

OIL AND GAS IN THE NIGERIA-CAMEROON MARITIME BOUNDARY DISPUTE: AN ALTERNATIVE LEGAL APPROACH

ANNOTATED BIBLIOGRAPHY

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This annotated bibliography provides selected sources of information relating to my LL.M. thesis research at the University of Calgary. My research focuses on an alternative legal approach to the exploitation of the oil and gas in the Nigeria-Cameroon maritime boundary dispute. I aim to apply the new concept of joint development of oil and gas resources to the Nigeria/Cameroon maritime boundary dispute. This dispute is a classic example of the type of boundary dispute that jeopardizes the development and exploitation of the world's hydrocarbon energy resources. Boundary disputes over offshore resources are common where hydrocarbon deposits straddle delimited continental shelf boundaries or are found in areas of overlapping continental shelf claims. The risk to investment is high in these disputed regions. Consequently, resource exploitation may face significant delay while potential participants wait for an international border to be agreed upon by, or imposed upon, the nations involved. Joint development is an alternative to the settlement of boundary disputes in the exploration for or exploitation of oil and gas.

This annotated bibliography is divided into two sections: (a) General works comprising joint development of offshore oil and gas, and joint development a duty to cooperate in international law; (b) Case study comprising model agreements for joint development. Each section includes three parts: monographs, articles and relevant conference papers.

The first section of this bibliography consists of literature on joint development, and the debate among writers in the field on whether there should be an international law duty to cooperate in joint development. These provide a general framework for my research.

The second section deals with the case study of different joint development agreements regarded as model agreements and the literature relating to the debate on whether there can be a model agreement for joint development.

GENERAL WORKS: JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS, AND JOINT DEVELOPMENT A DUTY TO COOPERATE IN INTERNATIONAL LAW

Monographs

Blake, G. et al., *Boundaries and Energy: Problems and Prospects* (London: Kluwer Law International, 1998).

This is a collection of papers delivered in a conference organized by the International Boundaries Research Unit in 1996 on how transboundary hydrocarbon resources can be peacefully managed and transported. The book generally highlights four approaches to

problems which may contribute to avoiding either deadlock or conflict: examination of state practice, joint development zones as an alternative to dispute, the work of the courts in dispute resolution, and new ways of looking at old and intractable boundary problems. The book also provides a commentary on the paradoxes associated with globalization.

Blake, G. et al., *The Peaceful Management of Transboundary Resources* (London : Graham & Trotman 1995).

This is a collection of papers delivered in a conference also organized by the International Boundaries Research Unit in 1994 on transboundary resources generally: oil, gas, minerals, groundwater, surface water and fisheries. The book suggests efficient management and exploitation in the context of collaborative arrangements between neighbors. It discusses the political and practical problems being encountered where no such agreements exist. It also emphasizes the pressing need for states to collaborate to develop shared resources in their borderlands.

Charney, J. I. and Alexander, L. M *International Maritime Boundaries* vol. I (Dordrecht: Martinus Nijhoff Publishers, 1993).

This is a collection, in several volumes, of global and regional analytical papers and individual boundary expert reports on the studies of the maritime boundaries of the ten regions of the world: North America, Middle America, South America, Africa, Central Pacific/East Asia, Indian Ocean and South East Asia, Persian Gulf, Mediterranean and Black Seas, Northern and Western Europe, Baltic Sea. The book also includes the report of all international maritime boundary settlements and the maritime boundaries remaining to be settled. It highlights nine categories of considerations that might have played a role in the boundary delimitations: political; strategic and historical; legal regime; economic and environmental; geographic; islands, rocks, reefs and low-tide elevation; baseline; geological and geomorphological; method of delimitation; and technical considerations. The global papers examine the practice in order to determine which of the original hypotheses are correct. The regional papers consider the practice in particular regions as a whole and identify certain facts that influenced delimitation in individual regions.

Charney, J. I. and Alexander, L. M *International Maritime Boundaries* vol. II (Dordrecht: Martinus Nijhoff Publishers, 1993).

This is a continuation of the boundary reports mentioned above.

Charney, J. I. and Alexander, L. M *International Maritime Boundaries* vol. III (Dordrecht: Martinus Nijhoff Publishers, 1993).

This is also a continuation of the boundary reports mentioned above.

Cukwurah, A. O. *The Settlement of Boundary Disputes in International Law* (Manchester, England: Manchester University Press, 1967).

This book generally deals with the peaceful settlement of boundary disputes in international law. It examines international boundaries in general and the processes in boundary making. It classifies causes of boundary disputes and the different methods of settlement available in international law. The book recommends diplomatic modes of

settlement for its flexibility and suggests the setting-up of permanent mixed-boundary commissions.

Daniel, T. & Perry, A., *The Language of International Boundary Dispute* (London: Public International Law Group, Kendall Freeman).

This booklet explains and interprets the terminology used in the unusual field of international boundary disputes.

Elian, G. *The Principle of Sovereignty over Natural Resources* (The Netherlands: Sijthoff & Noordhoff, 1979).

This book talks about the settlement of the problems arising out of the utilization of the world's natural resources. It discusses the concept of sovereignty over natural resources and suggests that the problem of the access of all the states to natural resources for the benefit of mankind as a whole can only be solved through cooperation. The book argues that sovereignty over natural resources should not prevent, but support future international economic cooperation. The book recommends the establishment of new economic relationships between the world's states for a better atmosphere of international cooperation.

Hocknell, P. R., *Boundaries of Cooperation Cyprus, De facto Partition, and the Delimitation of Transboundary Resource Management* (Netherlands: Kluwer Law International, 2001).

This book examines the process of managing transboundary resources which represents a significant opportunity for the advancement of peaceful cooperation through equitable and sustainable means. It studied partitioned states, especially the state of Cyprus and addresses the current debate on the role of international boundaries and reassessing the normative assumptions upon which they are constructed. It also includes the theoretical debate amongst political realist and liberalist accounts of the circumstances under which parties cooperate or fail to cooperate in the management of transboundary resources.

Kaikobad, K. H., *Problems of Adjudication and Arbitration in Maritime Boundary Disputes* (Netherlands: Kluwer Law International, 2002).

This book examines a selected range of the problems which International Courts and tribunals encounter in adjudication, such as limitation on jurisdiction, flawed judgments, errors, inconsistencies and inaccuracies in judgments or maps accompanying judgments, interpretation and application of the judgment or award and request for revision of judgment.

Kriesberg, L. and Thorson, S. J., *Timing the De-escalation of International Conflicts* (New York: Syracuse University Press, 1991).

This book talks about the role of timing in conflict resolution. It generally treats the concept of de-escalation and timing and answers the questions as to the conditions that constitute good timing, de-escalation, strategies and policy choices. It offers assessment

of when the time is ripe for de-escalation effort and concludes that it is not always correct to de-escalate even when the time appears ripe. Also, trying to de-escalate even when the timing is not right may be correct because it may build constituency support. Thus the prevailing conditions must be considered when deciding to make de-escalation effort or deciding which strategy to pursue.

Lee, B. T. & Shamsul Bahrin, T., *Vanishing borders: the new international order of the 21st century* (Aldershot, Brookfield, England: Ashgate, 1998).

This book is a selection of papers from the August 1996 conference organized by the Department of Geography, University of Malaya, Kuala Lumpur. Topics include the worldwide impact of countries' greater interdependence and globalization, illustrated by specified areas including Japan, the Pacific Islands, New Zealand, and South Africa. Also considered are regional political alliances such as the European Union and ASEAN, along with economic developments like the Trans-Asia railway that serve to further erode national borders. The main subjects are Boundaries, International Economic Integration, International Cooperation, and Internationalism.

Perrez, F. X., *Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law* (The Hague: Kluwer Law International, 2000).

This book in stressing the present day importance of cooperation, contribute to the understanding of international law by concluding that cooperation has to be conceived as an element of the concept of sovereignty. It therefore explains sovereignty to mean not just independence but a responsibility to cooperate.

Schrijver, N., *Sovereignty over Natural Resources Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).

This book analyzes the evolution of permanent sovereignty over natural resources from a political claim to a principle of international law. It also demonstrates that permanent sovereignty over natural resources under modern international law entails rights as well as duties which include a responsibility to cooperate and focuses on balancing rights and duties of states with regards to sovereignty over natural resources.

Articles

Ariffin, D. H. "The Malaysian Philosophy of Joint Development" (1985) 10 Energy 533.

In this article the author discusses joint development within the Malaysia-Thai context as a joint operation which will be managed under simple and clear arrangements and operate within a framework of laws that is practical and unambiguous as well as compatible with the respective national development programs.

Charney, J. I. “International Agreements and the Development of Customary International Law” (1986) 61 Wash. L. Rev. 971.

This article discusses the debate on the function of negotiation, adoption and conclusion of international agreements in the development of new norms of customary international law. It examines the circumstances where this will be possible by using the Restatement’s general rule. It also identifies some factors which would help to distinguish those agreements that may appropriately give rise to customary international law and those which may not.

Churchill, R. R. “Falkland Islands: Maritime Jurisdiction and Co-operative Arrangements with Argentina” (1997) 46 ICLQ 463.

The article focuses on the establishment of co-operative arrangements for seabed resources in 1995 between the United Kingdom and Argentina. It gives a brief account of the extension of maritime jurisdiction around South Georgia and the South Sandwich Island in 1993. In order to set the co-operative arrangements for the sea bed resources in context, the article recapitulates the parties’ co-operative arrangements for fisheries and their operation in practice since 1990.

Dzurek, D. J. “Boundary and Resource Dispute in the South China Sea” (1985) 5 Ocean Year Book 254.

This article discusses the South China Sea region, the marine resources of the area and the motives for action. It further analyzes the political interactions among the countries of the region, the sovereignty disputes and jurisdictional claims.

Fesharaki, F. “Joint Development of Offshore Petroleum Resources: the Persian Gulf Experience” (1981) 6:11 Energy 1325.

This article discusses the Persian Gulf region, their boundary conflicts and their experience in joint development. It further analyzes the factors that made joint development possible in this region.

Freeman, K. “Joint Development Zones: How to Negotiate and Structure a Joint Development Agreement” (September 2003) online: Kendall Freeman home page <<http://www.kendallfreeman.com>>

The article outlines the basic structure of joint development agreements and considers the various issues that may arise during the negotiation of such agreements. The article further analyzes the pros and cons of the use of precedents in drafting such agreements.

Gao, Z. “The Legal Concept and Aspects of Joint Development in International Law” (1998) 13 Ocean Year Book 107.

In this article, the author recounts the problems of overlapping claims and the difficulties

in exploitation of hydrocarbon resources in different maritime areas of the world caused by the establishment of the continental shelf and exclusive economic zone regimes. The article analyses in details the new concept of joint development and the controversy in academic circles. It further captures the debate on whether joint development has crystallized into a rule of international law.

Holmes, J. “End of Moratorium: The Timor Gap Treaty as a Model for the Complete Resolution of the Western Gap in the Gulf of Mexico” (2002) 35 Vanderbilt Journal of Transnational Law 925.

The paper explores the issues surrounding the treaty between United States and Mexico with a ten-year moratorium within a buffer zone that encompasses transboundary reserves. The article suggests a model to resolve the dispute over access to transboundary reserves that will benefit both states. The article recommends the implementation of a joint development scheme in the buffer zone, using the Timor Gap Treaty as a model.

Hui, Y. “Joint Development of Mineral Resources – An Asian Solution?” in Ko Swan Sik et al. (eds.) 2 Asian Year Book of International Law (the Netherlands, Kluwer Academic Publishers, 1994) 87.

This article examines the ocean boundary delimitation problems and oil and gas exploitation problems caused by overlapping or concurrent claims by opposite and adjacent coastal states. It further discusses state practice favoring regimes for the joint development of such areas and the factors leading to such cooperative regimes. It also provides the legal basis for the regime as well as the relevant provisions of the United Nations Convention on the Law of the Sea 1982.

Ifesi, A. “Offshore delimitation of resource deposits situated across national boundaries: the International Court of Justice decision in Cameroon v. Nigeria lending clarity or compromise?” (1 January 2004) online: Transnational Dispute Management <<http://www.transnational-dispute-management.com>>

This Article analyzes the International Court of Justice decision in Cameroon v. Nigeria in respect of two contentious issues; the use of equidistance line as the predominant method of maritime delimitation and the method of determining sovereignty over Bakassi Peninsula.

Irwin, J. C. “An Alternate Role for the International Court of Justice: Applied to Cameroon v. Nigeria” (1998) 26:4 Denv. J. Int’l L. & Pol’y 759.

This article criticizes the ineffectiveness of the present role of the International Court of Justice and suggests the application of a modified study of Fredrich Kratochwil in order to expand the role and achieve effectiveness in conflict resolution. The article asserts that this alternative role would achieve conflict resolution through peaceful means.

Jagota, S. P. “Maritime Boundary and Joint Development Zones: Emerging

Trends” (1993) 10 Ocean Year Book 110.

This article describes maritime boundaries and the ensuing difficulties in delimitation, as well as the nature and types of joint development arrangements.

Kwiatkowska, B. “Equitable Maritime Boundary Delimitation – A Legal Perspective” (1988) 3 International Journal of Estuarine and Coastal Law 287.

The article examines the role of the legal concept of equity in modern interstate relations and in the management of practical international affairs that involve sharing, participation, allocation and delimitation of natural resources and boundaries. It also discusses the nature of the equitable principles and its operation within the law; the principle of agreement and third-party dispute settlement; the principles of entitlement and the method of a single maritime boundary. The article further considers the method of the equidistance and other equitable criteria, techniques and methods used in delimitation.

Lagoni, R. “Interim Measures Pending Maritime Delimitation Agreements” (1984) 78 AJIL 345.

The article discusses the problems of maritime delimitation all over the world. It defines the specific meaning of interim measure under paragraph 3 of Articles 74/83 of the United Nations Convention on the Law of the Sea (UNCLOS) and traces the history of the drafting of the above paragraph. The article analyzes the different variants of interim measures pending delimitation under UNCLOS and finally examines the conventional concept of interim measures pending delimitation in the broader context of general international law.

Lagoni, R. “Oil and Gas Across National Frontiers” (1979) 73 AJIL 215.

The article analyzes the state practice as it has been expressed in agreements concerning common oil and gas deposits in order to determine the legal problems arising from those deposits and to discover whether the solutions adopted may be considered a part of customary international law. It also discusses the questions of who has supreme authority over which part of the common deposit and how international law protects a state against infringements upon its part of the deposit. The analysis is concerned with the structure and legal nature of cooperation by neighboring states in regard to common deposits of oil and gas. The article also examines the different legal questions that arise if a deposit is situated in an area claimed by two or more states and considers the relevance of such deposits to the delimitation of territorial or continental shelf areas.

Miyoshi, M. “The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation” (1999) 2:5 International Boundary Research Unit Maritime Briefing.

This article discusses the history of joint development, the nature and legal basis of joint development. It analyzes thirteen precedents of joint development schemes in different

regions of the world. The article also provides a theoretical review of the precedents discussed, the basic provisions of a joint development agreement and third states interests.

Miyoshi, M. "The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf With Special Reference to the Discussions at the East-west Center Workshops on the South-east Asian Seas." (1988) 3 International Journal of Estuarine and Coastal Law 1.

The Article describes the three workshops held at the East-West Center in Honolulu in 1980, 1983 and 1985 respectively to discuss *the South China Sea: Hydrocarbon Potential and Possibilities of Joint Development*. The Article discusses the concept of joint development from the lawyers' point of view. It analyzes the legal concept of joint development, unitization of deposits, obligation of abstention from unilateral development and obligation to negotiate in good faith. It has three appendices showing the legal issues discussed at the workshops.

