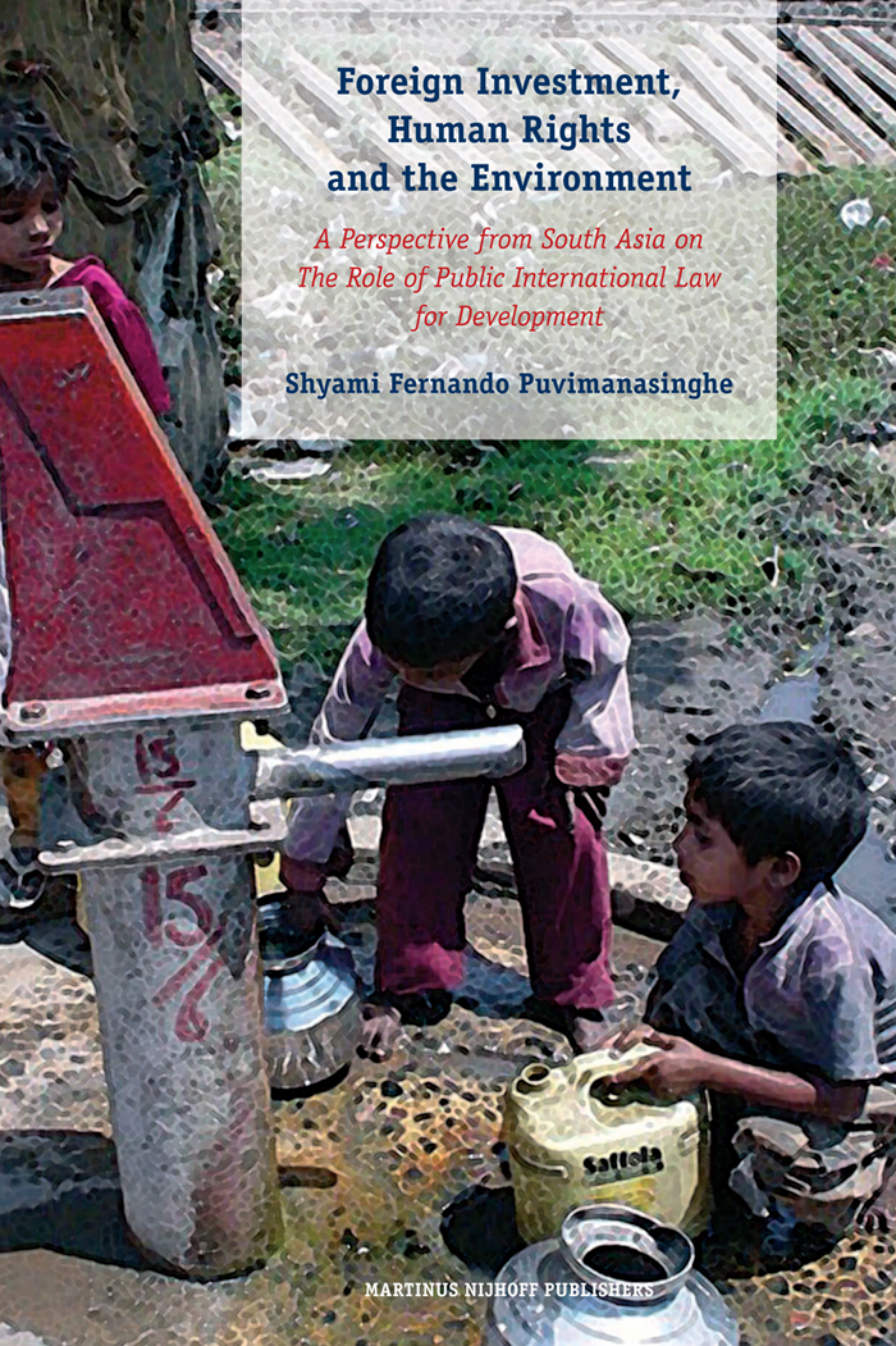
Foreign Investment,
Human Rights
and the Environment
A Perspective from South Asia on
The Role of Public International Law
for Development
Shyami Fernando Puvimanasinghe
MARTINUS NIJHOFF PUBLISHERS

FOREIGN INVESTMENT, HUMAN RIGHTS AND THE ENVIRONMENT

Foreign Investment, Human Rights and the Environment

A Perspective from South Asia on The Role of Public International Law for Development

by

Shyami Fernando Puvimanasinghe

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FOREWORD

In the last few decades, the international law on foreign investment has been preoccupied with the liberalization of movements of foreign investment and increasing the standards of protection that was to be given to the foreign investment which flows into developing states. The hold of neo-liberal philosophies on the subject was so intense that little attention was paid to the fact that such investment, though beneficial, could also have adverse impacts on the economic development as well as the environment of the states which did not have the resources to regulate the influx of such investment. It is a breath of fresh air in the subject that a young scholar has written a measured work on the nature of investments made by multinational corporations, emphasizing the fact that it could have beneficial as well as harmful effects. Shyami Puvimanasinghe is to be congratulated on writing this book which explores, in a balanced fashion, the means by which conduct of multinational corporations deleterious to host states as well as to global interests could be avoided and if it takes place, how responsibility for it is to be allocated.

The topic is a difficult one to deal with. The preponderance of attention by international lawyers has been on the protection of the interests of the multinational corporations. Their endeavours have sometimes been misdirected. The law that has evolved is full of inconsistencies. The liability of the multinational corporation is cloaked through arguments relating to lack of personality but yet, its right to present a case before international tribunals is affirmed with vigour. There have been efforts to develop soft, non-binding codes, recognizing that there is a problem, but no development of hard rules that would deal with these problems. The ability of private power to control the rules of international law is demonstrated in these trends.

It is in the context of the law that has so far been developed that the work of Shyami Puvimanasinghe assumes immense relevance. Not only has she written with a splendid passion in addressing these inequities, she has surveyed the whole area of the relevant law, including even peripheral areas, so that a complete picture could be built up within which prescriptions could be made to deal with the problems of responsibility of multinational corporations for their misconduct.

Conventional international law has ignored the existence of centres of power other than states. This view has a historical base but its tenacity is due more to the fact that it is a convenient method of hiding the role of private power. International law has been a convenient cloak for the hiding of colonialism in the past and at present, it cloaks asymmetries of power within the world, enabling unjust solutions in situations where there is obvious injustice. That the large

majority of international lawyers are engaged in the perpetuation of such international law will stand as an indictment of international law as an academic discipline. The major trend in international law does not accord with reality. Related fields such as international relations candidly recognize the existence of other centres of power within the world, including multinational corporations, non-governmental organizations and global movements in the area of the environment, poverty alleviation and human rights. They recognize the need to deal with these centres of power. Equally, philosophers have begun addressing issues of international justice and they take into account the need to control private power which impedes economic development. In domestic law, those who resent the divide between public and private law do so partly because private power equals governmental power in many spheres and artificial results are produced through the maintenance of the distinction. Yet, in international law, the issue of private power is hardly addressed and one can only speculate as to why such a situation persists.

This work makes a powerful display of the need to shift away from the traditional, entrenched ideas of international law. It studies foreign investment in the context of movements that have taken place in the areas of human rights and the environment. It takes examples from South Asian states to illustrate the impact of these movements on foreign investment law, while demonstrating their significance to international law in general. The canvas on which the author has painted is broad. Such a survey is necessary, given the importance of the work and the impressive amount of literature that has been surveyed. Researched and written under the supervision of the distinguished Dutch jurist, Professor Nico Schrijver, and Dr Karin Arts, the work will prove to be a path-breaking study in the field of the interaction between human rights, the environment and foreign investment.

The area studied is comprehensively covered. The jurisprudential and social contexts of the law are well explored. The interaction between old notions of state responsibility and the new notions of a law for sustainable development are well stated. The features of public interest litigation, an innovative feature in South Asian law, are stated. The study of the interaction between national and international law is also a factor that adds to the utility of the study. The extent to which international standards of corporate behaviour and corporate liability could be evolved and be given effectiveness through national law is considered.

It is on the whole a book that would considerably contribute to the advancement of the law in this developing area. Its merit lies in the fact that it is written from the perspective of the developing world but with a sense of fairness and balance. The prescriptions stated in the book deserve close attention so that norms in the area could be thought out for the future with a view to promoting global objectives rather than narrower interests of the few with power.

December 2006

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PREFACE

It is a great pleasure and an honour for me to have the opportunity to write a preface to this work by Dr Shyami Fernando Puvimanasinghe on a very challenging area of international law. The task that she sets out herself to achieve in this book is certainly a very interesting one. The organisation of the book is logical and the layout is very good. Equally impressive is her familiarity with a wide range of literature belonging to the fields of both public international law and international economic/environmental/human rights law. The research that she has carried out is quite original in character and she has put a great deal of effort to present an as up-to-date and informative work as possible.

The content of this book significantly enhances our understanding of the interplay between foreign investment, human rights and the environment in international law in general and in South Asia in particular. It provides a thorough, comprehensive, critical and competent analysis of the subject matter. I am most impressed by the wealth of knowledge demonstrated by Dr Puvimanasinghe throughout the book. It is an extensively researched piece of work which is highly interesting intellectually, pleasant to read and easy to follow.

I am pleased that Dr Puvimanasinghe has produced a highly commendable book on such a rapidly changing and fast growing area of international law. She has made a major contribution to the body of knowledge on the subject. What I also am most impressed about in the book is the care and skill that she has demonstrated in analysing several issues of difficult and elastic character and come up with a comprehensive study of the subject matter. I would like to congratulate her most warmly on the publication of this book which I can happily recommend to researchers and students of international law as well to those interested in international diplomacy and international relations.

December 2006

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INTRODUCTION

Few issues if any are as controversial in international economic law as the regulation of foreign investment. For too long the international law on foreign investment has been preoccupied with one issue only (albeit of great importance): fair treatment of foreign investors and protection of their private property rights. In reality increasing attention is being paid to the public, social and human rights impacts of foreign investment, especially in developing countries, and efforts are being made to maximise their benefits and minimise their disadvantages. So far it has proven very difficult to agree on an international regulatory framework towards this end. Multilateral efforts aimed at standard-setting failed consistently, no matter whether they were undertaken in the context of the World Bank, the United Nations or the Organisation for Economic Co-operation and Development. Therefore, we welcome very much this book by Dr Shyami Puvimanasinghe. It is a solid and academically sound work, written in the best tradition of scholarly work in the field of international law. Her book covers a wide range of public international law matters, especially in the realms of international economic law, human rights law and international environmental law, and analyses the interrelatedness (or: the lack thereof) between these three branches of international law. On all these scores it is up-to-date, balanced and not shying away from highlighting defects. The book makes interesting and new contributions to existing knowledge. The most innovative aspect of the book is the analysis of the role of public interest litigation in pursuing such an integrated approach and enforcement of all too often 'soft law' international law standards at a domestic level. The special attention to South Asia provides the reader with relevant up-to-date information and a highly interesting and distinctive perspective on the application, interpretation and enforcement of what are rather new principles and rules of international law in this particular part of the world. The analysis of past and current practice in, for example, India and Sri Lanka, documents a wealth of relevant information and usefully opens it up to a larger audience. But the book very clearly also pursues a strong own ethical orientation, which makes for a distinctive perspective from a south Asian and with particular reference to the taunting experiences in the field of foreign investment regulation in various South Asian countries, notably India and Sri Lanka. Furthermore, the book also poses legal study in the wider context of development studies, the hallmark of the Institute of Social Studies in The Hague where Dr Puvimanasinghe conducted the main part of her research, under our joint supervision. Her book is indeed a living example of both the relevance (actual and potential) of law for development and

of the value added of infusing legal considerations into development studies and debates.

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December 2006

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This publication embodies an adapted and updated version of my Ph.D. thesis, defended at the Institute of Social Studies (ISS), The Hague, The Netherlands, on 9th May 2006. The completion of a doctoral study marks a milestone on the highway of one's life, and I thank all the persons who supported me in this process, which culminates with this book.

First and foremost I thank my promoters, Professor Nico Schrijver (University of Leiden and ISS) and Dr Karin Arts (ISS), for providing an enabling environment, both intellectually challenging and humanly pleasant, which contributed greatly to the successful completion of my Ph.D. I value the space they left to development of my own ethical orientation and perspective and their active encouragement and support towards the publication of this book. I express my sincere gratitude to the other members of the Thesis Committee, who readily accepted to assess my thesis: Professor M. Sornarajah (National University of Singapore), Professor S. Subedi (University of Leeds), Professor W. van Genugten (Tilburg University), Professor F. Weiss (University of Amsterdam), and Dr R. Kurian (ISS).

I am grateful to the Netherlands Fellowship Programme and the Dutch government for the NFP Fellowship without which this Ph.D. project would not have materialized. To the Institute of Social Studies, I am thankful for the many ways in which it sustained me and I especially appreciate the assistance and support of the Office of the Head of Student Affairs, the Ph.D. Secretariat, the Student Office, the Library and the Computer Department.

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I gratefully acknowledge all the persons who so willingly provided information and insights, and all the institutions from which I collected materials. I do not endeavour to mention individual names here, but place on record, my genuine appreciation. My thanks to the staff of the libraries of the ISS and the Peace Palace in The Hague, the Palais des Nations in Geneva and the University of Botswana in Gaborone; and to the personnel in several offices in Geneva, especially UNRISD, UNCTAD, OHCHR, UNEP and the South Centre. Some of

the materials in this study were obtained from institutions in New Delhi, including the Indian Society for International Law, Indian Law Institute, Centre for Environmental Law, Public Interest Law Centre, India International Centre, University of Delhi and Jawaharlal Nehru University. My field research was based in Sri Lanka, special thanks to: Ministry of Environment; Ministry of Foreign Affairs; Attorney-General's Department; Human Rights Commission; Department of Commerce; Ceylon Chamber of Commerce; Board of Investment; Central Environmental Authority; UNDP-Colombo; SACEP-Colombo; Faculty of Law and Centre for the Study of Human Rights, University of Colombo; Law and Society Trust; Environmental Foundation; Public Interest Law Foundation; Centre for Environmental Justice; Nadesan Centre; Lawyers for Human Rights and Development; International Centre for Ethnic Studies; Marga Institute; Centre for Policy Alternatives; Citizens Trust; Centre for Society and Religion and Movement for National Land and Agricultural Reform.

I thank all my friends especially those who have been most supportive through the last five years – Malika, Nisrine, Veronica, Bimala, Oshani and Bruno, Manosha and Sarath, Sandy and Hanny, Chi and Noel and Ambassador Lionel Fernando and Somalatha Subasinghe. I thank all my family for their support – especially Cheryl and Dr Lakshman Cooray, Chanis and Alexis Boisard, and the children. Finally, to those for whom my appreciation is beyond words, I dedicate this book: my parents – Shelton and Yvonne Fernando; my husband – Dr Ashok Puvimanasinghe; and my children – Amadhya Marishque and Apeksha Marize.

Shyami Fernando Puvimanasinghe
December 2006
Gaborone, Botswana

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1899

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1930

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1945

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1949

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ABBREVIATIONS

AA	Agreement on Agriculture
AC	Appeal Cases
ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
AI	Amnesty International
AIR	All India Reports
AJIL	American Journal of International Law
All ER	All England Reports
APEC	Asia Pacific Economic Co-operation
ASEAN	Association of Southeast Asian Nations
AsYIL	Asian Yearbook of International Law
ATCA	Alien Tort Claims Act
Art(s).	Articles
BITS	Bilateral Investment Treaties
BOI	Board of Investment
BPO	Business Process Outsourcing
BYIL	British Yearbook of International Law
CA	Court of Appeal
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEA	Central Environmental Authority
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERDS	Charter of Economic Rights and Duties of States
CP	Clarendon Press
CriLJ	Criminal Law Journal
CSD	Commission for Sustainable Development
CSR	Corporate Social Responsibility
CUP	Cambridge University Press
DC	District Court
EC	European Community
ECOSOC	Economic and Social Council
ECR	European Court Reports
EGI	Ethical Globalization Initiative
EIA	Environmental Impact Assessment
ELQ	Environmental Law Quarterly
EJIL	European Journal of International Law

EPIL	Encyclopedia of Public International Law
EPL	Environmental Protection Licence
EPZ	Export Processing Zone
ESCAP	Economic and Social Commission for Asia and the Pacific
ESG	Environmental, Social and Corporate Governance
EU	European Union
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
FPI	Foreign Portfolio Investment
FR	Fundamental Rights
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GNP	Gross National Product
GSP	Generalized System of Preferences
GRI	Global Reporting Initiative
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
HL	House of Lords
HRQ	Human Rights Quarterly
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICSID	International Convention for the Settlement of Investment Disputes Between States and Nationals of Other States
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
IDA	International Development Association
IJIL	Indian Journal of International Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IMF	International Monetary Fund
IPRs	Intellectual Property Rights
ISO	International Organization for Standardization
ITC	International Trade Centre
IUCN	International Union for the Conservation of Nature
KLI	Kluwer Law International
LDC	Less Developed Country
LST	Law and Society Trust
MAI	Multilateral Agreement on Investment
MC	Magistrate's Court

MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
MITS	Multilateral Investment Treaties
MNC	Multinational Corporation
MNE	Multinational Enterprise
MSI	Multi-stakeholder Initiative
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
NEA	National Environmental Act
NIEO	New International Economic Order
Nijhoff	Martinus Nijhoff Publishers
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
NORAD	Norwegian Agency for Development Co-operation
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OUP	Oxford University Press
Para(s).	Paragraphs
PCIJ	Permanent Court of International Justice
PIL	Public Interest Litigation
PPP	Public Private Partnerships
Prin(s).	Principles
PRI	Principles for Responsible Investment
PTAs	Preferential Trading Agreements
RIAA	Reports of International Arbitral Awards
SA	Social Accountability
SAARC	South Asian Association for Regional Cooperation
SACEP	South Asian Co-operative Environment Programme
SAELR	South Asian Environmental Law Reports
SAPTA	South Asian Preferential Trading Agreement
SAFTA	South Asian Free Trade Agreement
SC	Supreme Court
SCC	Supreme Court Circular
SIA	Sustainability Impact Assessment
SLJIL	Sri Lanka Journal of International Law
SLR	Sri Lanka Law Reports
SLJSS	Sri Lanka Journal of Social Sciences
SPS	Agreement on Sanitary and Phytosanitary Measures
TBL	Triple Bottom Line
TNC	Transnational Corporation
TRIMS	Trade Related Aspects of Investment Measures

TRIPS	Trade Related Intellectual Property Rights
TVPA	Torture Victim Protection Act
TWLS	Third World Legal Studies
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNCHR	United Nations Commission on Human Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNIDO	United Nations Industrial Development Organization
UNRISD	United Nations Research Institute for Social Development
UNTS	United Nations Treaty Series
VUB	Vrije Universiteit Brussel
WCED	World Commission on Environment and Development
WHO	World Health Organisation
WLR	Weekly Law Reports
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation
YLJ	Yale Law Journal

Chapter One

INTRODUCTION

1.1 Foreign Investment, Human Rights and the Environment

Conceived out of an interest in international law and development, this book deals specifically with the core problem of the adverse effects of foreign direct investment (FDI) activity on the environment and human rights in developing countries. It endeavours to explore how public international law can serve as a means to sustainable development – that is, as a medium for the advancement of development, while simultaneously protecting and promoting human rights and conserving the environment in the context of foreign direct investment. The activities of certain transnational corporations (TNCs) in several countries, particularly in the third world, have led to various negative social and environmental implications.[1] Injury to the human person or property, and damage to the environment often occur in combination and are closely linked in the factual settings involved. The magnitude and frequency of adverse impacts, coupled with the inconsistency and inadequacy of the relevant law and its implementation are illustrated by several case examples. When 40 tons of methyl-isocyanate gas leaked from a pesticide plant of a subsidiary of the TNC Union Carbide in Bhopal, India, on the night of 3 December 1984, the disaster that followed killed over 5,000 people, injured over 500,000, caused severe birth defects to over 100,000 children born of parents exposed to the gas, major economic hardship, massive environmental damage and human misery beyond the realms of imagination.[2] Twenty years later,

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1 UNRISD, *States of Disarray: The Social Effects of Globalization*, UN, Geneva, 1995; UNRISD, *Visible Hands: Taking Responsibility for Social Development*, UN, Geneva, 2000.

2 634 F. Supp. 842 (S.D.N.Y.) affirmed in 809 F. 2d 195 (2d Cir. 1987); V.P. Nanda, 'Export of Hazardous Waste and Hazardous Technology: A Challenge for International Environmental Law', 17 *Denver Journal of International Law and Policy*, 1988, pp. 155, 165–70; M.R. Anderson, 'Litigation and Activism: The Bhopal Case', *Third World Legal Studies*, 1993, p. 175; S. Puvimanasinghe, 'The Bhopal Case: A Developing Country Perspective', 6 *Sri Lanka Journal of International Law (SLJIL)*, 1994, p. 187. Safety measures designed to prevent a gas leak were either malfunctioning or shut down to save on costs, and the plant's warning safety siren had been turned off. Corresponding safety standards in Carbide's plants in the USA were higher by far: S. Shingavi, 'We want Real Justice for Bhopal', http://www.globalpolicy.org/tncs/2004/0625bhopal.htm. The depths of decline of the human condition are illustrated by the words of Champa, a survivor of the disaster, cited by Shingavi: "No one could even think about anyone else. When people died, you said 'thank

on 3 December 2004, the Bhopal tragedy and its victims were commemorated, with the grim reminder that adverse consequences continued to arise so many years later; the hazardous chemicals buried at the company site when the plant was operating and those left behind after the disaster had polluted the soil and underground water, affecting the health of many people who had no other source of water. The victims still lack just compensation and adequate medical, economic and social assistance. The law and its implementing mechanisms had failed to provide redress and mete out justice.[3]

Litigation flowing from the disaster began in its aftermath and continues to date. Early litigation in the form of a class action was dismissed in the USA on the grounds of *forum non conveniens*,[4] and, after protracted proceedings in both the US and India, terminated with a settlement between Carbide and the Indian government. Years later, a class action against Dow Chemicals (which took over Union Carbide) for damages for violations of international human rights law and environmental contamination filed by survivors' organizations and support groups was dismissed by the Federal District Court of New York in March 2003. Reasons included the lapse of time between knowledge of injury and the filing of the action; lack of standing to bring claims on behalf of members; and the impossibility of implementing clean-up orders and medical monitoring due to the remoteness of the location from the US court. Appeals to the Appellate Court followed the dismissal and are based *inter alia* on the inapplicability of time bars to continuous environmental injuries; the withholding of knowledge by the company; the previous practice of the US courts in implementing clean-up orders in remote locations; and the usual practice of representation in class actions.[5] Meanwhile, early in 2005, Dow Chemicals was summoned before an Indian criminal court in a renewed attempt to adjudicate on responsibility.[6] There are far-reaching efforts by activists and organisations, including survivors, who continue the crusade for justice in Bhopal. Women are especially active in these groups since, as in most situations they bear the greatest burdens.

God' and kept walking. When children got free from their mothers, mothers left them behind and didn't even look back. No one could think about people who they had left behind or lost. Everyone was running."

3 'Bhopal Gas Tragedy and its Effects on Process Safety', *International Conference on the 20th Anniversary of the Bhopal Gas Tragedy*, December 1–3, 2004, Indian Institute of Technology, Kanpur, India, http://www.iitk.ac.in/jpg/bhopal12.htm During this Conference it was also revealed that the number of immediate deaths exceeded 8000, that since the accident, over 12,000 died from complications caused through inhaling the gas and that over 120,000 continue to suffer to date; 'Bhopal 20 Years On: Polluted Water, Chronic Illness and Little Compensation', *Global Policy Forum*, http://www.globalpolicy.org/socecon/tncs/2004/1129bhopal.htm

4 *Op. cit.* n. 2.

5 http://www.countercurrents.org/en-bhopal27303.htm; http://www.eians.com/stories/2005/07/26/26om.shtml

6 http://takeaction.amnestyusa.org/action/index.as?step=2&item=11668

In *Doe* v. *Unocal*,[7] a class action was brought by tribal people in Myanmar, who alleged numerous human rights violations and environmental damage by the Burmese government and Unocal in the course of building a gas pipeline from Myanmar to Thailand. Allegations included the killing of tribal people, raping of women, destruction of property, torture and forced labour. In the case against both the government and the TNC, a court in the United States upheld jurisdiction, stating that the act of state doctrine could not protect either of the defendants in the case of *jus cogens*. Although the state was found to have sovereign immunity, the plea did not shield Unocal from an action in relation to complicity in the alleged acts. The claims were based on the US Alien Tort Claims Act.

A trial date had been set for June 2005 but, ending protracted litigation, on 21 March 2005 the parties announced that a final settlement had been reached in this case. The agreement by Unocal includes direct compensation and 'substantial assistance' through the funding of programmes to improve living conditions, health care and education.

These examples have their parallels in other geographical areas, especially in Africa and South America. They include the activities of Freeport McMoran in Indonesia leading to violations of human rights and environmental damage; those of Royal Dutch Shell in Ogoniland, Nigeria,[8] resulting in deaths, human suffering and destruction of the environment; and of Texaco in the Oriente region of the Amazon in Equador,[9] harming indigenous peoples and their ambience.

The core issue that emerges through the examples is that of human dignity and environmental integrity in the context of foreign direct investment through TNC activity. This issue arises more frequently through manifestations of a less drastic nature, such as the poor treatment of workers on a daily basis and the sale of products of low quality in the course of business, causing harm to human

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7 (1997) 963 F. Supp 880. In 1997, a US federal district court agreed to hear the case, which was however later dismissed; M. Sornarajah, *The Settlement of Foreign Investment Disputes*, Kluwer Law International (KLI), The Hague, 2000, p. 365. The plaintiffs' appeal and Unocal's motion to dismiss, led to protracted litigation in the US Court of Appeals for the Ninth Circuit. In 2002, a decision of the California Superior Court upholding jurisdiction made this case the first in US history where a TNC would stand trial for human rights abuses abroad.

8 *Ken Wiwa and Jane Doe, plaintiffs against Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC, Defendants, Ken Wiwa et al., Plaintiffs against Brian Anderson*, Defendant, 96 Civ. US 8386 (KMW), US DC, SDNY, 2002 US. Dist. Ct. cited in M. Fitzmaurice, 'Case Study: *Wiwa and Royal Dutch Petroleum and Shell Trading Company* before the U.S. Court of Appeals for the Second Circuit', *Hague Joint Conference on Contemporary Issues of International Law: From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System,* The Hague, 3rd–5th July 2003. Also see 392F.3d812 (5th Circuit) 2004.

9 In L. Zarsky (ed.), *Human Rights and the Environment: Conflicts and Norms in a Globalizing World*, Earthscan, London, 2002, several authors deal with cases of economics/human rights/environment conflicts from Suriname, Ghana, the Russian Far East, Indonesia, Laos, China, Columbia, Panama, South Africa, Eastern and Central Africa.

health, safety and dignity.[10] It raises questions about responsibility and accountability[11] in the development process, which make the rule of law, the discipline of law and, more specifically, international law seminal to this study. This whole set of issues, it could be argued, raises fundamental questions about values, both human and universal, and the conscience of humanity as a whole. The reality in fact and the *lacunae* in law together provide the mandate for a critical evaluation of public international law and its implementation within the context of investment, development, human rights and the environment.

This research is posited within the interconnectedness – the positive as well as the negative aspects – of globalization. Arup[12] advocates a balanced view of globalization, which is mindful that something big is happening, yet positive about the degree of diversity and contingency in the world. He asserts that the strongest view of globalization carries the prescription for neoliberalism, open trade and free markets, but need not be overwhelming:

> A more nuanced view may lack the elegant simplicity of more linear projections. But it finds the reasons, in the ways economics, politics and cultures work, why differences are still maintainable, indeed, why alternatives can be injected into the global circuits.[13]

This survey is oriented towards the pursuit of such a middle path which positively acknowledges diversity and pluralism in the ways that legal systems work and, through the injection of broader interpretations, alternatives and complementarities to global legal processes, endeavours to adopt a nuanced approach to globalization. The concomitant existence of parallel human, community and international value systems embracing broader social interests including economic development, human rights and the environment needs to be reconciled with the dictates of neoliberalism, free trade and investment. The approach to the law here is with a view to such reconciliation.

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10 W. Bello in *Deglobalization: Ideas for a New World Economy*, Zed Books, London and New York, 2002, pp. 6–7, stated that "several factors came together to focus public attention on the corporation in the 1990s – the most egregious being the predatory practices of Microsoft, the environmental depredations by Shell, the irresponsibility of Monsanto and Novartis in promoting genetically modified organisms, Nike's systematic exploitation of dirt-cheap labour, and Mitsubishi, Ford and Firestone's concealment from customers of serious product defects". Nestle, Walmart and Philip Morris are just three other companies frequently associated with violation of human rights in developing countries.

11 P. Slinn, 'Law, Accountability and Development', *Third World Legal Studies*, 1993, p. vii; Law and Society Trust, 'The Hazards of Technology and Industry: A Challenge for Law and Social Accountability', *Report of Workshop held by Law and Society Trust (LST), Colombo in association with the Indian Law Institute*, Colombo, Sri Lanka, December 1985; A. Dias, 'Human Rights, Environment and Development: With Special Emphasis on Corporate Accountability', *Human Development Report* 2000 *Background Paper*, http://stone.undp.org/docs/publications/background_papers/Dias 2000.html

12 C. Arup, *The New World Trade Organization Agreements-Globalization through Services and Intellectual Property*, Cambridge University Press (CUP), Cambridge, 2000, p. 38.

13 *Ibid.*

This study is set largely within the context of third world states, and thus adopts a developmental approach to international law. In relation to thoughts on a research agenda for Third World Approaches to International Law, B.S. Chimni discusses several possible areas for the re-thinking of this discipline and the critical intervention of international law scholarship, including increasing transparency of transnational corporations and ensuring sustainable development with equity. He states:

> Yet, we need to guard against the trap of legal nihilism through indulging in a general and complete condemnation of international law. Certainly, only a comprehensive and sustained critique of present day international law can dispel the illusion that it is an instrument for establishing a just world order. But it needs to be recognized that contemporary international law also offers a protective shield, however fragile, to the less powerful states in the international system. Second, a critique that is not followed by a construction amounts to an empty gesture.[14]

Towards such a construction, Chimni suggests several approaches, including the pursuit of imaginative solutions to improving the lives of poor and marginal groups; exploitation of the contradictions in the international legal system; efforts to maintain the inner coherence of this system and making individual legal regimes offer some concessions to vulnerable groups. This study's line of argument, to some extent, parallels his approach.

The core problem in this study is elucidated below, through the articulation of a series of issues which arise at each stage of the analysis.

In relation to adverse effects from FDI activity, basic questions arise as to their factual nature, extent and legal consequences. The *lacunae* in the international legal system, as illustrated through the case examples, raise issues which call for its critical evaluation, also with reference to implementation, with a view to assessing its ability to advance economic development while simultaneously protecting and promoting human rights and the environment. The critique of public international law in relation to its actors, structures and processes, as well as its different dimensions, levels and value implications, leads to questions about the complex web of international legal principles relating to TNCs; to economics, human rights and the environment; the role of home and host states; regional and national arrangements; and the interventions of non-state actors. This analysis is posited in an evolving, controversial and elastic sphere of international relations and law, where a binding global agreement has hitherto been an elusive dream. The potential value of the expanding body of soft law, policy and global values could provide solutions to the research problem, and there is a need to

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14 B.S. Chimni, 'Third World Approaches to International Law', A. Anghie *et al.* (eds.), *The Third World and International Order: Law, Politics and Globalization*, Martinus Nijhoff (Nijhoff), Leiden/Boston, 2003, p. 72.

bridge the gaps that exist between normative frameworks and value systems, as well as between law and policy. These raise critical questions about the means and processes for giving effect to these laws and policies, as well as for bridging these gaps, through a broad approach to interpretation.

In terms of context, firstly, questions arise with regard to the basic factual fabric which underlies the analysis, including globalization and its regulation, development, and the regional and national settings that define the contours of this study. The core problem posited within this context calls for the identification of key concepts, both goals and means which would best serve to evaluate the international legal system. The analysis of the role of international law and its dual functionality raises the issue whether coherence between the two roles necessitates a third element. In the application of the conceptual framework to the problem, questions arise in relation to the methodology for evaluation, and the approach to be adopted towards that methodology.

The essentially global nature of TNC activities makes it necessary to transcend the realms of local regulation, and raises the issue of their regulation in international law, traditionally confined to the context of inter-state relations. The analysis of regulation here thus necessitates the positing of TNCs within the framework of international law, with a view to assessing the relevant norms and their appropriateness in relation to this study. Issues arise as to the nature and extent of adoption and re-interpretation of norms which relate to states when applied to non-state actors, further complicated by the cross-currents of sovereignty, globalization, market-based reforms and sustainable development. Foremost among the issues which arise are whether international legal personality should extend to include transnational corporations; whether international jurisdiction can embrace adverse human rights and environmental consequences flowing from their activities; whether international responsibility can ensue from such impacts; and whether international minimum standards can be applied in the face of such effects.

The balancing of conflicting interests necessitated by sustainable development and the law relating to it raises the issue whether international legal norms in the spheres of foreign investment, development, human rights and environment do in fact lead to convergence or divergence. The meaning and legal implications of sustainable development in international law need to be explored, also with a view to the implementation of its principles at the international, regional and national levels. Conversely, the evaluation of attempts at the integration of economic and non-economic interests in practice, for instance, public interest litigation in the East or the Triple Bottom Line in the West, needs to be explored in terms of the possible cross-fertilization of principle and practice, and the progressive development of international law.

The state-centric nature of human rights poses complications with regard to their application to private actors, necessitating an inquiry into means of stretching these conceptions to non-state actors (NSAs). Trends in the progressive development of international law warrant examination, given the considerable body of

soft law and public policy embracing a far-reaching body of international public values in this sphere, and the need for binding obligations. The transition from soft law and policy to binding obligations and their implementation in fact needs to be considered through innovative approaches to the interpretation of the sources of public international law.

The inability of the international community to reach a consensus on regulation of investment activity, the centrality of power, politics and conflicting values which pervade the arena of international economic law and the many diversities and nuances both within and among the different levels and means of regulation raise issues relating to alternatives in regulation. The emerging body of international public values, policy and, to some extent, law through numerous corporate codes of conduct as well as civil society initiatives warrant close examination in the light of the progressive development of international law and the possible emergence of a body of *lex mercatoria* in this regard.

The issue of the role of home and host states warrants analysis, particularly in view of the centrality of sovereignty in international law and the impacts of globalization on state sovereignty, market-based reforms and sustainable development. Home states and their interventions, through intergovernmental institutional arrangements, control over TNCs based in them and extraterritorial application of national laws; and host states and their role in territorial control and legislation need to be analysed within the overall international legal framework, to assess their roles in relation to international law.

The need for enhancement in the implementation of international law and for the integration of legal principles at the international, regional and domestic levels raises issues about the interrelationship of regional and national arrangements (in this case in South Asia and Sri Lanka) in relation to sustainable development in its different dimensions. The evolving body of jurisprudence in the area of public interest litigation (PIL), human rights and the environment in the broader context of sustainable development and the law implementing it warrants deeper analysis. This is because it may provide interesting insights into a reasonably viable instrument for the operationalization of sustainable development, and the critical role of the judiciary in maintaining the rule of law as well as implementing a body of international public values embodied in soft law and policy. Questions arise in relation to PIL as a means of ensuring a measure of accountability, upholding the rule of law, enhancing participatory rights and recognizing legal pluralism and, further, of filling the gaps between soft and hard law, and values and norms.

The changing matrix of actors, structures and processes in international relations requires that international legal studies transcend the limitations of states, state practice and state sovereignty. Questions arise as to the legal value and implications of non-state actor interventions, in particular those of TNCs and NGOs, and how they relate to public international law. The need for public participation now recognized in international law, the emerging body of international public

values, the diversity of international society and consequent need for legal pluralism towards a more inclusive approach to international law, and the progressive development of international law all raise issues warranting analysis.

Finally, the many different strands forming part of the complex web need to be viewed together as a coherent whole, to comprehend the total picture of this study, including the vacuums as well as the duplication. The many bridges of understanding that can fill the gaps that lie *inter alia* between economic and non-economic interests, soft and hard law, law and justice, values and norms, raise questions with regard to the ingredients of a concrete mixture for the cementation of these spaces, and the finding of a fertile ground for convergence.

Consequent upon the above issues, several related questions arise for consideration, namely, the meanings of 'foreign investment' and 'transnational corporation', the connection between sustainable development and foreign investment, and the regulation of foreign investment. The issue of what constitutes foreign investment does not remain static but changes with time and circumstances: in this case, with changes in the nature of international economic relations.[15] Moreover, FDI has diverse forms, although some general features can be described. Foreign investment may be characterized as the transfer of funds or materials from one country (called the capital-exporting country) to another country (called the host country) to be used in the conduct of an enterprise in that country in return for direct/indirect participation in the earnings of the enterprise.[16] This definition also incorporates the meanings of the terms 'home state' (referred to here as the capital-exporting country) and 'host state' (host country). According to Sornarajah, foreign investment involves the transfer of tangible or intangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.[17] It is contrasted with portfolio investment, where there is a movement of money for the purpose of buying shares in a company formed or functioning in another country, the distinguishing element being that, in portfolio investment, there is a divorce between management and control of the company and the share ownership in it.[18] In the case of portfolio investment, it is generally accepted that the investor takes upon himself the risks involved in the making of such investments, as they are not protected by customary international law. But customary international law protected the physical property of foreign investors and other assets directly invested by means of principles of diplomatic protection of the home state and state responsibility.[19]

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15 As pointed out in UNCTAD, *Scope and Definition*, UN, New York/Geneva, 1999, p. 7.
16 S.A. Riesenfeld, 'Foreign Investment', *Encyclopaedia of Public International Law*, 1995, Vol. 2, p. 435.
17 M. Sornarajah, *The International Law on Foreign Investment*, CUP, Cambridge, 2004, p. 7.
18 *Ibid.*
19 *Ibid.*, p. 8.

This study deals with FDI, and the application of international and domestic legal/policy frameworks to foreign portfolio investment (FPI) may differ considerably, given their differences in nature and the differences in management of portfolio investments. Relatively less regulated, more remote and more complex, the risks of adverse effects from portfolio investment are higher, and warrant attention in a separate study. The financial crises in the emerging markets of Mexico in 1994 and South-East Asia in 1997–8, and their enormous social impacts, serve only to buttress this suggestion.

The linkages between FDI and sustainable development are complex,[20] and international law and policy provide some guidance on their interrelationships. The Rio Declaration calls on states to 'co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation'.[21] According to Agenda 21, investment is critical for the economic growth of Less Developed Countries (LDCs), and to meet basic needs in a sustainable manner, without depleting the underlying resource base; sustainable development requires increased investment, and foreign private investment is an important source.[22] At the same time, the regulation of investors and investment activity is also essential, but there is no comprehensive international legal regime for this purpose.[23] As for the issue of what constitutes a TNC, according to the criteria adopted in the Draft United Nations Code of Conduct on

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20 See 'Foreign Direct Investment and Sustainable Development', *Financial Market Trends*, no. 79, OECD, June 2001; S. Subedi, 'Foreign Investment and Sustainable Development', in F. Weiss, E. Denters, P. De Waart (eds.), *International Economic Law with a Human Face*, KLI, The Hague, 1998; M. Sornarajah, 'Foreign Investment and International Environmental Law', in S. Lin (ed.), *UNEP's New Way Forward: Environmental Law and Sustainable Development*, UNEP, Nairobi, 1995, pp. 283–297; L. Zarsky (ed.), *International Investment for Sustainable Development: Balancing Rights and Rewards*, Earthscan, London, 2005; P. de Waart, 'Sustainable Development through a Socially Responsible Trade and Investment Regime', E. Nieuwenhuys, 'Global Development through International Investment Law: Lessons Learned from the MAI', E. Kentin, 'Sustainable Development in International Investment Dispute Settlement: the ICSID and NAFTA Experience', all in N. Schrijver, F. Weiss (eds.), *International Law and Sustainable Development: Principles and Practice*, Nijhoff, Leiden, 2004, at pp. 273, 295 and 309 respectively.

21 Principle 12, Rio Declaration on Environment and Development, UN Doc. A/Conf.1515/Rev.1, 13 June 1992.

22 Para. 2.23. Agenda 21 in para. 30.2, states that through more efficient production processes, preventive strategies, cleaner production technologies and procedures throughout the product cycle, hence minimising and avoiding wastes, the policies and operations of business and industry, including transnational corporations can play a major role in reducing impacts on resource use and the environment. Para. 30.10 states that business and industry including transnational corporations should be encouraged to report annually on their environmental records, as well as their use of energy and natural resources; to adopt and report on the implementation of codes of conduct promoting the best environmental practice, such as the Business Charter on Sustainable Development of the International Chamber of Commerce (ICC) and the chemical industry's initiative.

23 S. Subedi, *op. cit.* n. 20, p. 414.

Transnational Corporations of the United Nations Centre on Transnational Corporations (UNCTC), TNC means:

> An enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activities of these entities, which operates under a system of decision making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.[24]

The Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises state that multinational enterprises usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their activities in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.[25]

Definitions and descriptions of TNCs illustrate that their economic activities transcend state borders and are international/transnational in nature. They usually operate in networks of branches and subsidiaries; decision-making and control often take place in a city far removed in terms of geographical space, and their activities as well as their legal forms are generally vague and nebulous. As pointed out by a United Nations Conference on Trade and Development (UNCTAD) study,[26] there is, in definitions of TNCs, a tendency to include a wide range of entities, and to focus on the nature of the affiliation that must exist among the entities, typically one of inter-firm ownership and control. It is the fact of several entities controlled in a coordinated fashion by another foreign entity that gives rise to special concerns that instruments using these definitions are intended to address.

One basic problem with regulation of TNCs in the international arena is that international agreements cannot directly impose obligations on them. Thus state intervention and the goodwill and resolve of both home and host states become fundamental to any attempt at regulation, which would involve treaty-making and implementation through domestic incorporation. This leads to issues of conflicting interests among states. It involves diverse dynamics which have to date prevented the international community from creating a binding agreement reconciling and accommodating diversity,[27] in a spirit of international co-operation and

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24 Draft Code of Conduct of the UNCTC, UN Doc. E/1990/94, 12 June 1990, para. xx.

25 Concepts and Principles 1, OECD Guidelines for Multinational Enterprises, OECD, Paris, 27 June 2000.

26 UNCTAD, *op. cit.* n. 15, p. 46.

27 The failure of the UNCTC Draft Code of Conduct for Transnational Corporations, OECD's Multilateral Agreement on Investment as well as efforts within the WTO, exemplify the vacuum in international relations and law.

solidarity, in the intersecting area of investment, development, human rights and the environment.

In the context of the failed Multilateral Agreement on Investment (MAI), Muchlinski states:

> . . . the OECD Guidelines on Multinational Enterprises could be incorporated as an annex to the MAI. However, assuming these matters reach the agenda, a likely outcome would be an anodyne, hortatory provision on environmental protection, which echoes the OECD Environmental Guideline, coupled perhaps, with some protection of foreign investors against discriminatory applications of host state environmental laws and regulations.[28]

In view of the all-embracing nature of sustainable development the potential components of law that can be discussed are vast. Moreover, related phenomena like voluntary self-regulation[29] by investors and interventions of civil society can also be included. For the purposes of this study, therefore, the chapter on international law standards deals with the economic law dimension,[30] the human rights law dimension[31] and the environmental law dimension,[32] although they are all integral components of the overarching conception of sustainable development. The demarcation is artificial yet convenient.

On the issue of the difficulty of host state control of TNCs in general, Malanczuk states:

> It is often difficult in practice to effectively regulate on the national level the activities of such global companies, due to their extensive network of decision making and

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28 P. Muchlinski, 'Towards a Multilateral Investment Agreement (MAI): The OECD and WTO Models and Sustainable Development', in Weiss *et al.*, *op. cit.* n. 20, pp. 429–451, at pp. 450, 451. He also makes the point, at pp. 428, 429, that the issues of equity and distributive justice that lay at the heart of the NIEO have not diminished, despite the success of certain developing countries in becoming more closely integrated into the global economy. He further states that the calls for a new world order based on the idea of sustainable development may offer a way forward to integrate such issues into the policy-making agenda in a globalizing free-market economy. There is wisdom in this argument, as sustainable development involves many issues of mutual and universal concern, less particular than concerns of development *per se*. They are thus less sensitive and controversial, and can be approached in the spirit of re-inforcing mutual interests, which may be more feasible than balancing conflicting interests.

29 See R. Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy*, Technology, Business and Society-Programme Paper no. 2, UNRISD, Geneva, 2001.

30 See J. McDonald, 'The Multilateral Agreement on Investment: Heydey or MAI-Day for Ecologically Sustainable Development?', 22 *Melbourne University Law Review*, 1998, p. 617.

31 See M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, KLI, The Hague, 1999; C. Avery, *Business and Human Rights in Times of Change*, Amnesty International-UK Business Group, London, 2000; R. McCorquodale, 'Human Rights and Global Business', in S. Bottomley, D. Kinley (eds.), *Commercial Law and Human Rights*, Dartmouth, UK, 2002.

32 See R. Falk, 'Environmental Protection in an Era of Globalization', 6 *Yearbook of International Environmental Law*, 1995, p. 3; R.J. Fowler, 'International Environmental Standards for Transnational Corporations', 25 *Environmental Lawyer*, 1995, p. 1.

> operational structures formed by their headquarters, branches, subsidiaries and other forms of investments in independent company units throughout the world and their flexibility in transferring seats of production as well as profits within the framework of the organisation as a whole.[33]

However, the inherent weaknesses of the international legal regime lead logically to the issue of domestic regulation by home and/or host states. In spite of the difficulties of host-state regulation, certain features in the law of sustainable development in South Asia, for instance the emergence of public interest litigation in the last two decades, are indicative of some steps in this direction. This form of litigation has emerged largely through judicial resolve on the domestic implementation of sustainable development, and has involved the adoption of innovative measures towards preserving the rule of law and promoting socioeconomic and environmental justice.[34] More recently at the international level, the Global Judges' Symposium adopted the Johannesburg Principles on Sustainable Development and the Role of Law, further emphasizing, fortifying and globalizing the role of the judiciary in sustainable development.[35] The principles recognize that the judiciary has a key role to play in integrating human values set out in the Millennium Declaration: namely, freedom, equality, solidarity, tolerance, respect for nature and shared responsibility, and translating them into action by strengthening the rule of law both internationally and nationally.[36]

The nexus between international and national laws was apparent in paragraph 41 of the aborted draft UNCTC Code on TNCs:[37] 'Transnational Corporations shall carry out their activities in accordance with national laws, regulation, established administrative practices and policies relating to the preservation of the environment in the countries in which they operate and with due regard to international standards.' The draft Code repeatedly asserted the right of the host country to regulate TNCs and the latter's duties to respect host states' territorial sovereignty. In paragraph 8 the Code asserted that TNCs are subject to local laws. This notion

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33 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, London, 1997, p. 102.

34 See SACEP/UNEP/NORAD, *Report of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development*, SACEP, Colombo, 1997; SACEP/UNEP/NORAD, *Compendium of Summaries of Judicial Decisions in Environment Related Cases (With Special Reference to South Asia)*, SACEP, Colombo, 1997.

35 Adopted on 20 August 2002 in Johannesburg, South Africa, http://www.unep.org/dpdl/symposium/Principles.htm E.-U. Petersman, in *The GATT/WTO Dispute Settlement System – International Law, International Organizations and Dispute Settlement*, Kluwer, London, 1997, at p. 244, deals with the need for strengthening judicial review at the domestic level.

36 *Ibid.* The Programme of Action includes the improvement in the level of public participation in environmental decision-making, access to justice for the settlement of environmental disputes and the defence and enforcement of environmental rights, and public access to relevant information. A Committee of Judges would keep under review and publicise emerging environmental jurisprudence and provide information thereon.

37 *Op. cit.* n. 24.

reappeared in paragraph 36 in the context of technology transfer, in paragraph 37 on consumer protection and in paragraph 41 on environmental protection. The draft code must, however, be viewed in perspective, as a statement of policy rather than law, as it was never adopted. It was negotiated between 1976 and 1990, and in the different post-cold war political climate was finally set aside in 1990. In the draft MAI of 1995 the regulation of foreign investment was not a priority. The draft showed little regard for developing country interests.[38] It also granted extensive rights to foreign investors without imposing corresponding duties on them, and ignored to a considerable extent concerns about cultural identity, employment, labour standards, human rights, consumer protection and environmental conservation.[39] Recent developments in FDI regulation include the UN Secretary-General's Global Compact,[40] the rise of self-regulation and corporate social responsibility from the corporate sector, and numerous initiatives of civil society. The Compact, a statement of policy, provides for human rights, labour, the environment and transparency. The recent Principles for Responsible Investment (PRI) 2006 are a policy/soft law initiative[41] towards Environmental, Social and Corporate Governance (ESG). Combining voluntary commitments with large-scale financial input, such initiatives could promote sustainable development in the future. The many corporate codes that have emerged are witness to a body of international public values and policy, if not law, bound to see concretization in the future. Recent efforts in the UN also include the Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights[42] and the appointment of a Special Representative on Human Rights and TNCs.[43] The Interim Report of the Representative, released in February

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38 In UNCTAD, *Lessons from the MAI*, UNCTAD Series on issues in international investment agreements, UN, New York/Geneva, 1999, it is stated at p. 24, that developing countries were not able to make a direct input into the negotiations, but it was ultimately intended to be open to accession by all countries. The concerns of LDCs were not brought directly to the table, except through those that had obtained observer status. See N. Schrijver, 'A Multilateral Investment Agreement from a North-South Perspective', in E.C. Nieuwenhuys, M.M.T.A. Brus (eds.), *Multilateral Regulation of Investment*, E.M. Meijers Institute, KLI, The Netherlands, 2001, pp. 17–33.

39 Schrijver, *ibid.*, at p. 33, goes on to state that any attempt towards a multilateral investment convention that does not balance rights and duties of foreign investors, host states and home states is bound to fail.

40 Presented at the World Economic Forum, Davos, 31 January 1999, www.unglobal.compact.org

41 http://www.unpri.org. This is an initiative of the UN Secretary-General, involving voluntary undertakings by institutional investors, and to be implemented by the UN Global Compact and the United Nations Environment Programme (UNEP) Finance Initiative.

42 The Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights [U.N.Doc.E/CN.4/Sub.2/2003/12/Rev.2(2003)] were adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights on 13 August 2003.

43 Harvard University Professor John Ruggie was appointed to this post in August 2005 to "identify and clarify standards of corporate responsibility and accountability for transnational corporations"; the Business Leaders Initiative on Human Rights has pledged to support the work of the Representative and is exploring new tools for business to comply with binding human rights standards: T. Benner, 'The UN can help business help itself', *International Herald Tribune*, August 18 2005, http://www.iht.com/articles/2005/08/17/opinion/edbenner.php

2006, led to a variety of reactions and discussions aimed at further elucidation.[44] Efforts in relation to the creation of an investment regulation instrument in the WTO have so far been a failure, as was seen in the last Ministerial Conference in Hong Kong, in December 2005.

In developing countries, underdevelopment[45] and the challenge of survival, limited and unequal access to resources, abject poverty and water-borne disease make the human dimension of problems of economics and ecology overt. Human dignity and rights thus become central to the concept of sustainable development. Host states in the third world often lack stringent legislation for the protection and promotion of economic development, human rights and the environment, and the capacity and propensity for enforcement. Raising standards can have adverse economic consequences, posing a dilemma for host states. Host state regulation requires an international law basis for legitimacy and efficacy. The notion that host state regulation is difficult and impracticable is common, yet controversial. C.S. Pearson,[46] for instance, finds that 'this argument of leverage is not totally persuasive' and prefers national regulation. He supports the view that international norms are a useful adjunct to national efforts. Sustainable development needs norm-setting followed by implementation at all levels, especially the domestic level.

1.2 The Rationale for and Focus of this Study

The gravity and frequency of occurrence of issues of adverse social and environmental impacts through foreign direct investment activities in developing countries, coupled with the *lacunae* in related regulation and implementation, warrant systematic study in quest of solutions, in this case, through public international law. The evaluation of how this body of law can serve as a medium for the advancement of economic development, while simultaneously ensuring and enhancing human rights and conserving the environment in the context of FDI, requires its critical analysis. Public international law is here part of a complex web, further complicated by the interconnectedness of globalization. Some of the most significant strands are therefore extricated for the purposes of this book.

This project represents the convergence of interests at three levels: practical, academic and personal. At the practical level, the issue of human rights violation

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44 Interim Report E/CN.4/2006/69 of 21 February 2006. Reactions included Comments from Joint NGOs of 18 May 2006, Amnesty International, Earthrights International, and Mary Robinson, President, Realizing Rights: The Ethical Globalization Initiative.

45 See L. Marasinghe, 'Third World Jurisprudence for the Twenty-First Century', in A. Anghie, G. Sturgess (eds.), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, KLI, The Hague, 1998, p. 49.

46 C.S. Pearson, *Down to Business: Multinational Corporations, the Environment and Development*, World Resources Institute and Duke University Press, Durham, 1985, p. 68.

and environmental degradation through foreign investment needs attention, as the adverse effects of the broader phenomenon of globalization tend to be neglected, and social and environmental deterioration, poverty and intra-state violence continue to escalate unabated in many developing countries, with limited resources including legal capacity.[47] This study is relevant in terms of its policy implications, because it addresses a reality faced by many states, having only a limited capacity to deal with these issues. Solutions may come from different sectors, but a comprehensive legal framework could make a contribution particularly in the international arena. At the academic level, the intersection of the issues of development, foreign investment, human rights and the environment has not been sufficiently treated by international law and other disciplines, as well as in academic endeavours. A balanced legal framework does not exist at this point in time, and development is by and large a neglected dimension in international law and its systematic study. Through in depth analysis of a specific set of issues, this study seeks to contribute to discourses on the role and relevance of law in and for development, at both the conceptual and practical levels.

The regional and national levels of legal arrangements selected for evaluation here are the South Asian and the Sri Lankan, respectively, stemming from my own roots and affinity. This study presents a perspective from South Asia which in turn is coloured by my own experience of life and living in Sri Lanka, where conflicts between economics, society and the environment are increasingly common. The law, and more specifically international law, could be a tool for achieving a balance between economic and non-economic values. This study will include a component on the regional and domestic jurisprudence of South Asia and Sri Lanka, respectively, to the extent that they reflect and incorporate, or conversely – through norms of state practice – influence constructively the international legal regime. The inclusion of this component is due both to the inherent weakness of the international legal regime in enforcement and to the insights that the local developments can provide. On the personal level this research pursues my own ethical orientation, and evolves from an interest in the nexus between FDI, development, human rights and the environment, as they represent broader ramifications on the impact of globalization and development on humanity and its habitat. They form part of my interests in law and development (especially the role of law in and for development, the actual and potential relevance of law for development and the value of injecting legal considerations into development studies), North-South relations and the economic, social and human problems particularly of the South, especially of South Asia and most specifically of Sri Lanka.

The focus on LDCs in spite of the fact that the major flows of FDI take place between developed countries is not without justification. The selected examples are all from developing countries, which have lower standards of regulation on

47 See UNRISD, 1995, *op. cit.* n. 1; UNRISD, 2000, *op. cit.* n. 1; Bello, *op. cit.* n. 10.

broad social interests, and are thus more vulnerable. Although inflows are small, they can have large economic, social and environmental impacts on local areas.[48]

> The gaps are largest, however, between the 30 rich, developed countries of the OECD as a whole and the rest of the world – the 170 or so developing and 'transition' economies of the 'global south.' In general, OECD countries have adopted a democratic form of government, with a strong embrace of civil and political rights and the rule of law.[49]

Investment activity can have positive impacts on economic development, the transfer of technology, innovation and much more.[50] It can be instrumental in furthering human rights, and promote, protect, realize or fulfil economic, social and cultural rights, as well as environmental standards. In fact, given recent trends, TNC activities could have beneficial impacts on these interests through self-regulation or corporate codes of conduct, which can raise standards and their implementation. However, the primary focus of this book will be on regulation of FDI with a view to preventing or minimizing adverse effects, as this is a legal issue in which there is a gap in the law. It is a particular dimension of the relationship between TNCs and broader social issues. Domestic business could similarly be a threat to human and environmental interests. But this study has been conceived out of an interest in international law and development. To focus on local companies would involve a different set of issues, limited by and large to the domestic plane. There will be references to local business when they are of direct relevance.

In the post-colonial era, there has been much foreign investment in the third world, but a major portion of it remains locked in the shackles of poverty. Irresponsible governance at the domestic level has not accorded adequate respect for the promotion and protection of values like human dignity and ecological integrity.[51] Sornarajah comments that while the premise on which investment

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48 L. Zarsky, 'Global Reach: Human Rights and Environment in the Framework of Corporate Accountability', in Zarsky, *op. cit.* n. 9, p. 34. In contrast, this author states at p. 35, that protections of basic civil and political rights, guaranteed by the Universal Declaration of Human Rights, are not extended to citizens in many developing countries. According to the Asian Development Bank which she cites also at p. 35, resource degradation and environmental pollution in both East and South Asia is so 'pervasive, accelerating, and unabated' that it risks human health and livelihood. Zarsky, at p. 38, points out that a new wave of advocacy is concerned with three sets of issues – labour rights, environmental protection and human rights – and the links between them. She goes on to state that this set of ethical concerns is emerging as a set of core global ethical principles for a corporate accountability approach to business management and government regulation.

49 L. Zarsky, *ibid.* p. 33.

50 See UNCTAD, *Foreign Direct Investment and Development*, UNCTAD Series on Issues in International Investment Agreements, UN, New York/Geneva, 1999.

51 UNRISD, 1995, *op. cit.* n. 1.

treaties are made is that foreign investment leads to economic development and that treaties lead to greater flows of foreign investment, both assumptions are coming to be contested.[52] Treaties do not usually make any reference to economic development or any provision for the promotion of development. However, he suggests that the Doha Declaration – which mandates the study of investment as a possible discipline under the WTO and requires it to be studied in the context of development – will highlight the need to ensure that treaties contain provisions addressing economic development. He suggests that this may influence a movement away from investment-protective models of economic liberalism to models that contemplate the elimination of the harmful effects of FDI while protecting beneficial investment.[53]

In the light of the fluid, uncertain and unsatisfactory status of the normative framework on the promotion and protection of social interests towards sustainable development in the context of foreign direct investment, this study embarks on the quest for a broader, more inclusive approach in terms of the law and legal process. A major part of the international legal framework relating to the problem under consideration lies in the realms of soft law, rich in human, community and international public values, ethics and ideals, but poor in terms of formal legal validity. The application of sources theory here requires a broader interpretation of law/legal process, in turn reducing the gap between law and policy, values and norms.

1.3 The Hypothesis, Objectives and Questions raised by this Study

This study will consist of a critical evaluation of the international legal framework which applies to the advancement of economic development, protection and promotion of human rights and the environment in the context of foreign direct investment, and the related regional (here, South Asian) and national (here, Sri Lankan) legal regimes.

It is premised on the hypothesis that while the conflicting interests of investment, development, environment and human rights need to be reconciled in the pursuit of sustainable development in developing countries – and the regulation of FDI is a key issue in this context – there are *lacunae* in the public international law framework in point. The international legal ground needs to be explored in its different dimensions, levels and value implications, as well as with regard to the changing matrix of actors, structures and processes, with a view to enhancing its capacity to further sustainable development.

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52 Sornarajah, *op. cit.* n. 17, p. 262.
53 *Ibid.* pp. 262, 263.

The objectives of the study

This study aims to achieve the following objectives:

- To evaluate critically the international legal framework applicable to the advancement of economic development, protection and promotion of human rights and conservation of the environment in the context of FDI in developing countries, and
- to explore the legal ground for enhancing its capacity to further sustainable development.

This framework consists of international legal principles as well as regional and domestic legal arrangements, and related interventions of states and non-state actors in FDI regulation.

The research questions raised

The central research question will address the following issue:

- How can public international law serve as a medium for the advancement of economic development while simultaneously protecting and promoting human rights and conserving the environment in the context of foreign direct investment?

The sub-questions include:

- What do the case law illustrations reflect with regard to the international legal system in relation to sustainable development?
- Which key concepts can be identified to critically evaluate international legal principles in context?
- What is the relevant role of public international law and, in the light of its dual functionality, what is the nexus between the aspiration to values and the application of norms?
- How are TNCs and their regulation posited within the framework of public international law?
- How do principles of international environmental law, international human rights law and international economic law serve to advance economic development, protect and promote human rights and conserve the environment within the meaning of sustainable development?
- What are the roles of the home and host states and how do they relate to international legal norms?
- How are international legal principles reflected in, influenced by and implemented through regional (in this case, South Asian) and domestic (in this case, Sri Lankan) legal arrangements?
- What is the contribution of the concept of public interest litigation in the development and implementation of jurisprudence relating to sustainable development?
- How do NSA interventions in the form of self-regulation and civil society initiatives relate to international legal principles in the research context?

- What sort of rethinking and reconceptualization would enhance the bridging of the gap between hard and soft law/policy, and the law in its value systems/ideal aspirations on the one hand, and its normative manifestations on the other?

1.4 The Perspectives and Scheme of the Book

The contents of the Chapters

Chapter II sets out the context defining the main factual parameters of this study, including a brief discussion of globalization and its regulation, development and the geographical background of the regional and national settings. It also embodies the conceptual framework constructed with the notions of justice, equity and sustainable development; a discussion of the role of international law, its dual functionality and the possibility of a third role; the methodology of the theory and sources of international law and the approach to be adopted to this methodology.

Chapter III surveys relevant general principles and core concepts of public international law centred around states, state practice and state sovereignty, *vis-à-vis* transnational corporations and their legal regulation. The issue of regulation is complex because of the international/transnational nature of TNCs and their activities, which have traditionally been regulated at the local level, and also because of the crosscurrents of globalization, sustainable development and market-based reforms. Core principles for analysis with a view to possible directions for adjustment, interpretation and change are international legal personality, international jurisdiction, international responsibility and the international minimum standard.

Chapter IV reviews the salient features of sustainable development law, with a view to understanding what it implies for this study and how principles of international law in the fields of environment, human rights and economics converge or diverge in context. It examines how international human rights law can be an instrument in ensuring that the activities of TNCs are kept within the bounds of human rights through the systematic analysis of its standards and their interpretation. It reviews the framework of international economic law, particularly on investment, trade and development. The inability of the international community to reach a consensus on the regulation of investment activity raises issues with regard to alternatives, complementarities and broader interpretations in relation to the sources of international law. The emerging body of international public values, policy and, to some extent, law are examined as part of the progressive development of international law.

The role of home and host states in the regulation of foreign investment will be analysed in Chapter V, against the backdrop of international relations, including globalization and the changing dimensions of state sovereignty. Home states and their interventions (for instance, through inter-governmental institutional arrangements and extraterritorial application of national laws) and host states and their

functions (for instance, in legislation and implementation) are analysed to assess their roles in relation to international law.

Regional arrangements in South Asia and national arrangements in Sri Lanka will be evaluated in chapter VI, as second and third tiers operating within the global framework. The jurisprudence on the innovation of PIL will be explored because of its particular regional significance; its role in economic development, environment and human rights and pursuing an integrated approach; its instrumentality in the operationalization of sustainable development and application, enforcement and interpretation of relevant and often evolving international standards in Southern Asia. The evaluation of PIL in several countries in the region provides critical insights into the role of the judiciary in maintaining the rule of law, securing participatory rights in view of diversity and pluralism, giving effect to international public values, soft law and policy, and breaking down the gaps between soft and hard law, values and norms.

The role of NSAs, more specifically TNCs and NGOs, will be examined in chapter VII. The legal value and implications of their interventions, in particular those of TNCs and NGOs, and how they relate to public international law will constitute the core issue, against the background reality of the centrality of states, their practice and their sovereignty. The expansive body of international public values, increasing emphasis on public participation and civil society, and the need for diversity and legal pluralism, on the other hand, will be used in support of the progressive development of international law, which may buttress the bridging of gaps between economic and non-economic values, soft and hard law.

The closing chapter, chapter VIII, will review the substantive laws, arguments and innovations discussed in the light of the concepts and methodology, objectives and questions applied and addressed in this study. It endeavours to cement the gaps *inter alia* between economic and non-economic interests, soft and hard law, values and norms.

Perspectives

This chapter concludes with some general observations on the salient features of this book which flow from its specific approach, multi-dimensional perspectives and central line of argument. The sources of public international law as set out in article 38 (1) of the Statute of the International Court of Justice (ICJ)[54] constitute the basic methodology adopted, in the light of the conceptual framework and the need to dissect the anatomy of international law in context. However, a substantial component of the relevant international legal framework lies in the twilight zone of soft law, enriched in its embodiment of values, ethics and ideals, but impoverished in terms of formal legal validity, leading to a vacuum.

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54 The Statute of the ICJ is an integral part of the Charter of the United Nations, signed at San Francisco on 26 June 1945.

International law has moved to recognize that some matters that fall within the domestic concern of states can have implications for international values, in which case the international community has a right to ensure that changes are brought about in the domestic situation, the obvious example being human rights issues.[55] It can be argued that this proposition applies in a substantial sense to the core issues in this study. The application of sources theory here requires some lawful adjustment in the form of a broader interpretation of the law and legal process, which in turn reduces the gap between law and policy, values and norms. This argument derives reinforcement from the notion of the progressive development of international law and cross-fertilization between the different sources, as soft law can eventuate in the making of conventions, crystallization into custom and the development of general principles through the intermediary of state practice. Soft law, *lex ferenda* and international public values can inform the development of international law, as well as law and policy at the regional and national levels,[56] towards an integrated approach.

Nico Schrijver advocates an integrated global approach in relation to international investment regulation, where, substantially, the conflicting interests of permanent sovereignty, international economic co-operation and international arbitration arrangements were the cornerstones of international consensus.[57] In the continued maldevelopment of concrete international consensus in the form of a global agreement, it is submitted that a broader approach to procedure/process through the methodology of the sources of international law would buttress such an integrated global approach. Further, as stated by Sornarajah, conventionally, Bilateral Investment Treaties (BITS) have almost solely provided for the interests of multinational corporations without taking into account the possible harm that may be caused by them,[58] though there are now some signs of change. In this environment, reconciliation requires that the parallel development of an emerging body of international public values should be reflected in the international legal system through structural linkage with the sources of international law.

The application of sources theory in international law posits sustainable development, a key concept in this study, in a less than unequivocal position. But it does have a *de facto* existence in public international law both as a value system and as a normative framework, and influences decision-making in several ways.

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55 Sornarajah, *ibid.* n. 17, p. 263.

56 As stated by D. Shelton in 'Editor's note: The Role of Non-binding Norms in the International Legal System', D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press (OUP), Oxford, 1999, at p. 554, on the domestic level, non-binding international instruments often become a source of law even before they are obligatory at the international level.

57 N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, CUP, Cambridge, 1997, pp. 380–384.

58 Sornarajah, *op. cit.* n. 17, p. 259.

In the light of this ambivalence – further complicated by the 'soft law' texture of a substantial number of the threads of the international legal fabric relevant to this study – there is a need to find ways and means to balance conflicting interests at different levels, including those between public purpose and private interests. Sustainable development is an area where there is explicit recognition of the role of a multiplicity of actors in the making of policy and law, in turn enabling the infusion of a broader set of values than through state practice alone. This is best illustrated by principle 10 of the Rio Declaration which recognizes the rights of individuals to participate in decision-making processes, and to have access to information and to judicial and administrative remedies. This study advocates the realization of this principle, through a variety of means, including public interest litigation, civil society initiatives and corporate codes. These can fortify the weak position of soft law and policy including this principle, weaving them into the web of laws determining standards.

The less than wholesome status of international law and its implementation points to the need for more action at the regional and domestic levels. Home and host states and non-state actors serve to complement the legal system. International standards which are not binding on states may be enforced through corporate codes and, conversely, codes can lead to the evolution of such standards and thus influence the creation of norms. But the corporate social responsibility movement is unlikely to succeed without being embedded in a framework of binding rules.[59] Thus Secretary-General Kofi Annan was instrumental in making the United Nations (UN) an institution that sees corporations as partners and thus part of the solution, not as part of the problem of global governance and development.[60]

The perspective from South Asia will give this study a particular context in terms of economic and geopolitical realities, sociocultural particularities and legal experience. The jurisprudence on public interest litigation will be studied as a mechanism for the operationalization of sustainable development. In such litigation, basically the requirement for *locus standi* is freed from the need to be an aggrieved person to simply being a person with a genuine and sufficient concern. This enables a relatively larger group of people to gain access to justice, including concerned members of the citizenry, underprivileged members of society and individuals forming part of a large class of plaintiffs. The judiciary is seen in this study as a core institution for the upholding of the rule of law. It is significant for present purposes that Article 38(1)(d) of the Statute of the ICJ includes judicial decisions as subsidiary means of determining rules of law.

