels, are overwhelmingly produced from feed stocks that are also used in food and feed markets—corn and sugarcane for ethanol (in the US and Brazil, respectively); soy, palm oil, and rapeseed for biodiesel (with major production in the Americas, Southeast Asia, and Europe, respectively).<sup>14</sup> This has led to significant concerns over the direct and indirect impacts on food security through land use competition. Biofuels threaten the right to food.<sup>15</sup> The Special Rapporteur on the Right to Food drawing on Article 11 of the International Covenant on Economic, Social, and Cultural Rights claimed that States must provide citizens with opportunities to

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<sup>11</sup> N. Colbran & E. Asbjorn, Biofuel, the Environment, and Food Security: A Global Problem Explored through a Case Study of Indonesia, (2008), Vol. 9, Issue 4, *Sustainable Development Law and Policy*, pp. 3-17.

<sup>12</sup> Witcover, J, Yeh. S & Sperling. D, *supra* note 6.

<sup>13</sup> L. Cotula, N. Dyer & S. Vermeulen, *Bioenergy and Land Tenure: The Implications of Biofuels for Land Tenure and Land Policy*, (2008), FAO/IIED.

<sup>14</sup> Witcover, J, Yeh. S & Sperling. D, *supra* note 6.

<sup>15</sup> Where biofuel feed-stocks are grown, the shift in land use is sometimes called “direct” land use change. When other productive activities are displaced by biofuel feed-stocks, it can lead to production expanding onto new lands; this is sometimes called “indirect” land use change - K. Shortall, “Marginal land” for energy crops: Exploring definitions and embedded assumptions, (2013), Vol. 62, *Energy Policy*, pp. 19-27.

obtain sufficient, nutritionally adequate, and safe food. He stated that the "human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives."<sup>16</sup> The first significant international community response to global biofuel expansion came in the form of the Declaration resulting from High-Level Conference on World Food Security in 2008.<sup>17</sup> The Declaration itself was rather weak encouraging information and skills exchange amongst state and non-state actors.<sup>18</sup>

Feed-stock for second-generation biofuels comes from short rotation tree plantations, which can be established either on currently existing cropland, forest land or marginal land. Concern over land use change and its direct and indirect impacts prompted interest in using so-called 'marginal' lands. Growing energy crops on 'marginal' land is seen as a way of ensuring that biomass production involves an acceptable and sustainable use of land.<sup>19</sup> The term 'marginal land' is one of a number of labels used to characterise the type of land promoted for second generation biofuels production others being 'idle', 'unused', 'free', 'spare', 'abandoned', 'set aside', 'degraded', 'fallow', 'additional', 'appropriate' and 'under-utilised' land. However, the various terms obscure technical, economic, social and environmental aspects of the potential, value and

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<sup>16</sup> Committee on Economic, Social and Cultural Rights, The right to adequate food (Art. 11), UN Doc. E/C 12/1999/5, 12 May 1999, para. 14.

<sup>17</sup> Declaration of the High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy- Declaration of the High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy, FAO, IFAD, CGIAR, (5 June 2008) available [http://www.fao.org/fileadmin/user\\_upload/foodclimate/HLCdocs/declaration-E.pdf](http://www.fao.org/fileadmin/user_upload/foodclimate/HLCdocs/declaration-E.pdf) [last accessed 20 November 2014]

<sup>18</sup> Medium and Long Term Measures Paragraph 7(f), *ibid.*

<sup>19</sup> G. Berndes et al, Bioenergy, Land Use Change and Climate Change Mitigation, (2010) International Energy Agency Bioenergy, p. 4 available <http://task39.org/files/2013/05/Bioenergy-Land-Use-Change-and-Climate-Change-Mitigation.pdf> - [last accessed 4 October 2014].

ecosystem functions that the land may hold. Shortall notes that ‘the definitions of these terms are ambiguous and fluid and there are many interesting conceptual issues raised, particularly in relation to the linguistic negotiation of “free” and “unused” land.’<sup>20</sup> The reality is that there is substantial uncertainty over the global land reserve that could optionally be deployed for the production of biofuels.<sup>21</sup>

State law and policy on defining, categorising and zoning ‘marginal lands’ has significant implications for forest dependent peoples, particularly in the case of insecure and unclear land tenure rights. Marginal land is often used for other purposes, such as gathering firewood, and the people who use it often lack the political power to defend these uses.<sup>22</sup> Indeed the FAO has cautioned that liquid biofuels production, such as of *jatropha curcuas*, might contribute to the socio-economic marginalisation of women and female-headed households in several ways. For instance large-scale plantations necessary for economically viable industrial scale production require an intensive use of resources and inputs to which smallholder farmers, particularly female farmers, traditionally have limited access.<sup>23</sup>

Other environmental law issues have also become concerns due to bioenergy production expansion. Most of the states who are engaged in large-scale bioenergy production are signatories to the multilateral environmental

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<sup>20</sup> Shortall. K, *supra* note 15.

<sup>21</sup> P. Havlik et al, Global Land-use Implications of First and Second Generation Biofuel Targets, (2011), Vol. 39, Issue 10, *Energy Policy*, pp. 5690-5702.

<sup>22</sup> S. Borrás Jr & J. Franco. From Threat to Opportunity-Problems with the Idea of a Code of Conduct for Land-Grabbing, (2010), Vol. 13, *Yale Human Rights and Development Law Journal*, p. 507.

<sup>23</sup> A. Rossi & Y. Lambrou, Gender and Equity Issues in Liquid Biofuels Production: Minimizing the Risks to Maximize the Opportunities, (2008), FAO cited in Colbran. N & Asbjorn. E, *supra* note 11.

agreements the CBD and the International Treaty on Plant Genetics, which require parties to realise 'the conservation of biological diversity' and 'conservation and sustainable use of plant genetic resources for food and agriculture'.<sup>24</sup> The texts of the CBD and UNFCCC are in conflict regarding the issue of bioenergy crops. While the CBD advocates biofuels as a measure to sequester GHG emissions through the Kyoto Protocol, including the Clean Development Mechanism, the UNFCCC calls for strict guidelines to prevent negative impacts on biodiversity and ecosystem functions.<sup>25</sup> Many countries have also started to expand biofuel production using exotic non-food crops, such as the *jatropha curcas*, which carry the risk of becoming alien invasive species. Under the CBD parties are obliged to adopt a precautionary approach to prevent the spread of alien invasive species.<sup>26</sup> Bastos highlights how the IUCN has argued that the lack of attention to this matter has been a major threat to both livelihoods and the environment, particularly in developing countries.<sup>27</sup> Other inter-related concerns with alien invasive species included the use of pesticides (covered by the Stockholm Convention on Persistent Organic Pollutants), resulting pollution of wetlands (covered by the Ramsar Convention) and impacts

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<sup>24</sup> CBD Article 1 (1992); Treaty on Plant Genetics Resources, Food and Agriculture Article 1.1 (2004).

<sup>25</sup> The CBD has integrated the issue of biofuel production and use into the programme of work on agricultural biodiversity (decision IX/1); it has convened regional workshops to develop criteria and indicators for sustainable production and use of biofuels (Decision IX/2) as well as develop policy guidance to minimise the negative biodiversity impacts that affect related socio-economic conditions (Decision IX/5). The CBD Secretariat has contributed to developing tools and approaches for biofuels sustainability assessments including those of the Global Bioenergy Partnership; the UN FAO Bioenergy and Food Security Criteria and Indicators project for further details see <http://www.cbd.int/agro/biofuels/tools.shtml> [last accessed 20 November 2014]

<sup>26</sup> Article 8(h), CBD (1992) states that, "Each contracting Party shall, as far as possible and as appropriate, prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species".

<sup>27</sup> IUCN, *Guidelines on Biofuels and Invasive Species: Draft for Comment* (2009) 3-5 cited in M. G. Bastos - Lima, *Biofuel Governance and International Legal Principles: Is It Equitable and Sustainable*, (2009), Vol. 10, *Melbourne Journal of International Law*, pp. 470.

on endangered species (covered by CITES).<sup>28</sup> To address the entire negative environmental and social impacts from bioenergy production different actors have called for, and/or help develop sustainability criteria, guidelines and certification standards.

Scarlat and Dallemand propose an institutionalist type solution in the form of an International Biofuels Sustainability Pact. They claim such an agreement on sustainability principles would help, to secure the sustainability of biofuels production at an international level. The implementation of a global, harmonised certification scheme, based on international sustainability standards might be an option to secure different direct and indirect effects of biofuels/bioenergy production.<sup>29</sup> Yet such proposals fail to take full account of the multilevel complexity, fragmentation between, within and across different legal fields, jurisdictions and actor groups as well as differentials in governance capacity to enforce any such scheme. Proposals to develop mandatory international sustainability criteria for biofuel production appear to have fallen on deaf ears. It seems that international cooperation between states has largely occurred in order to promote the expansion of bioenergy with the impacts only being latterly considered.<sup>30</sup> International efforts towards assessing the impacts of increased

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<sup>28</sup> J. Harrison et al. Mechanisms for Driving Sustainability of Biofuels in Developing Countries, (2010), *Renewable Energy Law & Policy Review*, p. 197.

<sup>29</sup> N. Scarlat & J.F. Dallemand, Recent Developments of Biofuels/bioenergy Sustainability Certification: A Global Overview, (2011), Vol. 39, Issue 3, *Energy Policy*, pp.1630-1646.

<sup>30</sup> In 2005, the Group of 8+5 (which includes China) launched the Global Bioenergy Partnership with the objective of promoting the 'continued development and commercialisation of renewable energy' and of supporting 'wider, cost-effective, biomass and biofuels deployment, particularly in developing countries where biomass is prevalent'. The GBEP In November 2011 the GBEP Steering Committee endorsed the report The Global Bioenergy Partnership Sustainability Indicators for Bioenergy. GBEP Partners and Observers through the GBEP Task Force on Sustainability developed it. The report presents 24 voluntary sustainability indicators for bioenergy intended to guide any analysis undertaken of bioenergy at the domestic level with a view to informing decision making and facilitating the sustainable development of bioenergy and,

production of biofuels have largely resulted in soft measures. These have been modeled on previous initiatives in the forestry sector, particularly voluntary certification mechanisms.<sup>31</sup> Some examples are the Round Table on Responsible Soy, the Roundtable on Sustainable Palm Oil, and most notably the Roundtable on Sustainable Biofuels, which has a wider remit and is intended to be applicable to several biofuel producing crops. The result is that these international voluntary, non-legally binding agreements allow countries to assert sovereign rights to exploit natural resources and are often framed in the form of guidelines.

A counter argument to Scarlat and Dallemand comes from Harrison. He believes that national legislation should be the key driver of a country's sustainable biofuel development rather than international. According to Harrison a participatory process of all stakeholders and rights holders should be used to draft the law, this will provide a legitimate regulatory intervention rather than depend on externally developed standards and guidelines by non-state actors.<sup>32</sup> However, any regulation to achieve sustainable production, be it national or international, will only be as good as the criteria, indicators and effective on-going procedurally inclusive enforcement lying behind it.

## **7.2 Renewable Energy, Climate Change and Forest Laws: Biodiesel (Dis)Connects in China**

China as a major producer of bioenergy has faced issues relating to sustainable land use and production. It has sought to address these through a number of channels. For China, as with many countries, expanding bioenergy production to

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accordingly, shall not be applied so as to limit trade in bioenergy in a manner inconsistent with multilateral trade obligations; see <http://www.globalbioenergy.org>

<sup>31</sup> Bastos-Lima. M.G, *supra* note 27, p. 470.

<sup>32</sup> Harrison. J, et al, *supra* 28, p.197.

an industrial scale requires coherent development across three different areas of law: energy, land (including forests, water and soils) and climate change. Each of these legal fields is rapidly changing in China as the government seeks to address a range of social, economic and environmental issues. The following section discusses the recent developments in these legal fields, and considers how they have fed into the normative discourse on emerging biodiesel policies in China, where oil-bearing tree crops have been adopted as feedstock. In the final section it assesses the administrative and regulatory mechanisms employed to implement laws and policies and considers their impact on achieving normative objectives. It argues that China is a long-way from establishing an interconnected legal and institutional framework to realise large-scale sustainable biodiesel production. I begin though with a background of the changes in China's energy consumption in the past decade.

### 7.2.1 Background: Energy Consumption in China

China's energy consumption has risen exponentially in recent years. The total energy consumption of China surpassed 3.25 billion tce<sup>33</sup> in 2010, 37.7% greater than in 2005. The China Bureau of Statistics has calculated that fossil fuels accounted for nearly 91 % of total energy consumption in China in 2009, of which about 69.5 % came from coal, 17.5 % from oil, 4 % from gas, and around 9 % from nuclear and renewable energy sources.<sup>34</sup> This over-reliance on fossil fuels has meant that since 2007 China's CO<sub>2</sub> emissions from energy consumption has topped the world and is growing at a speed of 10% per annum. Its energy-

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<sup>33</sup> tce = tonnes of coal equivalent.

<sup>34</sup> National Bureau of Statistics of China, China Statistical Yearbook 2011 available <http://www.stats.gov.cn/tjsj/ndsj/2011/indexeh.htm> - [last accessed 5 October 2014].

related emissions in 2011 reached 8.7 billion metric tons, accounting for 26.8% of global emissions.<sup>35</sup> The overconsumption of fossil fuels, especially coal and low-efficiency energy processing, as well as associated environmental problems, have prevented China from achieving any ecologically sustainable development.<sup>36</sup>

### 7.2.2 Renewable Energy Law and Policy

China committed to achieving an integrated approach to delivering a sustainable energy sector after the 1992 UNCED Rio Conference. It had already drafted an Energy Conservation Law in 1982.<sup>37</sup> In 1994 the State Council approved Agenda 21 paper on *China's Population, Environment and Development in the 21<sup>st</sup> Century*. This set out to:

*'to establish and implement a policy and legal framework that is suitable for a market economy; to develop and promote advanced and environmentally harmless technology for the production and consumption of energy; to improve energy efficiency; to use resources rationally; to reduce environmental pollution; to achieve sustainable development of the energy industry and to meet the development requirements of society and the economy by enhancing integrated planning and administration of the energy sector.'*<sup>38</sup>

<sup>35</sup> EIA: China country report, (4 February 2014), US Energy Information Administration available <http://www.eia.gov/countries/analysisbriefs/China/china.pdf> [last accessed 4 October 2014]

<sup>36</sup> Hao Zhang, China's Low Carbon Strategy: The Role of Renewable Energy Law in Advancing Renewable Energy, (2011), Vol. 12, Issue 2, *Renewable Energy Law & Policy Review*, pp. 133-148.

<sup>37</sup> The Law was not adopted until 1998. Although it was revised in 2007 the Energy Conservation Law remains mostly a policy declaration and framework with weak operative authority. This resulted in difficulties in devising and implementing coherent policies - Wang Mingyuan, China's Plight in Moving Towards a Low-Carbon Future: Analysis from the Perspective of Energy Law in D. Zillman, C. Redgwell, Y. Omorogbe & L. Barrera-Hernández (eds), *Beyond the Carbon Economy: Energy Law in Transition*, (2008), Oxford University Press, p. 383-5.

<sup>38</sup> China's Agenda 21 (1994) Section 13.3 details available <http://www.un.org/esa/agenda21/natlinfo/countr/china/inst.htm> [last accessed 20 June 2015]

The objectives of Agenda 21 were incorporated into the subsequent five-year plans. The 10<sup>th</sup> Five Year Plan, for example, included a Plan for Industrial Development of New and Renewable Energy.<sup>39</sup> However it was the Outline for New and Renewable Energy Development in China 1996-2010 that established a basic normative framework, largely around the principle of sustainable development for energy conservation and the development of renewable energy resources laws in China.<sup>40</sup>

In 2002, the National Development and Reform Commission announced the intention that renewable energy will contribute 10% of China's energy consumption by 2010.<sup>41</sup> This led to the passing of the Renewable Energy Law (REL) in 2005.<sup>42</sup> The REL was the first national legislation to articulate the Chinese government's commitment towards coordinating the country's 'short-term energy needs with its long-term sustainable development objectives.' China's REL was notable for being one of the first pieces of legislation on this theme to be drafted by a national government in the world.<sup>43</sup>

The REL was enacted for the purpose of promoting the exploitation and utilisation of renewable energy, increasing the overall supply of energy,

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<sup>39</sup> China's 10<sup>th</sup> Five Year Plan, 2001-2005, (2000) available <http://www.china.org.cn/e-15/> [last accessed 20 June 2015]

<sup>40</sup> Wang Xi, Mao Runlin & M. Dong, Strategy, Policy and Law Promoting Renewable Energy, in A. Bradbrook et al (eds), *The Law of Energy for Sustainable Development*, (2005), IUCN Academy of Environmental Law Research Studies, Cambridge University Press, p. 310.

<sup>41</sup> This reiterated the targets contained in the 11<sup>th</sup> Five Year Plan of Energy Development for 2006-2010 which aimed to limit China's total energy consumption to about 2.7 billion tonnes of coal equivalent, with an allowable annual increase rate 4% and an objective of reducing energy consumption by 20% per unit of GDP by the end of 2010.

