

# ADVANCING THE ENVIRONMENTAL RULE OF LAW: A CALL FOR MEASUREMENT

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*Alexandra Dapolito Dunn\* & Sarah Stillman\*\**

## I. INTRODUCTION

What is the rule of law, and what does it mean when applied to environmental, natural resources, and energy law?<sup>1</sup> To begin to peel back the layers of these questions and to derive answers, it is helpful to reflect on a few specific scenarios. Take for example, a multi-national corporation engaging in the extraction of natural resources, such as forestry or mineral mining. How likely is it that this entity would be assessed a civil penalty by the regulatory agency responsible for carrying out regulatory enforcement if it:

1. Engages in its operations without the required permits or authorizations;
2. Fails to pay taxes;
3. Contaminates a local water source;
4. Releases pollutants beyond legal limits; or
5. Fails to provide required public notifications?

How likely is it that this company's officials would face criminal enforcement by the government if it were proven with admissible evidence that, for example, the water contamination was knowing and intentional, and that the company had technologies available to pre-

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\* Alexandra Dapolito Dunn, Executive Director and General Counsel of the Environmental Council of the States; Chair, American Bar Association's (A.B.A.) Section of Environment, Energy & Resources, World Justice Task Force; past Chair, A.B.A. Section of Environment, Energy, and Resources; member of the A.B.A. Presidential Task Force on Sustainable Development. Lecturer in Law, Columbus School of Law, Catholic University of America and Adjunct Associate Professor of Law, American University Washington College of Law. J.D., magna cum laude, Columbus School of Law, Catholic University of America; B.A., cum laude, in Political Science and French, James Madison University, VA.

\*\* Sarah Stillman, Law Clerk, Environmental Council of the States; Visiting Attorney, Environmental Law Institute. LL.M., highest honors, the George Washington University Law School; Environmental Law Master Degree, University Paris 1-Panthéon Sorbonne.

1. Hereinafter in this article, the term "environmental rule of law" is used to refer more broadly to "environment, energy, and natural resources rule of law."

vent the contamination but chose not to employ them due to cost? Thinking further, how might an ordinary citizen obtain information about this company's use of non-proprietary chemicals in its mining activities? To whom might a neighboring family seek redress regarding their concern for the constant passing of ore-filled trucks, the dust which accumulates on their small home's windowsills, and their strong conviction that the dust is causing their child's breathing difficulties? Further, what processes might be in place to educate and inform the public about the project's phases, planned impacts, and possible neighborhood impacts? What agreements might be in place to employ or train local residents so that they benefit from the operation that extracts their community's natural resources? And lastly, what possibility is there that this company might change its course based on public or community input—particularly if the only opportunity for such input is after the operations have commenced? All of these lines of inquiry probe the depth and role of law, regulation, and enforcement in the environmental arena.

The rule of law concept has ancient roots.<sup>2</sup> Although there is no commonly-accepted definition, the rule of law is often described today as encompassing a clear system of laws and requirements, widely accepted and advanced by all levels of society and its governance.<sup>3</sup> There is international consensus on the value and importance of the rule of law, as this statement by Thomas Carothers reveals:

[A]lmost no leader anywhere is openly against the rule of law or will publicly mount an argument that the rule of law is a bad idea for his or her society. And ordinary citizens almost everywhere will respond very positively to commitments by politicians to strengthen the rule of law.<sup>4</sup>

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2. 1 B. JOWETT, *THE POLITICS OF ARISTOTLE TRANSLATED INTO ENGLISH WITH INTRODUCTION, MARGINAL ANALYSIS ESSAYS, NOTES AND INDICES 101-02* (1885) (in *The Politics*, written in 350 B.C., Aristotle argued, "the rule of the law is preferable to that of any individual.").

