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What Is International Aviation Law?

1.1. INTRODUCTION: A BOOK ABOUT INTERNATIONAL AVIATION LAW

1.1.1. *Introducing Aviation Law in Its International Dimension*

In his landmark casebook-treatise *Aviation Law*, Professor Andreas Lowenfeld set out to answer the challenge of his friend, Judge Henry Friendly, that there would only be value in giving the rules and regulations governing air transport separate treatment if “the heads of [the] given subject can be examined in a more illuminating fashion with reference to each other than with reference to other branches of law.”¹ Despite Judge Friendly’s negative appraisal of the possibility, Lowenfeld prevailed. *Aviation Law* – expanded considerably with the publication of its second edition in 1981 – provided an integrated overview and analysis of the broad, and occasionally disparate, “heads” (e.g., economic, safety, and tort) of U.S. aviation law to a generation of students, practitioners, and academics before tumbling into obsolescence as its author abandoned further updates in favor of new research agendas.² As the size and format of the book you currently hold in your hands (or have downloaded to your eReader) make apparent, *The Principles and Practice of International Aviation Law*³

¹ ANDREAS F. LOWENFELD, *AVIATION LAW: CASES AND MATERIALS* xiii (1972) (internal quotation marks omitted).

² See, e.g., ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* (2d ed. 2008); ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* (3d ed. 2005); *THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS* (Andreas F. Lowenfeld & Linda J. Silberman eds., 2001).

³ We prefer the term “international aviation law” to “international air law.” Other authors have a different view, see, e.g., I. H. PH. DIEDERIKS-VERSCHOOR, *AN INTRODUCTION TO AIR LAW* (Pablo M. J. Mendes de Leon ed., 9th rev. ed. 2012). Our preference, which follows that of Professor Andreas Lowenfeld’s treatise (discussed in the main text), is motivated only by our view that the word “aviation” can be used independently of the word “law” to describe the industry we

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is not a direct descendant of Lowenfeld's work. It is not a thousand-page hybridization of scholarly treatise and casebook. Neither is it a recitation of the "black letter" of any single jurisdiction's aviation law. Rather, what follows is a fully up-to-date critical introduction to aviation law in its *international dimension* that addresses those elements of national and inter-State legal and political cultures that continue to have the greatest impact on the development of international aviation law.

1.1.2. *Complexity of International Aviation Law*

The choice of a global perspective on aviation law in place of a jurisdiction-specific analysis is not accidental. For more than sixty years the air transport industry has functioned as probably the world's most visible services sector and (despite, as we will see, the irony of its own legal inability to "globalize" across borders) as one of the principal catalysts for globalization. Revenues from international air passenger and air cargo carriage hugely overshadow those from domestic air transport – a differential that is expected to widen even further in the coming decades.⁴ And, although domestic aviation regulation

are discussing: the term "air" does not appear to have the same autonomy (the "air industry" seems a nebulous idea; a Google search of that term quickly defaults to "airline" or "air transport" industry). For an early consideration of the question of nomenclature, see DANIEL GOEDHUIS, *AIR LAW IN THE MAKING* (1938) (arguing that "air law" is favored also in France (*Droit Aérien*) and Germany (*Luftrecht*) but noting Italian jurist Antonio Ambrosini's use of the even wider term "aeronautical law"). Another approach to naming the subject is taken in the International Civil Aviation Organization's *MANUAL ON THE REGULATION OF INTERNATIONAL AIR TRANSPORT* (Doc. 9626, 2d ed. 2004), at (iv) [hereinafter *ICAO MANUAL*], which draws a distinction between "air transport" as a more specific term, referring to those aspects related to carriage by air (usually commercial air transport), and "aviation" as a more generic term that includes topics such as military, state, and private flying, aircraft manufacturing, and air navigation. Although in this book we focus primarily on international commercial air transport, we also consider legal and regulatory issues that affect other participants in the modern "aviation" value chain (including airports, air navigation service providers, manufacturers, computer reservation systems, and ground-handlers). Accordingly, we still prefer to adopt the wider term.

⁴ Despite the current weak economic conditions, especially in the West, global air transport over the long term is expected to grow by 5% annually until 2030, a compound increase of more than 150%. Differential growth rates, however, will see a relative shift to areas outside the United States and the European Union with Asia and the Middle East in particular expected to become the focus of international air traffic flows. Fully half of the world's new traffic added during the next 20 years will be to, from, or within the Asia-Pacific region, which may therefore overtake the United States as leader in world traffic by 2030 (reaching a market share of 38%). See European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, *The EU's External Aviation Policy: Addressing Future Challenges*, COM(2012) 556 final, at 5 [hereinafter *European Commission Communication, External Aviation Policy*].