<sup>42</sup> Objective: '*to promote the development and utilization of renewable energy, improve the energy structure, diversify energy supplies, safeguard energy security, protect the environment, and realize the sustainable development of the economy and society*'. Article 1 PRC Renewable Energy Law, 2005

<sup>43</sup> Hao Zhang, China's Low Carbon Strategy: The Role of Renewable Energy Law in Advancing Renewable Energy, (2011), *Renewable Energy Law & Policy Review*, pp.133-148.

improving the mix of energy, enhancing energy security, protecting the environment, and achieving sustainable economic and social development. The REL sets out the major principles for developing renewable energy as one of China's national priorities and establishes the mandatory renewable energy development target and other supporting mechanisms for scaling up renewable energies.<sup>44</sup> The REL also sets targets for the percentage of energy that should be produced and consumed in China by 2010, 2020 and finally by 2050. By 2020, 15% of all energy is to come from wind, biomass, solar and hydropower energy. Additional laws or regulations needed to be formulated within the framework of the REL and its complementary provisions to encourage the use of different types of renewable energy according to their level of technological development.<sup>45</sup> In conjunction with this strategy, the Chinese National Reform and Development Commission issued the Medium and Long Term Development Plan for Renewable Energy in 2007 as a blueprint for setting national renewable energy targets.<sup>46</sup> According to this Plan the consumption of biodiesel in China would reach two million tons in 2020.<sup>47</sup>

In relation to biomass, through the REL the Chinese government wanted to continue efforts begun under the 1998 Energy Conservation Law. Under REL Articles 16 and 23 petroleum-selling enterprises were obliged to 'incorporate biofuels that meet the national standards into their fuel selling system.'<sup>48</sup> A

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<sup>44</sup> Ibid.

<sup>45</sup> Wang Mingyuan, *supra* note 37, p. 397.

<sup>46</sup> Ibid.

<sup>47</sup> Feng Wang, Xue-Rong Xiong & Chun-Zhao Liu, Biofuels in China: Opportunities and Challenges, (June 2009), Vol. 45, Issue 3, *Vitro Cellular and Development Biology Plant*, pp. 342-349.

<sup>48</sup> Article 16, PRC Renewable Energy Law (2005) "The Government encourages clean and efficient development and utilization of biological fuel and encourages the development of energy crops. The Government encourages the production and utilization of biological liquid fuel. Gas-selling enterprises shall, on the basis of the regulations of energy authorities of the State

terminological guide is provided in Article 32 for biomass, energy crops and bio-liquids.<sup>49</sup> The REL did not however apply ‘to the direct burning of straw, firewood and dejects, etc. on low-efficiency stove.’<sup>50</sup> It therefore does not cover the significant use of forest materials gathered by rural forest based communities in China. Inclusion would have been politically, economically and socially controversial given the significant numbers of rural peoples dependent on these fuel sources. The Chinese government has emphasised the non-grain (non- food oil) bioenergy development path in various policy documents, i.e., the Medium and Long-Term Renewable Energy Development Plan by NDRC, the Agricultural Bioenergy Development Plan (2007–2015) by the Ministry of Agriculture, and the Issues on Development and Promotion of Oil Plants by General Office of State Council.<sup>51</sup> This was a clear attempt to prevent agricultural land and crops being used as bioenergy feed rather than for food production. The government also saw an opportunity to link the bioenergy elements of the REL with the reforms undertaken both in agricultural and forest land use policy since the late 1980’s and 1990’s. [see section 7.3.4]

### 7.2.3 Climate Related Law and Policy

Despite the fact that climate change is not included in the REL, its promulgation synchronized with the entry into force of the UNFCCC’s Kyoto Protocol to which

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Council or people’s government at the provincial level, include biological liquid fuel conforming to the national standard into its fuel-selling system.”

<sup>49</sup> Article 32 PRC Renewable Energy Law (2005) ‘Biomass energy: means energy converted from natural plants, rejects as well as urban and rural organic waste; Energy crop: means herbage and wood plants specially planted and used as raw materials of energy; Biological liquid fuels: means methanol, ethanol, bio-diesel and other liquid fuels derived from biomass resources.’

<sup>50</sup> Article 2, PRC Renewable Energy Law, (2005).

<sup>51</sup> Shiyang Chang et al, Biofuels Development in China: Technology Options and Policies Needed to Meet the 2020 Target, (2012), Vol. 51, *Energy Policy*, pp. 64-79.

China is a party.<sup>52</sup> China's widespread uptake in renewable energies in the past decade has contributed to reduction in emission intensity targets contained in both domestic and international climate change pledges by the government. China developed a National Climate Change Program, the first in any developing country, which outlines the desire to make further efforts to restructure its economy, promote clean technologies, and improve energy efficiency. In June 2007, the National Development and Reform Commission issued China's National Climate Change Programme (CNCCP).<sup>53</sup> This was China's first comprehensive policy initiative to address climate change. The CNCCP sets out non-binding targets to be achieved by 2010, including the restatement of the goal 20% reduction in energy consumption per unit of GDP and a 10% increase in the share of renewable energy in total energy supply as set out in the REL. In a letter notifying its support for the Copenhagen Accord China went further stating that it 'will endeavour to lower its carbon dioxide emissions per unit of GDP by 40-45% by 2020 compared to the 2005 level, increase the share of non-fossil fuels in primary energy consumption to around 15% by 2020.'<sup>54</sup>

One of the main policies adopted by China to meet its climate change mitigation objectives was to increase both the stock and resilience of its forest carbon sinks. Internationally this was by the inclusion of a commitment to 'increase forest coverage by 40 million hectares and forest stock volume by 1.3 billion cubic meters by 2020 from the 2005 levels.' In the Chinese government's official

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<sup>52</sup> Can Wang et al. China's Carbon Mitigation Strategies: Enough? (2014), Vol. 73, *Energy Policy*, pp. 47-56.

<sup>53</sup> See NDRC, 'China's National Climate Change Programme' (June 2007) available [www.ccchina.gov.cn/WebSite/CCChina/UpFile/File188.pdf](http://www.ccchina.gov.cn/WebSite/CCChina/UpFile/File188.pdf) [last accessed 14 November 2014]

<sup>54</sup> Copenhagen Accord China's letter including autonomous domestic mitigation action, Appendix II - Nationally appropriate mitigation actions of developing country parties, submitted 28 January 2008, [http://unfccc.int/files/meetings/application/pdf/chinacphaccord\\_app2.pdf](http://unfccc.int/files/meetings/application/pdf/chinacphaccord_app2.pdf) [last accessed 18 November 2014].

letter approving the Copenhagen Accord.<sup>55</sup> Combining an increase in both the stock and resilience of forest carbon sinks with bioenergy production to meet REL targets was a logical synergy for law and policy-makers in the Chinese government.

After the 2013 edition of China's Policies and Actions for Addressing Climate Change the State Forestry Administration issued the Plan on the Division of Work for Enhancing the Forest's Role in Tackling Climate Change to Implement the Durban Climate Change Conference Agreement.<sup>56</sup> This reiterated plans that government had already proposed in its domestically applicable 2007 Climate Change White Paper and internationally at the UN General Assembly in September 2009.<sup>57</sup> China's most recent statement to the UN General Assembly on 23 September 2014 stuck to the proposed targets.<sup>58</sup> Again the commitment places forests firmly within China's mitigation strategy.

China is keen to have bioenergy plantations of oil-bearing tree crops recognised as 'forest' so they can qualify for Kyoto Protocol Clean Development (CDM) project status.<sup>59</sup> China already has a number of Kyoto Protocol CDM afforestation and reforestation projects through which certificates of emissions reductions are generated for trade.<sup>60</sup> To qualify for afforestation and reforestation status projects need to meet the Marrakech definition of a forest. Existing plantations, as well as those of certain bioenergy crops such as *jatropha curcus* can be

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<sup>55</sup> Ibid.

<sup>56</sup> Can Wang et al, *supra* note 52, p. 47-56.

<sup>57</sup> PRC Climate Change White Paper; Address to UN General Assembly, New York, 22 September 2009.

<sup>58</sup> UN Climate Summit: China Pledges Emissions Action, (24 September 2014) BBC News available <http://www.bbc.co.uk/news/world-29334807> [last accessed 15 July 2015]

<sup>59</sup> Feng Wang, Xue-Rong Xiong & Chun-Zhao Liu, *supra* note 47.

<sup>60</sup> For details on the CDM see section 4.5.1 (ii).

included as part of afforestation and reforestation for reporting under the UNFCCC. This is due to the broad all inclusive 'forest' definition employed by the UNFCCC Parties.<sup>61</sup> Although *jatropha curcas* is a deciduous shrub that grows to a height of about five metres it can easily meet the forest definition requirements of the Kyoto Protocol.<sup>62</sup> Whether forestry projects, especially the CDM, result in real emission reductions, are additional to a countries intended forest plans and deliver sustainable land use outcomes is questioned by various actors. In relation to China its own forest policies for years were committed to extensive increases in forest stock. There are concerns though over China's quality of afforestation and reforestation due to poor stocking plants, inappropriate species selection, poor after care and limited monitoring by the forestry authorities.<sup>63</sup> It therefore makes it difficult to justify claims for additionality and sustainability.

#### 7.2.4 Forest Related Law and Policy

A primary objective for China's forest law and policy is to increase the national forest estate after decades of decline.[see section 5.2.1] This has involved large-scale national afforestation and reforestation programmes on an unprecedented scale in human history. These began in the late 1980s, the main programmes being the following.

In 1988 the Chinese government approved three national Afforestation projects:

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<sup>61</sup> The definition of forests under the Kyoto Protocol agreed with the Marrakech decisions states that x. Chinas forest definition is broader. Under these definitions *jatropha curcus* that can grow to a height of 2 metres when planted can be categorised as a forest. Insert details

<sup>62</sup> As such *jatropha curcus* will also meet national and international definitions of a forest and therefore will constitute afforestation and reforestation, and also qualify for potential future CDM funding if additionality requirements under the Kyoto Protocol are met. Provide relevant details.

<sup>63</sup> G. Heilig, et al, Poverty Alleviation in China: A Lesson for the Developing World?, paper presented at the International Conference on the West Development and Sustainable Development August 2-4, 2005 Urumqi, China available [http://www.gerhard-k-heilig.com/pdf/Poverty\\_5.pdf](http://www.gerhard-k-heilig.com/pdf/Poverty_5.pdf) [last accessed 20 November 2014].

- the Shelter Forest Project of Coast;
- the Plain Farmland Forest Shelter Project;
- and the Project of Fast Growth, High Yielding Timber production Base.

In 1989 the Chinese Government approved two more major Afforestation projects:

- the Shelter Forest System Project of ‘Three Northern Region’;
- the Shelter Forest Project of the Middle and Upper Reaches of the Changjiang River.

The Chinese government quickly extended and added to these afforestation and reforestation projects in 1998 after the ecological disasters in the Yangtze and the Yellow River Basin where several thousand people died after mudslides in heavily deforested areas. In that year the State Council adopted a Program Outline of China’s Ecological Environment Construction. It included a framework for the beginnings of the largest public payment for environmental services programme in the world, the Forest Ecosystem Compensation Programme (also known as the Sloping Land Conversion Programme (SLCP)).<sup>64</sup> Farmers received compensation in the form of grain in return for planting trees on land that was formally used for agricultural production. Zhiyong describes the SLCP as a ‘CDM activity of Chinese style’.<sup>65</sup> A trial was launched in 1999 and extended in 2002 across the country. The SLCP sought to restore natural ecosystems and mitigate the adverse impacts of agricultural practices carried out in previously forested

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<sup>64</sup> It is also referred to as the Grain for Green Programme and Sloping Land Conversion Programme. Jintao Xu, A. White & U. Lele, *China’s Forest Tenure Reforms: Impacts and Implications for Choice, Conservation and Climate Change*, (2010), Rights and Resources Initiative, Washington DC, available [http://www.rightsandresources.org/documents/files/doc\\_1403.pdf](http://www.rightsandresources.org/documents/files/doc_1403.pdf) [last accessed 6 October 2014].

<sup>65</sup> Li Zhiyong, A Policy Review on Watershed Protection and Poverty Alleviation by the Grain for Green Programme in China, in H. Sim, S. Appanah, & Y. Young, *Proceedings of the Workshop on Forests for Poverty Reduction: Opportunities with CDM, Environmental Services and Biodiversity*, (2004), RAP Publication, p.186 available at <http://www.fao.org/docrep/008/ae537e/ae537e0j.htm> [last accessed 20 November 2014].

areas or marginal land, such as flooding, sedimentation of reservoirs, and dust storms. The SLCP classified China into eight regions for the purpose of ecological restoration and improvement. It set the plan out in three stages. It covers 25 provinces/regions/cities over 1600 counties, involving 15 million households and 60 million farmers. According to the plan, almost 15 million hectares of cropland should be set aside for reforestation or conversion into grassland; of which more than 4 million hectares should be on steep slopes of at least 25 degrees. The SLCP is the biggest land-use transition, watershed management and poverty alleviation programme involving the largest population in Chinese history and across the globe.<sup>66</sup> Between 2031-50, in the SLCP's final phase the aim is to establish a nation-wide ecological system that can support the sustainable development of the Chinese economy and society. If actualized the policy will have a significant impact on ecological protection, and the alleviation of poverty amongst the farmers in the soil erosion prone and water stressed regions.<sup>67</sup>

The state has allocated 'marginal lands' to households for management, but has restricted harvesting and marketing of any products. The SLCP programme allows the planting of some 20% of "economic trees" which the farmers can use commercially (in contrast to "ecological trees" that can not be harvested). The government has often imposed targets for planting and for species planted, and

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<sup>66</sup> Li Zhiyong, A Policy Review on Watershed Protection and Poverty Alleviation by the Grain for Green Programme in China, in H. Sim, S. Appanah, & Y. Young, *Proceedings of the Workshop on Forests for Poverty Reduction: Opportunities with CDM, Environmental Services and Biodiversity*, (2004), RAP Publication, p.186 available at <http://www.fao.org/docrep/008/ae537e/ae537e0j.htm> [last accessed 20 November 2014].

<sup>67</sup> Ibid.

has even regulated details such as spacing and layouts of forest plots.<sup>68</sup> It has encouraged farmers to plant cropping trees such as walnut and apricot to supplement their livelihoods. In some areas farmers were encouraged to plant *jatropha curcas* and other biodiesel oil-bearing trees. Farmers were not involved in the process of the SCLP policy development either in terms of targets, species selection or fiscal mechanisms adopted.

Despite this Uchida et al claimed the SLCP was a 'win-win proposition', at least in the short-run.<sup>69</sup> Two thirds of the three million hectares included in the SLCP were under collective management. Although it was primarily aimed at ecological restoration some have argued that the programme contributed to poverty alleviation in some of the most deprived mountainous rural areas in China.<sup>70</sup> The logic being that not only does the programme provide higher incomes but the farm households would have access to additional family labour that is now not needed for use on the set-aside plots.<sup>71</sup> Although farmers who set aside these crop areas are compensated in cash, grain, and seedlings, G. Heilig, et al argue that the command and control style fiscal regulatory intervention was inefficient. They claim that opening up market opportunities would have provided better environmental, social and economic outcomes.<sup>72</sup>

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<sup>68</sup> M. Bennett, *Markets for Ecosystem Services in China: An Exploration of China's "Eco-compensation" and Other Market-Based Environmental Policies* (2009), Forest Trends.

<sup>69</sup> E. Uchida, Jintao. Xu & S. Rozelle, "Grain For Green" In China: Cost-Effectiveness and Sustainability of a Conservation Set-Aside Program, (2003) Annual meeting, July 27-30, Montreal, Canada 22252, American Agricultural Economics Association available <http://ideas.repec.org/p/ags/aaea03/22252.html> [last accessed 6 October 2014], p. 17.

<sup>70</sup> K. Gerhard et al, *Poverty Alleviation in China: A Lesson for the Developing World?*, paper presented at the International Conference on the West Development and Sustainable Development August 2-4, 2005 Urumqi, China available [http://www.gerhard-k-heilig.com/pdf/Poverty\\_5.pdf](http://www.gerhard-k-heilig.com/pdf/Poverty_5.pdf) [last accessed 20 November 2014].

<sup>71</sup> E. Uchida, Jintao. Xu & S. Rozelle, *supra* note 78.

<sup>72</sup> G. Heilig, et al, *supra* note 63.

A second major programme, the Forest Ecosystem Compensation Fund (FECF), is aimed at conserving and improving management of “public benefit” forest area. In terms of regional distribution, 72% of total public benefit forest area is in the west, one of China’s economically poorest regions. The pilot phase of the FECF was launched in 2001 and formally adopted in 2004. The program now stretches to all corners of the country. The FECF, like the SLCP, pays households, communities, and local governments to protect about 44.53 million ha of key forest areas across 30 provinces.

The FECF’s legal foundations were set down in Article 6, Chapter 1 of the revised PRC Forest Law (1998), which called for the establishment of a ‘Forest Ecosystem Benefit Compensation Fund’ for exclusive use for the construction, fostering and protection of ‘public benefit’ forests.<sup>73</sup> Section 3, Article 15 of the Forest Law Implementation Regulations (2000) further states that those who manage and protect ‘public benefit’ forests have the right to receive compensation.<sup>74</sup> The State Forestry Administration largely coordinated the afforestation and reforestation. Inappropriate selections of non-native species for planting at times including *jatropha curcas* were taken.

Both these programmes offered significant opportunities for *jatropha curcas* to be mainstreamed as part of China’s afforestation and reforestation. They were targeted specifically also at alleviating poverty in some of the poorest regions n

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<sup>73</sup> Article 6(1), PRC Forestry Law, (1998).

<sup>74</sup> Article 15, PRC Forest Law Implementation Regulations (2000).

China. Yet there have been criticisms of the use of alien invasive species, mismanagement of compensation funds by authorities and elite capture of initiatives. The latter has become an issue of greater concern given decentralisation under the forest land law reforms.

#### 7.2.4 Administrative Governance

The REL provides the basis for administering China's energy resources. Legislative imperatives include: the need for an integrated system; consideration of the impact of foreign or international law; political frameworks; as well as public sentiment.<sup>75</sup> As with other environmental law issues a new law on renewable energy, including bioenergy, will do little to realise the overall objective of the sustainable development of energy resources in China. Additional rules, regulations, rules and systems will be necessary to establish a complete legal framework governing renewable energy resources. The establishment and improvement of the relevant legal system is as important as the recognition of the significance of such a law.<sup>76</sup> These additional rules, regulations, and systems are only beginning to be put in to place for biofuels.