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59 In the medium term, an *a la carte* approach to CSR will undermine itself through lack of credibility. But core binding rules, will counter any accusations that CSR initiatives are mere window dressing: Benner, *op. cit.* n. 43.

60 In Anan's words, "it is the absence of broad-based business activity, not its presence, that condemns much of humanity to suffering". *Ibid.*

The bedrock concept of sovereignty conventionally restricts the making of public international law to states and state practice, usually involving the legislative and executive branches of the state. The elasticity that some of these tools afford flows from their evolution out of habitats distinct from purely state legislative and executive action; their relatively participatory nature embracing the actions of non-state actors, the legal profession, the judiciary and civil society; and their inclusion of in-built mechanisms for implementation. The success of the law's bridging function here requires a sense of innovation, the depth that recognizes global social structural changes indicating the need for pluralism; and the breadth of approach that transcends conventional boundaries, without surpassing the lawful limits of public international law.

The middle path pursued in this book adopts a nuanced approach which seeks to accommodate alternatives in view of the diversity in laws and legal systems in the context of globalization. The waters that fill the wells of international goodwill and solidarity as represented by the vast body of international public values, policy and soft law must be permitted to seep into the international normative framework, through the exploitation of contradictions within it, and the quest for coherence in the international legal system. Such a project can make international law a protective shield for neglected interests both at the international level between states, and at the national level, between communities, and thereby seek to balance the interests of foreign investment, human rights and the environment towards sustainable development.

Chapter Two

THE CONTEXT AND CONCEPTS OF THIS STUDY

2.1 The Contextual Setting

Posited in the realms of international economic relations and law, this thesis presents a perspective from South Asia on how public international law can serve as a medium for the advancement of development while simultaneously protecting and promoting human rights and conserving the environment in the context of foreign direct investment. It will survey how various fields of international law do or do not, and can or should converge into a comprehensive approach, taking into account the North-South issues involved. The developmental approach in this study involves the pursuit of just, equitable, and sustainable development as key concepts in an increasingly complex global order. The position adopted is that the profit motive alone cannot spell the destiny of people and the ecosystem, and that regulation with a view to balancing economic with human and ecological welfare is essential to the rule of law, order and peace.

This study is positioned within the overarching context of globalization and its regulation. A term which defies definition, the idea of globalization refers to those processes which tend to create and consolidate a unified world economy, a single ecological system and a complex network of communications spanning the globe, even if not penetrating to every part of it.[1] The resulting global era is typified by the trends of the spread of liberal democracy, the dominance of market forces, the integration of the global economy, the transformation of production systems and labour markets, the spread of technological change, the media revolution and consumerism.[2] These global connections or recent transformations have taken different forms in different places, but show consistent trends which have shaped institutional change,[3] described as an evolution process strongly

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1 W. Twining, *Globalisation and Legal Theory*, Butterworths, London, 2000; at p. 4, Twining cites Anthony Giddens in *The Consequences of Modernity* where globalization is described as the intensification of world-wide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and *vice versa*; see B. De Schutter, J. Pas (eds.), *About Globalisation*, Vrije Universiteit Brussel (VUB) Press, Brussels, 2003.

2 UNRISD, *States of Disarray: The Social Effects of Globalization*, UN, Geneva, 1995, p. 9.

3 *Ibid.*

influenced by the economic and political agenda of advanced industrial countries.[4] Richer countries transmitted policy changes to the rest through their dominance of international trade and finance, and control of the Bretton Woods institutions, ultimately leading to restructuring of economies along neoliberal lines: deregulating economic activity, privatizing public enterprises and cutting back on state expenditure.[5] Meanwhile, globalization processes have neglected social institutions on all levels: international (social organizations have been taken over by transnational corporations and international financial institutions); national (many state institutions have been eroded or eliminated); and local (the imperatives of market forces have been undermining communities and families) levels.[6] One of the most significant actors in globalization is the transnational corporation (TNC).[7] Globalization has many layers and dimensions and needs to be explained in the context of a new world society still in the process of formation, and thus presents a moving target.[8] This study adopts a nuanced approach to the reality of globalization,[9] seeing it as both a positive and negative force, which needs to be managed in a manner which enhances the positive effects while preventing/limiting the negative impacts. At the other end of the spectrum, there are parallel globalization movements, projecting an alternative trend towards globalization of social issues and movements, predominantly forging the interests of human rights, labour, environment and development,[10] and constituting a visible antithesis.

Precedent to a discussion on the law, some reflection will be made on the concept of development itself. 'Development' transcends disciplinary boundaries and is usually a subject of study in the social sciences, particularly in development studies. If the law is to maintain its relevance, it should be informed and influenced by theories of development and changes in approaches to it. Complimentary to the overarching concept of sustainable development, the approach to development in this study is influenced by views of writers like the humanist economist Amartya Sen. He holds that development is a process of expanding the real freedoms that human beings enjoy,[11] enabling them to realize their potential, build

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4 *Ibid.*

5 *Ibid.*, p. 10.

6 *Ibid.*, p. 8.

7 See W. Bello, *Deglobalization: Ideas for a New World Economy*, Zed Books, London, 2002, p. 6.

8 F.J. Lechner, J. Boli (eds.), *The Globalization Reader*, Blackwell, USA, 2000, p. 49.

9 As suggested by C. Arup, in *The New World Trade Organisation Agreements-Globalization through Services and Intellectual Property*, CUP, Cambridge, 2000, p. 38.

10 See M. Sornarajah, 'The Clash of Globalizations and the International Law of Foreign Investment', *Simon Reisman Lecture in International Trade Policy*, Norman Paterson School of International Affairs, Ottawa, 12 September 2002.

11 A. Sen, *Development as Freedom*, Anchor Books, New York, 2000, p. 36. At p. 37, Sen states that when the process of development is judged by the enhancement of human freedoms, it must include the removal of a person's deprivation. He asserts that "the relevance of the deprivations of basic political freedoms or civil rights, for an adequate understanding of development, does not have to be established through their indirect contribution to other features of development

self-confidence, and lead lives of dignity and self-fulfilment.[12] Viewed in this light, there is no inherent contradiction between development, human rights and the environment. The contradictions from the interrelationships between these three phenomena arise essentially because of the dominant approach to development as represented by Gross National Product (GNP) growth and industrialization, and as promoted by neoliberalism. Thus it is almost obvious that the trend of free trade and investment would not inevitably do justice to the public interest and human welfare. In much of the third world, in spite of decades of foreign investment, underdevelopment is the stark reality. Development practice by LDCs has concentrated on economic progress to the neglect of social interests, especially in recent decades.[13] However, "there can be no peace without justice, no freedom without human rights and no sustainable development without the rule of law."[14]

The law can provide the conceptual basis, instruments and institutions, all tools in the realization of values and the application of norms. This study of the role of international law concepts and principles, set within the larger discourse of globalization and sustainability, recognizes the conflicting interests and the need to manage globalization.[15] It seeks to evaluate the role of international law as a medium for the regulation of globalization,[16] as well as TNCs,[17] towards reconciling economy, society and the environment. It will adopt a particular perspective of the purposes which could be, and should be, served by international law

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(such as growth of GNP or the promotion of industrialization). These freedoms are part and parcel of enriching the process of development".

12 *Ibid.*

13 See UNRISD, 1995, *op. cit.* n. 2, UNRISD, *Visible Hands: Taking Responsibility for Social Development*, UN, Geneva, 2000; Bello, *op. cit.* n. 7.

14 L. Freivalds, J. Straw, 'A Global Order based on Justice', *International Herald Tribune*, 23 June 2004.

15 See J. Martinez Alier, 'Environmental Justice as a Force for Sustainability', in J. Nederveen Pieterse (ed.), *Global Futures, Shaping Globalization*, Zed Books, London, New York, 2000, at p. 159; P. Peters, 'Sustainable Development with a Human Face?' in F. Weiss, E. Denters, P. de Waart (eds.), *International Economic Law with a Human Face*, KLI, The Hague, 1998, p. 414; W. Van Genugten, K. Homan, N. Schrijver, P. de Waart, *The United Nations of the Future: Globalization with a Human Face*, KIT Publishers, Amsterdam, 2006.

16 See I. Carlsson, S. Ramphal, *Issues in Global Governance*, Papers written for the Commission on Global Governance, KLI, London, 1995; D. Nayyar, J. Court, *Governing Globalization: Issues and Institutions*, UN University/World Institute for Development Economics Research, Helsinki, 2002; in M.J. Gibney (ed.), *Globalizing Rights: The Oxford Amnesty Lectures* 1999, OUP, Oxford, 2003, a series of essays challenge the view that the development of global markets and investment, with the widespread circulation of information on which this depends, make human rights abuses less likely. Also see W.H. Meyer, *Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid and Repression*, Praeger, USA, 1998.

17 See 'Freedom Without Responsibility: The Rise and Rise of Transnational Corporations', UNRISD, 1995, *op. cit.* n. 2, pp. 153–166; and 'Calling Corporations to Account', UNRISD, *op. cit.* n. 13, pp. 75–90.

in this context and take account of the views of legal scholars[18] who perceive the steady encroachment of the protection of global capital over the dignity and well-being of people in the light of globalization and human rights. A basic problem here is that markets are global but regulation is mostly local.[19] International law could thus be a useful medium, since it can apply at the global level. The weakest schemes of regulation and enforcement are in developing countries.[20] Sustainable development, social development and human development provide broad, general themes within which the specific issues will be analysed. This is because each of these approaches to development is more holistic than the path of pure economic progress. Violations of human rights and environmental degradation here flow in essence from a course of action that results from a decision made by government or business. At the local level, many affected persons and interests are excluded from the decision-making process. Similarly at the international level, developing countries and their interests may be underrepresented in decision-making. Affected groups and interests at both levels are usually of unequal power. The disparity in social, economic and political power – it could be argued – necessitates, at least on the basis of a moral obligation, some affirmative action in the nature of concerted positive steps towards amelioration in the interests of just, equitable and sustainable development. International law does uphold certain values at its apex, and a critical evaluation of its normative framework requires its analysis in the light of this value system.

Given the perspective taken in this study, it will set out in the following paragraphs, a brief account of the regional and domestic contexts of South Asia and Sri Lanka also with some basic reference to related philosophical concepts in the region. Located in the global South, the island of Sri Lanka lies in the geographical region of South Asia. Though one of the economically poorest regions of the world, South Asia, on the other hand, is rich in non-economic terms: ecological, historical, cultural and spiritual. But countries in the region are gradually discarding their ancient traditions of holistic approaches to development in favour of neoliberal policies and the market ideology. The South Asian regional grouping as defined by the South Asian Association for Regional Cooperation[21] comprises Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. The November 2005 SAARC Summit in Dhaka made a decision to admit Afghanistan

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18 For instance U. Baxi, in 'Voices of Suffering and the Future of Human Rights', 8 *Transnational Legal and Contemporary Problems*, 1998, p. 125, cited in A. Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World, 32 *New York Journal of International Law and Politics*, 2000, p. 243.

19 As articulated by W. Bello, *op. cit.* n. 7, at p. 7, in an unregulated global market, it is even more difficult to reconcile the demands of social responsibility with those of profitability.

20 L. Zarsky, (ed.), *Human Rights and the Environment: Conflict and Norms in a Globalizing World*, Earthscan, London, 2002, p. 34.

21 Charter of the South Asian Association for Regional Cooperation, 8 December 1985, http://www.saarc-sec.org

as its eighth member,[22] subject to completion of formalities. It also agreed in principle that China and Japan will be conferred observer status in SAARC.[23]

The states of South Asia, historically referred to as the Indian subcontinent, share a land mass which forms a considerably self-contained region despite great diversity. The subcontinent is severed from the rest of Asia to the North by a mountain wall, and protrudes to the South into the Indian Ocean. Within the region, there are no major barriers to hinder the flow of ideas, people, knowledge, technological advances, artistic and cultural movements. The region comprises mountains, deserts, river valleys, forests, deltas, coastal plains and chains of islands. 'The fact of these divergences lying within a geographic unity under the shadow of the Himalayas has helped to invest the region with a sense of common history and common destiny through the ages, notwithstanding its shifting political configurations and boundaries'.[24] South Asia is both rich and poor in terms of natural resource endowment, and drawbacks include the fact that its land area falls far short of its population, and that resources are unevenly distributed. However the richness and diversity of resources and the self-contained nature of the region creates scope for regional co-operation.[25]

The region's openness to the sea and situation along trade and shipping routes gave it prominence in early trade and investment. From 1872, British rule covered virtually the whole of South Asia, along with a trend to mould the region into one entity held together by a single administration. This shared colonial heritage of the British Raj for over two centuries created common political and legal institutions and similar governmental and administrative frameworks.[26] Politically, the longstanding conflict between India and Pakistan has been the main threat to peace and security in South Asia, and the winds of change now witnessed in this sphere augur well for the whole region.

Home to Hinduism, Buddhism and other philosophies and religions, South Asia's richness lies considerably in its spiritual traditions. Islam and to a lesser extent Christianity too, are represented in the region. Plagued by problems of poverty, over-population and a host of divisions and classifications based on economics, ethnicity, class, caste, religion and the like, the spirit of universalism of religions manifested through art, philosophy, literature and fundamental values has

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22 International News, http://www.nation.com.pk/daily/nov-2005/21/international 17.php; Afghanistan to be new SAARC Member, http://timesofindia.indiatimes.com/articleshow/1293872.cms; Plus Afghanistan SAARC, http://dayafterindia.com/dec205/national3.html; Afghanistan to be offered SAARC Membership, http://www.voanews.com/english/archive/2005–11–13–voa4.cfm/CFID=388071

23 *Ibid.*

24 L.L. Mehrotra, *Towards a South Asian Community*, Indian Council for Cultural Relations, Indraprastha Press, New Delhi, 1997, p. 71. The contents of the paragraphs on South Asia are based mostly on this book.

25 *Ibid.*, pp. 86–88.

26 *Ibid.*, p. 128.

been a uniting factor in the region, where history, tradition and culture are rich in unity and diversity. The Indus Valley was the cradle of one of the world's oldest civilizations, going back over 10,000 years. One of the core concepts of Hindu philosophy is the awareness of the unity and mutual interrelation of all things, as they are interdependent parts of one universe, an inseparable web, which is also the basic conception in ecology. Buddhist, Hindu, Jain, and Gandhian philosophies are closely connected to sustainable development, as they embody the moral and ethical values of justice, equity and compassion for all, the inevitability of change, as well as austerity and moderate consumption, reconciliation, realistic pragmatism and equitable distribution of resources, which could be invaluable in solving global problems of environment and development, which require above all, change in relation to daily living[27] and consumerism. Buddhism's message is against social inequalities and injustice, towards an ethical and spiritual middle path.[28] Many Buddhist texts are enlightening in relation to concepts in this thesis, including the protection and conservation of nature;[29] Hindu literature is rich in its sense of harmony with nature;[30] Islamic scriptures in relation to ecology, include the ideas of trust and stewardship.[31] The Buddha *Dharma* (teaching on moral and social order) expresses the concepts of non-violence and compassion to human beings and all sentient beings, which encompass human rights, for instance, not depriving another of life, and analogous conceptions are evident in the other philosophies.[32] The subcontinent is thus home to a value system involving the spir-

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27 K. Chowdry, 'Buddhism and Environmental Activism', http://www.biopolitics.gr/ HTML/PUBS/VOL5/html/cho-ind.htm; S. Sivaraksa, 'Global Problem-Solving: A Buddhist Perspective', http://www.buddhanet.net/e-learning/buddhism/bs-s10.htm

28 *Op. cit.* n. 24, p. 120.

29 For instance, the Anguttara Nikaya iii. 368, on non-violence to nature and expression of feelings by the spirit of a king banyan tree; *Thera Gatha* 648 on non-violence to all living beings. Several articles on Buddhism and Ecology can be accessed on the Journal of Buddhist Ethics, available online. Other Classical sources from the Buddhist tradition include the *Maharatnakuta Sutra* and the *Metta Sutra.*

30 In the ancient sacred literature of the Vedas, the *Atharva Veda* 12.1 is just one example, representing a sense of reverence to the Earth, the Mother of humanity. This Vedic Hymn to the Earth, the *Prithvi Sukta* celebrates Earth in all her bounty and bliss, and expresses the need for her protection and conservation. The idea of Earth as an inviolable sacred space is found in both the *Vedas* and the *Upanishads* in Hinduism, and was also closely linked to purity of the spiritual environment, coherence and cosmic peace.

31 For example, the Qu'ran, 55:1–12 on the bounties of the sun, the moon, the stars, the trees, and the need for justice and a balance in relation to them; see F.M. Denny, 'Islam and Ecology: A Bestowed Trust Inviting Balanced Stewardship', website of the Harvard Forum on Religion and Ecology, http://environment.harvard.edu/religion/main.html

32 L.M. Singhvi in *The East is Green*, http://daphne.palomar.edu.calvenvironment/religion.htm describes the ecological harmony and quest for spiritual and physical symbiosis, synthesized in a system of ethical awareness and moral responsibility in Jain, Vedic and Buddhist philosophies; U. Chakravarty, *The Social Dimensions of Early Buddhism*, Vedams Books, New Delhi, 1996; http://environment.harvard.edu/religion/religion/Buddhism/texts/index.html

itual, ethical, individual and collective dimensions of human life, which are all inter-connected and require mutual accommodation, as all phenomena in nature are united in a physical and metaphysical relationship.[33]

Coming to the national context of Sri Lanka, the hand of history testifies to the fact that international trade and investment in their earliest manifestations were closely linked to the processes of colonization and exploitation.[34] Sri Lanka, previously Ceylon, has a colonial past of nearly five centuries, and TNCs were at the forefront of colonial administration.[35] The island has a recorded history of over 2500 years. The ancient chronicles state that when a King (Devanampiya Tissa, 247–207 B.C.) was on a hunting trip, the Arahat Mahinda, son of the Emperor Asoka of India, preached to him a sermon, which converted him to Buddhism, the basic precepts of which include simplicity in living, equilibrium, moderation and the middle path. The sermon includes the words: 'O great King, the birds of the air and the beasts have as equal a right to live as thou. The land belongs to the people and all living beings; thou art only the guardian of it.'[36]

This ancient wisdom appears to encompass modern notions of public trust/stewardship/custodianship of the environment, as it informs the king that he is only the guardian of the land. If the King, the birds and the beasts have an equal right to live, *a fortiori* it implies that human beings too have the same right. It points to a value system which affords equity and equality to all living beings, including fauna and flora. In this context, it is not difficult to accommodate modern concepts such as intergenerational and intragenerational equity, as presumably, there can be no distinctions between the entitlements within/between generations of human beings. Certain concepts found in contemporary international instruments, like the intrinsic value of all living beings,[37] are inherent in Eastern philosophies.

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33 Janism of Lord Mahavira is an ecological philosophy, and the central tenet of Gandhism of Mahatma Gandhi is non-violence.

34 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, London, 1997, at p. 12 points out that European expansion abroad in the interests of trade and commerce was promoted in England, The Netherlands and France by ruthless profit-making companies, enjoying privileges which permitted them to perform state functions in overseas territories. M. Sornarajah, *The International Law on Foreign Investment*, CUP, Cambridge, 2004, at p. 19, states that in the eighteenth and nineteenth centuries, investment took place largely in the context of colonial expansion.

35 For instance, the British East India Company during British rule, and the Dutch East India Company during Dutch rule. Sornarajah (*ibid.*) at p. 20, points out that it was the major trading companies which had first established colonial power in the states that were later integrated into the colonial system, and cites these two companies as having played major roles in the establishment of their States' colonial rule.

36 From the ancient chronicles of Ceylon, cited in *Hungary* v. *Slovakia* (*The Danube case*) 1997 ICJ Reports 7 and *Tikiri Banda Bulankulama et al.* v. *The Secretary, Ministry of Industrial Development et al.* (*The Eppawalla case*) 2000 *South Asian Environmental Law Reporter* (SAELR) 7(2)1.

37 Referred to in the preamble to the *World Charter for Nature*, UNGA Resolution 37/7, 28 October 1982.

So too are the idea of *ahimsa*/non-violence to all living beings, and intrinsic notions of duties/responsibilities.

Into the 3rd millennium Sri Lanka still bears witness to a heritage of a magnificent hydraulic civilization,[38] based on a philosophy of nature-friendly, holistic development. Its system of networks of irrigation canals and tanks (artificial reservoirs) was the hallmark of the local way of life, where each village was built around the temple and the tank, a combination of the spiritual and material aspects of life. With the course of colonization followed by government by local elites, modern Sri Lanka, like most third world countries, faces the problems of development and the environment, urbanization, poverty and pollution so that today, 'the small Indian ocean island . . . provides textbook examples of many modern dilemmas: *development versus the environment*'.[39]

There is one reality which pervades all aspects of life in Sri Lanka, from which values, laws and policies can claim no immunity: the island experienced over 25 years of civil war, and now savours an uncertain peace based on a shaky ceasefire. Perceptions continue to be shaded/jaded by war and its aftermath including the depths of economic decline. There is thus pre-occupation with the need for the resurgence of domestic economic growth and individual survival, making economic progress paramount, displacing other values. The tidal wave of devastation then plunged the island into deeper dire straits, and fortified the need to resuscitate or even resurrect the economy. While this is indeed essential, the other side of the picture also needs elucidation: human and environmental tragedy – be it man-made or natural – gives rise to the most basic issues about values: they show that there are economic, social and environmental values – held by people everywhere – and that every human life has/should have the same value.

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38 J.B. Disanayake, in *Water Heritage of Sri Lanka*, University of Colombo, Colombo, Sri Lanka, 2000, at p. 5: "Ecology and culture do not usually go together. Ecology deals with patterns of relations of plants, animals and people to each other and to their surroundings, and culture deals with all the products of human thought. There are, however, certain aspects of both ecology and culture that have very interesting and intimate relationships. This book deals with one such aspect: the water heritage of Sri Lanka."

39 The futurist Arthur C. Clarke, cited in the *Eppawalla case, op. cit.* n. 36; A. Wickramasinghe in 'Sustainable Development: The Question of Socio-Economics and Development Priorities', 20 *Sri Lanka Journal of Social Sciences (SLJSS)*, 1997, deals with some of the critical policy concerns involved in the procedural path towards sustainability. Also interesting in this regard is L.C.DeS. Wijesinghe's 'Environment and Sustainable Development – Some Thoughts on a Global Perspective', 16 *SLJSS*, 1993.

2.2 The Conceptual Foundations

2.2.1 Justice

The concept of justice[40] has been an aspiration of the law from time immemorial. John Rawls, elaborating on the role of justice,[41] states that laws and institutions should be reformed or abolished if they are not just. Rawls used a thought experiment, the original position, in which a person selects principles of justice for the basic structure of society from behind a veil of ignorance. Each person is said to possess an inviolability founded on justice that even the welfare of the society as a whole cannot override. Principles of justice play a central role in society, usually marked by both conflict and identity of interests. A set of principles is required for choosing among the various determinant social arrangements: principles of social justice, which assign rights and duties in the basic institutions of society, and define an appropriate distribution of the benefits and burdens of social co-operation. There is in each society, some common conception of justice, as well as individual conceptions, thus highlighting the role of the principles of social justice. For Rawls, injustice appears to consist of social and economic inequality.

On the subject of justice, Rawls states that the primary subject in terms of social justice is the basic structure of society, or the way in which the major social institutions (political constitution and principal economic and social arrangements) distribute fundamental rights and duties and determine the division of advantages from social cooperation. He defines the concept of justice by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages, and distinguishes the concept of justice (a proper balance between

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40 C.K. Allen, in *Aspects of Justice*, Stevens & Sons Ltd., London, 1958, p. 3 states on the concept of justice, that ever since men have begun to reflect upon their relations with each other and upon the vicissitudes of the human lot, they have been preoccupied with the meaning of justice. It is the subject of the most famous philosophical discussion in literature, the Republic of Plato, and it has entered, of necessity, into every sphere of human contemplation, temporal and spiritual, both in the ancient and modern world. Allen goes on to state that the concept has been analysed and classified into innumerable different forms, the most celebrated analysis, and perhaps still the most enduring, being that of Aristotle in the *Fifth Book of the Nicomachean Ethics*. He names a few of the numerous adjectives attached to different kinds of justice, including distributive, natural, universal, social, economic and international.

41 J. Rawls, in *A Theory of Justice*, Clarendon Press (CP), Oxford, 1972, p. 3. At p. 10, Rawls uses one of the most traditional senses of justice as a basis, that is, refraining from *plenoxia*, as in Aristotle's *Nichomachean Ethics*. This means refraining from gaining some advantage for oneself by seizing what belongs to another, or denying a person that which is due to him. Rawls builds upon Aristotle's conception of social justice, when he designs the justice of the basic structure. He approaches distributive justice through the social contract, towards a theory of justice as fairness, from which he derives 2 principles of justice-liberty and difference. For Rawls, injustice consists of social and economic inequality. J. Rawls, *Justice as Fairness:* A *Restatement*, Belknap Press, Massachusetts, 2001, provides clarifications to his original theory.

competing claims) from a conception of justice (a set of related principles for identifying the relevant considerations which determine this balance). In *The Law of Peoples*,[42] Rawls extends the principles of justice to the international plane, applies the idea of the original position to international relations, and elaborates eight principles on how people should act on the international stage. He asserts that people, not nations form the basic unit, and groups of people forming states should follow the principles of justice, through the means of democracy. People are said to have a duty to assist other people living under unfavourable conditions that prevent their having a just/decent political and social regime.

Julius Stone, in analysing the notion of justice in the law of nations,[43] states that the continuing struggle to realize the prophetic vision of the brotherhood of man in the face of so many past failures may be among the more glorious and eternal marks of the human condition, as it is certainly central in the perplexities of the wise and the informed in each generation. The main intellectual source of these perplexities, he finds, resides in our inability to fix any hard core of irreducible meaning to the concept of justice that is intellectually convincing, as distinct from one which is more or less plausible to some or others of us.[44] Stone asserts that the fact that some notion like justice has been steadily associated with the clamour for human betterment, playing a charismatic role in the major movements of human thought and action throughout the ages, is also a historical fact of immense importance. He also describes justice in a broad sense, as ethically approvable social arrangements: 'It is a notion that somehow gives meaning to the tasks of men who work with the law. . . .'[45] Stone states:

> For there is good reason why the normative tasks of ethical and political philosophy, and the philosophy of justice that is an integral part of them, can never be finished as long as human society itself persists. Every substantial change in man and his environment calls for re-examination of existing values in their application to new situations. This call is more than ever insistent in a world of state societies growing increasingly industrialized and mobile, powered now by an unprecedented technological explosion. What has been said of the continued importance of the critique of law by justice in the municipal sphere seems still more compelling in relation to the future of international law.[46]

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42 Harvard University Press, Cambridge, 1999.

43 *Visions of World Order – Between State Power and Human Justice*, The Johns Hopkins University Press, Baltimore/London, 1984, p. 71.

44 *Ibid.* Here he goes on to state: "In 1946 I was indeed able to feel that there was an identifiable hard core of the notion of justice within Western societies. This was that society would be so organized that men's felt wants could be freely expressed; that law, in order to be just, must at least protect that expression and provide it with the channels through which it could compete effectively for the support of politically organised society".

45 *Ibid.*, p. 72.

46 *Ibid.*, pp. 72, 73. He goes on to describe the international legal order as one in which crisis is the greatest catalyst of re-examination of goals and methods and of the adequacy of the *status*

Writers like Charles Beitz and Thomas Pogge endeavoured to extend Rawls' principles to the arena of the distribution of world resources. Pogge,[47] deals *inter alia* with issues of international justice, third world poverty and the need for distributive justice and institutionalized global order, and also carries on the discussions of earlier writers like Immanuelle Kant and John Rawls, in relation to international justice. Kant emphasized the moral obligation to establish legal relations with all human beings, and to have respect for all. Pogge goes beyond the statist approach however, to almost a Utopian stance for the law of peoples. Onara O'Neill in the Bounds of Justice[48] approaches justice in the context of globalization, asserting the need for global social justice and fair distribution of social and economic advantages, which traverse the bounds of state sovereignty to include non-citizens, and the relatively weak and vulnerable, both among citizens and non-citizens. She questions the way that international economic relations are determined by the rich and the powerful on the international plane, to some extent causing the lesser fortunes of the disadvantaged, for instance by their approach to the welfare state as a domestic but not global construct. O'Neill suggests a heightened role for international/transnational institutions, in ensuring accountability and responsibility, for example of foreign investors and donors, in the pursuit of fair terms of trade, extension of jurisdiction to wrongs committed abroad, better negotiating capacity of the weak, and compensation for harm caused. She advocates for universal principles of justice, which would negate wrongful action towards the weak, and the need for human rights to be a means to global justice, to which they should be subject. Conceptions of justice for the third world have naturally focussed on the need for social and economic equality and fairness, particularly in relation to the distribution of the world's resources.[49] Critical Legal Theory, Marxism, Socialism as well as Liberation Theology have also been used by advocates of justice for the developing world, given the centrality in these philosophies, of the need for equality, socio-economic equity, freedom, liberation and emancipation.[50] They essentially critique power, control and domination, in search of emancipatory alternatives.

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quo. At the present stage of the international legal order, in which the number of participant states has more than doubled and the range of cultures and of levels of their political, social, demographic, and economic capacity has become frighteningly diverse, even settled areas of the law are increasingly challenged and subjected to the questionings of justice. And these questionings extend beyond particular segments of the law to its very foundations, including the identity of its main participants and beneficiaries-states or human beings?

47 *Realizing Rawls*, Cornell, 1989; *Global Justice*, Blackwell, Oxford, 2001; *World Poverty and Human Rights*, Polity Press, Cambridge, 2002.

48 CUP, New York, 2000; also see M. Sornarajah, 'Power and Justice in International Law', *Singapore Journal of International and Comparative Law*, 1997, p. 28.

49 See for instance, A. Sen, *Ethics and Economics*, Blackwell, Oxford, 1989, *Inequality Re-Examined*, Harvard University Press, Cambridge, 1995, and *Development as Freedom, op. cit.* n. 11.

50 Y.-B. Kim, 'Covenant with the Poor: Toward a New Concept of Economic Justice', http://www.religion-online.org; D. Kellner, 'Critical Theory, Post-Structuralism & the Philosophy of Liberation', http://www.ula.edu

The idea of justice goes to the core of this inquiry as it is the most phenomenal value which the law can aspire to as well as the most perpetual yet perplexing pursuit of legal systems, and this study endeavours to evaluate the legal framework primarily by virtue of its connection to a value system. The context of this study envisages a plethora of competing (as well as mutual) claims, and one of the features of justice is its ability to balance between different claims and to lay down principles for identifying the considerations to determine such a balance. The concepts of social and distributive justice can play a particularly meaningful role in this research as they can be instrumental in delineating rights and duties, benefits and burdens. This study takes place against the backdrop of the changing nature of international relations, which become more expedient in the light of globalization, calling for a re-examination of values in their application to new situations. From a third world perspective, social and economic justice and the protection and promotion of neglected interests are fundamental to the apex value of fairness in this study.

2.2.2 Equity

The closely related concept of equity has been discussed by T.M. Franck as follows. Fairness is described as being a composite of two independent variables: legitimacy and justice. The best-developed approach to an inquiry into the justice of international law according to him is to study the emerging role of equity in international tribunals:

> In fairness discourse, the most restrained justice-based claims may be advanced in the form of equity, which embodies a set of principles designed to analyse the law critically without seeming to depart too radically from the traditional preference for normativity in the exercise of authority, nor to present too bold a challenge to the community's expectations of legitimacy in legal rules and processes.[51]

Franck describes equity as a concept that is developing into an important redeeming aspect of the international legal system that could serve to introduce elements of justice into global society.[52] This is essential in the light of the revolutionary pace of technological and scientific innovation and widening gap between rich and poor. The system is generally cautious to resort to re-distributive justice because of the need for legitimacy, stressing the need for determinacy and coherence in

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51 T.M. Franck, *Fairness in International Law and Institutions*, CP, Oxford, 1995, p. 47; also see C.R. Rossi, *Equity and International Law, A Legal Realist Approach to International Decision Making*, Transnational Publishers, New York, 1993 and S. Rosenne, 'The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law', in A. Bloed, P. van Dijk (eds.), *Forty Years of the International Court of Justice: Jurisdiction, Equity and Equality*, Europa Instituut, Utrecht, 1988.

52 Franck, *ibid.*, p. 79.

the law. Franck concludes by stressing the need to constantly redefine the context in which human endeavours are undertaken; the corresponding need for flexibility in imposing general principles on such endeavours; the need for the formal equality of states to be made actual by recourse to notions of justice, given the growing inequality in the distribution of goods; the need for justice to protect interests not ordinarily recognized by law like the biosphere and the well-being of future generations; and the need for justice to play a tempering role in the apportionment of goods in the context of an infinite number of variables. Fairness discourse, which aims to temper the imperative of legitimacy with that of justice, serves then to redeem the law.[53]

The Statute of the ICJ in Article 38 (2) enables the Court to decide a case *ex aequo et bono*, if the parties agree thereto. It enables a degree of flexibility and adjustment within the confines of the law. In the early arbitration of the *United States* v. *Norway/Norwegian Ship Owners' Claims*,[54] equity was viewed as a general principle of justice. Several cases before the ICJ, as well as its predecessor the Permanent Court of International Justice (PCIJ), considered equity in judgments and advisory opinions, creating jurisprudence on it. One of the earliest was *The Netherlands* v. *Belgium/Diversion of Water from the River Meuse*,[55] where Judge Manley Hudson affirmed the freedom of the Court to consider principles of equity. More recently, in *Mali* v. *Upper Volta/The Frontier Dispute Case*,[56] the ICJ asserted that equity can be invoked when it is recognized by the law of civilized nations. And in *Hungary* v. *Slovakia/The Danube Case*,[57] Justice Weeramantry in his separate opinion discussed the value of equity. Equity is also a core concept of third world approaches to international and international economic law, the right to development, the idea of a New International Economic Order and sustainable development, especially inter-[58] and intra-generational equity.

The inherent nature of equity, its synonimity to fairness of which it is also a constituent, its complementarity to justice in terms of aspiring to fairness with the added ingredient of flexibility, and its non-deviation from the basic requirements of normativity and legitimacy make it a core concept in this study, given its focus on justice and fairness, and objective of finding a balance between ideal aspirations

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53 *Ibid.*

54 1922 RIAA 307.

55 1937 PCIJ Ser. A/B No. 70.4.

56 1986 ICJ Reports 554.

57 1997 ICJ Reports 7.

58 The idea that each generation should use and develop its resources in such a way that they can be passed on to future generations in no worse condition than received, as articulated by Edith Brown Weiss in 'The Planetary Trust – Conservation and Intergenerational Equity', 11 *Environmental Law Quarterly*, 1984, p. 495; *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, UN University, Tokyo/Transnational Publishers, New York, 1989; and 'Our Rights and Obligations to Future Generations for the Environment', 84 *American Journal of International Law*, 1990, p. 198.

and normative limitations. Equity enables the research process to analyse and evaluate the law critically in keeping with the objectives of this study, and is also a source of international law, in keeping with the methodology adopted. Like justice, equity is closely related to the idea of balancing competing claims as well as sustainable development. This study takes place against the backdrop of a degree of imbalance and inequity, the need for law to protect human rights, development and the environment, all non-conventional interests, in the light of the state-centric focus and original purpose of public international law.

2.2.3 Sustainable development

Fundamentally, the concepts discussed above are interrelated as well as complementary, whether viewed *inter se*, in this study, or in the overarching context of sustainable development.[59] With regard to sustainable development, the Stockholm Declaration of 1972,[60] in Principle 13, states that in order to achieve a more rational management of resources and thus to improve the environment, states should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their populations. The interconnectedness of environment and development was recognized in Art. 30 of the Charter of Economic Rights and Duties of States (CERDS),[61] which refers to the need for the protection, preservation and enhancement of the environment for present and future generations by all states, and also the responsibility of states to see that their environmental policies enhance and do not adversely affect the present and future development potential of developing countries. These are examples of how law and policy can be a means to sustainable development.

The World Commission on Environment and Development (WCED), in its Report, *Our Common Future*, popularized the concept of sustainable development, later embodied in the Rio Declaration of 1992. To promote social progress and better standards of life in larger freedom, and to employ international machinery for the promotion of the economic and social advancement of all peoples, are objectives of the UN, as set out in its preamble. It can be argued based on these lines, that what the Charter envisaged was a broad approach to development, where the human/social dimensions are not neglected. Again under Article 55 the UN is required *inter alia* to promote higher standards of living and conditions

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59 See M.C.W. Pinto, 'Reflections on the Term Sustainable Development and its Institutional Implications', in K. Ginther, E. Denters, P.J.I.M. De Waart (eds.), *Sustainable Development and Good Governance*, Nijhoff, Dordrecht, p. 76; sustainable development has many philosophical underpinnings, and relates closely to ethics, morals and a way of life – see S. Murcott, 'Perspectives of Sustainable Living', http://www.sustainableliving.org/seminar96/murcott.htm

60 The Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14, Stockholm, 16 June 1972.

61 UNGA Res. 3281, 12 December 1974.

of economic and social progress and development, solutions to international problems including international economic and social problems. Even a cursory reading of *Our Common Future*, the Rio Declaration or Agenda 21 would suffice to appreciate the fact that the concept is even more all embracing. As pointed out in principle 1 of the Rio Declaration, human beings are at the centre of concerns for sustainable development. The United Nations Special Rapporteur on Human Rights and the Environment strongly stressed the linkages in her Report on Human Rights, Environment and Development.

The concept of sustainable development is broad enough to embrace many of the basic prerequisites for the balancing of business and public interest: accountability and responsibility on the part of business and governments; empowerment and democracy, participation and inclusion of a wide spectrum of actors to ensure intragenerational equity and precaution to enhance intergenerational equity. The core problem in this study illustrates that in reality, economic development in the form of foreign investment projects, human rights and environmental considerations are all inextricably interlinked.

Two basic norms of sustainable development law, namely inter- and intragenerational equity, reflect the interconnectedness of the key concepts in this book – justice, equity and sustainable development, and also balancing of conflicting interests:

> There have been a variety of perspectives in tracing the legal roots of the principle of sustainable development, but the dominant common trend is the element of equity-equity within our generation and equity towards the future generations. Implicit in this concept is a sense of fairness and distributive justice in sharing the natural resources of the planet and its environment, and international commons in outer space forming part of the common heritage of humankind. The principle of intergenerational equity can therefore be considered to constitute the substratum of the rights or obligations equation in any legal framework for sustainable development.[62]

The idea of sustainable development has an impact on development,[63] both in theory and practice. The linkages between projects, processes and discourses of development on the one hand and, human rights and the environment on the other, are close, contingent and complex. As sustainable development evolves to encompass the triad of concerns of economics, environment and human rights, it

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62 O. Schachter, 'Implementing the Right to Development: Programme of Action', in S.R. Chowdhury, E.M.G. Denters, P. de Waart (eds.), *The Right to Development in International Law*, Nijhoff, Dordrecht, 1992, pp. 27–30.

63 Volumes have been written on the notion of development and decades have gone by in the purported pursuit of its accomplishment, but underdevelopment remains the stark reality in many parts of the world. For present purposes, it is submitted that development should be perceived, 'not in the sense of economic development as a goal in itself, but in the sense of projects aimed at increasing the sum total of human welfare and happiness' as asserted by C.G. Weeramantry in the preface to Weiss *et al.*, *op. cit.* n. 15, p. vi.

affords a context/platform for progress that is purportedly holistic.[64] It has been said that equity[65] is the hallmark of sustainable development.

Sustainable development, which aims first to integrate development and the environment, is a broad and amorphous concept, dealing essentially with the management of resources with a view to regulation of their use and exploitation, rational planning and conservation. It is also increasingly evident that the human dimension is a third integral phenomenon, gradually making sustainability a three-dimensional concept. Even early references to the concept make explicit reference to human populations, and the rights of present and future generations.[66] The fundamental human right to the environment was explicitly recognized in principle 1 of the Stockholm Declaration.[67] More recent manifestations include principle 1 of the Rio Declaration,[68] which places human beings at the centre of concerns for sustainable development. Participatory human rights of a procedural nature, such as that of access to information and the opportunity to participate in decision-making processes, are integral components of sustainable development.[69]

The lesser known concept of sustainable human development has been described thus:

> Sustainable human development is development that not only generates economic growth but distributes its benefits equitably; that regenerates the environment rather than destroying it; that empowered people rather then marginalizing them. It is development that is pro-people; pro-nature; pro-jobs and pro-women.[70]

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64 Sustainable development is broadly defined by N. Schrijver in 'On the Eve of Rio+10: Development – the Neglected Dimension in the International Law of Sustainable Development', *Dies Natalis Lecture*, Institute of Social Studies, The Hague, 11th October 2000: "A comprehensive economic, social and political process, which aims at the sustainable use of natural resources of our planet and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations".

65 International Bank for Reconstruction and Development, *World Development Report* 1994, World Bank, Washington, p. 1; justice and equity, both inter and intra-generational, are the core concepts of sustainable development as stated by Schachter, *op. cit.* n. 62, pp. 27–30.

66 For instance the Charter of Economic Rights and Duties of States, *op. cit.* n. 61.

67 *Op. cit.* n. 60. Principle 1 refers to the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and also to a responsibility to protect and improve the environment for present and future generations, thus combining conceptions of rights and duties, and notions of justice and equity.

68 UN Doc. A./CONF.1515/Rev.1, 13 June 1992.

69 Principle 10 of the Rio Declaration explicitly recognises rights in relation to public participation. Jurisprudence rooted in public interest litigation in South Asia, discussed in Chapter 6, provide an example of the implementation of sustainable development law through the realisation of such participatory rights.

70 J.G. Speth, UNDP Administrator, cited in *Human Development Report*, UN, New York, 1994.

In this study, sustainable development is at a conceptual level, understood in a broad, multidimensional sense. At a methodological level, the application of sources theory renders it a specific meaning, amorphous on the one hand, yet reasonably concrete on the other, given its existence to some extent, within the body of public international law. Sustainable development is practically used as a guide in decision-making, thus enabling the infusion of its salient elements including fairness, justice, equity and the balancing of conflicting interests to the development process. This affords it a useful role in this study. In the constituent elements of intergenerational and intragenerational equity, the interconnections between the different concepts forming the complex web[71] of both goals and means used in this study assume greater significance. The recognition of sustainable development in public international law, its objectives of reconciling the conflicting interests of environment, development and human rights and more generally public interest and private purpose; and its capacity to enhance responsibility and accountability on the part of governments and business, naturally make it a core concept in this study. Its application in several international conventions and other instruments, its inclusion in regional and domestic legal arrangements, and its role in guiding decisions at all levels, enable the injection of more fluid, value-laden concepts like justice, equity, democracy, empowerment, participation and good governance to the body of law.

2.3 The Role of International Law: Value System and Regulatory Framework

> Given the structure of international society, and its continuing adherence to a strong doctrinal view supportive of sovereign rights, the most appropriate role for the jurist is to avoid the temptations of apologetics or of utopianism, neither relinquishing juridical autonomy to the political domain or setting forth legalistic positions that are dismissed as pathetic fantasy by those entrusted with the responsibilities of political leadership. In my view, international law and lawyers can best contribute to the prospects of fashioning a more humane type of global civilization by self-confidently entering the dialogic space between entrenched political power and transnational social forces, acknowledging the relevance of both, but subordinating their autonomy to neither.[72]

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71 See J. Agyeman, R.D. Bullard, B. Evans (eds.), *Just Sustainabilities: Development in an Unequal World*, Earthscan, London, 2003, in particular, Agyeman, Bullard, Evans, 'Introduction: Joined-up Thinking: Bringing Together Sustainability, Environmental Justice and Equity', pp. 1–18; D.R. Faber, D. McCarthy, 'Neo-liberalism, Globalization and the Struggle for Ecological Democracy: Linking Sustainability and Environmental Justice', pp. 38–63; A. Dobson, 'Social Justice and Environmental Sustainability: Ne'er the Twain Shall Meet?', pp. 83–98; and Agyeman, Bullard, Evans, 'Conclusion: Towards Just Sustainabilities: Perspectives and Possibilities', pp. 323–335.

72 R. Falk, 'The Coming Global Civilization: Neo-Liberal or Humanist?', in A. Anghie, G. Sturgess (eds.), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, KLI, The Hague, 1998, p. 15, at p. 32.

Between social activism on the one hand and political leadership and private enterprise on the other, there lies a space for the functionality of public international law, especially in view of rising dissatisfaction with global economic and political processes. In the context of development studies, the law traditionally has not been a key player, but it could promote a path to just, equitable and sustainable development. International law[73] could be instrumental in enhancing accountability in the development process. It can be a means to promote developmental approaches which respect the values of human dignity[74] and ecological integrity.[75] Supportive tools in the achievement of these objectives could be the balancing of conflicting interests and reinforcing mutual and/or universal interests, in view of the vast divergence as well as convergence of interests within the international community. Other avenues include the pursuit of an international legal regime, which is holistic/coherent, realistic and efficient.

International law has potential in the light of the unity and universality of many human rights, developmental and environmental concerns. There is, to some extent, a lack of conflict or controversy in relation to the prevention of business conduct which leads for instance, to environmental damage and human rights violations, given the mutual/universal interests of the international community to do so. The different levels of law that apply to the many interests involved, makes it necessary to look into the international, regional and national levels of legal interventions[76] and their linkages. At the domestic level, there is scope for implementation of international law, which is itself by and large the product of state practice. The role of states and interventions of non-state actors also need to be evaluated because of their relationships to international law.

This research will not be insensitive to the overarching roles of politics and power, which at times relegate international law to mere rhetoric or ideology.

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73 See R.St.J. Macdonald, D.M. Johnston (eds.), *The Structure and Process of International Law*, Nijhoff, The Hague, 1983; L. Henkin, *International Law: Politics and Values*, 1999; Malanczuk, *op. cit.* n. 34; I. Brownlie, *Principles of Public International Law*, OUP, Oxford, 2004; A. Cassese, *International Law*, OUP, Oxford, 2005.

74 To reaffirm faith in fundamental human rights and the dignity and worth of the human person is one of the objectives of the UN Charter of 1945, as stated in its preamble. Art. 1 on the purposes of the UN, underlines the need to develop friendly relations among nations, based on respect for the principle of equal rights of peoples and to promote and encourage respect for human rights and fundamental freedoms for all. The International Bill of Human Rights and other international and regional human rights instruments are predicated on the basic premise of the dignity and worth of the human person.

75 Ecological wellbeing has in recent decades become increasingly visible in international relations and law. This is reflected in numerous international instruments including the Declarations of Stockholm, Rio and Johannesburg, and several Conventions, which forge ahead, the protection of environmental values.

76 On global-local intersections in development, see M. Vellinga, 'The Global-Local Nexus in World Development: Some Comments', 19 *Scandinavian Journal of Development Alternatives and Area Studies*, 2000, p. 31; with respect to this nexus in law, see in general, M. Kirby, 'The Growing Rapprochement between International Law and National Law,' in Anghie, Sturgess (eds.), *op. cit.* n. 72, p. 333.

International law can sometimes be used as a rationalization of self-interest in universal terms. Thus some third world academics tended to view this body of law as having emerged from a handful of Western nations in a process in which they played no part. The new international law to which they aspired particularly in the 1960s and 1970s had a strong redistributive character, for instance the attempts at acceptance of the New International Economic Order (NIEO).[77] Similarly, these writers argued that less developed countries should be allowed to participate more extensively in formulating and applying international norms. International law should be more interventionist according to them, in order to realize the communitarian ideal of a broader and fairer sharing of the world's resources. To achieve the changes in international doctrine that were deemed necessary to realize this goal, reliance was to be placed less upon treaties, which depend on the willingness of the developed countries to agree to demands, than upon the processes of international organizations in which third world countries dominate numerically and participate in power – for example, resolutions of the United Nations General Assembly (UNGA).[78]

In view of the relative weakness of third world approaches to forge ahead a fairer agenda, as epitomized by the plea for a NlEO, this inquiry will also pursue mutual interests, in quest of a balance. Human rights, development and the environment are interests of mutual and even universal concern, and this factor weakens the traditional North-South divide. The need to search for convergence and co-operation rather than confrontation becomes even more important in the unipolar world, which emerged after the end of the Cold war era.

The scope of international law is circumscribed by definition. In the light of the dilemma between international law's dual roles of aspiration to values and embodiment of norms, this study will endeavour to explore the space between these two functions, in pursuit of a degree of synergy between them. Norms are standards of behaviour that are typical of or accepted within a particular group or society,[79] and in the present context, they are laid down primarily by the law. Values consist of beliefs, about what is right and wrong and what is important in life.[80] Complexities arise from the nature of international law, as it is made up of a society of sovereign states, with no supreme system of government, making consensus through state practice the basic guideline in law creation.

This book adopts a developmental approach to international law, and looks towards re-thinking conventional norms, concepts and interpretations of sources of law, within lawful boundaries. It explores the potential of contemporary international law as a protective shield, through the pursuit of imaginative solutions, exploitation of the contradictions in the international legal system, efforts to maintain

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77 See M. Bedjaoui, *Towards a New International Economic Order*, UNESCO, Paris, 1979.
78 See A. Cassese, *op. cit.* n. 73, p. 508.
79 *Oxford Advanced Learner's Dictionary*, OUP, Oxford, 2000.
80 *Ibid.*

its inner coherence, as well as endeavours to redress imbalance and injustice through avenues which seek to protect neglected interests.[81]

2.3.1 Forward to fairness

International law is but a species of a genus – that of the law as a whole. The approach one adopts towards the law and its role in society would thus influence one's attitude to international law in the global community. One of the primary goals of the law as a whole is, or at least should be, the achievement of fairness. Just, equitable and sustainable development, which are at their core closely related to the idea of fairness, should all be approachable through international law.

On justice and equity, the reality of international relations as expressed by Cassese is that: 'In principle, all states are equal. However, one particular class – a handful of States with strong economic and military systems – holds authority in the international community'.[82] Politics and inequality of power is a salient feature of North-South relations, and similarly pervade several other relationships including that between TNCs and developing countries. The law should in this context, play a role in enhancing equality, in the pursuit of fairness.

2.3.2 The quest for equilibrium

When the law attempts to regulate human behaviour, it needs to balance innumerable conflicting interests, which exist in any society. The same applies to actors on the international plane. The idea of law as a tool for balancing conflicting interests and a means of social engineering was articulated by the American jurist Roscoe Pound and the sociological school of jurisprudence.[83] Equilibrium is also at the core of sustainable development. If international law is to accommodate sustainable development and its implementation, more than cosmetic changes to its rubric need to emerge. Both the idea of balancing conflicting interests and the notion of sustainable development are, in this conceptual setting, means for the attainment of justice and equity. The interrelationships between the different goals and means referred to in this context are complex, as sustainable development could be viewed as both goal and tool.

Conflicting North-South interests are another recurrent theme of this study, and international law can play a role here, as highlighted below:

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81 As advocated by B.S. Chimni, 'Third World Approaches to International Law', A. Anghie *et al.* (eds.), *The Third World and International Order: Law, Politics and Globalization*, Nijhoff, Leiden/Boston, 2003, p. 72.

82 Cassese, *op. cit.* n. 73.

83 See J. Stone, *The Province and Function of Law*, Maitland Publications, Sydney, 1950, in particular, p. 487; J. Stone, 'A Sociological Perspective on International Law', in Macdonald, Johnston, *op. cit.* n. 73, p. 263.

> . . . once precise areas of contention are identified, it becomes evident that international law has a role to play not only in providing equitable rules for a solution but also in adequately reflecting the social needs of our time. International Law, without bowing to mere expediency, must take account of changed values, of changed demands, and of the legitimate aspirations of new nations as well as old.[84]

Competing interests have a North-South complexion in the FDI context, given the dynamics between LDCs and TNCs, and the fact that, traditionally, the North is home to many TNCs, and the South hosts to FDI. The winds of change in recent decades however, have broken this linear simplicity, and the realities are now more complex. LDCs were conventionally concerned about the dominance of TNCs in national economies, but now equally, embark on a race to the bottom, in the pursuit of FDI. Developed countries – formerly preoccupied with the protection of the investments of their TNCs and legal certainty for their transactions – are now also interested in broader social interests, although investment protection is still a key concern.[85] However, the field does not usually consist of players on an equal level:

> When developing countries deal with large multinationals, the multinational is often in a position of dominance, whether by reason of its enormous resources or by reason of its monopoly of the desired technology. Its power is very often larger than that of many a nation State of the world. Indeed, the economic power of several individual multinationals is greater than that of more than three-quarters of the nation States of the world. But it is power which they wield in the territory of the developing countries, without any responsibility or accountability. It is therefore contrary to a basic democratic principle which postulates that power without responsibility is anathema to the democratic ideal.[86]

Thus the notion of balancing conflicting interests could surface in several contexts including North/South; TNCs/host-states; environment/economy; human rights/development, and rights/responsibilities. In the case of reinforcing mutual/universal interests, for instance, if poverty is viewed as an environmental problem, economic development and environmental protection are no longer conflicting but complementary interests. Human rights, developmental and environmental issues are often of mutual/universal interest.

Conflicting interests are also related to the issue of conflicting norms and value implementation, as well as to coherence/incoherence of norms. Norms are of

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84 R. Higgins, *Conflict of Interests: International Law in a Divided World*, The Bodley Head, London, 1965, pp. 49–50. In relation to balancing conflicting interests in natural resources, see N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, CUP, Cambridge, 1997.

85 Malanczuk, *op. cit.* n. 34.

86 C.G. Weeramantry, 'Human Rights and the Global Marketplace', 25:1 *Brooklyn Journal of International Law* (1999), p. 41.

practical relevance as guides to action.[87] The guidance of actions, in turn, takes place against a background of ends or values. So norms can be considered in relation to a set of background values that are implemented by the norms. But there can be conflict between values and there can be incoherence in the way values are implemented by norms.[88] The term 'conflict of laws', usually used to describe conflict between laws from different jurisdictions, could also apply to a conflict between provisions of one juridical order. The latter case according to one writer, speaking presumably in the context of a domestic legal system, can be resolved through different means – the delimitation of different scopes of application of the relevant provisions; the enactment of a higher order rule or the elimination of the conflict through the balance of the competing legislative interests.[89] Such conflicts also need to be resolved in the unified juridical order of international law.

2.3.3 From principle to practice: the role of public interest litigation

For sustainable development to proceed from principle to practice, the law needs to be complied with, implemented and enforced. This calls for suitable action both at the international level, and at the regional and national levels.[90] The pursuit of efficacy is naturally complicated in a society of sovereign states. According to Birnie and Boyle:

> Adequate protection of the global environment depends on the interplay of international and national measures and the use of national legal systems by individuals or environmental groups creates additional pressure for compliance by governments of their international obligations. More generally, the existence of individual procedural rights helps shape domestic environmental policy and facilitates the resolution of transboundary environmental conflicts through equal access to the same private law procedures. It gives non-governmental organisations an opportunity to bring legal proceedings or to challenge proposed developments on a public interest basis. It would be entirely realistic for international law to encourage these trends.[91]

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87 L. Lindahl, 'Conflicts in Systems of Legal Norms: A Logical Point of View', in P.W. Brouwer *et al.*, *Coherence and Conflict in Law: Proceedings of the 3rd Benelux-Scandinavian Symposium in Legal Theory*, Kluwer Law and Taxation Publishers, Deventer/Boston, 1992, p. 39.

88 *Ibid.*

89 F. Rigaux, 'The Meaning of the Concept of "Coherence in Law"' in Brouwer *et al.*, *ibid.*, p. 20.

90 Principle 23 of the World Charter for Nature, *op. cit.* n. 37, for instance, refers to the need for such interaction at all levels. Agenda 21, consisted of a blueprint of action towards sustainable development in the 21st century, directed at action at all levels. The Plan of Implementation of the World Summit on Sustainable Development, Johannesburg, A/CONF.199/L.1, of 2002, is also oriented towards implementation at the national, regional and international levels, and strengthening institutional arrangements for sustainable development at all three levels.

91 P.W. Birnie, A.E. Boyle, *International Law and the Environment*, CP, Oxford, 1992, p. 194.

In terms of legal developments of significance to the core concepts in this research, the innovation of public interest litigation will be discussed.[92] This involves cases in which the test for *locus standi* has to some extent been liberalized from the need to be an aggrieved person, to merely being a person with a genuine and sufficient concern. This liberalization has, in turn, created an enabling environment for persons adversely affected by industrial pollution, large development projects and the like to seek redress though class actions, citizen suits or representation of their cause by concerned organizations. Public Interest Litigation has evolved as a means of balancing the conflicting interests of development, environment and human rights towards a more just, equitable and sustainable development. It can enhance empowerment and democracy, participation and precaution, in the pursuit of greater responsibility and accountability on the part of governments and business. It could be classified as a concept of law and perhaps more aptly as an example of the role of law as a means of attaining certain goals. A striking feature of PIL is the central role played by the judiciary, judicial innovation and ingenuity. An independent judiciary can play a significant role in implementing and enforcing the law, especially global public values embodied in international law. PIL has taken root in South Asia, perhaps because of certain features which are common in the region, like lack of balanced laws, policies, implementing tools and capacity for sustainable development; a trend to indiscriminately follow free trade and investment; the ground realities of poverty, overpopulation, strong social, religious and cultural traditions; lack of faith in the political process, and an enlightened civil society, legal profession and judiciary.

2.3.4 The pursuit of coherence

According to Rigaux,

> coherence is a state of peace of the mind, of a logical mind which is disturbed when two competing concepts or rules or two different meanings of the same concept are conflicting. Incoherence also means the intellectual dissatisfaction facing a legal reasoning which is not in concordance with a logical process. One of the goals of an appropriate method of legal reasoning is to restore to the lawyers that peace of mind which can be called coherence.[93]

The evolution of international law relating to sustainable development raises basic questions about the interrelationship of principles from different fields of international law, and about the legal and institutional structures and power relationships in these fields. It also involves issues relating to regional and national arrangements, the roles of home and host states, business and civil society. Influences,

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92 See Chapter 6.

93 Rigaux, *op. cit.* n. 89, p. 17.

contradictions and comparative values, as well as the issue of (in)coherence of international law as a whole, raise many questions, which can be considered only by looking at the different areas of relevance.[94] The concept of coherence could help to discover the core meaning and to make some sense out of the plethora of laws and policies from multiple sources in the present context. There is a need for co-ordination and co-operation particularly at the intergovernmental level and a heightened role for multilateralism and intergovernmental organizations.

2.3.5 Change and reality

The law as a social science must adapt constantly to the changing realities of time, space and circumstances, to maintain its relevance. Basic changes in the nature and structure of international relations raise the issue of the need for change in the principles of public international law. Given the growing predominance of transnational business entities in the context of globalization, it is unrealistic for public international law not to reflect this factor in its fabric, at least to a limited extent. The same applies to the increased interventions of other non-state actors, and the changing structures of global society. Without a more realistic conception of the new framework of international relations, especially international economic relations, the law becomes out of touch with reality.[95] Such sentiments are echoed repeatedly by those who argue that for international law to play a more meaningful role, international legal institutions should not be viewed 'as abstract entities petrified in time and space (. . .).'[96] [For it is] 'misleading to consider international law as a piece of reality cut off from its historical, political and ideological context'.[97] International law could in this sense, be viewed as *dynamic*,[98] or a dynamic process, and not a mere brooding omnipresence in the sky. Cassese seeks to combine the strictly legal method with the historical and sociological

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94 This view is also expressed by P. Sands, in 'Sustainable Development: Treaty, Custom, and the Cross-Fertilization of International Law', in A. Boyle, D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, OUP, Oxford, 1999, p. 39. Sands questions whether the international legal order is an aggregate of disparate elements, or a systematically organized and coherent structure, and in the latter case, what organizing techniques, if any, exist to assure hierarchy.

95 Anthony D' Amato in his book *International Law and Political Reality*, KLI, The Hague, 1995, states in the preface at p. ix, that international law is not an end in itself, but serves three goals: helping nations avoid frictions that could lead to war, helping people realize their natural rights in a world divided into national jurisdictions, and helping to modify human activities to safeguard the planet's ecological balance. He asserts that although much of what passes as international law is little more than international rhetoric, the rules of international law also have a way of staking out baselines which affect a nation's own perception of the bounds of its national interest. International law helps draw a part of the picture of international politics that national decision-makers tend to perceive as Political Reality.

96 A. Cassese, *op. cit.* n. 73, preface, p. v.

97 *Ibid.*

98 *Ibid.*

approach, to expound the dynamic of international law, in particular to illustrate the tension between traditional law, firmly grounded in the rock of state sovereignty, and the new or nascent law, 'often soft and hazy as a cloud, but inspired by new, community values'.[99] R.P. Anand states:

> The alteration in the sociological structure of the international society must, of course, be accompanied by an alteration in law. Law, it has been well said, is not a constant in a society, but is a function. In order that it may be effective, it ought to change with changes in views, powers and interests in the community. The conditions under which the classical, traditional law of nations developed the views it contained and the interests which it protected, have all greatly changed. It is also no reproach to law to say that by its very nature it tends to be conservative and is 'a bulwark of the existing order'.[100]

The purpose served by all the *via media* discussed above to some extent is to link the dual roles[101] of international law as a value system and normative framework. The methodology adopts the theory and sources of public international law, which will be informed by the conceptual framework and the perspective of the role of international law. Finally, whether on the issue of international law and its role, or law and its role, it must also be remembered that there is much subjectivity and relativity in both concepts and definitions, and more precisely in the processes of conceptualization and definition which are in the final analysis, at least to some extent, a reflection of the definer's position, perspective and perception.

2.4 Methodology: The Theory and Sources of International Law

The basic problem examined in this study was set out by illustrating with some specific examples and general explanation, certain adverse impacts on human rights and the environment that may result from foreign direct investment in developing countries. Through this process, the core issues were raised, to examine and evaluate the relevant legal principles.

The methodology applied involves the discipline of public international law, and is based primarily on its theory and sources. This study argues in favour of

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99 *Ibid.*

100 R.P. Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law', in F.E. Snyder, S. Sathirathai (eds.), *Third World Attitudes toward International Law*, Nijhoff, Dordrecht, 1987, p. 11; for a variety of perspectives, see R.S. Pathak, R.P. Dhokalia (eds.), *International Law in Transition: Essays in Memory of Judge Nagendra Singh*, Nijhoff, Dordrecht, 1992; M. Shahabudeen, 'Developing Countries and the Idea of International Law', in R.St.J. Macdonald (ed.), *Essays in Honour of Wang Tieya*, Nijhoff, Dordrecht, 1993, p. 721; B.S. Chimni, in Anghie *et al.*, *op. cit.* n. 81, p. 72.

101 This dual function is well illustrated by Article 1 of the 1945 Charter of the United Nations, which embodies values for the UN to aspire to, here referred to as "purposes", and functions which it should fulfil apparently, to realise those values.

a broad, inclusive and innovative approach to the sources of international law in Art. 38(1) of the Statute of the ICJ. However, the law does not exist in a vacuum, thus it is necessary to first address some basic realities within which it operates. The research area lies at the crossroads of several disciplines, as the development process involves practically every sphere of social activity and every branch of knowledge. While open and sensitive to the existence of parallel responses from other disciplines, particularly other social sciences, this study is clearly posited within the discipline of the law and purports to be a critical evaluation of its relevant components.

The relevant legal framework could in principle include international law, both public and private, and the national laws of home and host states, as they relate to the international regime. Private international law will not be included in this study, which will be confined to regulation in the public sphere. However, some of its salient aspects may be discussed because of the blurring of boundaries with public international law, for instance, with regard to the legal personality of TNCs. Since this inquiry involves linkages, for instance between international economic law, international human rights law and international environmental law, the respective branches will be discussed to the extent of relevance. To view the operationalization of public international law on a second and third tier, some legal arrangements at the regional South Asian level and national Sri Lankan level will also be discussed.

The problem under consideration will be approached through a methodology, viewed through the lens of a theoretical framework, which perceives the law as being embedded in many social and political processes,[102] as a system of norms/rules as well as a system of values. At a more basic level, the role of law in society and of international law in the global community assume relevance. The law is a medium for bridging the gap between development theory and practice, as it has the capacity to convert policy to pragmatic prescriptions, which can often be enforced. The implementation of the international law relating to sustainable development in South Asia, through the innovation of PIL, could be cited as an example. Here, certain international environmental principles like the precautionary principle have proceeded from policy to principle and then to practice through case law and domestic legislation.

From its origins, to date, there are those who, like positivist thinkers including Austin, Hart and Kelsen,[103] have argued that international law is not law.

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102 For international legal theory in general, see O. Schachter, *International Law in Theory and Practice*, Nijhoff, Dordrecht, 1991; Macdonald, Johnston, *op. cit.* n. 73, J. Makarczyk, *Theory of International Law at the Threshold of the 21st Century-Essays in Honour of Krysztof Skubiszewski*, KLI, The Hague, 1996; K. Wellens, *International Law: Theory and Practice – Essays in Honour of Eric Suy*, Nijhoff, The Hague, 1998.

103 See M. Bos, 'Will and Order in the Nation-State System: Observations on Positivism and International Law', in Macdonald, Johnston, *op. cit.* n. 73, C.F. Amerasinghe, 'International Law and the Concept of Law: Why International Law is Law', in J. Makarczyk, *ibid.*

Their arguments focus primarily on the nature of international law, and its contrast with domestic law. This study will however, adopt a broader approach to law, as a system which can assume a sense of direction from a related set of values.

On a further level of abstraction, one could go on to consider the nature of the concept of law.[104] Here, the answer is furthest from simple:

> The infinite diversity of human relationships with which the law has to deal transcends the limited resources of language, which is always trying to overtake the complexities of life and business and reduce them to categories.[105]

It is not possible to give a single definition, but one could point to several approaches to explaining/describing law – for instance, by its basis in nature, reason, religion or ethics; by its source in custom, precedent or legislation; by its effects on the life of society; by the method of its formal expression or authoritative application; and by the ends that it seeks to achieve. On the ends that it seeks to achieve, which is part of the role of law in society, much would depend on the particular school of thought/legal philosophy/jurisprudence, and again, there is some variation even within each school of thought. Among the main approaches to legal philosophy are natural law, positivism, and the historical, sociological and Marxist schools of thought. One's attitude to international law would necessarily be influenced by one's conception of what is law in the first place. Some commentators[106] articulate the argument that international law is law, for several reasons, including the reality that rules described as rules of international law by governments are actually used by governments.

The sources of public international law constitute a basic resource in this research, in terms of methodology,[107] as they embody the international legal regime, and the processes for the crafting of international law. The relevance and hierarchy of the various sources of international law will be analysed, together with their interactions with regional and domestic legal frameworks. In the legal sense the term 'sources' refers to the criteria which distinguish binding law from other –

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104 See Stone, *op. cit.* n. 83; G.W. Paton, *A Textbook of Jurisprudence*, CP, Oxford, 1951; P. Smith (ed.), *The Nature and Process of Law: An Introduction to Legal Philosophy*, OUP, New York, 1993.

105 Lord Macmillan, *Law and Other Things*, p. 149, cited in G.W. Paton, *ibid.*, p. 51.

106 For instance C.F. Amerasinghe, *op. cit.* n. 103.

107 See C. Parry, *The Sources and Evidences of International Law*, Manchester University Press, Manchester, 1965; V.D. Degan, *Sources of International Law*, Nijhoff, The Hague, 1999; A. D'Amato, *International Law Sources*, Nijhoff, Leiden, 2004; D.W. Greig, 'Sources of Public International Law', in S. Blay *et al.* (eds.), *Public International Law: An Australian Perspective*, OUP, Melbourne, 2005; L.B. Sohn, 'Sources of International Law', 25 *Georgia Journal of International and Comparative Law*, 1995/96, p. 399; T. Skouteris, 'The Sources of International Law: Tales of Progress', *Hague Yearbook of International Law*, 2000, p. 12; R.S. Pathak, 'The General Theory of the Sources of Contemporary International Law', 19 *Indian Journal of International Law*, 1979, p. 483; B. Cheng, 'Some Remarks on the Constituent Element(s) of General (or So-called Customary) International Law', in Anghie, Sturgess, *op. cit.* n. 72, p. 377.

legally non-binding – social or moral norms and *lex lata*, or the law as it currently stands, from *lex ferenda* or the law as it may be or should be in the future.[108] According to Art. 38(1) of the Statute of the ICJ, which is generally accepted as constituting a list of these sources, they are international conventions; international custom and the general principles of law recognized by civilized nations. They also include judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International conventions or treaties constitute legally binding sources of law for states which are party to them and continue to grow in importance. They can only be concluded by recognized subjects of international law.[109] Custom, also a legally binding source of law, consists of the objective element of a general practice of states, and the subjective one of *opinio juris*, that is, that it is accepted by states as law, through a conviction that a certain form of conduct is required by international law.[110] Treaties could constitute evidence of customary law, particularly multilateral treaties, and to a lesser extent, also bilateral ones, if sufficiently widespread.[111] If a multilateral treaty claims to be declaratory of customary law, or is intended to codify customary law, it can be cited as evidence of customary law even against a state, which is not a party to the treaty.[112] A general practice is a relative concept defying exact definition, and should usually involve a very wide acceptance, although this depends on the issue. The practice of the most concerned or involved states is important. State practice consists of what states do as well as what they say.[113] The vague phrase 'general principles of law' could be understood to mean both general principles of international law and general principles of national law. These principles are used to fill in gaps where no treaty or custom exists, and could be useful in new areas of international law,[114] such

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108 Malanczuk, *op. cit.* n. 34, p. 35. He also points out that "in this sense the term 'source' has a technical meaning related to the law-making process"; that in the "decentralized international legal system, lacking a hierarchical structure", the problem of finding the law is very complex, and the subjects of international law are also the creators of this law; and that "changes in international society since 1945 have led to basic disputes on the sources of international law" which have become "an area of considerable theoretical controversy".