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(especially in the United States) certainly exhibits the complexity that no doubt captivated Lowenfeld, the regulatory governance of international air transportation – which of course includes *national* governance of inbound and outbound international air services – is by an order of magnitude even more complex. Indeed, while the tempo of regulatory change has fluctuated between intrusive and light-handed, complexity is *always* implicated when one considers the task of regulating air transport within, across, and beyond the borders of more than 190 sovereign States. Comprehending this legal labyrinth without a modern foundational text is a formidable challenge for a dedicated academic and almost impossible for students and practitioners who must, by necessity, compartmentalize their time. We hope that this book will serve all of these potential readers.

1.1.3. Enduring Role of Domestic Law

Nevertheless, it must be obvious from the foregoing statements that domestic aviation law retains an important place in this study even though our principal focus is international. As this chapter introduces, and as the remainder of the book elucidates, there is a dynamic relationship between aviation law's “classically” international components (e.g., the corpus of bilateral and multilateral agreements) and the State (or, in the case of the European Union (EU), supra-State) legal systems that regulate air transport. For example, although almost every country has laws addressing the civil liability of air carriers for any damage they may cause to their passengers, cargo, or to third parties on the ground, to the extent that a flight responsible for the damage can be identified as international, one or more multilateral treaties will set the baseline rules for the responsible carrier's liability, the choice of jurisdiction for any lawsuits, and the carrier's available defenses.⁵ In those situations, domestic courts will have direct jurisdiction over claims arising from damages caused by an air carrier's performance of international services, yet much of the procedural and substantive disposition of those claims will be, depending on your perspective, aided or constrained by the international legal obligations contracted by the carrier's home State.

1.1.4. Definitions, Sources, and Organizations

In the next part, we will define more precisely what we mean in this book by the term “international aviation law.” We will then discuss the book's

⁵ For further discussion, see *infra* Chapter 7.

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interpretive approach – one that relies not only on traditional doctrinal scholarship, but also at times on economic analysis and on other so-called rational choice methodologies. Next, we will review the sources of international law and briefly explain how they intersect with international aviation law in both its public and private dimensions. Finally, we will consider how international aviation law is applied through a number of governmental and nongovernmental bodies and explore how those organizations (both public and private) continue to help shape legal developments in the field. More detailed exposition of all of these topics will be found throughout the remaining chapters.

1.2. THE DISTINCTIVENESS AND CONTENT OF INTERNATIONAL AVIATION LAW

1.2.1. *A Discrete Object of Study?*

It is not necessarily obvious what is meant by “aviation law” or, more specifically, “international aviation law.” Is there really a distinct body of the law of *aviation* that stands comparison with “organic” subjects like the law of *contracts*, the law of *property*, and the law of *torts*? To restate the question in stronger terms, is international aviation law simply an academic illusion open to Judge Frank Easterbrook’s charge of being patently absurd like his mythical “law of the horse” and thus “doomed to be shallow and to miss unifying principles”?⁶ Lowenfeld’s case for aviation law as a discrete object of study was made easier by the fact that he grounded his materials in the legal culture of the United States. A designated segment of Title 49 of the *United States Code*, for instance, specifically covers aviation. At the same time, however, laws as sectorally panoramic as the Sherman and Clayton Antitrust Acts and the Railway Labor Act⁷ have undeniably powerful effects on the functioning of the U.S. aviation industry. To cut a line that demarcates “pure” aviation statutes from “aviation-related” legislation would not only render an account of this area of law woefully incomplete, but would also be needlessly artificial. Still, to legal conservatives who may be suspicious of *sui generis* bodies of law that depart from the ideal of a set of foundational principles covering all of

⁶ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207.

⁷ The Sherman Antitrust Act and Clayton Antitrust Act provide the basis for most U.S. competition regulation including the air cargo and airline industries. The Railway Labor Act was amended to include aviation in 1936. See generally Duane E. Woerth, *Airline Labor Law in the Era of Globalization: The Need to Correct a Misreading of the Railway Labor Act*, ISSUES AVIATION L. & POL’Y (CCH) ¶ 30,011, at 16,011 (2001).