Miyoshi, M. "Some Comments on Legal Aspects of Precedents for Joint Development" (1981) 6:11 Energy 1359.

The article examines the impact of joint development on state sovereignty, whether joint development is a rule of customary international law and some reasons for success in joint development.

Miyoshi, M. "Is Joint Development Possible in the South China Sea?" (1998) 13 Ocean Year Book 610.

The article examines the factors essential to joint development and some precedents of joint development, and considers whether a multilateral joint development arrangement would be possible. It also considers some technical issues to be taken into account in drafting a joint development agreement.

Ong, D. M. "The New Timor Sea Arrangement 2001: Is Joint Development of Common Offshore Oil and Gas Deposits Mandated under International Law?" (2002)17 International Journal of Marine and Coastal Law 80.

The article analyzes the legal implications of the latest development in the Timor Gap saga. It discusses the new arrangement (the new Timor Sea Treaty) which implements a modified version of the joint development principle enshrined by the earlier 1989 Timor Gap Treaty and which is much more favorable to East Timor. The article also examines the uncertain legal status of the new arrangement and suggests that it is sufficiently robust to stand the test of time. The article concludes more generally that it can now be argued that joint development is mandated under international law as a viable legal alternative to straightforward continental shelf boundary delimitation in the presence of common hydrocarbon deposits.

Ong, D. M. “The 1979 and 1990 Malaysia -Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?” (1999)14 International Journal of Marine and Coastal Law 207.

The article examines one of the most recent successful joint development agreements, the 1990 agreement between Malaysia and Thailand on the establishment of the Malaysia-Thailand Joint Authority. The article discusses the background to, the negotiating process and the legal regime of the agreement. It also considers the impact of this and other bilateral joint development precedents upon the possible development of a general or regional customary rule of international law requiring states to enter into joint development arrangements when confronted by similar situations.

Ong, D. M. “Joint Development of Common Offshore Oil and Gas Deposits: ‘Mere’ State Practice or Customary International Law?”(1999) 93 AJIL 771.

The article discusses the recent state bilateral practice which gives rise to the question whether rule of customary international law requiring cooperation is now applicable to a common hydrocarbon deposit. It assesses this question and related issues in the light of recent state practice. It also appraises the doctrinal debate on the legal status of the cooperative requirement regarding joint development and examines the continental shelf regime and the problems posed by common hydrocarbon deposits.

Onorato, W. T. “Apportionment of an International Common Petroleum Deposit” (1968) 17 ICLQ 85.

The article discusses what the relevant law may be in a case where a single petroleum structure or field on land or offshore underlies in part the territory of two or more states. It also discusses how such legal rules as may be applicable, can be most constructively applied. It examines the question of national ownership of such discoveries and its connection with the problem of delimiting international offshore boundaries.

Onorato, W. T. “Apportionment of an International Common Petroleum Deposit” (1977) 26 ICLQ 324.

This article is a revised edition of the first published in 1968.

Onorato, W. T. “Promoting Foreign Investment through International Petroleum Joint Development Regimes” (1986) 1 ICSID Review – Foreign Investment Law Journal 81.

This article analyses the impacts of political risks to private capital foreign investment in the petroleum sector. It also discusses joint development regimes and its legal basis, and encourages desired foreign investment through some form of joint or unitized development regime.

Onorato, W. T. “Joint Development of Seabed Hydrocarbon Resources: An Overview of Precedents in the North Sea” (1981) 6:11 Energy 1311.

This article demonstrates the impact of precedents from state practice as evidence of the body of international law which has evolved on the subject of joint development.

Onorato, W. T. “A Case Study in Joint Development: The Saudi Arabia–Kuwait Partitioned Neutral Zone” (1985) 10:3/4 Energy 539.

The article illustrates the basic concept of joint development by demonstrating that the neutral zone between Saudi Arabia and Kuwait from the outset was treated as a commonly held joint development area and its subsequent formal partition had no effect on the basic concept of the joint development agreement or the rights of the concessionaires.

Onorato, W. T. “Joint Development in the International Petroleum Sector: The Yemeni Variant” (1990) 39 ICLQ 653.

This article describes a new departure or variant (the concept of corporation) to the established legal or classical format for joint development of international common hydrocarbon reserves.

Ostreng, W. “Reaching Agreement on International Exploitation of Ocean Mineral Resources (With Special Reference to the Joint Development Area between Jan Mayen and Iceland)” (1985) 10:3/4 Energy 555.

The article discusses the negotiating positions of Iceland and Norway regarding their continental shelf around Jan Mayen which were influenced by international law resource interests, security concerns involving the superpowers, and international relations. The article asserts that stable conditions of sovereignty in the joint development area are important and conciliation commissions can be useful in paving a way for cooperation in joint development.

Park, C. “Joint Development of Mineral Resources in Disputed Waters: The Case of Japan and South Korea in the East China Sea” (1981) 6:11 Energy 1335.

The article describes the structure of the pact signed by Japan and South Korea in 1974 to freeze the boundary issue and develop oil from the disputed waters of the semi-enclosed East China Sea.

Richardson, E. L. “Jan Mayen in Perspective” (1988) 82 A. J. I. L 443.

The article discusses the formation of the Iceland/Norway joint development agreement which obviated the need to draw a line demarcating the right to exploit nonliving resources in the disputed area. The article considers the potential benefits of using this approach in other maritime boundary disputes. It reviews the stages in the resolution of the Jan Mayen dispute, the terms of the agreement and the factors affecting its success. It discusses other situations in which the joint development approach has been used and

some examples of current delimitation disputes where this approach may be applicable.

Thao, N. H. “Joint Development in the Gulf of Thailand” (Autumn 1999) IBRU Boundary and Security Bulletin.

The article discusses the joint development agreements in the Gulf of Thailand between Malaysia and Thailand, between Malaysia and Vietnam and other potential agreements. The article examines why this model is preferred in the Gulf, the factors that ensure the success of a joint development agreement and the lessons to be drawn from the experience in the Gulf.

Townsend-Gault, I. “Joint Development of Offshore Mineral Resources – Progress and Prospects for the Future” (1988) 12 Natural Resources Forum 275.

The article describes the two sets of circumstances under which joint development may occur and the factors against joint development, analyses and compares five offshore joint development arrangements, and considers whether there can be a model agreement for joint development.

Sholanke, O. O. “Delimiting the Territorial Sea between Nigeria and Cameroon: A Rational Approach” (1993) 42 ICLQ 398.

The article analyses the provisions of Article 15 of the United Nations Convention on the Laws of the Sea 1982, with a view to suggesting a rational approach for the delimitation of the territorial sea between Nigeria and Cameroon. The analysis begins with a resume of the probable causes of the present impasse between the two states.

Triggs, G. and Bialek, D. “Current Legal Developments Australia” (2002) 17:3 Int’l J. Marine & Coastal L.423.

This article discusses Australia’s withdrawal of its maritime disputes from the compulsory jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea, and the implications for independent East Timor.

Utton, A. E and McHugh, P. D. “On an Institutional Arrangement for Developing Oil and Gas in the Gulf of Mexico” (1986) 26 Natural Resources Journal 717.

The article describes the status of maritime boundary in the region and the need for unitization. It also examines and compares related international practice on cooperation in different regions and recommends such practice for the Gulf of Mexico.

Valencia, M. J. “Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas” (1986) 23 San Diego Law Review 661.

The article discusses the common elements found in a joint development agreement such as: the extent of the area, contract type, financial arrangements, process of selection of

concessionaires or operators, length of the agreement, nature and functions of the joint management body. The article also examines some areas of overlapping claims in the Pacific region and the role of geology in joint development arrangements.

Valencia, M. J. and Miyoshi M. “Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas?” (1986) 16:3 Ocean Development and International law 211.

The article discusses the overlapping claims in the Southeast Asian oceans with significant petroleum potential which appear to be candidates for joint development. It further delineates and describes the factors influencing the choice of joint development in such areas. Hypothetical schemes for joint development of some candidate areas are also described.

Walde, T. W. “Methods for Settling Boundary Disputes; Escaping from the Fetters of Zero-Sum Outcomes” (1 January 2004) online: Transnational Dispute Management <[http:// www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)>

This Article develops a wider and more sophisticated method of understanding of the main methods of settling International Boundary Disputes and their implications in terms of definitive solution and acceptance, cost, time, quality and the range of benefits and utility for the parties involved.

Woodliffe, J.C. “International Unitization of an Offshore Gas Field” (1977) 26 ICLQ 338.

The article illustrates the recent process of interaction between law and technology, with a study of the international agreement between United Kingdom and Norway relating to the joint exploitation of the Frigg gas field in the North Sea. The article discusses in details the background of the agreement, its provisions and its prospects.

Conference Papers

Beyene, Z. & Wadley, I.L. “Common goods and the common good: Transboundary natural resources, principled cooperation, and the Nile Basin Initiative” (Centre for African Studies Breslauer Symposium on Natural Resource Issues in Africa, University of California, Berkeley, 2004).

This paper reviews and emphasizes further development of the fundamental norms of cooperation upon which collaborative principles such as the petroleum Joint Development Agreement is built, for the peaceful management and optimal utilization of transboundary natural resources.

International Energy Law, Contracts, and Negotiations Parts 1 & 2 Upstream Issues and Agreements (Houston, Texas: RMMLF/AIPN/CAIL, 2002).

This is a collection of conference papers presented at a conference of Rocky Mountain

Mineral Law Foundation, Association of International Petroleum Negotiators and Institute for Energy Law. It focuses on the collaborative schemes of the oil and gas industry such as Joint Development Arrangements, Unitization, and Production Sharing Arrangements.

CASE STUDY: MODEL AGREEMENTS FOR JOINT DEVELOPMENT

Monographs

Auburn, F. M., Forbes, V. and Scott, J. “Comparative Oil and Gas Joint Development Regimes” in C. Grundy-Warr ed., *Eurasia* vol. iii (Routledge London: World Boundaries Series, 1994) 196.

This chapter focuses on some of the existing joint development texts, comparing specific issues covered by the agreements while examining the degree to which they contribute as precedents to legal conflict resolution.

Fox, H. et al., *Joint Development of Offshore Oil and Gas*, vol. I (London: British Institute of International and Comparative Law, 1989).

This is a publication by the British Institute of International and Comparative Law, of their draft model agreement on joint petroleum development. This book offers a practical, flexible and comprehensive solution to the development of offshore oil and gas resources where no general maritime boundary has been agreed between two coastal states. The book also contains commentaries on the provisions of model agreement; the law of the sea and recent developments; some of the existing joint development agreements and their operations; development models; and potential areas for joint development.

Fox, H. *Joint development of offshore oil and Gas* vol. II (London: British Institute of International and Comparative Law, 1990).

This is the second volume of the British Institute of International and Comparative Law publication. It contains the outcome of the conference held at the institute to review the first draft of the model agreement. It has a collection of the papers presented, the text of the revised model agreement and a detailed summary of the comments and criticisms made, and the research team’s response.

Articles

Auburn, F.M., Ong, D. and Forbes, V.L. “Dispute Resolution and the Timor Gap Treaty” (1994) 35 IOCPs Occasional Papers.

The article examines the rules of delimitation of marine boundaries and their application to the disputed area. The discussion includes an assessment of the possible outcomes of a tribunal’s application of the rules to draw boundary lines between Australia and

Indonesia, and Australia and East Timor. The paper compares the Timor Gap Treaty with the Malaysia/Thailand agreement in order to examine the possibility of applying such a solution to other disputed areas, such as the Spratly and Paracel Islands in the South China Sea.

Bergin, A. "The Australia-Indonesia Timor Gap Maritime Boundary Agreement" (1990) 5:4 International Journal of Estuarine and Coastal Law 383.

This article compares the Timor Gap Treaty with similar joint development agreements in other areas and concludes that the Timor Gap Treaty is unique in the complexity and scope of its provisions and in the joint nature of the institutions and procedure created.

Kaye, S. "The Timor Gap Treaty: Creative Solutions and International Conflict" (1994) 16:72 Sydney Law Review 72.

This article examines the background and nature of the Timor Gap Treaty, evaluates its content, structure and the regime which it has initiated. It also critically assesses the challenge being raised against the treaty.

Onorato, W. T. and Valencia, M. J. "International Cooperation for Petroleum Development: the Timor Gap Treaty" (1990) 5:1 ICSID Review: Foreign Investment Law Journal 374.

This article discusses in details the Timor Gap Treaty, tracing its history and the factors that influenced it. It further analyzes the provisions of the treaty and the annexed Petroleum Mining Code, Production Sharing Contract and Taxation Code. It also compares the treaty with its antecedents, drawing out what makes the treaty a model.

Triggs, G. and Bialek, D. "The New Timor Sea Treaty and Interim Arrangement for Joint Development of Petroleum Resources of the Timor Gap" (2002) 3 Melbourne Journal of International Law 322.

This article examines the legal background to the Timor Gap dispute, the validity of the respective seabed rights of Indonesia, Australia and East Timor. It also discusses the impact of Australia's recent withdrawal of maritime boundary disputes from the jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea.

Wilde, D. and Stepan, S. "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia" (1990) 18 Melanesian Law Journal 18.

This article describes the background to the Timor Gap Treaty, the key provisions and the international issues and challenges to the treaty. It concludes that the treaty demonstrates cognizance of sophisticated evolution in the field of joint development of petroleum resources.

Conference Papers

Umar, T. “The Nigeria-Sao Tome & Principe Joint Development Zone: A Unique Investment Opportunity” AAPG-Houston (March 13 2002) online: Nigeria-Sao Tome JDA home page <<http://www.nigeriasaotomejda.com>> and “JDA Roadshow Presentation: Overview of the JDZ”, online Nigeria-Sao Tome JDA home page <<http://www.nigeriasaotomejda.com>>

These papers give an overview of the Nigeria-Sao Tome & Principe Joint Development arrangement. It describes the background to the agreement and the claims and negotiating positions of the parties, the steps taken in signing and ratifying the treaty, the key provisions, the current development and future prospects of the arrangement.

Official Documents

Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, entered into force 9 February 1991, A. T. S. 1991 No. 9; 29 I. L. M 1990 469.

Treaty on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of the Two States, the Federal Republic of Nigeria and the Democratic Republic of Sao Tome e Principe, 21 February 2001 <<http://www.nigeriasaotomejda.com>>

**INTERNATIONAL INVESTMENT LAW:
A CRITIQUE OF FOREIGN INVESTORS' RIGHTS AND DUTIES**

ANNOTATED BIBLIOGRAPHY

The following is an annotated bibliography for my thesis as an LL.M candidate at the University of Calgary.

The objective of my thesis is to critically analyze investor rights and investor duties in international law. It is through bilateral investment agreements (and thus, international law) that investor rights are solidifying and expanding. While investor duties, specifically the duty to comply with host country law, are dwindling.

Prime examples of new investor rights are establishment rights, which protect foreign investors seeking to make new investments from state measures that discriminate on the grounds of nationality. Host countries are waiving their right to regulate the entry of foreign investment in favour of the creation of these new establishment rights that benefit investors and investors' home countries.

My research to date has focused on establishment rights, their increased appearance in bilateral investment agreements, their projected content and their possible consequences. My reason for analyzing establishment rights (admittedly new rights and not fully developed) is to demonstrate, through this example, the strong movement towards the use of international law to found and strengthen investor rights.

With regard to my theoretical perspective, I have relied on postcolonialists' interpretation of Michel Foucault's discourse theory to phrase the foreign investment discourse within the free market discourse. Ultimately, I have rearticulated investor rights (specifically establishment rights) as part of the discourse of power.