3. The rule of law definition formulated by the World Justice Project (WJP) is one of the worldliest accepted definitions. "Rule of law" is defined as a system in which the following four universal principles are upheld: (1) the government, its officials and agents, as well as individuals and private entities, are accountable under the law; (2) the laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property; (3) the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and (4) justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve. *THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014*, at 4 box 1 (2014).

4. Thomas Carothers, *Rule of Law Temptations*, 33 *FLETCHER F. WORLD AFF.*, no. 1, 2009, at 49, 52.

Some preliminary study quickly shows that the concept of the environmental rule of law is not new. For example, celebrating its 800th anniversary this year, the Magna Carta<sup>5</sup> was complemented by what could be thought of as one of the first environmental rules of law—a Charter of the Forest in 1217. The Charter, which re-established rights of access to the royal forest for free men, provided tangible rights, privileges, and protections to ordinary people as to the natural resources available in the forests; it also established a relationship between them and more powerful land-affecting entities such as the Monarchy.<sup>6</sup>

In recent decades, the rule of law concept has evolved beyond its traditional focus—on the role of law and legal systems to ensure security and property rights—to law as a tool for promoting and advancing broader goals like sustainable development. This evolution has been supported by thoughtful academic articles on the rule of law and sustainability,<sup>7</sup> legal practitioner conferences on the intersection of these subjects,<sup>8</sup> national and international discussions and agreements,<sup>9</sup> and leading books.<sup>10</sup> The exponential increase in the collective knowledge of the legal community has led to a broader

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5. MAGNA CARTA, ch. 20 (1215), *reprinted in* ENGLISH HISTORICAL DOCUMENTS, 316, 316 (David C. Douglas & Harry Rothwell eds., 1975).

6. Article 9 of the Charter of the Forest states: “Every free man shall agist his own wood in the forest as he wishes and have his pannage. We grant also that every free man can conduct his pigs through our demesne wood freely and without impediment to agist them in his own woods or anywhere else he wishes. And if the pigs of any free man shall spend one night in our forest he shall not on that account be so prosecuted that he loses anything of his own.” THE CHARTER OF THE FOREST, ch. 24 (1217), *reprinted in* ENGLISH HISTORICAL DOCUMENTS, *supra* note 5, at 337, 339.

7. *E.g.*, Sachiko Morita & Durwood Zaelke, *Rule of Law, Good Governance, and Sustainable Development*, in 1 SEVENTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 15, 16 (Jo Gerardu et al. eds., 2005).

8. *See, e.g.*, *Access to Justice and the Rule of Law: The Next 25 Years*, A.B.A., [http://www.americanbar.org/advocacy/rule\\_of\\_law/newsroom\\_events/rule\\_of\\_law\\_conference/rule-of-law-conference-2015.html](http://www.americanbar.org/advocacy/rule_of_law/newsroom_events/rule_of_law_conference/rule-of-law-conference-2015.html) (last visited Mar. 29, 2015) (this conference is one of many yearly Rule of Law conferences coordinated by the American Bar Association).

9. *E.g.*, Press Release, Org. of Am. States, OAS and UNEP Sign Agreement on Envtl. Rule of Law and Sustainable Dev., OAS Press Release E-506/14 (Nov. 19, 2014); Putrajaya Statement, 1st Asia and Pacific Int’l Colloquium on Envtl Rule of Law, U.N. Env’t Programme (Dec. 12, 2013), <http://www.unep.org/delc/worldcongress/WorkshopsEvents/ThePutrajayaStatement/tabid/132340/Default.aspx> (“The constituent elements of environmental rule of law include, inter alia, adequate and implementable laws, access to justice and information, public participation, accountability, transparency, liability for environmental damage, fair and just enforcement and human rights.”).

10. *E.g.*, A.B.A. SECTION OF INT’L LAW, PROMOTING THE RULE OF LAW: A PRACTITIONER’S GUIDE TO KEY ISSUES AND DEVELOPMENTS (Lelia Mooney ed., 2013); TOM BINGHAM, THE RULE OF LAW (Penguin Books 2011).

understanding of the rule of law applied in practice and how it applies to environmental issues.