109 *Ibid.*, p. 36.

110 *Ibid.*, p. 39.

111 *Ibid.*, p. 40.

112 *Ibid.*

113 *Ibid.*, p. 43. At p. 39 Malanczuk states that evidence of actual practice can be found in a range of published materials including newspaper reports of actions taken by states, from statements made by government spokesmen to Parliament or the press, at international conferences and at meetings of international organizations; from a state's laws and judicial decisions and published extracts from the archives of the Foreign Ministry. There is also a range of unpublished material such as correspondence with other states, and advice received by the state from its legal advisers. In addition, evidence may be found in the documentary sources produced by the United Nations, in the writings of international lawyers, and in judgments of national and international tribunals, which are subsidiary means for the determination of rules of law under 38 (1) (d).

114 *Ibid.*, p. 49.

as the sphere under consideration in this study. Laws applicable in this research context are embodied in all the different sources, including conventions and custom, although conventions are not many. General principles of law are also significant here, including general principles of national law, given the domestic implications of sustainable development, as well as the *lacunae* in international law.

Judicial decisions, which could be used as subsidiary means for the determination of rules of law under Art. 38(1)(d) can also constitute evidence of customary law or clarify the meaning of treaty law. They could evolve from international, regional and national courts and tribunals. Judges can probably also create new law, which has happened in the ICJ, whose decisions introduced innovations into international law.[115] Judicial decisions are important in this inquiry, which derives support from case law at different levels. Cases of PIL from South Asia demonstrate that judges can bring innovation in areas where law and policy are closely connected and give meaning and effect to international law, especially soft law. Although the centrality of sovereignty, states and state practice in international law, make the legislative and executive branches the primary contributors to the making of international law, this study adopts the approach that the judiciary is a core institution for the upholding of the rule of law, also in view of judicial review, and thus can make an effective contribution. The writings of publicists or learned writers constitute subsidiary means for the determination of rules of law, and can also be evidence of customary law.[116] Although of diminishing significance, writings still play a role, for instance, in providing a conceptual framework for legal discussion.[117]

In addition to the above listed sources, there has been much discussion on the question of other possible sources of international law, including acts of international organizations, soft law and equity. In the case of acts of international organizations, most of the organs of such are composed of representatives of member states, and often the acts of such organs are the acts of represented states.[118] So a resolution of the UNGA could be evidence of customary law as it reflects the view of the states voting for it. International organizations usually have at least one organ which is not composed of member states, and the practice of such organs is capable of constituting a source of law.[119] Sometimes, an organization is authorized to take decisions binding on member states.[120] If a resolution declares that something is the law, it can be used as evidence of customary law, and its

115 *Ibid.*, p. 51.
116 *Ibid.*
117 *Ibid.*
118 *Ibid.*, p. 52.
119 *Ibid.* See also I. Brownlie, 'The Decisions of Political Organs of The United Nations and the Rule of Law', in Macdonald, Johnston *op. cit.* n. 73; R. Khan, 'The Legal Status of the Resolutions of the UN General Assembly', 19 *Indian Journal of International Law*, 1979, p. 552.
120 Malanczuk, *ibid.*

value varies with the number of states voting for it.[121] A resolution passed at a meeting of an organization needs to be examined together with all other available evidence, to decide whether it is evidence of custom.[122]

When equity is referred to as a source of international law, it is described as a synonym for justice, and is also linked to appeals to natural law.[123] Judges and arbitrators can use equity to interpret or fill gaps in the law, although this does not necessarily mean that they use equity as a source of law.[124] Article 38(2) of the ICJ statute enables a court to decide a case *ex aequo et bono*, a decision in which equity overrides all other rules, if the parties agree thereto. Whether equity forms a source of international law is very much a matter of controversy, although lawyers and judges do make appeals to equitable considerations.[125] Equity has considerable potential in this study, in its search for alternatives, complimentarities and broader interpretations, as it allows a degree of flexibility and lawful adjustment.

'Soft law' – which involves certain declarations and resolutions of international organizations and often consists of guidelines of conduct which are neither strictly binding norms of law nor completely irrelevant political maxims, operating in a grey zone between law and politics[126] – constitute perhaps the most important source in the present context. Such provisions can be found in treaties not yet in force or in resolutions of organizations, which lack legally binding quality. In practice, soft law may wield considerable strength in shaping international conduct, and may also be relevant from a sociological perspective of international law, on the formation of customary or treaty law and the related issue of legitimacy.[127]

This study will adopt the argument that soft laws do have moral, ethical as well as legal value. To discover this value, one does not have to venture beyond the Charter of the UN which, in its opening lines, sees the necessity to establish conditions under which justice and respect for the obligations from treaties and other sources of international law can be maintained. With time, soft law can crystallize into general principles, and more importantly, customary international law. In the light of the difficulty of reaching international consensus and a binding treaty on the regulation of foreign investment, the emergence of a formidable body of soft laws is indeed significant. They represent an underlying legal pluralism unparalleled in most other areas, as they emerge from such a wide vari-

121 *Ibid.*
122 *Ibid.*
123 *Ibid.*, p. 55.
124 *Ibid.*
125 *Ibid.*
126 *Ibid.*, p. 54.
127 *Ibid.* However, he adds that certain principles and rules which are emerging as new norms in the process of law-making, without yet having become accepted as legally binding, may still have limited anticipatory effect in judicial or arbitral decision-making as supporting arguments in interpreting the law as it stands.

ety of actors: international organizations, civil society and private business,[128] trade unions, professional associations and many others; in effect, perhaps more representative than state practice itself. The argument in favour of soft law will be concretized in this study through the notion of the progressive development of international law and cross-fertilization between the different sources, as soft law can eventually find its way into conventions, custom, and general principles. Soft law, *lex ferenda* and international public values can inform the development of international law as well as legal and policy development at the regional and national levels.[129] It has also been pointed out in this chapter that many broad social interests such as environmental protection form part of ancient and timeless philosophies and religions, which connect to systems of values at different levels. The influence of such global values taken as a whole become all the more important in the context of FDI regulation, where an international convention has so far proved a myth, but instead, there have been a multitude of attempts at regulation from different sources at different levels, mostly in the realms of soft law.

The argument for the realization of Principle 10 of the Rio Declaration which recognizes the rights of individuals to participate in decision-making processes, to have access to information, and access to judicial and administrative remedies will be advanced in this work, through a variety of means including public interest litigation, civil society initiatives and corporate codes. International standards which are not binding on states may be enforced through corporate codes and conversely, codes can lead to the evolution of such standards and thus influence the creation of norms. Other interrelated developments through the interventions of regional and national arrangements and home and host states could all influence the scope of international law and its cross-fertilization, perhaps bringing its content closer to a system of global public values which is now apparent in the area of development, environment and human rights.

In addition to the number of international instruments and the practice of international organizations which illustrate state consent, domestic legislation and implementation further reflect state practice. In South Asia, in the sphere of the law relating to sustainable development, for instance, such legislation and implementation have played a key role. The combined effect of these instruments followed by subsequent state conduct could pave the way to the emergence of a body of customary law as state conduct reflects *opinio juris*. Thus although resolutions are not binding on those who vote in favour of them, states may undertake binding obligations through them. The attitude of states in relation to the obligations

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128 Corporate Codes of Conduct can develop from policy to soft law, and influence the progressive development of international law. See N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises*, Kluwer, Deventer, 1980.

129 See D. Shelton, 'Editor's note: The Role of Non-binding Norms in the International Legal System', in D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, OUP, Oxford, 1999, p. 554.

is thus important and all circumstances of the case are relevant especially the conduct of states, before, during and after adoption of the text.[130]

Multilateral Investment Treaties (MITS) and BITS constitute critical sources of investment regulation. The ideological controversies that from earliest times pervaded the arena of foreign investment and its regulation are to date partly responsible for preventing the emergence of a comprehensive multilateral instrument for regulation. However, there have been aborted attempts like the UNCTC's Draft Code and the OECD's MAI. There are also other agreements, which represent international consensus, either at the regional level like the OECD Guidelines on MNEs, and the North Atlantic Free Trade Agreement (NAFTA) and Association of Southeast Asian Nations (ASEAN) investment agreements, or through international organizations like the Guidelines on Foreign Investment by a study group of the World Bank and related and prospective efforts within the World Trade Organization (WTO). BITS now number over 2500, and their overall impact is significant as they represent a substantial body of state practice, and as such, could wield much influence on the course of foreign investment regulation.

The international law relating to development provides some scope for the emergence of principles for balancing the relevant conflicting interests. It creates a space for the progressive development of international law. Development law provides a fertile ground as it promotes development in a somewhat holistic manner, but this fertility is negated by the rather feeble legal status of much of this law. It however provides a normative framework[131] within which further principles may emerge. In terms of legal status, opinions regarding UNGA Resolutions and their contribution to the development of international law differ widely, ranging from regarding them as the primary source of international law to the outright denial of any legal significance. Some resolutions are purely political, and there are varied degrees of legal value even in those which are normative and purport to formulate principles of law, and here too variables like the form and wording will determine the precise legal status. Much of development-related law consists of programmatory resolutions, that is, those which are prospective in nature, proclaim principles and rules which are new and not yet generally observed, and recommend measures which are not yet instituted. Of much greater value is the 1962 Declaration on Permanent Sovereignty over Natural Resources, which is in the

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130 Thus in the area of sustainable development, in the 1990's, treaties were made rather than additional resolutions, for instance, the Biodiversity Convention. S. Atapattu, 'Recent Trends in International Environmental Law', 10 *SLJIL*, 1998, p. 47, at 49; see N. Schrijver, 'The Role of the United Nations in the Development of International Law', in J. Harrod, N. Schrijver (eds.), *The UN Under Attack*, Gower, Aldershot, 1988, pp. 33–56.

131 This paragraph is largely based on arguments developed in N. Schrijver in Harrod, Schrijver, *ibid.* Schrijver states at p. 52: "The UN debate on the development problem and the resolutions resulting from it have substantially contributed to the gradual formation of a normative framework for international social and economic co-operation of States to promote development".

nature of a permissive resolution, an important form of law-creating resolutions: they accord entitlements, even rights to do things which hitherto were not permitted by international law. This Declaration, which formulated certain new principles, was supported by a vast majority of states.[132] In fact, the description of a UNGA Resolution as a 'Declaration' is in itself a sign that the instrument is a normative resolution with legal value and relevance. 'Declaration' suggests that the General Assembly is concerned with an act of the confirmation or codification of already existing, customary principles of international law. It is significant that several resolutions having potent value to this study from the field of development, are denoted as 'Declarations', for instance that on the Right to Development (DRD)[133] and that on permanent sovereignty over natural resources. This gives a value added to its legal basis. It is submitted that the stark absence of treaty law, paucity of customary international law, and the softness and weakness of any laws that exist are a practical illustration of the politics that underline the sphere of international law relating to development. One ray of hope lies in the fact that customary international law could emerge through series of resolutions and soft law pronouncements. The preponderance of soft law in this study makes the understanding of international law making and the validity of sources central to it.

The analysis of the effectiveness and implementation of sustainable development requires the study of regional arrangements, such as within ASEAN, Asia Pacific Economic Co-operation (APEC) and SAARC.[134] At the national level it would include a study of the Sri Lankan Constitution, and other legislative enactments. Particularly in the Third World, countries often sign international agreements, and only pay lip-service to them. But implementation is of seminal significance and international law instruments often expressly provide for the need for concerted action at the domestic level. Interventions of civil society[135] and self-regulation by TNCs[136] will be surveyed to the extent that they relate to international law. The issue arises whether the erosion of state sovereignty in a globalizing world creates space for the evolution of law/policy from non-state actors. International organisations have a limited form of functional personality in international law, TNCs have a lesser status and NGOs even a lesser position in relation to rights and duties in international law, including the ability to make law. Their strengths

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132 *Ibid.* UNGA Res. 1803, 14 December 1962, was in fact adopted by 87 votes to 2, with 12 abstentions.

133 UNGA Res. 41/128, 4 December 1986.

134 Association of South-East Asian Nations, Asia-Pacific Economic Co-operation and South Asian Association for Regional Co-operation, all discussed in chapter 6.

135 See for instance, D.F. Murphy, J. Bendell, *Partners in Time? Business, NGOs and Sustainable Development*, UNRISD Discussion Paper no. 109, UNRISD, Geneva, 1999.

136 See for example, P. Utting (ed.), *The Greening of Business in Developing Countries: Rhetoric, Reality and Prospects*, Zed Books/UNRISD, Geneva, 2002; P. Utting, *Business Responsibility for Sustainable Development*, UNRISD Occasional Paper no. 2, UNRISD, Geneva, 2000; E.V.K. Fitzgerald, *Regulating Large International Firms*, UNRISD Programme on Technology, Business and Society, Paper no. 5, 2001.

and weaknesses in turn influence the value if any that can be attached to their interventions in the making of law and policy.

Primary sources in this inquiry include international legal instruments like international conventions and decisions of international and regional intergovernmental organs; reported cases of international courts; and comparative law emanating from domestic courts in South Asia, including several cases from the national jurisdiction of Sri Lanka. The regional and domestic jurisprudence is discussed only to the extent that they connect to international law by way, for example, of methods of implementation. Secondary sources include books and articles. Corporate codes and civil society initiatives are additional resources. The study also includes several materials from the internet.

This study advocates, develops and elaborates a broad, inclusive and innovative approach to the sources of international law as enunciated in Art. 38(1) of the Statute of the ICJ. The moderate and nuanced approach taken in this context, envisages traversing conventional boundaries, without surpassing their lawful parameters. The need to accommodate alternatives and complimentarities in view of the diversity and plurality in laws and legal systems in the context of globalization, the exploitation of contradictions within it, the quest for coherence in the international legal system, and the role of international law as a protective shield to neglected interests both at the international and national levels, justify the approach taken in this inquiry.

Chapter Three

TRANSNATIONAL CORPORATIONS AND PUBLIC INTERNATIONAL LAW

3.1 Introduction: International Legal Regulation of TNCs

Definitions and descriptions of TNCs display their amorphous nature and the various geopolitical and ideological distinctions that both surround and situate them in factual context. The issue of regulation of TNCs is simultaneously complex for its lack of clarity, impoverished for its inadequacy, and yet rich for its strategic and dimensional diversity. The uniquely ubiquitous structure of TNCs and their activities naturally results in legal problems. TNCs 'are born, live and die' under the municipal law of a state.[1] Rules of private international law or conflict of laws are applicable to them. When doing business abroad, the conduct of each subsidiary is governed like any other private person, by the host state's local law, occasionally by controls by the home state, and indirectly, by the international law of aliens. Thus there is a basic problem that regulation is essentially local, whereas the economic activities of TNCs are overtly international. The inherent character of TNCs then gives rise to controversial issues such as the home state's right to exercise diplomatic protection, the extraterritorial application of national laws by the home state resulting in concurrent jurisdiction by two or more states, non-discrimination treatment by host states in comparison with treatment given to domestic enterprises, expropriation and nationalization, and the settlement of disputes between TNCs and host states.[2] The increasing fragmentation of transnational economic activity into sub-contracting, supply chains, business process outsourcing (BPO)/outsourcing[3] and other such arrangements further complicates the

1 P. Fischer, 'Transnational Enterprises', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. IV, 2000, p. 924. On regulation in general, see P.T. Muchlinski, *Multinational Enterprises and the Law*, Blackwell, London, 1995.

2 *Ibid.*

3 Outsourcing basically involves the arrangement for someone outside a company to do work or provide goods for that company (*Oxford Advanced Learner's Dictionary*, OUP, Oxford, 2000). It is also defined as the delegation of non-core operations or jobs from internal production to an external entity (such as a sub-contractor) that specializes in that operation (http://en.wikipedia.org/wiki/Outsourcing).

regulation of TNCs, as they make connections remote, thus identification, causation and accountability become more complex issues.

The issue arises as to whether a particular violation of human rights or environmental harm as a result of TNC activity (or indeed the promotion/protection of development/human rights/environment) is governed by international law, the national laws of the home or host state, a combination of these, or some other source. In addition to all these possibilities – which are basically related to state or inter-state practice – there is a growing body of interventions by international organizations, as well as self-regulation by TNCs and regulatory initiatives by civil society/NGOs, sometimes together with international organizations. Parallel to the traditional state model, non-state actors are no longer merely objects of regulation, but influence the law that governs such relations and its implementation.

In addition to general principles of public international law, several of its constituent branches – international economic law, international human rights law and international environmental law including the law on sustainable development[4] – become relevant. Foreign investment law also involves a multitude of bilateral and multilateral arrangements. This chapter will survey only the relevant general principles and concepts in international law. The specific branches will be analysed subsequently. However, there are many points of intersection, and the spirit of coherence requires that the distinct branches should ideally be viewed as component parts of one overarching process.

International law evolved to regulate interstate relations and is slow to adapt to change. The problem being researched in this book raises basic issues relating to the actors, structures, processes, values and interests that this body of law involves, which are in a constant process of evolution that should be reflected by the law. Certain general principles or concepts of public international law are particularly pertinent. Analysis of regulation in its different dimensions leads primarily to questions as to the application, relevance and appropriateness of concepts and principles of international legal personality, state and international jurisdiction under various foundations, international responsibility for breaches of international law and international minimum standards. Substantial adjustments with respect to these norms may lead to greater protection of broader social interests, if the law evolves in a continuum.

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4 On TNCs and international law, see M.K. Addo (ed.), *Human Rights and the Responsibility of Transnational Corporations*, KLI, The Hague, 1999; M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, KLI, The Hague, 2000; S.P. Subedi, 'Who Controls the Multinational Corporations? Does the Answer Lie in International Law?', *Inaugural Address*, Middlesex University, London, 15 May 2002 and 'Multinational Corporations and Human Rights', in K. Arts, P. Mihyo (eds.), *Responding to the Human Rights Deficit: Essays in Honour of Bas de Gaay Fortman*, KLI, The Hague, 2003, p. 171.

3.2 International Legal Personality

Regulation of TNCs, including the issue of their accountability and responsibility, leads to the question of the status of TNCs as the primary actors in international investment and whether or not they possess international legal personality or in other words, are subjects of international law. A subject of law has been defined by the ICJ, as an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.[5] The concept has been lucidly articulated as follows:

> It is clear that there are many types of international legal person. It is also clear that 'international personality' is not an absolute concept. It is relative in the sense that different types of international legal person may have different types or layers of international personality. Generally (and not exhaustively), international personality entails the ability to bring claims before international tribunals exercising an international legal jurisdiction, to enjoy rights and be subject to international legal obligations, to participate in international law creation, to enjoy the immunities attaching to international legal persons within national legal systems, to participate in international organizations and to conclude treaties.[6]

The presence or absence of international legal personality would necessarily influence the nature and extent of regulation, particularly at the international level. States are the only entities regarded unequivocally as fully-fledged subjects of international law. International organizations do in certain circumstances satisfy some of these conditions.[7] As pointed out by Brownlie, however, the realities of international relations are not reducible to a simple formula and the picture is somewhat more complex.[8]

The distinction made by some writers between capacity and personality is enlightening. The common denominator of all subjects of international law is the quality of being endowed with legal capacity. The range of legal capacity varies with the different role of units in international relations. Only independent states with sovereign equality enjoy all-round legal capacity. All other entities possess only a capacity, which is limited to the function they are to fulfil in the legal order.[9]

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5 *Reparation for Injuries Case*, ICJ Reports (1949), p. 179. I. Brownlie in *Principles of Public International Law*, OUP, Oxford, 2003, at p. 57, points out that this definition is circular, since the *indicia* referred to depend on the existence of a legal person. In other words, personality is defined by reference to the existence of certain criteria, which in turn, depend on the existence of personality.

6 M. Dixon, R. McCorquodale, *Cases and Materials on International Law*, OUP, Oxford, 2003, p. 132.

7 *Reparation for Injuries case, op. cit.* n. 5.

8 *Op. cit.* n. 5; special types of personality also apply in some circumstances to certain other bodies *inter alia* non-self governing peoples, national liberation movements, belligerent and insurgent communities. See pp. 61–67.

9 H. Mosler, 'Subjects of International Law', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. IV, 2000, p. 710.

In the seventeenth century, when all law was regarded as derived from natural law, no sharp distinction was made between international law and municipal law, and it was easy to assume that individuals had legal personality under international law.[10] The status of individuals or persons becomes relevant in this discussion, for more than one reason. The consideration of social interests including human rights is central to this research, making the status of individuals a significant concern. Secondly, there is a close link between individuals and TNCs, as the latter are juridical persons. Legal personality can be accorded to natural persons or human beings, and to artificial or juridical persons. In terms of history, by the nineteenth century,[11] with positivism becoming the dominant philosophy, only states were considered to possess personality in international law. This position seems perfectly natural and even inevitable within the classical setting of international relations, which concerned exclusively the relationships between states.[12]

The revolution in the law – mandated by the conceptions of human rights, environmental protection as well as several other developments[13] – has made fundamental inroads in this context. One could argue that the emergence of human rights values led, in part, to a new status for individuals to be recognized at least partially, as subjects of international law. The classical position concerning juridical persons was, for obvious reasons, by and large the same as that of individuals. But it becomes a necessary corollary of the trend to recognize rights and duties in individuals, to stretch the same notion to juridical persons as well.[14] It should be noted that in the case of individuals, this elevated status was for their own benefit, as they gradually became benefactors of more rights. As a parallel process, public international law is increasingly recognizing individual responsibility.

It is stated by Seidel-Hohenveldern that whatever active personality individuals may possess under international law, such personality is derived from a treaty, is limited to the powers granted therein and is moreover of a precarious nature.[15] Individuals, both juridical and physical or natural, can be considered as subjects of international law within the framework of some treaties. However, it has also been pointed out that many rules of international law exist for the benefit of individuals and companies, but that does not necessarily mean that the rules create rights for them.[16] An example in point is the doctrine of diplomatic protection,

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10 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, London, 1997, p. 100.
11 *Ibid.*
12 I. Siedel-Hohenveldern, *International Economic Law*, Sweet and Maxwell, London, 1999, p. 9.
13 For instance, the entire field of international humanitarian law/the law of armed conflict, which provides numerous legal safeguards to human beings, especially vulnerable groups in the war context, and imposes individual criminal responsibility on war criminals.
14 See Seidel-Hohenveldern, *op. cit.* n. 12, p. 10, and Seidel Hohenveldern, *Corporations in and under Public International Law*, Grotius Publications, Cambridge, 1987.
15 *Ibid.*, p. 10.
16 Malanczuk, *op. cit.* n. 10.

which vests a right in the home state with a view to protecting its nationals residing or operating abroad.

Even when rights are created, one has to discern between the direct existence of rights in international law, and obligations of states parties to grant domestic law rights to individuals or companies, an issue which could still arise even in the sphere of human rights.[17] On the international legal status of the individual, Cassese asserts:

> . . ., in contemporary international law individuals possess international legal status. They have a few *obligations*, deriving from customary international law. In addition, *procedural rights* enure to the benefit of individuals, not however *vis-à-vis* all States, but only towards the group of States that have concluded treaties, or the international organizations that have adopted resolutions, envisaging such rights. Clearly, the international legal status of individuals is unique: they have a *lopsided position* in the international community. As far as their obligations are concerned, they are associated with all the other members of the international community; in contrast, they do not possess rights in relation to all members of that community. Plainly, all States are willing to demand of individuals respect for some fundamental values, while they are less prepared to associate them to their international dealings, let alone to grant them the power to sue States before international bodies.[18]

International organizations/intergovernmental organizations, when they are endowed with international legal personality, have been described as 'ancillary' subjects[19] of international law, as they still remain instruments in the hands of states, and their existence and functioning is considerably dependent on states. They have only a limited field of competence and action.[20] Their elevated status could well be justified on many grounds including their composition of states themselves, as well as their usually public purpose in terms of existence. They clearly have rights and duties, and also play a significant role in the making of international law. Nongovernmental organizations are also relevant actors in the present discussion as they play an increasing role in international relations and law, particularly in the areas of human rights and the environment. The view is sometimes expressed that states and intergovernmental organizations alone cannot be relied on to promote universally beneficial policies.[21] NGOs profess to advocate for global justice, responsibility,

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17 *Ibid.*

18 A. Cassese, *International Law*, OUP, Oxford, 2005, p. 150.

19 *Ibid.*, p. 135.

20 *Ibid.* In the Advisory Opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996, p. 66 at 78 it was stated that "International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the principle of specialty, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them".

21 Martin, McCorquodale, *op. cit.* n. 6, p. 153.

welfare and the public good. Despite the fact that NGOs increasingly participate in the formulation of international law, its implementation and enforcement, NGOs as subjects of international law are virtually nonexistent. There is a remarkable cleavage between their international activism and their legal standing in terms of international rights and duties which may require the attention of states.[22]

On the issue of the rationale underlying the emergence of new subjects in international law, Cassese is of the opinion that in the case of international organizations, the reasons are expediency and practicality, in keeping with the fact that in modern times many questions have acquired an international or transnational dimension, and can therefore only be settled by interstate co-operation.[23] In the case of political intergovernmental organizations, the ideology of preventing a third world war then led to the further strengthening of these organizations, giving them international standing. The case of according limited personality to individuals and national liberation movements was driven by the ideological factor – the Western, liberal-democratic theory, the human rights explosion in the case of the individual, and the doctrine of self-determination in the case of national liberation movements.[24]

The question as to whether non-state actors and, more particularly, TNCs have some degree of international legal personality takes one into a controversial area. Although there[25] is a growing tendency to admit that they have some degree of personality, the dominant view is against such a notion. Conventional conceptions of state sovereignty and states themselves are slow to concede such a position to non-state actors. If it at all exists, it is still comparatively rare and even more limited than that of international governmental organizations. Legal personality is derivative in the sense that so far it can be conferred only by states. It is only states which make treaties or adopt customary rules giving international rights to companies. And, it is only states which can make contracts with companies governed by international law.[26]

Some writers have departed from this position but they are a minority, and they usually admit only a certain degree of legal personality at an international level.[27]

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22 M. Noorthmann, 'Non-State Actors in International Relations', in B. Arts, M. Noorthmann, B. Reinalda, (eds.), *Non-State Actors in International Relations*, Ashgate, UK, 2001, p. 71.

23 Cassese, *op. cit.* n. 18, p. 134.

24 *Ibid.*, p. 70.

25 Brownlie, *op. cit.* n. 5, at p. 65, states that in principle, corporations do not have international legal personality. At p. 67, he argues against facile generalizations on the subject of international legal personality, in view of the complex nature of international relations, and in respect to corporations, the absence of a centralized law of corporations. While several entities have personality for particular purposes, he notes that a great deal depends on the relation of the particular entity to the various aspects of the substantive law. The *context* of problems according to Brownlie, remains paramount.

26 Malanczuk, *op. cit.* n. 10, pp. 100, 104.

27 For example, Seidl-Hohenveldern, *op. cit.* n. 12, at p. 17; P.T. Muchlinski, *op. cit.* n. 1; another interesting example is the definition of 'international dispute' in J.G. Merrils, *International Dispute Settlement*, CUP, Cambridge, 1998, expressly including non-state actors.

Literature supporting international legal personality for companies and other non-state actors is often in the realms of international economic law.[28] There is some academic opinion in public international law as well as human rights, that in view of the fact that TNCs have more economic activities and influence than many states, there is a need to accord legal personality to them, at least to a limited extent. Such views represent a relatively realistic and fundamentally functional approach to the issue. According to Weeramantry:

> Multinationals are responsible actors in the field of international law no less than States, and the sooner this is realized, the better it will be for human rights across the globe. We must attune the international law of the future to the concept that a large variety of new actors have appeared on the international scene, with rights and responsibilities which international law will recognize as inhering in them. The great corporations are a very important group of these new international actors whom the law of the future will recognize as accountable to the international legal system.[29]

Again according to Weeramantry, 'International law is growing out of the idea that its subjects are only sovereign states, and this for many reasons.'[30] He referred here to far-reaching developments in the human rights field, the increasing number of non-state actors and the particular problem of making corporate actors straddling across national boundaries accountable for wrongdoings.[31] It is implicit in some of these writings that recognizing TNCs as subjects will do justice, and will yield effective results. If that is so, then it could be regarded as an instrument towards attaining just, equitable and sustainable development. At the same time, however, some of these arguments do not take into account the slowness of international law in adapting to change. One writer advocates the view that entities only owe responsibilities to the international community when they are considered subjects of law. Since TNCs have rights and duties, and can also enforce rights in certain circumstances, she concludes that they do have international legal

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28 For instance, Seidl-Hohenveldern, *ibid.* D. Kokkini-Iatridou, P.J.I.M. de Waart, 'Foreign Investments in Developing Countries-Legal Personality of Multinationals in International Law', 14 *Netherlands Yearbook of International Law*, 1983, p. 87.

29 C.G. Weeramantry, 'Human Rights and the Global Marketplace', 15 *Brooklyn Journal of International Law*, 1989, p. 149.

30 C.G. Weeramantry, 'Private International Law and Public International Law', 24 *Revista di diritto internezionale privato e processuale*, 1998, p. 313.

31 *Ibid.*, pp. 313, 314, 317. Similarly it has been stated by Seidel-Hohenveldern, *op. cit.* n. 12, at p. 16: "However, the very fact of the operation of these enterprises in more than one State makes it difficult for national authorities, whether of the home State or of the host States, to control these enterprises fully. In order to be satisfactory, such control requires information to be obtained from and legal effects to be produced outside of the country concerned. But public as well as private international law allow only very sparingly any extraterritorial effects to measures taken by another State".

personality.[32] It is submitted however, that all these *indicia* could give TNCs a certain degree of functional personality, not necessarily amounting to subject status.

A significant criterion for the proposition that rights of individuals or companies exist under international law is when a treaty conferring rights gives them access to an international tribunal in order to enforce their rights. Most international tribunals are not open to individuals or companies, the obvious example being the contentious jurisdiction of the ICJ.[33] Exceptions include the International Centre for the Settlement of Investment Disputes (ICSID)[34] of the World Bank and the Permanent Court of Arbitration,[35] both dealing essentially with disputes of a commercial nature, and also the United Nations Compensation Commission,[36] the Iran-United States Claims Tribunal[37] and the International Tribunal for the Law of the Sea, deep sea-bed disputes chamber,[38] in certain circumstances.[39] Individual access to international dispute settlement procedures is most frequent in the sphere of human rights, but even here there are restrictions and conditions involved, depending on the specific treaties. As pointed out by Malanczuk, human rights disputes usually consist of individual complaints against their own governments, whereas in investment disputes under international law, a foreign government and state complaints are involved.[40] In this context, Seidl-Hohenveldern asserts:

> Thus, the fact of having access to the international dispute-settlement bodies set up in connection with the OECD guidelines as well as in the United Nations Code of Conduct will bestow on multinational enterprises the quality of subjects of international law [. . .] In concluding that multinational enterprises thus are subjects of international law let us, however, stress once more that, in spite of their economic importance in the field

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32 N. Jagers, 'The Legal Status of the Multinational Corporation Under International Law', in M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, KLI, The Hague, 1999, p. 266. She cites M.N. Shaw, *International Law*, Grotius Publications, Cambridge, 1991, p. 137, where it is stated that international personality involves a test of judgement and perception of the situation and the context of the current nature and requirement of the international community; and Rosalyn Higgins (*Problems and Process, International Law and How We Use It*, CP, Oxford, 1994, pp. 49–50), who stated that the concept is an intellectual prison and the whole notion of subjects and objects has no credible reality or functional purpose. Since international law is formed by the needs of the international community, it would, she says, be better to speak of participants instead of subjects.

33 Article 34, Statute of the International Court of Justice.

34 Established by the International Convention on the Settlement of Investment Disputes between States and the Nationals of Other States/ICSID Convention, 1965, as amended on 15 April 2006.

35 Established by the Convention for the Pacific Settlement of International Disputes, 1899, revised in 1907.

36 Established by UN Security Council Resolution 692, 20 May 1991.

37 Established by the Claims Settlement Declaration, Algiers Declarations, 19 January 1981.

38 Established by the United Nations Convention on the Law of the Sea, 10 December 1982.

39 Malanczuk, *op. cit.* n. 10, p. 101.

40 *Ibid.*, p. 101.

> of international relations, their international law status remains precarious, as the States having adopted the OECD guidelines or adopting the United Nations Code of Conduct may, by a subsequent act, revoke at any time the rights granted therein.[41]

The public-private dichotomy has influenced the human rights discourse, maintaining that only states are subjects, and they alone are amenable to human rights law. This view has been challenged in the light of the need for TNC regulation, by writers who in turn point to the indirect recognition of duties of corporations through, for instance, the prescription of international labour standards and environmental law.[42] Some writers refer to the vertical and horizontal application of human rights obligations, the former only to states, the latter to other entities as well. They further point to the European Union (EU)'s direct placing of duties on businesses through treaties, legislation and decisions of the European Court of Justice (ECJ); and to the enforcement mechanisms for certain duties through the civil liability regime of environmental agreements, the criminal liability regime of the OECD Bribery Convention and recourse to the ECJ. TNCs are now bearers of rights such as those under investment treaties, and should also be bearers of duties. The cumulative impact of this lawmaking and application suggests, it is argued, a recognition that corporate behaviour is a fitting subject for international regulation.[43] On the other hand, however, this does not suffice to make them subjects of international law, and it is also true that holding rights and duties alone does not confer international legal personality. The increasing role played by TNCs in law creation (self-regulation) and implementation is a pointer towards their affinity to subject status. One thing is certain, however, and that is that the amorphous structure of TNCs renders them immune to the control of any single state and requires regulation and protection at the international level.[44]

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41 Seidel-Hohenveldern, *op. cit.* n. 12, p. 17.

42 S. Subedi, in Arts, Mihyo, *op. cit.* n. 4, p. 174. Also see Subedi, 'Foreign Investment and Sustainable Development', in F. Weiss, E. Denters, P. de Waart (eds), *International Economic Law with a Human Face*, KLI, 1998, pp. 413–428, and S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal*, 2001, pp. 443–545, at 488.

43 *Ibid.* The view has been advanced by Kamminga and Zia-Zarifi, *op. cit.* n. 4, at p. 6, that international legal personality to TNCs points towards growth of a complementary system of law that fills the penumbra of existing State-centred international law and facilitates as well as regulates activities undertaken by, through, and with sovereign States and their citizens. They state that enhanced rights and duties of TNCs do not threaten State sovereignty because international law is not a zero-sum system in which legal subjecthood to one entity denies it to all others.

44 *Ibid.*, p. 3. They add that since no single law creates the TNC, no single law delineates the limits of its proper activity. At p. 5 they go on to show two conceptualizations of TNCs under international law: On the one hand, TNCs are juridical individuals, composed of separate enterprises each (potentially) responsible to domestic legislation in different sovereign States; on the other hand, they are unified entities with common strategy and resources beyond the control of any single State. These two approaches in turn, can be used by proponents of facilitating their activities as well as those advocating regulation, in turn creating a gap between rights and duties.

The issue also arises as to whether for the purpose of this study the accordance of international legal personality to TNCs will in fact become more complex and counter-productive. This would be the case if it enhances the degree of power already exerted by them, which could in turn further weaken the possibility of governmental and international control, and lead to less protection of human rights, development and the environment. Any move towards a different status for TNCs therefore should be cautious and should encompass the necessary checks and balances. The course of history shows that the elevation of regulation and responsibility of TNCs arouses resistance, while the advance of rights and privileges is strongly advocated particularly in the light of the North-South power dynamics and vested interests. Subject status may enhance the rights of TNCs and this is not necessarily a negative consequence, as long as equal weight is given to sharpening their duties as well. One core difference between TNCs and international governmental organizations is the fact that the former operate in the private domain essentially to further private interests, whereas the latter function essentially for the public purpose. With respect to nongovernmental organizations, they at least ostensibly act for the benefit of the public purpose. The thematic concept of balancing private interests with public purpose would require that if TNCs be recognized as subjects, the same be applied to NGOs and this would again raise many complex issues.

The need for accountability on the part of TNCs is hardly open to question. But whether according them international legal personality is a suitable, feasible or useful course of action is by no means certain. Some writers like Weeramantry[45] suggest that such a step will ameliorate the human rights situation across the globe. On a less optimistic note, such a course could, indeed, lead to deterioration of the same situation, as the increase of their own rights – which may accompany subject status, if not limited by parallel checks and balances – can leave room for greater violations of human rights. Taken to its logical conclusion, it could even lead to extreme consequences such as the idea to accord sovereignty or sovereign equality to non-state actors, another increasingly amorphous group.

Certain justifications do exist for the recognition of international legal personality of TNCs, particularly those of practicality and expediency, as in the case of international organizations. This would also be realistic, given the stark reality of the international economic scenario. If such recognition can lead to greater accountability of TNCs, it could enhance efficiency as well, in terms of performance as well as regulation. Like in the case of international organizations, any degree of personality which may be recognized in the future, will have to be of a specialized form, and distinctly articulated. Similar to the way that notions such as crimes against humanity increasingly recognize duties on the part of individu-

45 *Op. cit.* n. 29.

als based on a universal system of fundamental values, it is possible to argue in favour of like concepts founded on basic community values in relation to the social and environmental responsibilities of TNCs. Here, the idea of reinforcing mutual/universal interests is a useful tool. The balancing of conflicting interests would require that economic gain be balanced with social and ecological welfare, and recognition of TNCs as subjects may constitute a step in the process of achieving such an equilibrium. Again, the nature of TNCs could perhaps be used to advance the protection of social values, for instance, because they could be subject to several levels, means and approaches to legal regulation.

Viewed from the standpoint of the goal of just, equitable and sustainable development, it may become easier to impose duties on TNCs if they have a definite status rather than with their presently precarious predicament. Here the balancing of conflicting interests would require that international legal personality be given to TNCs only to a limited extent. If global justice and equity, and a balanced path to development are perceived as mutual and universal interests for the future of humanity and the earth, then the tool of forging ahead and reinforcing common interests also seems to point in the same direction. And this is in a sense ensured naturally by the fact that state sovereignty in international law determines that states are the ultimate decision-makers and could take away rights and powers already bestowed on them. It is also important not to treat legal personality as an absolute concept and, instead, identify forms of functional personality and break it down into specific rights and duties. From the thematic concept of coherence and the need for a holistic system, it seems acceptable that in keeping with the reality of international economic relations, TNCs are recognized as subjects, in the sense that they be given a form of functional personality/functional sovereignty. But on the other hand, it is states that by and large do, and indeed should, wield political power. Thus it is important to preserve full international legal personality solely for states.

Theoretical perspectives of positivism, legal pluralism and functionalism lead to diverse positions on the issue of international legal personality for non-state actors including TNCs.[46] From the standpoint of a more just, equitable and sustainable development, it is not essential that TNCs be regarded as full subjects. But they should be given a degree of recognition in international law through accordance of a certain capacity concomitant with the smooth functioning of their business, with due respect to broader social interests. The focus should be on the overall equilibrium between rights and corresponding duties and their efficient application. In achieving this balance, it is necessary to aim for coherence, with respect to the plethora of international, regional and national laws as well as TNC

46 See M. Noortmann, 'Non-State Actors in International Law', in Arts *et al.*, *op. cit.* n. 22, pp. 60–63.

self-regulation and NGO innovation, which currently confuse and complicate the international legal landscape.[47]

3.3 State and International Jurisdiction

The hybrid nature and fluid structure of TNCs naturally leads to questions on their relationship to issues of jurisdiction, itself complex in content and unclear in application. Claims against corporations are for the most part decided under national law, in keeping with conflict of law/private international law rules. But in the present context, public international law norms become relevant to TNCs and their responsibilities vis-à-vis human rights, development and the environment, and as a condition precedent, to jurisdiction. As pointed out by Nollkaemper:

> The transfer of authority from the public to the private sphere threatens to bring a gap in the protection of international public values. The national law that applies in transnational litigation, may be inadequate or even violate international law and thus not be sufficient. In such cases, the plaintiffs, but also the international legal order as such, has an interest that public international law norms are translated into the private domain of corporate responsibility.[48]

Issues of jurisdiction are relevant to this discussion as they connect in a fundamental way to TNCs and public international law. The concept is used here in the sense of powers exercised by a state over persons, property or events.[49] State

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47 See L. Reed, 'Multinational Corporations and Accountability under International Human Rights Law: The Role of International and External Codes of Conduct in the Extractive Industries'; A. Clapham, 'On Complicity'; P.H.F. Bekker, 'Corporate Aiding and Abetting and Conspiracy Liability under International Law'; and other papers presented at the Sessions on 'Corporate Responsibility for Human Rights and Environmental Damage-Issues of Transnational Litigation including International Jurisdiction', *Hague Joint Conference on Contemporary Issues of International Law: From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System*, The Hague, 3–5 July 2003.

48 A. Nollkaemper, 'Translating Principles of Public International Law into Principles of Corporate Liability', *Hague Joint Conference, ibid.*, p. 1.

49 P. Malanczuk, *op. cit.* n. 10, p. 109. B.H. Oxman, 'Jurisdiction of States', in the *Encyclopaedia of Public International Law*, vol. III, 1997, at p. 55, states, 'In its broadest sense, the jurisdiction of a State may refer to its lawful power to act and hence to its power to decide whether and, if so, how to act. While lawyers frequently use the term "jurisdiction" more narrowly to refer to the lawful power to make and enforce rules, it is useful to bear in mind the broader meaning. For example, the United Nations may not intervene in matters essentially within the domestic jurisdiction of a State (United Nations Charter, Art. 2(7) (. . .). The term "jurisdiction" is most often used to describe the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons. A State exercises its jurisdiction by establishing rules (sometimes called the exercise of legislative jurisdiction or prescriptive competence), by establishing procedures for identifying breaches of the rules and the precise consequences thereof (sometimes called judicial jurisdiction or adjudicative competence), and by forcibly impos-

powers are primarily legislative, executive and judicial. In the present context, the executive and the judicial would be the most relevant. Traditionally, a state may not perform any governmental act in the territory of another state without the latter's consent, because of state sovereignty. The rock – or rather what has been the bedrock – of international law, the concept of the territorial sovereignty of states, has been described as follows, in an often quoted award of 1928:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its territory in such a way as to make it the point of departure in settling most questions that concern international relations.[50]

The bases of jurisdiction are essentially related to sovereignty, and are founded generally on territoriality and nationality, and exceptionally on extraterritoriality and universality.[51] In criminal cases, traditionally, state jurisdiction is founded on the principle of territoriality. Accordingly, a state has jurisdiction over crimes committed in its territory.[52] Where a criminal act commences in one state and is continued into another, both states have jurisdiction: the first by the subjective territorial principle, and the second by the objective territorial principle, also called the 'effects doctrine'.[53] The latter may facilitate states to apply their laws, like environmental laws, extraterritorially, which in turn, has its merits and de-merits. On the positive side, given the fact that TNC activity including those that could be harmful can transcend international borders, the effects doctrine could lead to the extension of higher standards for the promotion and protection of human rights and the environment.[54]

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ing consequences such as loss of liberty or property for breaches or, pending adjudication, alleged breaches of the rules (sometimes called enforcement jurisdiction or competence)'.

50 *Island of Palmas Case* (1928) II RIAA p. 829 at 838.

51 At p. 116, Malanczuk, *op. cit.* n. 10, points out that the existence of different grounds of jurisdiction invoked by national courts means that several states may have concurrent jurisdiction. He adds that international law is silent on this point, in turn leading to the possibility of hardship, unless international human rights can be invoked. Brownlie, *ibid.*, at p. 309, states that the principles are in substance generalizations of a mass of national provisions, and that they often interweave in practice.

52 Oxman, *op. cit.* n. 49, at p. 57, points out that there is some controversy over the extent to which a foreign company may be subject to the territorial jurisdiction of a State with respect to matters unrelated to the company's activities in that State's territory or with respect to the activities in that State of a separate corporate affiliate.

53 Malanczuk, *op. cit.* n. 10, p. 110.

54 According to Brownlie, *op. cit.* n. 5, at p. 297, 'the territorial theory has been refined in the light of experience, and the law, which is still rather unsettled, is developing in the light of two principles. First, that the territorial theory, while remaining the best foundation for the law, fails to

The most commonly used basis of jurisdiction next to territoriality, is that of nationality, which as a mark of allegiance and aspect of sovereignty, is also recognized as a basis for jurisdiction over extraterritorial acts.[55] It is the municipal law of a state that determines whether a person or company has the nationality of that state. On the issue of TNCs and nationality, a company is usually regarded as having the nationality of the state under the laws of which it is incorporated and in whose territory it has its registered office.[56] Likewise, the mere fact that a company operated abroad and was controlled by foreign shareholders did not, by itself, prevent the existence of a genuine link between the company and the state whose nationality it possessed. According to the Iran–United States Claims Tribunal,[57] a multinational company can be regarded as American if among a large number of shareholders the majority have addresses in the United States; and the company is able to submit certain specified documents including a state certificate on the incorporation and existence of the company in accordance with the law of the competent state of the United States.

Accordance of a particular nationality could lead to greater accountability for broader interests on the part of the company, which would then not be able to evade jurisdiction easily, on the basis that it owes no allegiance to any nation state. Responsibility on the part of business is, in turn, itself a means of balancing the interests of economy, society and the environment, and ensuring a more sustainable approach to development. If the TNC has the nationality of the home country, there is a possibility of greater protection of broader interests, because it would more often than not have higher standards. From the perspective of justice and equity, it seems fair that such higher standards are imposed. A major part of the profits from TNC activity in developing countries is repatriated to home states. It would therefore make economic sense to internalize factors such as environmental damage, which are often externalized, leaving the host-state to bear the costs. Instead, it would be more just for the TNC, which makes the profit, to also bear responsibility for the social and environmental costs, in line with the international environmental law principle of polluter-pays. Nationality of

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provide ready-made solutions for some modern jurisdictional conflicts. Secondly, that a principle of substantial and genuine connection between the subject matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised, should be observed'.

55 Brownlie, *ibid*., p. 301.

56 *Barcelona Traction, Light and Power Company*, 1970 ICJ Reports, p. 3. As pointed out by Oxman, *op. cit.* n. 49, at p. 57, controversial issues of conflicting assertions of jurisdiction can arise with respect to a company organized under the laws of one State and controlled by a company organized under the laws of another State.

57 Cited in Malanczuk, *op. cit.* n. 10, p. 267. G.H. Aldrich, in *The Jurisprudence of the Iran – United States Claims Tribunal*, CP, Oxford, 1996, states at pp. 47, 48, that these requirements for the proof of corporate nationality were laid down in Orders issued in 2 cases before the Tribunal, *Flexi-Van Leasing Inc*. v. *The Islamic Republic of Iran*, Order of 15 December 1982, reprinted in 1 Iran – United States Claims Tribunal Reports, pp. 455, 462; and *General Motors Corp. et al*., Order of 18 January 1983, reprinted in 3 Iran United States Claims Tribunal Reports, p. 1.

the home state could also lead to greater efficacy in terms of compliance and implementation. One reason is that in the environmental domain – especially implementation of legislation – in developing countries is often weak, due to several factors, including lack of interest and dearth of resources. Similarly, human rights protection is not always a high priority.

The principle of nationality in state jurisdiction, also called active nationality, means that a state may prosecute its nationals for crimes committed anywhere in the world.[58] Greater use of the principle of nationality/active nationality principle[59] can enable home states to apply their laws to breaches by their nationals abroad. The passive nationality principle claimed by certain states means that a state may try an alien for crimes committed abroad affecting one of its nationals.[60] Of less significance in the present context is the protective or security principle, which enables a state to punish acts prejudicial to its security, even when they are committed by foreigners abroad.[61] Nearly all states assume jurisdiction over aliens for acts committed abroad, which affect the security of the state, a concept that involves mostly political acts, but could also include economic offences.[62] It is not impossible to envisage a situation when a state affected by a TNC act may invoke this basis of jurisdiction. According to the passive personality principle, aliens may be punished for acts abroad harmful to nationals of the forum.[63] Apart from being controversial in itself, this principle is not of much use in the present context.

Some states claim jurisdiction over all crimes, including all crimes committed by foreigners abroad.[64] Even countries which do not subscribe to this principle tend to concede that exceptionally – in cases of acts such as genocide, torture, war crimes and piracy, which are crimes in all countries and which threaten the international community as a whole – universal jurisdiction can be invoked. A more far-reaching conception or interpretation of the universality principle, subscribed to only by a few states, is that it allows states to prosecute persons under national law for acts, which are not criminal under international law.

Greater resort to universal jurisdiction (in its broad sense the power of a state to punish certain crimes, wherever and by whomsoever they have been committed,

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58 Malanczuk, *ibid.*, p. 111.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 Brownlie, *op. cit.* n. 5, p. 302.

63 *Ibid.*, p. 306.

64 Malanczuk, *op. cit.* n. 10, p. 112. According to Brownlie, *ibid.*, at p. 307, 'a considerable number of states have adopted, usually with limitations, a principle allowing jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy'. The notion of international public policy is indeed useful in the present context. In relation to universal jurisdiction, also see Dixon, McCorquodale, *op. cit.* n. 6, pp. 294–300.

without any required connection to territory, nationality or special state interest)[65] may also be useful in the context of the problem under consideration, subject to safeguards such as the requisite of criminality under international law. This possibility is strengthened by the fact that most of the violations involve human rights, where the use of jurisdiction based on universality[66] has been more common. Mutuality of interests is indeed a fitting rationale in this context. In the age of globalization, this could well be a mechanism for maintaining a balance between national and global interests, the freedom of the market and the need for regulation, and economic development and human rights and planetary sustainability. Apart from criminal wrongs in violation of human rights, universal jurisdiction could apply to torts and other civil proceedings for compensation and damages, particularly in the human rights domain. States can provide remedies for victims of crimes against accepted interests.[67]

In *Filartiga* v. *Pena Irala*,[68] a citizen of Paraguay filed a suit in the US against a former Paraguayan police officer, now living in New York, for the torture and death of his brother by acts committed in Paraguay three years earlier. The US Court of Appeals for the Second Circuit held that torture under the guise of official authority is a violation of international law, and that foreign torturers discovered in the US might be sued before an American court, regardless of where the act occurred. The suit was based on the US Alien Tort Claims Act (ATCA), which grants district courts jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US. The Alien Tort Statute has since been applied in other cases of torts and crimes and has been increasingly used in recent years.[69]

Redress of this nature has substantial potential. Further, the horizontal nature of the decentralized international legal system gives some leeway to states to create new forms of redress, towards the progressive development of international law. It seems realistic that, when practically all spheres of human activity (including the economy, information technology and the media) have become global, the legal system should follow suit. At the dawn of the new millennium, with cases like *Pinochet*,[70] the currents of universal jurisdiction were to some extent at high tide. However, there should also be clear limitations, to avoid abuse of the sys-

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65 Malanczuk, *ibid.*

66 *Ibid.*, p. 113.

67 *Ibid.*

68 630 F.2d 876 (2d Cir.1980), cited in Malanczuk, *ibid.*, p. 114.

69 Another statute under which the United States asserts extensive jurisdiction is the Helms-Burton Act of 1996, under which American citizens have the right to file suits in domestic courts for financial compensation with regard to property lost in Cuba during the 1959 Cuban revolution. The President however, has the right to wave this rule every six months if the courts become inundated with lawsuits. http://www.earlham.edu/~pols/ps17971/weissdo/HelmsB.html

70 *Regina* v. *Bartle* (1999) 2 All ER 97.

tem, prevent floods of litigation and maintain a degree of coherence. In the *Pinochet case*, the House of Lords (HL) in England assumed jurisdiction over the trial of torture allegations against the former President of Chile, General Pinochet, under the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT/Torture Convention). In the absence of any nexus based on territoriality or nationality, the majority of the Law Lords founded jurisdiction on the basis of universality, as torture is a crime, which threatens the international community and is universally recognized as criminal. This is not a totally novel development in public international law, seen in the light of precedents like the trials of Nuremberg and Tokyo. In the *Pinochet case*, the Torture Convention, declared that 'all' torture wherever committed world-wide is criminal, and required states to either extradite or punish. This presents a possible basis for universal jurisdiction. Under Art. 4 of this Convention, each state-party is required to ensure that all acts of torture are offences under its criminal law and to make torture punishable by appropriate penalties. This was provided for by incorporating legislation in the UK, the Criminal Justice Act of 1988, which made all torture criminal as well as triable in the UK. Under Arts. 5, 6 and 7, the bases of jurisdiction are liberal, covering assertions based on territoriality, nationality as well as universality. The *Pinochet* case could, with the passage of time, lead to more claims founded on universal jurisdiction, particularly because of the idea of the universality of human rights.[71] However in Belgium, legislation permitting universal jurisdiction for Belgian courts in cases of atrocities committed abroad led at first to several cases,[72] but was found to be unsustainable and thus had to be amended.[73]

The extension of domestic legislation abroad, chiefly on the basis of nationality – for instance, under the ATCA of the US – is another course of action

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71 Some recent developments including the establishment and functioning of bodies like the International Criminal Court, International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone are an indication in this direction (under the ICC Statute 1998, ICTY Statute 1993, ICTR Statute 1994 and Statute of the Special Court for Sierra Leone 2002, respectively).

72 The 1993 Law amended in 1999 and 2003 gave Belgian Courts the authority to prosecute in cases of genocide, crimes against humanity and war crimes regardless of the crime's connection to Belgium or the accused's presence on Belgian soil. It was hailed by human rights groups as being part of a trend towards accountability for atrocities. Courts in some other countries including Austria, Germany, Denmark and Switzerland had also applied laws based on universal jurisdiction to war crimes in Rwanda and former Yugoslavia. See http://www.hrw.org/press/2001/11/belgium1126.htm. Some of the allegations against the laws, however, include Belgium becoming a magnet for all the world's human rights cases; violation of international law; and the inaptness of applying the law to defendants not on Belgian soil.

73 See Laurie King-Irani, 'On war crimes Learning Lessons: Belgium's Universal Jurisdiction Law under Threat', http://indictsharon.net/-20030624lki.shtml; S. Smit, K. Van de Borgt, 'Belgian law concerning the Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives'. http://www.asil.org/insights/insigh112htm

with high potential for just and equitable as well as effective solutions. It could lead to higher standards of environmental and civil rights protection when home states apply their legislation to the activities of TNCs based in them. It is also in line with the idea of forging ahead mutual and universal interests. Efficacy is the primary justification for its use. Extraterritorial application of domestic laws is becoming increasingly popular as a means of combating a range of social issues,[74] and both the USA and Europe have taken initiatives in this direction. It is sometimes justified by reference to effects on the home country, which is applicable to most social and environmental issues.[75] Moreover, TNCs have a legal presence and operational base in the home state.

However, extraterritoriality raises a different set of problems including excessive dependence on home countries and their legal systems, lack of uniformity resulting in uncertainty and unpredictability, as well as possible conflict with international law and state sovereignty. Realistically, only states which have substantial power and resources can effectively exercise extraterritorial jurisdiction. Variations in state practice and policy as well as politics and diplomatic relations could result in intractable problems. Carried to its logical extreme, extraterritoriality could lead to different home states applying different standards to different TNCs in different host states. Some writers[76] do not support extraterritoriality since the existence of different conditions in countries does not justify the transposition of one state's norms so directly to another. Other problematic issues include vulnerability to allegations of cultural and legal imperialism, and interference with the sovereignty of other states.

On the other hand, it must be recognized that we live in 'an interdependent global economy, characterized by pervasively transnational commercial activities, in which no nation can ignore what occurs beyond its borders.'[77] Traditional notions of national sovereignty would naturally have to be compromised to some extent to accommodate broader global interests, including the emerging body of global public values represented in numerous instruments of soft law and policy, particularly in human rights, environment and development. Even under international law, the co-operation of home states is essential, as they have to become party to relevant treaties and enact domestic legislation for the regulation of TNCs based in them.

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74 For instance, the sexual exploitation of children in developing countries, see ECPAT Europe Law Enforcement Group, *Extraterritorial Legislation as a Tool to Combat Sexual Exploitation of Children – a study of 15 cases*, ECPAT and Defence for Children International Section, Amsterdam, 1999. See in particular, Conclusions and Recommendations, pp. 255–270.

75 S.P. Subedi, 'Foreign Investment and Sustainable Development', *op. cit.* n. 42, p. 427.

76 C.S. Pearson, *Down to Business: Multinational Corporations, the Environment, and Development*, World Resources Institute and Duke University Press, N.C., 1985, p. 68.

77 G.B. Born, 'A Reappraisal of the Extraterritorial Reach of U.S. Law', 24 *Law and Policy International Business*, 1992, p. 99.

The US has on several occasions applied its laws extraterritorially, especially to harmful activities of nationals abroad.[78] The resurrection of the ATCA of 1789 in *Filartiga* v. *Pena-Irala*[79] recurred in cases of genocide, war crimes and cruel and inhuman treatment. While the plaintiffs envisaged in this Act are aliens, the defendants can be individuals/groups of any nationality, including US citizens and firms.[80]

Actions brought against a home country-based parent company for the harmful activities of its host country-based subsidiaries involve extraterritorial jurisdiction as well as the company law-based conception of lifting the veil of incorporation/corporate veil. Whereas a company's liability is limited by the terms of its incorporation – in other words, veiling it from any liability beyond such incorporation – in certain exceptional circumstances, this veil of incorporation is pierced to establish liability, as in this instance, in cases of parent and subsidiary companies. US cases of extraterritoriality involving firms include *White* v. *Pepsi Co.*,[81] when Pepsi company was sued in the USA for injuries caused by a bottle that exploded in Jamaica. In *Dow Chemicals Co.* v. *Alf Daro*,[82] Costa Rican farmers were permitted to sue Dow Chemicals for injuries caused by a pesticide manufactured in the USA and exported to Costa Rica. Local farmers claimed damages for injuries, namely sterility caused by the substance dibromochloropropane that was used by the defendant US firm in Costa Rica, although this was banned in the US. The claim was upheld and the doctrine of *forum non-conveniens* was struck down. The case of *In Re Bhopal Gas Plant Disaster*[83] was sent back to India on the basis of *forum non conveniens*, upholding Union Carbide's argument that India and not the US was the appropriate forum. One of the arguments of Union Carbide was that

78 Another interesting development is the *Model Business Principles*, a voluntary code of business ethics for US-based TNCs to show their commitment to human, environmental and labour rights, unveiled by President Clinton in May 1995, cited in B.A. Frey, 'The Ethical and Legal Responsibilities of Transnational Corporations in the Protection of International Human Rights', 6 *Minnesota Journal of Global Trade*, 1997, pp. 153–188, 172. The main precedent for this approach is in the Foreign Corrupt Practices Act (FCPA) of 1977, 15 U.S.C. 78dd-78U (1988) which finds a parallel in the European Convention on Corruption. There has also been some discussion in the US about a Foreign Environmental Practices Act.

79 *Op. cit.* n. 68.

80 Nollkaemper, *op. cit.* n. 48, at p. 2, stated on the subject of the ATCA, that what it may achieve is a double translation: from the international to the national and from the public to the private domain. Thus the shortcoming of international law could be overcome on the national level. He went on to comment that it seems desirable that the courts in the Netherlands and elsewhere liberalize their approach to these matters.

81 866 F.2d 1325 (11th Cir. 1989), cited in 104 *Harvard Law Review* (HLR) 7, 1991, p. 1618, cited by Subedi in Weiss, Denters, De Waart (eds.), *op. cit.* n. 42, p. 426.

82 768 S.W. 2d 674 (Tex. 1990), Cert. denied, 111 S. Ct. 671 (1991), *ibid.*

83 634 F. Supp. 842 (S.D.N.Y.) affirmed in 809 F. 2d 195 (2d Cir. 1987); S. Puvimanasinghe, 'The Bhopal Case: A Developing Country Perspective', 6 *SLJIL* 1994, p. 184.

it did not owe any duty to people affected by its operations overseas.[84] The decision in this case did not augur well for the fate of the victims of the disaster, for whom justice and equity were a mere illusion. In terms of efficiency, years of litigation brought little or no relief to individual victims, and 20 years later, the battle for justice and redress still continues.

A more favourable attitude was evident in a case involving oil spills by Amoco Cadiz off the French Coast, when an American court stated:[85]

> As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, Standard is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities, AIOC and Transport.

In *Doe* v. *Unocal*,[86] a class action was brought by tribal people in Myanmar, who alleged numerous human rights violations and environmental damage by the Burmese government and Unocal in the course of building a gas pipeline from Myanmar to Thailand. The claims were based on the US Alien Tort Claims Act. After protracted litigation, a trial had been set for June 2005, but in March 2005, the parties announced that a final settlement had been reached. The agreement by Unocal includes direct compensation and 'substantial assistance' through funds for programs to improve living conditions, health care, and education. However, this case appears to be part of a trend to restrict the use of the ATCA. The TNC Freeport-McMoran was sued in the US for the violation of environmental standards in Irian Jaya.[87] With regard to the practice of the UK, a British citizen sued the Rio Tinto Zinc group in the UK for injury to his health when working for their subsidiary in South Africa. The HL held that companies based in the UK could be sued in its courts for wrongs committed by them or their subsidiaries abroad.[88]

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84 Similar arguments were invoked by Thor Chemical Holdings against claims by South African workers and by Cape plc., formerly the Cape Asbestos Company Ltd. The company argued that South Africa rather than London was the correct forum. But the House of Lords, using the *Spiliada* doctrine, held that justice could not be done in South Africa in spite of the existence of pointers to suggest that is was the correct forum: The Times (London), 10 November 1998, p. 30, cited in Subedi, *Inaugural Address, op. cit.* n. 4, at p. 9. Under the *Spiliada* doctrine as explained, at p. 22, footnote 29, the courts had to take into account all the relevant circumstances to determine which was the proper forum for such litigation. In deciding the appropriateness of the forum they had to see in which forum substantial justice could be achieved (*Spiliada Maritime Corporation* v. *Consulex Ltd.* (1987) Appeal Cases (AC) 470).

85 Cited in M. Sornarajah, 'Foreign Investment and International Environmental Law' in S. Lin (ed.), *UNEP's New Way Forward: Environmental Law and Sustainable Development*, UNEP, 1995, pp. 283–297, p. 239, in Subedi, *op. cit.* n. 42, p. 427.

86 (1997) 963 F. Supp 880.

87 *The Economist*, 20 July 1996, p. 57.

88 *Connelly* v. *RTZ plc.* (1998) AC 854, cited in Subedi, *Inaugural Address, op. cit.* n. 4, p. 9. In *Lubbe* v. *Cape plc.*, (2000) 1 Weekly Law Reports (WLR) 1545, also cited in Subedi, again the HL held that a British-based TNC could be taken to court for the injurious acts of its subsidiaries abroad.

The case of *Wiwa* v. *Royal Dutch Petroleum Company and Shell Transport and Trading Company*[89] throws a new light on the issue of jurisdiction in transnational litigation and related issues. The case arose out of the alleged violation of human rights and environmental damage caused to the Ogoni people of Nigeria. Their opposition to the acts of the then government of Nigeria and the complicity of the oil companies resulted in arrests, detention, torture and finally the execution of nine members of the Movement for the Survival of the Ogoni People including its leader, Ken Saro Wiwa. The plaintiffs' initial and amended actions were brought under the ATCA before the US District Court. Arguing that the case should be heard either in The Netherlands or the UK, the defendants moved to dismiss the complaints on several grounds, and the District Court dismissed the action based on *forum non conveniens*, holding that the United Kingdom was the adequate forum.

In 1999, Jane Doe together with her brother Ken Wiwa, appealed on behalf *inter alia*, of her father and her husband, before the Court of Appeals, Second Circuit[90] against the oil companies under the ATCA and other laws alleging violations of human rights. The court held that the New York Investors Relations Office of the appellant companies subsidiary was an agent of the appellants for the purposes of New York's personal jurisdiction Statute; the appellants, through such office were doing business in New York, thus conferring jurisdiction; and that the District Court had failed to weigh all relevant considerations in making a finding of *forum non conveniens*.

The Court of Appeal found: failure to consider that two of the plaintiffs were residents of the US; failure to consider the interests of the US in denying a forum to litigate alleged violations of international human rights law, the law of nations, and the interests of justice; and failure to balance substantial expenses and inconvenience for the plaintiffs by dismissal as against minimal inconvenience for the companies if the case was retained. The ATCA and the Torture Victim Protection Act (TVPA), it stated, reflect a US policy interest in providing a forum for adjudication of such abuses. As required under the law relating to *forum non conveniens*, the court balanced a range of public and private factors.

At the other end of the spectrum stands the Sri Lankan case of *Tikiri Banda Bulankulama* v. *Secretary, Ministry of Industrial Development*,[91] which in terms of jurisdiction is an example of the conventional territorial basis, here invoked by a host

89 *Ken Wiwa and Jane Doe, plaintiffs against Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC, Defendants, Ken Wiwa et al., Plaintiffs against Brian Anderson*, Defendant, 96 Civ. US 8386 (KMW), US DC for the SDNY, 2002 US Dist. Ct., cited in M. Fitzmaurice, 'Case Study: *Wiwa and Royal Dutch Petroleum and Shell Trading Company* before the U.S. Court of Appeals for the Second Circuit', *Hague Joint Conference, op. cit.* n. 47. Also see 392 F.3d 812 (5th Circuit) 2004.

90 226 F. 3d 88 (2nd Cir. 2000). See also Addo, *op. cit.* n. 4; Kamminga, Zia-Zarifi, *op. cit.* n. 4, Subedi in Arts, Mihyo, *op. cit.* n. 4.

91 2000 SAELR 7 (2) 1.

state. This case involved a joint venture agreement between the Sri Lankan government and the local subsidiary of the TNC Freeport-McMoran, for the mining of phosphate. The terms of the mineral investment agreement were highly beneficial to the company, and oblivious to broader concerns of human rights, the environment, indigenous culture, history, religion, value systems, and the requisites of sustainable development. It was the subject of a public interest suit by the local villagers in the Supreme Court. The proposed project was to lead to large-scale displacement of people and environmental degradation. The Court – asserting that fairness to all, including the people of Sri Lanka, was the yardstick in doing justice – held that there was an imminent infringement of the fundamental rights[92] of the petitioners, all local residents. The particular rights were those of equality, freedom to engage in any lawful occupation, trade, business or enterprise, and freedom of movement and of choosing a residence within Sri Lanka. The Court disallowed the project from proceeding unless and until legal requirements of rational planning including an Environmental Impact Assessment was done. Several principles from the Stockholm and Rio Declarations, although admittedly largely soft law, were used to throw light on applicable domestic laws. In this way, international public policy and law were applied to regulate the activities of the government, a TNC and a subsidiary.

Viewed as a whole, it is evident that at present clarity, consistency and coherence hardly exist in the area of international jurisdiction as it relates to TNCs. What is also evident is that many developments have taken place and are yet evolving, which have important ramifications for the protection of human rights and the environment, and the movement towards/digression from a more just, equitable and sustainable development. One of the core influences has been that of judicial attitudes and state practice. The evolution of international consensus at the bilateral and multilateral levels would significantly influence how jurisdictional issues emerge in the future. The progressive development of international law – for instance, through the emergence of a body of soft law with respect to corporate responsibility – would have important consequences for directing state and particularly judicial attitudes on state and international jurisdiction.

3.4 International Responsibility

International responsibility, better known as state responsibility,[93] is again closely connected to state sovereignty. At the end of a prolonged and protracted process

92 This involved violations of Articles 12 (1), 14 (1) (g), and 14 (1) (h) of the Sri Lankan Constitution.

93 Judge Max Huber in the *Spanish Zone of Morocco Claims Case* (1925) II RIAA 615 said: 'responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility'.

of drafting over decades, most principles of state responsibility are today embodied in the UN International Law Commission (ILC)'s Articles on Responsibility of States for Internationally Wrongful Acts.[94] Some of the most salient provisions of these Articles are the following: Every internationally wrongful act of a state entails the international responsibility of that state.[95] There is an internationally wrongful act of a state when conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of the state.[96] The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[97] There is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character.[98]

State responsibility is concerned with the determination of whether there is a wrongful act for which the wrongdoing state is to be held responsible, what the legal consequences are, and how such international responsibility should be implemented. A finding of state responsibility leads to an obligation to make reparation.[99]

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94 The Draft Articles of the ILC were adopted by UN General Assembly Resolution 56/83 in August 2001. Cassese at p. 244 notes that the GA 'took note' of the Draft Articles, and 'commended' them to governments, 'without prejudice to the question of their future adoption or other appropriate action'. Dixon and McCorquodale, *op. cit.* n. 6, at p. 404 comment that this code of general principles commands widespread support, although there are still some aspects which are incomplete and others that are controversial. The Articles may however, form the basis of an international treaty, and the contents of some articles reflect customary international law. For an authoritative commentary on the Articles, see J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, CUP, Cambridge, 2002.