This annotated bibliography is divided into three sections. The first section consists of general texts on international law, corporate accountability, and environmental law reviewed to set the stage for my understanding of investor rights.

The second section consists of the literature on international investor rights and duties, specifically establishment rights, and their growing appearance in regional /bilateral investment agreements.

The third and final section is devoted to postcolonialism. It focuses specifically on the interpretation of Michel Foucault's discourse theory by postcolonialists as the basis for a re-interpretation of establishment rights.

SECTION I - GENERAL TEXTS

INTERNATIONAL LAW, CORPORATE ACCOUNTABILITY AND ENVIRONMENTAL LAW

Legislation

Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360 (1995).

North American Free Trade Agreement, Dec. 17, 1992, Ch. 11, 32 I.L.M. 605 (1993).

United Nations Convention on the Law of Treaties, May 23, 1869, 18232 U.N.T.S. 1155 (1980).

Secondary Materials

Books

Bakan, Joel. *The Corporation: the Pathological Pursuit of Profit and Power* (Toronto: Penguin Canada, 2004).

The author defines corporations as institutions and deconstructs them. He concludes that a fundamental change in law is necessary to counterbalance the social and environmental wrongs due to unchecked activities of corporations.

Brownlie, Ian. *Principles of Public International Law* (Oxford: Oxford University Press, 2003).

This textbook is the leading textbook in international law and is important for the explanation of general principles of international law.

Brownlie, Ian. *The Rule of Law in International Affairs International Law at the Fiftieth Anniversary of the United Nations*, (The Hague: Martinus Nijhoff Publishers, 1998).

This textbook is an edited version of the General Course on Public International Law at The Hague Academy of International Law. As such, it has served as general reference material.

Handl, Gunther. *Multilateral Development Banking: Environmental Principles and Concepts Reflecting General International Law and Public Policy* (London: Kluwer Law International and Asian Development Bank, 2001).

This book sets out a detailed analysis of international environmental legal principles and policies directly relevant to multilateral development banks' operations in developing member countries.

Hawken, Paul, Lovins, Amory, & Lovins, Hunter L. *Natural Capitalism: Creating the Next Industrial Revolution* (New York: Little, Brown Company, 2000).

The authors introduce environmental responsibility in a businesses' success paradigm.

Holliday, C.O. , Schmidheiny, S., Watts, P. *Walking the Talk the Business Case for Sustainable Development* (San Francisco: Berret-Koehler Publishers, Inc., 2002).

This book sets out the business case for sustainable development providing examples of multinational successes in developing countries.

Kindred, Hugh. *et.al., International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Edmond Montgomery Publications Limited, 1993) at 50.

This textbook sets out the basic principles of international law, I have used it to understand how international law regulates multinational corporations.

Muchlinski, Peter T. *Multinational Enterprises and the Law*, (Oxford: Blackwell Publishers Inc., 1996).

The book thoroughly discusses the role of the law (be international law, home country or host country law) in regulating multinational enterprises.

Orts, Eric. W. & Deketelaere, Kurt. *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Cambridge: Kluwer International Law, 2001).

The authors compare American and European environmental contracts. My focus was voluntary compliance.

Papp, D.S. *Contemporary International Relations Frameworks for Understanding*, 3d ed. (Toronto: Collier Macmillan Canada, 1992) at 95-97.

I have reviewed this textbook for a definition of multinational corporations and their role as viewed in international relations literature.

Rifkin, Jeremy. *The European Dream* (New York: Jeremy P. Tarcher/ Penguin Inc, 2004).

The author deconstructs the 'American Dream' and describes the new 'European Dream,' that includes differences in legal systems. For example, the book explains the difference between American individualism and the European communitarian focus.

Sands, Peter H. *Transnational Environmental Law – Lessons in Global Change* (London: Kluwer Law International, 1999).

The book is a collection of essays advocating a different vision of international law for environmental protection and sustainable development.

Stiglitz, Joseph E. *Globalization and its Discontents* (New York: W.W. Norton & Company, 2003) at 53, 67.

The author critically analyses the numerous inter-governmental organizations dedicated to development (specifically those arising from the Bretton-Woods Agreements) and proposes a new vision of international economic policies.

Articles

Anderson, Sarah & Cavanaugh, John. “The Rise of Corporate Global Power” (2000) Institute for Policy Studies, Embargoed until December 4, 2000.

The authors compare multinationals and countries on the basis of gross domestic product per sales (GDP/sales) and conclude that of the 100 top economies in the world, 51 are multinationals.

Baxter, R.R. “International Law in “Her Infinite Variety” (1980) 29 *The International and Comparative Law Quarterly* 549.

The author’s analysis of international / multilateral treaties and their “soft law” content is very precise and helpful. Ultimately, it outlines the importance of “soft law” in international law.

Benvenisti, E. “Domestic Politics and International Resources: What Role for International Law”, in M. Byers, ed., *The Role of Law in International Politics* (New York: Oxford University Press, 2000).

The author discusses the correlation between the international and domestic spheres and the sustainable and optimal use of International Common Pool Resources. She states that governments are more likely to be influenced by those representing the interests of industry or agribusiness (potential polluters and heavy users.) The result is that the same interest groups influence both constitutional law and international law.

Kirgis, Frederik L. Jr. “Standing to Challenge Human Endeavours That Could Change the Climate” (1990) 84 *The American Journal of International Law* 525.

The article focuses on climate change and the effects of defining it as a “common concern.”

Churchill, Robin R. & Ulfstein, Geir. “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law” (2000) 94 *The American Journal of International Law* 623.

This article analyzes the development of institutional creations of international environmental treaties. The authors compare these institutions to intergovernmental organizations and call for the application, *mutatis mutandis*, of international institutional law.

Cordonier Segger, M.C. & Khalfan, A. *A CISDL Legal Brief – International Sustainable Development Law: Principles, Practice & Prospects (Preparatory Committee Process for the World Summit on Sustainable Development 2002, 2002)*.

The legal brief describes the principles that could be the basis in the creation of a new International Sustainable Development Law – specifically a sub-law related to the sustainable use and stewardship of natural resources.

Martin, J.G. & MacNaughton, A.L. “Sustainable Development: Impacts of Current Trends on Oil & Gas Development”, (2004) 24 no. 2 *Journal of Land, Resources & Environmental Law (Natural Resources Law & Policy Essays commemorating the 50th Anniversary of the Rocky Mountain Mineral Law Foundation)* 257.

The authors outline three transformational trends in the oil and gas business: (1) rising expectations about corporate social responsibility and the social license to operate; (2) transparency, objectivity and the “triple bottom line” reporting to stakeholders; and (3) increased public participation (stakeholder engagement and consultation.) The article is a call to in-house counsels and industry lawyers to acknowledge the shifting paradigms that clients are working under and lawyers need to shift their practice with their clients.

Palmer, Geoffrey. “New Ways to Make International Environmental Law” (1992) 86 *The American Journal of International Law* 259.

The author describes the numerous methods that are available in international law for the making of international environmental law. He calls for a new institution to deal with international environmental law issues.

Risse, Thomas. “Transnational Governance and Legitimacy” (2004), online: Center for Transatlantic Foreign and Security Policy <<http://www.sgir.org/conference2004/papers/Risse%20-%20Transnational%20Governance%20and%20Legitimacy.pdf>>.

The author succinctly defines “accountability” and “corporate social responsibility.” He concludes that legitimate governance beyond the nation state is aimed to improve on external accountability of multinationals.

Sorokina, Olga. *International Institutions and FDI Incentives: What are the Available Instruments for Fostering Non-OECD Energy Investment?* (2002) Working Paper, International Agency – Energy Diversification Division, online International Energy Agency <www.iea.org/dbtw-wpd/textbase/papers/2002/fdi.pdf>.

The author provides a general overview of the options a country has to foster foreign direct investment. She described the conflicting interests of investors and host countries and the possibilities for balancing these interests.

Valette, Jim. *Transnational Corporate Beneficiaries of World Bank Group Fossil Fuel Projects, 1992-2002*, online: Sustainable Energy and Economy Network/Institute for Policy Studies <http://www.seen.org/PDFs/tnc_list_wb.pdf>.

The author concludes that the World Bank Group's Fossil Fuels Projects disproportionately fund multinational corporation's projects versus local business.

Wiener, Jonathan. "Global Environmental Regulation: Instrument Choice in Legal Context" (1999), 108 *Yale Law Journal* 677.

The author outlines and discusses the difference of an environmental regulatory system applicable to nation states versus the international community. The author focuses on tradeable allowances.

World Bank Group, *Extractive Industries Review Final Report* (World Bank, released on December 23, 2003), online: World Bank <<http://www-wds.worldbank.org/>>.

The research question posed in the report is "Can extractive industries projects be compatible with the World Bank Group's goals of sustainable development and poverty reduction?" The Report responds affirmatively, but acknowledges the need to make changes in the World Bank's policies.

SECTION II – BILATERAL INVESTMENT AGREEMENTS AND ESTABLISHMENT RIGHTS

Books

Moosa, A. *Foreign Direct Investment: Theory, Evidence and Practice* (New York: Palgrave, 2002).

The author analyses in-depth the explanatory theories of why companies choose to invest abroad.

Sornarajah, M. *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2004).

This book is the leading textbook in international law and is important for the explanation of general principles of international law.

_____ , *The Settlement of Foreign Investment Disputes* (The Hague: Kluwer Law International, 2000) at 79.

The book is a seminal analysis of foreign direct investment disputes undertaken by one of the most prominent academics on foreign direct investment.

Articles

Atik, Jeffery. “Fairness and Managed Foreign Direct Investment” (1994) 32 *Columbia Journal of Transnational Law* 1.

The author undertakes an in-depth analysis of open foreign direct investment and managed foreign direct investment, thus elaborating extensively on host countries’ establishment policies.

Bernal, Luisa E., Kaukab, Rashid S. & Yu III, Vicente Paolo B. “The World Development Report 2005: An Unbalanced Message on Investment Liberalization” (2004) *South Centre, prepared for the G-24*.

This article is a critical analysis of investment liberalization. It focuses on the rights granted to investor and the corresponding lack of duties.

Black, Alexander J. “Co-Location and Convergence of Public Utility Easements” (1999) *NAFTA: Law & Business Review of the Americas*.

Follower of Atik’s open and managed foreign direct investment analysis.

Blomstrom, Magnus & Kokko, Ari. “The Economics of Foreign Direct Investment Incentives” (2003) *National Bureau of Economic Research Inc. Working Paper Series No. 9489*.

The authors conclude from their analysis that nations should “beware that investment incentives focusing exclusively on foreign firms, although motivated in some cases from a theoretical point of view, is generally not an efficient way to raise national welfare as the strongest theoretical motive for financial subsidies to inward FDI – spillovers of foreign technology and skills to local industry – is not an automatic consequence of foreign investment.”

Breyer, S. “Regulation and its Reform”, 1982 Harvard University Press, Chapter 1, “Typical Justifications for Regulation” at 16.

The article is a seminal piece on the justifications (or lack thereof) of regulation.

Brooks, Douglas H. & Sumulong, Lea R. “Foreign Direct Investment: The Role of Policy” (2003) 23 Asian Development Bank ERD Policy Brief at 6.

The authors conclude that screening procedures by host countries based on specific economic and social criteria are beneficial only in the short run but are detrimental to development in the long run.

Civello, Paul. “The TRIMS Agreement: A Failed Attempt at Investment Liberalization” (1999) 8 Minnesota Journal of Global Trade 97 (footnote).

Follower of Atik’s open and managed foreign direct investment establishment provisions.

Chua, Amy L. “Foreign Investment Cycles in Emerging Economies” in Mautius Lugard, “Toward an Effective International Investment Regime” (1997) 91 American Society of International Investment Regime 485 at 500.

The author provides an analysis of how foreign investment actually benefits foreigners and the top echelons of the host country than the totality of the population of the host country.

Cremades, Bernardo M. “Promoting and Protecting International Investment” (2000) 3(3) International Arbitration Law Review 53 at 53.

The article discusses the liberal reasoning behind foreign direct investment and the “natural” flow of capital from capital-abundant countries to capital-scarce countries.

Elshihabi, Saamir. “The Difficulty Behind Securing Sector-Specific Investment Establishment Rights: The Case of the Energy Charter Treaty” (2001) 35 International Lawyer 137.

The article is right on point for my research as it analyses in detail the importance of establishment rights for energy projects.

Hallward-Driemeier, Mary. “Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite” (2003) Policy Research Working Paper 3121, The World Bank Development Research Group Investment Climate at 22.

The author questions whether bilateral investment treaties actually deliver on the promise of investment promotion. The conclusion of the author is that the consequences of a bilateral investment treaty are not always increased investment.

International Institute for Sustainable Development & The Royal Institute of International Affairs, “Investment, Doha and the WTO: Trade and Sustainable Development Priorities Post-Doha” (2003) Background Paper to the Chatham House Meeting convened by RIIA and IISD.

The article focuses on investor rights and duties and supports the proposition that investment agreements have not been balanced between host countries and investors.

Lipsey, Robert E. “Home and Host Country Effects of FDI” (2002) National Bureau of Economic Research Inc. Working Paper Series No. 9293.

Through economic analysis the author reaches the conclusion that the evidence presently available on the effects of foreign direct investment on host countries is inconclusive.

Lugard, Mautirs. “Toward an Effective International Investment Regime” (1997) 91 American Society of International Law Proceedings 485 at 486, remarks by Kenneth J. Vandeveld, Thomas Jefferson School of Law, San Diego.

The author delineates the components of a liberal investment regime and the reasons for government neutrality.

Mann, H. “International Investment Agreements: Building the New Colonialism” within NAFTA’s Investment Chapter: Dynamic Laboratory Failed Experiments, and Lessons from the FTAA” 97 American Soc’y Int’l L. Proc 247 (2003).

The article is a strong criticism of the growth of establishment. The author concludes that they are the “new colonialism” and that international investment law must take into account a more balanced view in order to include host countries concerns.

Moran, Theodore H. “Strategy and Tactics or the Doha Round: Capturing the Benefits of Foreign Direct Investment”(2002) Asian Development Bank at 40.

The author explores interventionist practices in foreign direct investment and concludes that developed countries are become increasingly more interventionists instead of more liberal.

OECD, “OECD Global Forum on International Investment: New Horizons for Foreign Direct Investment” (2002) at 308.

This compendium of articles is the result of a conference. Interestingly, the compendium includes critical articles on the ideology of foreign direct investment versus the growing empirical evidence that not all foreign investment is beneficial to the host country.

Patterson, Neil, et.al. “Foreign Direct Investment: Trends, Data Availability, Concepts and Recording Practices” (2004) International Monetary Fund.

The author analysis the recent statistics on foreign direct investment and indicates that developing countries are still far behind developed countries in their ability to attract foreign investment.

Ratner, S.R. “Corporations and Human Rights: A Theory of Legal Responsibility” 111 Yale Law Journal 443.

The article sets out a theory, based on international law and state duties, to impose human rights liability on corporations.

Taylor, C.O’Neal. “Linkage and Rule-Making: Observations on Trade and Investment and Trade and Labor” (1998) 19 University of Pennsylvania Journal of International Economic Law” 639 at 648.

The article deals with establishment rights on a tangential basis as it focuses on the linkage between investment and trade and labour. Nevertheless, it provides an interesting analysis of the definition of establishment rights and their importance.

Thanadsillapakul, Lawan “Open Regionalism and Deeper Integration: The Implementation of ASEAN Investment Area (AIA) and ASEAN Free Trade Area (AFTA)” Thailand Law Forum, online site:

<http://members.tripod.com/asialaw/articles/lawanasean.html>

The author outlines the new establishment provision of the ASEAN Investment Area.