The environmental rule of law is closely linked to the United Nations' Millennium Development Goals (MDGs), which set targets for sustainable development progress to be met by 2015.<sup>11</sup> Though leaders in the sustainable development community are now turning their attention to the "post-2015 development agenda" and the seminal opportunity it offers to take the environmental rule of law to the next level of global impact. Knowledge and understanding of the importance of the environmental rule of law has evolved, and its continuing evolution is accompanied by a growing desire amongst legal, academic, and civil society organizations, all of which seek to measure environmental rule of law outcomes. A demand for measurement, however, means that time and reflection must be placed into the cultivation of accepted measurement tools and indicators, as well as gaining support for these tools once established. Measuring the status of the environmental rule of law in nations is a complex but critical exercise. A key management principle is that "[y]ou can't manage what you don't measure. . . . Unless you measure something you don't know if it is getting better or worse. You can't manage for improvement if you don't measure to see what is getting better and what isn't."<sup>12</sup> Continuing to affirm and define the environmental rule of law will be an ongoing and essential exercise in the coming years.

This article first discusses how environmental rule of law fits into the Post-2015 Development Agenda. Next, the article discusses various approaches to measure the environmental rule of law—those currently available as well as those under development. Following this, the article discusses specific activities of the American Bar Association's Section of Environment, Energy, and Resources with the World Justice Project to measure and advance the environmental rule of law. Finally, the article concludes with a call to environmental law practitioners globally to become engaged in the process of advancing this area of law and a well-accepted set of metrics.

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11. See U.N. Secretary-General, *Implementation of the United Nations Millennium Declaration: Rep. of the Secretary-General*, Annex, U.N. Doc. A/57/270 (July 31, 2002).

12. F. John Reh, *You Can't Manage What You Don't Measure, About Money*, ABOUT MONEY, <http://management.about.com/od/metrics/a/Measure2Manage.htm> (last visited Mar. 29, 2015); see LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (Frederick A. Stokes Co. 1914) (1913).

## II. ENVIRONMENTAL RULE OF LAW: ITS PLACE IN THE POST-2015 DEVELOPMENT AGENDA

The United Nations (UN) member states recently renewed their commitment to the rule of law as a basis for development during the 2012 UN General Assembly High Level Meeting on the Rule of Law, as well as in the Rio+20 Conference on Sustainable Development Outcome Document, which provides that “democracy, good governance and *the rule of law*, at the national and international levels, as well as an enabling environment, *are essential for sustainable development*, including sustained and inclusive economic growth social development, *environmental protection* and the eradication of poverty and hunger.”<sup>13</sup> The rule of law is directly connected to sustainable development because it sets forth a legal, political, and social order while also advancing security.<sup>14</sup> For example, “Without proper functioning institutions of governance based on the rule of law that promote social stability and legal certainty, there cannot be investment and assumption of risk that form the basis of market economy development, let alone sustainable development.”<sup>15</sup> Rule of law also strengthens accountability for the exploitation of natural resources and, therefore, can reduce abuses of power and corruption as well as attract investments.<sup>16</sup>

In fact, nearly fifteen years ago, 191 UN member states pledged to meet the MDGs for sustainable development by 2015.<sup>17</sup> The eight MDGs were agreed to by all of the world’s countries and international development institutions. Although not specifically referred to in the text, strengthening the rule of law emerged again as essential to promote sustainable development and achieve the MDGs.<sup>18</sup> Notwithstanding the affirmation of environmental sustainability as a MDG, a

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13. G.A. Res. 66/288, ¶ 10, U.N. Doc. A/RES/66/288 (Sept. 11, 2012) (emphasis added); see U.N. Secretary-General, *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. A/66/749 (Mar. 16, 2012) (“Environmental degradation, rapid urbanization, conflict, fragility, severe income inequalities and exclusion of vulnerable groups constitute major challenges to human development and security. Robust principles are needed to underpin the management of our future. The rule of law is a core principle of governance that ensures justice and fairness, values which are essential to our humanity.”).