Prior to the REL central government controlled the energy sector. The government held the powers of resource distribution, regulatory powers and overall authority in relation to energy projects. The government also controlled the scope and significance of development activities. Some local governments did

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<sup>75</sup> Ye Junong, *Environmental Policy and Law*, China University of Political Science and Law Press (2003) cited in Wang Xi, Mao Runlin & M. Dong, *Strategy, Policy and Law Promoting Renewable Energy Resources in China*, in A. Bradbrook et al, *The Law of Energy for Sustainable Development*, (2005), IUCN Academy of Environmental Law Research Studies, Cambridge University Press, p. 312.

<sup>76</sup> Wang Xi, Mao Runlin & M. Dong, *ibid*, p. 316.

not fully realise the strategic significance of renewable energy resources and did not prioritise their development as part of the provincial government's agenda.<sup>77</sup> This is now changing with increasing decentralisation and privatisation of energy provision.

The success of the REL depends on several factors including the development of the relevant complementary norms, effective enforcement, further amendments and improvements of the legislation, administrative reform, and meeting basic conditions regarding technology, the market and society.<sup>78</sup> The competent departments of the State Council or the provincial people's governments need to develop complementary measures and rules. Wang identifies the general trend to be to strengthening market mechanisms and increasing the role of civil society so that 'three hands' (i.e. the government, the market and civil society) cooperate and function jointly to realise the REL targets. These complimentary provisions are part of the REL, they also are an important premise for building social equity while improving the economic efficiency and sustainable development of the renewable energy industry.<sup>79</sup> The relevant government entities have a legal duty to enact these provisions. However, their absence to date demonstrates that China's renewable energy legislation is still at its development stages. While this situation continues there will be problems in enforcement leading to a decline in the effectiveness of the renewable energy law system.

A root and branch reform of China's energy administration is arguably required in order to realise a renewable energy future in China. Wang claims that the

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<sup>77</sup> Ibid p. 312.

<sup>78</sup> Wang Mingyuan, *supra* note 45, p.396.

<sup>79</sup> Ibid p. 394.

system of renewable energy administration established by the REL is a 'simple confirmation of the status quo, without any innovation. All the existing shortcomings, such as the existence of a multiplicity of policies from various departments, overlapping functions, duplicate programs, overly elaborate procedures, and difficulties in coordination, remains unresolved.'<sup>80</sup> The REL Article 5 prescribes that 'the competent energy department of the State Council shall undertake the uniform administration of the exploitation and utilisation of renewable energy. The relevant departments in science and technology, agriculture, water resources, land resources, construction, environmental protection, forestry, ocean, weather and others shall be responsible for the related administration within their respective areas. The energy administrations of all locals' people's governments above the county level, and other departments at the same level within their areas, shall be responsible for administration within their administrative regions.'<sup>81</sup> The National Development and Reform Commission, the Ministry of Commerce, the Ministry of Agriculture, the Ministry of Water Resources and the State Electricity Regularly Commission respectively all are in some way in charge of renewable energy affairs. Furthermore as a result of multiple government institutional reforms, the organs in charge of renewable energy exploitation and utilisation have been weakened, and human resources are severely insufficient. The resulting policies and activities lack stability and continuity, government malfunctions become commonplace, internal accountability mechanisms are often a formality, social checks and balances are non-existent, and the certainty and effectiveness of

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<sup>80</sup> Ibid p. 395.

<sup>81</sup> Article 5, PRC Renewable Energy Law (2005)

renewable energy policy implementation is substantially reduced, thereby hindering the chances of realising the goals of the legislation.<sup>82</sup>

#### 7.2.5 Regulatory Approaches

China's energy sector has undergone a degree of privatisation, although important aspects of energy production, supply and distribution remain in state ownership. In attempting to enact change in the energy sector, the government uses market-based fiscal mechanisms to incentivise the development of new funding sources and their distribution. Reflecting the increasing incorporation of market mechanisms into environmental law in China the Energy Conservation Law had already used incentive measures, such as subsidies and feed-in-tariffs.<sup>83</sup> It however combined these with command and control regulation. Government energy procurement became one of the key means through which to achieve the Law's objectives by guaranteeing a market for the big power producers. The 10<sup>th</sup> Five Year Plan, for example, included a Plan for Industrial Development of New and Renewable Energy. The Plan anticipated that 'with the market as a guide ... enterprises should provide technical support to: cultivate and regulate energy markets; standardise products; localise technology; and promote new and renewable energy industries.'<sup>84</sup> The REL built on these fiscal approaches that the Chinese government had already established. Economic incentives such as funding and tax relief will be offered to companies and taxation, concessions and price regulations will be used to provide guarantees for the market.<sup>85</sup> This would build on previous investments by the Chinese into renewable energy,

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<sup>82</sup> Wang Mingyuan, *supra* note 45, p.396.

<sup>83</sup> PRC Energy Conservation Law, (1997).

<sup>84</sup> PRC Tenth Five Year Plan for New and Renewable Energy Industry, National Economy, Trade and Resources, (2001), Issue 1020, Article 3(1).

<sup>85</sup> Article 4 PRC Renewable Energy Law, 2005

including biofuels, both domestically and internationally.<sup>86</sup> This law uses financial incentives, such as a national fund to foster renewable energy development and discounted lending and tax preferences for renewable energy projects within provinces and municipalities.<sup>87</sup>

In general the Chinese governments objective is to firstly implement policies that favour the development of renewable energy resources; secondly, to regulate competition in the market; thirdly, to promote the localised use of renewable energy resources; fourthly, to increase the share of renewable energies in the overall energy system; and finally, to improve the energy structure in China and contribute to environmental protection.<sup>88</sup>

### 7.3 China's Biodiesel: Promise and Pitfalls of *Jatropha Curcas*

China has a long history of utilising biomass sources such as crop straw, firewood, agricultural wastes or animal excrement, which are generated or obtained from agricultural production and can be adopted as energy sources either directly or after further processing.<sup>89</sup> The traditional consumption of this kind of 'agricultural renewable energy' continues in the rural areas of China, which, to a large extent, differentiates it from renewable energy sources in the modern context. Indeed, the 2005 REL excluded traditional biomass energy from its reduction targets. [see section 7.2.2] However, the availability of such

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<sup>86</sup> Hou Dadi, 2020 Energy Demand and Energy Conservation in Bradbrook. A et al, *supra* note 39, p. 55.

<sup>87</sup> J. Lewis, China's Strategic Priorities in International Climate Change Negotiations, (Winter 2007-08), *The Washington Quarterly*, pp. 161-2.

<sup>88</sup> Wang Xi, Mao Runlin & M. Dong, *supra* note 40, p. 310.

<sup>89</sup> Jianguo Zhu, Agricultural Renewable Energy and its Management in China, in Bradbrook. B et al, (eds), *supra* note 40, p. 156.

traditional energy sources may be impacted by the policies and regulatory measures adopted to meet modern large-scale bioenergy targets.

For China, limiting land competition, especially over agricultural land, is a key concern when it comes to biofuel production, given the national food security question. Similarly to many countries that have committed to renewable energy targets requiring the increased use of biofuels, especially bioethanol and biodiesels, China is struggling to ensure supplies that do not compromise food security, biodiversity, and water availability.<sup>90</sup> Nevertheless, China is now the third largest bioethanol producer in the world after the United State and Brazil.<sup>91</sup> But bioethanol has negatively impacted the use of agricultural land in China. Officially the government has claimed that they maintain ‘a principle with biofuel: it should neither impact on the people's grain consumption, nor should it compete with grain crops for cultivated land.’<sup>92</sup> In practice, this principle is difficult to enforce.

Due to limits on the availability of surplus agricultural land and water sources China has decided to place greater efforts on the second-generation cellulosic bioethanol technologies. Nonetheless, second-generation biofuels will have implications for land use in some form because of direct and indirect land use change effects.<sup>93</sup> Even if the biodiesel feedstock can be derived from some oil-

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<sup>90</sup> A. Bezlova, ‘Biofuels eat into China’s foodstocks’, *Asia Times* online (21 December 2006) available [http://www.atimes.com/atimes/China\\_Business/HL21Cb03.html](http://www.atimes.com/atimes/China_Business/HL21Cb03.html) [last accessed 20 November 2014]

<sup>91</sup> Qiu Huanguang et al, *Bioethanol Development in China and the Potential Impacts on its Agricultural Economy*, January 2010, Vol. 87, Issue 1, *Applied Energy*, pp. 76-83.

<sup>92</sup> Yang Jian, Director of the Development Planning Department under the Agriculture Ministry, cited in Bezlova. *A supra* note 90.

<sup>93</sup> CBD, New and Emerging Issues Relating to the Conservation and Sustainable Use of Biodiversity: Biodiversity and Liquid Biofuel Production, Subsidiary Body on Scientific, Technical and Technological Advice, UNEP/CBD/SBSTTA/12/9, (25 April 2007), Paris, paragraph 5 –

bearing seeds, it still needs large tracts of forest land for growing.<sup>94</sup> The government is planning to develop forestry-based biodiesel using oil-bearing tree species on forest and 'marginal' land.<sup>95</sup> There are more than twenty species of oil-bearing tree species that can be used to produce biodiesel feedstock in China. The main species include *jatropha curcas*, Chinese pistache, varnish tree and tung tree.<sup>96</sup>

It is believed that *jatropha curcas* has significant potential for the production of environmentally friendly biofuels as well as an opportunity for pro-poor rural development.<sup>97</sup> Globally by 2008 more than 720,000 ha had been planted, rapidly rising to over 21 million ha in 2014, out of an achievable total potential of around 30 million ha.<sup>98</sup> There are 175 species of *jatropha curcas* plants in the world of which five are present in China.<sup>99</sup> *Jatropha curcas* has been grown in China for more than 300 years.<sup>100</sup> As *jatropha curcas* grows well in poor arid soils it is seen to be ideal for certain geographic locations in South-West China including Guizhou, Sichuan and Yunnan. It is intended that this will improve local fragile ecological system and help farms increase their production and incomes.

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available <http://www.cbd.int/doc/meetings/cop/cop-09/official/cop-09-26-en.pdf> [last accessed 20 November 2014]

<sup>94</sup> Mingfa Yao, Haifeng Liu & Xuan Feng. The Development of Low-carbon Vehicles in China, (2011), Vol. 39, Issue 9, *Energy Policy*, pp. 5457-5464.

<sup>95</sup> Ibid

<sup>96</sup> Shiyang Chang et al, Biofuels Development in China: Technology Options and Policies Needed to Meet the 2020 Target, (2012), Vol. 51, *Energy Policy*, pp. 64-79.

<sup>97</sup> R. Brittain & N. Lualadio. *Jatropha: a smallholder bioenergy crop: the potential for pro-poor development*, Vol. 8, Food and Agriculture Organization, (FAO), 2010.

<sup>98</sup> H. Romijn, Land Clearing and Greenhouse Gas Emissions from *Jatropha* Biofuels on African Miombo Woodlands, (2011), Vol. 3, Issue 10, *Energy Policy*, pp. 5751-5762.

<sup>99</sup> In December 2005, the Sichuan Provincial Approval Board for Forest Breeding identified two improved clones of *jatropha* see Meng Ye et al, Current Situation and Prospects of *Jatropha Curcas* as a Multipurpose Tree in China, (2009), Vol. 76, *Agroforestry Systems*, p. 487 available [https://jatropha.uni-hohenheim.de/uploads/media/Agroforestry\\_2009.pdf](https://jatropha.uni-hohenheim.de/uploads/media/Agroforestry_2009.pdf) [last accessed 20 November 2014].

<sup>100</sup> Ibid.

China began a research and pilot program on *jatropha curcas* for biodiesel production under its Eighth Five-Year Plan (1991-1995). In the mid 1990's thirty hectares of *jatropha curcas* pilot woods were established in the Jinsha River drainage area of south-west China. The program is now a core element of the country's Scientific Action for the Development of China's Western Region.<sup>101</sup> By 2010, China had planned to plant 13 million hectares, an area the size of England, with *jatropha curcas*, according to the State Forestry Administration.<sup>102</sup> The government was also looking for the *jatropha curcas* trees to provide wood fuel for a power plant with an installed capacity of 12 million kilowatts, which would account for 30% of the country's renewable energy by 2010.

As in the case of non-grain sugar and starch energy crops, the marginal land available for oil-bearing trees should be in compliance with current land administration policies.<sup>103</sup> The government plans to use 'marginal land' and mountainous land for biofuel feedstock production.<sup>104</sup> In line with the Land Administration Law (2004 amended) the 2008 Research Group on China Renewable Energy Development Strategy classified marginal land available for non-grain starch and sugar crops into two parts as: (i) unutilized land and (ii) part of low-productive arable land.<sup>105</sup> It is estimated that, among the available

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<sup>101</sup> UNDP Green Poverty Alleviation in Poor Rural Areas of China, Project Document , CPR/06/209 Revision, (2006) UNDP China, p. 14 - available <http://www.undp.org.cn/projectdocs/51952.pdf> [last accessed 20 November 2014] (here after UNDP GPA Project, 2006)

<sup>102</sup> Sun Xiaohua, Fuel from forests is new clean energy goal, (8 February 2007), China Daily, available [http://www.chinadaily.com.cn/cndy/2007-02/08/content\\_804034.htm](http://www.chinadaily.com.cn/cndy/2007-02/08/content_804034.htm) [last accessed 20 November 2014]

<sup>103</sup> Tian, Yishui et al, Estimation of Un-used Land Potential for *Biofuels* Development in *China*, (November 2009), Vol. 86, Supplement 1, *Applied Energy*; pp. 577-585.

<sup>104</sup> Shi-Zhong Li & C. Chan-Halbrendt, Ethanol Production in the People's Republic of China: Potential and Technologies, (2009), Vol. 86, *Applied Energy*, pp.162-169.

<sup>105</sup> Shiyang Chang et al, *supra* note 96.

forest barren lands, barren mountains, barren sand areas, and unutilized land resources, there are more than 36 million hectares that can be available for oil bearing trees, of which more than 14 million hectares is from forest land alone.<sup>106</sup>

According to Tian the potential land area for cultivating oilseed plants and energy crops, including *jatropha curcas*, is estimated to meet the annual feedstock requirements of 50 million tons of liquid biofuel.<sup>107</sup> Using these classifications for determining available marginal land supply potential would mean that land availability would not be a barrier to China's biofuels targets in 2020.<sup>108</sup> This conclusion is based on assumptions about yields of oil-bearing tree crops grown on marginal and forest land. Forest policy advisors argue that definitions of terms such as 'wasteland', 'unused land' and 'degradation' urgently need to be clarified and specified in order to prevent wrong estimations and misallocation of lands for *jatropha curcas* production on a vast scale.<sup>109</sup>

Yet there are uncertainties on the actual yields.<sup>110</sup> Early experiences from the *jatropha curcas* cultivation illustrate that although it can survive under hostile environmental conditions, oil yields can be much higher in conditions where the

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<sup>106</sup> Ibid.

<sup>107</sup> Tian, Yishui et al, *supra* note 103.

<sup>108</sup> Shiyang Chang et al, *supra* note 96.

<sup>109</sup> ProForest, *Jatropha Literature and Perspectives Review: Main Potential Social and Environmental Impacts Arising from Large Scale Plantings*, (2008), ProForest Ltd., Oxford.

<sup>110</sup> CBD, New and Emerging Issues Relating to the Conservation and Sustainable Use of Biodiversity: Biodiversity and Liquid Biofuel Production, Subsidiary Body on Scientific, Technical and Technological Advice, UNEP/CBD/SBSTTA/12/9, (25 April 2007), Paris, paragraph 5 – available <http://www.cbd.int/doc/meetings/cop/cop-09/official/cop-09-26-en.pdf> [last accessed 20 November 2014].

plant has adequate access to soil nutrients and water.<sup>111</sup> This creates strong economic pressures for companies to establish plantations in areas that cannot be qualified as complete wastelands or degraded forest lands.<sup>112</sup> According to the Worldwatch Institute 'it is not rare in China for local governments to sell off lush hills to logging companies as "waste forestlands."<sup>113</sup> Moreover if these resources are made available for cultivation, one might argue that the land can be used for production of food instead of biofuels, if food security is the primary concern of the country.<sup>114</sup>

The impacts of *jatropha curcas* depends on the extent and type of degradation of the local ecosystem in which it is to be introduced, and also on the alternative land uses that could be found for the land. Recent world-wide biofuel surveys warn that the argument that *jatropha curcas* biodiesel will be grown only on truly degraded lands seems over-optimistic in view of already abundant evidence with so-called biofuel-induced deforestation with first-generation feedstocks.<sup>115</sup> China's plans to expand *jatropha curcas* biofuel production though 1.27 million hectares in Yunnan Province have led to concerns about impacts on

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<sup>111</sup> On the water impacts of biofuels see Richard Kunz and Graham Jewitt, The Impact of Biofuel Feedstock Production on Water Resources: A Developing Country Perspective: Biofuels, Bio-products and Bio-refining, (July/August 2011), Volume 5, Issue 4, Special Issue: *Bioenergy and Water*, pp. 343-473 available <http://onlinelibrary.wiley.com/doi/10.1002/bbb.v5.4/issuetoc> [last accessed 20 November 2014]; W. Achten et al, Jatropha Bio-diesel Production and Use, (2008), Vol. 32, Issue 12, *Biomass and Bioenergy*, pp.1063-1084, p.6 cited in H. Romijn, *supra* note 95.

<sup>112</sup> K. Openshaw, A Review of Jatropha Curcas: An Oil Plant of Unfulfilled Promise, (2000), Vol. 19, *Biomass and Bioenergy*, pp. 1-15 cited in H. Romijn *ibid*.

<sup>113</sup> Yingling Liu, *Chinese Biofuels Expansion Threatens Ecological Balance*, (27 March 2007), Worldwatch Institute, Renewable Energy World.Com available <http://www.renewableenergyworld.com/rea/news/article/2007/03/chinese-biofuels-expansion-threatens-ecological-balance-47837>, [last accessed 20 November 2014].

<sup>114</sup> Shiyan Chang et al, *supra* note 96.