United Nations, “FDI in Least Developed Countries at a Glance: 2002” (2002) United Nations, New York, Geneva.

This report is the latest report undertaken by the United Nations on Least Developed Countries (LDCs) and foreign direct investment. Even though growth has occurred in some LDCs (specifically oil or gas exporters) inflows of foreign direct investment to LDCs are small in absolute terms.

United Nations Conference on Trade and Development, “Admission and Establishment” (1999) UNCTAD Series on issues in International Investment Agreements, New York/Geneva.

This report is a comprehensive review of establishment and admission rights and regulation within the foreign direct investment scheme.

Vandavelde, Kenneth J. (2000) “The Economics of Bilateral Investment Treaties” (2000) 41 Harvard International Law Journal 469 at 480.

The author explores the benefits of foreign direct investment from a liberal perspective.

Websites

International Energy Agency www.iea.org/dbtw-wpd/bookshop/

The website provides statistics on production and export of oil and gas importers and exporters to determine the size of oil and gas foreign direct investment.

International Centre for the Settlement of Investment Disputes (ICSID)

www.worldbank.org/icsid/treaties/treaties.htm

This website lists bilateral investment agreements with search option by country.

United Nations Conference on Trade and Development (UNCTAD)

www.unctad.org/en/docs/poiteiid2.en.pdf

This website lists bilateral investment agreements with search option by country.

PART III

(A) POSTCOLONIALISM

Books

Ashcroft, Bill. *Post-Colonial Transformation* (London: Routledge, 2001) at 50.

The book was my main source of my analysis on resistance to the main discourse and the ideal of counter-resistance.

Ashcroft, Bill. Gareth Griffiths, and Helen Tiffin, *Post-Colonial Studies: The Key Concepts* (Routledge: London, 2002) at 70 - 73.

The book is an easy to use, handy dictionary in which key terms of postcolonialism are defined simply and clearly.

Fink Eitel, Hinrich. *Foucault: An Introduction* (Pennbridge Books: Philadelphia, 1992) at 44.

The book is an introductory text to Michel Foucault writings, specifically Foucault's discourse theory.

Loomba, Ania. *Colonialism / Postcolonialism* (Routledge: London, 1998) at 39

The book is an introductory text to postcolonialism and its ideals.

McHoul, Alec & Grace, Wendy. *A Foucault Primer: Discourse, Power and the Subject* (New York University Press: New York, 1993) at 36 – 40.

The book summarizes clearly and simply Foucault's vision of discourse and power.

Young, Robert J. C. *Postcolonialism: An Historical Introduction* (Blackwell Publishing: Oxford, 2001) at 385.

This book is a classic introductory text to postcolonialism.

Articles

Anghie, Tony. "International Institutions and the Colonial Origins of Law and Development", *Globalization and Its Discontents*.

The author, a renowned Third World Approaches to International Law academic, analyses the lack of third world input and vision in law and development.

Bartolovich, Crystal. "Global Capital and Transnationalism" in *A Companion to Postcolonial Studies* et.al. Henry Schwarz and Sangeeta Ray (Oxford: Blackwell Publishers, 2000) at 137.

The article is important to my thesis as the author proposes that local economies have been continuously destroyed and reconstructed in the interests of external capital forces.

Baxi, Upendra. "Postcolonial Legality" in Henry Schwarz & Sangeeta Ray, et.al. *A Companion to Post-Colonial Studies*, (New York: Blackwell Publishing, 2000) at 552.

The article succinctly lists the consequences of free and unregulated foreign direct investments in host countries.

Baxter, Hugh. “Review Essay: Bringing Foucault into Law and Law into Foucault – *Foucault and Law: Towards a Sociology of Law as Governance*. By Lan Hunt and Gary Wickham. London: Pluto Press. 1994. 194.” (1996) 48 *Stanford Law Review* 449 at 450, 473.

The book review places the use of Foucault’s philosophy and theories within the legal context, specifying that Foucault had in fact discarded law in its totality.

Bellamy Foster, John. “The New Age of Imperialism” Volume 55, Number 3, *Monthly Review*.

The author argues that the United States is the new imperial power, and thus, host countries are once again (never actually left) a colonial framework.

Bracking, Sarah & Harrison, Graham. “Africa: Imperialism Goes Naked” Volume 55 Number 6, *Monthly Review*.

The article explores the fact that host countries do not have adequate legal systems to hold foreign investors accountable.

Brigg, Morgan. “Post-development, Foucault and the Colonization Metaphor” (2002) 23 No. 3 *Third World Quarterly* 421 at 429

The author re-defines the “Development Project” through a postcolonial lens and provides constructive criticism on how postcolonialism can be productive in its analysis and in its search for a solution in the colonial battle.

Centre Europe – Tiers Monde, “Bilateral Treaties on Free Trade and Promotion and Protection of Investments: “arms of massive destruction” to national and international public law and human rights law. Statement submitted to the Human Rights Sub-Commission 2004; E/CN.4/Sub.2/2004/NGO/10.

The article is a strong criticism of bilateral investment treaties, free trade, promotion and protection of investments and specifically delineates methods of invalidating bilateral investment treaties.

Centre – Europe – Tiers Monde, “Sociétés transnationales: exemple de violations des droits humains” (2004).

The submission to the United Nations outlines recent alleged human rights violations by multinationals.

Fidler, David P. “Revolt Against or from within the West? TWAIL, the Developing World, and the Future Direction of International Law – *Agora: Third World*”

Approach to International Law (2003) 2 Chinese Journal of International Law 29 at 56.

The author outlines the historical context of Third World Approaches to International Law and condenses the issue into whether resistance from western hegemony should be from within or without.

Fink, Eric M. “Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics (2004) 55 Hastings Law Journal 931 at 936,937.

The article critically analyses law and economics and its theoretical foundations.

Fiol-Matta, Liana. “Civil Law and Common Law in the Legal Method of Puerto Rico: Anomalies and Contradictions in Legal Discourse” (1995) 24 Capital University Law Review 153 at 156-157.

The author’s interpretation of Foucault’s discourse theory and its application to Puerto Rico’s legal system provided a basic structure for my interpretation of Foucault and the foreign investment discourse.

Lander, Edgardo. “Eurocentrism, Modern Knowledges, and the “Natural” Order of Global Capital in Napantla: Views from the South” (Duke University Press: Duke, 2002) at 247.

The article succinctly reviews international investment law and international property law and the inherent Western biases found therein.

Mattei, Ugo. “A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance” (2003) 10 Indiana Journal of Global Studies 383 at 409.

The author review legal transplantation and analysis its imperialistic components.

Maxwell, Simon “The Washington Consensus is Dead! Long Live the Meta-Narrative!” (2005) Working Paper 243, Overseas Development Institute, U.K.

The article reaches the conclusion that the Washington Consensus era is finished. For my thesis, I found the author’s analysis of the U.N. Millenium Goals extremely interesting for the goals still espouse Washington Consensus principles.

Purdy, Jannine. “Postcolonialism: The Emperor’s New Clothes?” in Eve Darian-Smith and Peter Fitzpatrick, et. al. *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999).

The author reaches the conclusion that the colonial countries have not reached “post” stage, and that colonialism is still the dominant characteristic between Western countries and developing countries.

Shivji, Dr. Issa G. Special Forum on “Theory and Struggles of Social Justice” Law’s Empire and Empire’s Lawlessness: Beyond the Anglo-American Law” originally read by Tam Dalyell MP, Rector of the University of Edinburgh at the Conference on Remaking Law in Africa Transnationalism, Persons and Rights,’ held on 21-22 May 2003 at the Centre of African Studies, University of Edinburgh, Scotland.

Dr. Shivji, clearly espouses the need to re-think law in order to cleanse it from its Western biases. The author comes to the conclusion that re-making law is no longer a plausible solution. Ultimately, in my opinion, the paper is a call for developing country lawyers to shed Western legal values.

Soederberg, Susanne. “On the Contradictions of the New International Financial Architecture: another procrustean bed for emerging markets?” (2002) 23 No. 4 Third World Quarterly 607 at 608.

The author’s proposition is that the developing country’s requirement to adapt to the Washington Consensus principles is exercised through the means of “conditionality” - policy reforms in exchange for international investment’s money – i.e. positive reinforcement to lift barriers to both outside investment and foreign currency for full economic expansion to be achieved.

Sornarajah, M. “Power and Justice in International law” (1997) Singapore Journal of International and Comparative Law 28 at 50.

Even though Sornarajah is not a “postcolonialist” in *stricto sensu*, his analysis of international law and its relationship to power is crucial for my thesis.

“Beyond the Washington and Post-Washington Consensus in Zimbabwe and South Africa? Beyond both the "Washington Consensus" and the "Post-Washington Consensus" in Zimbabwe and South Africa? The failure of structural adjustment and the possibility for a democratic approach to economic policy”, Paper presented to the Parliamentary Initiative on the Mozambican External Debt Assembly of the Republic, Maputo, 4 December; Alternative Information and Development Centre: <http://www.aidc.org.za/?q=book/view/27>>.

The article is a critical analysis of the numerous economic policy initiatives from the West.

TAX DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES

AN ANNOTATED BIBLIOGRAPHY

By Julie Krivitsky, LL.M. candidate

This Web page contains selected sources of information relating to my thesis research for an LL.M. at the Faculty of Law, University of Calgary. My thesis seeks to contribute to the body of literature evaluating the effects of interaction of tax treaties and trade agreements on cross-border service providers.

The sources are divided into the following three sections:

Section 1 encompasses the materials dealing with the theoretical basis for non-discrimination.

Section 2 includes the texts concerning tax treaties and trade agreements as well as their interaction.

Section 3 comprises the literature regarding the European Union solution to tax discrimination.

Within the Sections the sources are subdivided into monographs and articles.

SECTION 1 – NON-DISCRIMINATION

MONOGRAPHS:

Franck, T., *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995).

This highly acclaimed book takes the analysis of justice of John Rawls into the international arena by creating a framework for a critique of international law and its institutions from the perspective of fairness.

Nozick, R., *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

One of the most provocative essays in political philosophy that challenges redistributive theories of justice by extolling the virtues of individualism and laissez-faire capitalism.

Rawls, J., *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

This influential work is one of the most interesting modern attempts to defend principles of distributive justice. The problem of inequality is at the heart of this leading egalitarian theory of justice.

Ricardo, D., *The Principles of Political Economy and Taxation* (New York: Dover, 2004).

In this landmark treatise Ricardo formulated the principles of the market economy and articulated the theory of comparative advantage which continues to form the basis of international trade theory today.

Smith, A., *The Wealth of Nations* (New York: Everyman's Library, 1991).

One of the seminal classical studies on economic theory that revolutionized the way governments and individuals view the creation and dispersion of wealth. The work exposes the disadvantages of the mercantilist theories and describes the benefits of free trade.

Sykes, A., "Comparative Advantage and the Normative Economics of International Trade Policy" 1 J. Int'l Econ. L. (1998) 49.

The work conveys the key insights into the theory of comparative advantage suggesting why and how comparative advantage and its sources lead to international exchange. The author assesses the normative economics of trade by reviewing the case for free trade and trade discrimination.

ARTICLES:

Driesen, D., "What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate" (2001) 41 Va. J. Int'l L. 279.

The inquiry into the meaning of the concept of "free trade" and the implications of selecting a non-discrimination concept as a normative criterion in trade policy.

Garcia, F., "Trade and Inequality: Economic Justice and the Developing World" (2000) 21 Mich. J. Int'l L. 975.

The assessment of the problem of inequality in international trade followed by the evaluation of the existing remedial mechanisms in international trade law.

Graetz, M.J., "Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies" (2001) 26 Brook. J. Int'l L. 1357.

By analysing and critiquing the theoretical foundation of international taxation, the author advocates the need to revise the normative criteria on which international income taxation is based.

Kapstein, E., "Distributive Justice and International Trade" (1999) 13 Ethics & Int'l Affairs 175.

The article analyses distributive complications of political economy and provides a normative assessment of the manner in which the gains from trade are allocated among nations.

Kaufman, N., "Fairness and the Taxation of International Income" (1998) 29(2) Law & Policy in Int'l Bus., online: University of Calgary <http://80-infotrac.galegroup.com.ezproxy.lib.ucalgary.ca:2048/itw/infomark/202/833/63516529w2/purl=rc1_EAIR_fm?sw_aep=ucalgary> (date accessed: 2 March 2005).

The author questions, on equity grounds, the widely accepted views on the relationship between the worldwide and source taxation and argues that the extent of a country's competence to tax is an international matter. Consequently, inter-nation, not inter-individual equity, must provide the foundation for an equitable international tax system.

SECTION 2 – TAX TREATIES AND TAX AGREEMENTS

MONOGRAPHS:

Baker, P., *Double Taxation Conventions*, looseleaf (London: Sweet & Maxwell, 2004).

This leading work clearly and thoroughly presents the principles of double taxation treaties made between countries. Many of these treaties are based on the Model Tax Convention on Income and Capital of the Organisation for Economic Co-operation and Development which, accompanied by the official commentary and the author's annotations, forms the framework for this work.

Graetz, M.J., *Foundations of International Income Taxation* (New York: Foundation Press, 2003).

A valuable compilation of excerpts from articles and references to legal scholarship concerning both theoretical and practical problems in international tax law.

Jackson, J.H., et al., *Legal Problems of International Economic Relations: Cases, Materials and Text* (St. Paul: West Publishing Co., 1995).

This documents supplement conveniently compiles basic international agreements on trade in goods and services along with the principal United States statutes regulating international trade.

Lang, M., et al., *Multilateral Tax Treaties* (London: Kluwer Law International, 1998).

The authors examine the arguments in favour and against the conclusion of a multilateral tax treaty by attempting to draw up a draft for a multilateral tax treaty which is patterned along the lines of the Model Tax Convention on Income and Capital of the Organisation for Economic Cooperation and Development.

Trebilcock, M., & Howse, R., *The Regulation of International Trade*, 2nd ed. (London: Routledge, 2001).

A useful guide to the rules and institutions that govern international trade. The book reviews both theoretical underpinning and practical functioning of international trade regimes, including the World Trade Organisation, the North American Free Trade Agreement, and some aspects of the European Union.

Vogel, K., et al., *On Double Taxation Conventions*, 3d ed. (London: Kluwer Law International, 1997).

The book provides a comprehensive analysis of each article of the Model Tax Conventions on Income and Capital of the Organisation for Economic Cooperation and Development, the United Nations, and the United States with particular reference to German tax treaty practice. The text also refers to relevant case law and expert opinions.

ARTICLES:

Arnold, B.J., et al., "Summary of the Proceedings of an Invitational Seminar on Tax Treaties in the 21st

Century" (2002) 50(1) Can. Tax J. 65.

A useful summary of the discussion concerning the nature, role, and operation of tax treaties. The seminar covered such fundamental topics as the need for and the appropriate goals of tax treaties and a comparison of the respective merits of multilateral and bilateral treaties.

Avery Jones, J. F., "Are Tax Treaties Necessary?" (2000) 53 Tax L. Rev. 1.

The article analyses several major problems associated with tax treaties and suggests how the situation can be improved.

Avi-Yonah, R., "Treating Tax Issues Through Trade Regimes" (2001) 26 Brook. J. Int'l L. 1683.

This commentary focuses on those areas in which tax law and trade law overlap and explores some of the ways in which the overlap occurs.

Dagan, T., "The Tax Treaties Myth" (2000) 32 N.Y.U.J. Int'l L. & Pol. 939.

By using the game theory the author shows that the prevailing view that tax treaties is an indispensable mechanism to alleviate double and non-taxation is misguided. Rather, tax treaties is just a means to reduce or eliminate administrative costs and to extract tax concessions for residence countries.