14. See Issue Brief from U.N. Dev. Programme, *Rule of Law and Development: Integrating Rule of Law in the Post-2015 Development Framework 1-2* (Jan. 2013), <https://www.worldwewant2015.org/node/341332> [hereinafter UNDP Issue Brief].

15. Morita & Zaelke, *supra* note 7.

16. UNDP Issue Brief, *supra* note 14, at 4.

17. G.A. Res. 55/2, ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

18. *Id.* ¶¶ 9, 24, 30.

recurrent criticism of the MDGs is that they insufficiently address the environmental component of sustainable development and the weaknesses in the overall progress toward environmental sustainability persist.<sup>19</sup> It is important to keep the environmental component of sustainability front and center when using the rule of law as a sustainable development underpinning.<sup>20</sup>

Identifying these limitations is not to suggest that the environmental rule of law has failed to make meaningful advances at both the international and national levels. Principle 10 of the 1992 Rio Declaration on Environment and Development pledged to open environmental decision-making to public input and scrutiny.<sup>21</sup> While the legal principles were not binding for the member states, Principle 10 put forward the fundamental elements for environmental rule of law access rights: access to information; public participation; and justice.<sup>22</sup> As the introductory hypothetical suggested, decisions with significant environmental and social consequences are often made without involvement or knowledge from the communities and people whose interests are directly affected. When governmental decisions include these essential access tenants, decisional outcomes are often less environmentally damaging, more sustainable, and equitable. These three key principles can help to ensure that individuals have access to a healthy environment, an opportunity to impact their surroundings, and the ability to derive economic benefit from operations in their communities.

The adoption of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in

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19. See U.N. DEV. PROGRAMME, MAKING PROGRESS ON ENVIRONMENTAL SUSTAINABILITY: LESSONS AND RECOMMENDATIONS FROM A REVIEW OF OVER 150 MDG COUNTRY EXPERIENCES 3 (2006); *Environmental Sustainability for the World We Want: Moving from the MDGs to Post-2015 (World We Want, E-Discussion Framing Paper, Jan. 29, 2013)*.

20. This cultural change requires intention. See, e.g., G.A. Res. 66/102, ¶¶ 5, 14, U.N. Doc. A/RES/66/102 (Jan. 13, 2012) (while reaffirming the importance of the rule of law to realize sustainable development, this resolution only briefly mentions the environmental aspect of sustainable development).

21. United Nations Conference on Environment and Development, June 3-14, 1992, *Report of the United Nations Conference on Environment and Development, Annex I, U.N. Doc. A/Conf.151/26 (Vol.1)*.

22. Principle 10 states, "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." *Id.*

Environmental Matters (Aarhus Convention)<sup>23</sup> is another important step in the promotion of the environmental rule of law. As a multinational environmental treaty that focuses exclusively on the Convention's State parties' obligations to their citizens and nongovernmental organizations, it provides citizens with tools to enforce compliance with their states' commitments.<sup>24</sup> Although limited in geographic scope to Europe,<sup>25</sup> the Convention is the only legally binding international instrument to date that puts Principle 10 of the Rio Declaration into practice. The Aarhus Convention provides for the right to environmental information held by public authorities; to participate in environmental decision-making; and to review procedures to challenge public decisions. Access to information, public participation, and justice are reaffirmed as keys to a more transparent, inclusive, and accountable decision-making process in matters affecting the environment. These are the founding principles of environmental rule of law, as they empower citizens to participate in governance in ways that hold their governments accountable.<sup>26</sup>

Advancement of the environmental rule of law can also be seen in the inclusion of a right to a healthy environment in the constitutions of more than ninety countries in the past four decades. Accompanied by implementing regulations, these constitutional rights are providing citizens with an opportunity to enforce laws that increases environmental protections.<sup>27</sup>

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

24. See *Case Law Related to the Convention*, U.N. ECON. COMM'N FOR EUR., <http://www.unece.org/env/pp/tfaj/jurisprudenceplatform.html> (last visited Mar. 29, 2015) (providing a comprehensive list of cases argued in member States' courts under the Aarhus Convention).