<sup>115</sup> B. Asselbergs et al. "Size does matter." *The possibilities of cultivating jatropha curcas for biofuel production in Cambodia*. Expertise Centrum voor Duurzame Ontwikkeling, University of Amsterdam, the Netherlands (2006) cited in H. Romijn, *supra* note 95.

biodiversity.<sup>116</sup> Furthermore, Kanninen et al caution that policies promoting the production and use of biofuels, such as *jatropha* as an environmentally friendly alternative to fossil fuels may have the perverse effect of increasing GHG emissions. It can result in stimulating conversion of natural forests and woodlands either directly or indirectly, by turning over existing productive agricultural land to biodiesel plantations while increasing the pressure to expand agriculture into forested areas.<sup>117</sup> Achten et al. recommend that future planting be approached cautiously, to allow for the proper development of a scientific basis for planning. Since *jatropha curcas* may live for up to fifty years, mistakes made now will have a long-lasting effect, including the potential for the plant to become an alien invasive species, threatening biodiversity and other ecosystem functions.<sup>118</sup>

Despite this potential for negative effects on the eco-environment, China's commitment to the expansion of *jatropha curcas* biodiesel production fails to account for a number of significant challenges including 'biodiversity, land competition, water balance, community participation, company-farmer cooperation and production chain development.'<sup>119</sup> The following section draws

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<sup>116</sup> Yingling Liu, *Chinese Biofuels Expansion Threatens Ecological Balance*, (27 March 2007), Worldwatch Institute, Renewable Energy World.Com available <http://www.renewableenergyworld.com/rea/news/article/2007/03/chinese-biofuels-expansion-threatens-ecological-balance-47837> [last accessed 20 November 2014].

<sup>117</sup> M. Kanninen, *Do Trees Grow on Money?: The Implications of Deforestation Research for Policies to Promote REDD*, (2007), Vol. 4, Centre for International Forestry Research.

<sup>118</sup> W. Achten et al, *Jatropha bio-diesel production and use*, (2008), Vol. 32, Issue 12, *Biomass and Bioenergy*, pp.1063-1084, cited in K.M. Findlater & M. Kandlikar, Land use and second-generation biofuel feedstocks: The unconsidered impacts of *Jatropha* biodiesel in Rajasthan, India, (2011), Vol. 39, Issue 6, *Energy Policy*, pp. 3404-3413; although China has a number of *jatropha curcas* varieties it is the non-Chinese varieties that hold greater commercial potential due to their higher seed yields.

<sup>119</sup> Liu Jinlong & Li Xinlei, *Social Issues Related to Jatropha Plantation and Processing at Wenshan Prefecture Of Yunnan Province*, (2009) unpublished paper, School of Agricultural Economics and Rural Development, Renmin University of China, Beijing, China [hard copy available upon request]

on a case study to examine why this may be.

#### 7.4 *Jatropha Curcas* in Yunnan: Experiences from the Field

In 2006 the United Nations Development Programme (UNDP) in partnership with the Chinese government launched the 'Green Poverty Alleviation for Poor Rural Areas of China' (GPA) programme.<sup>120</sup> The GPA would come to full fruition in 2009. The GPA programme objective was to help address the disparity in benefits from two decades of economic growth between rural and urban areas, particularly the chronic poverty in the Western provinces. Environmental degradation was seen to be a major contributor to the problems faced by rural communities. UNDP recognised that 'the fragile ecology and environment has suffered serious damage due to deforestation, over-grazing and inappropriate farming methods leading to aggravated soil erosion and desertification.'<sup>121</sup> Getting the balance between poverty alleviation through increased economic opportunities and protecting the environment is core to the UNDP GPA in China. UNDP's China's Director Alessandra Tisot wrote that, 'fostering the potential of green industries and energy sources in remote mountain areas and deserts is an important vehicle which can generate income and employment opportunities, while protecting the environment.'<sup>122</sup> The overall approach adopted by the GPA programme was to 'use eco-environmental regeneration and energy

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<sup>120</sup> UNDP GPA Project, 2006 supra note 101.

<sup>121</sup> Ibid.

<sup>122</sup> Cited in UNDP China, '*Green technology to fight poverty in western China An innovative initiative between UNDP and the Chinese government to reduce poverty and improve ecosystems for Chinese ethnic minorities*', UNDP Press Release, (21 November 2006), Beijing, China available <http://www.undp.org.cn/modules.php?op=modload&name=News&file=article&catid=14&topic=8&sid=327&mode=thread&order=0&thold=0> [last accessed 20 November 2014].

development as an entry point and a conduit for testing optional solutions for income generation and social well-being improvement and thus alleviation of poverty ... [with] priority given to the western region and ethnic minority communities.’<sup>123</sup> The linking environment, energy and poverty alleviation was a common approach adopted by UNDP in the projects. They were indicative of the UN ambition to support sustainable development, mitigate climate change and whilst reducing wealth disparity in countries where they had projects.

The GPA partners sought to address these needs and to design an integrated poverty reduction system. According to the GPA partners this required the establishment of ‘an equitable and optimised commercial supply chain for biodiesel and its by-products.’<sup>124</sup> It was this clear intention to achieve poverty alleviation, targeting ethnic communities particularly, through promoting biodiesel production in sustainable manner that meant the GPA programme fed into the interpretation and implementation process of a broad range of international and national law and policy forest related matters. These included human and minority peoples rights, particularly access and benefit sharing, sustainable forest land use management, climate change and biodiversity related issues.

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<sup>123</sup> UNDP GPA Project, 2006 *supra* note 101, p.12: The project document includes an extensive list of direct beneficiaries: ‘Government organisations, institutions and related agencies at national, provincial, municipal and county level by strengthening capacities in poverty alleviation, ecological and environmental protection, sustainable energy planning, job creation, and the development of sustainable rural economies; local implementation agencies and farming communities through capacity development and infrastructures; energy consumers through the development of green energy supply systems with potential to increase production efficiency and flexibility; poor minorities through improved income, better environmental and living standards, access to viable energy resources and greater participation in their future social and economic development.’

<sup>124</sup> UNDP GPA Project, 2006, *supra* note 101, p. 13.

#### 7.4.1 Introducing Large Scale Biodiesel to Yunnan

The GPA programme strategy introduces an alternative way through which to realise the SLCP, a major part of the governments West China Development Program, to restore ecological balance in the western region by turning low-yielding farmland back into forest and pasture ways. The pilot project aimed to demonstrate the economic, environmental and social value of *jatropha curcas* planted by farming communities on mountain slopes for the production of biodiesel.<sup>125</sup> By 2009 it anticipated *jatropha curcas* planting would scale up to nearly three million acres.<sup>126</sup> The GPA project rationale was based on the assumption that by ‘providing poor farmers with agricultural technologies to produce high-yield but environmentally sustainable crops of *jatropha curcas* trees, a species that normally grows wild and naturally prevents desertification’ will alleviate poverty.<sup>127</sup>

From the outset UNDP placed its faith in the claims that ‘there is a growing market, domestically and internationally, for the biofuel that can be made from these [*jatropha curcas*] trees.’<sup>128</sup> It was believed that *jatropha curcas* cultivation had ‘considerable potential in Sichuan, Guizhou and Yunnan’.<sup>129</sup> The GPA aimed to build upon existing plans to which the Provincial governments in both Yunnan and Sichuan had committed. In Yunnan the Forestry Bureau in 2006 had already drawn up a plan to develop large-scale *jatropha curcas* production for biodiesel. The neighbouring province of Sichuan had also instigated *jatropha curcas*

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<sup>125</sup> Ibid, p. 12.

<sup>126</sup> 1 mu = 6 acres; UNDP, Annual Report 2007, section Environment and Energy: Balancing Access and Security, (2008), UNDP, UN, New York available [http://www.undp.org/publications/annualreport2007/environment\\_energy.shtml](http://www.undp.org/publications/annualreport2007/environment_energy.shtml) [last accessed 20 November 2014]

<sup>127</sup> Ibid, p. 14.

<sup>128</sup> Ibid.

<sup>129</sup> UNDP GPA Project, 2006, *supra* note 101, p. 12.

plantations.<sup>130</sup> These were established as part of the Provinces commitments to implement the SLCP, as well as meet the Renewable Energy Law targets. Further opportunities in the form of forest carbon emissions trading under the UNFCCC CDM and the new national programme were potentially attractive incentives for investors, public and/or private.

The GPA project documents included concerns though as to whether the *jatropha curcas* scaled up to industrial size plantation production would be sustainable. Sustainable production, particularly regarding the environment, was integral to the GPA's success. The GPA recognised that in order 'to address poverty problems in western rural areas, central and local governments place considerable emphasis on the protection and improvement of the eco-environment, landscapes, fauna, flora and biodiversity.' It further acknowledged that 'the reconstruction of fragile ecosystems will be a long and difficult task requiring considerable strategic investment.'<sup>131</sup> Ensuring sustainability required that the necessary environmental impact assessment as well as ongoing governance oversight mechanisms would be in place. As section 7.4.4 illustrates these were distinctly lacking by the close of the project.

Yunnan Province faces economic, social and environmental challenges.(section 6.2.1) This is particularly the case in the mountainous regions that were deforested in the 1980s and 1990s and have subsequently suffered economically

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<sup>130</sup> It was already in 2006 proposed that in Sichuan's Panzhihua prefecture 15,000 mu of *jatropha* be planted. It is planned by 2010 to increase this to 5.3 million hectares. By 2015 the Provincial Plan was to have an area of 6.6 million hectares. The main investor in the expansion is Sino-Petrol, the largest Chinese petroleum company, see WWF China unpublished draft report on *Jatropha Plantations in Sichuan*, (2008), hard copy available with author.

<sup>131</sup> UNDP China, *Green Poverty Alleviation in Poor Rural Areas of China, Project Summary*, (2008), UNDP, China available <http://www.undp.org.cn/projects/51952.pdf> [last accessed 20 November 2014].

from a 1998 logging ban imposed by the national government in an attempt to redress environmental degradation. The national forest programmes, especially the SLCP, were targeted at forest restoration in mountainous regions, like Yunnan and Sichuan Provinces. When the National government adopted second generation biofuels as a means to increase green energy production without threatening food security it looked to these regions for the 'marginal' and degraded forest land upon which to grow *jatropha curcas*. Yunnan Province was part of a broader Western Development Initiative, supported by UNDP funding, to promote economic growth in the region. One approach to raising the farmers' incomes was to foster bioenergy production on forest land through a joint programme with the Chinese government as this aligned with government targets to produce biodiesel on a large scale that were contained within the REL. The 11<sup>th</sup> National Five Year Plan of forestry contained a target of cultivating two billion mu biodiesel from forest materials.<sup>132</sup> Yunnan developed a provincial plan for 150 mill mu of energy forests, 100 mill mu of which would be *jatropha curcas*.<sup>133</sup>

Not all of Yunnan Province however is suitable for *jatropha curcas* planting. Yunnan Province is a biodiversity hotspot where significant protected areas exist to conserve the ecosystem [see section 6.2.1]. Significant areas have been severely degraded due to unsustainable forest and land use management and are the focus reforestation under the SLCP. The GPA sites piloting *jatropha* plantations are located in several of Yunnan's autonomous ethnic prefectures:

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<sup>132</sup> 15 mu is the equivalent of 1 hectare.

<sup>133</sup> The Governor of Yunnan in 2008 was previously head of Yunnan Forestry Bureau and a keen advocate for energy forests (as well as National Parks – see Chapter 6).

Shuangbai, Honghe, Wenshan, and Yuxi, some of the poorest regions in China. The plantation areas in each county would vary. Site size and plant selection were to be flexible depending if the soils and conditions within the regions failed to support the planned choice.<sup>134</sup>

The following sections examine in detail the piloting of *jatropha curcas* in Yuanyang County in Honghe Hani and Yi Autonomous Prefecture. It focuses on the ways that sustainability and poverty alleviation through equitable benefit opportunities were addressed. It specifically draws on interviews and field notes from a three-day site visit to Nansha Township in Yuanyang County.<sup>135</sup>

#### 7.4.2 GPA Implementation: Actors and Norm Interpretation

Different actors were involved in the design and implementation of the GPA programme. Many of these were already engaged in bioenergy developments, some specifically with *jatropha curcus*. Within China, the primary actors were UNDP, the Ministry of Science and Technology (MOST) and the Provincial Forestry Bureau. A further important player was the newly established biodiesel company Shenyu New Energy Company (SNEC), in Kunming, and other old and newly emerging energy businesses, including international counterparts like the UK registered Sunshine Technology Company.

Prior to the GPA programme, government ministries, along with provincial business interests, were already establishing biodiesel production, processing and distribution infrastructure. MOST has accumulated a comprehensive knowledge of the properties and difficulties of a wide range of trees and plants

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<sup>134</sup> UNDP GPA Project, 2006, *supra* note 101.

<sup>135</sup> Also known as NanShe or Yuanyang New City.

with potential to yield bio-energy. Since 2007, MOST was also engaged in preliminary discussions with research institutions, the National Development and Reform Commission (NDRC) and SFA about linking carbon sequestration under UNFCCC CDM afforestation and reforestation projects and *jatropha curcas* plantations for forest carbon trading. UNDP had already collaborated with the MOST to develop and implement clean energy action plans in eighteen Chinese cities to promote clean energy and clean energy technology use so as to control air pollution and maintain economic growth.<sup>136</sup>

UNDP as a UN agency was already closely associated with other UN energy related programmes and policy threads. In 2004 UN-Energy was created to 'help ensure coherence in the United Nations system's multi-disciplinary response to the 2002 World Summit on Sustainable Development and to create a rational approach towards a sustainable energy system especially, in developing countries, to meet the MDGs'.<sup>137</sup> UNDP is one of the nineteen members of UN-Energy. To date it is open to debate whether such 'coherence' has been achieved in the UN work programmes on energy.<sup>138</sup> Since 2002 UNDP and the Global Environment Facility have cooperated with the NDRC to support China's national rural energy programs. The Project has developed a Renewable Energy Service

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<sup>136</sup> UNDP GPA Project, 2006, *supra* note 101, p. 11.

<sup>137</sup> UN-Energy was established as a subsidiary body of the UN Chief Executives Board in 2004. Further information available <http://esa.un.org/un-energy/index.htm>

<sup>138</sup> S. Karlsson, & O. Hamalainen, Enter Energy for Sustainable Development in Global Governance: The Impact of Hard vs. Soft Law Frameworks on Energy Agendas in the UN System, (2005), Paper presented at *The 2005 Berlin Conference on the Human Dimensions of Global Environmental Change*, Potsdam, Germany: The Global Governance Project (Glogov.org) of the Vrije Universiteit, Amsterdam (Institute for Environmental Studies), the Freie Universität Berlin (Environmental Policy Research Centre), the University of Oldenburg and the Potsdam Institute for Climate Impact Research.

Company management training course and business models to build capacity in organizations responsible for operating village power systems.<sup>139</sup>

MOST is responsible for formulating and organising implementation of national plans of fundamental study and development and dissemination of key technologies in energy and transportation fields. This includes research and development into sustainable energy systems in China, e.g. through developing and promoting the use of renewable energy technologies. In this project, MOST focused its resources on comprehensive research and development and management support of the biodiesel sub-project, and formed collaborative relationships with international specialist technology suppliers.<sup>140</sup> MOST works closely with the State Forestry Administration, and the Forestry Bureaus, who supervise planting. Long Jiang, Director General, MOST Yunnan Province claimed that '*jatropha curcas* can produce yield for twenty to thirty years so may make it viable for CDM.' He added that 'Yunnan's Forestry Bureau and Sino-Petrol want to get carbon sequestration credits from all of Yunnan's *jatropha curcas* in the future.'<sup>141</sup> In 2007 the Forestry Bureau in Yunnan received four million rmb invested by the Sunshine Technology Company (UK) to support the carbon sequestration research on *jatropha curcas*.<sup>142</sup> According to Long Jiang the involvement of a foreign company as an investor has no effect on the governance

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<sup>139</sup> UNDP GPA Project, 2006, *supra* note 101, p. 20.

<sup>140</sup> *Ibid* p. 24.

<sup>141</sup> Interview with Long Jiang, Director General, MOST Yunnan Province, (10 August 2008), Kunming, Yunnan.

<sup>142</sup> Sunshine Technology Company are investing with the Shenyu New Energy Company in *jatropha* processing plants – see *RE-impact, Rural Bioenergy in Southwestern China* (2010) details available <http://www.ceg.ncl.ac.uk/reimpact/China.htm#BioenergyYunnan> [last accessed 20 November 2014] – no representative from the company would agree to be interviewed.

or control over *jatropha curcas* development in Yunnan.<sup>143</sup> Yet what it did demonstrate was an interest by a non-Chinese company in the opportunities to capitalise upon the national government's interest in investing in biodiesel through *jatropha curcas* production. For the UK company China was attractive because of less strict emphasis on labour laws, sustainability criteria and the emerging interest in forest carbon sequestration credit trading.

Another previous collaboration between UNDP/MOST pilot counties was on microcredit programmes. An important observation is that these piloting institutions besides issuing loans, also provided technical and vocational training for income generating activities thus performed with a high repayment rate of the loans. It means the loans could not work well alone. In this connection, the MOST nationwide technical network is important in facilitating microcredit operation of financial and non-financial institutions. This GPA project has microcredit components, which should use the MOST experiences gained from UNDP projects in managing micro-credit loans.<sup>144</sup> However in Yunnan MOST had never worked with UNDP directly. The relationship over the project was not without problems. Although the UNDP/GOC project had started in August 2007 according to Long Jiang, Director General, MOST Yunnan Provincial, 'UNDP had not yet provided the money' for the project, he continued by saying that 'MOST will do it anyway as it is part of government programme.'<sup>145</sup> This appeared to underscore the fact that the investment in *jatropha curcas* sourced biodiesel was a government priority with or without the UNDP GPA programme. UNDP through its own programme literature presented a more normatively aligned

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<sup>143</sup> Long Jiang, *supra* note, 141.

<sup>144</sup> UNDP GPA Project, 2006, *supra* note 101, p. 24.