Daly, M., "Some Taxing Issues for the World Trade Organization" (2000) 48(4) Can. Tax J. 1053.

The article considers the extent to which taxation is subject to the World Trade Organisation rules by looking at some of the most recent trade policy reviews.

Dunoff, J., "The Death of the Trade Regime" (1999) 10(4) EJIL 733.

The analysis of international trade regime from the economic, game theoretic, and political science perspectives.

Fischer-Zernin, J., "GATT Versus Tax Treaties? The Basic Conflicts Between International Taxation Methods and the Rules and Concepts of GATT" (1989) 6-7 Intertax 236, 310.

The article provides the groundwork for the analysis of the relationship between the General Agreement on Tariffs and Trade and international tax law and demonstrates the need for further investigation of this issue.

McDaniel, P., "Trade and Taxation" (2001) 26 Brook. J. Int'l L. 1621.

An indispensable explanation of the relationship between trade law and tax law. The author outlines the normative bases for tax policy and trade policy, how these policies have intersected in the past and offers a model under which both policies can be pursued with minimal potential for conflict.

McIntyre, M., "Options for Greater International Coordination and Cooperation in the Tax Treaty Area" (2002) 56/6 Bull. Int'l B.F.D. 1.

The article addresses the issue of how to promote greater intergovernmental cooperation and coordination on the assumption that these goals are worthy ones for governments to pursue.

Slemrod, J. & Avi-Yonah, R., "(How) Should Trade Agreements Deal With Income Tax Issues?" 55 Tax L. Rev. (2002) 533.

A valuable examination of the relationship and the goals of tax treaties vis-à-vis trade agreements.

Thuronyi, V., "International Tax Cooperation and a Multilateral Treaty" (2000) 26 Brook. J. Int'l L. 1641.

The paper discusses why it would be desirable to replace the existing bilateral network of tax treaties with a multilateral treaty administered by an international organisation.

Vogel, K., "Reflections on the Future of the OECD Model Convention and Commentary" (1996) Bull. Int'l B.F.D. 527.

The author outlines some of the problems with the Model Tax Convention on Income and Capital of the Organisation for Cooperation and Development and suggests how it can be modernised.

Vogel, K., "Worldwide vs. Source Taxation of Income – A Review and Re-Evaluation of Arguments (Parts I-III)" (1988) 8-11 Intertax 216, 310, 393.

The article examines the validity of the normative criteria in international income taxation and demonstrates how presently existing system can lead to unjust and detrimental results.

Warren, A.C., "Income Tax Discrimination Against International Commerce" (2001) 54 Tax L. Rev. 131.

The author questions the validity of the distinction between permissible and impermissible income tax discrimination in the context of international trade.

SECTION 3 – THE EUROPEAN UNION SOLUTION

MONOGRAPHS:

Jeffery, R.J., *The Impact of State Sovereignty on Global Trade and International Taxation* (London: Kluwer Law International, 2001).

The book analyses the impact of state sovereignty on international trade and taxation focusing in particular on tax discrimination in the European Union by choosing a new approach for assessing the role of global economic change and the legal understanding of the state, encompassed in the concepts of sovereignty and jurisdiction, in the creation and elimination of international direct tax distortions.

Terra, B., & Wattel, P., *European Tax Law* (London: Kluwer Law International, 1997).

The authors present a systematic survey of tax implications of European integration and tax harmonisation policy and discuss tax rules in force and pending in the European Union.

Van Thiel, S., *Free Movement of Persons and Income Tax Law: the European Court in Search of Principles* (Amsterdam: International Bureau of Fiscal Documentation, 2003).

A valuable study analysing the impact of the case law of the European Court of Justice on direct taxation principles in the European Union.

Thinking about public participation in substantive terms: the duty to accommodate

Verónica Potes

My research project focuses on public participation in oil development decision-making. My general objective is to analyze whether or not a duty to accommodate articulated rights claims can help make such participatory processes meaningful.

My work will focus on the Andean region in South America, the countries of Venezuela, Colombia, Ecuador, Peru and Bolivia. Oilfields in the Andean region are located in environmentally and socially sensitive areas that are also home to many indigenous peoples. Due to the wide array of conflicting interests, decision-making related to the development and exploitation of oil is an arena of confrontation. Development decisions that have been made have usually been challenged through judicial and political actions, even if preceded by some sort of participatory process. Environmental activists and indigenous peoples have been especially critical of the lack of effective consideration of their needs and concerns in the outcomes of those processes.

I argue that while careful consideration must be given to the procedural aspects of participatory processes, some substantive component is required to make them meaningful to the advancement of the rights and interests they are called to protect. Meaningful public participation demands not only fair and transparent opportunities to be heard but also the accommodation of articulated concerns and claims. The purpose, meaning and content of a duty to accommodate lie at the core of my research.

Citizens in the Andean region and Canada have common concerns about the cultural, social and environmental impacts of oil activities. They also share an interest in promoting public participation in decision-making processes. In the very recent *Taku River* and *Haida Nation* cases, the Supreme Court of Canada has held that consultation processes involving indigenous peoples include a government duty to accommodate their rights, claims and concerns, when appropriate, as a means to foster social reconciliation. The debate on what amounts to accommodation has unfolded and is highly contested by both legal scholars and practitioners. My work will contribute to this debate by approaching it from an international human rights perspective. I will include in my analysis the opinions of international bodies on conflicts between natural resource development and human rights to argue that a purposive approach to the duty to accommodate has the potential to make real social and environmental sense. While concentrating on Indigenous Peoples rights, the conclusions of my work are intended to apply to non-Aboriginal settings, *mutatis mutandis*.

The annotated bibliography that follows is divided into three sections:

- a) [Accommodation and the duty to accommodate in the Canadian context with particular focus on the context of Aboriginal rights as constitutional rights](#)
- b) [Rights discourse as a means to advance social and political objectives, with particular focus on human rights and the emerging right to a healthy environment, as well as the correlation between rights and duties](#)
- c) [Governance and natural resources management with emphasis on participatory processes for development decision-making and the tensions between rights, development and democracy](#)

a) Accommodation and the duty to accommodate in the Canadian context with particular focus on the context of Aboriginal rights as constitutional rights

Shelagh Day and Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75 The Canadian Bar Review 433

The authors analyse the concept of accommodation in Canadian Courts’ decisions and question whether it has the capacity to foster inclusive institutions. Accommodation of difference is a loaded notion, they argue, and as it is based on a sameness/difference paradigm, it not only fails to address power inequalities and prejudice but even reinforce them. In addition, ‘the undue hardship’ defence against accommodation fosters, for the authors, a “second class kind version of equality” that can be limited by economic convenience.

Sonia Lawrence and Patrick Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79 The Canadian Bar Review 262

The authors favour a purposive approach to consultation that calls for good faith negotiations between the Crown and the Indigenous Peoples. Negotiating toward an agreement that identifies the rights and obligations of the parties, as opposed to a unilateral act of decision taking by the Crown, promotes true reconciliation.

Thomas Isaac, “The Crown’s duty to consult and accommodate Aboriginal people” (2003) 6 The Advocate 865

From a procedural perspective, Isaac argues that the duty to consult and to accommodate Aboriginal peoples’ rights and concerns is a progression of the fair procedure doctrine in administrative law where accommodation is a substantive additional requirement. Isaac favours a case by case analysis of accommodation and deference to government establishment of guidelines of the manner in which accommodation must take place.

Thomas Isaac and Anthony Knox, “The Crown’s Duty to Consult Aboriginal People” (2003) 41 Alberta Law review 49

The authors explore the nature, scope, source and trigger of the duty to consult Aboriginal People in the Canadian context, as well as what is expected from Aboriginal Peoples in consultation processes from a procedural perspective and in search for certainty of a contested emerging principle.

Kent McNeil “reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2 The Indigenous Law Journal 1

The author contrasts Justice Lamer’s stance on reconciliation as an act of the Crown to procure balance of interests between western and aboriginal Canada to that of Justice MacLachlin who favours negotiation as a means to foster reconciliation.

John Borrows and Leonard Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does it Make

a Difference?” (1997-1998) 36 Alta. L. Rev. 9

According to the *sui generis* doctrine, Aboriginal rights do not derive from common law principles nor their interpretation is restricted to the latter, but are rather meant to act as bridges between Aboriginal and non-Aboriginal law. While recognizing the potential of this doctrine in advancing indigenous interests, the authors make a critical appraisal of the challenges that it also poses.

Jeremy Webber, “Relations of Force and Relations of Justice: the Emergence of Normative Community between Colonists and Aboriginal Peoples” (1995) 33 Osgoode Hall L. J. 623

Webber elaborates on the multi-source character of Canadian law and argues that Aboriginal rights are the result of experimentation and accommodation of cultural differences. History, Webber says, shows how interaction between Aboriginal and non-Aboriginal peoples led to a series of practices that became normative over time amid relations of power but also of justice. Ultimately, the author calls for negotiation as a better way to cope with contemporary conflicts between the Aboriginal and non-Aboriginal societies in Canada.

Arthur Pape, “Honour of the Crown. A New Constitutional Duty to Protect Aboriginal Rights. A Consideration of the Supreme Court of Canada’s decisions in the Haida Nation and Taku River Tlingit First Nation cases” Paper presented at the Conference on the Impact of the Haida and Taku River Decision: Consultation and Accommodation with First Nations, January 26-27, 2005 (unpublished)

From a purposive perspective, Pape elaborates on the implications of recent Supreme Court decisions on cases involving the duty to consult and to accommodate Indigenous Peoples. Reasonableness of state decisions is to be measured against the objective of protection owed to Aboriginal rights, according to Pape.

b) Rights discourse as a means to advance social and political objectives, with particular focus on human rights and the emerging right to a healthy environment, as well as the correlation between rights and duties.

Joel Bakan, *Just Words, Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press Inc., 1997)

Bakan argues that in spite of the ideals of equality, freedom and democracy underlying the Canadian Charter the legal system that is called to apply is not necessarily in tune with such progressive purposes. Indeed, for Bakan, the rights discourse is ineffectual in advancing political and social goals as the *establishment* is flexible enough to co-opt progressive interpretations of rights.

César A. Rodríguez, et al, *Justice and Society in Colombia: A Sociolegal Analysis of Colombian Courts* in Lawrence Friedman and Rogelio Pérez-Perdomo, eds. *Legal Culture in the Age of Globalization*, (Stanford, California, 2003)

Chapter 5 analyzes the transformations within the judicial system in Colombia since de mid 1980s, including the recent “protagonism of constitutional justice” in human rights cases.

Jack Donnelly, *The Concept of Human Rights* (Kent: Croom Helm, 1985)

Donnelly provides a thorough depiction of what distinguishes rights from other moral claims. He further elaborates on the nature and source of human rights and anticipates the problems of suggesting a list of human rights. He defends a constructivist approach to human rights which implies that these rights are the result of moral choices of an envisioned human being. The analytical framework he develops to define human rights is a valuable tool for discussion of allegedly emerging rights.

Sean Coyle, “Are there Necessary Truths about Rights? (2002) 15 (1) *Canadian Journal of Law and Jurisprudence* 21

Coyle posits that indeed there are necessary truths about rights independently of the wide array of rights content, based on Hohfeld’s analysis of jural relations.

Jack Donnelly “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” (1985) 15 *Cal. W. Intl L.J.* 473

Donnelly dissects what has been articulated as a ‘human right to development’ to conclude that there is not such a right. He bases his analysis on the source, content and subjects of human rights. Moreover, he calls into attention the perils of confusing ends (human rights) with means (development or new world orders). Although his arguments have been criticized for its reliance in the Western-thought tradition, their analytical clarity permits a better understanding of the always contested tenets of human rights.

Luiz Carlos Bresser Pereira, “Citizenship and *Res Publica*: The Emergence of Republican Rights” (2002) 6 2 *Citizenship Studies* 145

Bresser Pereira characterizes republican rights as rights to have the public patrimony used and kept for the service of the public interest. These rights protect both citizens and the collectivity from other rent-seeking citizens and include: rights to the environment, to the historical patrimony and to the economic patrimony. While recognizing the difficulties of characterizing the public interest, the author defends that it is still possible to define it through democratic consensus.

Jürgen Habermas, “Human Rights and Popular Sovereignty: The Liberal and Republican Versions” (1994) 7 1 *Ratio Juris* 1 in Philip Alston *Human Rights Law* (New York: New York University Press, 1996)

Habermas questions the antagonism between popular sovereignty and human rights by men) and addresses them through a mutually reinforcing approach. This approach is deliberative democracy, a process through which equal and free citizens reach an agreement as to “which goals and norms lie in the equal interest of all”.

Douglas Sanders, “Collective Rights” (1991) 13 *Human Rights Quarterly* 368

Sanders distinguishes among individual rights, group rights (the sum of the rights of the individual members of the group) and collective rights (held by collectivities with their own particular cultural characteristics). The latter are characterized by their seeking of survival as a group against assimilation.

Gert Verschraegen, “Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory” (2002) 29 2 *Journal of Law and Society* 258

Based on Niklas Luhman's systems theory, Verschraegen offers a functional explanation of why human rights emerged. Verschraegen dismisses the debate on the philosophical legitimation of human rights as misleading and fruitless, and emphasizes on their functionality as 'a self protecting device of [modern] society'. The modern functionally differentiated society demands individuals to be freed from identity restraints imposed by strong social groups in order to participate in the different function systems (economy, politics, law, education, religion, etc). As opposed to the classical approach tenets of universality and over-individualism, a systems perspective on human rights views them as historically determined and a condition for participation in society.

Staughton Lynd, "Communal Rights" (1984) 62 Texas Law Review 1417

The author criticizes the notion of rights as property which treats rights as scarce commodities to be fought for, thus preventing members of a society to care about each other's needs. He does not support, however, the anti-rights talk and instead argues for communal rights, those rights that belong to the whole community and cannot be given up. These rights, which Lynd characterizes as unalienable, include the right to engage in concerted activity, the rights guaranteed by the first amendment and the rights associated with the power of eminent domain and favour the definition of long term society objectives as opposed to individualistic and adversarial conceived rights.

Gayle Binion, "Human Rights: A Feminist Perspective" (1995) 17 (3) Human Rights Quarterly 509

According to Boyle, a feminist look to the classical human rights theory contradicts its overly individualistic and abstract approach and calls for the feminist question: how is women's life experience considered in the definition and operation of rights. The author challenges the public/private dichotomy and cultural relativism and argues for a responsibility, non adversarial approach to human rights.

Dinah Shelton, "Human Rights, Environmental Rights and the Right to Environment" (1992) 28 Stan. J. Intl. L. 103

Shelton examines the emerging right to environment through the perspectives of human rights and environmental protection. She lessens importance to the anthropocentric vs. biocentric debate highlighting the interdependence between human rights and environmental rights as well as their overlapping features as societal values. Shelton moves then further to analyze the potential of the emerging right to the environment of becoming a fully recognized right, independent of but promoting the goals of human rights.

Jennifer A. Downs, "A Healthy and Ecologically Balanced Environment: an argument for a third generation right" (1992-1993) 3 J Duke J Comp. & Int'l L. 351

Downs overviews the evolution of human rights from the so-called first generation rights to the emerging third generation ones. She elaborates on the two salient features of the latter: solidarity and collectiveness and identifies an emerging right to environment as necessary to accomplish other human rights already recognized. She discusses the place and function of a right to environment within the current human rights regime.

Elaine Hughes and David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999) 30 Ottawa Law Review 229

The authors propose a substantive content of environmental rights.