25. The Aarhus Convention is open for signature to "States [sic] members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters." Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *supra* note 23, at 463-64.

26. Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1, 1-2 (2007); see AARHUS CONVENTION COMPLIANCE COMM., CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE 2004-2011 (Andry Andrusevych et al. eds., 2nd ed., 2011).

27. See David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENV'T SCI. & POL'Y FOR SUSTAINABLE DEV., July-Aug. 2012, at 3, 8; see, e.g., *Environmental Justice in the Philippines*, UN DEV. PROGRAMME, [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/projects\\_and\\_initiatives/environmental-justice-philippines](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/projects_and_initiatives/environmental-justice-philippines) (last visited Mar. 12, 2015) (stating that the new Rules of Procedure for Environmental Cases, which governs the civil,

These substantive and procedural gains, however, can be undermined by common threats to the rule of law that impact the environmental arena as much as any other—these include poverty, civil strife, corruption, and authoritarian governments. Additional barriers such as illiteracy, poor access to communication channels, transaction costs in personal time, fees to access legal remedies, and the risk of personal or property retaliation can effectively discourage citizens from exercising environmental rights.<sup>28</sup> Thus, mere legal entitlement to environmental rule of law elements like information, participation, and a justice system is insufficient to fully realize the potential benefit of this area of law.

The MDGs set forth commitments to be met by 2015,<sup>29</sup> and the UN is expected to adopt the final version of the Sustainable Development Goals (SDGs)—new targets built on the achievements of the MDGs in September 2015.<sup>30</sup> The SDGs are not meant to replace the MDGs; they offer the UN member states an opportunity to renew and further their commitments toward sustainability. The post-2015 development agenda provides a clear opportunity to take the environmental rule of law as it has been shaped thus far by the events and concepts described above, and find ways to develop meaningful international commitments and actions. For example, one of the new SDGs is meant to promote more peaceful and inclusive societies while providing access to justice, and building effective, accountable, and inclusive institutions at all levels. To achieve this specific goal, member states are expected to promote the rule of law at the national and international levels; ensure equal access to justice for all; develop effective, accountable, and transparent institutions at all levels; ensure responsive, inclusive, participatory, and representative decision-making at all levels; broaden and strengthen the participation of developing countries in the institutions of global governance; ensure public

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criminal, and special civil actions in all trial courts regarding environmental cases, were aimed at protecting the constitutional right people to health by providing a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights under Philippine law).

28. JOSEPH FOTI & LALANATH DE SILVA, *WORLD RES. INST., A SEAT AT THE TABLE: INCLUDING THE POOR IN DECISIONS FOR DEVELOPMENT AND ENVIRONMENT* 5 (2010).

29. G.A. Res. 55/2, *supra* note 17, at ¶¶ 11, 19 (the MDGs range from cutting extreme poverty rates in half to halting the spread of HIV/AIDS and providing universal primary education).

30. U.N. Secretary-General, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet: Rep. of the Sec-General*, ¶ 24, U.N. Doc. A/69/700 (Dec. 4, 2014). The new SDGs include, but are not limited to, achieving gender equality; ensuring availability and sustainable management of water and sanitation for all; and ensuring access to affordable, reliable, sustainable, and modern energy for all. *Id.* ¶ 60.

access to information; and protect fundamental freedoms in accordance with national legislation and international agreements.<sup>31</sup> With a few exceptions, most UN member states support inclusion of rule of law principles in the post-2015 development agenda, aligning with the global public opinion reflected in the UN's World We Want Survey—where having an honest and responsive government rated highly among other issues explored in the survey.<sup>32</sup> Incorporating a general goal to promote the rule of law into the post-2015 agenda is expected to help clarify the actions and investments needed to further rule of law commitments. Moreover, unlike the MDGs, the SDGs do not affirm environmental sustainability as a goal on its own; rather, the protection of our environment appears as an underlying principle that permeates throughout many SDGs.