95 Art. 1. The act should be essentially that of the state, but under Art. 11, conduct which is not attributable to a state shall yet be considered to be such, if and to the extent that the state acknowledges and adopts the conduct in question as its own. So in the *Corfu Channel Case (UK* v. *Albania) (Merits)* ICJ Reports 1949, 4, it was held that the mere fact of control of a state over its territory and waters does not mean that it knew or ought to have known of any unlawful act done therein. But the fact of exclusive control, it was said, had a bearing on the methods of proof available to establish that knowledge and the victim state can use indirect evidence for this purpose.

96 Art. 2.

97 Art. 3.

98 Art. 12. Also of importance are Art. 28, which states that international responsibility entails legal consequences as laid down in the Articles; and Art. 40 on the international responsibility for a serious breach by a state for an obligation arising from a peremptory norm of international law; a breach of such an obligation is said to be serious if it involves a gross or systematic failure by the responsible state to fulfil the obligation.

99 Under Art. 30 (b) of the ILC Draft, the responsible state is under several obligations to the affected state. It must cease the wrongdoing, offer assurances of non-repetition if appropriate, and under Art. 31.1, make full reparation for the injury caused. In the *Factory at Chorzow (Claim for Indemnity) Case (Germany* v. *Poland) (Merits)* PCIJ Ser (1928) No. 17, the Permanent Court of International Justice (PCIJ), stated that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation, which is the indispensable complement of a failure to apply a convention, and that there is no necessity for this to be stated in the convention itself.

The principle of state responsibility has been said to embrace 'the totality of legal rules and consequences linked to the breach of any international obligation of the state'[100] and to go deeply into the 'roots': the theoretical and ideological foundations of international law.[101]

In the context of this research, the question arises whether the principles of state responsibility can have any relevance or application in the event of human rights violations and environmental wrongs by TNCs. In the light of their predominance in international economic affairs, the far-reaching rights and powers they wield and the *lacuna* with regard to their international regulation, the question arises whether home states can be held responsible for the civil and criminal wrongs of firms based in them. Under the current law of state responsibility, a state is liable only for its own acts and omissions and, as a general rule, one of the state organs should be involved.[102]

The history of international law has witnessed only a handful of cases where a state has been held responsible for acts of private persons. One such instance is the case of *United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)*.[103] The case arose from the occupation by some Iranian citizens of the US embassy in Tehran and the taking of the embassy staff as hostages. Here it was held that the approval given to these acts by the state translated them to those of the state, making it internationally responsible for the acts of private persons who were now acting like agents of the state.

Exceptionally, through due diligence obligations, a state might be held responsible for acts of non-state entities.[104] The concept of due diligence appears to afford a viable medium to the finding of state responsibility for the acts of non-state entities. A relatively recent exposition of this concept is that in *Asian Agricultural Products Ltd. (AAPL)* v. *Republic of Sri Lanka*.[105] Here the Sri Lankan security forces destroyed an installation partly owned by AAPL, claiming that it was being used by the Tamil Tigers, a secessionist movement in the island. The Tribunal found that although Sri Lanka was not responsible for acts of the secessionists, it was responsible in its own right for failure to exercise due diligence in protecting AAPL's

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100 M. Spinedi, B. Simma (eds.), *United Nations Codification of State Responsibility*, Oceana Publications, Inc., New York, 1987, p. vii.

101 *Ibid.*

102 Malanczuk, *op. cit.* n. 10, p. 258.

103 ICJ Reports 1980, p. 3. On the other hand, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *US)*, ICJ Reports 1986, p. 14, the court did not consider that the assistance given by the United States to the *contras* warranted the conclusion that their acts were imputable to the US. On the other hand the US could be responsible for its own conduct *vis-à-vis* Nicaragua including conduct related to the acts of the *contras*, and these should be investigated. Thus with respect to private persons, much appears to depend on the degree of assistance, effective control, and direct involvement of the state.

104 'Trail Smelter Case', (1938), RIAA III 1905.

105 30 ILM 577 (1991), International Centre for the Settlement of Investment Disputes.

property. It was stated that it is a generally accepted rule of international law that a state on whose territory an insurrection occurs is not responsible for loss to foreign investors, unless it can be shown that the state failed to provide the standard of protection required by international law. It also cited an early case where it had been stated that the principle of non-responsibility in no way excludes the duty to exercise a certain degree of vigilance.[106] International responsibility would lie on the part of the host state for breach of a primary obligation of adequate protection.[107] It may be commented here that if a host state can be responsible for negligence in this manner, in principle the reverse situation could also be envisaged, where a home state could be responsible as well, for the acts of a foreign investor. The law relating to foreign investment has from the outset been heavily one-sided, geared towards the protection of investors. The question may be asked whether in the light of the need to adjust to the modern realities of international economic relations and the dictates of justice and reasonableness, home state responsibility could also ensue in this manner.

Under the law of state responsibility the injured state can claim reparation, for instance through compensation.[108] The defendant state's duties are owed not to the injured alien, but to the alien's national state, the underlying theory being that the claimant state itself suffers a loss when one of its nationals is injured:[109]

> Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. . . . The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action.[110]

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106 Judge Huber in the *Spanish Zone of Morocco Claims op. cit.* n. 93.

107 Here the Tribunal did a thorough review of arbitral case law and doctrinal authorities. It cited Brownlie (I. Brownlie, *System of the Law of Nations – State Responsibility* – Part 1, Oxford, 1986, p. 162) who stated that there is an extensive and consistent state practice supporting the duty to exercise due diligence and that there is general agreement among writers that the rule of non-responsibility cannot apply where the government concerned has failed to show due diligence.

108 *Ibid.*, p. 270.

109 This aspect was clearly laid down in the *Barcelona Traction Case, op. cit.* n. 56.

110 *Ibid.*

The notion of aggravated responsibility is another useful construct in the present context.[111] Ordinary responsibility as discussed so far ensues in the case of breaches of bilateral or multilateral treaties, or general rules – for instance those protecting reciprocal interests of states.[112] A breach leads to a bilateral relationship between the two states concerned, an issue of a private as opposed to a public nature. On the other hand aggravated responsibility could ensue when a state violates a general rule laying down a 'community obligation', i.e., a customary obligation *erga omnes* protecting fundamental values.[113] Unlike in ordinary responsibility, a state can invoke the responsibility of the wrongdoer regardless of there being material or moral damage to it, because it does not pursue a personal or individual interest, but a community interest on behalf of the international community:[114]

> (i) concerning a fundamental value (peace, human rights, self-determination of peoples, protection of the environment), (ii) *owed to all the other members* of the international community, or to the States bound by a multilateral treaty, (iii) having as its correlative position a 'community right', that is, a right belonging to any other State (or to any other contracting party, in the case of a multilateral treaty); (iv) this right may be exercised by any other State (or contracting party), whether or not damaged by the breach; and (v) the right is exercised on behalf of the international community and not in the interest of the claimant State.[115]

It is interesting that two of the primary concerns of this research, human rights and the environment are listed herein, and in fact a third, economic development, is linked to self-determination and sovereignty. However, Cassese also states that aggravated responsibility is rarely invoked as states still cling to the idea that they should take action on international dealings primarily to protect their own interests, and shun meddling in matters which are not of direct concern to them.[116]

Concepts related to state responsibility, that of liability, used in the different senses of responsibility; the obligation of paying compensation; and duties of states arising from harmful consequences of hazardous activities not prohibited by international law[117] are also limited to states, but may assume broader dimensions in due course. The notion of 'liability for injurious consequences arising out of acts

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111 This concept is embodied in Art. 48 of the Articles on State Responsibility of 2001, which states that any state other than the injured state is entitled to invoke the responsibility of another state if the obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group, or the obligation breached is owed to the whole international community.

112 A. Cassese, *op. cit.* n. 18, p. 185.

113 *Ibid.*

114 *Ibid.*, p. 186.

115 *Ibid.*, p. 200.

116 *Ibid.*, p. 211.

117 *Ibid.*

not prohibited by international law', still not entirely developed even in relation to states, could also eventually become relevant in this context, particularly since environmental harm has always been a primary concern envisaged under this head.

From the perspective of justice, equity and sustainable development, making a home state responsible for the wrongful conduct of TNCs based therein appears to be a tenable argument, in the sense that home states wield considerably more control over TNCs than host states, and also stand to gain from the profits repatriated to them. It could thus be viewed as a form of cost internalization, which, at face value, appears to be just. It is also a means of balancing conflicting interests – that is, the interests of home countries in having their companies gain from the benefits of doing international business, and the interests of host countries and communities – not to have unfair social and environmental costs imposed on them. The pursuit of social and ecological well-being would after all be a reinforcement of their mutual interests. The expansion of the concept of state responsibility in this manner could yield efficient results. Arguments based on coherence, however, would not be so supportive of imposition of state responsibility in this context. This is because if states are held responsible for TNC wrongs, it could then be argued that they should also be held responsible for the wrongs of other non-state actors, including individuals. At this point, the argument becomes difficult to sustain, even though international law is in fact increasingly recognizing the imposition of individual responsibility.

At the other end of the scale, it is also necessary to consider the negative factors of invoking state responsibility or its allied concepts/principles. State responsibility is in itself highly complex and its constituent principles are yet in the process of being elucidated. Its increased use could handicap friendly relations between states, in view of making the rather serious allegation of a breach of international law. Hence it could have far-reaching consequences for international relations, diplomacy and peaceful co-existence. International legal personality is an evolving concept, and arguments could similarly be raised with respect to state responsibility for other emerging subjects. Expediency is important in the business and commercial world, and one could envisage a situation in which actions of this nature, if allowed, would slow down international business transactions and perhaps become an obstacle to economic development. One could also question whether, in an era of globalization where the rights of states are on the decline, it is feasible to increase their share of responsibilities, both closely connected to sovereignty. Again, on the other hand, the roll-back of the state may only increase the gap in the balance of power between and within countries, and reinforcing their role partly through greater social responsibility could be a useful step.

It is clearly evident from this discussion that the core element in international and state responsibility is the wrongful conduct of the state/its organs. However, several deviations and exceptions are interwoven in the law, including the cases of peremptory norms, adoption of acts of individuals or groups, significant control

over actions of individuals, due diligence obligations for non-state entities and aggravated responsibility. State responsibility, even when applied almost exclusively to states, has barely displayed even a semblance of coherence. Thus it could be reasonably asked whether indeed there is any scope for the expansion of its dimensions. On the other hand, it seems possible that further deviations be recognized, as it has been relatively flexible. Justice, equity and sustainable development may require such a course, and it will certainly be realistic and efficient to consider the expansion of state responsibility, although the dictates of coherence and legitimacy may not point in the same direction. As stated by Cassese in the context of aggravated responsibility:

> Nevertheless, here, as in other areas of international law, it is important for forward-looking legal means and instrumentalities to be available to States. Sooner or later States will make use of them, thus implementing those fundamental values they tend to proclaim and even tout, but often forget to put into practice.[118]

In the context of fundamental values, the emerging body of law and policy on corporate social responsibility (CSR) relates to international responsibility and merits consideration. To return to the words of Judge Huber 'responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility'.[119] Given a liberal interpretation in keeping with the notion that laws must operate in a continuum, these words could also apply to other actors, including TNCs. CSR emanates from a variety of sources, both interstate instruments in the form of involuntary codes of conduct, and instruments from the sectors of business (voluntary codes) and civil society.

As for interstate instruments – with regard to Bilateral Investment Treaties, which are significant sources of investment regulation – although there are thousands in number, they operate almost exclusively in the economic domain. Their purpose is primarily to protect foreign investors, promote foreign investment, and purportedly economic development. They do not conventionally make provision for promotion and protection of broad social values.

With regard to multilateral treaties and instruments, although the UN Code of Conduct for TNCs was only conceived but never born, its spirit continues to find expression in the cycles of reincarnation of a range of creatures representing

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118 *Ibid.*, p. 211.

119 *Spanish Zone of Morocco Claims Case, op. cit.* n. 93. See R. McLaughlin, 'Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes', 11 *Colorado Journal of Environmental Law and Policy*, 2000, p. 377; M.M.A. de Bolivar, 'A Comparison of Protecting the Environmental Interests of Latin American Indigenous Communities from Transnational Corporations under International Human Rights and Environmental Law', 8 *Journal of Transnational Law and Policy*, 1998, p. 105; R.J. Fowler, 'International Environmental Standards for Transnational Corporations', 25 *Environmental Lawyer*, 1995, p. 1; L. Dubin, 'The Direct Application of Human Rights Standards to, and by, Transnational Corporations', 61 *The International Commission of Jurists (ICJ) Review*, 1999, p. 35.

several species of superior or inferior caste and class. The OECD Guidelines of 1976 as revised in 2000, the World Bank Guidelines and the International Labour Organization (ILO)'s International Labour Code from the intergovernmental sector and at the policy level, the Global Compact of the UN Secretary-General; the Core Standards of the World Development Movement from NGOs; and the Business Charter for Sustainable Development of the International Chamber of Commerce (ICC) from the private sector are just a handful of examples of international law and policy in the making in this sphere. These have their regional counterparts, for instance, in Asia, the 1998 Draft NGO Charter on TNCs (to monitor Japanese TNCs abroad) and the International Agreement on Investment of the Indian-based Consumer Unity and Trust Society (CUTS).

The Sub-Commission on the Promotion and Protection of Human Rights, in its consideration of globalization and its impact on the full enjoyment of all human rights;[120] human rights, trade and investment;[121] the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations;[122] and the liberalization of trade in services and human rights[123] places much emphasis on the responsibilities of all concerned, primarily states and TNCs. The Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights,[124] pursue an equilibrium, in relation to the negative and positive impacts of globalization.

Surely the cumulative effect of all the above should be the formation of a formidable body of international public policy and fundamental community values which must be reflected in the law. The progressive development of public international law would have to take into account this evolving body of law and policy,[125] which should in turn influence classical norms such as state and international responsibility.

3.5 International Minimum Standard v. National Standard

The question arises whether the international minimum standard (IMS)[126] traditionally applicable between states and non-nationals, has any relevance or usefulness

120 E/CN.4/2002/54.

121 E/CN.4/Sub.2/2002/L.11/Add.1.

122 *Ibid.*

123 *Ibid.*

124 UN. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), unanimously adopted by the UN. Sub-Commission on the Protection and Promotion of Human Rights Resolution 2003/16 of 13 August 2003.

125 See the UNGA Resolution entitled *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/Res/56/163, 20 February 2002. Although soft law in terms of legal status, such an instrument can influence the progressive development of international law.

126 P. Malanczuk, *op. cit.* n. 10, p. 256.

in this study. International law lays down an IMS for the treatment of aliens/nationals of other states. So when aliens are permitted into the territory of other states, the latter are obliged to treat them in a fair and civilized manner.[127] Failure to comply with the IMS leads to state responsibility of the wrongdoing state, and the national state of the injured alien can invoke diplomatic protection.[128] Under its rules, *inter alia*, a state's responsibility will be engaged if an alien is unlawfully killed, physically ill-treated or if his property is damaged, all without justification.[129] The standards apply usually to an alien when he resides or acquires property in a foreign state. The alien's national state can claim in certain circumstances, if the foreign country's laws or behaviour fall below the IMS.[130]

> The minimum standard concept (sometimes called the international standard of justice) affirms that there are rights created and defined by international law that may be asserted against States by or on behalf of aliens. It denies the tenets of the Calvo doctrine, according to which aliens have only those rights which are afforded to local nationals, i.e. national (or equal) treatment. Since it asserts only the rights of aliens, it diverges from the position that international law grants certain human rights to all persons, even *vis-à-vis* their own States.[131]

The history and development of the standard was never a story of consistency. It grew intertwined with the overall idea of diplomatic protection, having evolved in the 18th century and developed further in the 19th and 20th centuries.[132] Among the topics included were the rights of aliens to fair civil or criminal judicial pro-

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127 *Ibid.*

128 *Ibid.* Malanczuk goes on to assert that a state is guilty of a breach of international law if it inflicts injury on aliens at a time when they are outside its territory. It cannot perform any governmental act whatsoever in the territory of another state, without the latter's consent.

129 *Ibid.*, p. 261. In the *Neer Claim* IV RIAA (1926) pp. 60, 61–2, the Mexico-United States General Claims Commission stated that "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".

130 Malanczuk, *ibid.*, p. 260.

131 D. Vagts, 'Minimum Standard', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. III, 1997, p. 408. He goes on to state that the term is more generally used with respect to rights conferred by customary international law than with respect to rights based on specific treaties.

132 *Ibid.* N. Schrijver, in *Sovereignty over Natural Resources: Balancing Rights and Duties*, CUP, Cambridge, 1997, pp. 173–181, considers the national standard versus the international minimum standard in the regulation of foreign investment. In the colonial and early postcolonial era, capital-exporting states stipulated that the international minimum standard of civilization/international standard of justice/international minimum standard (IMS) was obligatory for all governments, however they treated their nationals. This ensured a certain degree of protection to foreign investors. The national standard, on the other hand, was also applied especially by Latin American states. The Calvo doctrine/national standard, stipulated that investment regulation in general and the taking of foreign property in particular, are matters for domestic jurisdiction. Under this standard, nationals and foreigners alike were equal before the law.

ceedings, to decent treatment if imprisoned, to protection against disorders, violence, and against deportation in abusive ways, and to the enjoyment of their property unless taken for a public purpose and with fair compensation. Opposition to the standard was expressed primarily in the form of the Calvo Clause advocated by Latin American countries. At the Hague Codification Conference of 1930, the majority of states supported the international standard. In 1933, the Montevideo Convention on the Rights and Duties of States was adopted with a strong statement of the equality principle, as opposed to that of the international minimum standard.[133]

With respect to the current legal status of the IMS, since World War II various trends in international law at the multilateral level have had the effect of reducing the clarity and usefulness of the concept.[134] Among the now more numerous community of nations, newly independent states tended to uphold the Latin American view that the standard worked against their interests.[135] Simultaneously there was a sharpening of the focus on individuals in international law and on the violations of rights by governments of their own nationals, and a lessening of the international arbitrations on aliens' rights. The explosion in human rights concepts was another significant influence decreasing the minimum standard's relevance.[136] Some may argue that the standard has become redundant with the human rights revolution creating rights locally and internationally, for nationals and aliens, under treaties and customary law. Others maintain that 'for all of those advances in the protection of human rights rules, however, there are still significant ways in which the traditional minimum standard demands more of State behaviour.'[137] With respect to the overall relevance of the standard to the rights of aliens in the personal sphere, it is probable that they would still have claims to its protection, and the arguments in its favour retain their validity.[138] In fact, states do not treat aliens equally in all respects,[139] and this is a justification for the application of minimum standards.[140]

On the bilateral level, there were several agreements incorporating the standard.[141] In the property rights domain, a series of United Nations General Assembly

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133 Vagts, *op. cit.* n. 131.
134 *Ibid.*, p. 409.
135 *Ibid.*
136 *Ibid.* While human rights concepts can be seen as parallel and competing *vis-à-vis* minimum standards, some writers like Brownlie, *op. cit.* n. 5, p. 505, find a synthesis between them, and call for a further synthesis. Human Rights developments, they argue, have provided the standard with a new content based on those human rights, which are part of customary international law, such as the prohibition of inhuman and degrading treatment.
137 Vagts, *ibid.*, p. 410.
138 *Ibid.*
139 *Ibid.*
140 *Ibid.*
141 *Ibid.*, p. 409.

resolutions rejected the standard's application.[142] Brownlie states that the controversy concerning national and international standards has not remained within the bounds of logic, and that this is not surprising as the two viewpoints reflect conflicting economic and political interests.[143] The core principle according to him is that a sovereign cannot in all circumstances avoid responsibility by pleading that aliens and nationals had received equal treatment.[144]

It is perhaps possible to consider the converse of the conventional application of the standard. That is, when a foreign business entity violates the human rights or environmental norms below an IMS, whether this concept could aid the victims, and whether their national state could act to invoke redress on their behalf. Although the stretching of the concept in this way is no straightforward matter – in terms of rationale, if one considers the facts that international business is by far more mobile than the alien or the immigrant, wields a lot more power both economic and political, and can consequently cause significant harm to persons or property of another nationality – it is not impossible to envisage the expansion of the concept to respond to the present problem. The injured individual would in any case have to be a national of the claimant state and the action would lie against another state, here the home state of the TNC. In this context it is significant that:

> The minimum standard can arise either directly through an act or omission attributable to the State that causes physical or economic harm to the non-national, or indirectly where the territorial sovereign is guilty of a 'denial of justice', being cases where the non-nationals are prejudiced in their attempts to obtain a national remedy in a dispute against any other party (e.g., another private individual).[145]

This indeed shows that the standard could have a broad application, as it applies both directly and indirectly, to acts and omissions, and to physical and economic harm, and a state could be found responsible for neglect of duty. In this way the actions of private parties could be included within the ambit of the minimum standard, increasing its relevance and utility value in the present discussion. Approached from the theoretical perspective of this research, the imposition of IMSs here could have the effect of paving the way to higher standards of justice and equity, and a more sustainable and humane form of development. Similarly, it affords a means of compromising conflicting interests and reinforcing mutual or

142 *Ibid.* On the other hand, I. Brownlie *op. cit.* n. 5, pp. 502, 503, points out that the UNGA Declaration on Permanent Sovereignty over Natural Resources, UNGA Resolution 1803, 1962, probably supports the minimum standard. He also states at p. 504, that basically, there is no single standard, national or international.

143 Brownlie, *ibid.*, p. 503.

144 *Ibid.*

145 Dixon, McCorquodale, *op. cit.* n. 6, p. 437.

universal interests – those of economic development, human rights and the environment. In view of the current reality of the predominance of TNCs in the global economy, it seems realistic that such standards be imposed. Such a course of action could also yield efficient results and achieve a degree of coherence, as minimum standards would by and large be the same for all possible victims, irrespective of residence, nationality or jurisdiction.

Adede deals with minimum standards in a more general sense, within the context of international economic law.[146] He describes the quest for a New International Economic Order in the 1960s and 1970s in terms of an attempt to establish new minimum standards. These include access to and distribution of the world's resources through legal instruments in which the rights and interests of all the actors in the world arena are fully protected. The attempt to establish new minimum standards was through a series of UN resolutions and the policies of other forums of multilateral diplomacy in which the third world had gained numerical power.

Here it can be argued that a broader and more general approach could be adopted to the meaning of IMSs, in the setting of international economic law, as suggested at the outset of this section. Perhaps this can even be linked to the emerging body of international public values, in the sense of certain fundamental universal community values. Views such as those put forward by Adede go to show that there may still be some leeway for arguing for IMSs of a more general nature in the sphere of international economic law and the particular context of resulting situations of injustice through the violation of rights and interests in the social and environmental spheres, by states as well as NSAs. On the one hand, it could be said that the stretching of a concept to NSAs is doubtful when, in the first place, the existence and application of the standard even in the technical sense and in the traditional setting of states has been unclear and inconsistent. On the other hand, there does appear to be some merit in the exercise, given its long history and existence to date even if rather inconspicuously. On the one hand, in the epoch of human rights, it may seem redundant to resurrect an old doctrine of customary international law. But on the other hand, the numerous limitations that circumscribe the application and implementation of human rights treaties internationally and locally suffices to make the search for alternatives reasonable, as customary law would have a more widespread application. The task of promotion in addition to protection of social and environmental interests may also be served. In the case of certain regions such as the Asian continent, there is no intergovernmental treaty framework for human rights, and the invocation of an alternative concept would be particularly relevant. There is no reason why human rights standards and minimum international standards cannot enter a path of peaceful co-existence. The inability of the international community

146 'The Minimum Standards in a World of Disparities', in R.St.J. Macdonald and D.M. Johnston (eds.), *The Structure and Process of International Law*, Nijhoff, The Hague, 1983, at p. 1021.

so far to reach consensus on the regulation of FDI further fortifies the quest for other standards.

BITS now number over 2500, and their overall impact is significant as they represent a substantial body of state practice and, as such, could wield much influence on the course of foreign investment regulation. By and large, they incorporate the international minimum standard towards the protection of foreign investors. As for multilateral investment agreements, which are still confined mainly to soft law and guidelines, they tend to be more balanced, making provision for the protection of investors as well as home states, to a greater or lesser degree.

Schrijver refers to the function of a protective shield played originally by the principle of permanent sovereignty over natural resources.[147] This approach, he states, could stand in the way of reshaping the principle to accommodate the realities of economic and environmental globalization. But recently, more attention is being paid to interpretation and application of this concept as a source of duties as well as rights, with respect *inter alia*, to the treatment of foreign investors, proper management of resources and sustainable development. Here the duty to co-operate has a crucial role to play with regard to interpretation and application of the principle, and this change is also reflected in FDI regulation.[148] He also states that it could be argued that the traditional doctrines on the national standard and the IMS are losing relevance as a result of modern trends in international economic law including those on international dispute settlement and according a functional status to TNCs in international law.[149]

With regard to the application of concepts and norms, which are fundamentally formulated to apply to sovereign states, the same arguments which have already been advanced with regard to the above discussion on international legal personality do apply. Basically, if non-state actors engage in activities to the same or greater degree than states, then certain rights and duties which applied previously only to states, must now be recognized with respect to them. Inspite of the proliferation of human rights concepts, documents and principles in theory, the global reality is a human rights deficit highlighted by glaring inequality.[150] In situations of large-scale inequality of wealth, power and other factors, the balancing of conflicting interests and the dictates of social justice and equity require even a tilting of the scales in favour of the less resourceful. With respect to globalization,

147 Schrijver, *op. cit.* n. 132, pp. 171, 172.

148 *Ibid.*

149 *Ibid.*, p. 383. He states at p. 381, that in certain respects, the 1962 Declaration embodies the most balanced approach to foreign investment regulation, as on the one hand, it requires *inter alia* the fair treatment of foreign investment; on the other hand, it squarely recognizes the economic sovereignty of host states and their right *inter alia* to regulate foreign investment and to expropriate and nationalize foreign property subject to certain conditions.

150 P. Mihyo, K. Arts, 'The Human Rights Deficit: Root Causes and Efforts to Address it', in Arts, Mihyo (eds.), *op. cit.* n. 4.

the immediate need is to deal with governing/regulating its processes.[151] Viewed in its macro dimensions, there is a need for a quest for measures to regulate the key players that influence these realities, both states and TNCs at all levels. Given the political obstacles in achieving macro-level changes and global consensus, micro-level innovations such as an adapted concept of IMSs can be relevant and useful as part of the response of international law.

3.6 Concluding Remarks: Towards Multidimensional Approaches to Regulation

Changes in the basic principles of public international law involve some fundamental adjustments in terms of their nature and structure, which would in turn reshape the larger body of this discipline. The notions of realism and coherence and, to a lesser extent, those of justice, equity and equilibrium do indeed indicate the need for such normative and structural adjustments. However, the evolution of general principles is a slow and gradual process, and thus basic changes may for now be confined to the realms of academic discourse. Large-scale consensus on rudimentary changes to the body of international law may or may not evolve with the passage of time. A survey of international law and policy in this sphere does portray a paradox of a sterile vacuum on the one hand, and potent bounty on the other. The challenge lies in the quest for a synthesis within the resulting antithesis. Thus on the other hand, several of these norms are relative and not absolute, do have some inherent flexibility, and have at times been innovatively applied by states, especially the judicial arm of governments.

The growing impact of non-state actors in the international legal system, law-making and implementation has led to the issue of what is sometimes described as a movement away from government to governance. The new role of non-state actors has many implications for international legal theory and practice, which could lead to a change in the basic structure of the international legal system, its participating actors, fundamental values and principles.

Any issue, relationship or law in the nebulous and partially polarized international community is bound to raise the most fundamental questions, even those questioning their very existence. The basic principles of public international law, such as those on personality, jurisdiction and responsibility evolved long before many of the branches of public international law – for instance, the international law of development, human rights or international environmental law – were even conceived. We are therefore faced with a situation of complexity, where traditional rules were formulated upon the infrastructure of a certain set of values of

151 D. Nayyar, J. Court, *Governing Globalization: Issues and Institutions*, UN University/World Institute for Development Economics Research, Helsinki, 2002.

classical international law and never really adapted to a substantially different scene. However, the changing dimensions of sovereignty must have some effect on the law, as it is no longer the bedrock of international relations, to the same extent as before. This argument is double edged, as on the one hand, it is necessary to accept the reality and therefore concede a degree of state sovereignty; and on the other hand, a certain minimum of sovereignty must be maintained at all costs, particularly with respect to regulation.

With regard to international legal personality, the centrality of state sovereignty in international law determines that states are the ultimate decision-makers with regard to the rights, duties and powers if any, of other actors. Justice, equity and sustainable development, which require the balancing of conflicting interests as well as reinforcing mutual interests, may be served by according TNCs a certain status in international law, taking a realistic approach to their role in international economic relations. In view of the need for coherence, it seems reasonable that TNCs are recognized as subjects, in the sense that they be given a form of functional personality. But on the other hand, it is states that by and large do and indeed should wield political power. Thus it is important to preserve full international legal personality solely for states. With regard to state and international jurisdiction as it relates to TNCs, it is evident that at present, clarity, consistency and coherence hardly exist. It is also evident that many developments have taken place and are yet evolving. These have important ramifications for the protection and promotion of human rights, development and the environment, and the movement towards/digression from a more just, equitable and sustainable development. One of the core influences has been that of the judiciary and its attitudes. The progressive development of international law – for instance, through the emergence of a body of soft law with respect to corporate responsibility – may have important consequences for directing state and particularly judicial attitudes on international jurisdiction. The ongoing formation of a formidable body of international public policy and fundamental community values must be reflected in the law. The progressive development of public international law would have to take into account this evolving body of law and policy, which should in turn influence classical norms like state and international responsibility. Basically, if non-state actors engage in activities to the same or greater degree than states, then certain rights and duties, which applied previously only to states, must now be recognized with respect to them. Given the political obstacles in achieving large-scale changes and global consensus, incremental innovations such as an adapted concept of international minimum standards can be relevant and useful as part of the response of international law.

The purport of this chapter was to posit TNCs within the public international law domain, in the broader context of FDI, human rights and the environment. The conceptual web of the goals of justice, equity and sustainable development and the means of balancing conflicting interests, coherence, realism and efficiency, did naturally colour the complexion of the relationship between TNCs and pub-

lic international law. It was seen that the role of law here lies in bridging the gulf between goals and means, between ideals and norms, which involves essentially governing the processes of globalization partly through regulating TNC activity. Sustainable development endowed this discussion with the more specific interests of development, environment and human rights. The steadily increasing transfer of rights from the public to the private sphere creates a gap between the reality of the international political economy and the law, and between the principles of public international law and the protection of international public values. This needs to be met by suitable regulation, one means to which is the infusion/injection of public values to the private domain. The approaches to such a process are necessarily multidimensional, as has been revealed by the analysis of diverse principles as well as the variations in terms of state practice and judicial attitudes discussed in this chapter. Thus one needs to go beyond basic principles of public international law to explore the law relating to sustainable development: international economic law including development, international environmental law including sustainable development, and international human rights law including labour as well as their regional and domestic manifestations, interventions of home and host states, and non-state actors.

Chapter Four

INTERNATIONAL LAW STANDARDS: THREE DIMENSIONS

4.1 Sustainable Development: A Three-dimensional Concept

This chapter aims to review the salient features of international law relating to sustainable development. This is done through an evaluation of the basic constituent elements of sustainable development – the economic, social and environmental dimensions encapsulated by international economic law, international human rights law and international environmental law. The importance of sustainable development at a basic level, shows the relevance of international norms to life,[1] livelihoods and environments.

Although the international law relating to sustainable development grows out of several branches, norms and principles of public international law, its roots are most firmly embedded in international environmental law. The history of international environmental law shows that many different issues have been engulfed within the subject and new issues will continue to be embraced. Some issues like sustainable development and its constituent elements have solicited controversy. Alexander Gillespie,[2] in deciphering the depths of environmental ethics and in attempting to ascertain why the environment is protected in the international arena, shows how nations, like individuals, create environmental laws and policies which often are not successful as they are riddled with inconsistencies and ultimately contradictory in purpose. Nations protect the environment for different reasons, and these ethical, economic or other distinctions are reflected in laws and policies.

Although the notion of sustainable development emerged from international environmental law, it is evolving as a concept encapsulating the three-dimensional relationship of economic development, environment and human rights. Like human

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1 On the need for international law to play a greater role in the lives of people and adopt a more participatory approach to international law-making, see S. Wright, 'Redefining International Norms for the 21st Century: The Incorporation of Different Voices', in Y. Le Bouthillier, D.M. McRae, D. Pharand, *Selected Papers in International Law, Contribution of the Canadian Council*, KLI, The Hague, 1999, p. 459.

2 A. Gillespie, *International Environmental Law, Policy and Ethics*, OUP, Oxford, 1997.

development, sustainable human development and social development, it can accommodate issues that go beyond purely economic interests in development. Its central tenet of reconciling environment and development, allows this notion to go to the core of balancing conflicting interests including FDI, human rights and environment, and the interests of TNCs and host countries.[3] Justice, equity and development also find expression in the sustainable development discourse.[4] It is therefore useful to evaluate to what extent international law in the spheres of economy, environment and human rights integrate this conception, in the sense of balancing these countervailing considerations.

It has been stated with respect to the different approaches on business regulation:

> Thinking about what type of international business regulation would be in the interest of developing countries in general, and poor households in particular, is a worthwhile exercise. The ability to draw on ongoing progress in the three fields of global regulation based on international law would provide a far more realistic basis for debate than voluntary initiatives based on business ethics and brand image.[5]

4.2 International Environmental Law

International environmental law in its current manifestations evolved predominantly over the last three decades. While many trace its origins back to the early 1970s, some writers go back further to the second half of the 19th century.[6] From this point Sands traces several distinct periods of development: from the bilateral fisheries treaties in the nineteenth century up to the creation of the new international organizations; from the creation of the UN to the UN Conference on the Human Environment (UNCHE), Stockholm, 1972; from that point to the United Nations Conference on Environment and Development (UNCED) in 1992; and then from UNCED to date.[7] The last was a period marked by intensive standard-

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3 See United Nations Department of Economic and Social Development, Transnational Corporations and Management Division, *International Law – Emerging Trends and Implications for Transnational Corporations*, UN, New York, 1993; 'A Global Compact for the New Century', 31 January 1999, www.unglobalcompact.org

4 See J. Agyeman, R.D. Bullard, B. Evans (eds.), *Just Sustainabilities: Development in an Unequal World*, Earthscan, London, 2003.

5 E.V.K. Fitzgerald, *Regulating Large International Firms*, UNRISD Technology, Business and Society Programme Paper no. 5, at p. 18; the three fields envisage the economic, environmental and social.

6 P. Sands, *Principles of International Environmental Law*, CUP, Cambridge, 2003, p. 25; this paragraph is largely based on the account of the History of International Environmental Law developed in Sands, pp. 25–69; on international law and the environment, see P. Sands (ed.), *Greening International Law*, Earthscan, London, 1993; P.H. Sand, *Transnational Environmental Law*, KLI, London, 1999; A. Kiss, D. Shelton, *International Environmental Law*, Transnational Publishers, New York, 1999; P. Birnie, A. Boyle, *International Law and The Environment*, OUP, Oxford, 2002.

7 *Ibid.*, Sands, pp. 25–69.

setting, also with attempts at mainstreaming when environmental concerns were supposed to be integrated into all activities.[8] A brief account of the history of international environmental law is presented, to place the continuously evolving international law relating to sustainable development in perspective.

In the earliest stage of development, environmental laws dwelt on the conservation of wildlife and the protection of rivers and seas,[9] through bilateral, and occasionally regional or multilateral arrangements. Concern for flora and fauna coincided with industrialization and use of mineral resources, and led for instance to bilateral fisheries conventions and bilateral treaties for conservation of migratory birds.[10] Two arbitral awards,[11] a few treaties and rudimentary institutional arrangements represented the limited development of international environmental law. Relevant significant developments stemming from this era are the recognition of the need for limitation of natural resource exploitation and pollution stemming from industry and technology, and the inevitability of international measures for regulation of these matters.[12]

From the creation of the UN up to the Stockholm Conference, international organizations began to address a range of environmental issues including, at an elementary level, the relationship between economic development and the environment. One of the UN's purposes is to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character,[13] providing a basis for subsequent environmental activities. The ECOSOC resolution convening the 1949 UN Conference on the Conservation and Utilization of Resources (UNCCUR) reflected awareness of the need for international action towards a balanced approach for management and conservation of natural resources, and paved the way for further UN action in environmental protection. UNCCUR's accomplishments included the recognition of the relationship between conservation and development.[14] The years that followed saw several developments under the auspices of the UN, in furtherance of environmental protection, including the effects of pollution from industrial and military activity.[15] The idea of the maximum sustainable yield in the Convention on Fishing and Conservation of the Living Resources of the High Seas of 1958[16] emerged from the law of the sea.

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8 *Ibid.*, p. 26.

9 *Ibid.*

10 *Ibid.*, p. 27.

11 *Pacific Fur Seal Arbitration*, 1 *Moore's Int'l Arb. Awards* (1893) 755, and *Trail Smelter*, 3 R.I.A.A. (1941) 716.

12 Sands, *op. cit.* n. 6, p. 30.

13 Charter of the UN, 26 June 1945, Article 1 (3) and Sands, *ibid.* p. 31.

14 Sands, *ibid.*, p. 32.

15 *Ibid.*, p. 33. Significant developments included the 1954 International Convention for the Prevention of Pollution of the Sea by Oil and the 1958 High Seas Convention.

16 Convention adopted by the United Nations Conference on the Law of the Sea (UNCLOS I), 29 April 1958. According to Art. 2, conservation in this context means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

The consolidation of international environmental law which commenced in 1972 took place against the backdrop of this ambience of a rudimentary body of rules on the environment, both global and regional, in a piecemeal, incoherent and uncoordinated form.

The Stockholm Conference marked the inception of the conceptualization of the environment as a holistic phenomenon, and concluded with the adoption of three non-binding instruments: a resolution on institutional and financial arrangements, a Declaration[17] with 26 principles and an Action Plan of 109 recommendations. Principles 21–24 of the Declaration are significant from a legal perspective. State sovereignty and responsibility, the need for international co-operation for the prevention and control of pollution and the development of international environmental law, as well as the important role of international organizations and the determination of national standards, are expressed *inter alia* in these principles. The Conference led to legal and institutional developments including the creation of the United Nations Environment Programme (UNEP). It led to a proliferation of nongovernmental environmental organizations and the visible inclusion of the environmental dimension in the work of existing institutions and instruments at the international and national levels. The balancing of conflicting interests as expressed in Prin. 21 and implicit references to equity as in that between generations are significant in the context of this study.

Several developments have taken place since the Stockholm Conference, merging into an amalgam of binding and non-binding international instruments which combine with several supporting documents to constitute an evolving literature on sustainable development. This consists of a body of laws and policies embracing a vast collection of global public values, which can support the construction of a normative framework for approaching issues of development, human rights and the environment. The end of the first decade from Stockholm to Rio witnessed the emergence of the non-binding World Charter for Nature (WCN),[18] a relatively ecocentric instrument requiring the conservation of nature for its own intrinsic value rather than for utilitarian reasons, and promoting the idea of optimum sustainable use and productivity of natural resources. The World Conservation Strategy of 1980, the ASEAN Agreement on the Conservation of Nature and Natural Resources 1985 and other instruments[19] had incorporated the idea of sustainable development, sustainable use and utilization. Art. 1 of the ASEAN Agreement expressly refers to the 'goal of sustainable development.' This notion

17 UN Doc. A/CONF.48/14, Stockholm, 16 June 1972.

18 UNGA res. 37/7, 28 October 1982.

19 Art. 2(1) of the ASEAN Agreement of 9 July 1985 states that conservation and management of natural resources should be treated as an integral part of development planning at all stages and at all levels. Other regional conventions also incorporated the idea, including the 1974 Paris Convention, the 1978 Kuwait Convention, the 1978 Amazonian Treaty and the 1989 Fourth Lome Convention: See P. Sands, *op. cit.* n. 6, p. 265.

was endorsed and concretized by the Brundtland Commission/World Commission on Environment and Development (WCED). In its 1987 report entitled 'Our Common Future',[20] environment/development/social issues were approached from a holistic viewpoint, as they were viewed as different aspects of the same issue. Its emphasis on poverty and its alleviation, and the dire need for development could be mobilized towards the goals of a more just, equitable and sustainable development. Another relevant development in this connection was the Proposed Legal Principles for Environmental Protection and Sustainable Development by the WCED Experts Group on Environmental Law 1987,[21] consisting of 22 articles.

The UNCED held in Rio de Janeiro in 1992 adopted three non-binding instruments, expressly incorporating sustainable development: the Rio Declaration on Environment and Development;[22] the Statement of Forest Principles and Agenda 21. Two treaties incorporating sustainable development into environmental responsibility were also opened for signature at the Rio Conference, namely the Convention on Biological Diversity (CBD)[23] and the Framework Convention on Climate Change (FCCC).[24]

As commented by Sands,[25] UNCED and what followed from it do not provide a clear sense of direction about likely future developments, but gives one indication about the future course of international environmental law in the next stage: This branch of law is moving beyond the adoption of normative standards, to address methods of implementation which are practical, effective, equitable and acceptable to most members of the international community. He adds:

> First, the focus on implementation means that international environmental law will be increasingly concerned with procedural, constitutional and institutional issues: environmental impact assessment, access to and dissemination of environmental information; techniques of law-making and issues of international governance, including accountability and transparency in decision-making; the participation or representation of the different members of the international community in the international legal process; new compliance mechanisms (including appropriate national judicial and administrative remedies), and new techniques of regulation (including economic instruments). Second, as environmental issues are increasingly integrated into aspects of economic and development institutions and law (in particular trade, development lending and intellectual property), the field in which international environmental law has developed will continue to broaden, creating new challenges for the subject for lawyers and others involved in its development and application.[26]

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20 WCED, *Our Common Future*, OUP, New York, 1987, endorsed by UNGA Res. 42/186, or the Tokyo Declaration.

21 Reprinted in R.D. Munro, J.G. Lammers (eds.), *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, Graham and Trotman, London, 1987.

22 UN Doc. A/Conf.1515/Rev. 1, 13 June 1992.

23 31 ILM 1992, p. 818.

24 *Ibid.*, p. 849.

25 Sands, *op. cit.* n. 6, p. 61.

26 *Ibid.*

Post-UNCED developments include UNGA follow-up resolutions, the adoption of new instruments and the negotiation of others. The Desertification Convention embodies the concept of sustainable development. The 1994 Report on Human Rights, Environment and Development by the UN Special Rapporteur on Human Rights and the Environment[27] was a cogent expression of the linkages between human rights, development and environment, within the context of sustainable development. The Kyoto Protocol, an amendment to the Climate Change Convention, introduces mandatory targets for the reduction of greenhouse gas emissions.[28] The Marrakech Accords were adopted to provide guidelines on the implementation of the Protocol.[29] The 1999 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,[30] although regional in scope, adds value through its emphasis on procedural mechanisms, which can further serve environmental justice as well as sustainable development. The 2000 Draft International Union for the Conservation of Nature (IUCN) International Covenant on Environment and Development[31] is another example of a (draft) treaty integrating sustainable development.

The International Law Association (ILA)'s non-binding New Delhi Declaration of 2002 contains interesting provisions in relation to the principle and practice of sustainable development, most notably for present purposes, the principle of integration.[32] Finally, the non-binding Johannesburg Declaration of the World Summit on Sustainable Development (WSSD) 2002[33] is significant for its emphasis *inter alia*

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27 UN Doc. E/CN.4/1994/9.

28 37 ILM 1997, opened for signature on 11 December 1997, and entered into force on 16 February 2005.

29 Marrakech Accords and Marrakech Declaration, Bonn, 2001.

30 The Arhus Convention, 38 ILM 1999, p. 517.

31 International Union for the Conservation of Nature, Environmental Policy and Law Paper No. 31, 2nd Edition, Gland, 2000.

32 On 6 April 2002, the 70th Conference of the ILA adopted by consensus the New Delhi Declaration of Principles of International Law Relating to Sustainable Development (Resolution 2002/3). The relevant subsections of Principle 7 of this Declaration state as follows:
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. 7.1 The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind. 7.2 All levels of governance – global, regional, national, sub-national and local – and all sectors of society should implement the integration principle, which is essential to the achievement of sustainable development. 7.3 States should strive to resolve apparent conflicts between competing economic, financial, social and environmental considerations, whether through existing institutions or through the establishment of appropriate new institutions.

33 This Summit concluded with the Johannesburg Declaration on Sustainable Development and Plan of Implementation of 4 September 2002, http://www.un.org/esa/susdev/documents/WSSD_POI_PD.htm; the Declaration drew support from several previous documents including the declarations of Stockholm and Rio; the Monterrey Report of the International Conference on Financing for Development and the ILO Declaration on Fundamental Principles and Rights at Work.

on humanity, human dignity, equity, poverty, environmental integrity, responsibilities to future generations, multilateralism and implementation. Art. 5 is important to this study in 2 ways, with its emphasis on responsibility and its three-dimensional approach. It refers to collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development: economic development, social development and environmental protection. Art. 14 refers to globalization, its positive and negative impacts, and its effects on developing countries, again very relevant to this study. While development and the environment were conceptually integrated in the Rio Declaration, its practical realization has yet to be achieved and will be an exercise which will continue well into the future. Progress in implementing sustainable development since the Earth Summit of 1992 had been slow, with poverty deepening and the environment deteriorating. Thus the focus on implementation in the Declaration and the Plan of Implementation, which contains time-bound socioeconomic and environmental targets, is significant both to this study and to the larger cause of sustainable development. In relation to maximizing the benefits of globalization and minimizing its adverse impacts, the policy adopted at the WSSD was to support a globalization process which should be inclusive and equitable, formulated and implemented with the effective participation of developing countries and those in transition.[34]

Finally, in the context of investment, sustainable development and the furtherance of Environmental, Social and Corporate Governance, the Principles for Responsible Investment[35] are a very recent development convened by the UN Secretary General, and implemented by the UNEP Finance Initiative and the UN Global Compact. They embody a set of voluntary principles for institutional investors, and although soft law by nature, can contribute to the progressive development of interlinked areas of international law and their integration.

4.2.1 The international law relating to sustainable development

In considering the meaning of the concept of sustainable development[36] and its definition, it is evident that several principles of the Stockholm Declaration embody the idea of sustainable development, or its constituent elements. This Declaration contains repeated references to the correlation of environment and development, implying and sometimes expressing the need for a balanced approach.[37] Prin. 13

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34 Economic and Social Commission for Asia and the Pacific (ESCAP), *Regional Follow-Up to the World Summit on Sustainable Development in Asia and the Pacific*, UN, New York, 2003.

35 27th April 2006, available at http://www.unpri.org

36 See A. Boyle, D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, OUP, Oxford, 1999; N. Schrijver, F. Weiss (eds.), *International Law and Sustainable Development: Principles and Practice*, Nijhoff, Leiden, 2004; M.-C. Cordonier Segger, A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects*, OUP, Oxford, 2004.

37 *Op. cit.* n. 17. Principles 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18 and 20 all provide examples

provides that, to achieve a more rational management of resources and protection of the environment, states should adopt an integrated and co-ordinated approach to development planning so as to ensure that development is compatible with environmental protection.

The most popular definition of the apparently paradoxical term "sustainable development" was articulated by the Brundtland Commission in 'Our Common Future', that is, 'development which meets the needs of the present generation without compromising the needs of future generations to meet their own needs.'[38] This is a rather broad and general definition, characterized by its core element, the balancing of conflicting interests. Popularized by this Report, the notion of sustainable development was explicitly embodied in the non-binding Rio Declaration,[39] and underlines several principles in this instrument. The concept has similarly been included in several subsequent instruments, both binding and non-binding.[40] A survey of environmental agreements and instruments reveals that the term sustainable development appears to consist of several objectives: namely, the commitment to preserve natural resources for the benefit of present and future generations; appropriate standards for the exploitation of natural resources; equitable use of natural resources; the integration of environmental considerations into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives.[41] The most salient substantive elements of sustainable development are the sustainable utilization of natural resources, the integration of environmental protection and economic development, the right to development, the pursuit of equitable allocation of resources both within the present generation and between present and future generations, and the internalization of environmental costs through application of the 'polluter-pays' principle.[42] The main procedural elements are public

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of this trend. An early recognition of the interconnectedness of environment and development is reflected in Art. 30 of CERDS, UNGA Res. 3281 of 12 December 1974 which states *inter alia* that the environmental policies of all states should enhance and not adversely affect the present and future development potential of developing countries.

38 *Op. cit.* n. 20, p. 43.

39 However, its history goes back much further, and the basic conception also emerged in the Founex Report of 1971 (Development and Environment: Report and Working Papers of a Panel of Experts Convened by the Secretary-General of the UNCHE, Founex, Switzerland, 4–12 June 1971).

40 For instance, a binding instrument is the Convention to Combat Desertification of 1994 and a non-binding, the Hague Declaration on the Environment (28 I.L.M. 1989, p. 1308) on global warming and climate change.

41 T. Swanson, S. Johnston, *Global Environmental Problems and International Environmental Agreements*, UN/Edward Elgar Publishing Ltd., UK, 1999, p. 236; also see K. Arts, J. Gupta, 'Climate Change and Hazardous Waste Law: Developing International Law of Sustainable Development', in Schrijver, Weiss, *op. cit.* n. 36, p. 519.

42 Birnie, Boyle, *op. cit.* n. 6, p. 86.

participation in decision-making and EIA.[43] Agenda 21 is also centred on the concept of sustainable development and its implementation is monitored, by the Commission for Sustainable Development (CSD).[44]

The legal meaning of sustainable development, like its definition, lacks clarity. It has been described as:

> A legal term which refers to processes, principles and objectives, as well as to a large body of international agreements on environment, economics and civil and political rights . . . International law in the field of sustainable development describes a broad umbrella accommodating the specialized field of international law which aims to promote economic development, environmental protection and respect for civil and political rights. It is not an independent and free-standing body of principles and rules and it is still emerging. As such, it is not coherent or comprehensive, nor is it free from ambiguity or inconsistency. It endorses on behalf of the whole of the international community an approach requiring existing principles, rules and institutional arrangements to be treated in an integrated manner.[45]

The incoherence that pervades the legal literature on sustainable development[46] constitutes its congenital weakness on the one hand, but its inherent ambiguity may also paradoxically be its value in terms of the space it creates for innovative thinking on the other. The lack of clarity and specificity could create opportunities for interpretation of instruments and construction of documents, which could well advance the agenda for just, equitable and sustainable development, especially given its value-laden character. The ideal of integration that characterizes the approach of sustainable development could well be a means to traverse from divergence to convergence. In *Hungary* v. *Slovakia*[47] – the only case where sustainable development arose for discussion explicitly before the ICJ – the majority

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43 *Ibid.*

44 UNGA Res. 47/191 of 1992.

45 P. Sands, 'International Law in the Field of Sustainable Development', 65 *British Yearbook of International Law (BYIL)*, 1994, p. 303.

46 Birnie, Boyle, *op. cit.* n. 6, at p. 85 point to some of the uncertainties that surround sustainable development, and bear on the question whether it can be considered a legal principle: "If it is a principle to be interpreted, applied, and achieved primarily at the national level, by individual governments, there may be only a limited need for international definition and oversight. If, however, it is intended that states should be held internationally accountable for achieving sustainability, whether globally or nationally then the criteria for measuring this standard must be made clear as must the evidential burden for measuring the performance of individual states".

47 *Case concerning the Gabcikovo-Nagymaros Project*, 1997 ICJ Reports 7. Also in relation to environmental protection, in the ICJ's advisory opinion on the *Legality of the Threat of Use of Nuclear Weapons*, 1996 ICJ Reports 66 at 241–42, the Court stated: "The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment".

judgement does not dwell upon the status of the principle of sustainable development. The separate opinion of Justice Weeramantry on the other hand, goes so far as to refer to sustainable development as a principle, and as an integral part of modern international law. He used it as the legal basis of his opinion: that on a balance of environmental and developmental considerations, the Gabcikovo project was important to Slovakia's development.[48] This position however, does not appear to gain wide acceptance. There are writers who argue that the process of developing a precise and coherent concept of sustainable development has a long way to go before it becomes suited to application by tribunals as a component of judicial reasoning.[49] However, it is clear that sustainable development is a widely recognized concept, which is by and large anchored in the law. It plays a role in guiding decision-making at many different levels and by many different actors, and could well become a principle of customary international law in the future.[50] Between the two ends of the spectrum of those who call it a legal principle and those who dismiss it as just another slogan, many would agree that it is a concept currently guiding decision-making, which in the future could create legally binding obligations. In this situation one can see the dilemma that underlies international law theory and sources: what in fact is being judged by sources doctrine is the formal validity of law, leaving no space for a value judgment. On the other hand, if in fact international law has a dual role to play as both value system and regulatory framework, there must be a way to judge the regulatory framework against the value system, in order that the latter is not relegated to mere academic discourse. The conventional view represents credibility and legitimacy, but could freeze the law through apparent incapacity in making value-judgments.

In terms of the implications of sustainable development for states, under the formal sources doctrine, it still lacks normative status. On the other hand, the concept has been accepted by many states, as a policy guide in decision-making and an incorporated provision in jurisprudence. It has been adopted as a policy by numerous governments, both at the national and regional levels and has influenced the application and the development of law and policy by several inter-

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48 *Ibid.*

49 V. Lowe, 'Sustainable Development and Unsustainable Arguments', in Boyle, Freestone, *op. cit.* n. 36, p. 19, at 26.

50 S. Atapattu in 'Sustainable Development, Myth or Reality? A Survey of Sustainable Development Law Under International Law and Sri Lankan Law', 14 *Georgetown International Environmental Law Review* 2001, p. 265 at 284, states "in summary, sustainable development seems to have attained something more than a mere concept but falls short of a legal principle binding on states. Whatever may be its precise legal status, it is clear that sustainable development has gained wide recognition and influenced international environmental law in a significant manner. Although some commentators may not agree, it has the potential to become the most influential principle of international environmental law of recent times, at least to the extent of influencing the decision-making process relating to development".

national organizations including the World Bank,[51] WTO and United Nations Development Programme (UNDP), and treaty bodies.[52] Its constituent elements, like the sustainable use of resources principle, polluter-pays principle or enforcement mechanisms like EIA, are regularly provided for in domestic laws. The process of Sustainability Impact Assessment (SIA) is now being carried out in some countries. Thus sustainable development appears to embrace the combined qualities of a policy, an emerging principle, and to some extent, also a principle of public international law. There is an ongoing process of crossfertilization, as international law and policy influence domestic law, and the combined effects of the actions and decisions at state level could in turn further develop the international law in point. Birnie and Boyle point out that the most far-reaching aspect of sustainable development is that for the first time it makes a state's management of its own domestic environment a matter of international concern in a systematic way, as evident *inter alia* in the CBD and Agenda 21.[53] With the integration of developmental and environmental concerns at its core, sustainable development has the potential of producing coherence in development projects and policy.

The following discussion of the constituent principles of the Rio Declaration and sustainable development must be viewed within the limited and vaguely defined parameters of the legal status of sustainable development, which necessarily curtails the normative value of these 'principles'. The latter are, by and large therefore, as yet law in the making, but should not be underestimated as they could be – and in fact are – important policy guides to the making of laws, acts and decisions. Although the Rio Declaration as a whole is not legally binding on states, it has certainly got persuasive value. Moreover, some of its provisions may reflect customary international law, others may reflect emerging rules and still others may provide guidance as to future legal developments.[54] What must be taken into account is not only the nature of the international instrument concerned, but also the intention of the parties in relation to it and the actual practice. The *lacuna* in legal theory stands in stark contrast to the practical integration of these policies into the actions of many players including government, TNCs and NGOs. However, the normative implications of the main elements of sustainable development remain unclear, as well as the relationship to each other, or to human rights law or economic law.[55] Issues as to coherence within the larger body of public international law thus remain unsettled.

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51 All investment projects proposed for consideration by the World Bank need to be screened for their potential environmental impacts under the Operational Policy 4.01 of 1998 on Environmental Assessment.

52 See Birnie, Boyle, *op. cit.* n. 6, p. 84 and notes 44–46 at p. 155.

53 *Ibid.*, p. 85.

54 Sands, *op. cit.* n. 6, p. 54.

55 Birnie, Boyle, *op. cit.* n. 6, p. 85.

4.2.2 The principles of sustainable development law

The core principles gleaned from these instruments that are directly relevant to this study include most significantly, the integration of environment and development[56] and the centrality of environmental concerns in sustainable development. The idea of integration is central to the Rio instruments and can have significant implications in shaping policies at all levels. The World Bank (WB) and other international development banks now incorporate integration into their lending policies. Most of the main global and regional treaties which deal with environmental protection, already evidence integration of the concerns of business, industry, and government with regard to economic development.[57] Principles 3 and 4 of the Rio Declaration represent core elements of sustainable development. Since both were controversial, their meaning, implementation and effect are not entirely clear.[58] The nature and extent of the right to development recognized in Prin. 3 is left open, as is the question of whether such a right attaches to peoples or individuals.[59] In practical terms, Prin. 4 can be read as permitting, or requiring, the attachment of environmental conditionalities to all development by states and multilateral development banks, and the integration of environmental considerations into all economic and other development.[60]

The meanings that can be given to the 'environment', as the natural world in which people, animals and plants live, and more broadly, as the physical conditions, including those that affect the behaviour and development of persons and things,[61] together with the inclusive usage of the term in the Stockholm Declaration,[62] enables the accommodation of human rights, justice and equity within its meaning. Together with the inclusion of broader concerns in social, human and sus-

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56 The Rio Declaration, in Prin. 4, states that to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it; Prin. 3 states that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations; Stockholm Declaration, *op. cit.* n. 17.

57 Birnie, Boyle, *op. cit.* n. 6, p. 87. They also comment that integration is a well-established feature of international environmental regulation and of most developed economies. Thus the real implications of Prin. 4 are to be found more in its impact on developing countries and development agencies; Prin. 7 of the New Delhi Declaration, *op. cit.* n. 32.

58 Sands, *op. cit.* n. 6, p. 51.

59 *Ibid.*

60 *Ibid.*

61 Both according to the *Oxford Advanced Learner's Dictionary*, OUP, Oxford, 2000.

62 The Preamble to the Stockholm Declaration gives a broad sense to the term, when it says: "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth . . . [ ] . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights, the right to life itself". Principle 1, re-produced below, similarly points to the broader meaning of the term.

tainable development, this overarching connotation of the environment represents a considerable amalgam of global values. In the case of *Hungary* v. *Slovakia*, the concept of sustainable development and its inherent requirement for reconciliation was recognized by the ICJ. The strong developmental focus in Prins. 3 and 4 is further strengthened in Prin. 5, which mandates international co-operation to eradicate poverty as an indispensable requirement of sustainable development. Prin. 8 requires states to reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies. The combined effect of these articles show the various dimensions of this vague and paradoxical term, 'sustainable development', which appears to promote a more just and equitable form of development.

The fundamental human right to the environment, and centrality of human beings in the concerns for sustainable development and their entitlement to a healthy and productive life in harmony with nature[63] leave room for the integration of human rights and environmental protection within the development process. Prin. 1 of the Stockholm Declaration[64] is a multidimensional provision, combining rights and duties, with a broad connotation of environment. Environment is here taken to extend to civil and political aspects (like freedom and equality), as well as economic and social facets (such as environmental quality), which could include, for instance, the standard of living, the quality of life and other central aspects of development. Facets of justice and equity are intrinsic to this principle, which is again representative of a broad sense of global public values which could provide guidance to the progressive development of international law and to approaches to interpretation of international, regional and national laws.

Neither the UDHR nor the International Covenants made express reference to a human right to the environment. But they all enshrine the right to life and to dignity, which could be broadly interpreted to include the right to environment. The Charter of Economic Rights and Duties of States of 1974 (CERDS) obligates states to protect the environment for present and future generations.[65] The language of Prin. 1 of the Rio Declaration, viewed from a human rights perspective, is somewhat retrogressive compared to its counterpart in the Stockholm

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63 Prin. 1, Rio Declaration. This more anthropocentric avatar of Prin. 1 of the Stockholm Declaration is reminiscent of the discourse on the right to development, and could be useful to the cause of development, although its prognosis for a better environment is somewhat questionable.

64 It states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".

65 UNGA Res. 3281, adopted on 12 December 1974. Article 29 states that the area/sea-bed and ocean floor and its sub-soil, beyond the limits of national jurisdiction as well as the resources therein, are the common heritage of mankind. All states are to ensure that the benefits from the exploration of the area and its resources are shared equitably by them all, taking into account the particular interests and needs of developing countries.

Declaration, the first clear expression of a right to environment. Whatever the terminology, the recognition of a right to a healthy environment would certainly help to protect and promote the environmental and human rights concerns envisaged in this study. On the other hand, it could have the effect of impeding development. The considerable coincidence of environmental and human rights issues becomes apparent especially in the right to development, right to environment and sustainable development. Sustainable development as a concept is bound to have ramifications for the future development of international human rights law. The conception of a human right to the environment is related both to civil and political rights and to economic, social and cultural rights, in view of the expansive meaning of 'environment.' In the current context, the recognition of a human right to environment and sustainable development adds value, particularly because of the overt human rights dimension of many environmental problems in developing countries.[66] Moreover, human rights provisions and implementing mechanisms generally came before environmental legislation and have been tested over time. They could thus provide an avenue for the contesting of rights related to the environment. The right to environment can be regarded as a general principle of international law. Further, an examination of national laws shows that a great number of states have now enacted environmental legislation and created rights and duties in relation to it, including at times, the right to environment.

The concepts of intergenerational[67] and intragenerational equity[68] are significant as they serve to both promote environmental conservation and deter the despoliation of the environment, while at the same time being sufficiently anthropocentric to ensure that the human and development dimensions are not neglected.

Intergenerational equity is central to sustainable development as defined by the Brundtland Report, and both the Stockholm and Rio Declarations embody the concept. So do the Climate Change Convention and some other treaties, such as UNCLOS of 1982, through the common heritage of humankind concept. Although Edith Brown Weiss argues that intergenerational equity is part of international law, other writers have some doubt, and question first of all, the assumptions on which the content of this theory is based.[69] Developing countries place

66 See F.Z. Ksentini, 'Human Rights, Environment and Development', in L.S. Lin (ed.), *UNEP's New Way Forward: Environmental Law and Sustainable Development*, UNEP, Nairobi, 1995; P. Cullet, 'Definition of an Environmental Right in a Human Rights Context', http://www.ielrc.org/content/a9502.pdf; S. Georgetta, 'The Right to a Healthy Environment', in Schrijver, Weiss, *op. cit.* n. 36, p. 379.

67 Rio Declaration, Prin. 3.

68 *Ibid.*

69 Byrnie, Boyle, *op. cit.* n. 6, p. 91. For the view that it is part of international law, see E.B. Weiss, *In Fairness to Future Generations*, 1989. This view is supported by Judge Weeramantry in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 266, but there does not appear to be general consensus.

greater value on equity within the generation, as the resource base cannot necessarily be preserved for beneficiaries in a distant future when people here and now do not have their basic needs. Several provisions of the Rio Declaration and also of the Conventions on Biodiversity and Climate Change implicitly recognize intragenerational equity. Prin. 5 of the Rio Declaration calls for co-operation for the eradication of poverty. The Ozone and Climate Change Conventions call for financial assistance, capacity-building and the principle of common but differentiated responsibility while the CBD establishes a system where developing countries are entitled to a fair and equitable sharing of the benefits arising from the use of genetic resources found in their territory.

The idea of environmental standards and monitoring by states implies obligations for states, particularly host states, to lay down standards and ensure they are maintained. Equally, TNCs are expected to observe these and to co-operate with host states. The right to development and the needs of present generations are equally important here. The eradication of poverty, reduction of inequality and meeting of basic needs,[70] the special situation and needs of developing countries[71] and common but differentiated responsibilities[72] are all priorities for developing countries.

EIA,[73] a procedural requirement laid down by international law and practicable at the national level, is an important tool for ensuring a more holistic and sustainable form of development. It often includes social impact assessment, and even if it does not, the practical process usually takes account of social and human rights concerns. Most significantly, it can afford a form of preventive regulation, so long as a proper assessment is required and executed, and implicitly embodies the precautionary approach. Strategic Impact Assessment and Sustainability Impact Assessment (SIA) are two more wholesome tools, for measuring the sustainability of a whole sector, or a whole programme/plan/policy, respectively. SIA will be the most holistic approach, as it incorporates, social, environmental and economic costs and benefits on a macro level, and should be related to national development policies in developing countries.

Several general principles of international law relating to sustainable development emerge from the Rio Declaration. The precautionary principle[74] which embodies the notion that any scientific uncertainty should lead to a decision most favourable to the environment – is, again, a useful preventive measure and an effective form of protection. Like EIA, it can be used by host states at the early stage of investment approval.

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70 Rio Declaration, Prin. 5.
71 *Ibid.*, Prin. 6.
72 *Ibid.*, Prin. 7.
73 *Ibid.*, Prin. 17.
74 *Ibid.*, Prin. 15.

The polluter-pays principle[75] can play a useful role, taking into account, the fact that TNCs, like business in general, naturally seek to maximize profits and externalize pollution, health costs of local communities and the like. It is economically efficient as well as reasonable and fair to require business to internalize costs. It has been pointed out that the language of Prin. 16 is such that it cannot be said that the polluter-pays principle is legally binding. It is said to lack the normative character of a rule of law and also that whatever its legal status or its relationship to sustainable development, it cannot supply guidance on the content of national or international environmental law without further definition.[76]

There is a degree of complementarity between the principles of good governance and those of sustainable development. Good governance has become another key concept in terms of the principles of government at the international, national and even corporate levels in the last few decades. It basically means good management, and its principles are said to include sensible economic and social policies, democratic decision-making, adequate governmental transparency, financial accountability, creation of a market-friendly environment for development, measures to combat corruption, as well as respect for the rule of law and human rights.[77] In some developing countries, much remains wanting in the sphere of good governance.[78] This is a useful tool in aiming for the goal of sustainable development, especially since it appears to be like an umbrella concept incorporating many useful elements such as information and participation. The concept is central to sustainable development as articulated below:

> Inherent in the concept of sustainable development is the need for a political system which provides for effective citizen participation in decision-making and for good governance, i.e. institutions for policy-making, decision-making and their implementation which are responsive to the objectives of sustainable development.[79]

Good governance in the context of the goal of sustainable development would mean respecting the principles of the Rio Declaration in designing development projects and programmes. Thus, narrow economic appraisals of the cost-benefit

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75 *Ibid.*, Prin. 16.

76 Birnie, Boyle, *op. cit.* n. 6, pp. 92–95.

77 B. Boutros-Gali, *An Agenda for Peace*, UN, New York, 1992, Para. 92, and *An Agenda for Development*, UN, New York, 1994.

78 J.S. Nye, J.D. Donahue (eds.), in *Governance in a Globalizing World, Visions of Governance for the 21st Century*, Brookings Institution Press, Washington DC, 2000, p. 188, state that "weak institutions of governance are also a defining characteristic of developing countries". Under the Declaration on the Right to Development of 1986, Art. 114, the primary responsibility for the creation of national and international conditions favourable to the realization of the Right to Development is placed on states.

79 K. Hossain, 'Evolving Principles of Good Governance and Sustainable Development', in K. Ginther, E. Denters, P.J.I.M. de Waart, (eds.) *Sustainable Development and Good Governance*, Nijhoff, Dordrecht, 1995, p. 20; S.R. Chowdhury, E. Denters, P.J.I.M. de Waart (eds.), *The Right to Development in International Law*, Nijhoff, Dordrecht, 1992.

of development projects and programmes would clearly not be sufficient for the purpose. There must be an assessment of the environmental and social impact of projects and programmes, and their implications for the goals of sustainable development.[80]

Good governance and accountability require as a *sine qua non*, certain procedural safeguards and mechanisms. The procedural rights of access to information, public participation in decision-making and access to justice[81] are crucial because environmental and human rights promotion and protection can only be realized if there is support from procedural mechanisms such as these. In fact, it may not be necessary to claim that there is a right to environment if people have, in the first place, sufficient information about decisions that affect their lives and surroundings, and the ability to participate in the making of such decisions. The participatory and procedural rights can advance an inclusive form of development. Access to justice becomes an essential corollary here. Effective national environmental legislation, including laws on liability and compensation for environmental victims,[82] is important in creating obligations which are particularly pertinent for host states. Many principles of the Rio Declaration, such as public participation, are simultaneously elements of good governance and sustainable development. Their integration into the national level therefore is a means to achieving better governance and accountability through the environment/development context.

With regard to the progressive development of the international law relating to sustainable development, Prin. 27 of the Rio Declaration calls for further development of international law in the field of sustainable development. International co-operation by states and people in a spirit of partnership for sustainable development[83] and fulfilment and effective participation of developing countries, if realized, will lead to further enhancement of the degree of applicable protection.