<sup>145</sup> Long Jiang, *supra* note 141.

international discourse centered on sustainability and poverty alleviation than MOST in interviews.

From the outset the private sector was identified as being central to delivering the GPA project. This was a clear break from the government centered SLCP that coordinated compensation based forest restoration activities in mountainous regions. The GPA project documents states that private sector bodies, individuals and business associations will be pro-actively drawn into activities wherever relevant and possible in supporting the development of community-based science and technology poverty reduction activities and commercialisation of the activities of planting and cultivation. The companies in these businesses should help with access to economic opportunities – through employment, business linkages, and income generating opportunities, access to credit, new technologies and trainings.<sup>146</sup> One of the lead companies selected by MOST to assist in implementing the *jatropha* projects in a number of prefectures, including Wenshan, was the Yunnan-based SNEC.<sup>147</sup> A number of other companies were interested in further development of *jatropha curcas* including IBF (US), General Electric (China) and (China) Sino-Petrol but SNEC were the dominant actors in Yunnan at the time.

SNEC was established and registered in March 2006 by Ms Gou Ping, who was formerly at the State Council's Poverty Alleviation Office, and now the company Director.<sup>148</sup> According to Mr Liu Zhuoxin, SNEC's Deputy General Manager, "Yunnan Shenyu New Energy had started as a research group, something like a

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<sup>146</sup> UNDP GPA Project, 2006, *supra* note 101, p. 24.

<sup>147</sup> Interview with Mr Liu Zhuoxin, Deputy General Manager, Yunnan Shenyu Energy Company Limited, (15 August 2008), Kunming, Yunnan.

<sup>148</sup> *Ibid.*

government backed NGO in 1999 [and] in 2000/01 Ms Gou Ping wrote a report called the 'Industrialisation of *Jatropha* for Poverty Alleviation.' As a consequence not surprisingly *jatropha curcas* is SNEC's primary business and the company has faith in its commercial potential. SNEC's overall objective was within three to five years to develop three million mu *jatropha curcas* plantations, with a 100,000-ton capacity-processing factory in Shuangbo county, Yunnan. By 2008, SNEC had planted approximately 1,000,000 mu of *jatropha curcas*. SNEC was already involved in ten counties all over Yunnan including Chuxiong, Wenshan, Dali, Lincang, Qujing. It had been conducting research with a range of academic institutions including Yunnan Forestry Academy, Yunnan Agriculture Academy, Kunming Institute of Botany, Xishuangbanna Tropical Botanic Garden, Kunming Institute of Zoology, Southwest Forestry college on a *jatropha curcas* resource survey; techniques on cultivation, seedling, pest control, harvesting, processing, GMO etc. since 2005. They were also collaborating with Beijing University's Chinese Academy of Social Sciences becoming a key member of a biofuel coordination group across China that researches *jatropha curcas*, trying to increase yields through genetic manipulation. By 2007, SNEC had submitted eleven patents to the China National Patents Office. It had already received patents for genetic variation, planting techniques, seedlings, extraction and a protein-type fertiliser.<sup>149</sup> SNEC were subcontracted to undertake GPA work by UNDP and MOST. For them this was a key business opportunity to upscale their operations across Yunnan. They would benefit from farmers being trained in cultivation and harvesting of *jatropha curcas* at the GPAs projects expense.

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<sup>149</sup> Ibid.

### 7.4.3 *Jatropha Curcas* Pilots in Yuanyang County: Site Selection

Yuanyang County is one of eleven counties that constitute Honghe Hani and Yi Autonomous Prefecture that is located in south of Yunnan province [see Map 2 section 6.2.1].<sup>150</sup> The Prefecture covers an area of 32931 km square. It has various types of topography ranging from high mountains with the altitude of 3074.7 metres to river valleys of 76.4 metres. The climate is variable but largely dominated by dry and wet seasons with an average warm temperature. Besides Han nationalities there are nine other ethnic minorities i.e. Hani, Yi, Miao, Dai, Zhuang, Yao, Hui, Lahu and Buyi, who live in the prefecture. It is the main area in which Hani and Yi as well as Hui minorities live.<sup>151</sup> A compact community of the Hani ethnic minority inhabits Yuanyang County, lying in the south part of the Ailao Mountains. Yuanyang County itself is famous for the 1,3000 year old rice terraces which were added to the UNESCO World Heritage sites list in June 2013.<sup>152</sup> The Hani people using their sophisticated traditional knowledge built these terraces for farming which has proved sustainable for centuries.

Nansha Township itself has a varied local agro-ecology. It is situated at an altitude between 2,900 metres and 800 metres. Bananas grow at 800m, from 800m-1,400m rice, corn and soya grow along with other fruits; above 1,400m forestry and tea crops are grown. The population in the *jatropha curcas* planting area is 100,0000, who are mainly ethnic peoples - Dai, Hani, Zhuang, Miao, Yi –

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<sup>150</sup> The eleven counties are: Mengzi, Jianshui, Shiping, Mile, Luxi, Pingbian, Hekou, Jinping, Yuanyang, Honghe and Luchun.

<sup>151</sup> 'Honghe - The Magnificent Land', China Travelogue, (13 May 2011), CCTV available <http://cctv.cntv.cn/lm/travelogue/20110513/104876.shtml> [last accessed 20 November 2014].

<sup>152</sup> In Yuanyang alone, 16,000 hectares feed eighty two villages. The increased opportunities for tourism also provide other potential income for Hani ethnic peoples - Hu Yongqi & Li Yingqing, Terraces on Top of the World, (26 July 2013) China Daily available [http://www.chinadaily.com.cn/m/yunnan/cultureindustry/2013-07/26/content\\_16847081.htm](http://www.chinadaily.com.cn/m/yunnan/cultureindustry/2013-07/26/content_16847081.htm) [last accessed 20 November 2014].

with traditional livelihoods from farming, rice, livestock and fruits cultivation.<sup>153</sup> The land where *jatropha curcas* was to be planted was determined to be 'abandoned' forest and degraded land by the Forestry Bureau.<sup>154</sup>

It fell to Yunnan's MOST to choose Nansha Township in Yuanyang County to be a pilot *jatropha curcas* site. The *jatropha* targets for Yuanyang county are planned to rise from 40,000 mu in 2007 to 70,000 mu in 2008 and by 2015 to have reached 200,000 mu.<sup>155</sup> The Yuanyang county MOST Director Mr Yang Qingyun claimed that *jatropha curcas* plantations were part of a larger energy saving programme that had began in 2004, two years before the GPA project.<sup>156</sup> This makes it clear that in the eyes of the Chinese government the GPA was feeding in to an existing biodiesel policy programme rather than being an intervention from a non-Chinese international organisation imposing particular approaches and conditions on its implementation. MOST sought to use the GPA programme in Wenshan to increase *jatropha curcas* plantation target size.

#### 7.4.4 Ensuring *Jatropha Curcas's* Sustainable within Yuanyang County

From the outset the GPA programme partners emphasised the importance of sustainability and realised that expansion in *jatropha curcas* production would impact forest lands. In the project documents it stated that 'these agro-economical activities to address planting and cultivation are planned in non-

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<sup>153</sup> Interview with Mr Yang Qingyun, MOST Director, Yuanyang county and MOST deputy-Director Mr Zhu, (12 August 2008), Nansha township, Yuanyang county, Yunnan.

<sup>154</sup> It was unclear what was meant by the term 'abandoned'. Given that it is the forestry bureau implementing the *jatropha* project then it can be assumed that the land is state forest land which was previously forested.

<sup>155</sup> 10,000 mu = 6.7 km square. The plans for *jatropha* in Yuanyang were to rise from 26 km<sup>2</sup> in 2007 to 133km<sup>2</sup> by 2015.

<sup>156</sup> Mr Yang Qingyun, and Mr Zhu, *supra* note 153, provided the information for this section.

arable land. On one hand, the pilot plantations will contribute to the replacement of fossil fuel oil and help improve soil degradation and desertification, on the other hand, as the associated commercial industry has planned for expansion, it is likely that they will begin to occupy primary or secondary forested areas.<sup>157</sup> This implies that it is anticipated that *jatropha curcas* will be grown on non-marginal lands once the marginal lands are planted on. The project from the outset assured that it 'will give special attention to the establishment of guiding principles for environmental protection and sustained development.'<sup>158</sup> During interviews and subsequent research no such guidelines were made available.

GPA programme partners identified a range of risks and potential impacts that the *jatropha curcas* project would have on forest lands. It acknowledged that impacts were inevitable noting that soil erosion may be caused by site preparation. To maintain high productivity and achieve economic viability, any commercial plantation would also need to use fertilizer and pesticide. Commercial plantations involve more human activities in the forests and increase the risk degradation, including through fires. It also recognised the GHG emissions deficit that would occur initially because, other GHG are generated as a product of the crop itself, the processing, refining, transport, and distribution of the fuel. A full life cycle analysis would potentially illuminate any possibility of claiming reduced GHG emissions under any carbon trading offsetting scheme, nationally or internationally under the UNFCCC or otherwise. Other risks associated with the project included the possibility that 'genetically modified

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<sup>157</sup> UNDP GPA Project, 2006, *supra* note 101, p. 17.

<sup>158</sup> *Ibid.*

crops' may be adopted adding to concerns of the impacts on biodiversity of alien invasive species and competition with other flora.<sup>159</sup> This reveals the inconsistencies within UNDP funding who also continues under its China programme to support the conservation and sustainable use of biodiversity in Yunnan.<sup>160</sup>

There was a clear need, which the GPA programme partners were aware of, that if enhanced application and commercialisation of new and renewable energy technologies' were to be achieved sustainable 'guidelines, standards and regulations' were needed.<sup>161</sup> However prior to the project specific regulation with mandatory guidelines and standards on biofuels in China was lacking. Aside from a general commitment to increase the amount of bioenergy within China, including biomass, ethanol and biodiesel, specifically on jatropha, there are no guidelines regarding EIA, sustainable production and effects on riparian and forest ecosystems. The project partners developed no such guiding principles. A pre-assessment of potential risks and benefits shall be conducted prior to the project implementation. Due to uncertainties of commercial activities, there could be a number of issues/risks to be addressed and, in a way; this provides further justification for UNDP support. It is important therefore that full risk analyses are carried out and risk mitigation strategies are developed in the initial stages of the project.<sup>162</sup>

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<sup>159</sup> Ibid p. 18.

<sup>160</sup> UNDP China also runs a China Biodiversity Partnership Framework (CBPF). This project phase runs from 2007-2015. It links with the EU-China Biodiversity Programme that sponsors the National Park projects hosted by TNC in Yunnan [see chapter 6]. Further information on the CBPF see <http://www.undp.org/eu/documents/Project%20Summary-CBPF%20EN.pdf> [last accessed 20 November 2014]

<sup>161</sup> UNDP GPA Project, 2006, *supra* note 101, p. 18.

<sup>162</sup> Ibid.

There is no evidence that this took place under the GPA programme. Sustainability was a question I raised with a government official when undertaking a site visit to one of the Nansha Township pilot trial *Jatropha* plots.<sup>163</sup> I was informed that irrigation was used and fertiliser applied to the 'jatropha trees' because 'like humans if they are fed and watered they are stronger.' The 'trees' were also planted on a gentle slope as opposed to a step slope because they had a greater chance of survival than otherwise. In the 2,000 mu plot a number of *Jatropha* species were grown. The local variety fared less well compared with non-native breed seeds. They would grow to 2m, survive 45 years and produce regular yields in November, with its best years occurring when the plant was 6-7 years old. It was clear that the *Jatropha curcas* was being grown on non-marginal land that the non-native varieties were being tendered with artificial supplements to ensure a greater (more profitable) yield. This is contrary to the claims made by advocates that *Jatropha curcas* can produce biodiesel cheaply on marginal land, thereby not competing for agricultural land or other forest land, with no inputs adding to cost.

#### 7.4.5 Benefit Sharing from *Jatropha Curcas* Biodiesel Project: Using the Market to Whose Benefit?

The Chinese government was keen to establish a market-based framework through which to achieve its goals of increased renewable energy supply. China under the REL had committed to deliver increased supply of different energy sources using a variety of fiscal and market-based mechanisms. [Section 7.2.5] UNDP observed that 'for this to be implemented, an appropriate market

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<sup>163</sup> The site visit took place on the 13 August 2008 with an employee from the Forestry Bureau and a driver.

structure and management framework is required' and added that this would 'greatly strengthen capacity in China to accelerate the commercialization of the renewable energy.<sup>164</sup> For UNDP 'the commercialisation of a market-based renewable energy supply base was central to China's efforts to move towards a less intensive fossil fuel economy [and that] this was in keeping with other developed countries such as Norway and Germany who were using market-based instruments to develop their renewable energy infrastructures.<sup>165</sup> National forest law and policy was also beginning to initiate a second series of decentralisation of management for forest lands to incentivise forest farmers to increase entrepreneurial activities. [Section 5.2.2]

Poverty alleviation for rural farmers, especially ethnic communities in mountainous regions was a stated aim of the GPA programme. GPA partners believed that to achieve this, *jatropha curcas* cultivation needed to become more financially attractive to farmers than other alternative land uses.

*The project is piloting a strategy of providing poor farmers with agricultural technologies to produce high-yield but environmentally sustainable crops of *Jatropha curcas* trees, To tap this potential, the project simultaneously assists farmers with establishing effective marketing mechanisms and supply links to manufacturers. It is also working with officials on policies to catalyse these initial efforts, such as subsidies for environmentally sustainable farming. Green Poverty Reduction in China should come to full fruition in 2009, with expectations that it will reach 200,000 farmers and produce an annual increase in income of at least 15 percent for half of those.*<sup>166</sup>

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<sup>164</sup> UNDP GPA Project, 2006, *supra* note 101, p. 16.

<sup>165</sup> *Ibid* p. 17,

<sup>166</sup> UNDP, Annual Report 2007, section Environment and Energy: Balancing access and security, (2008), UNDP, UN, New York available

UNDP also intended that the programme 'be gender sensitive and include women, marginalised groups and the unemployed.'<sup>167</sup> The GPA programme was linked to UN Development Assistance Framework outcomes.<sup>168</sup> Such clear targeting of recognised marginalized and discriminated groups draws on human rights discourse and development.

There were high levels of poverty in the areas identified for *jatropha curcas* planting. The annual income for farmers in 2008 was around 2,000 rmb per year. It was estimated that three tonnes of *jatropha curcas* oil seeds can produce one ton of bio-diesel. Dry oil seeds can be harvested and sold at a price of about rmb 1,000 to process 0.18 ton of bio-diesel. If farmer household plants 2 mu *jatropha curcas*, incremental household cash revenue of rmb 1,300 could be generated annually.<sup>169</sup> These market opportunities were seen to be avenues for farmers to raise household income through investment in biodiesel crops. The figures though do not include capital production costs that farmers would be expected to shoulder if they acted independently, including fertiliser to increase the yields sufficiently to make it a profitable enterprise. With the forest land reforms occurring which devolved tenure rights to farmers households these opportunities were seen to be very practical, although in Yuanyang county the

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[http://www.undp.org/publications/annualreport2007/environment\\_energy.shtml](http://www.undp.org/publications/annualreport2007/environment_energy.shtml) [last accessed 20 November 2014].

<sup>167</sup> UNDP GPA Project, 2006, *supra* note 101, p. 19.

<sup>168</sup> The UN Development Assistance Framework (UNDAF) harmonizes the development assistance of UN agencies in China and supports government initiatives through multi year programming cycles that respond to prioritised needs. Recent UNDP commitments are set out in the 2006-2010 UNDAF which emphasizes a number of priorities for the Western Region including improving access to health, education and social protection with a focus on disparity reduction, and creating an enabling environment for civil society and its effective engagement in Xiaokang priority issues – see UNDP GPA Project, 2006, *supra* note 101, p. 10.

<sup>169</sup> Mr Liu Zhuoxin, *supra* note 147.

land that it is planted on is state land. Farmers had user rights but these did not extend to growing commercial crops for the market.<sup>170</sup>

As part of the pilot projects a series of sound environmental, ecological and energy technologies were supposed to be offered to, and selected by, targeted poor minority households on a voluntary basis as a way to involve them in the process of developing locally appropriate sustainable production.<sup>171</sup> The GPA programme promised to include the following main elements:

- Establishment of a farmers' association in the selected demonstration area to represent local farmers and to act as a focal point for training and technical, commercial and policy support activities. A technical biofuels centre would also be created to provide essential support and advice.
- Tree planting, cultivation, harvesting and storage system design.
- Optimisation of product sales system for *jatropha curcas* seeds.
- Production/manufacturing system design for biodiesel.
- Establishment of a sustainable marketing system for the biodiesel.<sup>172</sup>

The four million rmb to support the jatropha project had come from the Forestry Bureau rather than MOST. Although MOST had selected Wenshan they had not invested any money into the project. The county Forestry Bureau was responsible for implementation and development including capacity building such as training of farmers. UNDP had sponsored training (over two hundred people) that included village farmers from the Nansha Township, Yuanyang in January 2007. The training was largely technical: in the nursery management of

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<sup>170</sup> After forest tenure reform the management and harvesting rights will belong to the farmers as opposed to the Community. State land will remain leased from the state.

<sup>171</sup> UNDP GPA Project, 2006, *supra* note 101, p. 12.

<sup>172</sup> *Ibid* p. 39.

seedlings, cultivation development and management, and increasing yields.<sup>173</sup> Also UNDP provided 50,000 rmb to train farmers through the farmers associations.