John Lee, “The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law” (2000) 25 Colum. J. Envtl. L. 283

Lee argues for an internationally recognized human right to a healthy environment as the individual state recognition or the inclusion of environmental components in already recognized human rights fail to adequately address environmental human rights violations. He overviews the international law sources to conclude that there is an emerging right indeed and further elaborates on legal theory principles underpinning this emerging right

Henry Shue, *Basic Rights. Subsistence, Affluence and U.S. Foreign Policy* 2nd ed. (Princeton: Princeton University Press, 1996) chapter 2

Shue questions the assertion that fulfillment of so called positive rights is more cumbersome than that of negative rights. Indeed, for the author it is duties that can be characterized as positive or negative and all basic rights have a bundle of correlative duties positive and negative. These include: the duty to avoid deprivation of the right, duty to protect from deprivation and the duty to aid the deprived. It is only the failure to comply with the first two that actually triggers the cumbersome third duty.

c) Governance and natural resources management with emphasis on participatory processes for development decision-making and the tensions between rights, development and democracy

Donald N. Zillman, Alastair R. Lucas & George (Rock) Pring, eds., *Human Rights in Natural Resources Development: The Law of Public Participation in the Sustainable Development of Mining and Energy Resources* (New York: Oxford, 2002)

The book has been reviewed as “a state-of-the-art examination of public participation in the resources field, from a legal and practical standpoint.” It provides a theoretical approach to PP as well as international, regional and national perspectives. It includes a section on the developing world.

Konrad Ginther, et al (eds), *Sustainable Development and Good Governance* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995)

Proceedings of the March 1994 ILA conference on Legal Aspects of Sustainable Development held in Graz, Austria. Part I theorizes on the concepts of ‘sustainability, and ‘governance’ from an international perspective. Part II elaborates on popular participation in sustainable development from a rights perspective; part III refers to development cooperation and human rights and includes a piece on the right to self determination from a sustainable development perspective. The volume includes case-studies in two developing countries and exposes the development vs. environment dilemma.

Jack Donnelly, “Human Rights, Democracy and Development” (1992) 21 (3) *Human Rights Quarterly* 608

Donnelly questions the assertion that human rights, democracy and development are automatically reinforcing. Indeed, he argues that the equity and liberty tradeoffs pose tensions between human rights advancement and development characterized as economic growth. Also, while democracy aims to

empowering the people, human rights objective is to empower individuals, a difference that more often than not causes conflicts. The response, Donnelly says, lies in distinguishing between means (democracy and development) and ends (human rights promotion), which demands qualifiers set on the former.

Neil Joseph Brennan, *Emancipatory Environmentalism: Civil Society and the Public Interest in Environmental Law* (A Thesis submitted to the Faculty of Graduate Studies in partial fulfillment of the requirements for the degree of Masters of Law) Faculty of Law, Calgary, Alberta, 1996

A deep theorizing work on what the author considers a “legitimation crisis” of current conceptualizations of “public interest”.

Tracy McKim, *Sustainable Participation: Law and Policy* (A Thesis submitted to the Faculty of Graduate Studies in partial fulfillment of the requirements for the degree of Masters of Law) Faculty of Law, Calgary, Alberta, 1993

The author argues that sustainability of development implies social sustainability which requires participatory decision-making processes. She proposes reforms to those processes so that these can foster ‘sustainable participation’.

Norman Wengert, “Citizen Participation: Practice in Search of a Theory” (1976) 16 (23) *Natural Resources Journal*

Although it is a relative old piece, it raises the issue of the different contents of PP can have depending on what is it meant to achieve. He distinguishes different approaches to participation: as policy, as strategy, as communication, as conflict resolution, as therapy; and argues for a theory of participation to better cope with the term.

Greg Hampton “Environmental equity and public participation” (1999) 32 *Policy Sciences*

Public participation methodologies must meet the needs of disadvantaged social groups to be effective in reducing or preventing environmental inequity. The author argues that “the extent to which public preferences are incorporated in policy decisions determines the worth of public participation programs in promoting environmental equity.”

Luke W. Cole and Sheila R. Foster, *From the Ground Up Environmental Racism and the Rise of the Environmental Justice Movement* (New York: New York University Press, 2001)

Chapter 5, “Processes of Struggle, Grassroots Resistance and the Structure of Environmental Decision Making” calls attention on how the promise of public participation in many environmental laws “leave in place, as do many formal administrative processes, the underlying social relationships of its participants.”

Nancy Perkins-Spike, “The Land Use—Environmental Distinction: a Geo Feminist Critique” (2002) 13 *Duke Env. L & Pol’y F* 55

The author criticizes the divorce between land use planning and environmental protection policy and argues that while the former is based on an excessively anthropocentric notion of the supremacy of the human species, the latter emphasizes the interconnectedness of species within the ecosystem. According

to this view, sustainable decision making regarding the environment is better served by contextualizing planning and incorporating the public into the process.

Eric Dannenmaier, “Democracy in Development. Toward a Legal Framework for the Americas” (1997) 11 (1) *Tulane Environmental Law Journal*

Dannenmaier explores the process through which the idea of a public participation strategy for the Americas was conceived. He sets out a series of topics to be considered in that strategy, including the Aarhus convention principles (access to information, access to public participation in decision making and access to justice). The strategy was adopted within the Organization of the American States in 2000.

Thomas Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (Washington, DC: World Resources Institute, 2002)

From a procedural perspective and drawing from experiences in the US, the authors examine 5 “social goals” for public participation to assess the success of public participation processes.

Jane A. Grant, *Community, democracy and the environment, Learning to share the future* (Oxford: Rowman and Littlefield Publishers Inc., 2003)

Taking as bases of discussion an American setting, Grant examines how “presence or absence of public spaces within which to deliberate about our deepest concerns may have profound implications for the biosphere”

Denis Goulet, “Development: Creator and Destroyer of Values”, in Kathleen Mahoney and Paul Mahoney (eds.) *Human Rights in the 21st. Century: A Global Challenge* (Dordrecht: Martinus Nijhoff Publishers, 1993)

Goulet depicts development as an ambiguous term. Moreover, the author characterizes development as a two edged sword with gains (improvements in material well-being and standards of living, technological progress, institutional specialization, freedom of choice and world interdependence) and losses (vertical dependence among nations, increase in social alienation and destruction of cultures). Therefore, he argues, the quest for development demands a constructive dialogue among societies and cultures that takes into account differences.

Anna J. Pugh “Too much for a nation to bear: questions of sustainability and consultation in environmental reviews; the Case of the Tulsequah Chief Mine” (2004) 13 *Dalhousie Journal of Legal Studies* 211

Pugh argues that bias toward development is entrenched in government decision-making regarding natural resources. She elaborates on the Tulsequah Chief Project in British Columbia to posit that this bias compromises not only the protection of Indigenous Peoples constitutional rights but also the alleged quest for sustainability.

Emily Walter, R. Michael M'Gonigle & Celeste McKay, “Fishing Around The Law: The Pacific Salmon Management System As A “Structural Infringement” Of Aboriginal Rights” (2000) 45 *McGill L.J.* 263

Drawing on a fisheries case, the authors highlight problems of accommodating conflicting patterns of natural resource management.

Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro States* (Berkeley: University of California Press, 1997)

Karl examines economic deterioration and political decay of oil exporting developing countries, and calls for attention of frameworks for decision-making. Venezuela is one of the countries studied.

Energy Sector Management Assistance Programme, "Environmental and Social Regulation of Oil and Gas Operations in Sensitive Areas of the Sub-Andean Basin." (ESMAP Report, 217/99, 1999)

This report is part of a component of a broader program of communication and information exchange among 11 sub-Andean countries (developed under the support of the World Bank and OLADE) aiming at continuation of the sector reforms, promotion of environmentally and socially sound industry practices, and improvement of socioeconomic situations of indigenous peoples. The report provides a comparative analysis of the existing legal, institutional, contractual, and regulatory frameworks, and of the capacity of the governments to enforce them and to facilitate the adoption by governments of a long-term plan of action on related environmental and social issues.

ANNOTATED BIBLIOGRAPHY

CONSERVATION EASEMENTS AS EFFECTIVE LEGAL INSTRUMENTS FOR PROTECTING BIODIVERSITY ON PRIVATE LAND IN ALBERTA

Victoria Row

Biological diversity (biodiversity) of life at the genetic and species level as well as diversity between ecosystems. Biodiversity is essential to all life including the continued survival of humans. Ecologists acknowledge the interdependent relationship of all species in ecosystems although they are uncertain about the nature of the interdependence. Scientists also recognize that nature is not a state of equilibrium. Rather nature is a state of constant, sometimes dramatic, unpredictable change. Sometimes that change involves destruction of habitat, losses of life, and losses of biodiversity. The losses of biodiversity are well documented. Habitat destruction and fragmentation caused by human activity is the greatest contributor to the loss of biodiversity. Agriculture is one of the biggest offenders. Species extinctions caused by human predation provide stark examples of biodiversity loss. Human efforts have brought species back from the brink of extinction.

Legal scholars point out that the protection of biodiversity on private land is essential because private land is often optimal habitat. Writers argue that knowledge from ecology should be incorporated into a legal regime to protect biodiversity on an ecosystem or watershed scale. They suggest publicly owned core areas of high biodiversity value should be surrounded by buffer zones where limited human activity compatible with the preservation of biodiversity is permitted. Large, circular protected areas are better than small or long, narrow parcels. Corridors are needed to connect areas of protected habitat. Academics argue that active, adaptive, ecosystem management is imperative to protect biodiversity.

Since 1996 the *Environmental Protection and Enhancement Act (EPEA)* has authorized the creation of conservation easement agreements (CEAs) for the protection, conservation, and enhancement of the environment, including biodiversity, and natural scenic and aesthetic values on privately owned land. Registered owners of land (grantors) and qualified organizations (grantees) may enter into CEAs. A qualified organization is defined in (*EPEA*) as a registered charity, the Alberta government or its agent, and a local government. The CEA may provide for certain uses of land, namely, open space use, recreational use, environmental educational use, and scientific study of natural ecosystems.

CEAs may be sold or donated. If a CEA is donated, the land owner receives tax benefits. The land owner may use the amount of the donation to reduce income tax or capital gains tax. The value of the donation is determined using appraisals.

CEAs are registered against the certificates of title to land in Alberta and are intended to bind all future owners in perpetuity. The land owner may designate someone other than the grantee to enforce the CEA. A CEA may be terminated by the parties, by a Court pursuant to section 48(4) of the *Land Titles Act (LTA)*, or by the Minister, if it is in the public interest to do so. Some of the common law impediments to the enforceability of easements and restrictive covenants have

been addressed in *EPEA*. For example, in order for the CEA to be enforceable, a qualified organization need not own any land. Conservation easements do not lapse by reason of non-enforcement, use of the land for a purpose inconsistent with the purpose of the CEA, or a change in use of the land surrounding or adjacent to the land encumbered by the CEA.

The following Annotated Bibliography deals with the some of the literature on the topics of biological diversity (biodiversity), ecosystem management and conservation easement agreements.

BIODIVERSITY

Michael J. Bean, *Overcoming Unintended Consequences of Endangered Species Regulation* (2002) 38 Idaho L. Rev. 409.

This scholar discusses some unintended and un contemplated consequences of the restriction of This author points out that disruption of natural disturbance regimes on private land such as fire and grazing may contribute to habitat degradation and threaten rare species. Chain reactions leading to the introduction of non-native species and subsequent competition or predation of endangered native species by exotic species are other factors discussed by the author. The author examines the “scorched earth” policy (intentional destruction of habitat) as a perverse response to the possibility of the discovery of a threatened species on private land. Another impediment to maintaining habitat for rare species on private land is the simple unwillingness to undertake routine management activities that would maintain habitat such as prescribed burning and pest control.

Daniel M. Bodansky, *International Law and the Protection of Biological Diversity* (1995) 28 Vand. J. Transnation'l L. 623.

Principles of international environmental law such as the precautionary principle, the principle of intergenerational equity and the principle of differentiated responsibilities are discussed. Because the benefits of biodiversity accrue in part to the international community the author argues for international co-operation and recommends incentives to encourage protection of biodiversity in the developing world.

Frederic Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions* (2002) 38 Idaho L. Rev. 431.

The author argues that private consumption of wildlife habitat by urban sprawl is caused in part because private citizens are willing to purchase a small amount of nature for their own benefit but leave it to government to do public good through regulation in the biosphere. He suggests that public and private property rights in wildlife have advantages that should not be ignored.

Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary* (2002) 38 Idaho L. Rev. 325.

The author argues that we must guard against the natural tendency to be drawn to special places when formulating strategies for protecting biodiversity and find institutional points such as geographic regions as focal points for law to protect biological diversity.

Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity* (1991) Ecology L.Q. 265.

Ms. Doremus argues that focusing on protecting species diversity creates patchworks of biodiversity conservation. Solutions she suggests include a new statute to provide an overview of the entire national biota with flexibility to allow different levels of protection for different areas. Another alternative would be to require consideration of effects on biodiversity under environmental assessment legislation which the author concludes would be of limited effectiveness because of the procedural nature of the legislation. Expansion of the public trust doctrine may help in specific instances. Endangered species legislation could be amended to allow for priority setting. The last alternative would require a legislatively mandated overview of the state of the national biota.

Holly Doremus, *Private Property Interests, Wildlife Restoration, and Competing Visions of a Western Eden* (1998) 18 J. Land, Resources & Envtl. L. 41.

The author suggests that government reintroduction of extirpated wildlife such as wolves may survive a takings challenge under the U.S. constitution. This author argues that it could be argued that no landowner could reasonably expect complete freedom from wildlife damage resulting from the reintroduction of predators such as wolves because there is a long tradition of government regulation of wildlife and that a Court is unlikely to view wildlife protection regulation as a physical invasion requiring compensation.

Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discours* (2000) 57 Wash. & Lee L. Rev. 11.

P.S. Elder, *Biological Diversity and Alberta Law* (1996) 34 Alta. Law Rev. 293.

This article is a survey of Alberta legislation which may protect or adversely impact biodiversity.

David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations* (1995) 19 Harv. Envtl. L. Rev. 303.

This author argues that an effective strategy to protect biodiversity requires active management and restoration of ecosystems. Management fees should be paid to landowners rather than compensation for takings because takings compensation denies landowner responsibility for continual land management and provides landowners no stake in addressing the issue of biodiversity conservation. Subsidies to developers will be required to allow regulatory agencies to reject development proposals that are incompatible with biodiversity conservation. The author suggests that takings compensation discourages policy initiatives which confront the ideology of private

property. The author concludes the timing is right for such an initiative (subsidies to conserve land). The timing is right because landowners with natural areas left on their land are less likely to receive assistance to convert their land to agricultural uses than those who have already converted their lands to agriculture and reaped the short term benefits of doing so. The author sees payment of management fees and subsidies not to develop as cheaper than the alternative of paying compensation for takings or negotiating entirely voluntary agreements in the market place. Finally, the author finds that problems with enforcement encourage landowners to shoot, shovel, and shut up. He favours compromises in terms of spreading the cost-burden over compromises in terms of achieving conservation objectives. This is a middle ground between complete voluntarism and compulsion which has its roots in respect for the land, those who own the land and future generations.

Neil Gunningham & Mike D. Young, *Toward Optimal Environmental Policy: The Case of Biodiversity Conservation* (1997) 24 *Ecology L. Q.* 243.