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[More information](#)5 1.2. *The Distinctiveness and Content of International Aviation Law*

life's events, *international* commercial aviation offers a compelling response as to why it can and should support a separate body of law: it is a massive industry, heavily regulated, structurally borderless, and treated by governments (e.g., through creation of a separate United Nations (U.N.) organ to frame common global aviation rules) not as an ordinary part of international trade but as singular and exceptional.⁸

1.2.2. *Content of International Aviation Law*

Simply stated, then, international aviation law is comprised of the rules and regulations (whether domestic, bilateral, or multilateral in their origin) that affect global air transport. The fount of this body of law includes not only the widely recognized sources of international law, but also the national and supranational legal and political cultures of the world community of States. At the level of international law, it is possible to identify aviation-specific multilateral treaties that govern global airline safety, security, and liability, and lately even aircraft financing, as well as the rights and duties of States with respect to control of their sovereign airspaces. From there, the mass of bilateral instruments that directly regulates the international aviation industry's commercial environment (routes, fares, capacity, etc.) can be located, aggregated, and analyzed to draw out general, but reliable, conclusions concerning the privileges and limitations that apply to air carriers' abilities to access foreign markets. Only a handful of "general" treaties (those not specific to any sector) have any bearing on aviation. And, consistent with aviation's exceptionalism, even some of those include whole or partial exemptions for air transport. For example, the North American Free Trade Agreement, which dismantled many of the trade and investment barriers between the United States, Canada, and Mexico, does not embrace their aviation sectors.⁹ Similarly, the Kyoto Protocol to the U.N. Framework Convention on Climate Change singles out emissions produced by international aviation for separate consideration under the auspices of the U.N.'s aviation body, the International Civil Aviation Organization (ICAO).¹⁰

⁸ As always, there are exceptions to the exceptional. Those who reject an autonomous concept of aviation law might concede, at most, that aviation is just a special instance of the broadly similar transport rules that cover maritime and rail. Some evidence exists for this assertion. Italy, for example, has combined its aviation and maritime rules into a single code, *Il Codice della Navigazione* [C. nav.] (It.).

⁹ See North American Free Trade Agreement, art. 1201(2)(b), U.S.-Can.-Mex., Dec. 17, 1992, reprinted in 32 I.L.M. 289 (1993).

¹⁰ See Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 2(2), opened for signature Dec. 11, 1997, 2303 U.N.T.S. 162; see also *infra* Chapter 6 (discussing more fully the implications of the Kyoto Protocol for the control of international aviation emissions).

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[More information](#)*1.2.3. Aviation's Exceptionalism*

By examining the provisions of all of these specific and general treaties, together with their historical and negotiating contexts, a unified (though not always coherent) picture of aviation's exceptionalism emerges. With due respect to Judge Easterbrook, the treatment of aviation law as distinct – in its international dimension no less than in its Lowenfeldian domestic dimension – is not just an academic indulgence. To illustrate: the near-universal prohibition on States granting foreign airlines “cabotage rights,” that is, the privilege to move passengers or cargo between two points within a single domestic territory, makes little sense without reference to what the 1944 Convention on International Civil Aviation (the “Chicago Convention”)¹¹ says about the practice. An international dimension also applies when it comes to domestic laws limiting foreign investment in airlines. Those laws are designed, in large part, to ensure that States comply with requirements in their bilateral air services treaties that their airlines remain “substantially owned and effectively controlled” by their own nationals as a prerequisite for access to foreign markets.¹²

1.2.4. Influence of National Regimes on International Aviation Law

Just as States have national laws to regulate domestic aviation, so too do they have rules governing air services to or from their respective territories. Is that international aviation law as well? To the extent that States are engaging in regulation of transnational activity, of course the answer is yes. Trawling through the particulars of each national regime, however, would require several volumes and has been usefully done elsewhere.¹³ Even so, a few

¹¹ Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 7, 1947) [hereinafter Chicago Convention]. The ninth and latest edition of the quadrilingual text (English, French, Spanish, and Russian) is available from the ICAO, Convention on International Civil Aviation, ICAO Doc. 7300/9 (9th ed. Dec. 3, 2010). As of March 1, 2013, ICAO reported 191 contracting States, making it one of the most “universal” of modern treaties. See Status of Convention on International Civil Aviation Signed at Chicago on 7 December 1944, http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf. As discussed *infra* Chapter 2, the Chicago Convention is the centerpiece treaty of international aviation law and also the constitutive document for ICAO.

¹² Cabotage and airline investment restrictions are discussed in detail *infra* Chapters 2, 3, and 4.

¹³ See, e.g., AVIATION LAW REPORTER (1947–2013) (semi-monthly update on U.S. aviation law, especially tort liability rulings); EUROPEAN AIR LAW (Elmar Giemulla et al. eds., 1992–2013) (regularly updated loose-leaf compilation of EU legislation and decisions affecting air transport).