According to Mr Yang Qingyun, 'the land for *jatropha curcas* was to be cultivated and planted by a private company then given to the farmers to manage. A bidding process that the Forestry Bureau organises and oversees identifies the 'private company.<sup>174</sup> On this occasion it was a company with close links to the government. SNEC, was awarded the contract for implementing the *jatropha curcas* production in Yunnan. <sup>175</sup> SNEC were directly involved in paying for transport, accommodation and wages to farmers. Farmers are paid by the number of seedlings they planted per day, this limited leverage for farmers to bargain and assert a fairer price for their involvement controlled the supply chain. SNEC have their own technicians, who often worked with academic and government scientists, and hire the labour [farmers] for planting. According to Mr Yang Qingyun, MOST Director in Yuanyang county 'The farmers were then paid for planting and nursery work ... [and given that] yield at the moment is very low ... the fruits go to the forestry bureau for seedlings.'<sup>176</sup> For the farmers the work was piecemeal and seasonal. As a result of this arrangement any

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<sup>173</sup> Mr Yang Qingyun, he noted that in 2007 the MOST Director [Long Jiang, Director General, MOST Yunnan Provincial Office] had "spent a lot of time doing trainings in other provinces such as Sichuan, Guizhou, Hunan" - *supra* note 153.

<sup>174</sup> *Ibid.*

<sup>175</sup> In many ways this is a similar system for awarding tree planting contracts which already are bid for by private companies who hire farmers to carry out the labour, Mr Yang Qingyun and Mr Zhu, *supra* note 153.

<sup>176</sup> Mr Yang Qingyun and Mr Zhu, *supra* note 153; - During a site visit on 13 August 2008 to one of the Nansha Township pilot trial *jatropha* plots it was evident that fertilisers were applied and irrigation took place. *Jatropha* plant survival was greatest on less sloping land. In the 2,000 mu plot a number of *jatropha* species were grown. The local variety fared less well. The *jatropha* 'trees' were planted in 2007. They would grow to 2m, survive 45 years and produce regular yields in November, with its best years occurring when the plant was 6-7 years old.

economic opportunity for farmers was limited to wage labour rather than entrepreneurial opportunity under the GPA programme.

Further income opportunities were potentially available through forest carbon trading. SNEC were keen to capitalise on what they perceived as a growing carbon market both internationally through the CDM and nationally, through China's national emissions trading scheme that was being piloted at the time.<sup>177</sup> By capturing this ecosystem service income stream farmers would again lose out on the benefits that the GPA programme help create through subsidising biodiesel production in Yunnan.

## 7.5 Conclusion

Bioenergy production poses both a potential opportunity but also a threat to forestry and forest peoples livelihoods. Some may see it as a positive contribution to climate change mitigation, but others perceive problems due to land grabs, alien invasive species, water stress as well as increased GHG emissions. To counter these challenges appropriate mandatory sustainability standards need to be in place. Achieving this though requires actors to collaborate in a fair, transparent and participatory manner. By not doing so certain voices and values are not considered. As this case study has demonstrated China is seeking to increase its bioenergy production, but it is open to question if everyone's interests are being fairly represented in the approach taken to achieve it.

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<sup>177</sup> Mr Liu Zhuoxin, *supra* note 147.

China is faced with increasing energy demands, the need to reverse decades of deforestation and degradation, as well as end poverty for farmers in forest regions in the country. Achieving this in a way that does not impact negatively on biodiversity and ecosystems requires effective laws to be developed and implemented. There needs to be a coherence between different legal issues including climate change, energy production and use, forest and land use planning, as well as farmers tenure rights.

The Green Poverty Alleviation Programme, collaboration between UNDP with the Chinese government, sought to advance several objectives included in national laws and policy. The programme primarily sought to increase economic opportunities for farmers in some of the poorest regions in Yunnan by providing an income through growing biodiesel crop *jatropha curcas*. This aimed to produce revenue for farmers who due to forest tenure decentralisation had opportunities to grow commercial groups for their own economic gain. But planting *jatropha curcas* would increase China's national forest stock, because under Chinese and international forest definitions, it is categorised as a tree rather than a shrub. In the future this could mean that *jatropha curcas* plantations would qualify for a carbon trading project either in the public or private voluntary sector. It would also open up access for those who had the rights to forest carbon sequestration to emerging forest carbon markets.

It is evident from the Green Poverty Alleviation Programme that the outcomes would not be as intended. Despite an emphasis within the project documentation on sustainability and benefit sharing in term of economic opportunities the delivery of the Programme revealed elite capture by government and business

actors. It also highlighted that sustainability principles were marginalised, especially precaution.

## Part Three: Reflections and Analysis

## C8 Beyond the Canopy: Reflections and Analysis

It is widely recognised that the boundaries of international law-making have altered. However differences exist between legal scholars as to by how much, in what way and what the implications are, particularly for the sovereign state. Institutionalists, like Slaughter adopt fairly classical interpretations to determine international laws boundaries, drawing on institutional structures, the state and traditional sources as the main instruments around which a global legal order is built.<sup>1</sup> In the eyes of several legal theorists this approach has significant limitations. According to Benda-Beckmann, due to globalisation, it is necessary for researchers to look beyond the classical ‘international legal regime’, what I refer to in this thesis as ‘the canopy’, in order to capture law-making processes.<sup>2</sup> Taking research beyond the canopy is necessary in Berman’s view because by studying and comparing local settings in which multiple actors normative interpretations become operative, researchers can gain a far more nuanced understanding of the international and transnational legal terrain and how it functions.<sup>3</sup>

‘Canopy’ also provides a useful analogy to link with forests. International forest related law has its own canopy beyond which few legal scholars have researched in an effort to understand the interlinkages between different aspects of law-making processes. Overall international forest related law scholarship continues to be

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<sup>1</sup> A.M. Slaughter, *International Law in a World of Liberal States*, (1995), Vol. 6, Issue 1, *European Journal of International Law*, pp. 503-538, p. 504.

<sup>2</sup> K. von Benda-Beckmann, *Globalisation and Legal Pluralism*, (2002), Vol. 4, *International Law Forum du Droit International*, pp. 19-25.

<sup>3</sup> P. Schiff Berman, *A Pluralist Approach to International Law*, (2007), Vol. 32, *Yale Journal of International Law*, pp. 301- 328, p. 327.

dominated by institutionalist approaches to identifying sources.<sup>4</sup> This research is extended beyond the traditional international forest law canopy to identify interlinkages between different law and policy elements. The research was located in China. This is a country that presents the researcher with challenging questions when interpreting theory on the scope of international law. This thesis's objective is to capture a snapshot in-situ of the dynamics occurring in a law-making process as the basis for reflecting on the wider processes in international forest related law-making. It is not a complete picture.

In this chapter I draw on the lessons learned from the two case studies in chapters 6 and 7 to reflect on how forest issues and international law are evolving in a transnational context. I will also discuss the nature of multiple actors' influence and its significance on law-making processes beyond the canopy. As I outlined in chapter 3 there is a growing interest in the effects of non-state actors impact on international law-making processes. Theorising and interpreting the impact of actors' involvement is however contested between the different international law schools of thought. In this chapter I will discuss the lessons learnt about actors in the case studies to comment on these differences in perspective and consider the value of each to a wider research agenda. The final section focuses on how economic values are now the basis for designing forest related regulation and policy. I conclude that the extension of economic valuation under the guise of concepts like Natural Capital and Green Economy, as well as sustainable development, is a unifying concept internationally amongst the dominant discourse

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<sup>4</sup> C. MacKenzie, Future Prospects for International Forest Law, (2012), Vol. 14, Issue 2, *International Forestry Review*, pp. 249-259, p. 251.

regardless of its impact on other values including human and indigenous peoples rights.

### 8.1 Evolving International Law's Principles: Sources, Processes and Interpretations Beyond the Canopy

An important part to the increase in global law and policy-making activity is the growth in principles. The increase in normative principles in international law has received attention amongst international legal scholars as outlined in chapter 2. Yet it is linked to a debate over sources. This exacerbates disagreements over normative principles origins and subsequent evolution. Broude and Shany's observation that there is an 'unprecedented normative density and intensity' is increased when the reach of consideration is extended to other non-state actors outputs as a source of principles.<sup>5</sup> The potential though for claiming that all actors have a place in the forming and on-going evolving of international law is perhaps misplaced if there is no analysis of the power that is inequitably distributed and shored up by inequitable distribution of wealth and opportunity. Norm entrepreneurs can only operate if the product that they produce is acceptable to those in power. The more radical interpretations of justice, fairness and equity drawing often on communitarian and socialist philosophies are less palatable to powerful elites who seek to capitalise on exploitation of resources including human labour. As the case studies illustrate it is increasingly important to consider the importance of power when examining wider international law-making processes in China involving multiple actors.

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<sup>5</sup> T. Broude & Y. Shany, The International Law and Policy of Multi-Sourced Equivalent Norms, in T. Broude & Y. Shany (ed), *Multi-Sourced Equivalent Norms in International Law*, (2011), Hart Publishing, pp. 1-15.

### 8.1.1 Deciding on Non-Traditional Sources: Issues of Legitimacy

In chapter 2 I outlined why different international legal scholars disagree over what constitutes a source in international law. A challenge for researchers looking beyond the canopy is to decide on which sources contribute to international law-making processes. By limiting one's research gaze to ICJ's Article 38(1) sources legal pluralists and critical legal scholars argue that significant material that contributes to international legal principles emergence and evolution is omitted. There is though a divergence between critical legal scholars and legal pluralists as the former see inherent dangers in adopting an all-inclusive approach to sources. Baxi's argues that this can perpetuate, and even exacerbate, existing power imbalances within international law-making processes by failing to challenge the legitimacy of dominant normative discourses.<sup>6</sup> My own experiences of research in China confirm this point to some degree.

The case studies adopted an inclusive approach to traditional and non-traditional legal sources. These included international treaties, statutory law and policy but also various project documents, business plans, publicity, and web-based materials. Limitations exist for any researcher in accessing all relevant documents to a process. This was exacerbated during my own research in China due to restricted access available to public documents on issues seen to be political. This is compounded by a cultural reticence amongst Chinese actors, as well as non-Chinese working in the country, to share documents with an unknown person. There is also the challenge that the opinions that express oppositional views rarely

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<sup>6</sup> U. Baxi, What may the Third World expect from International Law?, in R. Falk, B. Rajagopal & J. Stevens, *International Law and the Third World: Reshaping Justice*, (2008), Routledge Cavendish, pp. 9-23, p. 14.

openly surface in China. So the evidence trail tends to be controlled and arguably distorted in favour of the project objectives to a large degree. Making clear these limitations and distinguishing between available sources is necessary to, like Baxi suggests, challenge the legitimacy of dominant normative discourses.<sup>7</sup> Legitimacy in this context refers to representativeness not legality. Representativeness will increase with a more diverse range of sources from multiple actors. In the two case studies in China the range of sources was limited. As section 8.2 illustrates the situation in China challenges particular theories about the role of actors in international law-making processes, especially because of the dominance of an authoritarian state despite a form of economic market liberalism.

#### 8.1.2 PSNR: Recognising Self-Harm a First Step

The principle for sovereign states to control natural resources within their jurisdiction is recognised as customary international law. Section 2.1 outlined how the 'no harm' principle made PSNR less absolute. China has defended the PSNR like all countries. As with many developing countries it was reluctant to acknowledge common heritage. The weaker form, common concern is similarly unrecognised, especially for global environmental problems such as climate change due to the perception of historic responsibility recognised under the CBDR in the UNFCCC. Yet in reality China is confronted more with its own self-harm from resource extraction and pollution. Addressing these will have a positive impact for China and other neighbouring states, if not the world.

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<sup>7</sup> Ibid.

### 8.1.3 Sustainable Development: The Chinese Way and the Future

Both case studies have sustainable development as a primary objective. As chapter 2 illustrated sustainable development is a contested and dynamic principle. Schrivjer and French both claim that sustainable development can be extended beyond the original three pillars of social, economic and environment.<sup>8</sup> Schrivjer goes so far as to argue that sustainable development is now more multifaceted highlighting seven main elements: sustainable use; sound-macro economic development; environmental protection; temporality, promptness and longevity; public participation and human rights; good governance and; integration and interrelatedness.<sup>9</sup> The interpretation of so many different elements means that sustainable development can come in many different formats. A common approach is to advocate for all of these elements in a sustainable development initiative to be met rather than only focusing on one or two. However this contested, especially for having liberal democratic overtones.

China provides a particular setting in which to develop the sustainable development principle. Traditionally until the last five years China was clearly part of the global South. As such like other developing countries it interpreted sustainable development largely through the right to develop. It does not focus on all the elements that Schrijver identifies. Both case studies illustrated an emphasis on development with a lack of safeguards in place, regulatory or otherwise, to ensure sustainability. Such as in Pudacao the failure to implement a comprehensive management plan for the National Park, as well as a weakness in governance

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<sup>8</sup> D. French, *International Law and Policy of Sustainable Development*, (2005), Manchester University Press, pp. 24-33; N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, (2008), Martinus Nijhoff Publishers, p. 208.

<sup>9</sup> Schrijver. N, *ibid.*

coordination in the Three Parallel Rivers region resulting in warnings over development in a World Heritage site. The biodiesel plantations in the second case study had no sustainable management criteria associated with them despite intended precautionary approach being referenced in the UNDP/Government of China project documents. Using Schrijver's different elements it is possible to identify numerous limitations in the way that sustainable development in relation to the two projects; a lack of environmental protection; public participation and human rights; good governance. Where there is integration and interrelatedness of forest policy with for example meeting renewable energy biodiesel targets, afforestation and reforestation targets for climate change mitigation, this is not done so in a way that necessarily meets the other elements of sustainable development. In the case studies the focus is primarily on the economic aspects, and even then it is questionable whether these met a 'sound-macro economic development criteria'. This is to the exclusion of social benefits negotiated in a participatory transparent manner. Again this demonstrates non-Chinese NSA not infringing on China's sovereign rights. There appears to be a degree of Chinese exceptionalism in the way actors operates in the country.

The approach adopted within China towards interpreting sustainable development is significant globally because of the size of the country, its natural resource and environmental footprint, as well as its increasing involvement in countries development, privately or publically. Going forward sustainable development may well become increasingly an emphasis upon the economic as opposed to social and justice elements. Such an approach will be attractive to other states who are less

supportive of political rights including transparency, public participation and access to justice.

#### 8.1.4 Common but Differentiated Responsibility: Shifting Sands

Since China began to engage in international law it has supported differential treatment for developing countries. Back in 1972 the situation for China was very different than it is today, it had gone through the Cultural Revolution and a national famine. Poverty levels were extremely high. Today China is now the strongest economy in the world.

The principle of common but differentiated responsibility (CBDR) itself is contested for political philosophical reasons as outlined in section 2.1. This has had an impact on the interpretation of CBDR within international agreements developments through decisions to develop implementing measures such as the Kyoto Protocol's Clean Development Mechanism (CDM). It was through the CDM that China captured the greatest number of certificates for emissions reduction due to the scale of several of its manufacturing industries. This led to other least developed countries to question the appropriateness of newly emerging economies such as China to continue to benefit from an unreformed CBDR under the UNFCCC, as well as other treaties. Although China continues to have significant numbers of people below the poverty line it has the domestic capacity to address these problems more so than many least developed countries.

As China adopts a more pronounced role internationally it challenges existing balances of power. The state recognises that it has to play a role in advancing CDBR

for non-emerging economies beyond itself. As China no longer qualifies for international financial assistance from organisations like the World Bank it has built up its own bank, the China Development Bank as well as its international financial lending arm. It is through new sources of revenue, including the Green Climate Fund and the Asian Development Bank, that China will assert the CBDR within a new geo-political context.

#### 8.1.5 Cooperation: Strategic

As Chapter 5 outlined China has not only risen in terms of national economic power but as a result its political power within the international community is growing. China has a sense of difference from the archetypal liberal democratic universal international governance models that US and European countries advocate. China's current President Xi emphasises the historic foundations of China's perspective when he notes that 'several thousand years ago, the Chinese nation trod a path that was different from other nations.'<sup>10</sup> Going on to explain that China could not copy the politics of other countries 'because it would not fit us and it might even lead to catastrophic consequences'.<sup>11</sup> With these changes and traditional worldview of difference and multipolarity the government of China is keen to cooperate as long as it is in control. The case studies illustrate the confidence of the Chinese government and other domestic actors, especially business, to cooperate knowing it is on their terms. This is important for the international law in the wider context too.

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<sup>10</sup> Xi Jinping, *The Governance of China*, (2014), Foreign Language Press cited in Carrie Gracie, The Credo: Great Rejuvenation of the Chinese Nation (7 November 2014), BBC News online

<http://www.bbc.co.uk/news/world-asia-china-29788802> [last accessed 20 November 2014]

<sup>11</sup> Ibid.

## 8.2 International Non-State Actors: When in China ...

Research interest amongst political scientists and legal scholars to understand the influence non-state actors (NSA), including international organisations, have on international legal processes has grown. There interest has increased with the perceived disaggregation of the state. As I outlined in chapter 3 it is now widely recognised that law-making internationally is a process that involves multiple actors other than just the sovereign state. How actors, both state and non-state, activities within law-making processes are interpreted varies amongst international legal theoreticians. In Hurrell's opinion the exponential rise in international non-state activity has 'diluted and clouded the idea of international law as a state-privileging system and ... unsettled the concept of sovereignty'.<sup>12</sup> Whereas institutionalists see all actors activities as contributing to, or detracting from, developing a universal international legal order in which the sovereign state is supreme. Institutionalists emphasise where actors have 'values, identities and roles distinct from the geographic limitations of sovereign states', such as indigenous peoples and some international non-governmental organisations there is more scope for embedding of different norms and principles.<sup>13</sup> The question is whether this is applicable in all contexts. An important angle for a researcher to question is whether NSA align themselves with the host country's values and interpretations of international legal principles to advance their own agenda.

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<sup>12</sup> A. Hurrell, *On Global Order: Power, Values and the Constitution of International Society*, (2007), Oxford University Press, p. 111 cited in N. Bhuta, *The Role International Actors Other than States can Play in the New World Order*, A. Cassese, *Realising Utopia: The Future of International Law*, (2012), Oxford University Press, pp. 61-76, p. 68.

<sup>13</sup> R. McCorquodale, *Beyond State Sovereignty: The International Legal System and Non-state Participants*, (2006), Issue 8, *Revista Colombiana de Derecho Internacional*, p. 149.