These Australian authors describe the interaction of instruments available to protect biodiversity. They describe eleven criteria for designing the optimal policy mix to promote biodiversity conservation and its ecologically sustainable use, namely:

- (1) redundancy of mechanisms and instruments for backup in the case of failure;
- (2) focus on market failure, property right failure, institutional deficiency, political deficiency and information failure which can attain faster progress and fewer irreversible consequences than underlying causes (population growth, inequality, economic growth, poverty, and lack of knowledge);
- (3) institutional mixes which transfer strategic authority and responsibility to the lowest level at which it can effectively be exercised such as bioregions;
- (4) using at least one instrument to alleviate each threat or objective;
- (5) government investment in monitoring, detection, and management agreements with compensation that encourage renegotiation when circumstances change to address the free rider problem;
- (6) using community responsibility and compensation when objectives (return of birds) are met as opposed to payment for specified work;
- (7) introduction of instruments in order from least intrusive to most intrusive provided the threat is not great;
- (8) permitting trade-offs and encouraging innovation;
- (9) involving many parties (government, landowners and other users, and other interested actors);
- (10) using financially attractive instrument mixes to break a habit and get through a transition period (e.g. payment for not clearing which most landowners think is one of their property rights, management agreements with compensation for a term or years with a conservation easement in perpetuity);
- (11) changing property rights without compensation or with limited compensation for a transition period; and,
- (12) charging more for access to biodiverse reserves and biodiverse resources.

John Harte, *Land Use, Biodiversity, and Ecosystem Integrity: The Challenge of Preserving Earth's Life Support System* (2001) 27 Ecology L. Q. 929.

Ellen Hey, *Increasing Accountability for the Conservation and Use of Biodiversity: Transnational Global Character* (1995) 6 Colo. J. Int'l L. and Poly 1.

This author examines the Convention on Biological Diversity. She concludes that because of the lack of knowledge about biodiversity the convention might, through its procedural obligations, provide avenues for moving toward protecting biodiversity on a more substantive level. She says that NGOs have a "watchdog role" to play in this situation and can use model guidelines and contracts already adopted to fulfill that role.

Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management* (1997) 81 Minn. L. Rev. 869.

This writer doubts whether we can eliminate the middlemen of endangered species and get on to the business of protecting their landscapes. Houck tries to identify the sources of law to protect biodiversity. He looks to definitions, geographic scale, temporal scale, change, the role of humans, science and consequences and the status quo for the law on biodiversity. He suggests that ecosystems are too unspecific for law. He argues that protecting endangered species is "law" whereas ecosystem management is "law avoidance". Law avoidance arises because when humans are introduced as part of the ecosystem baseline standards disappear into a smudge of multiple use, and optimal yield.

James L. Huffman, *Marketing Biodiversity* (2002) 38 Idaho L.Rev. 421.

This author argues that action on a local level is required to protect biodiversity. He sees the extensive use of conservation easements, private trusts of water resources and commercial marketing of certain types of wildlife habitat as indications of market successes on a local scale. Small parcels with biological resources can be combined through something like the pooling and unitization of oil and gas law to create larger units corresponding to ecosystems. The illusion that regulation can get something for nothing (public goods from private owners) distorts the potential market in biological resources. Government impermanence and discounting the likelihood of protecting biodiversity through political action increase the costs of doing so.

Bradley C. Karkkainen, *Biodiversity and Land* (1997) 83 Cornell L. Rev. 1.

This author argues for the concept of core federally owned land with buffer zones permitting scientific research, education and some recreational use to protect biodiversity. Farther away from the core economic uses would be permitted on a sustainable basis through the application of land-use planning, ecosystem-level planning by private stakeholders and levels of government, and creative use of innovative market based approaches like transferable development rights.

Robert B. Keiter, *Biodiversity Conservation and the Intermixed Ownership Problem: From Nature Reserves to Collaborative Processes* (2002) 38 Idaho L. Rev. 301.

This author notes that in the United States private land is the best habitat because it was generally the considered the best land by settlers being the most fertile and having water.

Harriet Ketley, *Cultural Diversity Versus Biodiversity* (1994) 16 Adelaide L. R.99.

This author suggests that aboriginal peoples had an impact on the Australian landscape before 1798, the date European settlement commenced. For example, aboriginal people used fire to transform the landscape. Other aboriginal cultural practices such as keeping local knowledge secret and hunting may conflict with concepts of how to best achieve protection of the environment now.

Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land* (2001) 9 N. Y. U. Env'tl. L. J. 592.

The author discusses the relative costs of government expropriation of privately conserved land resulting from the installation of utilities, pipelines and rights of way versus the conversion of publicly owned lands devoted to conservation purposes or publicly owned land subject to conservation easements. He suggests that governments have an incentive to use publicly owned land because the cost of using publicly owned land is usually less than the cost of expropriating private land. Construction of public buildings such as schools or hospitals raises the same issues. The author also addresses conversion of publicly owned land previously devoted to conservation purposes and publicly owned conservation easements. This scholar points out that some limitation on the conversion of publicly owned land is provided by the prior public use doctrine, in the U.S., which says that a publicly owned conservation easement cannot be condemned by a lower government authority. He argues that more is needed and argues there should be a requirement that, when land devoted to conservation purposes is condemned, land of equivalent conservation value should be acquired to replace the condemned land. Scientific data would be required to determine whether replacement properties were of equal conservation value. If replacement is impossible the author suggests depositing money into an account specifically dedicated to conservation acquisition to be used in the future to purchase conservation lands. Appraisals would be required in addition to scientific data to determine economic equivalency. The exploration of alternatives to the projects proposed for the conservation lands under environmental assessment legislation are common conversion and condemnation restrictions. These alternatives should consider factors other than cost of the alternatives. There are strong economic incentives to use public conservation lands over private conservation lands if the public authority can do so without paying anything to convert conservation lands they already own. Notice and public hearing requirements restrict conversion and condemnation of conserved land. A super-majority vote is potentially an effective procedural mechanism for ensuring that non-controversial conversions are approved. A declaration that conservation is the highest and best use of a property provides a measure of protection from condemnation by a co-equal unit of government. Local governments can also grant

conservation easements on its fee simple land. These easements would still be vulnerable to condemnation. There should be expedited handling for conversions or condemnations that are non-controversial or where there is a net conservation gain because the harm to the environment is negligible. Another situation where expedited review might be warranted is where it is clear in advance that a conservation organization is acquiring properties that have rich conservation value but also include areas of little or no conservation value but high economic value that the conservation organization intends to resell. Monitoring conservation lands is important to dealing with conversion and condemnation attempts.

Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands* (2002) 38 Idaho L. Rev. 453.

This author suggests that monitoring and enforcement will be significant responsibilities for conservators in the future. She sees a conflict between conservation easements that permit uses that are inconsistent with the protection of biodiversity. She states that active management is required to preserve biodiversity and points out that conservation easements don't require a landowner's commitment to management. She sees potential for the conservation easement to plant the seeds of social and political change by helping to nurture a gradual transition from a traditional, rights-oriented view of private property ownership to a view that also contemplates responsibilities to the larger human and natural community. She suggests that the proponents of biological diversity should take a more active role in shaping the land trust movement and the conservation easements that are acquired.

Francesca Ortiz, *Biodiversity, The City and Sprawl* (2002) 82 B. U. L. Rev. 145.

This academic defines urban sprawl as the auto-dependent, scattered development of residential and non-residential uses located just outside urban areas, summarizes the causes of sprawl, and the environmental problems caused by it. She suggests conservation easements have a role in solving these problems.

J.B. Ruhl, *A Manifesto for the Radical Middle* (2002) 38 Idaho L. Rev. 385.

This writer discusses the reliance on expert-derived data, complex models and fluid, adaptive management styles by proponents of ecosystem management. He suggests that the concept of ecosystem management threatens the settled frameworks of public participation, agency discretion and judicial review crafted by conventional preservationists and resource developers.

J. Michael Scott, *Biodiversity: What Are We Protecting?* (2002) 38 Idaho L. Rev. 298.

This author agrees with Aldo Leopold that we need to find a way to expand the moral community to include land. This author points out that the skewed distribution of nature reserves in the United States to high-elevation relatively unproductive lands plus the

magnitude and scale of land required for ecosystem conservation indicate that additional tools that involve private landowners must be found.

Christopher D. Stone, *Land Use and Biodiversity* (2001) 27 Ecology L.Q. 967.

The author discusses the difficulty in finding a currency to measure biodiversity. He compares the institutional mechanisms available to preserve biodiversity based on his definition of efficiency – the social costs must not exceed the benefits. He favours a mix of environmental servitudes leaving ownership in private hands which condones mixed uses while compensating the owner for lost opportunity costs.

Christopher D. Stone, *What To Do About Biodiversity; Property Rights, Public Goods, and the Earth's Biological Riches* (1995) 68 S. Cal. L. Rev. 577.

This author sees the Biodiversity Convention as motivated largely by concern for the portfolio value of genetic material as a long-term insurance for human health and welfare. He thinks some of the most important resources are biological and capable of regeneration and consumption and conversion to better use by humans. The author calls attention to the many situations in which the same biological asset, such as a forest, provides three types of goods – benefits from selling goods in the market, localized benefits such as flood control, and public goods such as carbon sequestration. He suggests a forest's genetic material is a public good, analogous to both carbon sequestration and a wildlife park. He argues for using every mechanism available including strengthening powers to exclude, granting intellectual property rights in resources and their products, embargoing resource samples, and subsidies to landowners to ensure the rate of consumption and conversion of resources is not too much.

A. Dan Tarlock, *Biodiversity Federalism* (1995) 54 Md. L. Rev. 1315.

This author points out that previously it was thought that the environment (nature) was in balance or equilibrium. The author suggests that this image was central to the Judeo-Christian and Enlightenment world view. However, a new paradigm predominates. That paradigm is that human action is one of the principal forces operating on ecosystems and that system disturbances are both random and predictable. A newer overarching great idea states that an ecosystem is a thermodynamically-open far from equilibrium system. The new paradigm challenges the biodiversity preservation foundations and strategies of the first generation of environmental laws. The legal implications of the non-equilibrium paradigm are substantial over space and time. Conservation biologists seek to understand the relationship between species extinction and habitat fragmentation and to develop adaptive management strategies versus restoration and preservation. Management of ecosystems involves a series of calculated, risky experiments. The mismatch between ecosystem and political boundaries, interagency conflict, the difficulty of adapting private property and individual liberty interests to biodiversity values, lack of case law, state and local lack of co-operation with the national government are some of the barriers to biodiversity protection. A biodiversity perspective collapses the traditional political boundaries of land use decision making as well as traditional ownership classifications. Tarlock suggests that the river basin model is the most relevant to biodiversity protection.

In Lucas v. South Carolina Council, 112 S. Ct. 2886, 2892-2902 the U.S. Supreme Court said that a government regulation does not constitute a taking if the regulation simply codifies background principles of nuisance and property law. Tarlock says that the development of the common law permits the redefinition of the scope of permitted uses of land by providing property owners with adequate notice of the non-recognition of a claim. This would support a less one-dimensional concept of property. It would not compel the adoption of an ecological concept of property but would incorporate an ecosystem limitation.

Barton H. Thompson, *Providing Biodiversity Through Policy Diversity* (2002) 38 Idaho L. Rev. 356.

Tools for protecting biodiversity are: land-use regulation, direct governmental investment in habitat and government leveraging of private efforts. Regulation shifts the cost to private landowners and costs the government for implementation, monitoring and enforcement except in expropriation. Regulation may crowd out altruistic or other regarding behaviour rather than lead to supportive norms within the population. Endangered species legislation may encourage landowners to conceal information or destroy habitat. Regulation is necessary to ensure that all land uses take into account biodiversity needs. Subsidies of the commercial use of land and other resources remain one of the greatest threats to biodiversity in the U.S.

Edward O. Wilson, *The Diversity of Life* (New York: W. W. Norton & Company 1992)

This book sets out the theory of evolutionary biology. The author explains how human intervention may destroy the evolutionary process.

Sandra B. Zellmer & Scott A. Johnson, *Biodiversity in and Around McElligots's Pool* (2002) 38 Idaho L. Rev. 474.

The conversion of land to agricultural use has been recognized as one of the most significant human alterations to the global environment. Loss of wetlands due to this conversion is significant. These writers suggest that farms are superior to urban sprawl and should be protected.

ECOSYSTEM MANAGEMENT

John Harte, *Land Use, Biodiversity, and Ecosystem Integrity: The Challenge of Preserving Earth's Life Support System* (2001) 27 Ecology L. Q. 929.

Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management* (1997) 81 Minn. L. Rev. 869.

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law to protect biodiversity. He looks to definitions, geographic scale, temporal scale, change, the role of humans, science and consequences and the status quo for the law on biodiversity. He suggests that ecosystems are too unspecific for law. He argues that protecting endangered species is “law” whereas ecosystem management is “law avoidance”. Law avoidance arises because when humans are introduced as part of the ecosystem baseline standards disappear into a smudge of multiple use, and optimal yield.

Arlene Kwasniak, *Reconciling Ecosystem and Political Borders: A Legal Map*, (Edmonton: Environmental Law Centre, 1997).

This author outlines the overlapping jurisdiction of numerous governmental and private bodies when one considers protecting land on the ecosystem scale. She uses the example of an aspen parkland ecosystem south of Edmonton, the last remaining ecosystem of its kind in the world. She points out that there is authority in the Municipal Government Act for municipalities to co-operatively govern ecosystems that transcend municipal boundaries.

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This writer discusses the reliance on expert-derived data, complex models and fluid, adaptive management styles by proponents of ecosystem management. He suggests that the concept of ecosystem management threatens the settled frameworks of public participation, agency discretion and judicial review crafted by conventional preservationists and resource developers.

CONSERVATION EASEMENTS

Alexander A. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Property: Interpreting Conservation Easements as Charitable Trusts* (2002) 37 Real Prop. Prob. & Tr. J. 91.

This author suggests that the transactions which create conservation easements should be treated as equivalent to or analogous to the creation of charitable purpose trusts. He analyzes several legal issues, which, if the conservation easement is characterized as a charitable purpose trust, can be resolved based on trust principles, for example, the cy-prés doctrine. One of the examples he explores is the situation where a conservation easement agreement is entered into for the purpose of providing habitat for a specific endangered species. If the endangered species becomes extinct or its habitat is destroyed by fire, the application of the cy-prés doctrine would prevent termination of the conservation easement. Pursuant to the cy-prés doctrine, the object of the trust, the conservation easement, would be utilized for other charitable conservation purposes.

Judy Atkins & Ann Hillyer, *Land Conservation Transactions: Tax Implications of Gifts of Land and Interests in Land* The Leading Edge: Stewardship and Conservation in Canada, (July, 2003).

Judy Atkins, Ann Hillyer & Arlene Kwasniak. 2004. *Conservation Easements, Covenants and Servitudes in Canada A Legal Review* North American Wetlands Conservation Council (Canada). Ottawa, Canada.

The authors provide an overview of the current status of conservation easements in all Canadian jurisdictions. They also discuss the characteristics of the United States' Uniform Conservation Easement Act. These scholars provide guidance for lawyers drafting conservation easements. The enforceability of conservation easements and restrictive covenants is discussed, including the outcomes of litigation involving the interpretation and enforcement of conservation easements in Canada and the United States.

Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions* (1989) 40 Hastings L. J. 1187.

This academic discusses the advantages of characterizing a conservation easement as an "easement" rather than a "restrictive covenant" or "equitable servitude". He suggests that characterizing a conservation easement as an "easement" for certain purposes would make it immune or substantially protected from termination by virtue of the application of the equitable doctrine of changed conditions. Unlike easements, restrictive covenants and equitable servitudes which are vulnerable to termination pursuant to that doctrine. The author argues that if a conservation easement is obsolete, a court could reform the easement grant according to the cy-pres doctrine. According to this author, if the conservation easement was terminated, the land owner might be required to pay value of the easement to the conservator.