Certain principles of the Rio Declaration deserve to be reproduced here for their relevance to this study. Prin. 2 states that:

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

This basic principle embodies a verbatim reproduction of Prin. 21 of the Stockholm Declaration, apart from the addition of the words 'and developmental.' It combines two conflicting values, which underlie much of international environmental

80 *Ibid.*, p. 21.
81 Rio Declaration, Prin. 10.
82 *Ibid.*, Prin. 13.
83 *Ibid.*, Prin. 27.

law, the idea of rights and that of responsibilities. Since Prin. 21 is considered as part of customary international law, it can be cogently argued that Prin. 2 of the Rio Declaration also has the same status. According to Sands,

> the addition of the words 'and developmental' (which is not reflected in Article 3 of the Convention on Biodiversity or Prin. 2 (a) of the Forest Principles), in the context of a document adopted by consensus of 176 States arguably reflects an 'instant' change in the rule of customary international law which is widely considered to be set forth in Principle 21.[84]

Further, this principle has the potential to become an effective norm in the extension of international responsibility, which, it could be argued, should no longer be restricted to the state but extended to non-state actors in international business transactions. This is of course, *lex ferenda*/desirable law for the future, as opposed to the existing law/*lex lata*. Under the law of state responsibility as it now stands, a state is liable only for its own acts and omissions through its own organs while exceptionally, through due diligence obligations, it could be held responsible for the acts of non-state entities. However, the progressive development of international law may perhaps some day witness the fusion of the evolving body of international public policy and law related to sustainable development and traditional classical legal doctrines such as state responsibility. Further, home states could be considered responsible if it can be argued that TNCs based therein are within their jurisdiction and effective control and also that home states stand to gain from TNC economic activity. The idea of common but differentiated responsibility and the higher standards of regulation and implementation of environmental laws in home states would appear to point in the same direction. It is not impossible to conceive that host states could also be made responsible on the basis of activities within their control and geographical jurisdiction, where their laws and policies should apply. In any event, host states are at least under a moral obligation under this principle to exercise control over international and local business activities within them.

Prin. 10 is of far-reaching significance to this study, as it supports the development of procedural mechanisms for implementing international standards, and embodies participatory rights, especially at the national level.[85] It states:

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84 Sands, *op. cit.* n. 6, p. 50. While some writers regard this as a retrogressive step in terms of environmental protection, Sands is of the view that the additional words merely confirm that states are entitled to pursue their own development policies. He goes on to state that these words may even expand the scope of the responsibility not to cause environmental damage to apply to national development policies as well as national environmental policies.

85 Sands, *op. cit.* n. 6, p. 52. He also states that the Rio Declaration includes provisions which together provide a framework for the development of environmental law at the national and international level which will serve as an important point of reference to guide decision-making. Its

> 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.

And Prin. 13 provides that states should develop national law on liability and compensation for the victims of environmental damage, and co-operate more efficiently to develop further international law on liability and compensation for environmental damage from activities within their jurisdiction to areas beyond.

With regard to Agenda 21, one commentator considers its contribution to international law at three levels:

> First, as a consensus document negotiated by the international community over a period of two years it provides the only agreed global framework for the development and application of international legal instruments, including 'soft law' instruments, and the activities of international organizations. Second, limited parts of Agenda 21 might be considered to reflect rules of 'instant' customary law. Third, it may reflect consensus of principles, practices and rules which might contribute to the development of customary law.[86]

Sustainable development requires, to some extent, a blurring of the distinction between international, regional and national law.[87] Without implementation, sustainable development would be meaningless.[88] There are several sets of implications for the implementation of sustainable development: a holistic approach, universal participation, regulation of access to resources, and orderly co-operation at the global, regional and community levels.[89] These in turn, mean a seminal role for law and organization at all levels because in a seemingly globalizing yet

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contribution to the development of rules of customary international law will become clearer over time, although many of its provisions are already found in treaties and other international acts and reflected in the domestic practice of many states.

86 Sands, *op. cit.* n. 6, p. 53. In Chapter 39 (Para. 39.5) of Agenda 21 it is stated that it would be useful to examine the feasibility of elaborating general rights and obligations of states in the field of sustainable development. This could be an implicit reference to the fact that the Rio Declaration does not impose such general rights and obligations.

87 E.B. Weiss, 'The Emerging Structure of International Environmental Law', in N.J. Vig (ed.), *The Global Environment*, Earthscan, London, 1999, pp. 98–115.

88 For a document focused on implementation (in relation to climate change), see *Declaration of The Hague on the Environment*, *op. cit.* n. 40.

89 M.C.W. Pinto, 'Reflections on the Term Sustainable Development and its Institutional Implications', in Ginther *et al.* (eds.), *op. cit.* n. 79, p. 76.

simultaneously fragmenting world, co-operation for our common future does not flow from natural instincts, personal, national or international. Sustainable development mandates a spirit of global partnership and co-operation,[90] requiring a revolution in international relations. It requires an ideology based on compromise, globalism and sharing, common interests and long-term perspectives.[91] This is a departure from a world constructed on binary oppositions, where logic dictated that to be pro-development was necessarily to be anti-environment and vice versa,[92] towards a new way of understanding international relations.[93]

4.3 International Human Rights Law

The purpose of this section is to examine whether international human rights law can be an instrument in promoting and protecting basic human rights and freedoms in the context of the investment activities of TNCs.[94] International human rights can be a path to justice, equity and sustainable development.[95] The infusion of humanist values into the terrain of international economic activity is consonant with the balancing of conflicting considerations, especially those of private interests and public purpose.

The basic philosophy of human rights is fundamental to the conceptual foundations of this thesis, because of the sanctity it recognizes in human beings and the supremacy it accords to human dignity. The approach to development in this study is consonant with the conceptions of basic human rights and freedoms.[96]

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90 I.M. Porras, 'The Rio Declaration: A New Basis for International Co-operation', in Sands, *Greening International Law*, *op. cit.* n. 6, pp. 20–33. On the need for new attitudes and values, see also I. Carlsson, S. Ramphal, *Issues in Global Governance*, KLI, London, 1995; K. Hossain, 'Sustainable Development: A Normative Framework for Evolving a More Just and Humane International Economic Order', in Chowdhury et al., *op. cit.* n. 79, p. 259; and P. Peters, 'Sustainable Development with a Human Face?' in F. Weiss, E. Denters, P. de Waart (eds.), *International Economic Law with a Human Face*, KLI, The Hague, 1998, p. 401.

91 Porras, *ibid.*, pp. 20–33.

92 *Ibid.*, p. 23.

93 *Ibid.*, p. 33.

94 As pointed out by H.J. Steiner, P. Alston in *International Human Rights in Context-Law, Politics, Morals*, OUP, Oxford, 2000, at p. 1349, the central role of MNCs in the context of globalization raises the question of how to ensure consistency with human rights standards and an element of accountability. On Transnational Corporations and Human Rights, see M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, KLI, The Hague, 1999; M.T. Kamminga, S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, KLI, The Hague, 2000; O. de Schutter, 'Transnational Corporations as Instruments of Human Rights', in P. Alston, M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement*, OUP, Oxford, 2005.

95 See Chowdhury, Denters, *op. cit.* n. 79; Ginther *et al.*, *op. cit.* n. 79; E. Denters, N. Schrijver (eds.), *Reflections on International Law from the Low Countries*, Nijhoff, The Hague, 1998.

96 See A. Sen, *Development as Freedom*, Anchor Books, USA, 1999.

Such an approach becomes more relevant and even imperative in a perspective from South Asia, where poverty of people and of governance are striking ground realities. Many paradoxes and contradictions characterize a lot of Asian – more particularly South Asian, and most specifically Sri Lankan – societies including the drive for globalization, material wealth and modernization on the one hand, and the sanctity of traditional, cultural and spiritual values on the other. This creates a gap where the balancing act of human rights could play a role in finding equilibrium between conflicting values.

This section will proceed on the reality of the relative poverty in the protection of human rights in many developing countries, and the consequent need for amelioration.[97] While freedom and human rights are prerequisites to human development, the holistic concepts of human, social and sustainable development enable the infusion of the basic value of justice, especially social justice.[98] Between the high ideals of justice and the day-to-day activities of governments and business, one could posit the connected concepts of good governance, democracy and accountability. Given the realities of present-day global economic activity, good governance and accountability should also influence business.[99] Issues of corporate social responsibility thus arise, and operate alongside international human rights norms and international public policy. Issues relating to the relationship between TNCs and human rights[100] are complex, also complicating endeavours in governmental intervention:

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97 See K. Arts, P. Mihyo (eds.), *Responding to the Human Rights Deficit: Essays in Honour of Bas de Gaay Fortman*, KLI, The Hague, 2003, especially J. Harrod, 'The New Politics of Economic and Social Human Rights', *infra*, pp. 61–72.

98 See Agyeman, Bullard, Evans, *op. cit.* n. 4, where an effort is made to integrate sustainability, equity, social and environmental justice. S. Subedi in 'Multinational Corporations and Human Rights', in Arts, Mihyo, *ibid.*, p. 183 states: "If the protection of human rights is a global responsibility the regulation of MNCs in the interest of human rights values and principles should also be a matter of global responsibility and thus be discharged collectively. After all, human civilization is about equality, justice and fairness".

99 Taking into account the forces and processes of globalization, J. Stiglitz in *Globalization and its Discontents*, Penguin Books, London, 2002 advocates that accountability issues need to be addressed with regard to the major actors in international economic relations. Stiglitz, in 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life', in M.J. Gibney (ed.), *Globalizing Rights*, OUP, Oxford, 2003, p. 115 strongly advocates accountability and transparency of governments; B.S. Chimni in 'Response to Stiglitz', in the same publication, p. 157, argues that while transparency and openness in government is critical to strengthening democratic values, in the era of globalization, this goal cannot be realized without injecting transparency and openness in the functioning of international institutions and transnational corporations. See UNCTAD, *Social Responsibility*, UNCTAD Series on Issues in International Investment Agreements, UN, New York/Geneva, 2001.

100 For sociological studies, see E. Kolodner, 'Transnational Corporations: Impediments or Catalysts of Social Development?', Occasional Paper no. 5, World Summit for Social Development, http://www.unrisd.org/engindex/publ/list/op/op5/op05.htm; UNRISD, *States of Disarray: The Social Effects of Globalization*, UN, Geneva, 1995; UNRISD, *Visible Hands: Taking Responsibility for Social Development*, UN, Geneva, 2000.

> (1) governments are often loathe to take the measures necessary to ensure compliance by MNCs, especially in relation to labour matters; (2) such measures are costly and perceived to be beyond the resource capabilities of governments in developing countries; (3) in the context of increasing global mobility of capital, competition among potential host countries discourages initiatives that may push up labour costs and make one country less attractive than others with lower regulatory standards (the so-called 'race to the bottom'); (4) the multinational complexity of manufacturing and related arrangements in an era of globalization makes it increasingly difficult to identify who is responsible for what activities and where; and (5) especially in the labour area, difficult issues arise about the different levels of minimum acceptable standards from one country to another.[101]

The human rights dimension in this study lies at the crossroads of the three 'generations' of rights – civil and political, economic, social and cultural, and solidarity rights, and possibly a fourth generation of communication rights. FDI could lead to improvement of socioeconomic rights, for instance, through better provision of basic needs. According to Art. 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR):

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[102]

Socioeconomic rights need to be protected in a manner similar to civil and political rights, as the two species of rights appear to be synergistically interconnected in a symbiotic relationship. Traditionally, economic rights were regarded as developmental, promotional and discretionary only, confining human rights to the civil and political sphere. These distinctions are diminishing now, and it is no longer the position that civil and political rights necessarily entail negative obligations, and socioeconomic rights, positive obligations; as, for instance, the right to life may entail positive obligations such as to increase life expectancy. The view that responsibility cannot ensue for violations of socioeconomic rights is increasingly being questioned. State parties need to adhere to basic standards or minimum core obligations in relation to these rights, giving them enhanced legal status. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986 and the Maastricht Guidelines on

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101 Steiner, Alston, *op. cit.* n. 94, p. 1349. See also Amnesty International, *Global Trade, Labour and Human Rights*, AI, London, 2000; M.K. Addo, 'Human Rights and Transnational Corporations – An Introduction', pp. 3–37 and G. Chandler, 'Keynote Address: Crafting a Human Rights Agenda for Business', pp. 39–45, both in Addo, *op. cit.* n. 94.

102 Resolution 2200 A (XXI) of 16 December 1966.

Violations of Economic, Social and Cultural Rights of 1997 are two soft law instruments which are useful for the new dimensions they envisage for these rights. Importantly, the Maastricht Guidelines, in clause 18, go on to recognize violations of states for their failure to exercise due diligence in controlling the conduct of non-state actors over which they have jurisdiction, when such conduct deprives individuals of their economic, social and cultural rights.

Whether or not the relationship between investment and human rights is mutually beneficial[103] would depend to some extent on the governance of their interrelationships, making human rights law at the international, regional and domestic levels a vital factor in the equation. Here the concepts of good governance and accountability would be relevant to actors at all levels: multilateral institutions for their policies of economic governance at the global level; governments, because of their responsibilities at the international, regional and national levels; and also business, in view of its significance in economic activities at all levels. Given the crosscutting nature of the issues raised, several factors should be borne in mind here, including the universality and indivisibility of all human rights, the complexity of the relationships between these rights, and the numerous nuances, diverse interests and multiple approaches that shade and jade the landscape of rights in this sphere. While the idea of human rights in its philosophical and normative manifestations is conducive to the pursuit of a balance of countervailing interests, the law here operates alongside a range of other influences that shape the course of individual, societal and state conduct.

International human rights law consists of numerous international instruments, mostly intergovernmental, at the universal and regional levels. The sections that follow will identify some of the norms most relevant to the activities of TNCs.[104]

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103 For insights and approaches on the relationships between human rights and the environment, see A. Boyle, M. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, CP, Oxford, 1996; L. Zarsky (ed.), *Human Rights and the Environment: Conflicts and Norms in a Globalizing World*, Earthscan, London, 2002, in particular, L. Zarsky, 'Global Reach: Human Rights and Environment in the Framework of Corporate Accountability', pp. 31–54. Zarsky, at p. 32 asserts that an ethical framework in relation to human rights, labour and the environment is clearly emerging within the ambit of corporate social responsibility. In J. Agyeman, R.D. Bullard, B. Evans, 'Joined-up Thinking: Bringing Together Sustainability, Environmental Justice and Equity', pp. 1–16 in Agyeman, Bullard, Evans, *op. cit.* n. 4, at p. 11, it is pointed out that there is great (and under-researched) potential for the notions of environmental justice, human rights and sustainability to permeate environmental regimes, international policy and agreements and that it is also being increasingly recognized that one of the best ways to protect environmental rights is to uphold the basic civil, human and political rights of the individual.

104 See K. Hossain, 'Promoting Human Rights in the Global Marketplace', in Denters, Schrijver *op. cit.* n. 95, p. 101; C.G. Weeramantry, 'Human Rights and the Global Marketplace', 25.1 *Brooklyn Journal of International Law*, 1999, p. 27; J.L. Dunoff, 'Does Globalization advance Human Rights?', 25:1 *Brooklyn Journal of International Law*, 1999, p. 125; F.J. Garcia, 'The Global Market and Human Rights: Trading away the Human Rights Principle', 25:1 *Brooklyn Journal of International Law*, 1999, p. 51; E. Petersmann, 'Human Rights and International Economic Law in the 21st

They will first discuss general standards that may apply and go on to look at specific standards designed for the purpose.

4.3.1 General standards in international human rights law

Human rights protection – one of the primary goals of the UN, as expressly stated in the preamble of its Charter of 1945 and set forth in several constituent Articles of this document – naturally deals in essence with the obligations of states.[105] Ultimately however, 'states' and even the UN mean no more than the whole human race and thus these obligations should not be confined only to governments. The concept of the horizontal application of human rights would also support this argument. Adopting a more conservative approach – although the Universal Declaration of Human Rights of 1948[106] provides a general standard for a government's responsibility to its citizens – it is unclear whether TNCs as NSAs are also bound by these rights.[107] Academic opinion on this issue is divided.[108]

The preamble of the Charter[109] reaffirms faith in fundamental human rights and the dignity and worth of the human person, in the equal rights of men and

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Century', 77:1 *Journal of International Economic Law*, 2000, pp. 3–39; S.P. Subedi, 'Who Controls the Multinational Corporations? Does the Answer lie in International Law?', *Inaugural Address*, Middlesex University, London, 15 May 2002.

105 UN Charter, *op. cit.* n. 13. However, Steiner and Alston, *op. cit.* n. 94, state that in principle, the human rights obligations assumed by each government require it (or should require it) to use all appropriate means to ensure that actors operating within its territory or otherwise subject to its jurisdiction comply with national legislation designed to give effect to human rights. This proposition is well illustrated by the work of the CEDAW Committee under the Convention on the Elimination of Discrimination against Women (CEDAW). States which ratify the convention are required under Art. 18, to appear before the Committee every four years to report on how they are implementing the treaty through legislative, judicial and other measures, upon which the Committee gives advice on further steps to be taken for improving compliance (http://www.un.org/womenwatch/daw/cedaw/committee.htm). CEDAW Committee rulings have advised several countries in Asia, including China, Singapore and the Maldives, to bring about changes which can enable them to withdraw their reservations to various Articles of the Convention (http://www.cwfa.org/articledisplay.asp?id=1870&department=CWA&categoryid=nation).

106 G.A. Doc. A/810 (1948).

107 See B.A. Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights', 6 *Minnesota Journal of Global Trade*, 1997, pp. 153–188; S. Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights', XLVI: II *Netherlands International Law Review (NILR)*, 1999; P.T. Muchlinski, 'Human Rights and Multinationals: Is there a Problem?', *International Affairs*, 2001, pp. 31–47; K. de Feyter, 'Corporate Governance and Human Rights', in Institut Rene Cassin de Strasbourg, *World Trade and Human Rights*, Bruylant, Brussels, 2001.

108 For an example of writers who state that TNCs are bound by human rights violations, see Kamminga, Zia-Zarifi, *op. cit.* n. 94.

109 It has been pointed out in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, OUP, Oxford, 1994, at p. 48, that although the preamble is an integral part of the Charter, it does not set forth any basic obligations of member states. It is rather the function of the preamble, by highlighting some of the motives of the founders of the organization, to serve as an inter-

women and of nations large and small. It also refers to the Organization's determination to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. Furthermore it is stated that the UN aims to employ international machinery for the promotion of the economic and social advancement of all peoples. Under Art. 1 of Chapter 1 of the Charter, one of the basic principles of the UN is said to be the promotion of respect for human rights and basic freedoms. These apparently general pronouncements add value in that they contain the essence of the idea of human rights in one of its earliest formulations. They are the roots from which succeeding generations draw inspiration and find meaning for human rights concerns at different times, because of their universal and perennial nature. Further, it could be argued that legal provisions need to be seen in a continuum, and to be interpreted in accordance with changing circumstances. In this way, they can apply in a dynamic rather than a static manner. When the Charter came into being, the primary players were states, but since then many other actors have emerged, so that there may arise a need to encompass a broader range of actors in the progressive development of international law.[110]

Art. 1 of the UN Charter states that one of the basic purposes of the UN is to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all. It is further, a purpose of the Charter to make the UN a centre for harmonizing actions of nations in the attainment of these common ends.[111] Art. 55 of Chapter IX of the Charter is also significant as it states that the UN shall promote higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational co-operation and universal respect for, and observance of, human rights and fundamental freedoms. This article adds value through its emphasis on economic and social wellbeing, human rights and freedoms. All the rights envisaged in the present context can be connected to the contents of this article, given its expansive and all-embracing nature. Under the preamble, Arts. 1 and 55 of the Charter, the connections between international peace and security, economic and social development and the promotion and

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pretive guideline for the provisions of the Charter. In practice the impact of the preamble upon decisions of UN organs has been quite minimal.

110 See discussion on international legal personality/subjects of international law in Chapter 3 above.

111 B. Simma, *op. cit.* n. 109, at p. 55, commenting on this article states that the need for international co-operation has been repeatedly stressed by the UNGA, at times when concerted action has been really required, and in connection with the creation of new organs for economic co-operation and development.

protection of human rights are clearly seen.[112] Under Art. 56 'Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55', thereby imposing a legal obligation on member states.[113] Responsibilities are vested with the UNGA, but it also obliges the ECOSOC and the specialized agencies.

The most basic instrument of modern human rights and of the International Bill of Human Rights is the 1948 Universal Declaration of Human Rights. In its preamble the UDHR refers to the recognition of the inherent dignity, equal and inalienable rights of all members of the human family as being the foundation of freedom, justice and peace in the world. It stresses the importance of protecting human rights through the rule of law and promoting the development of friendly relations between nations.[114] The underlying philosophy of this text is consonant with the conceptual framework of this study with regard to the perception of human rights as a vehicle to justice and the seminal role of the rule of law. The genesis of modern human rights law as embodied in this Declaration is also of a binding nature given the fact that a significant part of this instrument has over the years crystallized into customary international law, thus giving legal value to some of its provisions.[115] The interdependence of nations, peoples as well as rights may seem obvious, but need to be consciously recognized, as the processes of globalization, while promoting interdependence, can also have the countervailing effects of disconnection and exclusion, which cannot augur well for the recognition of the dignity of all persons.

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112 The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN, Annex to Resolution 2625 (XXV) of the UNGA, adopted on 24 October 1970, re-affirms that under the Charter, co-operation between nations is a fundamental purpose.

113 According to *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*, preliminary report of the UN Special Rapporteurs on Globalization and Human Rights, UN Document E/CN.4/Sub.2/2000/13 15 June 2000, paragraph 41 at p. 15, action taken by member states collectively or individually to defeat this pledge is a violation of the Charter which under certain circumstances may amount to violations of principles of *jus cogens*.

114 It also recognizes that the advent of a world in which human beings shall enjoy basic freedoms is the highest aspiration of the common people; that the people of the UN have in the Charter reaffirmed their faith in fundamental human rights, and have determined to promote social progress and better standards of life in larger freedom, that member states have pledged themselves to achieve, in co-operation with the UN, the promotion of universal respect for and observance of human rights and fundamental freedoms, and that a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge. At this point the Charter goes beyond states to their constituents/human agents, stating that these aspirations come from the common people, whose intentions the states represent. The idea of common understanding again appears to refer to the people, who as human beings, can comprehend. Since cases of human rights violations often involve allegations against states, this people-centric provision could be of potential value, also in view of the changing structures of international society.

115 For discussion see Steiner, Alston, *op. cit.* n. 94, p. 229.

At the outset of the Universal Declaration, it is stated that this instrument is a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*, shall strive to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.[116] This is a potent and inclusive provision as it envisages the active participation of not only states, nor only individuals, but every organ of society, which could include NSAs such as TNCs and NGOs. This augurs well in view of the multi-actor scenario of globalization and its regulation, and the argument for horizontal application. Moreover, it refers to protection as well as promotion, and encompasses both national and international interventions.

The most salient articles of the Declaration include Art. 1 which recognizes that all human beings are born free and equal in dignity and rights, and Art. 2 under which everyone is entitled to all the rights and freedoms in the instrument, without distinction. It is significant that Art. 2 also provides against distinction based on the political, jurisdictional or international status of the country or territory to which a person belongs. Art. 3 provides for the right to life, liberty and security of person. Art. 4 prohibits slavery and servitude. Art. 5 bans torture, cruel, inhuman or degrading treatment or punishment. Art. 7 guarantees equality before the law and entitlement to equal protection of the law. Art. 8 gives the right to an effective remedy by the competent national tribunals for acts in violation of fundamental rights. Art. 9 prohibits arbitrary arrest, detention and exile. Other pertinent provisions include Arts. 13(1) which provides for the right to freedom of movement and residence within national borders; 17(1) which deals with the right to own property individually and collectively; and 17(2) which prohibits arbitrary deprivation of property. Art. 23(1) affirms the right to work, free choice of employment, just and favourable conditions of work and protection against unemployment. Also of relevance is Art. 25(1) under which everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. Under Art. 28 everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized. Art. 29 is very significant, as it lays down that everyone has duties to the community in which alone the free and full development of his personality is possible.

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116 Further, the UN General Assembly in its Resolution A/RES/56/163 of 20 February 2002 reiterates the importance of its Declaration 53/144 of 9 December 1998, its promotion and implementation. This Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, in spite of being primarily for the protection of human rights defenders, and even within the narrow confines of the limited legal value attributable to resolutions and declarations of the UN, has some value for progressive legal development.

This supports the argument that NSAs can have human rights obligations, particularly when they have far-reaching impacts on people. Finally under Art. 30, it is stated that nothing in the UDHR may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein. Again, this article is significant as it expressly extends the categories of possible violators of the rights beyond states. The destruction of the basic rights of others is clearly prohibited under this article. The UDHR thus encompasses a vast range of human rights and cogently demonstrates the universality and indivisibility of all rights.

The ICESCR[117] and the International Covenant on Civil and Political Rights (ICCPR),[118] contain similar articles. Both have been ratified by a great majority of states. Their common Art. 1 states:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

One significant aspect of the right to self-determination is the right of peoples to exercise sovereignty over their natural resources. This position is reinforced by the UNGA's Declaration on the Permanent Sovereignty over Natural Resources.[119]

Art. 5(1) of the ICCPR and the ICESCR is also significant. It states that nothing in these Covenants may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized therein, or at their limitation to a greater extent than is provided for in the Covenants. The broad and general language used here, if interpreted in consonance with the spirit of these documents, is capable of affording a certain degree of protection, although the primary duty for the active promotion and protection of rights rests with states. In any event, it could be argued that TNCs do have an ethical or moral duty for the promotion and protection of human rights. A moral obligation, if indeed it does exist, is relevant in that it could be a first step towards the formulation of a policy and finally a legal obligation.

Other significant rights in the ICCPR include the rights of minorities and freedom from forced labour. The ICESCR provides for the right to work and

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117 16 December 1966, 993 United Nations Treaty Series (UNTS) 3.

118 16 December 1966, 999 UNTS 171.

119 GA Res. 1803(XVII) of 14 December 1962. On the emergence and background of Common Article 1, see N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, CUP, Cambridge, 1997, pp. 51–56.

decent conditions of work, the right to an adequate standard of living, rights to health, culture and protection of the family. The Convention Against Torture and other Cruel, Inhuman and Degrading Treatment (CAT) and the Convention on the Rights of the Child (CRC) also embody several legally binding obligations which are relevant.

Venturing beyond to more context-specific instruments, the 1986 Declaration on the Right to Development (DRD)[120] is relevant, given the holistic nature of the Declaration's provisions, although it is not legally binding. As soft law, it can well influence the progressive development of international law and policy. Development is recognized as a many-sided process involving the development of economic, social, cultural and political aspects of human life.[121] Art. 3(3) states that development is a multidimensional global process, which should promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all states, and should also encourage the observance and realization of human rights. In Art. 1 the right to development is characterized as an inalienable human right. Under Art. 2, the central focus of the development process is the human person, who should be the active participant and beneficiary of the right to development.

As a result of the end of the Cold War in 1989 with the fall of the Berlin Wall, a more open international climate emerged, which was also more conducive to respect for, promotion and protection of human rights. In this new environment, the World Conference on Human Rights was convened, leading to the Vienna Declaration and Programme of Action.[122] Paragraph 10 of this Declaration reaffirms the right to development, as established in the Declaration on the Right to Development as universal, inalienable and an integral part of fundamental human rights. The Declaration states that human rights are universal, indivisible, interdependent and interrelated and also provides:

> To strengthen the enjoyment of economic, social and cultural rights, additional approaches should be examined, such as a system of indicators to measure progress in the realisation of the rights set forth in the International Covenant on Economic, Social and Cultural Rights. There must be a concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels.[123]

The Copenhagen Declaration and Programme of Action states that rapid processes of change and adjustment have been accompanied by intensified poverty,

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120 GA Res. 41/128, Annex, 41 UN GAOR Supp. (No. 53) at 186, UN Doc. A/41/53 (1986).

121 Similar approaches are adopted by the Human Development Index (HDI) of the UNDP and the Copenhagen Declaration and Programme of Action, 1995, *Report of the Summit for Social Development*, Copenhagen, 6–12 March 1995, UN Publication, Sales No. E. 96.IV.8.

122 UN Doc. A/CONF.157/23 (1993) Para. 5.

123 *Ibid.*, Para. 98.

unemployment and social disintegration. 'Furthermore, the global transformations of the world economy are profoundly changing the parameters of social development in all countries. The challenge is how to manage these processes so as to enhance their benefits and mitigate their negative impacts upon people'.[124] And the Beijing Declaration and Platform for Action of the UN Fourth World Conference on Women[125] called on governments to ensure that all corporations, including TNCs, comply with national laws and codes, social security regulations, applicable international agreements, instruments and conventions, including those related to the environment, and other relevant laws.

In the context of TNCs and human rights, labour rights are a core issue, hence the International Labour Organization (ILO) is foremost among the specialized agencies involved in this area. ILO processes have the advantage of being relatively inclusive, given the tripartite (governments, employers and employees) representation in much of its work, as well as its orientation towards fairness, given its emphasis on social justice and humane conditions of labour. Numerous instruments have been adopted under its aegis, including the ILO Constitution and the Declaration on Fundamental Principles and Rights at Work.[126] The Declaration states in section 2 that all ILO members – even if they have not ratified the conventions of the ILO – have an obligation, arising from the very fact of membership of the organization, to respect, to promote, and to realize in good faith and in accordance with the constitution, the principles concerning the fundamental rights in the conventions. These are the freedom of association and the effective recognition of the right to collective bargaining the elimination of all forms of forced and compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. Although only promotional in nature, the Declaration represents a significant embodiment of soft law and global public values, and could contribute to the progressive development of international law. The core ILO Conventions laying down the basic rights and obligations are the Convention on the Freedom of Association and Protection of the Right to Organize, the Convention on the Right to Organize and Collective Bargaining, the 1930 Convention on the Abolition of Forced Labour, the 1957 Convention on the Abolition of Forced Labour, the Convention on Equality Discrimination (Employment and Occupation), the Convention on Equal Remuneration, the Elimination of Child Labour – Minimum Age Convention and the Worst Forms of Child Labour Convention.[127] Convention 87 guarantees the right of all workers and employers to form and join organizations of their choice

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124 Report of the Social Development Summit, *op. cit.* n. 121, Annex 1, Para. 14.

125 UN Doc. A/CONF.177/20 (1995) Para. 165(1).

126 This Declaration and its Follow-up were adopted by the General Conference of the ILO, Geneva, at its 86th Session, on 19 June 1998.

127 Respectively no. 87 (1948), 98 (1949), 29 (1930), 105 (1957), 111 (1958), 100 (1951), 138 (1973) and 182 (1999).

and states that these organizations have the right to elect their own representatives and organize their activities without excessive interference by the state. Convention 98 protects workers from acts of discrimination against unions. The ILO however, cannot compel states to ratify its conventions, and enforcement of provisions in states that have done so, is a major challenge. Domestic implementation is therefore of utmost importance.

The United Nations Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights,[128] in its preamble lists several international instruments in which transnational corporations and other business enterprises, their officers and their workers are further required to respect generally recognized responsibilities and norms. The value that attaches to this document is limited, as it is still law in the making, akin to a policy evolving from a UN human rights body. However, it is useful to reproduce this list of instruments here, as it shows how many general or context-specific human rights obligations which create obligations *inter alia* for business, are in fact from an earlier chronological setting. These obligations have their existence in a particular domain – for instance, genocide or women's rights – but can be applied to the present context, depending on what particular rights have been violated. And of course they fortify the promotion and protection of these rights, and represent a far-reaching body of international public values which can inform the legal system.

The list of instruments covers a vast terrain of human rights concerns and includes the Convention on the Prevention and Punishment of Genocide; the CAT; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the ICESCR; the ICCPR; the CRC; the four Geneva Conventions of 12 August 1949 and two Additional Protocols for the protection of victims of war; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Rome Statute of the International Criminal Court; the United Nations Convention against Transnational Organized Crime; the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; the Rio Declaration on Environment and Development; the International Code of Marketing of Breast-milk Substitutes and the Ethical Criteria for Medicinal Drug Promotion of the World Health Organization (WHO); the United Nations Educational, Scientific and Cultural Organization (UNESCO)

128 UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, unanimously adopted by the U.N. Sub-Commission on the Protection and Promotion of Human Rights Resolution 2003/16 of 13 August 2003.

Convention against Discrimination in Education; conventions and recommendations of the ILO; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the OECD; and other instruments.

To some extent, the norms, because they envisage many obligations already contained in these instruments, do not create new legal obligations, but explain how existing obligations under international law are relevant to business entities. Under the UDHR, all organs of society – including business entities – are obliged to protect and promote human rights. A considerable number of the obligations contained in these instruments would form part of customary international law as well as general principles of international law. This list illustrates the existence of an abundance of resources in international instruments already in place for the protection and promotion of human rights. There appears to be a formidable body of international public values, opinion and consensus, international public policy and to some extent international public law in context. The varying degrees of legal standing is a feature which complicates the individual and combined impact of these laws, as there are many human rights provisions in binding instruments, some of which constitute customary international law. At one extreme, some norms have the status of *jus cogens* or obligations *erga omnes*, while at the other extreme, they may be straddling the boundaries between law and policy. If a particular obligation amounts to *jus cogens* its application would be straightforward, although only a few of the international standards would amount to such. The plethora of different instruments in distinct but related contexts, though, means that coherence would be a luxury, and harmonization a difficult art. Several provisions of the UDHR envision that the promotion and protection of human rights, although primarily a duty of states, is also a collective duty on all individuals and organs of society. Further, it is the duty of states to ensure that actors within their jurisdictions do not violate these rights. Given the role of multilateral institutions and TNCs in the global economy, this would appear to impose a considerable duty on them. Rationalization and balancing of pluralistic norms and values here would require that international economic activities must be subject to and consistent with the rule of law, here the rule of international law, including its constituent branch of international human rights law.[129]

4.3.2 Specific standards in international human rights law

The traditionally distinct, naturally dichotomous and, to some extent, mutually exclusive branches of laws relating to international economics on the one hand and the environment and human rights on the other, have proceeded some distance on common paths since the inception of the modern law of human rights. Some diffusion of the distinct discourses took place in the second half of the 20th

129 Also see J. Crawford (ed.), *The Rights of Peoples*, CP, Oxford, 1988.

century, especially with the advent of sustainable development. At the multilateral level, international public policy and, to a lesser extent, law show several significant developments of an evolving sense of balance.

Human rights are a basic concern in UN Secretary-General Kofi Annan's UN Global Compact[130] presented at the World Economic Forum in Davos, Switzerland in 1999. This document encapsulates a statement of policy wherein the Secretary-General challenged world leaders to embrace and enact the Compact, both in their individual corporate practices and through supporting appropriate public policies. On human rights, Prin. 1 requires business to support and respect the protection of international human rights within their sphere of influence; and Prin. 2 requires them to ensure that their own corporations are not complicit in human rights abuses. On labour, Prin. 3 calls for freedom of association and the effective recognition of the right to collective bargaining; Prin. 4 for the elimination of all forms of forced and compulsory labour; Prin. 5 for the effective abolition of child labour; and Prin. 6 for the elimination of discrimination in respect of employment and occupation. Some of these principles are binding legal obligations embodied in other instruments – for instance the International Bill of Rights – and to that extent involve legal standards. The principles in the Compact reiterate and complement salient principles of international human rights, labour, environmental law and since 2004, also transparency, binding them together in a business setting, within the broader context of globalization. The Compact is the only corporate responsibility initiative with the moral authority and convening power of the UN Secretary-General, and involves the key social actors – companies, labour, civil-society organizations and governments.[131] Participating companies are required to communicate in their annual reports and/or other major public reports on progress made in implementing the ten principles,[132] another significant feature of the Compact. The Compact also has partnerships with other initiatives – like SA 8000 and the Global Reporting Initiative (GRI) – to promote certification and reporting, respectively. Since it seeks to promote development through good corporate citizenship and the majority of the participating companies are from the South, the Compact represents a really global initiative.[133] Members of the Compact commit to join with the UN in partnership projects of benefit to developing countries, especially the least developed which tend to be marginalized by globalization, to endeavour to make the world economy more sustainable and inclusive, and to contribute to the Millennium Development Goals (MDGs).[134]

The Compact could be characterized as a Multistakeholder Initiative (MSI), which in this case involves a multilateral organization. MSIs usually emerge from

130 *Op. cit.* n. 3.
131 D. Leipziger, *The Corporate Responsibility Code Book*, Greenleaf Publishing, Sheffield, 2003, p. 73.
132 *Ibid.*
133 *Ibid.*
134 *Ibid.*

the joint initiatives of NGOs, and to a lesser extent, industry and trade unions and deal with standard setting and the promotion of dialogue, reporting, monitoring, auditing, and certification related to social and environmental issues.[135] The Compact also represents a form of public–private partnership (PPP), or co-regulation which usually involves a combination of government, multilateral, civil society and business interests.[136] The increase of such partnerships could result in a positive development from the view of enhanced channeling of resources towards sustainable development and shared values, provided, and to the extent, that such partnerships materialize and have practical impacts. Criticisms of the Compact, however, include the lack of attention to criteria and procedures for choosing corporate partners and monitoring and compliance mechanisms, and the tendency to ignore basic inconsistencies between policy interests of developing countries and those of TNCs. It has been argued that more could be achieved if the Compact were to divert its energies and resources to boosting developing country efforts to improve labour, human rights and environmental standards in ways that contributed to more socially inclusive patterns of development.[137] The Principles for Responsible Investment,[138] closely linked to the Global Compact, constitute a step in promoting investment conducive to sustainable development and Environmental, Social and Corporate Governance (ESG).

With regard to workers' rights, the ILO is one of the most visible among the specialized agencies active in this area. Several instruments have been adopted under its aegis, and one of the most directly significant is the soft law Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[139] The ILO Conventions for the protection of several aspects of labour rights impose binding obligations on states parties, which, however, have to implement them through national laws to give them effect. The core ILO standards arise *inter alia* from the 1948 ILO Convention on Forced or Compulsory Labour, the 1949 Convention on the Application of the Principles of the Right to Organize and to

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135 See UNRISD, *Corporate Social Responsibility and Business Regulation*, Research and Policy Brief 1, UNRISD/P/B/04/1 of 19 March 2004, pp. 1–2.

136 *Ibid.*

137 A. Zammit, *Development at Risk: Re-thinking UN-Business Partnerships*, UNRISD/South Centre, Geneva, 2003. UNRISD, Corporate Social Responsibility and Business Regulation, *op. cit.* n. 135, also states: "This emerges most clearly in relation to the global macroeconomic policy regime, centred on trade and investment liberalization, which creates an enabling environment for TNCs but often limits the development options and fiscal revenues of developing country governments . . . [ ] . . . UN-business partnerships provide TNCs with opportunities to pursue their own policy interests within the United Nations, and the organization's public purpose can be undermined if it begins to promote policy goals preferred by business when these are far from universally approved".

138 *Op. cit.* n. 35.

139 Adopted by the Governing Body of the ILO, Geneva, 1977, and amended in 2000, Official Bulletin, LXXXIII, 2000, Series A, no. 3.

Bargain Collectively, and the 1981 Convention on Occupational Safety and Health and the Working Environment.

The draft UNCTC Code of Conduct for MNCs[140] might have added value to the resource base, had it been passed, given the comprehensive provisions it contained for respect for human rights, local cultures, ways of life etc., as well as its developmental interests. In the absence of a comprehensive global scheme for regulation of investment at the multilateral level, the European regional instrument in the form of the OECD Guidelines on Multinational Corporations of 1976 as revised in 2000[141] are significant. This is because many major TNCs have their home base in OECD countries, and the Guidelines apply to enterprises operating in or from these countries to business operations worldwide. The 2000 Guidelines in their general policies call upon TNCs to contribute to economic, social and environmental progress with a view to achieving sustainable development. They are an improvement on their predecessor and their acceptance by OECD countries is conducive to the promotion and protection of human rights. Enterprises should 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'. The Guidelines include provisions on employment and environmental protection. They are supported by follow-up procedures and monitoring mechanisms, including means for requesting consultations, good offices, conciliation, mediation and clarifications of the Guidelines. They are expressly intended to supplement applicable law and to complement and reinforce codes of conduct and other private efforts.

The WHO's Framework Convention on Tobacco Control,[142] 'developed in response to the globalization of the tobacco epidemic', 'facilitated through a variety of complex factors with cross-border effects, including trade liberalization and foreign direct investment',[143] is a significant step at the multilateral level. It reaffirms the right of all people to the highest standard of health, develops a regulatory strategy to address addictive substances, and asserts the importance of demand reduction mechanisms (Arts. 6–14) as well as supply issues (Arts. 15–17). Further, it addresses the issue of liability in Art. 19. Under subsection 1, 'the parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where

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140 UN Doc. E/1990/94, 12 June 1990. See also N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises*, Kluwer, Deventer, 1980.

141 OECD Guidelines for Multinational Enterprises (OECD Declaration on International Investment and Multinational Enterprises, OECD, Paris) of 1976 as revised and adopted on 27 June 2000; see also Commission of the European Communities, *Green Paper on Promoting a European Framework for Corporate Social Responsibility*, Brussels, 18.07.2001.

142 Unanimously adopted by the World Health Assembly on 21 May 2003, this is the first global public health treaty, and the first treaty negotiated under the auspices of the WHO. http://www.who.int/tobacco/fctc/text/final/en/

143 Foreword, WHO Framework Convention on Tobacco Control, 2003, *ibid.*, p. v.

appropriate'. The article provides for exchange of information on legislation and regulations, and pertinent jurisprudence; assistance between parties in related legal proceedings; non-limitation of existent rights of access of parties to each other's courts; and sharing of information on relevant international efforts.

Recent developments in the United Nations Sub-Commission on the Promotion and Protection of Human Rights have involved analysis of core issues, including the interrelationship of globalization and human rights, in the form of a Report on Globalization and its Impact on the Full Enjoyment of All Human Rights.[144] Here the Sub-Commission recognizes that globalization is not merely an economic process, but also has social, political, environmental, cultural and legal dimensions which impact on human rights. It recalls that promotion and protection of human rights is the first responsibility of Governments and that the human person is the central subject of development. It considers that attention to the human rights obligations of Governments participating in international economic policy formulation will help to ensure socially just outcomes in the formulation, interpretation and implementation of those policies. The conceptual underpinnings of this study and report, involving the primacy of social justice based on human rights in relation to economics, the need to be holistic, the need for governmental responsibility and the centrality of the human being in development, augur well towards a balance of economic and non-economic values in the globalization context. The study has since been adopted by the United Nations Commission on Human Rights (UNCHR), but its reception by UN member states has been marginal, hence its future impact is uncertain.[145]

At the dawn of the new millennium, a report entitled 'Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights' was submitted by the Special Rapporteur on Toxic Waste[146] to the UNCHR. Since many illicit dumping cases are carried out by TNCs, often in a North–South context, this report is relevant by analogy. The

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144 E/CN.4/2002/54; Sub-Commission Resolutions 1999/8 of 25 August 1999, 1999/29 of 26 August 1999 and 2001/5 of 15 August 2001; Human Rights Commission Resolutions 1999/59 of 28 April 1999, 2001/32 of 23 April 2001, 2002/28 of 22 April 2002 and 2003/23 of 22 April 2003. Also of relevance are the Sub-Commission Resolutions 1998/12 of 20 August 1998 on human rights as the primary objective of trade, investment and financial policy; 1998/14 of 20 August 1998 on human rights and income distribution; 1999/30 of 26 August 1999 on trade liberalization and human rights; 2000/7 of 17 August 2000 on intellectual property and human rights; 2001/4 of 16 August 2001 on liberalization of trade in services, and human rights and 2001/21 of 16 August 2001 on intellectual property and human rights.

145 Adopted by Human Rights Commission Resolution 2003/23 of 22 April 2003. Recorded by vote of 38 to 15 member states. When Document L.77 embodying the draft Resolution on Globalization and its Impact on the Full Enjoyment of All Human Rights was presented and approved by the 58th UN General Assembly, 24 November 2003, the European Union voted against its adoption: http://europa-eu-un.org/articles/fr/article_3041–fr.htm

146 Report by Fatma-Zohra Ouhachi-Vesely, E/CN.4/2000/50, 20 March 2000.

recommendations draw the Commission's attention to the absence of tangible solutions in cases of illicit transfer of toxic products and compensation for victims and their families. In this sphere there is a legal regime involving binding obligations and implementation[147] and enforcement is the urgent requirement.

At this stage, efforts within the UN described above are still by and large limited to study, analysis and reporting. Far from the evolution of legal obligations, these subjects are yet being identified as issues warranting further consideration. On Human Rights, Trade and Investment, the UN Sub-Commission on the Promotion and Protection of Human Rights[148] expressed concern that international economic law and human rights law have developed as parallel and separate regimes. This implies the risk that human rights principles, instruments and mechanisms will be marginalized as illustrated by the actual/potential implications of WTO agreements. The Sub-Commission emphasized the role of states as bearing the primary duty in implementation of human rights and considered that when not carefully regulated, FDI can have detrimental effects on human rights. It noted that the High Commissioner for Human Rights (UNHCHR) in her report on liberalization of trade in services and human rights[149] had identified investment as the most problematic mode of trade in services, from the perspective of human rights. It recommended that the relevant bodies of the WTO include consideration of human rights and sustainable development implications of FDI frameworks. In considering the relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations,[150] the Sub-Commission noted the need to establish mechanisms to deal with human rights violations or abuses by TNCs and other enterprises.

The report on Liberalization of Trade in Services and Human Rights[151] makes several valuable recommendations. It suggests the development of human rights approaches to the General Agreement on Trade in Services (GATS) by negotiating, interpreting and implementing trade rules in accordance with human rights. The report goes on to identify particular areas of action as a step in elaborating human rights approaches in this context – for instance, ensuring the right and duty of governments to regulate. This report ends by highlighting a salient concept in the theoretical frame of this thesis: the need for coherence, which is said to be the key for future work on this subject – that is, ensuring maximum coherence

147 This includes the Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal 1989, the Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal 1999, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

148 E/CN.4/Sub.2/2002/L.11/Add.1.

149 E/CN.4/Sub.2/2002/9.

150 E/CN.4/Sub.2/2002/L.11/Add.1.

151 *Ibid.*

between the rules and policies of trade liberalization and the enjoyment of human rights. The report on trade liberalization and human rights is relevant in several ways. Trade in services takes place primarily through TNCs and, by and large, through FDI activity. The case illustrations at the outset of this research involved several instances of deprivation of basic rights like property and homes, and basic services like clean water supply. This report clearly views that certain basic entitlements cannot be left solely to market forces, and reiterates the role of the state and the rule of law. It repeatedly refers to the concept of basic entitlements, possibly reflecting a particular approach to development theory. Both through direct relevance and analogy, several features of this report are significant. It will however be realistic only if it can pave the way to binding international legal obligations and concrete actions, particularly from its most specific audience as seen from the Report: member states of the WTO. The report points to much that can be done by states within the parameters of freedom left by schemes of liberalization. By and large, it runs counter to the trends of globalization, reinforcing the role of the state in terms of both rights and duties.

The most directly relevant development within the UN Sub-Commission is the formulation of the UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[152] They represent the pursuit of equilibrium between negative and positive impacts of globalization at the multilateral level. They could be seen as part of a broader movement for corporate accountability which promotes complaints procedures, independent monitoring, compliance with national and international law and other agreed standards, mandatory reporting and redress for malpractice.[153] The Norms set standards and provide for monitoring and implementation, but are as yet only statements of policy or at most, soft law. To acquire more legal and political weight, they should be approved by the UNCHR.[154] In April 2004, the UNCHR stated that the Norms have no legal standing, and requested the Sub-Commission not to perform any monitoring functions. However, it recognized the need to prioritize strengthening relevant standards, and requested the Office of the High Commissioner for Human Rights to conduct further study and consultations with several actors, and to compile a report which would be considered when the Commission meets

152 *Op. cit.* n. 128.

153 See J. Bendell, *Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement*, UNRISD Technology, Business and Society Programme Paper no. 13, Geneva, June 2004; and UNRISD, *Corporate Social Responsibility and Business Regulation*, *op. cit.* n. 135. At p. 3 of the latter, it is pointed out that since the 1980s, international regulation of business has been characterized by two major imbalances. Firstly, multilateral co-operation has strengthened global corporate property rights, while regulation on social obligations has been confined to the national level and to relatively weak voluntary initiatives at the global level. Secondly, while rules exist between OECD countries – for instance in relation to investment, taxation and competition policy – they have not been extended to developing countries in a way that supports development.

154 D. Abrahams, *Regulating Corporations: A Resource Guide*, UNRISD, Geneva, July 2004, p. 39.

in 2005.[155] Thereafter, considerable opposition to the Norms was voiced from different quarters, including the United States Government, some companies, and industry bodies like the International Chamber of Commerce (ICC), the International Organization of Employers (IOE) and the U.S. Council for International Business (USCIB), all of whom used the principal argument that governments, not corporations, are responsible for the enforcement of human rights obligations, and should do this through developing and enforcing domestic standards.[156] When the Commission met in 2005, the Norms were not taken up as such, but on 20 April 2005, it passed a resolution calling for the UN Secretary-General to appoint a special representative to identify and clarify existing issues related to business and human rights. Harvard Professor John Ruggie was appointed as UN Special Representative.[157] Amnesty International states that as the most comprehensive statement of standards relevant to business and human rights, it expects that the UN Norms will form the basis for identification of further standards by the Special Representative. In the ongoing process, the Representative has submitted an Interim Report[158] to which many NGOs and others have reacted, towards the next step of a Final Report. The Special Representative is now in the process of having consultations with multiple stakeholders, and importantly, is keen to hear the voices of the global South, also at the regional and sectoral levels. Thus regional consultations dealing with both general and specific issues of business and human rights were held in Johannesburg, South Africa, in March 2006 (with a focus on zones of conflict and areas of weak governance), and in Bangkok, Thailand, in June 2006, (with a focus on supply chains as well as extractive industries). Consultations due to take place in Bogota, Columbia, in January 2007, will deal specifically with issues related to indigenous peoples.

The merits of the UN Norms include the fact that they are relatively universal, in comparison with other developments in this field, which emerge from specific regions, sectors, NGOs or companies. Since the UN is still the most viable international organization – at least for the reason of lack of a better alternative – standards emanating from it could provide a benchmark in view of their relative credibility, universality and acceptability to the international community. The Norms could thus add value to existing instruments on CSR as they are the first

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155 *Ibid.*

156 http://www.amnestyusa.org/business/un_norms.html: In fact, the US delegation asserted that the Norms were conceptually flawed and had no basis in law, and voted against the Resolution appointing a Special Representative. Some companies – for instance the Business Leaders for Human Rights group on the other hand – are exploring how the UN Norms can help guide their practices.

157 *International Herald Tribune*, August 18, 2005, http://www.iht.com/articles/2005/08/17/opinion/edbenner.php. The Norms are not mentioned in this Resolution-2005/69.

158 E/CN.4/2006/97 of 21 February 2006. Numerous and varied reactions to this Report emerged *inter alia* from Amnesty International, Joint NGOs, and Mary Robinson, founder of the Ethical Globalization Initiative.

international human rights norms aimed at responsibilities of business.[159] They appear to create a standard-setting framework based on existing international norms. Although their legal value must be viewed within the limits of soft law pronouncements, some of their contents reflect legally binding customary/conventional international law, or general principles. However the Norms can play a potentially significant role as many obligations in the traditionally state-centric context of the human rights sphere are extended to business through them.

In approaching the Norms, it is important to be objective in finding a balance between private interests and public purpose. The middle path mandates a move away from polarized positions which requires openmindedness. The Norms can bring clarity, consistency and predictability, thereby enhancing coherence in a hitherto confusing arena. In the regulation of TNCs – with regard to mother companies and subsidiaries, or majority-owned companies – the issues that arise are relatively clear-cut, while with chain companies and suppliers there is more complexity involved. The UN Norms apply to all these different forms of business probably also to subcontractors and outsourcing, and thus could lead to both clarity and coherence. The tendency of the business lobby – represented, for instance, by bodies like the ICC – is to advance all areas of common standards of regulation which are suited to business. The UN, it is submitted, is the most obvious forum to develop regulation standards in this regard.[160] One of the positive features of the Norms is that they provide a basis for preventive regulation, making issues of liability and responsibility a last resort. This, in turn, enhances the potential for protection of human rights, development and the environment, and creates a relatively more healthy, less defensive and less contentious environment for balancing conflicting interests. In view of the relatively small proportion of private businesses that have pro-active position statements on human rights, a set of universal norms can have far-reaching implications. The UN Norms add value to CSR instruments and, in terms of legal value, are more potent for incorporating legal obligations, when compared for instance, to the Global Compact.[161]

Art. 1 of the UN Norms (in part A, which deals with general obligations) states that:

> States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business

159 See the proceedings and Final Report of the Public Debate on *UN Norms for Business: Process, Content and Real Value*, organized by International Restructuring and Education Network, Europe (IRENE), Centre for Research on Multinational Corporations (SOMO), Amnesty International – The Netherlands, and the Maastricht Centre for Human Rights, Maastricht University, held in The Hague on 12 May 2004.

160 *Ibid.*

161 *Ibid.* See also UNRISD, *Corporate Social Responsibility and Development: Towards a New Agenda?* Report of the UNRISD Conference, Geneva, 17–18 November 2003.

> enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

Specific obligations are imposed in part B, Art. 2 – the right to equal opportunity and non-discriminatory treatment; part C, Arts. 3 and 4 – the right to security of persons; part D, Arts. 5, 6, 7, 8 and 9 – rights of workers; part E, Arts. 10, 11 and 12 – respect for national sovereignty and human rights; part F, Art. 13 – obligations on consumer protection; and part G, Art. 14 – obligations on environmental protection.[162]

The above survey of specific standards reveals that there are a variety of different interventions, which are closer to public policy than law. Attempts at regulation at the global multilateral level have usually been prematurely aborted, due to a variety of reasons. The interventions that exist are weak because of their congenital disabilities in terms of the imposition of legally binding obligations, owing largely to their heritage in the lesser sources of public international law, if not mere policy. Many of the interesting developments from the standpoint of a more holistic approach to economics and human rights are still confined to the realms of reports and recommendations of commissions and sub-commissions. But it must not be forgotten that several of the standards emanating from these non-binding instruments may in fact already be part of the class of binding obligations because of their embodiment in legally binding instruments. The obligations would, however, be binding mainly for states.

From a developmental perspective, most of the interventions are not strong enough to create binding legal obligations. The piecemeal mixture of laws, policies and lesser beings apply together in an uneasy and not so peaceful co-existence. At another level, the culmination of these processes, their cumulative effects and common threads – such as sustainable development, good governance, democracy, accountability, social justice and corporate social responsibility – could well result in their being viewed in a different light. For then they could provide a fertile ground for the progressive development of international law as well as regional and national laws, interventions of home and host states and non-state actors.

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162 Complaints procedures for violations by business exist in certain multilateral institutions including the World Bank, ILO, OECD and NAFTA. See J. Woodroffe, 'Regulating Multinational Corporations in a World of Nation States', in Addo, *op. cit.* n. 94, p. 131; N. Jagers, *Corporate Human Rights Obligations: In Search of Accountability*, Intersentia, Antwerp, 2002.

4.4 International Economic Law

The purpose of this section is to view the core issues of this study within the framework of international economic law.[163] International economic law is itself a vast subject, which defies straightforward definition and straddles unclear boundaries, and its nature may become increasingly fluid, as practically every aspect of human existence takes on some economic dimension. It constitutes several branches – including the law on international economic relations, international economic institutions, regional economic integration, international trade law, international investment law, the law relating to international business and financial transactions, monetary law, international development law and the international law on sovereignty over natural resources. This chapter will focus on the most relevant components for present purposes, namely, the international law relating to development as well as sovereignty over natural resources, the law relating to investment, and some salient aspects of international trade law.

In positing the subject of international economic law within the conceptual foundations of this study, the ideals of justice, equity and a more human, social and sustainable development come to the fore, and in fact, need to be situated at the apex. Sustainable development is seen to capture everybody's attention, unlike development *per se*, which is primarily and predominantly of interest to developing countries. Qureshi points out that in that sense it serves a positive purpose, although it may be regarded as a second-best approach to development issues, which deserve attention in their own right.[164] He also states that as a mechanism for resolving conflicting strains in international economic law, as well as ensuring a balanced growth of the international economy, sustainable development has begun to serve its purpose.[165] Two final points about sustainable development made by the same writer should be borne in mind, also because they seem to reveal certain realities about international economic relations and the centrality of power. The first is about its lack of emphasis on inter-nation equity/intra-generational equity; and second, its susceptibility to exploitation by vested interests. It can be added, however, that recent years have witnessed some winds of change.

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163 For international economic law in general, see J.H. Jackson, W.J. Davey, *Legal Problems of International Economic Relations*, West Publishing Co., St. Paul, 1986; I. Seidl-Hohenveldern, *International Economic Law*, KLI, The Hague, 1999; A.H. Qureshi, *International Economic Law*, Sweet and Maxwell, London, 1999. For a broad, inclusive approach, see Weiss *et al.*, *International Economic Law with a Human Face*, KLI, The Hague, 1998.

164 Qureshi, *ibid.*, p. 344.

165 *Ibid.*, p. 343. He adds: "In an international economic system that is underpinned by economic power, the emphasis on the particular principles may become unbalanced. Finally, the sustainable movement is symptomatic of a particular condition of mankind (specially the key shapers of the international economy), in not being able to address exclusively and effectively questions that seemingly are unconnected to vested interests, in this instance, development".

4.4.1 International economic law in general

Essentially, international economic law comprises the public international law analysis of the economic phenomena of international concern.[166] International economic law is to a large extent based upon reciprocal international (bilateral and multilateral) treaties.[167] Customary international law in this sphere is largely insignificant, and it usually entailed that states were free to regulate their economic and monetary affairs internally and externally as they seem fit. Some customary law limits of this freedom in the economic intercourse of states follow from the general principles of state sovereignty and state responsibility – for instance, the treatment of aliens and their property.[168]

At the heart of the law relating to international economic relations lies the international economic institutional framework, which determines to a large extent the international legal framework. The modern global system of economic regulation rests upon the multilateral system established by the Bretton Woods Conference in 1944.[169] The Bretton Woods institutions – consisting of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD) and later the General Agreement on Tariffs and Trade (GATT) leading to the establishment of the World Trade Organization (WTO) – wield a significant influence and, in fact, steer the course of international economic law to a certain extent. Predicated on the philosophy of comparative advantage of David Ricardo and John Stuart Mill, and the market theory of Adam Smith, these institutions seek to enforce a far-reaching course of liberalization of international economic transactions. The primacy of foreign investment led by TNCs as part of the globalization process is largely due to the goals set by these institutions.[170] In relation to the core issues in this study, therefore, it is not easy to make inroads into such a system, with strong foundations in a formidable institutional framework supported by far-reaching economic and political power. Earlier attempts of LDCs and those of civil society to make interventions were necessarily limited by the ground realities of their comparatively lesser position in terms of economics, power and law-making capacity. However, polarized positions of the past are now experiencing some change, due to fluctuations in the dynamics of the different actors, structures and processes. So today it is often the countries of the North, civil society in both developing and developed countries, and various other sectors that

166 *Ibid.*, p. 11.
167 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, London, 1997, p. 223.
168 *Ibid.*
169 *Ibid.*
170 See UNRISD, *States of Disarray*, *op. cit.* n. 100; UNRISD, *Visible Hands*, *op. cit.* n. 100; J. Stiglitz, *Globalization and its Discontents*, *op. cit.* n. 99; A. Zammit, 'The Nature of the Development Challenge', in Zammit, *op. cit.* n. 137.

pursue the regulation of FDI with regard to broader social interests. In the light of rising nuances in contemporary international law and relations, it is becoming difficult to speak of North and South, and positions taken represent conflicts and convergences of many different interests.

In response to criticism directed against the pure economic criteria applied in the World Bank's[171] policy in the past, it has become more sensitive to the social and environmental impacts of the international projects (especially damns and infrastructure) it finances.[172] It now adopts guidelines in the form of operational directives, under which it considers the rights of women, refugees, indigenous peoples and persons faced with involuntary resettlement. Some other development banks have also acted likewise.[173] The WB Inspection Panel was established in 1993 to respond to private individuals who believe their interests could be harmed by a WB-financed project, a mechanism for independent monitoring of internal directives.[174] The WB's policies, however, are being considered for revision and rationalization as the Bank has stated that compliance with regulations has proven too costly, and has weakened its competitiveness by driving potential borrowers to other funding sources.[175] Within the United Nations system, UNCTAD formulates the interests of developing states and endeavours to influence policy recommendations.[176] The regional economic commissions under ECOSOC are significant at the regional level. Outside the UN system, the OECD constitutes another important institution, which, with its membership consisting of the largest industrial states, wields considerable influence.

Cassese comments that a major result of developing countries' action for development has been to make this issue a central question of the world community, with international aid and social solidarity now firmly rooted.[177] Related guidelines, goals and institutions have been established, as well as moves by the G-8 to cancel or reduce debt, and by international institutions to lessen the North–South

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171 The World Bank Group includes the International Bank for Reconstruction and Development (IBRD); the International Development Association (IDA); the International Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Centre for Settlement of Investment Disputes (ICSID).

172 Malanczuk, *op. cit.* n. 167, p. 228.

173 For example, the Asian Development Bank and the Inter-American Development Bank both have environmental policies.

174 For instance, Bank sponsored projects in China and Tibet were referred to the Panel in 1999. The investigation in China concerned the issue whether the Bank had observed its policies and procedures on involuntary resettlement, indigenous peoples and environmental assessment (http://www.unhchr.ch/businesupdate.htm).

175 *Ibid.* J.E. Oestreich, 'The Human Rights Responsibilities of the World Bank: A Business Paradigm', http://gsp.sagepub.com/cgi/content/abstact/4/1/55

176 Occasionally it has also initiated treaties such as five International Commodity Agreements and the Convention on a Code of Conduct for Liner Conferences, UNTS vol. 1334, p. 15, and vol. 1365, p. 360, Geneva, 6 April 1974.

177 A. Cassese, *International Law*, OUP, Oxford, 2005, p. 526. Also see UNCTAD, *World Investment Report*, 2001 (Promoting Linkages), UN, New York/Geneva, 2001.

divide. Further, industrialized countries and international institutions increasingly stress the need for linkages between development and broader social issues, specifically insisting on the need for developing countries 'to promote development by simultaneously ensuring and enhancing *respect for human rights* and *protection of the environment*'.[178] Assistance and co-operation is sometimes made conditional on respect for international standards on human rights and the environment, which Cassese describes as a healthy development, often used as a means of promoting community values.[179] On the other hand, such linkages could also work unjustly towards those on whom they are imposed, further weakening their bargaining positions in international economic activities. The path towards strengthening the accountability of states as well as TNCs may be fairer than the conditionality approach. As far as host states are concerned, conditionalities can mean little in circumstances where they do not have the capacity for enforcement.

4.4.2 The International law relating to development

A developmental approach to international economic law would be more humanistic and sustainable than traditional approaches. A holistic approach to development would be conducive to the attainment of socioeconomic progress, which includes human rights and environmental protection. A broad conception of development and the furtherance of economic, social and cultural rights are consonant with the values of justice and equity.

Development is one of the objectives of international economic law, and the concept of development is not static: 'It has evolved from the grips of colonialism to the liberating movement of the New International Economic Order, and from that reaction, to the sober notion of sustainable development today'.[180] Several regional organizations play a significant role of steering the course of development, including the EC, the OECD, ASEAN and APEC. At the global level, the premier international bodies influencing development include the WB, UNCTAD, ECOSOC, IMF, WTO, UNESCO, WHO, FAO, ILO, UNDP, UNIDO and UNEP. Much of international development law is contained in soft law, mostly in the form of UN resolutions, in general international law and in bilateral treaty arrangements. It is also an area where differences of perspective and interests are both numerous and complex, thus mandating the process of balancing conflicting interests.

The UN Charter, in its preamble[181] sets forth the importance of fundamental human rights, freedoms and dignity, progress and better standards of life. Development and its close link with human rights is thus implied. Art. 1 of the

178 Cassese, *ibid.*
179 *Ibid.*, pp. 526, 527.
180 Qureshi, *op. cit.* n. 163, p. 336.
181 *Op. cit.* n. 13.

Charter highlights the importance of international co-operation in solving problems of an economic, social, cultural or humanitarian character, and in promoting human rights and fundamental freedoms. Art. 55 approaches development in its broader dimensions, linking it with human rights and self-determination and under Art. 56, members pledge themselves to take action in co-operation with the UN for the achievement of the purposes set in Art. 55. According to Art. 62, the ECOSOC may undertake studies on international economic, social and other related matters and make recommendations to the UNGA, member states and specialized agencies.

Notions of social justice, equity and redistribution are integral elements of the international law relating to development. 'It has been stated that International Economic Law has a welfare dimension. International Development Law is that dimension'.[182] The apex value of fairness in the conceptual underpinnings of this study finds a parallel in what could be called the international law of development, for instance, as exemplified in the UNGA resolutions on the Establishment of a NIEO.[183] 'The call for a "New International Economic Order" reflects the wide gap in living standards between North and South and the desire of developing countries to redress the imbalance in the international economic system, in which their very position is notoriously weak'.[184] But the legal content of the idea of solidarity among states is in many respects still ambiguous.[185] The Declaration on the Establishment of a New International Economic Order[186] and the Programme of Action on the Establishment of a New International Economic Order[187] adopted by the UNGA, were subject to various reservations by industrialized countries. These are not legally binding documents, but can still add value, except that the large number of negative votes again devalues their effects. Although the argument for such a new world order never saw the light of day, the articulation of doctrines relating to foreign investment in the UNGA resolutions on the NIEO and the CERDS influenced the content of the law of foreign investment. The

182 Qureshi, *op. cit.* n. 163, p. 335. Also see F.V. Garcia-Amador, *The Emerging International Law of Development*, Oceana Publications, New York, 1990.

183 Declaration on the Establishment of a New International Economic Order, UNGA Resolution 3201 (S-VI), 1 May 1974.

184 Malanczuk, *op. cit.* n. 167, p. 233.

185 *Ibid.* Contra the view of Cassese, *op. cit.* n. 177, p. 418, who states that one of the major results of the developing countries' action for development can be seen in the fact that this issue has become one of the central questions of the world community. According to Cassese, the idea that industrialized states should assist poor countries has solidly taken root, with the attendant feeling of social solidarity. Besides, many guidelines, goals and institutions have been set up to put solidarity into practice.

186 *Op. cit.* n. 183. Also see the Seoul Declaration/Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, Resolution adopted by the ILA in 1986. The ILA is an international non-governmental organization.

187 UNGA Res. 3202 (S-VI), 1 May 1974.

CERDS,[188] that was originally intended to become legally binding, revealed the fundamental differences between North and South, through the large number of abstentions and opposing votes.[189] It is submitted that these resolutions must be accorded value at least by treating them as policy dictates that can inform the creation of international legal principles, as they represent the consensual opinions of a large number of states.

Also of far-reaching significance is the whole drive towards self-determination, including economic self-determination, culminating in the emergence of the principle of permanent sovereignty over natural resources.[190] The growth of the international law of development and the recognition of a third generation of human rights in the form of solidarity rights has also influenced the law of foreign investment. Evolving conceptions of a 4th generation of human rights embodying communication rights including information could further influence the law in context. The quest for a NIEO was linked to the claim of recognition for a fundamental human right to development, flowing from the right to self-determination. The right to development was recognized by the UNGA's DRD,[191] the International Law Association (ILA)'s Seoul Declaration of 1986,[192] Prin. 3 of the Rio Declaration, the Vienna Declaration[193] and the ILA's New Delhi Declaration of Principles of International Law relating to Sustainable Development.[194] The ICESCR and the 1986 Limburg Principles on the Implementation of this Covenant contain several provisions which further the cause of development, and create a body of international public law and policy in this regard.

The normative framework of development is marked by the traditional model of rights and responsibilities, which can rest on both developed and developing countries. Under this model fall the protection of foreign investment, the regulation of multinational corporations, sustainable development, and economic sovereignty.[195] Also of relevance is the externally orientated regulatory framework which

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188 *Op. cit.* n. 65. The Charter stresses the permanent sovereignty of states over natural resources and their jurisdiction to regulate economic activity, especially with regard to foreign investment and TNCs.

189 Malanczuk, *op. cit.* n. 167, p. 234.

190 *Op. cit.* n. 119.

191 *Op. cit.* n. 120.

192 *Op. cit.* n. 186.

193 Principle 10.

194 Resolution 2002/3 of the International Law Association adopted in New Delhi on 6 April 2002. Article 2.3 states: "The right to development must be implemented so as to meet developmental and environmental needs of present and future generations in a sustainable and equitable manner. This includes the duty to co-operate for the eradication of poverty in accordance with Chapter IX on International Economic and Social Co-operation of the Charter of the United Nations and the Rio Declaration on Environment and Development as well as the duty to co-operate for global sustainable development and the attainment of equity in the development opportunities of developed and developing countries".