Both case studies have illustrated that international actors operating within a sovereign state can have an influence upon the development and implementation of forest related legal issues. The nature, form and implications of international actors intervention though needs closer scrutiny before being able to provide a more general evaluation of different theoreticians interpretations of actors activities influences. Intervention on forest issues by international actors in China has largely been to support the capacity either through funding or through providing human resources to achieve certain international objectives. In the following sections I will discuss TNC and UNDP in the context of the case studies, and reflect on the lessons learnt from the empirical research.

#### 8.2.1 International Actors in China: Pragmatism, Cooption and Complicity

Posner and others argue that NGOs are insignificant in the greater scheme of international process.<sup>14</sup> If one considers the role of TNC, the US conservation NGO, in the development of Pudacao National Park was not insignificant. The Chinese, government, academics and businesses however carefully manipulated TNCs contributions. For the Chinese government TNC were important for technical and scientific skills, as well as offering international credibility. They offered to provide interpretation of new ecosystem services such as carbon sequestration within the context of conservation using international discourse. The overall positive interpretation of NGOs that institutionalist offer, claiming that they 'deserve credit for helping to humanize modern international law' needs to be understood within context. This may apply in certain situations, but it needs also to be qualified again by understanding according to whose values the law has been 'humanised'.

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<sup>14</sup> R. Posner, *The Limits of International Law*, (2009), Chicago University Press, p. 27.

There are competing interpretations of international norms and principles held by NGOs and so not all can be adding the same humanisation to international law. In terms of Pudacao the international organisation worked with other international organisations but had a problematic relationship with community based organisations. Community representatives considered that TNC had the funding and government support to have a voice in the process of establishing a National Park model based on neo-liberal regulatory structures in a place where previously communities had greater power albeit at the tolerance of the Chinese government. This space is closed down with TNC working in collusion with the Chinese government provincial authorities on the basis that science demonstrates the negative impact of the communities. Less is made of the plans by the government to extract natural resources and build dams. Although an issue these are not challenged in a way that destroys them.

The communities on the other hand are appropriated into the National Park, their cultural lifestyle and traditions are undermined. What remains is repackaged as a experience for tourists to consume. In this sense it is not appropriate to say NGOs are irrelevant in the greater scheme of things as Posner states it is. In the case of Pudacao despite efforts to market the park as a positive step forward the lack of management plans, the emphasis on tourism and the minimal involvement of communities is illustrative of collusion with the Chinese governments authoritarian values. The failure by TNC to recognise their complicity in undermining the cultural values of ethnic peoples in south west Yunnan, as well as create a National Park that promoted unregulated tourism above conservation

should be part of a wider discussion on what international principles they are transmitting through their funded work from an MEA.

The UNDP as an international organisation fits in terms of observations by Thakur et al, that they are 'anchored in the state system'. As such UNDP works to take forward the international agenda however they have a strict awareness of sovereign rights and are politically astute about the limits within which they operate. As part of a UN body UNDP will influence the implementation process largely to assist with technicalities and capacity building. The idea that an IO may have norm making effects is implied according to Kingsbury and Casini because of the issuing of recommendations, guidelines, best practices, technical advice, findings, conclusions, committee rules, and other normative outputs.<sup>15</sup> The documents associated with the green poverty alleviation project draw on already accepted normative language and principles within the international domain on climate change forest restoration and renewable energy where these two are linked together. What is important is the process of implementation and to what degree the principle interpretations demonstrate anything of interest.

Although Weiss sees IOs as 'primary vehicles for setting global agendas and framing global issues, creating and diffusing norms' beyond the boundaries of the sovereign state in the green poverty alleviation case study there is little evidence of new norms being initiated by UNDP.<sup>16</sup> Weiss like many authors on IOs and NSAs make generalised claims that do not apply in all contexts where they operate. This

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<sup>15</sup> B. Kingsbury & L. Casini, *Global Administrative Law Dimensions of International Organizations Law*, (2009), *International Law and Justice Working Papers*, No.9, p. 4.

<sup>16</sup> T. Weiss, R. Thakur & R. Ruggie, *Global Governance and the UN: An Unfinished Journey*, (2010), Indiana University Press, p. 121 [Kindle version].

does not undermine the fact that they do make a difference it is however important not to recognise the importance of context, is China and exception or the rule, or part of a small group who do not fit the general conclusions of Weiss?

China has a specific perspective on working with non-Chinese actors.<sup>17</sup> It is keen to assert its control and not succumb to foreign culture uncontrollably. Many observers who believe in a linear pathway to liberal democracy within a capitalist global economy and the resulting legal architecture to support that were convinced that China was following such a trajectory. President Xi Jinping indicated that the once open door to foreigners to China is increasingly conditional on refraining from attacking the Chinese way, especially international civil society. He recently noted that there would be little space for civil society, no Western-style democracy and no listening to "well-fed foreigners who have nothing better to do than to lecture us".<sup>18</sup> The case studies illustrate that limited leverage is available to certain NSA and IOs in China especially as it becomes more economically and politically powerful internationally.

Outside actors are complicit in this process though. International actors justify their own strategies for engagement when in China using a number of reasons. These include: "without doing things the Chinese way then we would not achieve anything"; respecting sovereign jurisdiction, agreeing with the Chinese state's

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<sup>17</sup> It would be too much of a generalization to say that all actors in China concur with the governments approach. There are other voices and they are often keen to learn from international actors ranging from multinational enterprises to epistemic communities such as legal academics but underpinning exchanges is a reality that change is constricted and highly negotiated.

<sup>18</sup> Xi Jinping, *The Governance of China*, (2014), Foreign Language Press cited in Carrie Gracie, The Credo: Great Rejuvenation of the Chinese Nation (7 November 2014), BBC News online <http://www.bbc.co.uk/news/world-asia-china-29788802> [last accessed 20 June 2015]

interpretation of principles and values, and the way to advance these; small steps will lead to change further down the line etc. This approach is dangerous.

Specifically on NGOs Arts argues that 'the current hegemonic discourses tend to exclude specific types of actors with more radical perspectives and political critiques. They are increasingly being replaced by (more) moderate NGOs, such as TNC, whose strategies better match the current discourses on sustainable development and global governance.'<sup>19</sup> Radical counter hegemonic voices are rare in China. The government is a selective gatekeeper for an elite number of international actors to work on areas that fit with a moderate neo-liberal interpretation of applying international forest related law within an authoritarian context. This is certainly the case in China.

One area that is closed down almost completely is that of indigeneity identity in China. For indigenous peoples the concept of 'justice' includes self-determination, recognition of their custodianship of their lands and resources<sup>20</sup>, effective participation in decision-making through free, prior informed consent and equitable benefit sharing.<sup>21</sup> It is the pursuit of these four normative objectives that is the foundation for indigenous peoples organisations participation in international forest related law and policy making processes.

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<sup>19</sup> B. Arts, Discourses, actors and instruments in international forest governance in J. Rayner, A. Buck, & P. Katila, (eds), *Embracing Complexity: Meeting the Challenges of International Forest Governance*, (2012), IUFRO, pp. 57-75, p. 69.

<sup>20</sup> M. Blaser, H. Feit & G. McRae, Indigenous People and Development Processes: New Terrains of Struggle in M. Blaser, H. Feit & G. McRae, *In the Way of Development: Indigenous Peoples, Life Projects and Globalisation*, (2004), Zed Books, pp. 1-26.

<sup>21</sup> B. Richardson, Indigenous Peoples International Law and Sustainability, (2001), Vol. 10, Issue 1, *Review of European Community and International Environmental Law*, pp1-10.

As the national government restricts opportunity for self-determination ethnic communities in China are defined by the state and regulated as such. Working with ethnic peoples to inform them about their rights to self determination is restricted by the authorities so it is no surprise to find in the case studies TNC and UNDP being relatively passive on the issue. Looking beyond the international fora to interpretation of UNDRIP China has not embraced any concepts. The power of emergent super powers sovereignty is much in evidence in the way that such issues are off any international, or domestic, organisations agenda. This is in contrast to interventions in other countries by organisations of all types where community rights including indigenous peoples is explicit relating to forests, including TNC.

#### 8.2.2 TNN - Power in Collaboration

Both these projects could be seen to be examples of transnational networks in which there are different actors cooperating to achieve implementation of international forest objectives: greater conservation and mitigation of climate change. The claims that transnational networks are means through which a form of socialisation – the transfusion of norms, values, and identities among actors – occurs as part of building a new social order are overly optimistic from institutionalists like Slaughter.<sup>22</sup> Along with Streck's belief that transnational networks are a phenomenon that could close the current gap between needs and results in global environmental governance due to 'offering participatory decision-making, innovative implementation mechanisms, transparency, efficiency, speed,

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<sup>22</sup> A. M. Slaughter & T. Hale, Trans-governmental Networks and Emerging Powers in A. Alexandroff & A. Fenton Cooper, *Rising States, Rising Institutions: Challenges for Global Governance*, (2010), Brookings Institution Press, p. 750 [Kindle version].

and flexibility' is challenged by the evidence from the case studies.<sup>23</sup> Adding to this that 'network managers have a significant role in the development of a more extended, and effective multilevel environmental governance.'<sup>24</sup> Bernstein and Cashore claim that it is necessary reveal the power dynamics that operate where TNNs become gatekeepers to law and policy processes, often aligning to the dominant normative agenda rather than those excluded actors.<sup>25</sup> Although some would suggest that through TNNs local knowledge can be 'translated' into a global normative discourse in reality more often local communities are disempowered and can only participate in law and policy processes with the assistance of experts and the approval of authorities, usually the government.<sup>26</sup> And this is certainly the case with Pudacao national park, increasingly with the emphasis on science, business and possible forest carbon trading the local community is excluded and livelihoods are lost, along with a long cultural history. In these two case studies TNC along with the EU, under the CBD, along with the Chinese government worked alongside state epistemic communities and established a business with the man who was formally the head of tourism on land that was previously controlled by ethnic communities who already had their own small scale tourist approaches as part of their own livelihoods then fitted in to the World Heritage Convention along with IUCN standards. The human rights of these people are not recognised. The values are primarily those of the sovereign state and the economic value attributed to nature

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<sup>23</sup> C. Streck, *Global Public Policy Networks as Coalitions of Change*, (2002), *Global Environmental Governance*, pp. 121-140.

<sup>24</sup> *Ibid.*

<sup>25</sup> S. Bernstein & B. Cashore, *Can Non-State Global Governance be Legitimate? A Theoretical Framework*, (2007), Vol. 1, Issue 4, *Regulation and Governance*, pp. 347-371.

<sup>26</sup> D. Dumoulin, *Local Knowledge in the hands of transnational NGOs networks: a Mexican viewpoint*, (2003), UNESCO; An example of this is considered regarding NGOs working with Indigenous Peoples in D. Desai, *A qui l'homme sauvage? The text, context and subtext of agreements between mining corporations and indigenous communities*, in A. Perry-Kessaris, *Socio-Legal Approaches to International Economic Law: Text, context and subtext*, (2013), Routledge, pp153-167.

through an anthropocentric approach instrumentalism of ecotourism. The overarching controllers become the company and the local government by the end, as TNC is no longer welcome. There is no regulation in place for the national park, for ecotourism, and the management plans are not followed through and implemented by the company. Yet the concept of the national park is taken forward by those engaged in the original group at a provincial level with over twelve new parks planned.

In the two case studies there is little evidence of international epistemic communities being directly involved in the project developments. The importance of Chinese epistemic communities is very clear though. TNC works very closely with the South-West Forestry College for example. Also SNEC emerged from epistemic research community. International research programmes in China. What is important is the international agenda on forests that leading epistemic centres pursue and to varying degrees determine. The main focus of late is climate change and forests, with an emphasis on the carbon sequestration capacity of forests and land. This emphasis has fed into the agendas of the communities working to develop the science to inform the policy makers and planners for both the National Park and the biodiesel projects.

Identifying conflicts of interest between the funders, business and epistemic communities is a challenge in both of these case studies. The financial links between science and business often result in conflicts of interests.<sup>27</sup> As increasingly

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<sup>27</sup> L. Giessen, Reviewing the Main Characteristics of the International Forest Regime Complex and Partial Explanations for its Fragmentation, (2013), Vol.15, Issue 2, *International Forestry Review*, pp. 60-70

global environmental governance is sub-contracted out and networks are established between ECs and other actors, including the State, it is more challenging to identify conflicts of interest.<sup>28</sup> ECs, especially scientific and political ones, are criticised for their dominance in issue formation by the well-funded Northern ECs over the Southern counterparts. The international environmental agenda has for a long time been criticised for privileging Northern issues over and above those that concern developing countries.<sup>29</sup> The focus on carbon and increasingly the shift to turning this into a market-based payment for ecosystem services illustrates the international agenda linking closely with the focus and nature of projects with international science and economics.

As Arts argues that TNNs, both public and private, are among the winners in current global forest policy, because they have attained discursive power and bring crucial resources, such as information, to the political process of norm setting at all levels from the international through into the local via pilot projects for example.<sup>30</sup> They set the agenda, they determine who participates and they decide on the regulatory approaches that support certain values and principles in a particular approach. Bernstein is correct to claims that the growth in TNNs is a situation that is more a consequence of an underlying ideological aim [neo-liberalism] to deregulate and reduce the role of the state than a mere outcome of global environmental

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<sup>28</sup> See P. Levine, *Collective Action, Civic Engagement and the Knowledge Commons* in C. Hess & E. Ostrom, *Understanding Knowledge as a Commons: From Theory to Practice*, (2007), MIT Press, pp. 3025-3413, (Kindle Edition); M. Hulme, *Problems with Making and Governing Global Kinds of Knowledge*, (2010), Vol. 20, Issue 4, *Global Environmental Change*, pp. 558-564.

<sup>29</sup> S. Karlsson, *The North - South Knowledge Divide: Consequences for Global Environmental Governance*, in D. Esty & M. Ivanova, *Global Environmental Governance: Options and Opportunities*, (2002), Yale University Press, p. 74.

<sup>30</sup> B. Arts, *Discourses, Actors and Instruments in International Forest Governance* in J. Rayner, A. Buck, & P. Katila, (eds), *Embracing Complexity: Meeting the Challenges of International Forest Governance*, (2012), IUFRO, pp. 57-75, p.71.

problems.<sup>31</sup> China is a perfect country in which to achieve such dominance. Although it is perhaps an exception to Arts analysis because of the state is far from being deregulated.

Involvement of international actors within theoretical literature on international law has largely not recognised the two-way nature of relationships between internal and external actors and the context in which this takes place. Institutionalism, including trans-national legal process, has a largely positive take on the liberalising and democratizing contribution that non-state actors and international organisations play in evolving the international legal project. This is based upon a hierarchical relationship in which the principles and values of international law as a universal concept are being embedded through their activities.

China presents a challenge to legal theorists who reject institutionalist interpretations of international law-making processes. It also does not represent a jurisdiction where the state is disaggregating. Current President Xi's comments on the fall of the Soviet Union illustrate a commitment to a strong state. He is famously reported to have said the Soviet Union fell apart in 1991 because "no-one had the balls to stand up for it".<sup>32</sup> Xi's comments are a clear signal to international legal scholars that the mission to achieve a universal shared institutionalist global legal order will unlikely happen with China coming of age at the start of the 21<sup>st</sup> century

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<sup>31</sup> S. Bernstein, Power, Social Purposes, and Legitimacy in Global Governance in S. Bernstein & L. Pauly, *Global Liberalism and Political Order: Toward a New Grand Compromise*, (2007), State University of New York Press, pp. 3-23, p. 8.

<sup>32</sup> Xi Jinping, *The Governance of China*, (2014), Foreign Language Press cited in Carrie Gracie, The Credo: Great Rejuvenation of the Chinese Nation (7 November 2014), BBC News online <http://www.bbc.co.uk/news/world-asia-china-29788802> [last accessed 20 June 2015].

and flexing its international relations muscles. With a worldview based on multipolarity institutionalists may have to reconsider a universal approach and recognise that institutionalism within one pole at least will be developed along the lines of Chinese principle and value interpretations.

Benvenisti and Downs claim that fragmentation in international law needs to be understood as a phenomenon rooted in the political economy and control of power by an elite.<sup>33</sup> Yet this is situated with a focus on the colonial origins of international law, notions of disempowerment of others principles, norms and values. Yet it is clear that disempowerment is abundant in China between the authorities and many communities, farmers and ethnic peoples especially. In the two case studies disempowerment occurs not because of international law but because of inequities of power between a range of actors. It is their values and the emphasis on certain regulatory approaches that embeds further disempowerment and undermines principles such as equitable access to resources and benefits.

Political elite is not only those within government but also those who share similar value priorities. The neo-liberal approach to valuing forests is one that is supported by all the actors involved in the law and policy-making processes and implementation in China. It is the priority of those who have the gate opened for them to participate. Those who may focus on greater community empowerment and small-scale enterprise are not included. The Tibetan communities in Pudacao were not involved in the development of the national park, or in the final decisions

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<sup>33</sup> E. Benvenisti & G. W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, (2007), Vol. 60, Paper 41, *Tel Aviv University Law School*, pp. 1-40.

on whether to have compensation. They received it with a gratitude that is common to disempowered groups who understand that to refuse would result in more problems for their existence.

So this supports the proposition that several critical legal scholars make that many transnational legal norm-making activities of powerful actors are reshaping any apparent democratic international pluralist environment towards a 'legalised hegemony' that is preferential to the values of a new global elite.<sup>34</sup> In cases where transnational actors, even international organisations such as the UNDP, priorities sovereign rights over international rights and equity. This results in an interpretation of sustainable development that leaves aside the political elements such as social power through procedural rights. The optimistic academic scholarship especially on the growth of civil society in China was perhaps too hasty to predict an ever-linear progression towards a liberal democratic future. Recent indications from announcements by the most recent premier in China are reflecting an interest in closing down the shutters to the windows. Perhaps there were too many mosquitoes coming in.