James Boyd & Kathryn Cabarello, *The Law and Economics of Habitat Conservation: Lesson from an Analysis of Easement Acquisitions* (2000) 29 Stan. Env'tl. L.J. 209.

The authors explore the advantages and disadvantages of conservation easements over command and control regimes and tradable permit strategies for preserving private land using a variety of criteria (economic efficiency, fairness and preservation of species). They explore the use of appraisals as the method for determining the value of donated conservation easements for the purpose of setting the amount of tax benefits to which the donor is entitled. They conclude it is too early to tell whether the conservation easement is more effective than purchases of fee simple interests in land or tradable development credits as legal methods for protecting biodiversity.

Russell L. Brenneman, *Private Approaches to the Preservation of Open Land*, (Massachusetts: The Conservation and Research Foundation, 1967)

The author was counsel in many of the early land acquisitions for The Nature Conservancy. His book is a comparison of different legal mechanisms available to private landowners who wish to preserve open land. He favours the trust as the most flexible method.

Richard Brewer, *Conservancy The Land Trust Movement in America* (London: University Press of New England, 2003)

This author explains why land should be conserved, discusses the merits of various strategies to conserve land including conservation easements, and traces the histories of some land conservancy organizations in the United States.

Frederic Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future* (1996) 73 Den. U. L. Rev. 1077.

The author contemplates how to retain the incentives for private landowners to grant conservation easements while ensuring conservation easements will be enforced and enforceable in the future.

B. Collins, *Alienation of Conservation Easement* (1996) 73 Denver U. L. Rev. 1103.

Restraints on alienation have never been favoured by Courts. The perpetual nature of conservation easements raises this issue. This author argues this aspect of the conservation easement may encourage judicial intervention that would unfortunately destabilize the conservation easement.

Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law* (1989) 8 Stan. Envtl. L. J. 2.

These authors point out that the long-term security of conservation easements is not assured. They suggest judges may draw on legal rules applicable to common law easements, restrictive covenants, and equitable servitudes to interpret, terminate or modify perpetual limitations. The authors suggest that Courts should be cautious in doing so because of the possible chilling effect on the granting of conservation easements, the difficulty in assessing the flow of benefits to diffuse public beneficiaries, the favour in which conservation easements are held by legislatures, and the potential loss of resources to future generations.

Adam E. Draper, *Conservation Easements: Now More Than Ever – Overcoming Obstacles to Protect Private Land* (2004) 34 Envtl. Law 247.

This author points out that millions of acres of undeveloped land will change hands and potentially change use between 2000 and 2020. He suggests the conservation easement will be a useful tool to conserve private land.

Christopher S. Elmendorf, *Securing Ecological Investments on Other People's Land: A Transaction Costs Perspective* (2004) 44 Nat. Resources J. 530.

Elmendorf examines the risks for land trusts engaged in active management on land the trusts do not own. He discusses the strategic behaviour landowners may engage in such as holding out in efforts to protect large parcels of land (spatial opportunism) and

temporal opportunism (demanding excessive prices in the future). This writer explores several options available to land trusts to mitigate landowners' opportunistic behaviour: mortgages, collective conservation contracts creating special conservation districts, terminable conservation easements, and liability rule conservation easements.

Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes* (1982) S. Cal. L. Rev. 1353.

This author argues that the notice of the registration of an easement is the only area where the legislature should interfere with freedom of contract in the law of servitudes.

Susan F. French, *What's a Poor Land Trust to Do? Alternatives for Dealing with an Opportunistic World* (2004) 44 Nat. Resources J. 563.

French comments on Elmendorf's suggestions on how to reduce the vulnerability of land trusts to opportunistic behaviour of landowners. She favours extending payments to landowners over the life of the project rather than an initial lump sum payment and providing a process for the trust to acquire additional use restrictions in the future. These measures, according to this author, enable land trusts to use conservation easements instead of full ownership by providing the land trust with some security for its investment in restoration.

Julie Ann Gustanski & Roderick H. Squires (eds.), *Protecting the Land Conservation Easements Past, Present and Future*, (Washington, D.C.: Island Press, 2000).

This is a comprehensive collection of articles in which the status of the conservation easement in the United States is set out. It includes a comparison of all legislation enabling conservation easements in the 50 states. The authors organize the comparison by examining the group of states included in each of the 10 federal circuit court districts. The book also includes case studies of the use of conservation easements for different purposes by a variety of land trusts in an array of different landscapes. The case studies include success stories and cautionary tales.

Ann Hillyer & Judy Atkins, *Greening Your Title*, (Vancouver: West Coast Environmental Law Research Foundation, 2000).

The authors provide practical advice to lawyers advising landowners or conservators contemplating entering into conservation easement agreements.

Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions* (2000) 6 The Env'tl. Law. 441.

The author outlines some of the financial issues from a conservator's perspective arising from monitoring and enforcing conservation easements. Options for insurance for occupier's liability, litigation funds, and co-operation among conservators are suggested as methods of defraying or spreading those costs.

Gerald Korngold, *Privately Held Conservation Easements: A Policy Analysis in the Context of in Gross Real Covenants and Easements* (1984) 63 Texas L. Rev. 433.

This article examines all the policy considerations discussed in the previous article and applies them to conservation easements specifically. The author argues that conservation easements should be limited to government ownership which might reduce the amount of land protected but would mandate public hearings in the U.S. An alternative would be to have a conservation easement automatically vest in the government after a specified time (20 years). This enables the efficiency benefits of privately arranged conservation efforts without the dead hand control. Disadvantages would be the possible loss of tax deductions, the reluctance of private landowners to become involved with government, non-perpetual controls, and the disincentive of compulsion. The author suggests that a legislative provision allowing local or provincial government to intervene in enforcement proceedings would provide greater representation of the public voice. Awarding damages and denying injunctions when an injunction would not be in the public interest would allow termination without disrespecting conservation efforts or private property rights. Damages would allow the acquisition of new conservation easements. The author rejects the judicial solution of simply refusing to enforce a private conservation easement in gross. However, the author suggests a Court could apply a public interest standard to enforcement proceedings with respect to common law and statutory conservation easements. Nuisance law and rules relating to easements for public utilities would provide useful analogies and have the flexibility of the public interest standard.

Arlene Kwasniak, *Facilitating Conservation: Private Conservancy Law Reform* (1993) 31 Alta. L. Rev. 607.

The author identifies 3 typical objectives of private conservancy as: disposing of a partial interest in land without the burden of subdivision approval, transfer to a suitable organization, and binding protection in perpetuity. The objectives of common law easements and restrictive covenants and their limitations with respect to private conservancy are summarized. The author examines three Alberta statutes, namely, the Historical Resources Act, the Land Titles Act and the Environmental Enhancement and Protection Act, as possible sites for private conservancy legislation and proposes an amendment to one of these existing statutes.

Arlene Kwasniak, *Local Revenue Base and Conservation Lands: a Law and Policy Review*, The Leading Edge: Stewardship and Conservation in Canada, (July, 2003).

The author summarizes the treatment of conservation lands under municipal government property assessment, taxation, and exemption laws in Canada and the United States. She finds that many municipalities have the philosophy that vacant lands have no value and should be developed. In Alberta, assessment is at market value or agricultural use value. Agricultural use value is determined on the basis of the ability to produce an average net income under typical management practices. The lands must be actually used in farming operations. Market value means the amount a parcel might be expected to realize if sold

on the open market by a willing seller to a willing buyer. Market value is almost always considerably higher than agricultural use value in Alberta. Unused conservation lands would not likely be categorized as agriculture and would be assessed at the higher market value. The author notes that the Alberta government is considering a discretionary exemption for conservancy land but the requirements for this discretionary exemption are not set yet.

Arlene Kwasniak & Donna Tingley eds., *A Legacy of Land: Conservation Easements and Land Stewardship: Conference Proceedings June, 1999* (Edmonton, AB: Environmental Law Centre 2000).

The topics covered at this conference include stewardship, the general utility of conservation easements and their application to woodlots and municipalities, estate planning considerations, tax consequences, appraising conservation easements, and monitoring and enforcing conservation easements.

Arlene Kwasniak, *Reconciling Ecosystem and Political Borders: A Legal Map*, (Edmonton: Environmental Law Centre, 1997).

This author outlines the overlapping jurisdiction of numerous governmental and private bodies when one considers protecting land on the ecosystem scale. She uses the example of an aspen parkland ecosystem south of Edmonton, the last remaining ecosystem of its kind in the world. She points out that there authority in the Municipal Government Act for municipalities to co-operatively govern ecosystems that transcend municipal boundaries.

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future to purchase conservation lands. Appraisals would be required in addition to scientific data to determine economic equivalency. The exploration of alternatives to the projects proposed for the conservation lands under environmental assessment legislation are common conversion and condemnation restrictions. These alternatives should consider factors other than cost of the alternatives. There are strong economic incentives to use public conservation lands over private conservation lands if the public authority can do so without paying anything to convert conservation lands they already own. Notice and public hearing requirements restrict conversion and condemnation of conserved land. A super-majority vote is potentially an effective procedural mechanism for ensuring that non-controversial conversions are approved. A declaration that conservation is the highest and best use of a property provides a measure of protection from condemnation by a co-equal unit of government. Local governments can also grant conservation easements on its fee simple land. These easements would still be vulnerable to condemnation. There should be expedited handling for conversions or condemnations that are non-controversial or where there is a net conservation gain because the harm to the environment is negligible. Another situation where expedited review might be warranted is where it is clear in advance that a conservation organization is acquiring properties that have rich conservation value but also include areas of little or no conservation value but high economic value that the conservation organization intends to resell. Monitoring conservation lands is important to dealing with conversion and condemnation attempts.

Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future* (2002) 88 Va. L. Rev. 739.

This author questions the present generation's ability to predict the needs and preferences of future generations. The environment seems to be more dynamic and subject to more drastic changes than previously believed. She points out that we can't justify our wish that future generations share our aesthetic and ecological values. She argues that conservation easements will require substantial amendments and extinguishment unless we are able to predict accurately the needs and preferences subsequent future generations. Our powers of prediction have not proved to be exemplary. Yet built into conservation easements are mechanisms designed to frustrate modification or termination by making revisions to their terms impracticable or expensive. She recommends making sensible land use decisions now with the hope and expectation that future generations will do the same. The present generation should abandon the illusion that they can save nature through calculated efforts to restrict the options of future generations.

Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands* (2004) 44 Nat. Resources J. 573.

Mahoney argues against perpetual conservation easements for several reasons. She points out that reversing decisions to develop land is not as formidable as other writers suggest. This writer states that reversing decisions to conserve land may not necessarily be easier and less costly than revoking development decisions considering the institutional barriers put in place to prevent development.

Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands* (2002) 38 Idaho L. Rev. 453.

This author suggests that monitoring and enforcement will be significant responsibilities for conservators in the future. She sees a conflict between conservation easements that permit uses that are inconsistent with the protection of biodiversity. She states that active management is required to preserve biodiversity and points out that conservation easements don't require a landowner's commitment to management. She sees potential for the conservation easement to plant the seeds of social and political change by helping to nurture a gradual transition from a traditional, rights-oriented view of private property ownership to a view that also contemplates responsibilities to the larger human and natural community. She suggests that the proponents of biological diversity should take a more active role in shaping the land trust movement and the conservation easements that are acquired.

John Casey Mills, *Conservation Easements in Oregon: Abuses and Solutions*, (1984) 14 Environmental Law 555.

The author traces the legislative history of the conservation easement in Oregon and recognizes reduced cost and speed as advantages of private over government action in saving open spaces. The author cautions that indiscriminate use of conservation easements can lead to inefficient land use, urban sprawl, loss of tax revenue and undermining comprehensive plans. The author suggests Courts would be an ineffective and inefficient means of dealing with these potential negative consequences. The author proposes that government intervention is required to ensure an efficient and functional open space system.

Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands* (2001) 41 Natural Resources Journal 373.

The author of this article uses 5 case studies to demonstrate how conservation easements can be used successfully by private landowners to accomplish the public good of preserving larger ecosystems on private land and enhancing ecosystems on neighbouring public lands.

Dominic C. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements* (2004) 44 Nat. Resources J. 483.

This writer discusses why land trusts choose to protect land by using conservation easements rather than purchasing fee simple interests. He argues that conservation easements are more than just a less expensive alternative than full ownership and suggests that easements are preferred by land trusts when costs of monitoring and enforcing are low or where the landowner's historic use of the land will continue. On the other hand, full ownership of the land is preferred by land trusts when restoration or enhancement of the land's "environmental amenities" is planned.

Restatement of the Law of Property (Third) Servitudes 2000.

Special rules protecting conservation servitudes are included in the 2 volumes. The Restatement reverses the public policy favouring the productive use of land in the case of conservation servitudes.

Henry E. Rodegerdts, *Land trusts and Agricultural Conservation Easement*” (1998) 13 Nat. Resources & Env’t. 336.

In the United States agricultural land may be protected by conservation easements. This writer discusses the tax advantages of conservation easements to farmers.

Carol Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman* (1982) 55 S. Cal. L. Rev. 1404.

This writer points out the importance of an accurate description of the physical characteristics of the land in an instrument creating a servitude. She argues that it is important to be fair to future owners and give notice of the extent of the restrictions contained in the servitude to future owners.

Jeffrey M. Tapick, *Threats to the Continued Existence of Conservation Easement*” (2002) 27 Colum. J. of Env’tl. L. 257.

The author lists the ideological and financial benefits of conservation easements, namely, ideological and financial, continued enjoyment of the land by the landowner, flexibility to tailor the easement to the parties’ specific needs, financial benefits to landowners, perpetual protection, and public benefits. Tapick explains why a conservation easement at common law is not favoured by the law. A conservation easement would not be considered a real covenant or equitable servitude according to Tapick. Monetary damages were the only remedy available when enforcing a real covenant while equitable relief such as injunctions are available for enforcing equitable servitudes. Both the real covenant and equitable servitude had a legal requirement that the benefit “touch and concern the land”. Since the benefits of conservation easements are held in gross and the holder does not necessarily own any land a Court would not enforce it at common law. Statutory conservation easements avoid all these problems. Merger, the doctrine of changed conditions, public policy against dead hand control, the rule against perpetuities, failing to satisfy the technical requirements of the statute such as notification, silence on the intended duration of the easement, and release are still threats to the long term existence of the conservation easement. Tapick points out that the public trust doctrine or charitable trust doctrines might save a conservation easement from termination.

Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, (2004) 44 Nat. Resources J. 600.

Thompson responds to Julia Mahoney's article on the disadvantages of perpetual conservation easements. He points out that perpetual conservation easements eliminate the transaction costs that would be incurred if conservation easements had to be renegotiated periodically. He also stressed that imprudent landowner decisions based on temporary or fleeting considerations are prevented by perpetual restrictions.

Melissa Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date* (2002) 78 Den. U. L. Rev. 373.

These authors survey case law in the United States involving actions by conservators to enforce conservation easements. They point out that the parties' intent, the legislature's intent, contractual terms, statutory provisions, principles for the construction of statutes and contracts, public policy, and extrinsic evidence are potential issues and challenges to a conservator's enforcement efforts.

William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements* (New York City: Urban Land Institute, 1959)

This technical bulletin of the Urban Land Institute is wholly devoted to the concept of the conservation easement which was in its infancy at the time the bulletin was written. The author discusses the advantages of conservation easements and proposes how they would be used in an urban context.

Bruce Yandle, *Comments on Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, (2004) 44 Nat. Resources J. 518.

This academic comments on Dominic Parker's article. Yandle suggests that we should view landowners rather than the land trusts as the instigators of and decision makers with respect to donated property rights. He argues that on this view government regulation of land use influences private land owners decisions to become donors.