195 *Ibid.*, p. 337.

aims at setting standards and structure within the domestic economy so as to ensure unhindered development, including mechanisms such as good governance and communal frameworks, which ensure that resources common to mankind are shared by the international community.[196]

A degree of convergence of international economic law and human rights law is apparent in the DRD, which states in Art. 1:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[197]

This article is sensitive to the multidimensional character of development. The international law on development provides scope for principles on balancing conflicting interests of foreign investment, development, human rights and the environment. In terms of content, this is a rather fertile ground because it purports to promote development, and does so in a reasonably rights-oriented holistic manner. It represents a point of intersection, where international economic law and international human rights law intertwine.[198] But its substantive value is weakened through its poor legal heritage in the lesser sources of public international law.[199]

Although the right to development has been through some degree of stagnation/erosion in the last few decades, its spirit finds expression and manifests in various forms. The principle of common but differentiated responsibilities for instance, accommodates the realities of North–South inequalities and the need to deal with them equitably. In the New Delhi Declaration, this principle is encapsulated in Prin. 3, which is particularly interesting in the present context, because of the inclusion of non-state actors, and the integrated and interrelated approach adopted. It states:

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196 *Ibid.*

197 See K. Hossain, 'Human Rights and Development', in A. Jayagovind, *Reflections on Emerging International Law: Essays in Memory of Late Subrata Roy Chowdhury*, ILA, Calcutta Centre, Law Research Institute, Calcutta, National Law School of India University, Bangalore, 2004, at p. 44.

198 For some insights on the interrelationships between these two branches, see Petersmann, *op. cit.* n. 104.

199 N. Schrijver in 'On the Eve of Rio + 10: Development – The Neglected Dimension in the International Law of Sustainable Development', *Dies Natalis Address*, Institute of Social Studies, The Hague, 11 October 2001, at pp. 25–26, stated that development concerns have been neglected in international politics and law, but at the same time the international law of development is alive, subject to challenges from market economy approaches and new directions necessitated by the emphasis on human rights, the environment and good governance. He argues that the international community has committed itself to far-reaching goals, *inter alia* through the Millennium Declaration of the UN, and international law has a role to play as a value system consolidating integration and as a concrete regulatory framework.

> States and other relevant actors have common but differentiated responsibilities. All States are under a duty to co-operate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should co-operate in and contribute to this global partnership. Corporations have also responsibilities pursuant to the polluter-pays principle.[200]

The reason for the controversial character of the right to development and its related conceptions lies in the fact that they are by and large confined to soft law, *lex ferenda* and international public policy. However, it is a value system which can inform the progressive development of international law as well as legal and policy development at the regional and national levels[201] towards an integrated approach. Further, if the normative framework is to aspire to the value system, they must be linked through appropriate legal processes.

Certain arrangements within the international trading system help to enhance the economic performance of developing countries, and could be seen as steps towards the realization of the right to development, and the balancing of conflicting interests. Two such examples are Preferential Treatment of developing countries and the Generalized System of Preferences (GSP). Trade preferences for LDCs have been part of the commercial policies of developed countries since UNCTAD called for them in the 1960s.[202] They are intended to promote development as well as a better balance between developed and developing countries. However, with the trade liberalization agenda now in full swing, tariff preferences are becoming less significant.[203] In fact, they violate one of the basic principles of the GATT – non-discrimination based on MFN treatment – but were accommodated due to the development factor. Their role is changing within the context of the WTO/GATT framework, and their future within the free trade regime is uncertain.[204] Preferences for LDCs take different forms – the GSPs, special preferential regimes for limited groups of developing countries such as under the Lome or Cotonou Conventions, and to some extent, regional free-trade areas between developed and developing countries. For instance, the U.S. GSPs provide preferential duty-free entry for nearly 5,000 products from 144 designated beneficiary countries and territories.[205]

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200 *Op. cit.* n. 194.

201 See D. Shelton, 'Editor's note: The Role of Non-binding Norms in the International Legal System', in D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, OUP, Oxford, 1999, at p. 554.

202 http://www.fao.org/DOCREP/004/y2732E/y2732e03.htm

203 *Ibid.*

204 *Ibid.*

205 http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html

4.4.3 The International law relating to foreign investment

Driven by the desire to facilitate the free movement of trade and investments across state boundaries, the international law on foreign investment exists by and large with a view to safeguarding property interests, and more specifically to protect investors and both promote and protect investments. Towards these ends, there exists a complex system of bilateral and multilateral legal arrangements including many binding treaties. Thus, international investment law traditionally concerned itself with matters like the taking of foreign property and compensation for nationalization. Host state and home state controls are also concerned mostly with the protection of property rights of investors, taxation and the like. Foreign investment law evolved primarily to serve the interests of states which had the ability to expand their overseas trade, and its history has been by and large determined by the political and economic environment and underlying power relationships and structures.[206] The protection of broader interests has not traditionally been a composite element of the international law of foreign investment.[207]

Bilateral arrangements for foreign investment regulation operate alongside multilateral ones, and the last two decades saw their proliferation, making them a significant tool in investment regulation. But their value in this context is negligible, as they exist almost exclusively to protect and promote investments. They serve *inter alia* to attract foreign investment, protect property interests, enhance rights of investors, and give them legal standing in international trade disputes. However, there is potential for the inclusion of broader social interests, influenced by the emergence of international public policy in relation to sustainable development, and increased sensitivity of state and non-state actors. With regard to attempts at regulation with a view to protecting broader concerns, the focus in this section will be primarily on multilateral frameworks and instruments relating to investment. Such instruments emerge mostly under the aegis of international organizations, which are interested in developing the law in the area.

In spite of the existence of several regulations, it is significant that 'neither the MNEs themselves nor their activities abroad or the activities of any foreign investor, is regulated by a binding and comprehensive international instrument'.[208] International

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206 M. Sornarajah, *The International Law on Foreign Investment*, CUP, Cambridge, 2004, pp. 19, and 18–30, on the History of the Law on Foreign Investment. On foreign investment law in general, see G. Schwarzenberger, *Foreign Investment and International Law*, Stevens and Sons, London, 1969.

207 See M. Sornarajah, 'The Clash of Globalizations and the International Law of Foreign Investment', *Simon Reisman Lecture in International Trade Policy*, Norman Paterson School of International Affairs, Ottawa, 12 September 2002, for analysis on the counterveiling interests of human rights, the environment and development, *vis-à-vis* the free trade and investment agenda, including a survey of cases like NAFTA jurisprudence.

208 S.P. Subedi, 'Foreign Investment and Sustainable Development', in Weiss *et al.*, *op. cit.* n. 163, p. 414. Also see Horn, *op. cit.* n. 140.

treaties to regulate their activities have to rely on the co-operation of home states as well as host states, which would join the treaty and enact domestic legislation. One reason for the lack of an effective international legal regime is the absence of a strong institutional framework. The UNCTC became defunct in the mid-1990s, and merged into UNCTAD, a relatively weak institution, given its limited capacity.

In the past, the developed country interest in maintaining economic prosperity was an overriding concern in comparison to the developing country interest in development. The North supported a minimalist approach to regulation, while the South advocated a binding code. Inability to reach international consensus led to the abortion of the 1990 UNCTC Draft Code of Conduct for TNCs[209] and also the UNCTC. Codes of Conduct are sets of ethical principles and standards that guide a firm's social performance.[210] One of the most significant attempts at regulating TNC activity was made in the aborted Draft Code of the UNCTC. This code was never passed, and thus has to be viewed within the confines of an intended draft, and approximate in legal value to a policy initiative. The preamble to this Code states its objectives:

> Convinced that a universally accepted, comprehensive and effective Code of Conduct on Transnational Corporations is an essential element in the strengthening of international economic and social co-operation and, in particular, in achieving one of the main goals and objectives in that co-operation, namely, to maximize the contributions of transnational corporations to economic development and growth and minimize the effects of the activities of these corporations.

This conveys the ideas of balancing the interests of international business and other concerns including development, and of international co-operation (rather than confrontation) being a basic necessity. To achieve international co-operation in solving problems of an economic, social, cultural or humanitarian character is in fact one of the primary purposes and principles of the UN Charter, and it is important that more than lip-service is paid to such basic principles.

Among the most significant articles are: 7, 8 and 9 on national sovereignty of host states and their permanent sovereignty over natural wealth and resources; 13 on respect for social and cultural objectives, values and traditions of host states; 14 on respect for human rights and fundamental freedoms in the countries in which they operate;[211] 37–40 on consumer protection; and 41–43 on environmental protection. This code was never adopted due to reasons which transcend

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209 *Op. cit.* n. 140.

210 UNRISD, *Visible Hands*, *op. cit.* n. 100, p. 78.

211 However, no agreement was reached on whether this should be expressed as an obligation by the incorporation of the word 'shall' into the text or as a hortatory standard expressed by the word 'should': UNCTAD, Series on issues in international investment agreements, *Social Responsibility*, UNCTAD, Geneva/New York, 2001.

the law: North/South politics and opposition by TNCs and home states, and the acute shortfall of investment in developing countries in the post-cold war era, resulting in changed attitudes.

There is now a role reversal to some extent since developed countries often endeavour to include broader social concerns in trade and investment arrangements, and these efforts are frequently resisted by developing countries which tend to look upon them as forms of protectionism and non-trade barriers. International regulation is limited to guidelines, UN resolutions and other 'soft laws' like the non-binding OECD code of conduct for MNEs.[212] The interests of the South are rarely articulated in a united, principled and coherent form, and the South itself is becoming an increasingly diverse and fragmented group. The failed OECD-sponsored MAI was directed against governmental regulation, like the 1992 WB Guidelines.[213] Initial efforts to regulate TNCs were limited to the economic sphere. The integration of broader interests is a more recent development. Among the many soft laws in this field, the most relevant for present purposes are those which impact on development, human rights and the environment.

The voluntary 1976 OECD Declaration and Guidelines on International Investment for Multinational Enterprises as amended in 2000 and the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy are among the other soft law instruments that are significant here. The Tripartite Declaration is universal in application, but confined to labour matters. The 2000 OECD Guidelines for Multinational Enterprises state, as part of the General Policies to be observed, that TNCs should 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'. These guidelines are significant in that they constitute a general code of conduct for international business. They cover a vast range of issues including labour relations and environment. In terms of legal status, the guidelines are recommendations from OECD governments to firms based in them[214] and amount to no more than policy directives.

From 1995 to 1998 an attempt to create a binding treaty in the form of a MAI, took place within the OECD. The MAI was intended to include a revised version of the OECD Guidelines, which eventually came to exist on their own from 2000. This agreement was not conducive to the causes of development, environment or human rights, and was heavily opposed by diverse groups including student activists and NGOs, for different reasons. France and Canada, for instance,

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212 15 ILM 1976, p. 967.

213 31 ILM 1992, p. 1363. See World Bank, *Legal Framework for the Treatment of Foreign Investment*, Volume II, World Bank Group, Washington, 1992; I.F.I. Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines*, Nijhoff, Dordrecht, 1993.

214 J. Huner, 'The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises', in Kamminga, Zia-Zarifi, *op. cit.* n. 94, pp. 197–205 at 200.

claimed a broad cultural exception, strongly opposed by the US and Japan. Inability to reach a consensus eventually led to the abandonment of the MAI project in 1998. Although consensus has repeatedly failed at the global level,[215] regulation does exist at other levels, for instance in the regional groupings of the North Atlantic Free Trade Agreement (NAFTA) as well as the OECD. The NAFTA also includes a Dispute Settlement mechanism and an evolving body of jurisprudence.[216]

The Global Compact stresses the need for business to observe environmental standards, transparency standards, the human rights embodied in the UDHR and the core labour standards in the ILO Declaration on Fundamental Principles and Rights at Work of 1998.[217] The origins of these standards are not from international economic law, but from international labour law. A study by UNCTAD states:

> The most comprehensive set of international agreements embodying social standards is the ILO's International Labour Code, which consists of both legally binding conventions and recommendations. Although ratification of the conventions is a matter for each State, they are regarded as aspirational in that membership of the ILO entails the obligation to establish at least basic labour rights, and members are required to report the progress made in relation to those that embody fundamental rights. This has now been strengthened by the adoption of the Declaration on Fundamental Principles and Rights of Work.[218]

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215 The regulation of FDI is an area where multilateral agreements have hitherto been a virtual impossibility, and this is symptomatic of some of the weaknesses of the global economic system. Joseph Stiglitz in *Globalization and its Discontents*, *op. cit.* n. 99, pp. 21–22, describes the system as one of '*global governance without global government*'. He advocates the reshaping of globalization towards fairness, equity and sustainable growth. In practical terms, however, the regulation of globalization as a whole or the aspect of foreign investment is very complex. As explained by S. Young and A.T. Tavares, in 'Multilateral rules on FDI: Do we need them? Will we get them? A developing country perspective', 13:1 *Transnational Corporations*, April 2004, p. 1, at 4, 5, "The architecture of investment rules encompass multiple overlapping levels, namely, multilateral, macro-regional (trade/investment blocs), national/bilateral and sub-national/micro-regional levels. These levels interact with and may eventually contradict each other, creating problems of systematic co-ordination". They also point out that the importance given to investment rules and the state of development of regulation in this regard are highly variable between levels and even within each level.

216 See T. Weiler, C. May (eds.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, 2005; T. Weiler (ed.), *NAFTA, Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, Transnational Publishers, Ardsley, 2004; R.D. Bishop, J. Crawford, W.M. Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, KLI, Hague, 2005.

217 ILO 1998.

218 UNCTAD, *op. cit.* n. 211, p. 41. In relation to environmental standards, the International Organization for Standardization has its ISO 14000 standards. National and regional bodies have also produced standards on social and environmental issues, and these codes and standards are supported by verification and monitoring.

The 2006 Principles for Responsible Investment[219] are an interesting development from the perspective of sustainable development and FDI. They embody a set of 6 voluntary principles by institutional investors under the aegis of the UN Secretary-General, towards linking investment with environmental, social and corporate governance. The PRI combines vast resources from the corporate sector, government funds, pension funds as well as a wealth of expertise. The 10th principle[220] introduced to the UN Global Compact in 2004, that businesses should work against corruption in all its forms, including extortion and bribery is significant, as corruption undermines all efforts towards sustainable development.

In a comprehensive study on the role of UNCTAD in recent years, P. Muchlinski identifies some salient features.[221] He remarks on a shift from a negotiating process – intended primarily at the conclusion of a code of conduct addressed to TNCs and governments – to a more detached and analytical approach, aimed at ensuring further and better knowledge of activities of TNCs and their effects in the development process. This process, he suggests, should also aim at ensuring that developing countries themselves are better aware of, and able to deal to their benefit with, the principal issues arising out of a possible emerging global framework of investment rules. Investor protection is placed alongside developmental concerns in an attempt to reach a balance. As the agenda of international investment agreements widens, UNCTAD is in the process of responding to this challenge, both on the substantive issues covered and through the diversity of the dialogues with governments, business and civil society. There is also a linkage with WTO and training activities together, particularly for NGOs. If the WTO is to be the forum for negotiations for a multilateral framework in the future, it has the experience of negotiating and operating an emerging multilateral framework for investment through the General Agreement on Trade in Services (GATS), Trade Related Investment Measures (TRIMS) and Trade Related Intellectual Property Rights (TRIPS). Muchlinski argues that what is needed is a balancing of these priorities with the wider priorities of the existing UNCTAD programme.

With regard to current links between UNCTAD and the WTO, the International Trade Centre (ITC) acts as a technical cooperation agency of the two institutions, for the operational, enterprise-oriented aspects of development.[222] The ITC is the trade promotion arm of the WTO and UNCTAD for technical assistance aimed at enhancing the outward orientation of the private sector, and strengthening the

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219 *Op. cit.* n. 35.

220 24 June 2004, http.//www.unglobalcompact.org. Also important in the context of corruption are the US Foreign Corrupt Practices Act 1977, the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 and the UN Convention against Corruption adopted by General Assembly Resolution 58/4 of 31 October 2003.

221 P. Muchlinski, 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD', in Kamminga, Zia-Zarifi, *op. cit.* n. 94, p. 97.

222 http://www.intracen.org/index.htm

participation of developing countries and economies in transition in the international trading system,[223] to enhance performance in overall development goals. UNCTAD complements WTO's activities *inter alia* to build institutional infrastructure for trade and trade policy, data sharing and the development of joint studies.[224] There are also links between the WTO and the international financial institutions, such as an arrangement with the World Bank for co-ordination of activities involving developing countries.[225] As regards the ILO *vis-à-vis* the WTO, both the Singapore Ministerial Conference and the Doha Ministerial Conference affirmed commitment to the ILO's core labour standards, and the Doha Ministerial Declaration took note of work underway in the ILO, on the social dimension of globalization.[226] FDI, one of the 'Singapore issues', was included as an issue in the Doha Development Agenda (DDA).[227] With regard to the needs of LDCs in investment *vis-à-vis* development policies and objectives, human and institutional development, the Declaration refers to the need to work together with other institutions including UNCTAD.[228] In relation to investment regulation:

> any framework should reflect in a balanced manner the interests of home and host countries, and take account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances.[229]

The Doha Declaration envisaged negotiations on a multilateral investment agreement, but no substantial progress in this regard has taken place, either at Cancun (where there was opposition from developing countries-especially India, Malaysia and Thailand) or at the most recent WTO Ministerial Meeting in Hong Kong, in December 2005. The polarized positions of different groups of states in relation to investment regulation (like other controversial issues including subsidies in developed countries) has led to a stalemate in talks, as was evident in Hong Kong.

Muchlinski is of the view that the draft code could still have a role to play as its contents are less controversial now than in the politically polarized 1970s and 80s. It is also broad enough to encompass many of the issues that the contemporary agenda treats as core issues. But most of the resources of UNCTAD

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223 http://www.wto.org/english/the wto_e/whatis_e/eol/e/wto01_22.htm
224 *Ibid.*
225 *Ibid.*
226 WTO, Ministerial Declaration, Doha, 4 November 2001, WT/MIN (01) dec/1, 20 November 2001.
227 *Ibid.*, Paras. 20–22.
228 *Ibid.*, Para. 21.
229 *Ibid.*, Para. 22.

are channeled towards the making of policy, dissemination etc, and there is virtually no law-creating element. It is evident that the element of protection and promotion – which is most important in the context of human rights, development and the environment in a foreign investment setting – is largely confined to the realms of soft law, and there is, equally, an emerging body of international public values in this regard.

4.4.4 The relevant principles of international trade law

The law relating to international trade is governed primarily by a series of WTO agreements.[230] The GATT agreement provided the basic institutional framework for trade liberalization through reductions in tariffs, customs and other barriers to trade. The final agreement on the WTO, which now encompasses the GATT and related treaties, forms part of the Uruguay Round agreements.[231] In relation to FDI, the most relevant of the WTO agreements is the Agreement on Trade-Related Investment Measures.[232] This applies to investment measures relating to trade in goods. It brings the free-trade philosophy of the WTO/GATT system to investment, and seeks to ensure that any trade-restrictive and distorting effects of investment measures be avoided, as they adversely affect trade. There is in both the preamble and the body of this agreement, a focus on development and the interests of developing countries including least developed countries. But it is all predicated on the philosophy that the expansion and progressive liberalization of world trade and facilitation of investment across international frontiers to increase economic growth will bring about development for all. In this context, there is

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230 See in general, P. Van den Bosch, *The Law and Policy of the WTO*, CUP, Cambridge, 2005; R. Cunningham, *Trade Policies and Strategies*, International Law Publishers, International Law Publishers, 2005; C. Arup, *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property*, CUP, Cambridge, 2000; J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, MIT Press, Cambridge, 1997; on some of the implications of this agenda on developing countries, see South Centre, *The WTO Multilateral Trade Agenda and the South*, South Centre, Geneva, 1998. The proposal for the creation of an International Trade Organization as well as the Havana Charter purporting to create it – both rejected by the USA in the 1940s – included high in their agenda the controversial issue of the regulation of foreign investment. The GATT processes for the most part left investment regulation out until the Uruguay Round. The binding codes of the OECD on Liberalization of Capital Movements and Current Invisible Operations, 1963, further required the liberalization of capital movements over the long term. According to Young, Tavares, *op. cit.* n. 215, p. 4, "there have been three key and interrelated barriers to progress on a multilateral investment regime. The first concerns the problem of the relationship between multilateral rules and domestic priorities. The second relates to the balance between the rights of TNCs and obligations of countries (compared with the rights of countries and obligations of TNCs); and the third concerns asymmetries between home countries for FDI (mainly industrialized countries) and recipient host nations (mainly in the developing world)".

231 WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, CUP, Cambridge, 1999.

232 *Ibid.*, p. 143.

no overt provision for the protection or promotion of broader social concerns, and initial indications in practical terms are that TRIMS will only be against the interests of developing countries.[233]

The GATS[234] is relevant because trade in services often involves investment. Recognizing the growing importance of trade in services for the growth and development of the world economy, the aim of this agreement according to the preamble, is to establish a multilateral framework of principles and rules for trade in services, with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries.

The preamble also speaks of: the desire to achieve greater liberalization through successive multilateral negotiations aimed at promoting the interests of all participants, and at securing an overall balance of rights and obligations; the recognition of the right of members to regulate the supply of services within their national territories in order to meet national policy objectives; and the facilitation of the increasing participation of developing countries in trade in services. The body of this agreement likewise pushes forward the agenda for liberalization, and makes no mention of broader social concerns which could, of course, be positively and negatively affected as it provides both opportunities and challenges to development.[235] Since services can include a vast range of subjects – for instance, health care, education, tourism and provision of basic facilities like water and energy – GATS could have far-reaching consequences to LDCs, especially with the simultaneous rise in the use of MFN treatment, and the fact that in several LDCs, services like health care have been provided by the state.

It is increasingly common to include a MFN standard in investment treaties. Sornarajah states that this may universalize all the specifically negotiated advantages given by bilateral investment treaties.[236] The effects of a multilateral treaty that includes a MFN clause, accordingly, is difficult to contemplate because it universalizes every provision of every BIT. The general practice of MFN is to exclude from the scope of the clause regional agreements which give partners in regional agreements preferential treatment.[237] All GATS members agree to MFN treatment,

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233 A. Jayagovind, 'Shackling the Sovereignty: A Critique of the WTO Rulings on Investment Measures', in Jayagovind, *op. cit.* n. 197, p. 244.

234 Annex 1 B, *ibid.*, p. 286.

235 The report by the Sub-Commission on the Promotion and Protection of Human Rights, on Liberalization of Trade in Services and Human Rights considered *inter alia*, the issue of Human Rights, Trade and Investment. It expressed concern that international economic law and human rights law have developed as two separate regimes, with the risk that human rights principles will be marginalized as highlighted by the actual or potential human rights implications of WTO agreements. Also see Petersmann, *op. cit.* n. 198.

236 Sornarajah, *op. cit.* n. 206, p. 308.

237 *Ibid.*

which basically means that states must provide equal treatment to all foreign service-suppliers.

The TRIPS agreement[238] aims to reduce distortions and impediments to international trade, to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to trade. The Agreement on Agriculture (AA)[239] seeks *inter alia* to provide for substantial progressive reductions in agricultural support and protection resulting in correcting and preventing restrictions and distortions in world agricultural markets; and to establish a fair and market-oriented agricultural trading system. The preamble also noted that commitments under the reform programme should be made in an equitable way among all members, taking into consideration non-trade concerns, including food security and the need to protect the environment. Cassese comments that what is often missing is the *political will* of powerful states, which are bent on the pursuit of short-term interests and frequently excessively self-centred.[240] His main example is the current policy on agriculture where, in spite of pronouncements of free trade, the USA, European countries and Japan protect domestic agriculture by massive farm subsidies making products artificially cheap, and by high tariffs shielding them from the importation of foreign products. These subsidies and trade barriers result in industrialized countries' agricultural products such as cotton, rice and sugar being dumped on the world market, severely damaging developing countries.[241]

The TRIMS, GATS, TRIPS and AA were all made within the context of the Final Act of the Uruguay Round and the Marrakesh Agreement establishing the WTO (the WTO Agreement), and appear to make little or no provision for the protection of broader social concerns. They are all treaties and thus of much higher legal value than any pronouncement or agreement in the sphere of development or the regulation of TNCs discussed above. Thus the legal framework for the liberalization of trade and investment – protecting and promoting mostly goods, services and property interests – is destined to prevail over the corresponding agenda for the promotion and protection of social interests. However, this parallel agenda has also surfaced increasingly in the recent past, in many ways including anti-globalization movements, interventions by international institutions, states and non-state actors.

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238 Annex 1 C of the WTO Agreement, reproduced in WTO, *op. cit.* n. 226, p. 321. Other agreements with relevance to investment are the Agreement on Subsidies and Counterveiling Measures (which restricts some subsidies and counterveiling measures) and the Agreement on Dispute Settlement Understanding (where intergovernmental investment disputes are included). Young, Tavares, *op. cit.* n. 211, at pp. 3, 4 point out however, that the agreements do not appear to have been designed specifically with investment in mind, are limited in scope and lack integration.

239 WTO, *ibid.*, p. 33.

240 Cassese, *op. cit.* n. 177, p. 527.

241 *Ibid.*

Lately, trade has been intertwined with broader social issues, especially human rights, labour, environment and development, a fact which has been manifested in several ways. Increasingly, it is the developed countries and civil society groups, trade unions, academics, students and others who pursue these linkages. Some of their main concerns have been controlling trade practices which damage the environment, using trade and the WTO to enforce labour codes and human rights, and the effects of trade subsidies in the North on agriculture and development in the South.

Several cases brought before the WTO dispute settlement mechanisms have addressed the issues of trade *vis-à-vis* social interests. The WTO Dispute Settlement Body, in its resolution of cases concerning environment and trade, has used the concept of sustainable development. The *Shrimp Turtle Case* of 1998[242] concerned an import prohibition by the US on certain shrimp and shrimp products from India, Malaysia, Pakistan and Thailand, on the basis that they were harvested in a way that adversely affected endangered sea turtles, and contrary to US laws requiring particular methods of harvesting, excluding danger to turtles. The decision was challenged by the affected countries before the WTO Panel, which found that the ban could not be justified under relevant sections of GATT 1994. The US appealed to the Appellate Body, which found that its actions were an unjustifiable and arbitrary discrimination against the four countries. Moreover, it had not engaged the appellants in serious negotiations (like it had done with some other countries) towards agreements for the conservation of sea turtles before enforcing the ban.

The Appellate Body invoked the principle of sustainable development as an aid to interpretation, in relation to whether the US measures were provisionally justified. Here it referred to the Preamble of the 1994 WTO Agreement, which expressly acknowledges the objective of sustainable development. It stated that sustainable development has been generally accepted as integrating economic and social development and environmental protection, a conclusion supported by modern international conventions and declarations, including UNCLOS. Since sea turtles were an exhaustible natural resource, sustainable development was used to inform the decision that the US interest in conserving them was provisionally justified. On the other hand, the principle of sustainable development enunciated in the Preamble also informed the decision that the US action constituted unjustified discrimination, because the optimal use of the world's resources should be made in accordance with its objectives. Sustainable development was used to add colour to the interpretation of the WTO Agreements including GATT 1994. The Appellate

242 *US-Importation of Certain Shrimp and Shrimp Products/Shrimps-Turtles Case*, 12 October 1998, 38 ILM (1999) 118; Sands, *op. cit.* n. 6, pp. 965–970. See E.B. Weiss, J.H. Jackson, *Reconciling Enironment and Trade*, Transnational Publishers Inc., Ardsley, 2001; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, CUP, Cambridge, 2003.

Body used the decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment, which stated that there should not be any policy contradiction between an open, non-discriminatory and equitable multilateral trading system and acting for environmental protection and sustainable development, to support the use of the concept to interpret the WTO Agreements.

The *Beef Hormones Case*[243] concerned a European Community prohibition in a series of EC Directives, on imports of meat or meat products from cattle to which natural or synthetic hormones had been administered for growth promotion. Canada and the US challenged the prohibition, basically on the ground of alleged failure of the EC to undertake a risk assessment required by the relevant law, before adoption of such measures. The Panel upheld their challenges, based on inconsistency of the EC ban with relevant provisions of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS). The decision was overturned by the Appellate Body, finding that the initial burden lay with the party challenging the prohibition, rather than the party imposing it, under the SPS Agreement. The Body applied the Precautionary Principle, when it held that the function of the Panel was simply to determine whether the measures were sufficiently supported or reasonably warranted by the risk assessment, and did not require scientific certainty. In this case, the scientific studies relied on by the EC were too general in nature, and did not reasonably warrant or support the import prohibition. Therefore, the measures were held to be inconsistent with the relevant articles of the SPS Agreement.

There is a significant evolving body of jurisprudence on trade, environment, public health and other social issues within regional organizations like NAFTA[244] and the EU.[245] Both the WTO Agreement and the NAFTA Agreement, do allow for the inclusion of broader interests, in the light of sustainable development and the need for integration. With the Treaty of Amsterdam, sustainable development also became one of the fundamental objectives of EU integration as expressed in Art. 2 of the EC Treaty. The European Council in 2001 agreed on the EU Strategy for Sustainable Development and referred to the concept in the Laeker Declaration on the future of the EU, as a value defining the EU's global identity and role. The renewed Strategy for Sustainable Development of 2006[246] identifies seven key challenges, of an environmental, social and developmental

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243 *EC-Measures concerning Meat and Meat Products (Hormones)/Beef Hormones Case*, WT/DS48/AB/R, 16 January 1998; Sands, *ibid.*, pp. 979–981.

244 See for instance, *S.D. Myers Inc.* v. *Government of Canada*, Partial Award, 13 November 2000, 40 ILM 201, p. 1408.

245 See in general, O. De Schutter *et al.*, *Governance in the European Union*, Office for Official Publications of the European Commission, Luxemburg; M. Pallemaerts, A. Azmanora, *The European Union and Sustainable Development: Internal and External Dimensions*, VUB Press, Brussels, 2006; M. Pallemaerts, *EU and WTO Law: How tight is the legal straitjacket for environmental regulation?*, VUB Press, Brussels, 2006.

246 European Council DOC 10117/06 of 15/16 June 2006.

nature. The European Community has the most extensive and elaborate body of regional rules on international environmental law, application of standards, and emerging jurisprudence on integration of economic and non-economic concerns before the European Court of Justice (ECJ).[247] The idea of sustainable development needs to find its way into the numerous Bilateral Investment Treaties, as well as the ICSID law and dispute settlement process. The ICSID Tribunal has generally avoided taking into consideration, non-economic concerns, as exemplified by the *Santa Elena Case*,[248] where it chose not to take account of environmental obligations under the World Heritage Convention, in computing the quantum of compensation payable.

In the continued process of liberalization within a rule-based system, the WTO rules require the holding of biennial ministerial-level meetings. Having met at Marrakesh in 1994 and in Singapore in 1996, the 3rd Ministerial Conference in Seattle in 1999 did not materialize, mostly because of vehement and even violent opposition from a cross-section of transnational forces. Some of the main arguments of these diverse groups were based on the adverse effects of WTO laws on broader social issues including human rights, labour and the environment as well as development interests. Two years later in 2001, the Doha Round was intended to be a development round, and the Doha Declaration included several items relating to investment – for instance, negotiations on certain issues in GATS and TRIPS. Working groups continue to study certain relevant topics, including the relationship between trade and investment. The meeting in Cancun in 2003 did not have any significant impacts for the regulation of investment or for forging ahead an agenda towards a fairer and more sustainable development. Unfortunately, history virtually repeated itself in this regard, in the 2005 meeting in Hong Kong, although the main task envisaged for the 6th Ministerial Meeting was to settle a range of questions that would shape the final agreement of the DDA intended to be completed by the end of 2006.[249] The investment principles have not progressed, and have at this point failed, within the WTO.

The Sustainability Impact Assessment is also an instrument which deserves attention in WTO trade negotiations. The growing acceptance of sustainable development as an overarching policy goal has increased interest in assessing the impact of certain interventions on sustainable development, and in integrated impact assessment, based on several sustainable development principles and indicators, as a method of giving equal consideration to economic, social and environmental impacts.[250] This envisages a form of strategic-level appraisal of policy, plan and

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247 See for example, Case C-230/00, *Commission* v. *Belgium*, 2001 European Court Reports (ECR) I-4591; Joint Cases 418/97 & 419/97; *ARCO Chemie Nederland Ltd.*, 2000 ECR I-4475.

248 *Compania del Desarrallo de Santa Elena S.A.* v. *The Republic of Costa Rica*, ICSID Review, 15 (2000) no. 1, p. 167.

249 http://www.wto.org/english/thewto_e/minist_e/min05_e/min05–e.htm

250 C. George, C. Kirkpatrick, 'Putting the Doha Principles into Practice: The Role of Sustainability

programme, unlike the better known tools of cost-benefit analysis, environmental impact assessment and social impact assessment which usually deal with the project level.[251] The tool of SIA has been adopted by the EU, as part of its policy appraisal process.[252]

Multilateral and bilateral frameworks for investment and trade, progressing in the direction of liberalization and deregulation, are buttressed by related developments in other spheres – for instance, privatization and structural adjustment. At the other end of the spectrum, the quests for justice, equity and sustainable development require some moderation of these movements in the pursuit of a more balanced approach. Equilibrium between public purpose and private interest cannot endure an unequivocal quest for liberalization, insensitive to the vibrant body of international public values, policy and law on development, human rights and the environment.[253] In the absence of immediate prospects for a more satisfactory multilateral/bilateral regime on investment regulation, alternative, supplementary and complementary schemes such as interventions of home and host states, non-state actors and regional and national arrangements assume added significance.

The Report entitled 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium' or the Sutherland Report of 2005[254] evaluates the WTO on two tracks – firstly, principles of globalization and the multilateral trading system; and secondly, institutional improvements, including how to increase efficiency in decision-making and improve transparency of the WTO as an institution.[255] Some conclusions and recommendations relevant to this study are that: governments need to show restraint in pursuing Preferential Trading Agreements (PTAs) to avoid damage to the multilateral trading system (concern was expressed that preferential treatment is becoming merely a reward for governments pursuing non-trade related objectives); developed country members would establish a date to move all tariffs to zero; a set of clear objectives should be developed for the

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Impact Assessment', in H. Katrak, R. Strange (eds.), *The WTO and Developing Countries*, Palgrave Macmillan, UK/USA, 2004, pp. 315–338, at 326. SIA envisages assessment of public/governmental action: at p. 327.

251 *Ibid.*, p. 327.

252 *Ibid.*, p. 326. The European Council adopted an Action Plan for a system of integrated impact assessment, together with guidelines on minimum standards for stakeholder consultation at its meeting in Seville, June 2002. The European Commission's Directorate for Trade is committed to carry out SIAs for all new trade agreements, and a study is taking place *inter alia* for the DDA.

253 Also see W. Benedek, 'Implications of the principle of sustainable development, human rights and good governance for the GATT/WTO' and F. Weiss, 'The GATT 1994: environmental sustainability of trade or environmental protection sustainable by trade?', both in Ginther *et al.*, *op. cit.* n. 79, at pp. 274, 382 respectively.

254 By a panel chaired by Peter Sutherland, ex-Director General of GATT, January 2005, http://www.wervel.be/ENdossiers/fm_200502/fm_200502–0306.htm

255 *Ibid.*

WTO's relationship with civil society; new agreements should contain provisions for a contractual right for least developed countries to receive proper technical assistance and capacity building as they implement new obligations.[256]

4.5 Conclusion

Sustainable development embraces economic development, environmental protection and human rights.[257] The law and policy relating to sustainable development at the international level deals predominantly with the environmental aspect – less with human rights, and still less with the development dimension,[258] and this is reflected at the regional and domestic levels. Against the background reality of international inequality, power and politics, the pursuit of justice, equity and sustainable development require some fortification by way of affirmative protection of neglected interests and the quest for equilibrium. Justice requires a socially inclusive, rather than exclusive, approach. In view of the failure of traditional approaches to mete out justice, especially social and distributive justice between and among nations, a possible way forward is to focus on the advancement of common and universal interests, a mutually acceptable set of values. Human rights, development and the environment can be situated within such common values, and the idea of common interests could pave the way for some points of convergence among the three dimensions of economy, society and the environment. With the decrease of governmental regulation necessitated by globalization, equity may also decline. Thus efforts need to be made to infuse the values of justice and equity into the law at the international, regional and national levels. The overall analysis of international legal principles on economics, environment and human rights clearly illustrates that whereas investor, property and economic interests often enjoy protection/promotion by hard, binding laws and strong institutional support, the protection/promotion of environmental, social and human, especially development interests, is relatively weak.

Sustainable development it is clear, has assumed a certain, albeit ambivalent status in public international law. This chapter clearly illustrates that it is in the environmental context that sustainable development was conceived, and to which it continues to owe, for the large part, its existence. Although sustainable development discourse in international law now envisages a three-dimensional concept, this has not really begun to take shape in international instruments. Such changes will necessarily take time, given that each of these branches evolved in its own niche. The evaluation of human rights and economic law also show points of

256 *Ibid.*
257 Qureshi, *op. cit.* n. 163, p. 341.
258 See Schrijver, *op. cit.* n. 199.

integration/convergence, but it will take time for these areas to proceed in a process of integration. Instruments like the New Delhi Declaration are signals of a new direction, which is more holistic. Such approaches need to now infiltrate the practice of international as well as national law, to become real indicators of convergence. The magnitude of the body of values, represented by these three dimensions of international law, can only be truly realized through several means of incorporation of these values – for instance, through integration, domestic implementation and institutionalization. The methodology of the sources of international law, because of its inherent limitations, needs to be supplemented by these innovations, as well as interventions from regional and national arrangements, host and home states and NSAs. In other words, there is a need to stretch the sources to make them more inclusive and reflective of practical realities, through broader interpretation. The law here is only part of the whole picture, and an effort must be made to bring the law closer to the large body of international public policy/values.

A substantial portion of the laws which have value/potential value in this study belong to the body of soft law. Such law is necessarily limited in terms of impact and role, and serves mainly at the policy level. Domestic implementation of this body of international law/policy/values through, for instance, legislation of host states and extraterritorial application of home state laws constitute possible steps towards the practical implementation of these laws.[259] Cases of PIL bear witness to how some change can be realized, as soft laws – for instance, in the area of sustainable development – have been applied in South Asia through a series of judicial decisions in the region.[260] The increasing role of non-state actors, both civil society and the business sector, further help to consolidate soft laws, as they are reproduced in several initiatives, especially TNC statements of policy and voluntary codes of conduct. Implementation of these codes and policies give soft laws a practical effect.[261]

Sornarajah raises the issue whether matters of international concern on the environment and human rights are not *jus cogens* principles which trump the rights of foreign investors to unilateral arbitration created by investment treaties. He suggests that some values in international environmental law and international human rights law are so fundamental that the propositions of investment treaties designed to protect TNCs should give way to them.[262] He also suggests that these issues should not be dealt with by arbitral tribunals created by investment treaties which have only a narrow mandate to decide issues that arise from the investment. Rather, they should be decided on by tribunals that reflect the interests of the

259 See Chapter 5.
260 See Chapter 6.
261 See Chapter 7.
262 Sornarajah, *op. cit.* n. 206, p. 265.

international community as a whole, and Sornarajah advocates a doctrine of arbitrability which ensures that such community interests should not be disposed of by arbitral tribunals which draw their jurisdiction from the will of only the parties to the dispute before them.[263] Further, the issue may be raised if fundamental human rights, developmental and environmental interests forming part of a community system of values can transform the nature of a dispute from *inter partes* to *erga omnes*, beyond the concerns of only the parties to the dispute. Judge Weeramantry, in *Hungary* v. *Slovakia*, drew attention to the inadequacy of international law rules designed to decide the interests of the two parties to a dispute, in largely an adversarial fashion, in cases involving the greater interests of humanity and planetary welfare.[264] He suggests that issues in the nature of development versus environment and human rights, for instance, are of an *erga omnes* character, requiring reconsideration of the application of *inter partes* rules.[265] He also refers to the inadequacies of technical judicial rules of procedure for the decision of scientific matters. It can be argued that although bilateral and multilateral treaties for investment protection as well as dispute settlement arrangements tend to discard/displace/distort human rights and broad social interests the fundamental nature of these values together with increase in their horizontal application should facilitate their promotion/protection. The limited mandates of dispute settlement mechanisms like ICSID may need to be revisited to accommodate a more holistic approach. The ICSID Convention does not presently envisage non-economic issues.

There is academic opinion to the effect that the universal recognition of human rights calls for the constitutionalization of international law and foreign policies based on human rights and the principles of the rule of law, limitation and separation of government powers, social justice, democratic peace, and national as well as international constitutionalism.[266] The idea of constitutionalism involves a means by which issues relating to the construction of the institutions of the state, legal and political legitimacy, democratic accountability and the limits of political freedom are conceptualized and articulated within a society. Power dynamics play

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263 *Ibid.*

264 Separate Opinion of Vice-President Weeramantry, *Hungary* v. *Slovakia*, ICJ, 1997, General List no. 92, reproduced in SACEP/UNEP/NORAD, *Compendium of Summaries of Judicial Decisions in Environment Related Cases*, SACEP, Colombo, 1997, at pp. 241, 242.

265 He notes at p. 242: "We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation". As environmental law proceeds to develop, "it will need all the insights available from the human experience, crossing cultural and disciplinary boundaries, which have traditionally hemmed in the discipline of international law". (p. 243)

266 Petersmann, *op. cit.* n. 104, p. 3.

a basic role on the international plane, often standing in the way of global consensus, thus making the idea of constitutionalism a potentially useful concept. On the domestic plane, constitutionally entrenched rights have been used in many of the South Asian public interest litigation cases, where judicial review mostly in the nature of writs have led to decisions purporting to uphold the rule of law. This process has been facilitated by the use of Directive Principles of State Policy and conceptions of social justice in domestic Constitutions, as interpretive aids, embodying the spirit of the law. Although there is no constitution as such at the international level, certain fundamentals like *jus cogens, erga omnes* and the preamble, basic principles and purposes of the UN Charter could, it can be argued, be used as guides to interpretation, and similarly serve to uphold the rule of law.

Chapter Five

THE ROLES OF HOME AND HOST STATES

5.1 Home and Host States and Sustainable Development

The apparent gap in the relationship between TNCs and public international law, specifically with regard to regulation, raises the issue of the respective roles of home and host states.[1] The right to regulate foreign investment is implicit in the principles of territorial sovereignty of states and sovereignty over natural resources, but loses some of its original meaning in the context of globalization,[2] which affects the dimensions and ramifications of state sovereignty, yet does not supersede it. Host states may now have less territorial control over TNCs, but as a parallel process, home states appear to wield more extraterritorial control. Since TNCs are essentially still to be governed by national laws, there is a major role for states to play in their regulation. As the popularly elected guardians of the public interest, it is essential that states perform this function.

Home and host states are significant players in the matrix of actors in this study, and can, in principle, be instrumental intermediaries in several ways to make corporate activity consonant with international, regional and national standards and policies towards achieving sustainable development. Within the framework of sustainable development, sovereignty could also imply new obligations towards humanity and the environment. Sustainable development requires norm-setting followed by implementation and enforcement at all levels, particularly at the domestic level. Market-based reforms like deregulation, privatization and structural adjustment tend to weaken the capacity of the state to regulate foreign investment.[3] On the whole, globalization, sovereignty and sustainable development all have significant, interrelated and at times conflicting impacts on foreign investment regulation *vis-à-vis* host and home states.

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1 See M. Sornarajah, *The International Law on Foreign Investment*, CUP, Cambridge, 2004, Chapters 3 and 4; UNCTAD, *Host Country Operational Measures*, UN, New York, 2001; UNCTAD, *Home Country Measures*, UN, New York, 2001; J. Woodroffe, 'Regulating Multinational Corporations in a World of Nation States', in M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, KLI, The Hague, 1999.

2 See N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, CUP, Cambridge, 1997, pp. 173–198, 368–395.

3 S. Subedi in K. Arts, P. Mihyo (eds.), *Responding to the Human Rights Deficit: Essays in Honour of Bas de Gaay Fortman*, KLI, The Hague, 2003, p. 171, at 177.

With regard to the economic, social and environmental dimensions of sustainable development, public international law in each of these spheres creates complex bodies of multilateral arrangements, including Multilateral Investment Treaties (MITS), at present confined mostly to guidelines, soft law and policy statements which impose obligations on actors including home and host states, which thereby have the potential to promote development, human rights as well as environmental protection. MITS emanate from consensus among states, and also serve to regulate, *inter alia*, the conduct of states. Bilateral Investment Treaties (BITS), which constitute a basic mechanism for the regulation of foreign direct investment, are premised primarily on the objective of promoting and protecting investments, rather than balancing interests. Hence, apart from the protection of property rights, the impact on the furtherance of economic development, human rights or environmental protection has not been a key concern, and whether there will be a change in this situation is yet to be seen.[4] In fact, Sornarajah points out that the globalization protests against investment agreements were mainly based on the fact that they showed little concern for the international community or the host state in the protection of certain values, specifically human rights, environmental protection and economic development.[5] He states that those who argue along these lines would want to ensure that the regulatory function of the state in these areas of public interest be retained, that the state should have a defence to any claims made by foreign investors on the basis of the protection of its interests, and also have the means of recourse to the same dispute resolution mechanisms provided in the treaty in the event of violation of its interests.[6] Recognition of a regulatory right of the state could undermine the aim of investment protection, requiring recognition that a state has a right to intervene in investments endangering broad social interests.[7] Sornarajah states:

> But, the issue now is whether there has been too rapid a movement in favour of the protection of the rights of the investor without heeding the interests of the host state and its environmental and other interests. A reaction will set in if there is further movement in favour of protection without assuaging the valid concerns of those who argue the case for environmental protection, human rights and economic development. Unless investment treaties come to reflect a balance between the rights of investors and the regulatory concerns of the host states, their future viability will continue to be

4 Subedi, *ibid.*, at p. 180, states that unequal power relations between home and host states have led to most BITS being lopsided, and enabled the imposition of developed country standards on developing countries, which are desperate for foreign investment. He is thus of the opinion that it is unlikely that human rights protection will come about through this mechanism. See also M.K. Addo, *op. cit.* n. 1; M. Kamminga, S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, KLI, The Hague, 2000; N. Jagers, *Corporate Human Rights Obligations: In Search of Accountability*, Intersentia, Antwerp, 2002.

5 Sornarajah, *op. cit.* n. 1, p. 259.

6 *Ibid.*

7 *Ibid.*, p. 86.

> contested. Thus concern will become particularly acute as evidence keeps mounting that such treaties do not lead to greater flows of foreign investment into a host state or that they do not necessarily lead to economic development. The question will then be raised more stridently as to why there is so great a surrender of sovereignty in favour of the interests of the foreign investor when the *quid pro quo* that the host state receives is tenuous and uncertain. If the fervour for economic liberalism dies down, the challenges to investment treaties will become more strident.[8]

As far as the corporate sector and the promotion and protection of broader social interests is concerned, the responsibility in diverting, dispensing and distributing resources to needy beneficiaries through the correct channels would appear to lie primarily with states. Given the imbalance of economic and political power between most host and home states, the arena for bringing issues of regulation to the international platform was in various multilateral institutions such as the now defunct UNCTC. These issues had some potential to evolve in the bygone era of a bipolar world setting, the emergence of numerous newly independent nations, national sovereignty and the NIEO.

In the fundamentally different global context of today, the race for FDI by developing countries could result in a race to the bottom rather than a plea for regulation. In their recent approach, which concentrates more on economic development than human, social and sustainable development, there is sometimes opposition to this movement by developing countries. In the light of growing concern for global public values, the situation has changed so much that it is now primarily developed countries, together with a wide range of actors – trade unions, professional associations, academics, students and others from civil society and NGOs in both North and South – that advocate an agenda for inclusion of broader social concerns, for instance the move to include labour and environment issues in the WTO agenda. Judiciaries in several countries have become more vocal as well as visible actors who can make a meaningful contribution to both holistic development and its practical implementation, and to the development of global public values and policies. There is also a general tendency for distinctions to become blurred, including the distinction between North and South, and with the emergence of public – private partnerships, the distinction between public and private entities. This indeed reinforces the idea of international public values, policy and law. In the gradual transition from government to governance, it is no longer simply the governments but a broader range of representatives who together determine the regulatory climate by host and home states. International organizations also colour the nature, extent and effectiveness of these regulatory efforts through their interventions, and have a salutory role to play, given their cross-cutting nature of representing states with different interests, as well as increasing links with other segments of society.

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8 *Ibid.*, pp. 267, 268.

Home states

Home states have responsibilities in the promotion and protection of human rights and the environment through suitable economic policies and laws. They can exercise substantial control over TNCs based in them, and benefit from the latter's economic activities.[9] They usually have relatively higher standards of human rights and environmental protection than most host states, and more experience, resources and capacity for enforcement. Involvement by home states in this context can take place in several ways – for instance, through intergovernmental and international institutional arrangements. Home state regulation through extraterritorial application of national laws has also become popular in recent decades. The universality of human rights and the environment and the need to reinforce mutual and universal values and interests can serve to justify the use of extraterritorial intervention. In the environmental dimension of sustainable development, international environmental law provides a further basis for greater home state involvement.[10]

The USA has been liberal in the application of its laws extraterritorially. The United States Alien Tort Claims Act of 1789 has been liberally used to give extraterritorial application to national laws. The UK and several European countries have also applied their legislation extraterritorially in certain instances. On the other hand, there are many factors which make home states increasingly reluctant to regulate TNC activity abroad. It is not an easy task in the first place, and requires much political will as well as allocation of resources.[11] Unilateral means and self-appointed methods of such a nature are not inevitably undertaken by states, and may be unpalatable in terms of diplomacy and international relations. They could also come in for criticism for attempts to impose/export their own

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9 Sornarajah, *ibid.*, at p. 169, states that the rationale for home state control is that developed states owe a duty of control to the international community and do in fact have the means of legal control over the conduct abroad of multinational corporations. In moral terms, the activities of MNCs benefit the home state's economic prosperity, and thus it is incumbent on home states to ensure that these benefits are not secured through injury to other states or the welfare of the international community as a whole. The notion that home states have duties as well as rights is evolving, requiring them to ensure that MNCs act in accordance with emerging standards of accountability. He points out at p. 170 that a group of developing countries, namely China, India, Kenya, Pakistan and Zimbabwe have submitted that if there is to be a WTO instrument on investment, it should contain provisions for home country measures to control activities considered harmful to the development of host states.

10 For instance, Prin. 13 of the Rio Declaration requires states 'to cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction'. And Prin. 12 calls upon states to 'cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation'.

11 See Subedi, *op. cit.* n. 3, pp. 177, 178.

values, and developing countries are generally resistant to such endeavours,[12] as they rely heavily on sovereignty and territorial integrity.

One of the first applications of extraterritoriality in the recent past was in the case of *Filartiga* v. *Pena Irala*[13] in the USA in 1980, where the ATCA was applied to a case of torture allegations abroad, committed by officials of a foreign government. It was later applied to other violations of human rights. With legal landmarks like the *Pinochet case*,[14] where the House of Lords assumed jurisdiction under the Torture Convention over the trial of torture allegations against the former President of Chile, the concept of universality was extended.[15] On the other hand, the assertion of universal jurisdiction over certain international crimes under the genocide legislation in Belgium was subsequently amended.[16] Overall, the tendency for national courts to increasingly assume jurisdiction over violations of human rights could eventually influence related developments in public policy and law at the international level.

US cases on extraterritoriality involving firms and their harmful activities abroad – such as *White* v. *Pepsi Co.*[17] and *Dow Chemicals* v. *Alf Daro*[18] where the doctrine of *forum non conveniens* was struck down – were relatively more conducive to the protection of social interests than cases like *In re Bhopal Gas Plant Disaster*,[19] where it was upheld. The TNC Freeport-Mcmoran was sued in the US for the violation of environmental and human rights standards in Irian Jaya.[20] Here the precautionary principle was held not to be sufficiently established in customary international law as to give rise to a claim under the ATCA. In the UK, a British citizen sued the Rio Tinto Zinc Group for injury to his health when working for their subsidiary in South Africa, and jurisdiction was upheld by the House of Lords.[21]

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12 *Ibid.*

13 630 F.2d 876 (2d Cir. 1980). Other examples of US statutes with extraterritorial application include the Foreign Corrupt Practices Act of 1977, the Helms Burton Act and the Torture Victims Protection Act.

14 *Regina* v. *Bartle*, HL, 24 March 1999, (1999) 2 All ER 97, (1999) 2 WLR 827.

15 *Ibid.*, judgment of Lord Browne-Wilkinson; Human Rights Watch, 'The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad', http://www.hrw.org/campaigns/chile98/precedent.htm

16 See Laurie King-Irani, 'On Learning Lessons: Belgium's Universal Jurisdiction Law under Threat', http://indictsharon.net/warcrimes-20030624lki.shtml

17 866 F.2d 1325 (11th Cir. 1989), cited in vol. 104:7 *HLR*, 1991, p. 1618, referred to by S.P. Subedi in F. Weiss, E. Denters, P. De Waart (eds.), 'Foreign Investment and Sustainable Development', *International Economic Law with a Human Face*, KLI, The Hague, 1998, at p. 426.

18 768 S. W. 2d 674 (Tex. 1990) Cert. Denied, 111 S. Ct. 671 (1991).

19 634 F. Supp. 842 (S.D.N.Y.) affirmed in 809 F.2d 195 (2d Cir. 1987).

20 *The Economist*, 20 July 1996, p. 57; *Beanal* v. *Freeport-Mcmoran*, 969 F. Supp. 362, US District Court of Louisiana, 1997, affirmed 197 F3D 161 (US Court of Appeals for the 5th Circuit, 29 November 1999).

21 *Connelly* v. *RTZ plc.*, (1998) AC 854, cited by Subedi, *op. cit.* n. 3, p. 176. In *Lubbe* v. *Cape plc.*, (2000) 1 WLR 1545, cited by Subedi, *infra*, again the HL held that a British-based TNC could be taken to court for the injurious acts of its subsidiaries abroad.

Presbyterian Church of Sudan v. *Talisman Energy* is a case against a Canadian company for its alleged complicity in genocide, war crimes and torture in Sudan.[22] *Wiwa* v. *Royal Dutch Petroleum Company and Shell Transport and Trading Company*[23] arose out of the alleged violation of human rights and environmental damage caused to the Ogoni people of Nigeria, and again the Court held that the case could be heard in the US.

In *Doe* v. *Unocal*,[24] a class action was brought by tribal people in Myanmar, who alleged numerous human rights violations and environmental damage by the Burmese government and Unocal in the course of building a gas pipeline from Myanmar to Thailand. Unocal was alleged to have knowingly used forced labour to construct the pipeline. It contracted with the military to provide security, and the latter, was alleged to have committed atrocities, for which it was argued that there was corporate complicity and indirect legal liability on the part of Unocal. Although the state was found to have sovereign immunity, the plea did not shield Unocal from an action in relation to complicity in the alleged acts. The claims were based on the US Alien Tort Claims Act. After years of protracted litigation, a trial date had been set for June 2005, but in March 2005, the parties announced that a final settlement had been reached.[25] The agreement by Unocal includes direct compensation and 'substantial assistance' through funds for programs to improve living conditions, health care, and education. Since most cases of this nature under the ATCA have been settled, dismissed, or have not proceeded beyond preliminary issues of jurisdiction, *Doe* v. *Unocal* would have been of great significance, had it proceeded to trial. The case is however, part of a larger trend to limit the use of the ATCA in the case of acts by US corporations abroad, beginning with *Sosa* v. *Alvarez-Machain and others*.[26] This case involved the abduction of a Mexican national, Dr. Alvarez-Machain, through an agent hired by the US Drug Enforcement Agency, to bring him to the US for trial. The Supreme Court on the one hand, upheld the application of the ATCA in cases of the most serious violations of human rights. On the other hand, however, such use was

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22 374 F. Supp. 2d 331 (SDNY 2005).

23 *Ken Wiwa and Jane Doe, plaintiffs against Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC, Defendants, Ken Wiwa et al., Plaintiffs against Brian Anderson*, Defendant, 96 Civ. US 8386 (KMW), US DC for the SDNY, 2002 U.S. Dist. Ct., cited in M. Fitzmaurice, 'Case Study: *Wiwa and Royal Dutch Petroleum and Shell Trading Company* before the U.S. Court of Appeals for the Second Circuit', paper presented at the Sessions on 'Corporate Responsibility for Human Rights and Environmental Damage – Issues of Transnational Litigation including International Jurisdiction', *Hague Joint Conference on Contemporary Issues of International Law: From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System*, The Hague, 3rd–5th July 2003; 392 F.3d 812 (5th Circuit) 2004.

24 (1997) 963 F. Supp 880; *Doe I* v. *Unocal Corporation*, 27 F. Supp. 2d 1174 (CDCal. 1998); *Doe I* v. *Unocal Corporation*, 395 F.3d 932 (9th Circuit 2002).

25 EarthRights International, 'Final Settlement Reached in *Doe* v. *Unocal*', http://earthrights.org/news/unocalsettlefinal.shtml, 10 May 2005.

26 US Supreme Court, 29 June 2004, www.findlaw.com

limited to those human rights abuses classified as violations of the law of nations under the ATCA. Thus they had to be specific, universal, and obligatory international norms, in keeping with the express provisions of the Act. In *Khulamani et al.* v. *Barclays*,[27] a district court in New York held that the ATCA does not apply to cases of aiding and abetting. Here a South African NGO, Khulamani, representing over 30,000 victims of apartheid, sued several TNCs including Barclays Bank and Rio Tinto, for their alleged involvement in supporting the regime of racism. The case was dismissed, on the basis that judgments of the tribunals of Nuremburg, former Yugoslavia and Rwanda were not binding sources of international law, whereas they had been used in the *Unocal* and *Talisman* cases in relation to liability for aiding and abetting.

There appears to be no consistency in the extraterritorial application of home state laws, and transnational litigation is largely dependent on the judicial arm of the government in home countries, whose trends as seen above, change from time to time, depending on a variety of factors. It is, in one sense, not satisfactory to rely on a foreign court to mete out justice, in as basic a sphere as human rights. Excessive dependence on home countries and their legal systems and perhaps also political climate, lack of uniformity in standards resulting in uncertainty and unpredictability, as well as possible conflict with international law are other problems which could arise from application of home state laws. However, it provides one option, which is effective from the standpoint of justice. It can therefore certainly supplement a more universal mechanism for the protection of human rights as well as the environment. On the other hand, one advantage of extraterritoriality is that the relatively higher standards of protection of broad social interests in home states could, through this mechanism, be 'exported' to host states. Extraterritorial application of home country laws could spread the application of CSR and provide access to justice, which may otherwise be denied.

Transnational litigation has been instrumental in the emergence of corporate accountability,[28] and can further social justice on the international plane. Claims against corporations are for the most part decided under national law, but public international law norms are relevant to TNCs *vis-à-vis* social interests. The bases of jurisdiction – essentially related to sovereignty, and founded generally on territoriality and nationality, and exceptionally on extraterritoriality and universality – have varying degrees of relevance here. The effects doctrine,[29] jurisdiction based on nationality/active nationality, universal jurisdiction and extraterritorial

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27 *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (SDNY2004).

28 See F. van Hoof, 'International Human Rights Obligations for Companies and Domestic Courts: An Unlikely Combination?', in M. Castermans-Holleman, F. van Hoof, J. Smith (eds.), *The Role of the Nation State in the 21st Century, Human Rights, International Organisations and Foreign Policy: Essays in Honour of P. Baehr*, KLI, The Hague, 1998, p. 47; also see S. Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, 2004.

29 See Chapter 3.

application of national laws all have significant ramifications on the role of home states in this context.

Like similar arrangements by the UN and the ILO, the OECD Guidelines[30] exemplify collective efforts of home states to influence the activities of TNCs through multilateral arrangements. Some basic human rights and environmental obligations for the private sector are laid down by the OECD therein. National laws of home countries can wield influence, and several states have adopted regulations for pension plans and other financial institutions requiring companies to disclose information about socially responsible investment practices.[31] There are also several measures under consideration such as Corporate Codes of Conduct and Ombudsman for companies operating abroad, in developed host states.[32] These can complement parallel efforts at the multilateral level – for instance, the proposed UN Norms. National arrangements, as well as the evolution of international consensus at the bilateral and multilateral levels would certainly have an impact on transnational litigation primarily through interventions by home and host country courts.

Host states

The potential to ensure rational use and distribution of benefits from FDI lies primarily with host states. Since investment activity takes place within their territory, they need to adopt micro-policies and laws in relation to issues of trade and investment in keeping with their macro-level national development objectives. When TNCs operate within the territory of host states, their national laws would normally apply under private international law rules. Host states can adopt laws and policies, which aim to influence TNC activity as well as local business. But as pointed out by Malanczuk, in practice, regulation at the national level is a complex issue.[33]

The aborted draft UNCTC Code of Conduct for TNCs[34] asserted the right of the host country to regulate TNCs and the latter's duty to respect the territorial sovereignty of host states. According to para. 8 of the Draft Code, TNCs were subject to local laws. The nexus between international and national laws was apparent in para. 41 of the UNCTC Code which stated: 'Transnational Corporations shall carry out their activities in accordance with national laws, regulation, established administrative practices and policies relating to the preservation of the environment in the countries in which they operate and with due regard to international standards'.

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30 OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976.
31 D. Abrahams, *Regulating Corporations: A Resource Guide*, UNRISD, Geneva, July 2004.
32 *Ibid.*
33 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, London, 1997, p. 102.
34 UN Doc. E/1990/94, 12 June 1990.

Host states in the developing world often lack stringent legislation for the protection of human rights and the environment, and the capacity for enforcement. Raising standards can have adverse economic consequences, posing a dilemma for them. A race to the bottom is a reality among third world states, through the lowering of standards in competition for foreign investment. Host state regulation requires an international law basis, for legitimacy, credibility, acceptability and efficacy. Host country laws on the environment, development and human rights and their implementation need to be enhanced. The body of international law and multilateral instruments on the responsibilities of TNCs need to be implemented locally through domestic legislation and policy decisions. Foreign investment laws need to be holistic, and address these broader concerns with a cradle-to-the-grave approach, taking into account the rights and responsibilities of the different actors involved. Another possibility for host countries is to apply home country standards to TNCs. This can be done through the host country passing laws requiring TNCs to apply certain standards in their conduct. However, this raises issues as to the application of different standards – to local and foreign firms and among different foreign firms – administrative difficulties and allegations of denial of national treatment. The political–economic realities that circumscribe the ability of developing countries to regulate foreign investment through the transfer of rights and powers from the public to the private sphere are another limitation in this area.

States in the global South often relax foreign investment laws and even though they are purportedly in the pursuit of sustainable development, rarely adopt a holistic approach in the sense of rationalizing laws on FDI and broader social concerns. International law and multilateral instruments on the responsibilities of TNCs and sustainable development need to be implemented locally through domestic legislation, policy, and ideally, judicial decisions. National foreign investment laws would do well to go beyond purely economic concerns, and host states do have sovereignty-based rights in deciding whether to grant entry to an investment. But host state regulation is not a straightforward option, and the judiciary in a host state may sometimes be more able and willing than the executive or the legislature, to engage in finding equilibrium.

Technically, TNCs can be sued in the host state, although as the Bhopal litigation illustrated, the issue is complex. In the Sri Lankan case of *Bulankulama et al.* v. *The Secretary, Ministry of Industrial Development et al.*[35] economic activity was required to be subject to constitutionally entrenched human rights and equality provisions. The court found that there was an infringement of the fundamental rights of the petitioners, all local residents – namely the rights of equality, freedom to engage in any lawful occupation, trade, business or enterprise, and freedom of movement and of choosing a residence within Sri Lanka. Moreover, the

35 7 (2) SAELR 2000, p. 1.

legislation on Environmental Impact Assessment had not been complied with, and the court required that this be done. Together with other recent judicial decisions, this may signal a trend towards the convergence of economic and other interests, at least through decisions of the judicial arm of the government.

From a developmental standpoint, host states appear to be ideally situated to mould holistic macroeconomic and social laws and policies in consonance with their long-term development objectives. Their ability to regulate the admission of foreign investment leaves scope for a preventive approach in the protection and promotion of human rights, development and the environment.

Interesting approaches are also emerging from developing countries in Africa and Latin America. In Africa, the Ghanian cases of *Ashanti Goldfields* v. *The People of Akrofoum*[36] and *Terberebie Goldfields Ltd. and Others* v. *The People of Wassa Fiase and Others*[37] provide two examples of such approaches. In the first case, some solutions to human rights and environmental violations by the foreign investors were reached through negotiations with the people, through local government officials like the District Chief Executive and the Member of Parliament for the area. An acceptable agreement was reached between the three parties: the company, the local community and the local authority. It has been observed that conflicting views on water preferences here stemmed from different perceptions of development. The company presented the traditional perspective of development where economic values were the main concern, virtually to the exclusion of others. The local community presents a more contemporary approach, where environmental, cultural and social values are just as important.[38] However, in the face of weak enforcement and implementation, there is a need for stronger institutions, both governmental and nongovernmental.

In Latin America, in the conflicts that pervade the mining sector – for instance, gold mining in Surinam – it has been argued that an ombudsperson or an international NGO mediator could play a significant role.[39] The examples from Africa and Latin America invoke the use of alternative methods of dispute resolution – namely, negotiations, mediation and the ombudsperson. The utility value of these Alternative Methods of Dispute Resolution as well as arbitration and other such mechanisms do not appear to have been adequately examined in human rights/

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36 Cited in D. Korsah-Brown, 'Environment, Human Rights and Mining Conflicts in Ghana', in L. Zarsky, (ed.), *Human Rights and the Environment: Conflicts and Norms in a Globalizing World*, Earthscan, London, 2002, at p. 88.

37 *Ibid.*, p. 90.

38 *Ibid.*, p. 89.

39 F. McKay, 'Mining in Suriname: Multinationals, the State and the Maroon Community of Nieuw Koffiekamp', in L. Zarsky, *op. cit.* n. 36, pp. 57–78. These conflicts involve largescale violations of human and environmental rights. McKay at p. 58 cites a World Resources Institute Report of 1995 which stated that analyses of contracts for both logging and mining operations revealed that the Surinamese treasury receives few if any benefits and that the environment and tribal and indigenous peoples will suffer irreparable harm.

environment/development-related conflicts where many disputes have been subjected to litigation. Further examination of the scope of such mechanisms may pave the way to more participatory forms of conflict resolution in development, where the host state, if involved, could play a major facilitating role. Tools of rational planning such as impact assessments can also be useful *via media* to sustainable development, social inclusion and responsible governance where the state is a significant and yet not exclusive player in a multi-actor scenario. Stronger norms and institutions including judicial systems in LDCs could help them better uphold the rule of law. The view has been expressed that rather than adjudication, innovative institutions for mediation would use a soft law approach, which can refer to a wide set of evolving norms and which would aim to be inclusive and participatory. Institutional innovations at the global, regional and local levels, it has been argued, would help to amplify the voice of the powerless,[40] indeed an important path to social justice. Given the need to make host states mean more than just host governments, and the reality of the abundance of soft law, policy and international public values in this area, this is a useful argument. In this way, judiciaries as well as other actors involved in dispute settlement in host states can advance and enrich the body of public values, which can apply across international boundaries, to further the ends of just, equitable and sustainable development.

5.2 Conclusion

In terms of home states, judicial attitudes to jurisdiction and responsibility, *forum non conveniens* and lifting the corporate veil,[41] for instance, could make basic inroads. In the case of host states, judicial receptivity to public interest litigation and implementation of sustainable development principles as well as alternative means of conflict resolution can have a similar effect. It is striking that here, the judicial arm of government has been one of the central players, in both host and home states. As the repositories of governmental responsibilities in the dispensation of justice, their key role can augur well for the pursuit of fairness. Since legislative and executive functions of states at the policy planning and implementation levels can be limited by diverse constraints, the judiciaries in both home and host states have become significant players. The judicial arm has the capacity to take an objective and long-term approach to sustainable development, unhindered by short-term political motivations. And all this has to be seen in the light of the complex web of international law relating to human rights, economy and environment, the emerging body of multilateral arrangements on corporate social

40 N. Roht-Arriaza, 'Promoting Environmental Human Rights through Innovations in Mediation', in Zarsky, *ibid.*, pp. 261–280.

41 See Chapter 3.

responsibility, and the evolving body of global public values, which could influence the role of host and home states.

Home and host states can both produce effective solutions. One of the weaknesses of international law – its drawbacks in relation to implementation and enforcement – can to some extent be remedied through the interventions of states. Interventions of home and host states each have their respective strengths and weaknesses as discussed above. Viewed as a whole, the raising of standards is probably a better task for home states – through TNCs based in them and through multilateral and bilateral arrangements – rather than through extraterritorial application of domestic legislation. The latter could lead to confusion and incoherence, apart from political and other implications. The actual application of standards through legislative and judicial means is more suited to host states, assuming that TNCs can be subject to local laws and the legal system. This can provide effective redress to affected persons. Legislative tools which can prevent rather than cure injury and damage is crucial, given that a lot of the damage caused to human rights and the environment can be irreversible. Here the application of the precautionary principle and mechanisms like Environmental, Social, Strategic and Sustainability Impact Assessment become very useful, provided that the costs involved can be met.