The establishment of its own international financial institution to assist with development is another step by the Chinese, along with other Asian countries, to move away from dependency on receiving finance and assistance with western values as conditions including increasing democratic governance. The leverage of power over the Chinese state has all but come to an end. These case studies

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<sup>34</sup> B. Chimni, *Third World Approaches to International Law: A Manifesto*, (2006), Vol. 8, *International Community Law Review*, pp. 3-27; B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, (2003), Cambridge University Press; B. de Sousa Santos, *Towards a New Legal Common Sense*, (2002), Butterworths Lexis Nexis.

illustrate this clearly. The superficiality of usage of international laws principles in relation to both forest related projects was evident when they were translated in to practice.

### **8.3 Shared Values: Winners and Losers**

International laws literature rarely explores the significance of values to the interpretation of principles by multiple actors, and the links with regulatory development. This is more an area of interest for comparative legal researchers and socio-legal theorists. Critical scholars emphasise that international laws values are steeped in a colonising mentality of universalism that believes in the legal superiority of Western moral philosophy. Not only does China not agree with this interpretation on universalism, the world view on multipolarity guiding the country's international engagement, it also has its own philosophical traditions going back centuries upon which to develop contemporary interpretations of international laws normative principles. Recognising the significance of Chinese values, and how they inform the regulatory design on forest related law is important going forward globally given the country's population as well as its increasing involvement in other countries through investment and development assistance.

Is there any kind of value hybridisation taking place in China? Western neo-liberalism has informed Chinese economics and regulation for several decades. However it is layered on and interacts with a Marxist socialist economic tradition. This is hybridized with a level of state control to have market-based socialism. Both Marxist socialist and neo-liberal economics are underpinned by values of

instrumentalist anthropocentrism, even when appearing more intrinsic in its orientation. There is no evidence within our case studies that there is an attempt to orientate the law towards the biotic community and its rights. As with ethnic peoples in China the biodiversity and ecosystems are something that is ruled over and appropriated for economic benefit in whatever guise that may be.

In both case studies various rights were emphasised over others. Before considering the manner in which this happened and the implications at a broader level I will discuss the challenges that exist internationally that may need a reconfiguration of values to address.

Amongst an increasing number of scholars engaged in international environmental law and policy the concept of the Anthropocene is becoming important to how discourse is being framed. To overcome problems faced in the Anthropocene a paradigm shift in values is advocated. This needs to be clearly understood as a shift from certain values that are dominant as opposed to all existing values. The Anthropocene era could be one where greater inequity in control and ownership of resources is extended to the detriment of already vulnerable communities. This is already evident in the global efforts to manage public goods such as forests within the climate change regime. The emphasis on carbon sequestration turns forests into machines that reduce emissions in quantities that are accounted, traded and monitored. This dispossess many forests people of their cultural relations with the forests upon which they may be dependent for subsistence livelihoods and/or income. The literature to date on the Anthropocene and international law is

limited. It largely continues a universal tradition of finding a new world order but based on new values, although it continues themes of appropriation.

It is clear that China is taking significant steps to modify its environment through planning and the focus on plantations, both afforestation and reforestation, but not focusing on other more political rights. It is also a country that sees regulation as a means to control market intervention and enable farmers to gain from decentralised management of forests.

As section 5.4 illustrated China has an extensive complex relationship with nature recognising the intrinsic values and the need for harmony with nature. Perhaps the ecosystem approach most closely captures this blending of integrated economic, environmental and social dimensions. Again though there are questions relating to the rights of peoples if top-down planning adopts a centralised integrated land use planning approach in which humans are but one component especially in a country where there are limited procedural rights or other opportunities to influence decision making processes.

Interpreting human rights within the case studies it is important to understand how the Chinese state priorities rights. To argue that the country breached human rights is in itself to side with an interpretation that focuses largely on political rights such as freedom of speech, movement and assembly. Other economic rights such as the responsibility of the state to continually improve the living standards of its peoples the Chinese state has largely excelled in recent decades reversing global trends on poverty. It also appears that in the past decade its own efforts to

introduce law and regulation to address environmental degradation also is in line with delivering a healthy environment for all. The fact that it currently falls short is a ungenerous conclusion to reach given the scale of the task ahead.

China had like many countries traditionally up to the 1990s adopted command and control regulation to resolve environmental problems within its own jurisdiction. Today attention continues on developing appropriate elements of command and control regulation such as institutional/agency design; power allocated to make rules or standards; ability to authorize and allocate permits; procedural rules; monitoring and reporting; enforcement and accountability. But China has embraced liberal market regulatory objectives to assign value to new ecosystem markets as a way to tackle certain forest related environmental problems. This offers common ground through which leading mainstream international and non-national Chinese organisations can collaborate with the Chinese government and other domestic actors such as businesses and epistemic communities. Leading US and international non-state actors can work with China to advance such markets as many are in agreement that ecosystem valuation using economic techniques is a necessary regulatory development to reduce environmental degradation and climate change.

China has been at the forefront of developing public ecosystem service markets with the sloping land conversion programme. Now it has an interest in developing private market systems. According to Bakker 'market environmentalism,' is a mode of resource management that promises 'a virtuous fusion of economic growth,

efficiency and environmental conservation' via market means.<sup>35</sup> China is attracted by the idea of a circular economy. The Circular Economy Law is the countries version of sustainability. It is embedded with notions of balance, harmony and other Taoist nature based metaphors. China is backing the growth in the discourse on Green Economy, using terminology like Natural Capital. It already has established numerous pilots especially on payment for water services. China was the country to benefit most from the Clean Development mechanisms. Efforts to benefit from the CDM on afforestation and reforestation projects built up a knowledge base and human expertise skill base in China, assisted by the influx of World Bank and independent international accreditation agencies, that have filtered into the larger developments such as the national carbon trading scheme.

China is capitalising on its extensive ecological and biological gifts within its jurisdictions. It has no ideological or moral concern over placing a price on nature. The basis of the arguments are like Pearce's claim that the need to allocate value to finite resources, as 'infinite value was indistinguishable from zero value in a market economy'.<sup>36</sup> The Chinese state; like other countries has embraced this approach to regulating the natural environment, developing markets for ecosystem services. It is set to expand these with the introduction of the national carbon trading scheme. This takes the economic value of forest beyond the products to services. It establishes new types of markets that people can buy and sell. New property rights are allocated. As Perry-Kessaris argues such neo-liberal economics needs the appropriate institutional legal infrastructure and normative rules to facilitate such

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<sup>35</sup> K. Bakker, Neo-liberalising Nature? Market Environmentalism in Water Supply in England and Wales, (2005), Vol. 95, Issue 3, *Annals of the Association of the American Geographers*, p. 543.

<sup>36</sup> D. Pearce, Can Non-market Values Save the Tropical Forests?, in B. Goldsmith (ed), *Tropical Rain Forest: a Wider Perspective*, (1998), Springer Publishing, p. 260.

expansion.<sup>37</sup> For *jatropha curcas* the regulation was there. There were also the potential gains to be made from appearing to meet obligations under the UNFCCC and the Kyoto Protocol to increase forest carbon sequestration capacity. It also occurred at a time when China was establishing a national carbon trading scheme to which forest carbon was to be included once the rules were agreed in 2016.

The employment of market-based regulation is clearly beginning to replace purely command and control approaches in China in relation to forests. The influence of private payment for ecosystem services is impacting the regulatory design preference in China. Both case studies demonstrated that China placed its faith in market approaches. They illustrated that intervention in the provision of ecotourism and biodiesel to create private markets was seen as the most efficient means to deliver the principles and values discussed in related documents.

Conservation globally has embraced opportunities offered by liberal market regulatory mechanism to fund itself. In part this is the result of governments pursuing decentralisation over protected areas as part of a wider programme on forests. Yet it also is demonstrative of a wider international trend advocated by leading international organisations and actors, including US conservation leaders TNC, Conservation International and Flora and Fauna, of a market-based conservation regulatory model. The advocacy for such a model in China by an American conservation organisation illustrated that where there is a convergence in value priorities the government will work closely with an international non-

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<sup>37</sup> A. Perry-Kessaris, Prepare your indicators: economics imperialism on the shores of law and development, (2011), Vol. 7 Issue 4, *International Journal of Law in Context*, pp. 401-421, p. 407.

Chinese actor. The business model knowledge and capacity building TNC brought to the development of Pudacao National Park was integral to it receiving EU-China Biodiversity Partnership Funding. TNC collaborated with Conservation international, another US liberal conservation organisation, worked to develop potential future mechanism that could create a market for sequestered forest carbon from the National Park. This appears to resonate with Polanyi's observation that the success of a market economy depends on the market's capacity to control, regulate and direct the entire economic system. He adds that the implications of this are that society will be subordinate to the law of the market.<sup>38</sup> This is certainly true for the ethnic peoples in and around Pudacao, as well as the farmers contracted to grow *jatropha curcas*. The ethnic peoples in Pudacao are reduced to the market needs of ecotourism and provided with a meager fixed fee in compensation, not even benefitting from a percentage based fee that would have meant more money as gate numbers increased. All this was thrust on them without consultation.

The biodiesel case study illustrated the efforts to pursue the implementation using the market approach as outlined in China's Renewable Energy Law. The decentralisation in forest management and tenure that occurred at the same time opened up the possibility for greater market-based opportunities. Although articulated as being for farmers the opportunity lay more with companies seeking land to grow cash crops at scale. Some argue it was a win-win situation for farmers households and companies but this fails to recognise the way in which market

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<sup>38</sup> K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (2001 [1944]), Beacon Press, pp. 74-75.

opportunities distort preferring the player with resources and the power to negotiate over the long term. The success of *jatropha curcas* depended on the market expanding. With the support of government subsidies and regulation in renewables a market was created for Shenyu Company and others to fill. The decentralisation of tenure rights over forest land for households meant that there would be willing providers of land.

The key indicator of placing faith in business is through regulation to extend or initiate new market opportunities. The trend in this can be linked to shifts in the international perspective on environmental law that has increasingly incorporated market-based approaches into it. This is now illustrated by the fact that 'Green Economy' is now front and centre of discussion at the international level on how to achieve sustainable development.<sup>39</sup> Also the rise in voluntary self-regulation is an indicator of the business sector controlling the form of regulation adopted to manage the forest related economy. Within China ecotourism and biodiesel are already established business enterprises before any kind of voluntary or statutory regulation is in place. The fact that China is a member of the Global Biodiesel Partnership that has developed guidelines on biodiesel that are voluntary illustrates little about practice. Shenyu Company demonstrated little interest in adopting statutory regulation to ensure sustainable *jatropha curcas*. The failure to take measures that were precautionary adds to the impression that responsibility for governance of *jatropha curcas* biodiesel would only draw on international

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<sup>39</sup> The Future We Want, Rio de Janeiro, Brazil, 22 June 2012 available <http://www.un.org/en/sustainablefuture/> [last accessed 28 October 2014]. On forests see UN-REDD Forests Africa: Opportunities for a Green Economy - <http://www.un-redd.org/Home/tabid/565/Default.aspx> ; UNECE Green Economy: Forestry and Timber <http://www.unece.org/ro/forests/greeneconomy.html> [last accessed 24 October 2014].

principles to a limited degree, selecting in a pick and mix fashion and interpreting them appropriately to their own cause; i.e. that of

Neither the Pudacao National Park company nor the Shenyu company have in place any kind of CSR regulation nor refer to the need to develop any. They do not refer to any international guidelines. The idea that CSR is very much part of a mature market – in which consumers including the state demand these of businesses could be illustrative in terms of these new markets in China: ecotourism and biodiesel from *jatropha curcas*. What it does illustrate is that the vagaries of international efforts to support the idea that these are tools available to ensure that sustainability happens in a way that is equitable, and good for the environment as well as the economy are flawed. Emphasising the weakness in reality of practice in international law. That the focus yes needs to be on what happens in practice and then moving on to how to best achieve change, and quickly. Yet this would need state cooperation and an agreement over regulatory intervention models.

Centralised authoritarian management of ecosystem functions using a market-based model to trade units, be these water, carbon or biodiversity, is a unifying value between many actors. The expansion of the commodification of nature will, like other forms of global trade, be a value concept around which international law and institutions will invest. Less emphasis will be given to social elements, as is often the case with corporate social responsibility schemes including forest certification other than FSC. Already extending markets through the concept of ecosystem valuation has brought together several state and non-state actors alike. Cooperation to work on learning by doing pilots to resolve problems in the

technical and regulatory models for commodifying ecosystem services has been extensive. It has within the forest sector brought together financiers, conservation NGOs, epistemic communities, international financial institutions and organisations as well as bilateral cooperation between states. Some more critical actors within the not-for-profit environmental movement and indigenous peoples organisations are also becoming involved in an effort to reform form within as the concept becomes more embedded in policy and regulation is developed.

Achieving human rights by focusing solely on economic rights is an attractive approach to authoritarian regimes. It is a shrewd approach to human rights values recognising that for the majority democratic freedoms have less significance than basic food and jobs. A growing intolerance within European and American countries shown by more right-wing governments, as well as hostility to critical anti-hegemonic voices resent the economic powerhouse that China is, and the freedom to govern that the state has.

In an effort to appear to safeguard the values of the less powerful reflexive regulation advocates push for innovative dynamic regulatory tools that offer procedural feedback loops to ensure a steady balanced state. Safeguards using reflexive regulatory tools, especially including procedural participation throughout implementation and rule enforcement, are at the international level being incorporated into forest ecosystem service mechanisms. This is most notable in REDD+ under the UNFCCC. This emphasis on human and indigenous political, cultural and civil rights as being important for the success of ecosystem service valuation may be a challenge to China. In the two case studies there are signs that

the approach adopted to focus on economic related rights can embed inequities and further disempower marginalised peoples, including ethnic peoples and farmers.

Reflexive regulatory tools have not supported China's market-based regulatory approaches. These more procedural tools require there to be communication channels, transparency and open access to complaints procedures for civil society. China has largely resisted such empowerment although it has recognised the role of civil society as a tool to enforce national policy. The GONGOs play strategic roles but are at the mercy of the vicissitudes of the Chinese authorities, especially in the provinces.

Participation becomes a central pillar to the success of reflexive regulation in both the design and implementation phases. Reflexive regulation advocates recognise in theory that accountability and representation are integral to effectiveness. This is clearly not the case in China. But if you see monitoring and oversight through new technologies – administered by experts then China will develop these. To achieve participation procedures need to be fair, accessible and open; the process must be broader than select elites either within government or within elite non-state actors groups, as well as international organisations.

The dominance within international law scholarship relates to the decentering and neoliberal dominance in regulation. This was the result of post-cold war perspectives on international law as a global legal order that was progressively shifting to a universal hegemony. This is now fractured and fragmented. The focus

of the International Law Commissions study on fragmentation on international law was on the fragmentation within an order rather than an ideological fragmentation that under changing geo-political situation is becoming ever more prevalent. China has carefully worked the international legal system to its own benefit. Institutionalists that believe that intervention could lead to a universal hegemony founded upon liberal, democratic principles and rights based values as it builds its own pole within a multipolar world have found China a challenge to these ideals.

#### **8.4 Conclusions**

This thesis set out to investigate the potential benefits that different perspectives on international law could bring to research investigating the interface between principles, actors and values in law-making processes. It adopted a broad scope for defining the law-making process. By studying two cases in the field, and working on gathering a full understanding of statutory laws and principles it was clear that the different perspectives brought different strengths and weaknesses for any researcher seeking to reveal the interlinkages between principles, actors and values.

Firstly institutionalist approaches to these issues can contribute to a researchers toolkit with its persistent inquiry of structure within which law-making takes place, even when adopting a narrow scope. Within the context of international law there are several leading scholars who have applied such research to understand the linkages between the fragments. Applying administrative law concepts to this to raise issues of accountability and legitimacy is important at the international and

national context. Doing so provides a rigour to the structures within which law-making happens.

Secondly from this research it is evident that the institutionalist model will only explain so much, and in part this is because it will not ask the questions to reveal a greater more robust truth, a truth that exposes the power behind the law-making structures. Questions of inclusion, exclusion, fundamental values, fairness, and legitimacy of outcomes are approach by institutionalism in a way that ignores the power relations.

Thirdly context must be part of the analysis. Generalisations of legal systems, or developed and developing countries need to be challenged. All too often they conflate concepts, ideas and theories in ways that lose the uniqueness of a place in which law-making processes are occurring. China cannot be seen as another developing country. It today is a superpower, but it is one that has a history that goes back before there ever was a United States.

Finally, context is not everything. A further thread holding differing cultures, jurisdictions and ideologies together is the global market economy. New markets that appropriate nature as a tradable asset are emerging in the US, EU and the BRICs. Advocates believe this is necessary to reverse the degradation in ecosystems. It may well be at the expense of other values including rights.



## Appendix 1

### Interviewees List

Director of the Zhongdian County Forestry Bureau, Zhongdian, Prefecture, Yunnan

Jerry Chen, TNC Director, Yunnan Office

Richard Hardiman, Director EU-China Cooperation Programme, Beijing, China.

Mr He, TNC Policy and Regulation Advisor, Zhongdian, Yunnan, China.

Professor Liu Jinlong, Chinese Academy of Forestry, Beijing

Mr Liu Zhuoxin, Deputy General Manager, Yunnan Shenyu Energy Company Limited, Kunming, Yunnan.

Long Jiang, Director General, MOST Yunnan Province, Kunming, Yunnan.

Ding Wendong, Director of Pudacao National Park, Zhongdian County, Yunnan.

Mr Yang Qingyun, MOST Director, Nansha township, Yuanyang county, Yunnan

Yang Yuming, Deputy Director of the South West Forestry College, Kunming, Yunnan Province

Professor Ye, Ecotourism Faculty, South West Forestry College, Kunming, Yunnan

Associate Professor Zhao Yaqiao, Deputy Director, Rural Development Institute, Yunnan Academy of Social Sciences, Kunming, Yunnan.

Mr Zhu, MOST deputy-Director, Nansha township, Yuanyang county, Yunnan.

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