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powerful jurisdictions have had a substantial and quantifiable impact on the evolution and direction of the general body of international aviation law. The United States, which convened the negotiating conference for the Chicago Convention in November 1944, later pioneered the international air transport liberalization agenda known as “open skies,” provoked the modernization of the international aircraft accident liability regime, and (through the Boeing Company and the Federal Aviation Administration (FAA)) has until recently been the sole decider of global best practices for safe and reliable aircraft manufacture. The EU, now with twenty-eight Member States, legislated a single EU aviation market in 1992. The single market combined the Member States’ commercial airspaces into a unified sovereignty somewhat analogous to U.S. federal airspace and thereby (albeit without prior intent on the part of the legislators) caused the rise of the “low-cost” carrier phenomenon represented by Ryanair, easyJet, and others.¹⁴ The EU has since externalized its commitment to liberalization by pursuing an Open Aviation Area policy (OAA) (its more muscular version of open skies) with several third countries, most notably the United States.¹⁵ Where specific States (and subglobal organizations of States) have significantly shaped international aviation law, their influence will be discussed throughout the book.

1.3. A QUICK LOOK AT LEGAL THEORY

1.3.1. Dominance of Doctrinalism

This book is not wedded to any particular “theory” of law to explain (or speculate) why international aviation law has developed as it has, but we have chosen to refer to legal theory wherever it seems helpful to the reader’s understanding. It must be said that neither international law in general nor international aviation law in particular has been the object of much introspective theorizing by the academy. Both fields have been dominated by doctrinal experts skilled in explicating the content of the law.¹⁶ Most doctrinal

¹⁴ Low-cost carriers now represent 40% of intra-EU capacity, a figure projected to reach between 45% and 53% by 2020. See European Commission Communication, *External Aviation Policy*, *supra* note 4, at 6.

¹⁵ See generally *Developing the Agenda for the Community’s External Aviation Policy*, COM (2005) 79 final (Mar. 11, 2005). For more on the OAA, see *infra* Chapter 3.

¹⁶ This is not an unworthy pursuit given that the “teachings of the most highly qualified publicists of the various nations” are deemed by the Statute of the International Court of Justice to be a “subsidiary means for the determination of the rules of [international] law.” Statute of the International Court of Justice art. 38(1)(d), Jun. 26, 1945 [hereinafter ICJ Statute], <http://www.icj-cij.org/documents/>. See also Michael Peil, *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*, 1 CAMBRIDGE J. INT’L & COMP. L.

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scholars probably share the idealism of the late Columbia law professor Louis Henkin, who famously observed that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹⁷ A domestic tax lawyer would recoil from such a proposition if its tenets were applied to the taxpaying citizenry of a State,¹⁸ but for international lawyers it actually reflects a comforting assumption about the degree to which, and the reasons why, States comply with rules of international law.¹⁹ Sometimes even doctrinalists, especially those working in general international law, are tempted to cross over from observation to promotion and to proselytize or advocate for the merits of their field and its usefulness to humanity. After the “realist” school of international relations emerged during the second half of the twentieth century,²⁰ it was left to pioneering doctrinalists such as Ian Brownlie to rebuff claims that international law was little more than impotent rhetoric.²¹ Brownlie and others distilled a body of international law doctrine that was assumed, more often than proven, to serve as an exogenous constraint on State behavior. “Advocates” like Brownlie professed their faith in international law as *law*, ambitiously hoping that more international law or the “right” kind of international law (no matter how ill-defined) would yield positive outcomes ranging from universal respect for human rights to uninterrupted international peace and security.²²

1.3.2. *Issue of State Compliance*

In the field of international aviation law, Henkin’s assessment is probably close to the truth, although his statement lacks the power to explain a strong culture of State compliance.²³ Do States obey international aviation law because of a sense of moral obligation, or because the efficient and secure coordination of

136 (2012). For a comment on the authoritativeness of the writings of publicists, see *infra* note 74.

¹⁷ LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

¹⁸ A tax law professor who announced with satisfaction to students that “almost all citizens observe almost all principles of tax law and almost all of their tax obligations almost all of the time” might be accused of condoning tax evasion.

¹⁹ *But see* John Strawson, *Introduction*, in *LAW AFTER GROUND ZERO* xi, xix (John Strawson ed., 2002) (arguing that, after the World Trade Center attacks, international law became a post-Westphalian “contested arena”).

²⁰ *See generally* JACK DONNELLY, *REALISM AND INTERNATIONAL RELATIONS* (2000).

²¹ *See generally* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (7th ed. 2008).

²² *See id.*

²³ *See generally* Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2655 (1997) (explaining several schools of thinking on the methods by which international law binds State actors).