International law here is both a regulatory framework and a value system. Home and host states have a rich value system from which to draw for the balancing of interests and quest for equilibrium. The ethical framework of environmental and human rights-based responsibilities in the private sector exists primarily in advanced economies. In LDCs they are more dependent on state intervention and civil society initiatives, given the less developed private sector, and there is a need to synchronize all such efforts within the larger framework of development, justice and equity.[42] However, there is also a need for corporate social responsibility, and notions and standards of ethical globalization to be introduced and developed in developing countries.

In the light of the divergence that exists – between the perceptions and positions of different home states and different host states, as well as between host and home states – and the complications involved in transnational litigation, regional arrangements for regulation would be a potential middle-path between home/host state regulation and multilateral and bilateral arrangements. This may allow for the convergence of issues at an intermediate level, and among states of a relatively analogous geophysical, socioeconomic and political context. Even within the limited confines of the *status quo*, however, it is possible to see a potential role

42 See J. Agyeman, R.D. Bullard, B. Evans (eds.), *Just Sustainabilities: Development in an Unequal World*, *Earthscan*, London, 2003; S.M. Murshed, 'The New Millennium and Developments in the Field of Development', *Address at the Inauguration of the Master of Arts Programme*, Institute of Social Studies, The Hague, 10 September 2004.

for host and home states, which can be enhanced through bilateral and multilateral co-operation towards more balanced arrangements for regulation.

As pointed out by Sornarajah, the expanding law on the protection of human rights, labour and the environment does introduce some instability through counterveiling considerations to international investment law,[43] which has never been an uncontroversial subject even in itself. In the case of adverse impacts from TNC activity, social and environmental regulation lead to the recognition of rights of the state to intervene, undermining the aim of investor protection.[44] Several disputes on environmental protection have arisen in the context of the North American Free Trade Agreement (NAFTA) provisions of investment, between host and home developed countries. Here the question has also been considered whether protection of environmental interests over investments amounts to a taking.[45] It is obvious that home and host states play a vital role, also in shaping the course of public international law norms in this complex sphere, and can do much to introduce some clarity and coherence, through their contributions to state practice, and in the negotiation of investment treaties, which should:

> Contain provisions addressing issues of economic development and a movement away from the investment-protective models of economic liberalism to models that contemplate the elimination of the harmful effect of foreign investment while protecting beneficial investment.[46]

The interventions of states contribute to international public values and principles, and infiltrate the corpus of international law through means like reflections in state practice. Host and home states can further the cause of bringing international law closer to an overarching value system, through avenues such as extraterritorial application of domestic legislation, litigation in domestic courts and alternative methods of dispute resolution, discussed herein. The different aspects of home and host state control can have significant influences *inter se*. Two of the core influences have been judicial attitudes and state practice. The evolution of international consensus at the bilateral and multilateral levels would significantly influence how transnational litigation emerges in the future. The progressive development of international law would have significant consequences for directing state and particularly judicial attitudes on international jurisdiction. In this sphere, although there is a large body of relevant international instruments, they embody mostly soft law, if not mere policy or law in the making. Their infiltration into the normative legal system can give them an effective existence and enforcement capacity, enabling them to make a difference.

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43 *Op. cit.* n. 1, p. 86.
44 *Ibid.*
45 *Ibid.*
46 *Ibid.*, pp. 262–3.

Chapter Six

REGIONAL AND NATIONAL ARRANGEMENTS

6.1 Sustainable Development and Regional and National Arrangements

In recent years the South Asian region has witnessed several development/environment/human rights dilemmas which create the context of this study. What is, in all probability, the most serious of all adverse impacts of foreign direct investment in history – the Bhopal disaster – had its home in the heart of the region, in central India. With the currents of globalization flowing through South Asia in the last few decades there has been increased economic development as well as overall improvement in the region on the one hand. On the other, adverse impacts on the environment and human rights have been on the rise, with the potential to augment incrementally, given the regional realities of overpopulation, poverty, laxity in regulation and implementation, lack of good governance, increasing pace of development in some states and indiscriminate liberalization.[1] The unsound treatment of natural resources, injury to human health and safety through unsafe industrial practices and technology, child labour and poor treatment of workers, and disregard of holistic approaches to human, social and sustainable development are among the realities reported from South Asia.[2]

In India (and Columbia) Coca-Cola is associated with gross violations of human rights, violent suppression of community resistance, depletion of water resources through uncontrolled water mining, damage to agriculture and paddy fields, drying out of wells, dumping of toxic sludge and abuse of labour laws. Around the Plachimada plant in Kerala, there was also the distribution of toxic sludge to

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1 See *Vedanta Resources plc Counter Report 2005: Ravages through India*, Nostromo Research, London/India Resource Center, India, 2005, which describes the violations of human rights and the environment, including forced displacement of communities, abuse of workers rights and damage to public health by Vedanta Resources plc, a metals and mining investment company.

2 India Committee of the Netherlands, 'Monsanto, Unilever use Child Labour in India', http://www.indiaresource.org/issues/agbiotech/2003/monsantounilever.html India Resource Center, 'Indian Guinea Pigs for Sale', http://www.indiaresource.org/issues/globalization/2004/indiaguineapigs.html; National Fishworkers Forum, India, 'Five Star Mega Tourism Project to Destroy the Largest Mangrove Forest of the World', http://www.indiaresource.org/issues/globalization/2004/sunderbansnff.html

farmers as fertilizer and distribution of waste water to local residents. The sludge contained heavy metals especially cadmium, a known carcinogen, causing kidney damage, and lead, causing mental derangement and death, and anemia and mental retardation to children. Several communities across India and internationally, campaign for the closing down of its operations, which have already been terminated in Kerala. They also argue in favour of making the company accountable.[3] These campaigns have included the active participation of multiple actors across the globe, including governmental bodies, NGOs, political parties, scientists and the judiciary. They include Amnesty International, Greenpeace International, Corporate Accountability International, and green members of the European Parliament (who introduced the Plachimada Declaration). Strong resistance in India is led *inter alia* by local and indigenous tribal aboriginal peoples, the Plachimada Solidarity Committee, environmental activist and scientist Vandana Shiva who leads the Research Foundation for Science, Technology and Ecology (who alleged that Coca Cola was also injecting waste into dry boreholes and contaminating deep-water acquifers) and the Indian Center for Science and Environment (which found that nearly all colas and mineral water produced in India contained unacceptably large doses of commonly used pesticides).

The augmenting fragmentation and complexity of transnational economic activity now makes arrangements for subcontracting, supply chains and business process outsourcing (BPO)/outsourcing[4] commonplace. The abundance of labour, including skilled labour especially in information technology, at comparatively cheaper costs than in developed countries, has made India the primary service provider of outsourcing,[5] while Pakistan is also a major provider. This, in fact, compounds issues of labour rights, especially cheap labour in the region on the one hand, while on the other, it provides several advantages, including employment, technology and infrastructure development. From a legal perspective, outsourcing obfuscates connections between the many actors involved, making them remote and

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3 India Resource Center, 'Coca-Cola Challenged on Human Rights Abuses', http://www.indiaresource.org/campaigns/coke/2005/coke challenged.html In Kerala, the plant at Plachimada was closed in August 2005, consequent to an Order by the Kerala State Pollution Control Board, as the plant did not have adequate waste treatment systems, dumped toxic wastes polluting drinking water, and failed to provide drinking water to local residents whose wells were contaminated: D. Rajeev, 'India: Everything get worse with Coca Cola', http://www.globalpolicy.orgsocecon/tncs/2005/0822cocola.tm

4 See Chapter 3 for explanation. It usually implies transferring jobs to another country (offshoring), either by hiring local subcontractors or building a facility where labour is cheap (http://en.wikipedia.org/wiki/Outsourcing).

5 http://www.blogsource.org/india/index.html; it is stated in UNRISD, *Research for Social Change*, UN, Geneva, 2003, at p. 110, that specific improvements in corporate responsibility at the company level are dwarfed by negative macro trends involving the growth of polluting industries and the relocation of investment to areas with weak regulation. The piecemeal character of CSR and the prevalence of countertrends connected to liberalization gives rise to double standards: the pursuit of CSR and corporate irresponsibility, for instance increase in subcontracting, with the shedding of social obligations and costs.

unclear. This creates problems in identifying who should be accountable, for instance, in the case of human rights violations.[6] These problems of conflicting economic, social and environmental interests solicit the invocation of legal resources at the international, regional and national levels, thus making sustainable development a key tool. This notion has been adopted as an objective by the states in the region, at the national and intergovernmental levels.[7] The South Asian regional grouping as defined by the South Asian Association for Regional Cooperation[8] comprises Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, and the eighth country, Afghanistan, has just been admitted as a member.[9] An Integrated Programme of Action for Environmental Protection was formulated within SAARC in 1987. The 1998 SAARC Declaration[10] states that the Heads of State or Government emphasized the need for complementary action by organizations and institutions in the region in their efforts to protect the environment and achieve sustainable development in the region. The 2004 Islamabad Declaration made environmental issues a priority area, and recognized the need to undertake and reinforce regional co-operation in the conservation of water resources, environment, pollution prevention and control, and preparedness to deal with natural calamities. It also encouraged the creation of a Coastal Zone Management Centre in the Maldives, and working towards a Regional Environmental Treaty.

The SAARC countries, together with Afghanistan, constitute the eight member states of the South Asia Co-operative Environment Programme (SACEP),[11] to

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6 N. Gordon in 'Strategic Abuse: Outsourcing Human Rights Violations', http://www.dissidentvoice.org/Articles8/Gordon_Outsourcing-Abuse.htm, examines how hiring sub-contractors can help avoid responsibility for violating rights – economic and social rights like adequate working conditions and health care, as well as civil and political rights. In the mid-1990s, human rights groups disclosed that Nike employed children in substandard working conditions that endangered their health and that its Southeast Asian employees had received a salary of 2 dollars a day, which could not sustain them. It was later revealed that all production had been subcontracted to firms in Thailand, Vietnam and Indonesia., thus exploitation had been outsourced to subcontractors. He also refers to how governments violate rights by subcontracting services like health care to corporations.

7 See for example, ESCAP Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, 1995; in India, the Environmental Action Plan of 1993; in China, the National Agenda 21 of 1994; and in the Philippines, Agenda 21, 1995.

8 Charter of the South Asian Association for Regional Cooperation, 8 December 1985, http://www.saarc-sec.org

9 At the Dhaka Summit in November 2005, 'Afghanistan to be New SAARC Member', http://timesoWndia.indiatimes.com/articlesshow/1293872.cms

10 Colombo, 31 July 1998, Para. 55.

11 Established in 1982 under the Colombo Declaration and the Articles of Association of SACEP adopted by the Meeting of Ministers to Initiate the SACEP, Colombo, 25 February 1981, http://www.sacep.org; UNEP, SACEP, South Asia Environmental Education and Training Action Plan 2003–2007, SACEP, Colombo, 2003, focuses rightly on environmental education and training towards operationalizing sustainability into all activities. Other developments include the Male Declaration on Control and Prevention of Air Pollution and its Likely Transboundary Effects for South Asia adopted in Male, Maldives, April 1998 and agreements with UNEP and SAARC in 2003 and 2004, for co-operation in environmental protection.

promote regional co-operation in environment, in the context of sustainable development, and on issues of economic and social development which also impinge on the environment and vice versa. The main programmes under SACEP include the South Asia Seas Programme (SASP) and the South Asia Environment and Natural Resources Information Centre (SENRIC).

The Asian Development Bank (ADB), which funds many development projects in the region, has both an Environmental Policy and a Policy on Indigenous Peoples.[12] The Environmental Policy highlights certain areas needing attention, including the need for more upstream environmental assessment at the level of country programming, more structured consultation in the conduct of environmental assessments greater emphasis on monitoring and compliance requirements during project implementation, and the review of environmental assessment as an ongoing process rather than a one-time event.[13] Promoting sustainable development and environmental protection is a key strategic objective of the ADB.[14]

It is in the context of the law relating to sustainable development that regional and domestic developments in South Asia become most relevant.[15] The evolving body of regional jurisprudence on sustainable development, and the law implementing it, warrants examination. Jurisprudence flowing from public interest litigation, human rights and the environment has emerged largely through judicial resolve on the domestic implementation of sustainable development,[16] to uphold the rule of law and socioeconomic/environmental justice. These courts have not infrequently adopted innovative positions in balancing economic development,

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12 ADB, *Environmental Policy of the Asian Development Bank*, ADB, Manila, November 2002; ADB, *Guidelines for Incorporation of Social Dimensions in Bank Operations*, ADB, Manila, October 1993; ADB, *The Bank's Policy on Indigenous Peoples*, ADB, Manila, April 1998. EIAs, Initial Social Assessments and Indigenous Peoples Development Plans are all part of the Bank's policies incorporated in these documents.

13 *Ibid.*

14 http://www.adb.org/Environment/default.asp Thus the Bank *inter alia* promotes projects and programmes that will protect the environment and quality of life, and reviews the environmental impacts of its projects, programmes and policies which include the subject of involuntary resettlement.

15 For sustainable development issues in Asia see Economic and Social Commission for Asia and the Pacific (ESCAP), *Regional Follow-Up to the World Summit on Sustainable Development in Asia and the Pacific*, UN, New York, 2003; D.V. Smith, K.F. Jalal, *Sustainable Development in Asia*, Asian Development Bank, Manila, 2000; B. Boer, R. Ramsay, D.R. Rothwell, *International Environmental Law in the Asia Pacific*, KLI, London, 1998; for environment and human rights in South Asia see I.A. Rehman, 'South Asian Perspective on Human Rights and Environment', K.M. de Silva, G.H. Pieris, R. Coomaraswamy, 'South Asia: Politicized Ethnicity; Problems of Human Rights and Environmental Issues', both in *Perspectives on South Asia*, Konark Publishers, New Delhi.

16 See SACEP/UNEP/NORAD, *Report of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development*, SACEP, Colombo, 1997; SACEP/UNEP/NORAD, *Compendium of Summaries of Judicial Decisions in Environment Related Cases (With Special Reference to South Asia)*, SACEP, Colombo, 1997. For views on the judicial role in developing countries, see M.L. Marasinghe, W.E. Conklin (eds.), *Essays on Third World Perspectives in Jurisprudence*, Malayan Law Journal Pte. Ltd., Singapore, 1984; S. Puvimanasinghe, 'Development, Environment and the Human Dimension: Reflections on the Role of Law and Policy in the Third World, with particular reference to South Asia', 12 *SLJIL*, 2000, p. 35.

human dignity and ecological integrity.[17] In the future, member states of SAARC may be able to coordinate positions in developing appropriate enforcement mechanisms, through, for instance, adoption of comparable legislation and regulations and establishment of regulatory bodies.[18] As of now, the most prolific amount of case law has evolved from India, and public interest suits have also become commonplace in Pakistan, Bangladesh, Nepal and Sri Lanka. Information on developments of this nature could not be collected with regard to Bhutan and the Maldives, either because public interest litigation is not yet popular, or because of the unavailability of/difficulty to access any literature in point. The same holds for Afghanistan. However, Bhutan for instance, is known for its approaches to conservation and sustainability. In view of these disparities, sometimes with regard to information availability, it would do well for SAARC countries to enhance cooperative efforts towards further sharing and exchange of information from which all will stand to gain.

6.2 The International Environmental Law Dimension

6.2.1 Public interest litigation and the salient features of jurisprudence from South Asia

Public interest litigation[19] evolved as a popular tool in the South Asian region[20] since the mid-1980s. It has taken diverse forms, like representative standing, where

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17 Justice Krishna Aiyer of the Indian Supreme Court stated in *Municipal Council Ratlam* v. *Vardichand*, All India Reports (AIR) 1980 Supreme Court (SC) 1622, "Public Nuisance because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law. . . . . Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems, not pompous and attractive, but in working condition and sufficient to meet the needs of the people, cannot be evaded if the Municipality is to justify its existence".

18 As suggested in SAARC, *SAARC Vision Beyond the Year 2000: Report of the SAARC Group of Eminent Persons Established by the Ninth SAARC Summit*, Shipra Publications, Delhi, 1999, p. 101.

19 D. Nesiah, All-Asian Public Interest Environmental Law Conference, *Keynote Address*, Nuwara Eliya, 1 December 1991; D. Robinson, R. Dunkley (eds.), *Public Interest Perspectives in Environmental Law*, Chancery Law Publishing, UK, 1995; S. Divan, A. Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes*, OUP, New Delhi, 2001. H. Dembowski in *Taking the State to Court, Public Interest Litigation and the Public Sphere in Metropolitan India*, OUP, New Delhi, 2001, asserts that public interest litigation is useful in the face of governmental lawlessness.

20 According to Justice Bhagwathi, former Chief Justice of India: "Law as I conceive it, is a social auditor and this audit function can be put into action when someone with real public interest ignites the jurisdiction . . . public interest litigation is part of the process of participatory justice and standing in civil litigation of that pattern must have liberal reception at the judicial doorsteps". (*Fertilizer Corporation Kamgar Union* v. *Union of India*, 1981 AIR (SC), 344). S.J. Sorabjee, 'Judicial Activism in Public Law', paper presented at the *Silver Jubilee Law Conference of the Bar Association of Sri Lanka*, Colombo, 1999: "Over the years, experience has shown that governments are not obliging and do not control themselves. Moreover, governmental power has become pervasive and

a concerned person or organization comes forward to espouse the cause of poor or otherwise underpriviledged persons; and citizen standing, which enables any person to bring a suit as a matter of public interest, as a concerned member of the citizenry. Given the various and numerous classifications that divide the social fabric in this region, it is fair that poor, illiterate, legally-illiterate, minority, low-caste and other disadvantaged and underprivileged persons gain access to justice through distortions of traditional doctrines of standing. The test for *locus standi* in these cases has, within limits, been liberalized from the need to be an aggrieved person, to simply being a person with a genuine and sufficient concern. In addition, class actions allow one suit in the case of multiple plaintiffs and/or defendants, and have been useful in this area.

Before the Bhopal disaster, PIL emerged as a tool especially in cases of social injustice, for instance bonded labour and child labour, and issues of public accountability, for instance illegal payments to public officials. In the case of challenges to development projects, Indian courts had consistently been slow to interfere with projects beneficial to development.[21] In the case of the Sarda Sarovar Dam Project, PIL was invoked by the Narmada Bachao Andolan, challenging the failure to ensure rehabilitation for millions of persons displaced by the construction of over 300 dams across the Narmada river. Protracted litigation ended years later in 2000.[22] The main catalyst for the evolution of PIL was the Bhopal disaster. In its immediate aftermath, the victims of this catastrophic industrial accident first brought action against Union Carbide in India. The Indian government then passed legislation, assumed the role of *parens patriae*, and filed suit against the parent company in the US, on behalf of the victims. This course of action was largely due to lack of legislation, enforcement capacity and legal resources in India at that time. The ensuing case of *In re Union Carbide Corp. Gas Plant Disaster*[23] concerned liability and compensation for thousands of deaths and personal injuries. However, the case was sent back to India on the basis of *forum non conveniens*. Finally, it was settled out of court, and the settlement was given judicial assent in the Supreme Court of India.[24] Thus the issue of liability was never adjudicated by a court of law. Under the settlement, Union Carbide was to pay 470 million US dollars, generally thought to be inadequate.[25] Poor implementation means that victims of

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less amenable to effective administrative control. Experience has convincingly established that availability of judicial review is by far the most effective safeguard against administrative excesses and executive high-handedness".

21 The High Courts of Kerala, Karnataka, Gujarat, Bombay and New Delhi, for instance, refused to interfere with several development projects in the 1980s, including those relating to power production, oil refineries, bridges and international airports.

22 *Narmada Bachao Andolan* v. *Union of India and others*, Supreme Court of India, 18 October 2000.

23 634 F. Supp. 842 (S.D.N.Y. 1986), affirmed as modified, 809 F.2d 195 (2d Cir, 1987).

24 *Union Carbide Corporation* v. *Union of India* AIR 1990 (SC) 273.

25 For instance, I. Jaising, states in 'Bhopal, Settlement or Sell-Out?', *The Lawyers*, March 1984, p. 4: "The figure is woefully inadequate to meet the projected health and rehabilitation needs of the victims. The International Coalition for Justice in Bhopal estimates that a sum of US$ 4,600

Bhopal suffer from the lack of redress to date as highlighted on the 20th anniversary of the disaster, on 3 December 2004.[26]

The realization of the total incapacity of the host state legal system to deal with such a disaster led to the passage of environment-related laws and litigation in India, in the years immediately following the Bhopal accident. In many LDCs, insurance schemes in relation to life, health, safety and property are non-existent or underdeveloped, and legislation in relation to insurance was also put in place in India after Bhopal. While this is a useful step in relation to liability insurance by industry, the majority of people in South Asia would not be able to afford to buy insurance for their own health/safety. Most states in the region have since invoked both legislative and judicial mechanisms to further environmental protection and sustainable development, and their experience can be informative for other developing countries.[27] Among the legislative mechanisms are the following: several constitutions in the region recognize an obligation of the state as well as citizens, to protect the environment.[28] The right to life (and liberty) is enshrined in several constitutions[29] and has been interpreted by the judiciary to include the right to a clean and healthy environment.[30] In the Indian case of *Subash Kumar* v. *State of Bihar*, the petitioner filed a public interest litigation pleading infringement of the right to life, arising from the pollution of the Bokaro River by the sludge discharged from the Tata Iron and Steel Company. It was alleged that the water was not fit for drinking or irrigation, because of effluents in the river. The court

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million would be required for health care alone, based on an expenditure of $4,100 per person, for 200,000 persons allowing for an average life expectancy of 30 years".

26 Proceedings of the International Conference on the 20th Anniversary of the Bhopal Gas Tragedy, 'The Bhopal Gas Tragedy and its Effects on Process Safety', December 1–3, 2004, Indian Institute of Technology, Kanpur, India, http://www.iitk.ac.in/jpg/bhopal12.htm

27 C.G. Weeramantry, 'Private international law and public international law', 34 *Rivista di diritto internazionale privato e processuale*, 1998, pp. 313–324.

28 Constitution of India, Arts. 48A and 51A(g); Nepal, 26(4)-refers to the need to prevent further damage to the environment through development, by raising public awareness; Sri Lanka, 27(14) and 28(f). The Sri Lankan Constitution of 1978, Chapter VI entitled 'Directive Principles of State Policy and Fundamental Duties', states in Art. 27(14) that "the State shall protect, preserve and improve the environment for the benefit of the community". Art. 28 states that the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka "(f) to protect nature and conserve its riches". Art. 27 (4) provides that the State shall strengthen and broaden the democratic structure of government and the democratic rights of "the People by decentralizing administration and affording all possible opportunities to the People to participate at every level of national life and in government".

29 Constitution of Bangladesh, Art. 32; India, 21; Pakistan, 9.

30 In India, *Subash Kumar* v. *State of Bihar* AIR 1991 SC 420; in Pakistan, *General Secretary, West Pakistan Salt Miners Labour Union (CBA) KHWRA, Khelum* v. *The Director, Industries and Mineral Development, Punjab Lahore* 1996 SC MR 2061; in Bangladesh, *Mohiuddin Farooque* v. *Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources & Flood Control and Others* 48 DLR 1996 and *Mohiuddin Farooque* v. *Secretary, Ministry of Communication, Bangladesh*, Supreme Court of Bangladesh, High Court Division, Writ Petition no. 300 of 1995.

recognized that the right to life includes the right to enjoyment of pollution-free water and air for the full enjoyment of life. It stated that if anything endangers or impairs the quality of life, an affected person or a genuinely interested person can bring a public interest suit, which envisages legal proceedings for vindication or enforcement of fundamental rights of a group or community which are not able to enforce their rights on account of their incapacity, poverty or ignorance of law.[31]

An adequate standard of living has been interpreted to include an environment adequate for the health and well-being of the people.[32] In the Pakistani case of *Shehla Zia and Others* v. *WAPDA*,[33] the right to life was upheld and interpreted to include a healthy environment. The petitioners who were residents in the vicinity of a grid station being constructed by the respondents, alleged that the electromagnetic field created by high voltage transmission lines would pose a serious health hazard. It was held that the word 'life' cannot be restricted to the vegetative or animal life or mere existence between conception and death. Life should be interpreted widely, to enable a person not only to sustain life, but also to enjoy it. Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the court may order the stoppage of such activities, which create pollution and environmental degradation. Since the scientific evidence was inconclusive in this case, the court applied the precautionary principle. And since energy is essential for life, commerce and industry, a balance in the form of a policy of sustainable development was necessary, according to the Supreme Court. The court went on to appoint a Commissioner to examine and study the scheme and report back to it.

Legislation for environmental protection has now been passed in most countries in the region.[34] This includes provisions requiring environmental impact assessment for development projects, statutory environmental pollution control by administrative agencies[35] and environmental standards for discharge of emissions

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31 *Ibid.* Although the case was dismissed since it was found that personal enmity motivated the petitioner, it is still important for the principle it upholds.

32 *Ms. Shehla Zia and others* v. *WAPDA* (Human Rights Case No. 15–k of 1992, SC), the court interpreted the word 'life' widely to include the enjoyment of life.

33 *Ibid.*

34 For instance in Sri Lanka, the National Environmental Act No. 47 of 1980 as amended; in India, the Environment (Protection) Act 1986, Water (Prevention and Control of Pollution) Act 1974 and Air (Prevention and Control of Pollution) Act 1981; in Pakistan, the Environmental Protection Act 1997; in Bangladesh, the Environmental Conservation Act 1995; in Nepal, the Environmental Protection Act 1997; and in the Maldives, the Environmental Protection and Preservation Act 1993. In Bhutan, environmental conservation and sustainable development form part of the beliefs and values, inherent to the community. They are high on the policy agenda, integrated into measures like the Environmental Assessment Act 2000, Biodiversity Act 2003 and the work of the National Environmental Commission, and will be central in the National Environmental Protection Act presently in the process of formulation (http://www.nec.gov.bt/about_us.asp).

35 In Sri Lanka for example, the Central Environmental Authority and local authorities issue Environmental Protection Licences.

and effluents.[36] The use of public nuisance provisions has also become a popular mechanism in environmental protection.[37] A body of jurisprudence on sustainable development and its domestic implementation has evolved in India.[38] Most other countries in the region have followed in the same direction, and their individual efforts looked at collectively point to the evolution of a body of regional[39] or comparative jurisprudence on issues of development and environment, with an overt human rights dimension, largely through the agency of citizen involvement, legal representation in the public interest and judicial innovation. The contribution of the judiciary – especially the higher judiciary – is striking, especially in the light of the lesser commitment to sustainability (a long-term objective going beyond immediate interests) on the part of most third world politicians. The case law should in principle be applicable to both global and local business, provided that TNCs can also be subject to domestic regulation in host states. Most of the cases concern local industries, but some also deal with transnational business. Whatever the factual context may be, the legal issues are the same, and the legal principles have been applied to the balancing of conflicting interests of environment, development and human rights. The case law is therefore of basic relevance to this study and to foreign investment activities.

Heightened sensitivity and concerted action in the judiciary, legal profession and civil society have helped to create an expanded notion of access to justice[40] and foster the phenomenon of PIL.[41] Related developments include a degree of shift from adversarial to inquisitorial judicial methods[42] suited to environmental and other *erga omnes* kind of issues, a broad and purposive approach to statutory interpretation[43] and a measure of flexibility in procedure adopted and redress

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36 Part 1V B of the National Environmental Act of Sri Lanka, regulates environmental quality for inland waters and the atmosphere.

37 The Indian case of *Municipal Council Ratlam* v. *Vardichand, op. cit.* n. 17, is a landmark example of the use of public nuisance for broader purposes including environmental protection and social justice.

38 SACEP/UNEP/NORAD, *Report, op. cit.* n. 16; SACEP/UNEP/NORAD, *Compendium, op. cit.* n. 16, which also includes evolving jurisprudence from the larger Asia Pacific region.

39 N.A. Robinson, in SACEP/UNEP/NORAD, *Report, ibid.*, pp. 181–194, comments at p. 181, that the judiciaries of South Asian nations, and their Supreme Courts in particular, today lead the world in defining and refining the jurisprudence of environmental justice.

40 Enhanced access to justice, stemming from the broadening of the class of persons who can sue, has far-reaching ramifications for good governance and sustainable development.

41 Public interest litigation expands the scope of the class of persons that can sue beyond the horizons of aggrieved persons and is thus a vehicle for actions in the cause of the public/social/democratic interest.

42 Since in these cases, judges tend to shed their Anglo-American tradition of keeping a low profile and letting lawyers lead the case, to take a more inquisitorial and active role. For instance, in India, in the case of *Rural Action Litigation and Entitlement Kendra, Dehra Dun* v. *State of Uttar Pradesh* AIR 1988 (SC) 2187, the judges virtually directed the investigation and evidence.

43 In the Indian case of *Ratlam Municipality* v. *Vardichand, op. cit.* n. 17, statutes of ancient vintage like the Criminal Procedure Code, Penal Code and Municipalities Act, were read in a new light, taking into account the social justice orientation of the Indian Constitution, human rights and concern for the environment.

granted.[44] *The Dhera Dun case*[45] involved a public interest petition addressed to the Supreme Court by the Rural Litigation and Entitlement Kendra. The court directed that all fresh quarrying in the Himalayan region of the Dhera Dun district be stopped. Subsequently, acting on several expert reports, the court ordered the closure of several mines. The lessees of the mines submitted a scheme for limestone quarrying which was rejected. They then appealed to the Supreme Court. The court emphasized the need to balance the conflicting interests of development and conservation. The environmental disturbance caused by limestone mining had to be balanced against the need for limestone in industry. After careful consideration and study of the issues mostly on its own initiative, the court upheld the closure of the quarries. In view of the unemployment that would ensue, the court ordered as far as possible the immediate employment of the workers in the reforestation and soil conservation programme in the area.

Judicial intervention has served to scrutinize governmental and private sector activities and abate administrative apathy.[46] Significant measures include the creative usage of Directive Principles of State Policy,[47] judicial recognition of a right to a healthy environment,[48] and the interpretation of an adequate standard of living to include an adequate quality of life and environment. In cases like *Juan Antonio Oposa* v. *The Honourable Fulgencio S. Factoran* in the Philippines, which recognized intergenerational equity and the right to a balanced and healthful ecology, conservation, and sustainable development,[49] human rights provisions have been used for environmental protection.[50] The liberalization of *locus standi* in writ applications and fundamental rights cases has taken place in such a way as to include

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44 For example in the *Nawimana case* (1994 *SAELR* 1(1) 17), in Sri Lanka, what emerged from litigation was in fact a mediated settlement between the parties laying down the terms and conditions for quarry mining, which in turn received judicial assent.

45 *Op. cit.* n. 42.

46 The *Keangnam* case, 1(1) SAELR (1994) 1, in Sri Lanka dealing with pollution from quarry blasting coupled with failure on the part of governmental authorities, and the *Ratlam case, op. cit.* n. 17, in India involving pollution from industry coupled with neglect of duty by local authorities are examples.

47 These Constitutionally entrenched principles are intended to be guides in the enactment of laws and governance, and are not justiciable/legally enforceable. In India, the Directive Principles of State Policy have been used to create a range of new rights not referred to in the Constitution as legally enforceable rights. In Sri Lanka too, the directive principles have been used as guides to interpretation.

48 For instance, in India, *Rural Action Litigation and Entitlement Kendra, Dehra Dun* v. *State of Uttar Pradesh, op. cit.* n. 42, *M.C. Mehta* v. *Union of India* AIR 1988 SC 1115 and *M.C. Mehta* v. *Union of India* 1988, AIR (SC) 1037; in Pakistan, *Shehla Zia* v. *WAPDA, op. cit.* n. 32; in Bangladesh, *Mohiuddin Farooque* v. *Bangladesh et al.*, Supreme Court of Bangladesh, High Court Division, Writ Petition no. 300 of 1995.

49 Republic of the Philippines Supreme Court G.R. No. 101083 reproduced in 1(3) SAELR (1994) 113.

50 For instance the *Nawimana case, op. cit.* n. 44, the *Kotte Kids case* 5(4) SAELR (1998) 116, the *Air Pollution case* Fundamental Rights 569/98, SC of Sri Lanka, 1998 and the *Tikiri Banda Bulankulama case* 7 (2) SAELR (2000) 1 all in Sri Lanka.

any person genuinely concerned for the environment.[51] Other judicial measures include imposition on the state, of a public trust obligation over natural resources,[52] imposition of absolute liability for accidents arising from ultra-hazardous activities,[53] application of the polluter-pays and precautionary principles,[54] and promotion of sustainable development and good governance.[55]

The Indian case of *Municipal Council Ratlam* v. *Vardichand*[56] deserves analysis for its many striking features. The frontiers of public nuisance, a traditional remedy in statutes from an early era were considerably extended in this case, through innovative interpretation in the light of India's constitutional embodiment of social justice and human rights. The facts arose from what the Supreme Court described as a 'Third World Humanscape' where overpopulation, large-scale pollution, ill-planned urbanization, abject poverty and dire need of basic amenities combined with official inaction and apathy to create a miserable predicament for slum and shanty dwellers in a particular ward in Ratlam, Madhya Pradesh. Justice Krishna Iyer confirmed the finding of public nuisance by the lower courts.[57]

Fortifying judicial powers to enforce laws, the judge stated that the nature of the judicial process is not merely adjudicatory nor is it that of an umpire only, and that affirmative action to make the remedy effective is of the essence of the right which otherwise becomes sterile. Justice Iyer also referred to the need for the judiciary to be informed by the broader principle of the access to justice necessitated by the conditions of developing countries and obligated by the Indian

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51 The Indian case of *M.C. Mehta* v. *Union of India* 1987 AIR 965 and the Sri Lankan case of *Environmental Foundation Limited* v. *The Land Commissioner et al.* 1(2) SAELR (1994) 53.

52 *M.C. Mehta* v. *Kamal Nath* 1997 1 SCC 388.

53 In the *Shriram Gasleak case* (*M.C. Mehta* v. *Union of India* AIR 1987 (SC) 1086), the ideas of cost internalization, polluter pays and absolute liability long preceded the Rio Declaration. A more recent case in point is *Indian Council for Enviro – Legal Action* v. *Union of India* 1996 3 SCC 212.

54 *Vellore Citizens Welfare Forum* v. *Union of India* 1996 5 SCC 647.

55 *Gunerathne* v. *Homagama Pradeshyia Sabha et al.*, FR No. 210/97 SC minutes of 3/4/1998; P. Hassan, 'Environment and Sustainable Development – A Third World Perspective', 31:1 *Environmental Policy and Law* (2001), at p. 36, states that good environmental governance is of particular importance to developing countries, as it is only when their policies are democratic, participative, transparent, founded on the rule of law and supported by a strong and independent judiciary that donor countries will have the confidence to deal with them.

56 *Op. cit.* n. 17.

57 The Sub-Divisional Magistrate, Ratlam, acting under section 133 of the Indian Code of Criminal Procedure (counterpart of section 98 of the Sri Lankan Code), ordered by way of affirmative action, the municipality to provide toilets, drainage facilities, access to fresh water, basic sanitation etc. within a given time and according to certain guidelines. The order was upheld by the Supreme Court which confirmed that a court of law could compel a statutory body to carry out its duties, here under the Madhya Pradesh Municipalities Act of 1961, section 123. Although the provisions of the Criminal Procedure Code on granting conditional orders were discretionary in tone, the Court stated that sometimes, discretion could become a duty. On being urged by the local authority, the Supreme Court modified the magisterial orders, allowing more time and less costly options. The Court asserted that the courts are a last resort, unnecessary if public bodies carried out their functions. It suggested mobilization of the voluntary services of the local community, known in South Asian societies as 'sramdan', as well as the need for the central government to provide more funds to local authorities.

Constitution. This case adopts a holistic approach in terms of its orders for local development and provision of basic needs. The social dimension is upheld through resort to social justice and human rights.

Several recent cases of public interest litigation in South Asia further elucidate the concept of sustainable development and move forward in its implementation. The superior courts of India were really the catalysts for judicial activism and innovation in the region, with regard to public interest litigation, which is now also commonplace in the lower courts. The last couple of decades have witnessed a plethora of cases, including *Akhil* v. *Secretary A.P. Pollution Control Board W.P.*;[58] *A.P. Pollution Control Board* v. *Appellate Authority Under Water Act W.P.*;[59] *A.P. Gunnies Merchants Association* v. *Government of Andhra Pradesh*;[60] *Research Foundation for Science* v. *Union of India*;[61] *Chinnappa* v. *Union of India*[62] and *Beena Sarasan* v. *Kerala Zone Management Authority et al.*[63] In *Research Foundation for Science and Technology and Natural Resources Policy* v. *Union of India et al*.[64] a public interest suit led to appointment by the Supreme Court, of a Committee to inquire into the issue of hazardous wastes.

In Pakistan, recent cases include *Bokhari* v. *Federation of Pakistan*[65] and *Irfan* v. *Lahore Development Authority* (Lahore Air Pollution Case).[66] The first case concerned the grounding and collapse of a ship in the port of Karachi in 2003, leading to a major oil-spill, the biggest marine environmental disaster in Pakistan, which caused far-reaching environmental damage. The ability of the legal system to respond was in this case before the Supreme Court, found to be totally lacking, due to many reasons including lack of preparedness and failure to ratify relevant international conventions. The Court went on to discuss public interest litigation as it had evolved in India and Pakistan, where it was said to be particularly useful because of the ground realities of poverty, illiteracy and institutional fragility. It was found that in Pakistan, PIL had been used in a very wide range of social issues, from environmental pollution to the prevention of exploitation of children. This case was held to be suitable for public interest litigation. The Lahore Air Pollution Case concerned air and noise pollution from rickshaws, mini buses and other vehicles and the non-performance of statutory duties by the relevant authorities, charged with ensuring a pollution free environment for the citizens. The court cited several Indian judgments including *Ratlam Municipality* v. *Vardichand*

58 *Garbage Burning Case*, High Court of Andra Pradesh, 15490/2001, 10 March 2001.
59 High Court of Andra Pradesh, 33493/1998, 28 June 2001.
60 *Air Pollution from Gunny Sacks Case*, High Court of Andhra Pradesh, 386/2000, 21 July 2001.
61 14 October 2003; http://www.elaw.org/resources/text.asp/ID=2317
62 30 October 2002; http://www.elaw.org/resources/text.asp?ID=1433
63 In the High Court of Kerala, 15 December 2005.
64 Supreme Court of India, 1May 2005, www.elaw.org
65 24 September 2003; http://www.elaw.org/resources/text.as?ID=2277
66 5 July 2003; http://www.elaw.org/resources/text.asp?ID=1846

where Justice Krishna Iyer had touched on the need to be practical and practicable and order only what can be performed; and also the need to be realistic, not idealistic, and at the same time not give judicial consent to a value judgment where people's health is a low priority.

In *Nepal, Suray Prasad Sharma Dhungel* v. *Godavari Marble Industries et al.*[67] was a landmark case, decided by a full bench of the Supreme Court. The court held that a clean and healthy environment is part of the right to life, under the Constitution. It upheld the *locus standi* of NGOs or individuals working for environmental protection, and directed that relevant laws necessary for the protection of the environment be enacted. In *Sharma et al.* v. *Nepal Drinking Water Corporation et al.*[68] the Supreme Court emphasized the significance of pure drinking water to public health and without explicitly saying that it is a basic right, expressed that its provision was a responsibility of a welfare state. The Court took account of several aspects of the Nepali Constitution, including the main objectives of the state, and the spirit of the Constitution. Without issuing a writ of *mandamus* to guarantee the right to pure drinking water as requested by the petitioner public interest lawyer, it instead alerted the Ministry of Housing and Physical Development to hold the Drinking Water Corporation accountable in complying with its legal obligations under its governing statute. In *Sharma et al.* v. *His Majesty's Government Cabinet Secretariat et al.*[69] the Nepali Supreme Court was petitioned to quash a government decision allowing unfettered import of diesel taxies and leaded petrol from India. It held that a healthy environment is a prerequisite to the protection of the right to personal freedom under the Constitution and that hence the state has a primary obligation to protect the right to personal liberty under Art. 12 (1) by reducing environmental pollution as much as possible. Based on the concept of sustainable development, the court stated that environment and development should proceed harmoniously and the environment cannot be ignored for development. In view of the lack of implementation of its previous judgments, the court issued a directive to enforce essential measures within a maximum of two years in order to reduce vehicular pollution in the Kathmandu Valley, well known for its historical, cultural and archaeological significance.

In the Bangladeshi case of *Bangladesh Environmental Lawyers Association* v. *Bangladesh et al.*[70] the petition concerned failure of governmental authorities to perform statutory duties and their delay and negligence in relocating tanneries in Dhaka city to combat severe pollution. Another petition, *Bangladesh Environmental Lawyers Association* v. *Secretary, Ministry of Environment and Forests*[71] concerned the neglect, misuse and

67 Supreme Court of Nepal, 35/1992, 31 October 1995, www.elaw.org
68 10 July 2001; http://www.elaw.og/resources/text.asp?ID=2342
69 11 November 2003; http://www.elaw.org/resources/text.asp?ID=2518
70 Writ Petition of 21 April 2003; http://www.elaw.org/resources/text.asp?ID=1779
71 Petition dated 10 October 2003, www.elaw.org

lack of co-ordination by governmental authorities in relation to Sonadia Island, a precious forest area and rich ecosystem. Authorities were instead alleged to be preparing the land for industrial purposes destructive of the environment, for instance, shrimp cultivation, thereby destroying the habitat for fauna and flora, as well as weakening the possibility of preventing natural disasters.

In the Asia-Pacific region, comparative developments include the Philippine cases of *Isagani Cruz and Cesar Europa* v. *Secretary, Environment and Natural Resources et al. and A Bugal-b'laan Tribal Association* v. *Secretary, Department of Environment and Natural Resources et al.*[72] Developments in other regions include the case of *Lopez-Ostra* v. *Spain*,[73] where the European Court of Human Rights held that pollution from a tannery leading to health problems for local residents, violated the European Convention on Human Rights. Pollution was held to violate the right to respect for the home and for private and family life. In balancing economic concerns and human rights, the court gave priority to the rights of the residents over the economic welfare of the municipality. Similarly in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights* v. *Nigeria*,[74] the African Commission on Human and Peoples' Rights held that disposal of oil wastes into the environment in violation of environmental standards was a violation of the rights to life, health, property, the right to free disposal of natural resources, freedom from discrimination and the right to a healthy environment.

6.2.2 Domestic laws, public interest litigation and sustainable development jurisprudence in Sri Lanka

Sri Lanka's domestic jurisprudence in its modern formulation is clearly linked closely to relevant international law. Moreover, the dynamic currents of sustainable development law – especially in the context of human rights, public interest litigation and the environment – in the domestic courts of the South Asian region have influenced the ebb and flow of the waters of the island's jurisprudence, making fundamental changes to its course. The fabric of the domestic law, therefore, acquires new motifs and designs, creating an interesting mosaic. For a just, equitable and sustainable development at the domestic level, the developing country context must not be neglected. Thus, it is necessary to identify where environmental degradation and resource depletion make it difficult to meet basic needs, and to modify human activities to eliminate undesirable side-effects and satisfy these needs.[75]

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72 29 January 2004; http://www.elaw.org/resources/text.asp?ID=2323

73 Case 41/1993, Judgement of 9 December 1994.

74 Communication 155/96, cited in M-C Cordonnier Segger, A. Khalfan, *Sustainable Development Law: Principles, Practices, & Prospects*, OUP, Oxford, 2004, at p. 208.

75 K.H.J. Wijayadasa, *Towards Sustainable Growth: The Sri Lankan Experience*, Central Environmental Authority and Ministry of Environment and Parliamentary Affairs, Colombo, 1986, revised 1994, p. 5.

Sri Lanka's 1978 Constitution consists of some provisions on the environment, in its chapter on Directive Principles of State Policy and Fundamental Duties. Art. 27(2) states that the state is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include (e) the equitable distribution among all citizens of the material resources of the community and the social product, so as best to sub-serve the common good. Art. 27(14) asserts that the state shall protect, preserve and improve the environment for the benefit of the community. According to Art. 28(f), it is the duty of every person to protect nature and conserve its riches. Although Art. 29 states that the directive principles of state policy and fundamental duties are not justiciable,[76] the Sri Lankan Courts have given recognition to these principles which they have read in the light of principles of international law. In a dualist country such as Sri Lanka, they have been an invaluable aid to the incorporation of international law, and have facilitated the infiltration of international public and community values into the domestic legal system. The Sri Lankan Constitution does not provide for the right to life, and its chapter on fundamental rights deals mainly with civil and political rights, with limited protection of social, economic and cultural rights. Given these limitations, broad interpretations of the directive principles by the judiciary can truly advance social justice. As pointed out by Savithri Goonesekere:[77]

> The jurisprudence being developed in the Indian Supreme Court is important for Sri Lanka and South Asia, since it provides insights into the manner in which policy perspectives recognized in international standards can be integrated into domestic law. This process is important because international treaties in India and Sri Lanka as well as some other countries do not become locally enforceable as law unless they are integrated into local law by courts and legislatures.

Since 1990, there has been a cabinet portfolio for the subject of the environment.[78] As regards environmental protection at the sub-national level, under the 13th Amendment to the 1978 Constitution, protection of the environment is a

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76 This article reads: "The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal."

77 'Law and Social Policy in Post-Independence Sri Lanka', *Inaugural Lecture*, Centenary Seminar Series, Ladies College, Colombo, 17 February 2000. She cited two Sri Lankan cases in which the Supreme Court stressed the Constitutional importance of the Directive Principles – *Seneviratne* v. *University Grants Commission* (1978–79–80) 1 SLR 182, and *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* (1987) 2 SLR 312.

78 In the Philippines, a similar approach was adopted in the *Oposa case*, *op. cit.* n. 49. The Philippine Supreme Court stated: "while the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind".

subject in the concurrent list, meaning that both the central and provincial governments have functions in relation to it. Protection of the environment within the province to the extent permitted by or under the authority of Parliament is included in the Provincial Council list, meaning that such functions are devolved to Provincial Councils.

Sri Lanka has a long history of legislation in relation to the environment.[79] It has an abundance of legislative enactments,[80] in fact numbering over 70 statutes, which could be regarded as environmental as they have a bearing on the environment. These range from the Forest Ordinance and the Pearl Fisheries Ordinance to the Coconut Development Act and the Mines and Minerals Law. However, practically all these statutes were enacted before the era of environmental consciousness and certainly before sustainable development became part of legal language at the international, regional and domestic levels. It was noted in the early 1980s that 'all these laws are scattered, administered by different departments, at different levels, without overall coordination'.[81]

Specifically 'environmental' statutes were enacted only after 1980. These include the Coast Conservation Act no. 57 of 1981 as amended by Act no. 64 of 1988, the Marine Pollution Prevention Act no. 59 of 1981 and the National Heritage Wilderness Areas Act no. 3 of 1988. The most significant statute on environmental protection in the Sri Lankan context is the National Environmental Act (NEA) of 1980 as amended in 1988 and 2000,[82] and the implementing regulations. The 1980 Act marks a first step towards formulation of a comprehensive legal and institutional framework in a hitherto piecemeal terrain, and one of its basic features is the establishment of a Central Environmental Authority (CEA). The CEA is the policy-making and co-ordinating agency for environmental protection and management, and has several powers and duties under section 10 of the Act, to protect the environment and prevent pollution. Section 17 of the Act casts a duty on the CEA to recommend to the Minister of Environment the basic policy on

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79 A background to Sri Lanka's main environmental problems, policies and laws can be found in the National Report of Sri Lanka to UNCED, Colombo, 1991.

80 An account of Environmental Law in Sri Lanka is contained in M. Fernando, Country Presentation – Sri Lanka, in SACEP, UNEP, NORAD, *Report*, *op. cit.* n. 16, pp. 105–140; S. Atapattu traces the history of Environmental Law in Sri Lanka, in a paper entitled 'Wither Environmental Law in Sri Lanka? Tracing Fifty Years of Environmental Law in Sri Lanka', presented at the Conference on *Fifty Years of Law and Justice in Sri Lanka*, organized by the Law and Society Trust, Colombo, November 2000.

81 Wijayadasa, *op. cit.* n. 75, p. 6; the National Conservation Strategy presented to Parliament in 1988 recommended that the legislation relating to the environment at that time found scattered in a number of different statutes be reviewed: Report of *Workshop on Environmental Legislation* organized by the Central Environmental Authority and Ministry of Environment and Parliamentary Affairs, Colombo, January 14, 1992.

82 National Environmental Act, no. 47 of 1980, Legislative Enactments of Sri Lanka; Amendment Act no. 56 of 1988, Legislative Enactments of Sri Lanka and Amendment Act no. 53 of 2000, Legislative Enactments of Sri Lanka.

the management and conservation of the country's natural resources in order to obtain optimum benefits therefrom, to preserve the same for future generations, and the general measures through which such policy may be carried out effectively.

Through the NEA and regulations, two important tools for sustainable development were introduced – namely the Environmental Impact Assessment (EIA) and Environmental Protection Licence (EPL) – although the Act makes no express reference to sustainable development. Part IV C of the NEA deals with the approval process for major development projects, which are prescribed projects[83] requiring the approval of state agencies assigned as Project Approving Agencies.[84] The procedure for project approval is laid out in the regulations.[85] The EIA process has been carried out for many large projects, and has sometimes included a Social Impact Assessment and an Archaeological Impact Assessment. Through this mechanism, the degree of public participation and access to information in relation to large development projects has been greatly enhanced. The two reports involved in the EIA process are the Initial Environmental Examination Report and the EIA Report. The latter stage provides for public participation in the decision-making process, and enables development to be more transparent and participatory, and apparently more just, equitable and sustainable. The precautionary approach is implicit in the EIA provisions. The consideration of alternatives is the core element of the EIA process, so that the most environment-friendly option can be selected in a development project.

Part IV-A and IV-B of the Act deal with environmental protection and environmental quality and they at least implicitly embody the idea that the polluter pays to some extent. The EPL process regulates pollution of inland waters and the atmosphere, as well as noise, through a system of licensing for preventing the discharge, emission and deposit of waste into the environment. The Minister of Environment is empowered to make regulations under section 32 of the NEA. Regulations serve to enforce the provisions of the Act.[86] Regulations apply to control water pollution, noise pollution[87] and air pollution, specifying standards of

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83 Gazette Extraordinary no. 772/22 of 24 June 1993 as amended by Gazette Extraordinary no. 859/14 of 23 February 1995, Gazette Extraordinary nos. 1104/22 of 5 November 1999 and 1108/1 of 29 November 1999 respectively.

84 Gazette Extraordinary no. 859/14 of 23 February 1995 as amended by Gazette Extraordinary no. 978/13 of 4 June 1997.

85 Gazette Extraordinary no. 772/22 of 24 June 1993.

86 The National Environmental (Protection & Quality) Regulations, No. 1 of 1990 constitute the implementing regulations for the EPL. Gazette Extraordinary no. 596/16 of 2 February 1990 as amended by Gazette Extraordinary no. 924/13 of 23 May 1996 as amended by Gazette Extraordinary no. 1159/22 of 22 November 2000. The 2000 amendment prescribes the activities for which an EPL is required.

87 Gazette Extraordinary no. 924/13 of 23 May 1996 as amended by Gazette Extraordinary no. 973/7 of 30 April 1997. No. 924/13 lays down regulations in relation to hazardous waste management, which also requires an EPL.

ambient air quality.[88] Appeals are provided for in the case of refusals to grant, refusals to renew, suspensions or cancellations of an EPL.[89] An order has been made to prohibit the use of certain materials, which are ozone-depleting substances in any process, trade or industry.[90] On the whole, however, there is a greater amount of regulation than implementation. Problems with regard to implementation include lack of resources and expertise, as sustainable development often requires considerable financial resources as well as technology and skills.

In the mid-1990s, a bill was drafted to replace the NEA, embodying the concept of sustainable development and far-reaching provisions to convert this concept from policy/principle to practice. It *inter alia* included provisions for citizen's suits in relation to issues of environment and development. To date, however, this bill has not been passed. The primary reason for this situation is opposition to the proposed new law from the industrial sector, which wields substantial influence in view of the development needs of the country. Concerns have also been raised as to the feasibility of implementation of some of the provisions, as they do require substantial resources in terms of science, technology and financial expenses.

The generation of electricity has sometimes been at the centre of environment-development dilemmas in the country and once led to the temporary suspension of environmental statutes.[91] On the other hand, environmental considerations have at times been a factor that influenced the energy sector in various ways[92] and the environmental lobby has been to some extent responsible for forestalling the establishment of alternative sources of energy, especially coal-power plants through litigation and other means.[93] Sonali Dayarathne analyses the crisis in terms of Sri Lanka's obligations under the International Covenant on Economic, Social and Cultural Rights as well as her 'obligations' of sustainable development. She asserts – in relation to the National Report submitted to UNCED – that for the most part, the 'principles' of sustainable development have not been adhered to.

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88 The National Environmental (Ambient Air Quality) Regulations of 1994, published by Gazette Extraordinary no. 850/4 of 20 December 1994; the National Environmental (Air Emission, Fuel and Vehicle Importation Standards) Regulation no. 1 of 2000, published by Gazette Extraordinary no. 1137/35 of 23 June 2000 lays down emission-related standards for gasoline.

89 Implemented through the National Environmental (Appellate Procedure) Regulations, 1994, Gazette Extraordinary no. 850/4 of 20 December 1994.

90 Gazette Extraordinary no. 850/4 of 20 December 1994.

91 The Emergency (Generation of Electrical Power and Energy) Regulation 1 of 1997, made by the President under section 5 of the Public Security Ordinance was promulgated by Gazette Extraordinary no. 966/11 of March 12 1997.

92 S.R. Dayarathne, 'The Impact of the Electricity Crisis on Socio-Economic Rights and Sustainable Development', *Sri Lanka: State of Human Rights* 2002, LST, Colombo, 2002, p. 85. The text of this paragraph is largely based on this article.

93 *Ibid.*, at p. 102, she states that there have been allegations that the environmental lobby (sometimes together with religious and political groups) was responsible for blocking several power plant projects including the Trincomalee coal power plant, the new Upper Kotmale hydropower project, the Norochcholai coal power project and a small power plant at Anuradhapura.

She also argues after an analysis of the relevant provisions and case law that socioeconomic rights can be enforced in Sri Lanka to the extent that they are recognized in the Directive Principles of State Policy, subject to the limitation of availability of resources. While Prin. 4 of the Rio Declaration is no doubt important, she argues that we should also bear in mind Prin. 11, which states that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to others, especially developing countries.[94] Given the shortage of hydroelectric power – leading occasionally to the imposition of power cuts and slowing down of production in the country – the wisdom of overplaying environmental issues is in question. Sustainability and development should, it is submitted, play a greater role in guiding decision-makers in this case.

A survey of the legal landscape on environment and sustainable development in Sri Lanka shows that in the last couple of decades, vast strides have been made with respect to the making of legislation and implementing regulations. However, the enforcement of these laws has not been equally progressive. Allegations of inefficiency are commonly directed against the CEA.[95] The provisions of the NEA and implementing regulations are applied to Board of Investment (BOI) enterprises (foreign investment enterprises licensed by the BOI) which have to carry out all operations in conformity with these laws. The enforcement of NEA provisions is carried out by the BOI in respect of all projects within Export Processing Zones (EPZs). For enterprises outside the EPZs, the BOI grants Environmental Clearance and issues EPLs after obtaining concurrence from the CEA where necessary. An Environment Department has been established within the BOI and since the 1st of July 1990, all BOI enterprises need to obtain an EPL from the BOI prior to commencement of commercial operations. With respect to EIA, the Environment Department of the BOI assists the project proponents to obtain environmental clearance by providing guidance in the case of prescribed projects.[96]

Private-law remedies in the law of tort/delict which have served environmental protection purposes include private nuisance, strict liability, trespass, negligence and products liability. Legislative provisions in some 'non-environmental' statutes

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94 *Ibid.*, at p. 106.

95 'Redefining CEA's Role', *Biosphere*, Environmental Foundation Ltd., April 2002, p. 4. It is here asserted that the CEA is biased in favour of industry and that it has failed to carry out its duties under the NEA. Lack of resources, manpower, expert knowledge, working facilities, ministerial direction, co-ordination, commitment, leadership and public support, together with pressure from industry and political interference are here alleged to be the reasons for the limited success of the CEA. According to this article, the implementation of the EIA and EPL processes is unsatisfactory, and that of the Regulations on Solid Waste, Toxic Waste and Air Emissions, non-existent. There is however, a certain level of compliance by the private sector, as well as a certain degree of assumption of responsibility.

96 See Board of Investment of Sri Lanka, *Environmental Norms*, BOI, Colombo, 2001.

have also recently become a popular tool for environmental protection and sustainable development. The abatement of public nuisance traditionally provided for in the Penal Code[97] and the Criminal Procedure Code[98] have been imaginatively interpreted by courts in Sri Lanka and South Asia to serve broader social purposes and community values.[99] Although public nuisance can be prosecuted as a crime under the Criminal Procedure Code, civil law damages in tort are also recoverable by injured victims for special injuries. A precautionary, preventive approach can be attained through the application of the relevant provisions as recognized by both Indian and Sri Lankan courts.[100] The courts have been flexible with regard to the number of persons affected, and have even allowed cases where just one person complained.[101]

Many public nuisance cases constitute the relevant jurisprudence in the pre-environmental era and deal with diverse issues. The first major public nuisance case in Sri Lanka after the enactment of the NEA was *Keangnam Enterprises Ltd.* v. *Abeysinghe*.[102] It arose from a complaint by the inhabitants of a village in the North-Western province to the Magistrate's Court (MC) of Kurunegala, regarding public nuisance from blasting and metal quarrying operations. The metal was used to develop a major road. Excessive noise and vibration from blasting day and night had led to severe damage to person and property, including insomnia, fear psychosis, loss of hearing and bursting of ear-drums, the drying up of wells, failure of crops and structural damage to property. The Magistrate granted an injunction restraining the operation of the quarry and a conditional order to remove

97 Section 261 of the Penal Code no. 2 of 1883 states: "A person is guilty of a public nuisance who does any act, or omission, which causes any common injury, danger, or annoyance to the public or to the people in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who have occasion to use any public right". Public nuisance involves an unreasonable interference with a general right of the public.

98 Chapter IX (Sections 98–106) of the Code of Criminal Procedure Act no. 15 of 1979 sets out the procedure for abatement or removal of a nuisance by a Magistrate. Other statutes providing for the abatement of nuisance include the Nuisance Ordinance no. 15 of 1862 and the enabling statutes of the Municipal Councils, Urban Councils and Pradeshiya Sabhas.

99 S. Puvimanasinghe, 'An Analysis of the Environmental Dimension of Public Nuisance, with Particular Reference to the Role of the Judiciary in Sri Lanka and India', 9 SLJIL, 1997, p. 143.

100 For instance in the Sri Lankan case of *Ariyaratne* v. *Shashidharan* 1(4) SAELR (1994) 151, the need to prevent harm was recognized by the Magistrate's Court (MC).

101 In the Indian case of *Krishna Gopal* v. *State of Madhya Pradesh*, 1986 Criminal Law Journal (Cri. L. J.) 396, the judge found that there was in fact a deleterious effect on the community from the manufacture of glucose saline. In Sri Lanka, in the context of pollution by poisonous chemicals, it was found, that public nuisance could apply even if only one person was affected. (*Ilangamage Piyasena* v. *Mohomed Shafeek, Shatex Industries, Gandara*, MC, Matara, C/N 79325, 19 October 1993). The Court ordered the closure of a factory causing chemical pollution. The CEA had ordered the installation of a waste purification system after which the company could obtain an EPL. The company requested to be allowed to operate pending installation, which was refused.

102 1994 1 (1) SAELR 1.

the nuisance, upon which the company applied for revision to the Court of Appeal (CA) under Art. 138 of the Constitution. The Keangnam company had obtained some licenses such as a site clearance, but not an EPL as required by the NEA. The CA, which refused revision, insisted on this requirement, which the company had applied for but not yet obtained. The Court also did not accept the argument that the possession of an EPL would oust Magisterial jurisdiction for public nuisance, since the company did not have a licence.[103] In a subsequent case, the MC stated that the blasting of rocks and operation of a metal crusher amounted to a public nuisance, even though the company had an EPL, since the terms of the EPL were being violated, causing severe damage including physical injury to persons, damage to over 100 houses and metal dust pollution.[104] The quarry was required to comply with the standards set by the CEA in the EPL. A conditional order for the removal of public nuisance was also granted in a case of pollution from untreated chemical effluents discharged into public waterways by a textile-dying plant causing skin rashes;[105] a lime kiln around which there was an increased incidence of cancer and tuberculosis;[106] a factory producing rubber gloves and boots which caused groundwater pollution from toxic chemicals and wastes leading to respiratory problems;[107] a factory producing sulphuric acid[108] and several other cases. In *Hettiarachchige Premasiri et al.* v. *Dehiwala – Mount Lavinia Municipal Council*,[109] public nuisance provisions were used for the removal of a nuisance, in this case garbage, causing a major threat to public health as well as danger to a bird sanctuary in the vicinity. Since the nuisance was not removed by the Municipal Council in spite of having been given ample time, the interim order was made absolute.

In all these cases, the environmental factor weighed heavily with the courts. While this is indeed a welcome position, it is submitted that sustainable development rather than environmental protection *per se* should be the guide to both legislation and case law in the developing country context. Public nuisance being a

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103 The company subsequently obtained an EPL and the Court of Appeal (CA) stated that new submissions could then be made in the MC, where the main inquiry on public nuisance was pending. By that time however, the road was built by obtaining metal from other sources and public nuisance was no longer in issue. The Magistrate terminated the proceedings, and some of the villagers brought civil actions for damages in the District Court (DC). This case illustrates the urgency that development/environment cases involve, in contrast with the slowness of the traditional adversarial system of administration of justice. Alternative Methods of Dispute Resolution as well as rational planning may provide more practical and expedient solutions.

104 *Ariyaratne* v. *Shashidharan, op. cit.* n. 100.

105 Reported in the *Biosphere*, vol. 9, no. 4, December 1993.

106 *Ibid.*

107 *K.H. Amarasena* v. *Dyseen Lanka Pvt. Ltd, Katana*, MC Negombo Case no. 80695, 27 March 1995.

108 *Singalanka Standard Chemicals Ltd.* v. *T. A. Sirisena* 1996 3(3) SAELR 69.

109 *Garbage Dumping Case*, Mount Lavinia Magistrates Court, 28 February 2002, website of e-law. Another recent case in Sri Lanka was *Kottabadu Durage Sriyani Silva* v. *Chanaka Iddamalgoda*, 8 August 2003, http://www.elaw.org/resources/text.asp?ID=2116

criminal law remedy, does not allow much leeway for the balancing of conflicting interests unlike its civil law counterpart, private nuisance. The facts of the above cases are such that the decisions appear to be just and equitable, given the extreme impacts on human health in most of them. However, this may not always be the case, and it is important that environmental protection does not become a counter-productive issue. Nuisance remedies are *ex post facto*, in that the damage has taken place. In this sense, EIAs provide a better source of protection as they are prospective and can adopt a preventive approach.

PIL has also become a common feature in Sri Lanka, in cases concerning development, environment and human rights.[110] Environmental/developmental issues and human rights issues are closely linked in the jurisprudence of Sri Lanka.[111] These cases usually involve executive or administrative action and frequently also business activities. When major decisions concern the natural resources of the country and other important issues of public interest, there is little room for the community at large to question these decisions, to be informed about their implications, and to ensure accountable and good governance.[112] In Sri Lanka, decisions are sometimes made behind closed doors and conventionally, a culture of non-disclosure rather than transparency pervades public affairs.[113] In this context, PIL serves as a legal tool to raise issues of social accountability in decision-making by the government and industry.

In Sri Lanka, most environmental cases have been based on remedies in administrative law, fundamental rights, public nuisance and the public trust doc-

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110 Most of these cases have proceeded on the basis that as pointed out by Justice Matthew in *Kesavananda Bharthai* v. *State of Kerala* AIR 1973 SC 1461, the scope of human rights is not static and its contents must be guided by the experience and context of each generation.

111 See S. Atapattu, 'Environmental Rights and Human Rights', *Sri Lanka: State of Human Rights*, LST, Colombo, 1997; L. De Silva, 'Human Rights and the Environment', paper presented at the All-Asian Public Interest Environmental Law Conference, Nuwara Eliya, December 1991 and 'Access to Information and Public Participation', paper presented to the SAARC Public Interest Environmental Law Conference, Colombo, January 1995; S. Puvimanasinghe, 'Development, Environment and the Human Dimension: Reflections on the Role of Law and Policy in the Third World, with Particular Reference to South Asia', 12 *SLJIL*, 2000, p. 35; S. Puvimanasinghe, 'Public Interest Litigation, Human Rights and the Environment in the Experience of Sri Lanka', in N. Schrijver, F. Weiss (eds.), *International Law and Sustainable Development, Principles and Practice*, Nijhoff, 2004, p. 653.

112 Here issues arise not only about public participation in general, but also about the inclusion of particular groups, traditionally marginalized in decision-making in the region – like women, children, minorities and indigenous peoples, whose participation the Rio Declaration expressly provides for. R. Kapur's paper on 'Women's Rights in Troubled Waters: The Gendered Impact of the Narmada Dam', (paper presented at a Conference on Displacement and Democracy, organized by LST, Colombo, August 1993), explores how women were rendered invisible in the Narmada Valley projects in India.

113 L. De Silva in 'Access to Information and Public Participation', *op. cit.* n. 111, advocates recognition of a right to access to environmental information as it is often a matter of life and death or health and information. He points out that the SAARC region is replete with situations in which citizens, affected by pollution, hazardous chemicals, badly planned or executed development projects, do not have adequate information to make decisions concerning their life.

trine. The question of standing to sue/*locus standi* usually arises in writ applications such as *certiorari* and *mandamus*. These writs are particularly useful in invalidating unlawful action by governmental bodies and compelling them to carry out their statutory duties, respectively.[114] The first Sri Lankan case in the nature of PIL in the environment/development context, was *Environmental Foundation Ltd.* v. *The Land Commissioner et al.* (*The Kandalama case*).[115] It concerned the granting of a lease of state land to a private company for the purpose of building a tourist hotel. The hotel was to be built in close proximity to an ancient tank and sacred Buddhist temple, upsetting the local environment, both natural and cultural. In spite of the public interest suit questioning the irregularity of the lease, in contravention of the relevant statutory provisions, the project did go through. But the positive effect of the case was that the authorities were ordered by the court to follow the correct procedure and were compelled to do so by providing notice in the Gazette. This case was the first in Sri Lanka to uphold the standing of an NGO dedicated to the cause of environmental protection. It had important implications with respect to access to justice, the role of the judiciary, access to information and public participation in decision-making, compliance with and implementation of the law. The Environmental Foundation had since 1981 filed action in environmental matters without its *locus standi* being challenged; on some occasions, the cases were settled in such a manner that it was not necessary to rule on standing.

The *Environmental Foundation Limited et al.* v. *The Attorney General (The Nawimana case)*[116] was a case involving a fundamental rights petition, and was brought by residents of two villages in the South of Sri Lanka, in respect of serious damage to health and property caused by quarry-blasting operations. It therefore was in the nature of a class action. The petitioners alleged the violation of several Constitutional provisions, namely, that sovereignty is in the people and is inalienable and includes fundamental rights; that no person shall be subjected to torture or to cruel, inhuman or degrading treatment; freedom to engage in any lawful occupation, freedom of movement and of choosing a residence;[117] as well as directive principles of state policy.[118] The case was settled through mediation of the CEA, and the petitioners obtained relief. The court recognized the possibility of invoking fundamental rights provisions in environment-related cases, and the connection between environment, development and human rights. It also accepted, by a majority decision, the possibility of public interest litigation, since the first petitioner was an environmental NGO.

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114 The case of *Wijesiri* v. *Siriwardene* is the first reported case involving PIL in Sri Lankan jurisprudence.

115 1994 SAELR 1(2) 53.

116 *Op. cit.* n. 44.

117 Arts. 3, 11, 14 (1) (g), 14 (1) (h).

118 See n. 28 above.

In *Environmental Foundation Ltd.* v. *Ratnasiri Wickremanayake, Minister of Public Administration et al.*[119] there was an unequivocal recognition of the possibility of bringing public interest litigation in suitable cases. Until this judgement, cases in the nature of public interest suits had been heard, but with no pronouncements on their acceptability as a matter of principle. The judgment is therefore significant because it disposes of the issue as to whether public interest litigation is admissible in the Sri Lankan legal system. In this *certiorari* application, Justice Ranaraja expressly extended *locus standi* to a person who shows a genuine interest in the subject matter, who comes before the court as a public-spirited person, concerned to see that the law is obeyed in the interest of all. Unless any citizen has standing, therefore, there is no means of keeping public authorities within the law except where the Attorney-General will act, and frequently he will not.[120]

In *Deshan Harinda (a minor) et al.* v. *Ceylon Electricity Board et al. (The Kotte Kids case)*[121] a group of minor children (through their next friends) filed a fundamental rights application alleging that the noise from a thermal power plant generator exceeded national noise standards, and would cause hearing loss and other injuries. Standing was granted for the case to proceed on the basis of a violation of the right to life. Although the Sri Lankan Constitution does not expressly provide for the right to life, it was argued that all other rights would be meaningless and futile without its existence, at least impliedly. But the case was finally settled as the petitioners agreed to accept an *ex gratia* payment without prejudice to their civil rights, so that there is no adjudicatory decision.