### III. MEASURING THE ENVIRONMENTAL RULE OF LAW

Having established that the rule of law has emerged as one of the necessary foundations for achieving sustainable development, it is imperative to recognize that legal systems of rights and responsibilities are of limited value if they cannot be enforced by courts or other independent and impartial bodies, or if decision-makers cannot be held accountable. One Achilles heel is that “efforts have concentrated on developing new laws and creating new institutions, rather than building capacity for ensuring compliance with existing rules. Yet without compliance, laws and regulations are meaningless . . . and cannot promote sustainable development.”<sup>33</sup> Policymakers and practitioners struggle to demonstrate the effectiveness of efforts aimed at strengthening the rule of law partly because there is a lack of empirical data on policy and compliance effectiveness.<sup>34</sup> The time has come to measure the actual adherence to the rule of law principles by looking at the policy outcomes rather than focusing on the legal and institutional framework.<sup>35</sup> Measuring is often said to be key to advancing the rule

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31. Report of the Open Working Group of the General Assembly on Sustainable Development Goals, in letter dated Aug. 1, 2014 from the Permanent Representatives of Hungary and Kenya to the United Nations addressed to the President of the General Assembly, 22, U.N. Doc. A/68/970 (Aug. 12, 2014).

32. MY WORLD ANALYTICS, <http://data.myworld2015.org> (last visited, Mar. 12, 2015) (this website provides the live results from the World We Want Survey operated by My World).

33. Morita & Zaelke, *supra* note 7, at 15.

34. *See id.* at 19.

35. *See* Jeffrey K. Staton, *A Comment on the Rule of Law Unplugged*, 59 EMORY L.J. 1495, 1504 (2010) (“It is hard to imagine a less controversial claim than that the rule of law must be measured.”).

of law and there are over one hundred systems of measurement.<sup>36</sup> Some of these systems are sponsored by international organizations, while others are driven by non-governmental initiatives.

Measuring the environmental rule of law is a complex and technical exercise. Data is often inconsistent, difficult to collect, and even more difficult to compare given differing ecosystems and extensive biological diversity around the world. Measuring the environmental rule of law raises challenging political questions, as it expects governments and institutions to open themselves to external scrutiny while raising the rights of civil society. These tensions, while omnipresent in developed nations, are only magnified in nations torn by political conflict and insecurity, those struggling to establish democratic and legal institutions, and those under economic stress. In addition, when it comes to environmental-related rights and liability, legal principles such as standing or the amount in recovery are still evolving and cannot be said to be well-established in many countries around the world.<sup>37</sup>

Measuring the rule of law requires reflection on rights and responsibilities in a sophisticated manner. For example, if a business entity pollutes a river that runs near a community, do the residents have standing to pursue monetary compensation for the environmental damage, or to have the water quality remediated?<sup>38</sup> In sum, the rule of law is a complex social phenomenon.<sup>39</sup> “[M]oving from the typical list-making activity, which is associated with defining the rule of law, to an operational measure of the concept requires a statement about the hierarchy of elements on the list.”<sup>40</sup>

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36. Juan Carlos Botero et al., *The Rule of Law Measurement Revolution: Complementarity Between Official Statistics, Qualitative Assessments and Quantitative Indicators of the Rule of Law*, in *INNOVATIONS IN RULE OF LAW: A COMPILATION OF CONCISE ESSAYS* 8, 8 (Juan Carlos Botero et al. eds., 2012).