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transborder aviation operations simply cannot occur without it? As we will see, defectors from international air transport law regimes, whether the governing instruments are bilateral or multilateral, will suffer immediate economic and other consequences that cannot easily be remedied. That said, there are certain theoretical domains, beyond legal positivism (i.e., doctrinal law from identifiable sources), that a contemporary analysis of international aviation law should consider.

1.3.3. *Use of Economic Analysis*

Aviation law, at least in its domestic iteration, has long been the subject of economic analysis.²⁴ Starting with Michael Levine's pioneering 1965 critique of the now-defunct U.S. Civil Aeronautics Board's approach to economic regulation of the airline industry,²⁵ economics added coherence to aviation law scholarship during the 1970s and 1980s before eventually petering out.²⁶ This is not to say that economists did not continue to comment on aviation, only that the formal legal academy took little interest in attempting to make economics its primary analytical tool once the era of U.S. regulation had ended and eyes turned toward the international arena and the liberalization of cross-border air transport services. Some aspects of international aviation law always received scant attention from economists, particularly the private realm governing air carrier liability, despite the obvious economic consequences these rules have for the air transport industry as a whole.²⁷ In this book, we endeavor to include insights from the field of economics when they seem to explain the emergence (and shortcomings) of international aviation law, but we leave the strictly commercial aspects of airline economics to the side.²⁸ In Chapter 4, for instance, we look at the potential anticompetitive effects of international airline alliances that have received immunity from national

²⁴ The application of economic analysis to aviation law and policy emerged alongside the "Law & Economics" (L & E) movement of the 1960s and 1970s. Despite significant resistance within the legal academy, L & E remains the most successful interdisciplinary partnership between academic law and another academic field. See generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2011).

²⁵ See Michael E. Levine, *Is Regulation Necessary?* *California Air Transportation and National Regulatory Policy*, 74 *YALE L.J.* 1416 (1965).

²⁶ See, e.g., ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* (1981).

²⁷ See *infra* Chapter 7.

²⁸ For a useful introduction to commercial planning and business economics in the airline industry, see RIGAS DOGANIS, *FLYING OFF COURSE: AIRLINE ECONOMICS AND MARKETING* (4th ed. 2010).

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antitrust rules. We do not, however, look closer at the complex revenue-sharing and marketing agreements that sustain these alliances.

1.3.4. *Rational Choice Theory*

More recently, a new generation of international law scholars has taken its cue from international relations theorists rather than from the orthodox, but theoretically limited, thinking of the doctrinalists.²⁹ Leveraging economic analysis and other rational choice methodologies, the new scholarship attempts to provide instrumental accounts of international law and compliance without recourse to traditional (but vague) concepts such as “legality” or “morality.”³⁰ Rational choice adherents believe that in order to understand international law, scholars and students alike must go “behind” it to track, explain, and predict what they see as the largely self-interested behavior and motivation of States. Given the unavoidable economic and other State-interest implications of international aviation, rational choice theory opens up a richer methodology to understand and critique international aviation law. For example, the principle of “international Paretianism” – one of the conceptual products of this new literature – holds that States will not enter into international agreements unless they believe that they are made better off as a result of the transaction.³¹ When applied to international aviation, the principle helps to clarify why, for example, an aviation power like the United States has eagerly entered open skies treaties that expand market access opportunities for its airlines, but is hesitant to commit to a global aviation emissions reduction agreement that would impose heavy financial burdens on those same carriers.³² Moreover, as we will illustrate throughout the following

²⁹ For an early example, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989).

³⁰ Or, at least, this is the explanation for the field offered by neo-rationalists Jack Goldsmith and Eric Posner in *The New International Law Scholarship*, 34 GA. J. INT’L L. 463 (2006). Other scholars in the rational choice “mode” have attempted to offer more nuanced views that retain some of the “old thinking” on international law. See, e.g., JOEL P. TRACHTMAN, *ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008). For further examples of the different applications of rational choice theory in the field of international law, see *ECONOMICS OF PUBLIC INTERNATIONAL LAW* (Eric A. Posner ed., 2010); Symposium, *Rational Choice and International Law*, 31 J. LEGAL STUD. S1 (2002).

³¹ See ERIC A. POSNER & DAVID WEISBACH, *CLIMATE CHANGE JUSTICE* 6 (2010). International Paretianism is derived from “Pareto efficiency” in normative economics, namely, the proposition that “[a] change is said to be superior if it makes at least one person better off and no one worse off.” RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 54 (pbk. ed. 1983).

³² For further explanation, see Brian F. Havel & Gabriel S. Sanchez, *Toward a Global Aviation Emissions Agreement*, 36 HARV. ENVTL. L. REV. 351, 372–75 (2012).