37. E.g., Etienne Vergès, *Risks and Uncertainties of Scientific Innovations in French Liability Law: Between Radical Departure and Continuity*, 59 *MCGILL L.J.* 889, 906-07 (2014) (describing the expansion of pure ecological damage into French law as a sharp departure from the general principles of civil liability).

38. See generally Timothy Belevetz, *The Impact on Standing Doctrine in Environmental Litigation of the Injury in Fact Requirement in Lujan v. National Wildlife Federation*, 17 *WM. & MARY J. ENVTL. L. & POL'Y REV.* 103 (1992); Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 *MINN. L. REV.* 83 (2007); Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 *S. CAL. L. REV.* 1 (1985).

39. Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 *HAGUE J. ON RULE L.*, 269, 270 (2011).

40. Staton, *supra* note 35.

These difficulties have led to several different approaches to measure the environmental rule of law. Most approaches are moving beyond measures of institutional performance or existence of formal rights, and often include collecting user perspectives through surveys and working to improve availability and quality of data. The World Bank's Worldwide Governance Indicators, for example, aggregate six indicators concentrated on security of persons and property, contract enforcement, and property rights, but this measuring system does not focus much on environmental issues.<sup>41</sup> Other indices are meant to measure specific aspects of the rule of law, such as the Judicial Reform Index developed by A.B.A. Rule of Law Initiative, Transparency International's Global Corruption Barometer, or the procedural rights measurement developed by The Access Initiative.<sup>42</sup> Some review processes have been put in place to measure countries' compliance with international norms, such as the peer review process set forth by the UN Convention Against Corruption.<sup>43</sup>

During the last two decades, an increasing number of corporations around the world have also taken on the responsibility to produce annual sustainability reports,<sup>44</sup> and "[w]hile fewer than 100 firms globally reported such information twenty years ago, by 2013 more than 6,000 companies were issuing sustainability reports."<sup>45</sup> Several remarkable initiatives should be mentioned, such as the "CERES/Valdez Principles" set of environmental reporting guidelines developed by the U.S.-based Coalition for Environmentally Responsible Economies (CERES).<sup>46</sup> Moreover, CERES and the United Nations Environment Program launched the Global Reporting Initiative (GRI) to develop reporting guidelines to account for economic, social,

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41. Daniel Kaufmann et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues 2* (The World Bank Dev. Research Grp. Macroeconomics & Growth Team, Policy Research Working Paper No. 5430, 2010).

42. *Global Corruption Barometer 2013: Report*, TRANSPARENCY INT'L, <http://www.transparency.org/gcb2013/report> (last visited Mar. 30, 2015); *Judicial Reform Index (JRI)*, A.B.A., [http://www.americanbar.org/advocacy/rule\\_of\\_law/publications/assessments/jri.html](http://www.americanbar.org/advocacy/rule_of_law/publications/assessments/jri.html) (last visited Mar. 12, 2015); *The Access Initiative (TAI)*, WORLD RES. INST., <http://www.wri.org/our-work/project/access-initiative-tai> (last visited Mar. 12, 2015).

43. United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 42146.

44. This modern trend is often referred to as "sustainability," "environmental, social and governance" (ESG), "non-financial" or "corporate social responsibility" (CSR) reporting, depending on the degree of focus on environmental, social, or corporate governance issues. Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries 2* n.1 (Harv. Bus. Sch., Working Paper No. 11-100, Aug. 20, 2014).

45. *Id.*

46. *Id.* at 5.

and environmental performance. The goal of such an initiative was “to establish sustainability reporting at par with financial reporting in terms of rigor.”<sup>47</sup> Last November, the UN Global Compact launched an innovative program to help boards of directors accelerate recognition of the material impacts of non-financial issues and to integrate sustainability into business strategy and operations.<sup>48</sup>

This trend toward reporting non-financial information is not, however, a surrogate for an effective rule of law. There exist both the need and room for an environmental rule of law measurement that is neither corporate-centered nor focused on other aspects of sustainable development, but is fully rounded and takes into account all impacted parties and elements.

#### IV. A SPECIFIC EFFORT TO DEVELOP AN ENVIRONMENTAL RULE OF LAW METRIC

In an attempt to answer the call for a thorough measure of the rule of law as applied to environmental issues, the American Bar Association Section of Environment, Energy and Resources (SEER) has been working closely with the World Justice Project (WJP) to further study the nexus between the rule of law and environmental issues. The A.B.A. has long been committed to working with the United Nations in its efforts to promote sustainable development, and it remains fully dedicated to implement the broader post-2015 development agenda.<sup>49</sup>

Through the Section’s nearly ten-year investment of time, energy, and financial contributions to the WJP, its World Justice Task Force is now working closely with the WJP to frame and commence a multi-year project that will study the nexus between environment and energy issues and the rule of law. SEER’s efforts with the WJP will result in a report focused on the Environmental Rule of Law, which the WPJ will release in Summer 2016 at the World Justice Forum V in London. The report will be based on the WJP Rule of Law Index<sup>50</sup> developed through extensive surveys and leveraging excellent contacts with environmental professionals from around the world through the World Justice Forums. By including case studies and information to

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47. *Id.*

48. *Global Compact Board Programme: Unlocking the Value of Corporate Sustainability*, U.N. GLOBAL COMPACT, [https://www.unglobalcompact.org/docs/issues\\_doc/lead/board\\_programme/PDFs/BoardProgramme\\_Brochure\\_2014.pdf](https://www.unglobalcompact.org/docs/issues_doc/lead/board_programme/PDFs/BoardProgramme_Brochure_2014.pdf) (last visited Mar. 30, 2015).

49. Letter from William C. Hubbard, President, A.B.A., to Ban Ki-moon, Secretary-General, U.N. (Dec. 12, 2014), [http://www.americanbar.org/content/dam/aba/images/office\\_president/United\\_Nations\\_Sustainable\\_Development\\_121214.pdf](http://www.americanbar.org/content/dam/aba/images/office_president/United_Nations_Sustainable_Development_121214.pdf).

50. RULE OF LAW INDEX, *supra* note 3.

offer insights into the status of the environmental rule of law globally, the Index is the first attempt to systematically quantify the rule of law around the world; it remains unique in its operationalization of rule of law dimensions into concrete questions.<sup>51</sup> It also measures the rule of law experience in everyday life in ninety-nine countries worldwide through surveys to 1,000 people in the major cities of each country, as well as interviews with 2,400 experts worldwide.<sup>52</sup> While there will never be one single set of metrics to evaluate the environmental rule of law, the SEER/WJP collaboration presents an example of an intentional approach that will add to the body of knowledge in this area.

## V. CONCLUSION

This article has demonstrated the importance of advancing an environmental rule of law metric in the context of the post-2015 sustainable development agenda. There are several opportunities available in the coming years, particularly as the SDGs are adopted and UN member states are required to meet these new targets. A missing link at this moment is a functioning and comprehensive environmental rule of law measurement system. This article has highlighted several but delved more deeply into one in particular. Based on the great number of existing initiatives to measure the rule of law, and given the lack of an agreed upon rule of law definition, it will be difficult to reach a common agreement on a single environmental rule of law metric. Notwithstanding the technical, political, and legal difficulties mentioned in this article, being able to measure the environmental rule of law would be a monumental advance toward the achievement of sustainable development and a greater protection of our environment.

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51. *Id.* at 162.

52. *Id.* at 9; see *WJP Releases New Index and Interactive Data*, WORLD JUSTICE PROJECT (Mar. 6, 2014), <http://worldjusticeproject.org/blog/wjp-releases-new-index-and-interactive-data>.