In *Gunarathne* v. *Homagama Pradeshiya Sabha et al.*[122] in what was the first express reference to sustainable development by the Supreme Court, it was noted that: 'Publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved.' Here the court refers expressly to the prime elements of good governance, intrinsic to the concept of sustainable development. The court stated that the CEA and local authorities must notify the neighbourhood and hear objections, as well as inform the industrialists and hear their views in deciding whether to issue an EPL. The Court imported this requirement in the licensing process though the law was silent on the matter. The Court also required that agencies give reasons for their decisions and must inform the parties of such reasons, thus introducing facets of natural justice.

In *Lalanath de Silva* v. *The Minister of Forestry and Environment (The Air Pollution case)*,[123] the petitioner averred that the Minister's failure to enact ambient air quality standards resulted in his right to life being violated. The Supreme Court ordered

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119 1996 SAELR 3(4) 103.

120 The judge went on to state that private persons should be able to obtain some remedy and that this was a matter of 'high constitutional principle'.

121 *Op. cit.* n. 50.

122 1998 SAELR 5(2&3) 28.

123 *Op. cit.* n. 50.

the enactment of regulations to control air pollution from vehicle emissions in the city of Colombo. Regulations were enacted pursuant to this decision, which had the effect of ensuring steps for implementation of the law and compliance with it.[124] Leave to proceed with this case was granted on the basis of a violation of the right to life. However, the case was decided through an order for making regulations, without dealing with the issue of the right to life. This case is significant also from the perspective of the role of civil society with regard to laws and their implementation as the petitioner although himself a lawyer, appeared in his capacity as a member of the citizenry.

The case of *Tikiri Banda Bulankulama* v. *Secretary, Ministry of Industrial Development*[125] is a significant example of how consensus reached in New York, Geneva or The Hague can touch the lives, livelihoods and environments of people in a remote village on a distant island. This case concerned a joint venture agreement between the Sri Lankan government and the local subsidiary of a TNC for the mining of phosphate in the North-Central Province. The terms of the mineral investment agreement were highly beneficial to the company, and showed little concern for broader concerns of human rights, the environment, indigenous culture, history, religion and value systems, and the requisites of sustainable development as a whole. It was the subject of a public interest suit by the local villagers (including paddy and dairy farmers, owners of coconut land and the incumbent of a Buddhist temple) in the Supreme Court.

The proposed project was to lead to the displacement of over 2,600 families, consisting of around 12,000 persons. The Supreme Court found that at previous rates of extraction, there would be enough deposits for perhaps 1,000 years, but that the proposed agreement, would lead to complete exhaustion of phosphate in around 30 years. According to Justice A.R.B. Amerasinghe, fairness to all, including the people of Sri Lanka, was the basic yardstick in doing justice. The Court held that there was an imminent infringement of the fundamental rights of the petitioners, all local residents.[126] The particular rights were those of equality and equal protection of the law under Art. 12(1), freedom to engage in any lawful occupation, trade, business or enterprise under Art. 14(1)(g), and freedom of movement and of choosing a residence within Sri Lanka under Art. 14(1)(h).

The judge, after referring to the concepts of sustainable development,[127] intergenerational equity[128] as well as human development, and analysing the agreement

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124 Air Emission, Fuel and Vehicle Importation Standards, *op. cit.* n. 88.

125 *Op. cit.* n. 50.

126 'Imminent' since the agreement had not yet entered into force.

127 The three main principles of sustainable development referred to in the judgment were conservation of natural resources in accordance with the intergenerational equity principle, exploitation of natural resources in a sustainable manner, and integration of environmental considerations into development projects.

128 Section 17 of the NEA refers to the basic policy on the management and conservation of the country's natural resources, which should obtain optimum benefits therefrom and preserve the same for future generations.

with reference to several principles of international environmental law including Prins. 14 and 21 of the Stockholm Declaration and Prins. 1, 2 and 4 of the Rio Declaration, stated as follows:

> In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.[129]

This pronouncement could have significant ramifications for a dualist country like Sri Lanka, where international law norms need to be embodied in enabling legislation to be binding on courts. This judgement extends the incorporation process to the intermediary of the Superior Courts.[130] Deepika Udagama comments that it is doubtful that a petition could be grounded directly on international law and that while recently international human rights standards have been increasingly used as interpretive aids, international law will probably still have to be pleaded to expand the scope of existing domestic legal provisions.[131]

The court disallowed the project from proceeding unless and until legal requirements of rational planning including an EIA was done. It found that the proposed project would harm health, safety, livelihoods and cultural heritage, as it even interfered with the Jaya Ganga, a wonder of the ancient world, declared as a site to be preserved under UNESCO's World Heritage Convention. This cultural heritage, the court noted, was not renewable; nor were the historical and archaeological value and the ancient irrigation tanks that were to be destroyed. The toxic waste from the mining would have gone into pits breeding mosquitoes. Having considered the question as to whether economic growth is the sole criterion for measuring human welfare, the court stated that ignorance on vital facts of historical and cultural significance on the part of persons in authority can lead to serious blunders in current decision-making processes that relate to more than rupees and cents. The judgement, requiring the cancellation of the project unless proper procedures are followed, draws inspiration from principles of international environmental law and sustainable development (in particular the separate opinion of Judge Weeramantry in the ICJ case, *Hungary* v. *Slovakia*)[132] as well as the

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129 2000 SAELR 7(2) p. 1, at 28.

130 D. Udagama, 'Review of Fundamental Rights Jurisprudence', *Sri Lanka: State of Human Rights*, 2001, LST, Colombo, 2000 at p. 154.

131 *Ibid.*

132 *Case concerning the Gabcikovo-Nagymaros Project*, (1997) ICJ Reports 7.

ancient wisdom and local history of conservation, sustainability and human rights. The company's exemption from submitting its project to an EIA was held to be an imminent violation of the equal protection clause. Although the constitution basically provides only for civil and political rights to be justiciable, the court allowed for a broader interpretation through innovation, to include social and economic rights.[133] Natural resources of the country were said to be held in guardianship by all three branches of the government – executive, legislature and judiciary. The public trust doctrine was also recognized in this case. The judge in this case has been lauded for having taken 'the parameters of the discourse on constitutional protection of human rights to new heights'.[134] Moreover:

> While harking back to ancient practices does not generally provide grounds for a legal judgement, in this instance, it did make a positive contribution by emphasising the universal and timeless nature of concepts such as sustainable development, which are at times perceived as 'western' or alien to non-Occidental societies.[135]

Mundy v. *Central Environmental Authority and others*[136] concerned several appeals relating to the building of the Southern Expressway linking Colombo city with the city of Matara on the Southern coast, an important step in terms of infrastructure development towards enhancing industry, trade and investment. Protracted litigation opposing the project and its different alternative routes, involved allegations of potential damage to human rights including largescale displacement, and injury to the environment including sensitive ecosystems. The Court of Appeal had upheld the developmental interest, holding that when balancing the competing interests, the conclusion necessarily has to be made in favour of the larger interests of the community who would benefit immensely by the project. It had given highest priority to the public interest in development, then to the environmental damage to wetland ecosystems, and lastly, to the human interests of affected persons. Several persons appealed to the Supreme Court with regard to particular sections of the route which resulted in the taking of their lands, with no arrangements for compensation. The SC varied the order of the CA to the extent that it ordered compensation under the *audi alteram* principle of natural justice, and Constitutional Art. 12(1) on equality and equal protection. In an innovative and value-laden expression of equity, equality and social justice, Justice Mark Fernando stated:

> If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest

133 Udagama, *op. cit.* n. 130, at p. 150.
134 *Ibid.*, p. 150.
135 *Ibid.*, p. 152.
136 SC Appeal 58/2003, decided on 20 January 2004, http://www.elaw.org/resources/text.asp?ID=2285

> plot of land and a little hut because they are of 'extremely negligible' value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property the greater his right to compensation.[137]

Still another significant case *Environmental Foundation Ltd.* v. *Urban Development Authority et al.*,[138] concerned the proposed leasing out of the Galle Face Green, a popular seaside promenade in Colombo city, a major public utility built by a British governor in the 19th century. It has always been a treasured public property for use by all, but was by the terms of the proposed lease, to be handed over by the Urban Development Authority to a private company, to build a 'mega leisure complex'. The Supreme Court in a fundamental rights application, upheld the argument of the petitioner NGO in the public interest, to preserve the country's national heritage for use of the public. Very significantly, the court upheld the petitioner's argument of infringement of the right to information, through reading the Constitutional Art. 14(1) on the freedom of speech and expression including publication, as encompassing a right to information. This line of argument was adopted because the Constitution does not expressly include the right to information. In view of the clandestine nature of the agreement between the UDA and the EAP Group of Companies, the Court also held that in view of the arbitrary deprivation of requested information in the exercise of power, the petitioner's rights to equality under Art. 12(1) had also been infringed.

Public interest applications filed by the Centre for Environmental Justice – an environmental NGO – and pending before the Court of Appeal involve: firstly, irregular and/or unregulated mechanized mining and transport of sand from sand dunes in a wetland ecosystem in the North-Western Province, without permits under the relevant statutes;[139] secondly, activities threatening the coastal zone and its habitats, including destruction of mangroves; sand mining; coral extraction; destructive fishing methods; coastal pollution and improper constructions – all needing urgent coastal pollution control and management. In both cases, several international environmental instruments are being used in argument, in addition to local statutes. They include the Declarations of Stockholm, Rio and Johannesburg, the World Charter for Nature, the Biodiversity Convention, the 1972 World Cultural and Natural Heritage Convention and the 1997 Paris Declaration on the Responsibilities of Present Generations Towards Future Generations. Both cases are filed against relevant governmental authorities, pleading for writs of *mandamus* for carrying out of statutory duties,[140] as the government is the guardian of nat-

137 *Ibid.*, at p. 13.

138 SCFR Application No. 47, 2004, decided on 23 November 2005.

139 *Withanage* v. *Geological Survey and Mines Bureau and Others*, CA Application of 21 October 2004, http://www.elaw.org/resources/text.asp?ID=2642.

140 *Withanage* v. *Director Coast Conservation*, CA Application no. 551/2005 of 7 April 2005.

ural resources on behalf of present and future generations of the people of Sri Lanka. The most recent case now pending before the Court of Appeal, and filed by the same NGO, concerns the protection of a major national park, forming a wetland of international importance under the Ramsar Convention on Wetlands, and alteration of the boundaries of this park by the governmental authorities-*Centre for Environmental Justice* v. *Ministry of Agriculture, Environment, Irrigation and Mahaweli Development et al.*[141] This alteration would, it is argued, pose a further threat to the ecosystem, already endangered by landfills, aquaculture farms, fisheries, pollution, mining of minerals and the clearing of mangroves. The petition argues that the action of the authorities is in breach of several international conventions including the Wetlands, Cultural and Natural Heritage, Biodiversity Conventions and Bonn Convention on Migratory Species of Wild Animals, several declarations including the Johannesburg Declaration, and relevant articles of the Sri Lankan Constitution. It requests writs of *certiorari* and *mandamus*.

An evaluation of public interest litigation and jurisprudence relating to sustainable development in South Asia including Sri Lanka

Public interest litigation has been useful in injecting an informed, participatory and transparent approach to the processes of development, and to governmental and private sector actions involving public resources. It has provided a voice to persons who would otherwise be marginalized. Through PIL, multiple sectors become involved in the development process, as envisaged in the sustainable development notion. Most of all, it has brought forth an element of accountability, and also created some space for the portrayal of a human face in development. The tool of PIL has afforded a viable mechanism for compliance with sustainable development norms, in a creative and innovative manner, and also helped to make the development process more holistic. On the other hand, however, it has also meant that courts become directly involved in making policy decisions. This in turn has both positive and negative ramifications, and is by no means uncontroversial. It could create a system of decision-making that is, in a sense, *ex post facto* and decentralized, and if not kept within certain limits, could divert the development process away from the policy-planning objectives of the state, leading to inconsistency and incoherence. One safeguard here is that most cases revolve around the central issue of lawfulness of a decision or action.

PIL could be abused, overused and misused, and there must therefore be checks, balances and limitations, in order that the development process including foreign investment is not interfered with unnecessarily. Principles of international law should be selectively adopted and suitably adapted to domestic contexts, and

141 *Bundala National Park Case*, petition filed on 23 February 2006, http://www.elaw. org/resources/text.asp?ID=3063

not blindly followed. There is a tendency to use these tools to oppose development projects, particularly because of opposition in the political arena or other dynamics, such as religion, culture or politics. In order to maintain its credibility, the tool of PIL should be steered towards the attainment of sustainable development rather than the opposition to all development. In fact, the concept of sustainable development stands for the spirit of reconciliation and co-operation rather than conflict and confrontation, making environmental protection an integral component of development. Otherwise, it would be counterproductive to the whole project of development. What is important is to promote development that is sustainable.

The content of much of the jurisprudence tends to concern the negative aspects of large development projects, such as displacement, and of industrialization, such as pollution. This could be related to the influence of norms of environmental protection emerging from international law and the influence of the comparative experience and jurisprudence of the developed world. Even environmental legislation in developing countries often emulates that of developed countries. This is not an appropriate practice, as the context of each country is different. On some occasions, explicit reference has been made to the international law in context. At other times, there is no reference, and the reasoning process is independent, but the arguments and decisions come remarkably close to the law of sustainable development. What is clear is that the domestic jurisprudence is influenced by international law, and even more strongly by how this law has taken shape in the domestic courts of several states in South Asia.

Many concerns have been raised about the enforcement of decisions flowing from PIL, which often lags behind the decisions and orders. In fact, the experience of South Asia has been that implementation and enforcement have tended to lag behind the adjudication of cases and making of orders. If enforcement does not keep pace with the jurisprudence, the whole process will become futile and counterproductive. Therefore an effort must be made to ensure expedient enforcement of orders. Orders frequently give remedies such as the installation of safeguards in factories, rather than their closure. This is in line with the spirit of sustainable development.

Similarly to worldwide developments, in Sri Lanka and South Asia, NGOs have been active in the protection of human rights and the environment.[142] In Sri Lanka, two national-level NGOs have filed several lawsuits and helped numerous victims through their legal aid clinics, in addition to educational endeavours, campaigns for law reform and publications. In several South Asian countries,

142 S. Atapattu, *Sustainable Development and the Role of NGOs in Sri Lanka*, article based on a background paper prepared for the Conference on Building the Model South Asian Law Firm, organized by the South Asian Law Students Association, Washington DC, 17 February 2001, George Washington University Law School, Washington DC.

activists have played a phenomenal role in environmental protection and litigation. Through public interest lawsuits, they have helped shape domestic norms and standards. There are also thousands of grassroots-level NGOs in the field. The NEA provides for NGO representation in the advisory body to the CEA, the Environmental Council. The NEA does not grant NGOs *locus standi* to bring litigation, reserving that right only for the CEA. In other words, citizen suits are not provided for in the statute, and have only taken place because of judicial receptivity and inclination to enhance access to justice.

In South Asia, concerted moves to address issues of economics/environment and human rights with a more holistic approach have emerged primarily from the nongovernmental sector. The observance of broader social interests by TNCs is a subject increasingly scrutinized by civil society and some interesting developments have taken place in Asia. The 1998 Draft NGO Charter on Transnational Corporations[143] (by the People's Action Network to Monitor Japanese Transnational Corporations abroad) is one such example. Art. 1–E of the Indian-based Consumer and Unity Trust Society's[144] 'International Agreement on Investment' states that a contracting party shall be free to adopt or continue, with or without modification, such measures as are required for securing conformity with international treaties, conventions and agreements relating to human rights. In recent years a vibrant civil society has emerged in much of South Asia, in response to the globalization challenge in its various forms. The South Asia Watch on Trade, Economics and Environment (SAWTEE) based in Nepal, for instance, aims to create capacities in NGOs and media persons to enable citizens to understand and cope with the processes of transition and equip them with information and the tools of advocacy to provide adequate safety nets for protection of the environment and consumers through enhanced regional and international cooperation. The programme is part of Consumer International's global watch on trade and economics. Pro-Public or the Forum for Protection of Public Interest, also based in Southern Asia, focuses on environmental justice, good governance, globalization and the like. Through research, litigation, negotiation and other methods, it is in the process of promoting government and private sector accountability. While all their efforts as well as that of many others are laudable, they amount only to weak and piecemeal attempts to penetrate the international economic legal system and its regional and local parallels, and their ramifications for broad social concerns. Given the intrinsic disabilities of civil society in the arena of international law-making, such initiatives should ideally, emerge from intergovernmental processes.

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143 Referred to in UNCTAD, *Social Responsibility*, UN, New York/Geneva, 2001, p. 42.
144 *Ibid.*

6.3 The International Human Rights Law Dimension

Regional arrangements

The sound of silence pervades the intergovernmental scene of human rights frameworks in the continent of Asia, where there is no regional charter on the subject. This situation contrasts with that in other developing regions, Africa and Latin America, where the African Charter on Human and Peoples Rights of 1981[145] and the Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol) of 1988[146] create intergovernmental arrangements at the regional level.

The Asian Human Rights Charter,[147] an attempt at a regional arrangement, comes from the NGO sector. It states:

> In contrast to the official disregard or contempt of human rights in many Asian states, there is increasing awareness among their peoples of the importance of rights and freedoms. They realize the connections between their poverty and political powerlessness and the denial to them of these rights and freedoms. They believe that political and economic systems have to operate within a framework of human rights and freedoms to ensure economic justice, political participation and accountability, and social peace.[148]

An intergovernmental charter would fill the void which currently exists in human rights arrangements in Asia.[149] This vacuum may be due in part to the extreme diversity in every sense within the continent. However, practically all countries in the region are parties to several international instruments on human rights, and despite the absence of an official charter, have their individual obligations under these instruments. In an approach different to that of Asian values, Ghai[150] argues that within the international human rights discourse, a distinctive Asian approach is possible because the context of human rights is delineanated by the social and economic conditions of place and time, and by the transformative potential of human rights, which are a constant challenge to vested interests and authority in

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145 OAU. Doc. CAB/LEG/67/3/Rev.5, 21 ILM 58 (1982).

146 OASTS 69; 28 ILM 161 (1989).

147 The Asian Charter for Human Rights was declared in Kwangju, South Korea, on 17 May 1998, in commemoration of the 50th Anniversary of the UDHR. Its architecture involved the collaboration of many individuals, brought together by the Asian Human Rights Commission, Asian Legal Resource Centre, Hong Kong.

148 *Ibid.*, Art. 1.6.

149 See S.R. Harris, 'Asian Human Rights: Forming a Regional Covenant', 1 *Asian-Pacific Law and Policy Journal* 17, pp. 1–22; N. Jayawickrema, 'An Asian Convention on Human Rights', and V.R. Krishna Iyer, 'Asia on the leap – the role of law with special emphasis on the actualisation of human rights', both papers presented at *Lawasia*, Colombo, 13 and 16 September 1993.

150 Y. Ghai in 'The Asian Perspective on Human Rights', *Law and Society Trust Fortnightly Review*, vol. IV, Issue 62, 1 August 1993; the contents of this paragraph are based on this article.

societies driven by huge disparities in wealth and power, with traditions of authoritarianism and helplessness of disadvantaged communities, of militarization and the conjunction of corrupt politicians and predatory domestic and international capital. He refers to the massive violations of human rights in Asia, the low consciousness of human rights due partly to poverty which destroys human dignity and therefore human rights, the need for economic growth – together with more egalitarianism, protection of workers, land, customs and autonomy of long-settled communities. Ghai asserts that since challenges to violations of human rights in Asia are often not individual but group-based, and states are major violators, fruitful Asian perspectives should urge struggle domestically as well as globally, given the internationalization, politicization and power dynamics that affect all economies. He concludes that human rights conscientiation and mobilization are therefore a basic starting point.

Transposed to Southern Asia, human rights need to be viewed through a particular prism, which tends to represent the region as a whole. Apart from Pakistan, all the other states 'claim to have liberal systems of governance. The militarization of politics in virtually all South Asian countries, together with an increase in impunity and corruption, have however undermined the democratic nature of the state'.[151] In the absence of regional mechanisms such as regional treaties setting up courts for the purpose, the two main mechanisms for the protection of human rights in these countries are the judiciary, and the national human rights commissions and other special bodies. Studies have revealed that access to justice in the region is hampered by laws' delays and high costs. In Sri Lanka, alternative means of dispute resolution (ADR) are often suggested.[152] Lack of resources leading to lack of courts, lack of awareness of new legal developments and international instruments among lawyers and judges,[153] legal illiteracy and victim apathy influence the dimensions and contours of the ground realities of human rights.[154] India, Nepal and Sri Lanka have human rights commissions, which are state bodies, while Pakistan's commission is nongovernmental. In India, several other bodies have also been set up for the protection of various aspects of human rights.[155]

In relation to FDI and human rights in South Asia, one of the most visible issues is labour and abuse of rights in relation to it – such as the exploitation of

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151 LST, *Human Rights in South Asia: An Agenda for the Next Decade*, LST, Colombo, 2001, p. 43; also see Asian Forum for Human Rights and Development, *Rice and Roti: Rights and Freedoms*, Human Rights Report, Forum-Asia, Bangkok, 1999.

152 LST, *ibid.*, p. 45.

153 *Ibid.*, pp. 45, 46.

154 *Ibid.*, p. 46, it is also stated here that due to traditional attitudes judges are often reluctant to use international human rights instruments in their judgments even if they may be aware of them. It is stated at p. 46 that 'Until 1997, the Nepali Supreme Court had rejected the inclusion of international instruments in submissions. However, recently the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention Against Torture (CAT) have been used in two major cases with the arguments being accepted by the court.'

155 *Ibid.*, pp. 46, 47.

cheap labour, 'sweatshops' and child labour. Issues relating to labour in the Export Processing Zones in countries like India, Bangladesh and Sri Lanka have their negative impacts mostly on South Asian women who, for the most part, are born into a heritage of patriarchy, religious beliefs and cultural mores, and are to some extent, destined for unequal treatment. A study on the impact of transnational garment firms on human rights in South and South East Asia with specific focus on labour rights concluded that, with at least eight out of ten rights and prohibitions analysed, there was evidence of serious violations. The study suggests "the need for greater state regulation and international co-operation between states, by creating common labour standards, sanctions and implementing procedures and for non-compliance across national boundaries which will reduce the pressure on national governments to lower wages and labour standards with the aim of attracting investment".[156]

Each of the South Asian countries are signatory, at the individual level, to many international instruments on human rights – and as such each has its international obligations – and to a lesser extent, measures for domestic implementation. With regard to child labour, while all the countries in the region have ratified the Convention on the Rights of the Child, the protection of child rights is still weak.[157] Lack of awareness of legal rights and remedies has been seen to be one of the reasons,[158] which also means that legal actions are rare. There is no protection against child labour specifically at the regional level, although several policy declarations do exist. At the country level, in Sri Lanka, the 1999 Amendment to the Employment of Women, Young Persons and Children Act of 1956 prohibits employment of children under 12 years of age in all spheres, and under 14 years in the case of estate workers. However, no positive change can be seen in relation to child labour.[159] In comparison with some other South Asian states, Sri Lanka's incidence of child labour is far less, and exists mostly in the sectors of estate and domestic labour, and in different contexts, in relation to sexual exploitation and civil warfare. The lower incidence is possibly related to protective labour laws and their observance in most sectors including TNCs, compulsory schooling

156 J.G. Frynas, 'Human Rights and the Transnational Garment Industry in South and South-East Asia: a Focus on Labour Rights', paper presented at the International Conference of the Comparative Interdisciplinary Studies Section (CISS) of the International Studies Association (ISA), Washington DC, 29–30 August 2000.

157 LST, *op. cit.* n. 151, p. 62. The disintegration of the agricultural economy and advent of the industrialized economy resulting in high poverty and urban migration, and preference for children because of their lack of bargaining power are seen as some reasons for the rise of child labour in the region.

158 *Ibid.*, p. 62. In India there have been moves to include child rights in the Constitution, after the Supreme Court decision of 1992 (*Mohini Jain* v. *State of Karnataka* 1992, 3 Supreme Court Cases (SCC) 666), which declared education to be a fundamental right. This again illustrates the phenomenal role that the higher judiciary, complimented by public spirited individuals and lawyers, can play in the region.

159 *Ibid.*, p. 63.

and the provision of free education/schooling facilities for all children since independence. Sri Lanka has ratified all eight of the ILO Core Conventions,[160] but as in other parts of South Asia, the most important need is to give teeth to legal obligations. Moreover, making child labour unlawful where it exists, will not help unless there are alternate means of earning a living,[161] even alternate means of survival. A relevant example is provided by the experience of Bangladesh, where outlawing of child labour in factories was not combined with alternative means of finding a livelihood.[162] This is also an example where the social and political economy of human rights promotion and protection should be taken into account in the pursuit of solutions in the broader context of the universality of human rights. Children as young as five years of age, are sometimes employed in industries which produce textiles, toys, shoes and carpets, for export to consumers in the developed world, and are made to work 16 hours a day, 7 days a week.[163] Various international efforts such as the ILO's International Program on the Elimination of Child Labour (IPEC) in conjunction with member states and NGOs in developing countries now exist in this area.[164] In 1997, an agreement was signed by several TNCs and their local suppliers pledged to work with ILO and UNICEF to eliminate child labour from the football stitching industry in Pakistan. In one province of Pakistan alone, an estimated 7,000 children stitch three-quarters of the world's leather footballs and a pilot project aims to phase out the use of child labour from this sector.[165]

In modern transnational business arrangements of sub-contracting, supply chains, outsourcing and the like, which are common in South Asia, the region needs appropriate legal arrangements to deal with human rights violations, to provide for accountability of governments and corporations.[166] International law too is weak in this sphere, as these are new problems, and any law at this point is confined to soft law in the form of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. This provides that states are responsible to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors. Indeed, civil and political rights including the right to life also need to be protected, and regional arrangements need to address these new issues.

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160 http://www.ilo.org/public/english/region/asro/colombo/iloconvn.htm
161 *Op. cit.* n. 159.
162 *Ibid.*
163 Amnesty International, *Global Trade, Labour and Human Rights*, AI, London, 2000, p. 21.
164 *Ibid.*
165 *Ibid.*
166 See N. Gordon, *op. cit.*, n. 6.

A striking feature of human rights protection and promotion in the region is the number of interventions by civil society, virtually portraying an alternative approach to governance, in the face of the vacuum in state-sponsored mechanisms. South Asians for Human Rights (SAHR) is a recent nongovernmental initiative in the region. Within the primary body for regional co-operation in the region, the SAARC, the main emphasis has been on economic co-operation and development. Action against rights abuses, like child labour, have taken the form of policy initiatives such as declaration of a specific year as the SAARC year of the child, for instance. Very recently however, at the November 2005 SAARC Summit in Dhaka, member states adopted a Social Charter,[167] where the focus is on balanced social development, in keeping with broader national development goals and specific national historic and political contexts of each state. The Charter envisages that the 'obligations' thereunder will be respected, protected and fulfilled, and that domestic enforcement will be reviewed through agreed regional arrangements and mechanisms.

National arrangements

In Sri Lanka, chapter III of the Constitution of 1978 embodies its human rights component. Art. 11 of this chapter prohibits torture as well as cruel, inhuman or degrading treatment or punishment. Equality before the law, equal protection of the law and non-discrimination are provided for in Art. 12. Art. 14 provides for several rights and freedoms, which include: the freedom of association and to form and join a trade union; to enjoy and promote one's own culture; to engage in any lawful occupation, profession, trade, business or enterprise; freedom of movement and choosing a residence within Sri Lanka. Art. 17 entitles every person to apply to the Supreme Court as provided by Art. 126, in respect of the infringement/imminent infringement, by executive or administrative action, of a fundamental right to which he/she is entitled under the human rights chapter. Art. 126 states that violations of fundamental rights under chapter III are justiciable, though in keeping with traditional human rights approaches, infringement/imminent infringement must stem from executive/administrative action. Although business enterprises cannot be direct respondents in fundamental rights cases, they can be joined as respondents, while the state, which is usually involved by way of acts of commission or omission, is the main respondent.

Chapter III includes several disenabling provisions. For instance, the freedom of association is under Art. 15(4) subject to such restrictions that may be prescribed by law in the interests of racial and religious harmony or national economy. Under Arts. 15(5) and 15(6), the freedom to engage in any lawful occupation, profession, trade, business or enterprise and the freedom of movement and choos-

167 http://www.mofa.gov.bd/13saarcsummit/saarc_social_charter.html

ing a residence can also be limited in the interests of national economy. And under Art. 15(7), the exercise and operation of all fundamental rights declared and recognized in Arts. 12, 13(1), 13(2), and 14 are subject to restrictions which may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. These rights and restrictions do represent a form of balancing conflicting interests. On the other hand, the limitations are vague, nebulous and tend to go so far that the scales may be unevenly balanced.

The Directive Principles of State Policy and Fundamental Duties in Chapter VI of the Constitution are also significant. According to Art. 27(1), they are intended to guide Parliament, the President and Ministers in the enactment of laws and governance of Sri Lanka for the establishment of a just and free society. Under Art. 27(2) the State is pledged to establish a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all persons; the promotion of the welfare of the people through a social order in which social, economic and political justice shall guide all national institutions; an adequate standard of living and continuous improvement of living conditions; the development of the whole country by means of public and private economic activity and by laws prescribing planning and controls necessary for directing and co-ordinating such activity towards social objectives and the public weal; equitable distribution among all citizens of the material resources of the community and the social product, to best serve the common good; the establishment of a just social order in which the means of production, distribution and exchange are not concentrated in the State or a privileged few, but are dispersed among, and owned by, all the People. Under 27(7), the State shall eliminate economic and social privilege, and the exploitation of man by man/the State. According to 27(8), the State must ensure that the operation of the economic system does not result in the concentration of wealth to the common detriment. Art. 27(15), provides that the State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, and shall endeavour to foster respect for international law and treaty obligations in dealings among nations. By Art. 28 the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it is the duty of every person in Sri Lanka *inter alia* to respect the rights and freedoms of others. Though somewhat aspirational and hortatory in nature, these principles are useful as they throw light on purported objectives and values guiding governance. They must inform the making of laws as well as their enforcement and interpretation. Several principles bear a relationship to this study.

Chapter 4 on public international law standards demonstrated how human rights provisions have in fact been a mechanism in safeguarding the environment

and advancing sustainable development. The realization of human rights provisions has been buttressed by the judicial approach in Sri Lanka, as judges have endeavoured to give life to these rights and freedoms, like in several other countries in South Asia. The lack of executive and legislative commitment has in this context been to some extent rectified by judicial zeal. In the majority of cases described, the human rights machinery was invoked to protect human rights and the environment, and balance these values with economic development. Most of the cases were brought by NGOs and interested citizens. There is a gap in the sphere of governmental action, and most attempts at a holistic approach to development have been initiated by other sections of society.

6.4 The International Economic Law Dimension

Regional arrangements

From an economic/investment/trade perspective, the South Asian Association for Regional Cooperation (SAARC)[168] is the main regional intergovernmental organization in South Asia. The South Asian Free Trade Agreement (SAFTA) and the South Asian Preferential Trading Agreement (SAPTA) within SAARC deal with economic concerns only, and further integration and liberalization of economic activities in the region. There is no intergovernmental initiative, which seeks to integrate the regulation, protection and promotion of economic and non-economic concerns, although many social, human and environmental initiatives also form the subject matter of SAARC actions and instruments. SAARC's areas of regional co-operation are expansive, and include political co-operation, agriculture and rural development, health and population, women, youth, children, the girl child, environment and forestry, science, technology and meteorology, human resources development and transport, tourism, arts and culture, education and literacy, poverty eradication, communications, security, terrorism and drug trafficking.[169]

SAFTA is intended to supercede SAPTA, was adopted at the SAARC Summit in Islamabad on the 6th January 2004, and is due to enter into force on 1 January 2006,[170] although the completion of technical formalities may lead to a slight postponement. There is a 10-year period until 2015 for SAFTA to become fully operational. It includes provisions for tariff reduction and dispute settlement, and looks towards regional economic co-operation, integration and a free trade area[171] but

168 *Op. cit.* n. 8.

169 *Ibid.*

170 The official website of the government of Sri Lanka, http://www.priu.gov.lk/news_update/features/20041208economic_market_bulletin.htm

171 *The Independent*, New Delhi, December 18 2004, http://www.independent-bangladesh.com/news/dec/18/18122004ap.htm

much needs to be done towards the realization of these objectives. SAPTA concessions will continue until completion of the liberalization programme.

Developments in two other regional organizations in the form of the Asian-Pacific Economic Co-operation (APEC) and the Association for Southeast Asian Nations (ASEAN) are not directly relevant, but interesting and perhaps useful for purposes of analogy. Although Sri Lanka could broadly be posited also within Southeast Asia, at least for purposes of regional organization, and she is also situated within the larger Asia-Pacific region, she is not a member of ASEAN nor APEC.

APEC was established in 1989 and consists of several countries in the Asia–Pacific region,[172] where it is the main forum for facilitating economic growth, cooperation, trade and investment. Its 'three pillars' are trade and investment liberalization, business facilitation and economic and technical co-operation.[173] It is unique in being an intergovernmental organization with no treaty obligations, operating on the basis of non-binding commitments, open dialogue and equal respect for the views of all participants. Decisions are made by consensus and commitments are undertaken on a voluntary basis. The interests of APEC have so far been confined mostly to the economic sphere. However, its Non-Binding Principles of 1994 are inclusive, in that they require foreign investments to abide by the host economy's laws, regulations, administrative guidelines and policies.

ASEAN consists of a smaller group of countries within the same region, set up under the ASEAN Agreement.[174] The ASEAN Investment Agreement for the Promotion and Protection of Investments 1987 creates a system of liberalization of movement as well as protection of investments in the region.[175] It is unique in its provision for the unilateral right of the host state to invoke the dispute settlement provisions of the Agreement against a foreign investor, in case of violation of its interests.[176] This augurs well for the interests of the host state's development,

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172 The 'Member Economies' are Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, the Russian Federation, Singapore, Chinese Taipei, Thailand, United States of America and Vietnam. APEC represents what could be the most economically dynamic region in the world having generated nearly 70% of global economic growth in its first 10 years. In 2003 in Bangkok, APEC agreed to re-energize the WTO Doha Development Agenda negotiations and stressed the complimentary aims of bilateral and regional agreements, the Bogor Goals and the multilateral trading system under the WTO. The 1994 Bogor Goals of the APEC aim at free and open trade and investment in the Asia-Pacific by 2010 for developed economies and by 2020 for developing economies: http://www.apec.org/apec/about_apec. html

173 *Ibid.*

174 They are Brunei Darussalam, Cambodia, Indonesia, the Lao Republic, Myanmar, the Philippines, Singapore, Thailand and Vietnam: http://aseansec. org/6467.htm

175 Of the regional agreements, it is similar to NAFTA in terms of liberalization and protection. It is followed up by the 1996 Protocol to Amend the 1987 Agreement; the 1996 Protocol on Dispute Settlement Mechanisms and the 1998 Framework Agreement on the ASEAN Investment Area, http://www.aseansec.org

176 See M. Sornarajah, *The International Law on Foreign Investment*, CUP, Cambridge, 2004, p. 259.

environment and human rights, and introduces a balance in the almost exclusively investor-protection orientation of most BITS as well as other treaties, and processes of international dispute settlement.

A glance at regional arrangements as a whole reveals that civil society in South Asia has been more active in the promotion and protection of broader social interests and their integration with economic interests than the governments in the region, subject to the exception of the interventions and activism of the judiciaries. Again the role played by courts in creating a jurisprudence of sustainable development has been activated by public interest litigation, an initiative of civil society, the legal profession, NGOs and the citizenry. Recently, the business community has become more vocal, and, as a preparation for the November 2005 SAARC Summit in Dhaka, in January of the same year, they signed a declaration envisioning an economic union which they thought should be incorporated in the SAFTA treaty.[177] This charter of recommendations emerged from several stakeholders, including business and civil society. The recommendations include the compressing of the SAFTA trade liberalization to 3–5 years; the identification and elimination of non-tariff barriers within a given timeframe; the creation of a fund for human development especially for women and infrastructure development and capacity-building in the least developed countries in the region. It is further suggested that India be the driving force for SAFTA, and take certain specified steps with regard to LDCs in the region and that SAFTA should include a separate section on investment and provide for free flow of capital therein. Recommendations also include the creation of a SAARC Investment Area, liberalization of trade in services and regularization of service flows especially in labour, education and health; and more integration in investment, services, co-ordination of macroeconomic policies and infrastructure development. On the whole, this agenda appears to follow international trends, in a rather indiscriminate fashion. It is necessary to fit into the global economic environment, but it is also necessary to be aware of parallel trends including the growth of international public values on social interests; it is moreover, important to look for solutions within the context of the particular problems and particularities of the region. In the light of repeated failures at the multilateral level, Regional Trade (and Investment) Agreements have become increasingly important, and opinions differ widely from their being building blocks to stumbling blocks of future multilateralism, as well as international economic and social justice. Regional economic integration in the form of SAPTA has however, been very slow and intra-regional trade in South Asia accounts only for a small proportion of total global trade of the member

177 *The Independent, op. cit.* n. 171; the Commonwealth Business Council, the India-based Council for Social Development and the Confederation of Indian Industry organized the conference entitled: *Achieving SAFTA: Public-Private Partnership*.

states.[178] Reasons given include lack of trade complementarities, low mobility of labour within the region, little trade in services, lack of liberal trade policies, and the existence of a certain amount of unrecorded trade.[179] An increase in trade within the region will be mutually beneficial to the states. In this region, the concern of some is not the increase of RTAs, but whether growing regionalism can undermine the multilateral trading system.[180]

SAARC's areas of regional co-operation are so diverse that it could be used in the future as a forum for merging economic and non-economic concerns. At this moment, there is little linkage between the different areas. Corporate social responsibility could be a new area of co-operation, given that SAARC embraces economic as well as a range of non-economic concerns in the region, including environment and development. Human rights and labour do not surface as such in the SAARC co-operation list, and certainly need to be included. A scanning of regional literature, especially that of SAARC, gives a sense of the political leadership in the region looking towards free trade and investment as a mantra which can usher in an era of peace and prosperity. There is a need here for a more holistic and realistic approach. Sustainable development does feature, but mostly in the environmental context. Peace and prosperity cannot be manufactured in any industry, if its spirit does not flow freely from the human heart. In this context, it is indeed encouraging to see that at the latest SAARC Summit in Dhaka, in November 2005, SAARC members adopted a Social Charter,[181] developing a regional dimension of cooperation in the social sector. The Charter addresses a range of social issues in the region, also reflecting a system of public values, and the challenge that lies ahead is to see the realization of these laudable objectives, goals and principles.

National arrangements

Sri Lanka is party to over 20 Bilateral Investment Agreements.[182] Most of these are with the USA, European states and other countries in Asia, especially South Asia. The text of these BITS are exclusively on investment promotion and protection, and in fact, this is clearly spelt out in the title of each agreement.[183] There could, in the future, be a movement towards the inclusion of broader interests. Recently, certain OECD countries, namely Finland and Belgium, requested the

178 P.S. Mehta, P. Kumar, 'RTAs and South Asia: Options in the Wake of Cancun Fiasco', paper presented at the international conference to mark 10 years of Australia South Asia Research Centre (ASARC), 27, 28 April 2004, Australian National University, Canberra.

179 *Ibid.*

180 *Ibid.*

181 *Op. cit.* n. 167.

182 http://www.unctadxi.org/templates/DocSearch.aspx?id+779

183 Texts of agreements available at UNCTAD website, *ibid.*

inclusion of social and environmental considerations in their Bilateral Investment Agreements with Sri Lanka.

With respect to investment and environment, a certain linkage between economic and environmental governance is visible in the legislative arrangements for investment projects in Sri Lanka, primarily because of the institutional affiliation involved.[184] With regard to labour issues, basic standards are laid down by the BOI,[185] but investors are also subject to national labour legislation, which, as a whole in Sri Lanka, is relatively employee-friendly and labour-rights protective. An interesting feature in relation to labour and the environment, is the institutional integration involved, as the BOI is charged with facilitating investors, providing 'one-stop shopping' arrangements. It is thus charged with administering investment as well as labour, environmental and certain other issues within the same institution, which also has departments for labour and the environment, for instance. There is, however, no such arrangement for broader human rights issues, which is more controversial, given the governmental setting of this institution.

Some recent decisions in Sri Lanka illustrate that the Supreme Court has helped to foster the promotion and protection of human rights in relation to globalization. When the government in 2003 attempted to pass the Intellectual Property Bill to bring the country's intellectual property law in line with the WTO's TRIPS agreement, certain NGOs challenged the bill in the Supreme Court[186] before it could become law. Their main argument was that intellectual property rights over medicine would violate Art. 12 of the Sri Lankan Constitution, which guarantees equality before the law and equal protection of the law. The Court held the bill to be inconsistent with Art. 12, as it placed persons/corporate entities in Sri Lanka, a developing country, in an equal position with foreign persons and entities (mostly developed country-based foreign investors), overlooking the fact of their inequality. Similar issues arose in India, with the imminent passage of the Third Patents Amendment 2003 without Parliamentary scrutiny and due consideration of issues of health, food and technology, when advocates of the public interest argued that the Amendment would undermine India's post-Doha obligations to both its own and the world's poor, deviating from its previously pro-poor policies especially in health.[187] The latter would benefit from drugs manufactured by the thriving Indian

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184 For a discussion of national arrangements on investment and environment, see section 6.2.2 above.

185 Board of Investment, *Labour Standards and Employment Relations Manual*, BOI, Colombo, October 2002; BOI, *Guidelines for the Formation & Operation of Employees' Councils*, BOI, Colombo, March 2004.

186 SC Special Determination no. 14, 15, 16/2003, 15 July 2003.

187 R. Dhavan, 'The Patent Controversy', http://www.globalpolicy.org/socecon/bwi-wto/2004/1210patent.htm Dhavan argues that it is the government's duty to supply medicines for AIDS, as decided in countries like Costa Rica and Venezuela, along with several other convincing arguments, including the Doha Declaration 2001, which states that the WTO and TRIPS agreement "can and should be interpreted and implemented in a manner supportive of the WTO members' right to protect public health, and in particular, to promote access to medicine for all . . . and enable access to existing medicines and research and development into new medicines."

pharmaceutical industry, which could provide drugs including those for HIV/AIDS at affordable prices both in India and other LDCs, especially those in Sub-Saharan Africa, plagued by the AIDS disease. By hastily attempting to bring local laws in line with WTO/TRIPS obligations, these facilities would be undermined, and 'medicine without social justice is unacceptable'.[188]

> By giving greater credence to WTO deadlines than democracy, India is prepared to jeopardize its sovereignty. The WTO is not the only treaty India has to comply with. It is also a signatory to the Universal Declaration of Human Rights (1948), the Civil and Political and Economic and Social Rights Covenants (1966) and a host of others. The Supreme Court decisions culminating in and following Vishaka's case (1997) have directly imported many human rights into the life and liberty provisions of Article 21, including the right to health. The WTO cannot override these obligations.[189]

In Sri Lanka, in 2003, two more bills, referred to as the Water Bill and Land Bill, were also challenged in the Supreme Court for alleged inconsistency with the equality clause. The first, the Water Services Reform Bill[190] was challenged primarily on the grounds that it gave a marked preference to water companies as against the consumer, usurping the right to equality before the law and equal protection of the law. The SC halted the bill on a procedural ground. In the case of the Land Ownership Bill,[191] the same procedural defect was found, but the Court went further and also held that the bill was an implicit attempt to amend the Constitution by permanently altering the powers of the President, the Provincial Council and the National Land Commission. In the light of their inconsistency with the Constitution, all three of the above bills were held to require the special procedure of a two-thirds majority of vote of members of Parliament, for the bills to become law.

The above decisions have been hailed as being indicative of a trend to make economic globalization operate within the framework of constitutional guarantees on human rights.[192] Petersmann comments that the universal recognition of human rights calls for the constitutionalization of international law and foreign policies based on human rights and the principles of the rule of law, limitation and separation of government powers, social justice, democratic peace, and national as

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188 *Ibid.*

189 *Ibid.*

190 SC Special Determinations nos. 24–25/2003.

191 SC Determinations nos. 25–36/2003.

192 R. Rajepakse, '"Globalization" in relation to land and water: The Sri Lankan Experience', paper presented at the Centre for Policy Alternatives Seminar on Globalization and Human Rights, Colombo, 14 July 2004; E.-U. Petersmann in *The GATT/WTO Dispute Settlement System – International Law, International Organizations and Dispute Settlement*, Kluwer, London, 1997, discusses the Rule of Law across frontiers, and at p. 244, advocates further strengthening judicial review at the domestic level.

well as international constitutionalism.[193] The principles of constitutionalism, he suggests, must be applied in a mutually complementary manner at local, national, and international levels wherever power risks being abused.[194] Accountability in the developing economies of South Asia seems to deal primarily with governments, although there is necessarily then an impact on corporations and their accountability. PIL plays an important role in carving out some synergies between economics and human rights. The most vibrant force in the quest for social justice, equity and accountability in Southern Asia has been the individual and collective endeavours of civil society, complimented by activism of lawyers and judges, closely linked to constitutionally entrenched rights and means of judicial review.

Regional integration both with respect to economic and social concerns may enhance broad social development in all countries in the region. Presently the main arena for regional initiatives is the economics/investment/trade spheres. A parallel movement in the promotion and protection of broader social interests is beginning to evolve, especially with the SAARC Social Charter. However, this is a soft law/policy document, and needs to be concretized in several ways, including domestic implementation, action at the national level, and the development of binding obligations. Proposals for reform in the region pertain mostly to integrated schemes for deregulation and liberalization in the economic domain.[195] The dichotomy/distortion when viewed from the sustainable development prism, needs to be addressed through regional intergovernmental arrangements and national laws and policies to proceed from principle to practice.

6.5 Conclusion

Regional and national arrangements tend to replicate the international tendency to fail to focus adequately on problems of underdevelopment in developing countries and the promotion of development.[196] Corporate Social Responsibility is still a nascent notion in much of South Asia,[197] and needs to be integrated into all activities, especially those of business and governments. In Sri Lanka so far, the response of the corporate sector shows scope for integration of CSR towards a

193 E.U. Petersmann, 'Human Rights and International Economic Law in the 21st Century: The need to clarify their interrelationships', 77:1 *Journal of International Economic Law*, 2001, p. 3.

194 *Ibid.*

195 The World Bank/International Monetary Fund, *South Asia Regional Integration, Harmonizing Regulatory Mechanisms: Options for Deepening Investment in South Asia,* WB/IMF, 2004 Annual Meetings, Washington D.C., 1 October 2004.

196 As pointed out by S.K. Hennayake in 'The Civil War: An Impediment to Sustainable Development', SLJSS 1997, 20 (1&2), p. 63, it is important to note that what sustainable development attempts to sustain is 'development'.

197 See 'Corporate Social Responsibility in Asia: The Issues as they Emerge in the Asia-Pacific Region', http://www.csr-asia.com

balanced approach. The concept can be introduced through intergovernmental arrangements like SAARC, which presently appear to approach issues like economics, society and environment on a compartmentalized basis. This chapter embodies an illustration of how international law for the balancing of conflicting interests can be brought closer to justice, equity and sustainable development through a degree of innovation in regional and national arrangements in implementation. Without deviating from the basic methodology of the theory and sources of public international law, it is possible to trace paths towards bridging gaps of many sorts – between principle and practice; local, regional and international; norms and values; human rights, economics and the environment. PIL has been a particularly interesting innovation from the countries of South Asia. Judicial activism, innovation and creativity together with activism in civil society and the legal profession, has helped bring about a body of jurisprudence for the implementation of sustainable development. This, in turn, has a few drawbacks and, on the other hand, many advantages.[198] Judicial attitudes manifested in PIL suits in the region are in keeping with the ideas of the law evolving with changes in reality, the need to depart from age-old conflicts, and the mindset that requires continuation of the *status quo* simply because it is the *status quo*. As articulated by an English judge who never feared to pursue new paths in the quest of justice:

> If we never do anything which has not been done before, we shall never get anywhere. The law will stand still, whilst the rest of the world goes on, and that will be bad for both.[199]

But what this region also needs is more integration through intergovernmental arrangements – not only for economic, but also for social, human rights and environmental endeavours. Current arrangements within SAARC are inadequate for this purpose. Principle 3 of the SAARC Charter that co-operation within SAARC shall not be inconsistent with bilateral and multilateral obligations[200] may limit to some extent, the parameters for co-operation within this body. Much more concerted action is needed within the regional context, and the recent SAARC Social Charter is a positive step in this direction. Regional and national arrangements even within certain limitations, have helped in the law's role of balancing conflicting interests, and have advanced the cause of sustainable development further than that permitted by the inherent limitations of international law sources and theory. The ideas of constitutionalism and constitutionalization which emerged through some regional and domestic cases could be considered also at the international level, as they may enhance the capacity of international laws and policies in

198 See Section 6.2.2 above.

199 Lord Denning in *Packer* v. *Packer*, cited by Judge Deo in *Union of India* v. *Union Carbide Corporation*, Bhopal Gas Claim No. 113 of 1986, District Court of Bhopal.

200 *Op. cit.* n. 8.

furthering justice, equity and sustainable development. There is a single uniting factor in the ideas of the rule of law, good governance, sustainable development as well as constitutionalism, which is that of subjecting processes of government and decision-making to the rule of law, and further, to justice. Public interest litigation and sustainable development jurisprudence as they have evolved in South Asia have served this uniting objective, also thereby to some extent bridging the gap between values and norms. This is useful, particularly in the light of the constantly evolving and expanding nature of the law relating to sustainable development in international law.

Chapter Seven

THE INTERVENTIONS OF NON-STATE ACTORS

7.1 Non-State Actors and Sustainable Development

This chapter will survey the interventions of non-state actors in relation to the law and policy on sustainable development in its different dimensions. With states and international organizations no longer constituting the sole actors in globalization and its regulation, new players have entered the equation primarily from civil society. They include individuals, intellectuals, academics, students and activists, trade unions and associations, local communities, pressure groups and non-governmental organizations. Similarly the overarching nature of sustainable development embraces a broad range of actors, including governments, international organizations, multilateral development banks, the private sector including TNCs, employees, shareholders, suppliers, competitors, consumers, economists, environmentalists, and the public at large.[1] The Triple Bottom Line (TBL) goal,[2] sustainability,[3] accountability[4] and corporate social responsibility[5] requirements from companies particularly in advanced economies – lies in the economic, social and environmental dimensions of their activities[6] and is geared towards the notion of corporate citizenship.[7] The term 'business ethics' is used and interpreted in different

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1 See A. Crane, D. Matten, *Business Ethics: A European Perspective, Managing Corporate Citizenship and Sustainability in the Age of Globalization*, OUP, Oxford, 2004, p. 20.

2 *Ibid.*

3 This refers to sustainable development, discussed in chapters 2 and 4 above.

4 Corporate accountability implies that companies must be held to account for their actions not only in relation to financial performance, but also social, environmental and human rights impacts. Achieving this is likely to depend on a range of participatory and legal mechanisms that go beyond voluntary initiatives – UNRISD, *Research for Social Change*, UN, Geneva, 2003, p. 109.

5 Corporate Social Responsibility refers to the ethical behaviour of a company towards various stakeholders. The term may be interpreted to involve compliance with the law, but is generally associated with voluntary initiatives such as codes of conduct, social and environmental reporting and improvements in occupational health, safety and environmental management systems, *ibid.*

6 Crane, Matten, *op. cit.* n. 1, pp. 22, 24–25.

7 Corporate citizenship involves the notion that companies should adhere to shared or universal values pertaining to social and sustainable development, and that the rights of companies need to be balanced by commensurate responsibilities: UNRISD, *op. cit.*, n. 4.

ways, but mostly in relation to sustainable development.[8] Ethics, morals and values underline notions of corporate citizenship.

Initiatives of non-state actors can involve individual/joint interventions. The Global Compact of the United Nations Secretary-General is a hybrid instrument and could be characterized as a Multi-Stakeholder Initiative (MSI) as well as a Public – Private Partnership (PPP), since it involves both the UN and TNCs. The Compact has the potential to forge ahead an overriding policy to promote an enabling environment for a regulatory framework involving both state and non-state actors. It includes a focus on development, which makes it particularly useful in terms of measures for balancing the conflicting interests here. An initiative of this nature has far-reaching potential to combine the resources of multiple stakeholders and enhance co-ordination and convergence at the institutional level. Like most other codes of corporate social responsibility, however, it is part of the body of soft law or policy, rather than legally binding hard law.

Several environmental disasters in the 1980s and publicity about poor labour conditions and human rights violations in the 1990s led to a focus on the need for regulation of business and, in practice, to several regulatory efforts by non-state actors. They emerge from TNCs and industry organizations as well as Northern-based NGOs,[9] and co-operative efforts between civil society and business. The presence of civil society organizations was phenomenal in the UNCED proceedings, where some NGOs also had observer status. An express recognition of their role in sustainable development appears in the UNCED documents, especially Prin. 10 of the Rio Declaration[10] as well as Agenda 21. In the day-to-day operations of several sectors, sustainability is an increasingly significant influence involving many stakeholders, including the public at large/civil society, particularly NGOs.[11] NGO interventions have taken many forms, including attempts at regulation, sensitization and publicity. At the other end of the spectrum, the meandering course of sustainability has found its way into company boardrooms. Of the multiple 'stakeholders' involved in issues of 'sustainability', corporations are increasingly important players. There is, as a result, an emerging body of values which is tremendously diverse in terms of nature, content and the actors and interests it represents. This body of values, if permitted to infiltrate the normative legal system, would introduce an element of equilibrium in the law, and would fortify the concepts embodied in Prin. 10 of the Rio Declaration, including access

8 Crane, Matten, *op. cit.* n. 1, p. 21.

9 D. Abrahams, *Regulating Corporations: A Resource Guide*, UNRISD, Geneva, July 2004, p. 6.

10 This provides that environmental issues are best handled with the participation of all concerned citizens.

11 In Crane, Matten, *op. cit.* n. 1, p. 20, the primary stakeholders in the globalization context have been identified as shareholders, employees, consumers, suppliers and competitors, civil society (pressure groups, NGOs, local communities) and government. Sustainability is identified as an increasingly important goal for business.

to information and public participation in decision-making. Further, these developments clearly constitute a catalyst towards the realization of the ideals of democracy and good governance.

As found by an UNCTAD study,[12] new issues are emerging in relation to corporate governance, ethical business standards and the observance of human rights, indicating a growing concern about corporate social obligations among civil society groups and TNCs. It also states that there are intricate and sometimes indeterminate relationships between binding and non-binding standards, and between international and national, and private and public law. International standards – which may formally be non-binding on states – may effectively be enforced transnationally, through voluntary initiatives and interventions. Conversely, it is this soft law element which emerges from voluntary initiatives that may have an impact on the evolution of international standards in the field of social responsibility. Self-regulation by TNCs and the role of NGOs will be surveyed as two prominent phenomena within this complex scenario, and subject to the nuances which emerge from the concomitant and cross-cutting activities of the numerous actors. The section that follows will embody a discussion of self-regulation as a means of regulating foreign direct investment.

7.2 Self-Regulation

Corporations are increasingly subject to codes of conduct, both voluntary and involuntary. In the era of corporate social responsibility, they engage in self-regulation through the adoption of voluntary codes of conduct.[13] International law is not directly binding on companies, and where it imposes binding obligations on governments, few governments have tried to enforce the undertakings on private firms[14] (with the exception of liability arrangements under some multilateral conventions like the Convention on the International Trade in Endangered Species (CITES) and the Basel Convention on the Transboundary Movement of Hazardous Wastes.

Sustainability, the TBL, corporate accountability and corporate social responsibility (CSR) are key concepts influencing TNC conduct today, and some business entities are projecting a new role of corporate citizenship. These have evolved due to many factors, including pressure from social democratic parties and civil society in developed countries. The CSR discourse stretches responsibility to multiple stakeholders, and extends corporate performance from the bottom line of

12 UNCTAD, *Social Responsibility*, UN, New York/Geneva, 2001, p. 45.

13 See E.V.K. Fitzgerald, *Regulating Large International Firms*, UNRISD Technology, Business and Society Programme Paper no. 5, November 2001; R. Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy*, UNRISD Technology, Business and Society Programme Paper no. 2, April 2001.

14 Fitzgerald, *ibid.*, p. 11.

profit and loss, to the triple bottom line. It implicitly recognizes that corporations should assume additional responsibilities, but also maintains that improved performance in broad concerns can be achieved primarily through corporate self-regulation and voluntary initiatives. CSR envisages codes of conduct, improvements in environmental management systems and health and safety standards, social and environmental reporting, corporate social investment and various forms of philanthropy. Although CSR is still to evolve in much of the developing world, one of the positive features of globalization and TNC activity across borders is the spread of these emerging standards to LDCs as well, through the trade and investment activities of global economic actors.

Self-regulation can have several potential benefits, including the development of standards, which are maintained through good faith. In situations where countries compete for FDI in a race to the bottom, the voluntary embrace of standards can help maintain a certain minimum protection. With respect to self-regulation in general, Fitzgerald makes the point that it is often a defensive mechanism in the light of negative publicity and pressure from activists, the need to protect brand value and good public relations, and the prospect of mandatory regulation.[15] The observance of codes is not legally enforceable. Codes of conduct can be useful in that they can result in a situation of those who exercise rights and have the potential of infringing others' rights, also assuming correspondent responsibilities. Corporate codes can have several benefits as they provide a point of leverage for corporate action; a more overt tie between production and consumption; the acceptance by firms of responsibility for the activities of their suppliers and subsidiaries and the fact that violations of the code can be identified.[16] Fitzgerald lists confined adoption and implementation; the mere best practices nature of model codes and mere statement nature of company codes (that is, their nature of constituting merely guides to good practices and policy statements, falling short of requiring a particular standard of conduct); the limited scope and extent of corporate codes; lack of independent monitoring; concentration in consumer goods sectors and among exporters to Northern markets; and the focus on a few highly damaging issues, rather than being comprehensive,[17] as well as non-implementation. Dangers include overestimation, the possibility of bad faith, room for counterproductive effects, and undermining of trade unions.[18]

There can be considerable variation in the standards applied by TNCs and also local business, both among different sectors and within a particular sector. However, they may act as a catalyst that will force governments to examine new mechanisms for the enforcement of human rights, especially labour rights.[19] One

15 *Ibid.*, at p. 12.
16 Jenkins, *op. cit.* n. 13, pp. 28, 29.
17 *Ibid.*, pp. 26–28.
18 *Ibid.*, pp. 29–30.
19 N. Kearney, 'Corporate Codes of Conduct: The Privatized Application of Labour Standards', in

problem that is inevitable in such codes is their decidedly decentralized nature and lack of certainty or predictability. In view of the need for equilibrium between private interests and public purpose, these may be made through private interests or perhaps through public purpose motivated by private interest, which therefore may not really reflect a balancing of conflicting interests. Issues of credibility and acceptability therefore arise. One writer identifies several factors which indeed could limit the significance of corporate codes as a regulatory tool.[20] For instance, public pressure is often the main incentive for drawing up a corporate code, which in turn casts some doubt on the effectiveness of this form of self-regulation, as not all industries are equally susceptible to public pressure, producers of consumer goods being the most visible and sensitive to public opinion. On the other hand, whatever the motivation, the importance lies in the fact that there is bound to be an enhancement in standards, overall.

Self-regulation to be practical and practicable must first assume the existence of some ground realities, including a certain level of development of both a country's economy and its corporate sector. There would have to be *inter alia* some basic level of good governance, an adequately advanced legal framework and minimum protection of social interests. Unlike before when codes were advocated by developing countries, it is now constituencies in the developed world which promote them. Developing countries often resist the tying up of economic and social issues for economic development reasons. Codes have had only limited success even in the developed world. In many developing countries, still in the process of transition from agriculture to industry, with infant industry and unsophisticated corporate machinery, company codes of conduct are still relatively rare, but emerging slowly. These states have to rely largely on governmental regulation, and tools such as Environmental/Sustainability Impact Assessment, Environment Protection Licence and citizen suits may be more appropriate given the different context. Private approaches to social regulation such as labelling schemes work through the market mechanism, and depend for their success to some extent on consumer awareness. Companies would need to be tangibly rewarded for ethical business.[21] Again, in developing countries, although there is activism from NGOs, trade unions and pressure groups, it will take time for general awareness to reach such levels that companies can begin to be tangibly rewarded for corporate social responsibility. Poverty would disallow many from making a rational choice in the purchase

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S. Piccoto, R. Mayne (eds.), *Regulating International Business: Beyond Liberalization*, 2000, p. 208, cited in H.J. Steiner, P. Alston, *International Human Rights in Context: Law, Politics, Morals*, OUP, Oxford, 2000, at p. 1358.

20 N. Jagers, *Corporate Human Rights Obligations: In Search of Accountability*, Intersentia, Antwerp, 2002, p. 133.

21 Fitzgerald, *op. cit.* n. 13, states at p. 14, that a number of US investment funds now screen companies for their corporate environmental and labour practices known as ethical or social screening. Socially responsible investing has also attracted attention in Canada, the UK and Europe. The consequences have not yet made a tangible difference.

of goods and services, sustainable or not.[22] Development requires the upholding of the rule of law and good governance, certainty and consistency, stability and predictability of regulations. These may not be forthcoming through corporate codes alone, but if they operate within a larger scheme of national regulation and international human rights, labour and environmental norms, they may play a useful role. Moreover, while accountability of the private sector has become a salient concern in the North, many developing countries have to address the dual problem of accountability of governments as well as companies, making the issues more complex.

In spite of the merits of self-regulation discussed above, regulation by governments, international institutions and civil society is essential, and cannot be replaced by self-regulation. According to a report of the United Nations Research Institute for Social Development:

> The huge and growing social impact of transnational corporations requires that they take corresponding responsibility. While they would prefer to comply through voluntary initiatives, the public interest can only be fully served through stronger regulation and monitoring.[23]

This report identifies the turning point for a change in philosophy from confrontation to co-operation, proposed in the Rio Conference on Environment and Development. Agenda 21 called on governments, business leaders, international organizations and NGOs to work together.[24] The study by UNRISD on the potential and limits of CSR as a means to social development has revealed several shortcomings in self-regulation. Companies are selective in the choice of initiatives and fail to implement stated policies; they have few, if any, means of measuring CSR impacts and they may ignore key aspects of CSR such as labour rights.[25] Further, they often limit CSR obligations to affiliates, as opposed to suppliers, and many do not pay enough attention to the need for independent monitoring/verification of compliance with new policies and standards.[26] CSR is confined to a small group of companies, which are highly visible, and in the activist, con-

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22 On corporate codes, see also N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises*, Kluwer, Deventer, 1980; D. Leipziger, *The Corporate Responsibility Code Book*, Greenleaf Publishing, Sheffield, 2003; I. Mamic, *Implementing Codes of Conduct: How Businesses Manage Social Performance in Global Supply Chains*, ILO, Geneva/Greenleaf Publishing, Sheffield, 2004.

23 UNRISD, *Visible Hands: Taking Responsibility for Social Development*, UN, Geneva, 2000, p. 78; also see UNRISD, *States of Disarray: The Social Effects of Globalization*, UN, Geneva, 1995, which some years previously, highlighted the need to regulate TNCs at the public level.

24 It points out that the UN took a more conciliatory tone, closing its Centre on Transnational Corporations, which had been trying to design a code of conduct. Instead it turned to encouraging partnerships with business, and agencies like UNCTAD promoted developing countries' access to foreign direct investment.

25 UNRISD, *op. cit.* n. 4, at p. 110.

26 *Ibid.*

sumer and media spotlight.[27] One writer doubts the efficacy and practicability of self-regulation since TNCs make their rules, appoint their ombudsmen and decide who should be disciplined and how, thus making them accountable only to themselves.[28] He states that Shell had to rewrite its business principles after the dumping incident of the Brent Spar oil rig in the North Sea and doing business with the military regime in Nigeria which executed Ken Saro Wiwa.[29] Levi-Strauss was reported to be canceling contracts with suppliers employing child labour.[30] There are piecemeal processes, but coherence is a necessity.[31] Indeed, efforts at connecting broader social issues with CSR are beginning to emerge within regions and sectors, in collaborative efforts, led by different actors ranging from governments to civil society. For example, in Southern Asia there are ongoing efforts to tie up corporate social responsibility with issues of child labour, and in Southern Africa, to make policies and guidelines for corporate social responsibility in the extractive industries, within the context of the New Partnership for Africa's Development (NePAD). Such holistic approaches could indeed play a vital role particularly in the LDC context, towards realizing sustainable development.

Taken as a whole, the existence of a plethora of corporate codes and guidelines is a signal of a certain degree of recognition of broad social concerns and goodwill. If rationalized and analysed case by case, instead of espoused/dismissed *en masse*, they could provide useful insights and become a potential tool in the larger context of the seemingly impossible task of arriving at international consensus with regard to the regulation of foreign direct investment. Checks and balances would be essential, such as linkage with host-state policies and laws, in order to maintain a degree of coherence. The merits of self-regulation in the form of the overall promotion and protection of economic development consistent with

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27 *Ibid.* It is also stated at p. 110 that specific improvements in corporate environmental responsibility at the company level are dwarfed by negative macro trends involving the growth of polluting industries and the relocation of investment to, for instance, areas with weak regulation. The piecemeal character of CSR and the prevalence of countertrends connected to liberalization, it is said, often gives rise to double standards: the simultaneous pursuit of CSR and corporate irresponsibility, for instance increased reliance on subcontracting together with the shedding of social obligations and costs.

28 S. Subedi, 'Multinational Corporations and Human Rights', in K. Arts, P. Mihyo (eds.), *Responding to the Human Rights Deficit: Essays in Honour of Bas de Gaay Fortman*, KLI, The Hague, 2003, at pp. 179, 180. He also points out at p. 178 that some of the main reasons for opposition to mandatory regulation by international law is the public – private dichotomy and consequent argument that regulation can only be through the intermediary of states, the disbelief that international regulation will necessarily lead to better conduct, and the fact that TNCs are already subject to international law such as the principles of sustainable development.

29 *Ibid.*, p. 179.

30 *Ibid.* See Levi Strauss & Co., Social Responsibility/Global Sourcing Guideline, http://levistrauss.com/responsibility/conduct/guidelines.htm

31 Also see D. Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility*, The Institute of Economic Affairs, London, 2001.

human rights and the environment could point to the existence of a body of international public opinion, policy and values which have the potential of informing the law. To posit such developments within the context of public international law, it can be argued that self-regulatory codes are beginning to create a body of *lex mercatoria*,[32] and are more than policy statements. They amount to soft law, which could eventually influence the progressive development of international law. Such an approach is conducive to the closing of the gaps between hard and soft law, and between legal norms and overarching value systems.

7.3 Initiatives undertaken by Civil Society

The regulation of TNCs has become a core concern of global civil society, resulting from dissatisfaction with governmental and international regulation, the rise of civil society interest in global public values, and the large increase of NGOs at all levels, including the transnational level, and their activism in the spheres of environmental, developmental and human rights issues. The emphasis on control of TNCs in the 1970s was replaced by deregulation and self-regulation in the 1980s and 1990s. The end of the 1990s also saw the rise of co-regulation mostly in the forms of MSIs and PPPs.[33] Recent events of unruliness and violence by certain groups opposed to global economic and political processes graphically represent the nature and the level of disillusionment with the processes of globalization in developing countries, and even more so within the developed world. The undesirability of some of the manifestations of this disillusionment underlines the need for acceptable legal regulation and the primacy of the rule of law.[34] An increasingly aware, sensitive and active civil society in the 1990s was an important influence in the evolution of corporate social responsibility and there is today a large body of standard-setting initiatives by civil society, both by itself and with other actors. Collaborations between civil society groups and TNCs take the form of public-private partnerships and multistakeholder initiatives and include certification bodies, sectoral labelling schemes, factory monitoring, reporting guidelines and codes of conduct.[35] Civil society's activism such as 'name and shame' have led to the increase of business self-regulation – for instance in the cases of Nike and Nestle. The World Social Forum brought together several segments of civil society including many from the global South, and they addressed *inter alia*, the subject of the regulation of FDI, in the context of a development agenda.[36]

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32 See N. Horn, 'Codes of Conduct for MNEs and Transnational *Lex Mercatoria*: An International Process of Learning and Law Making', in Horn, *op. cit.* n. 22, p. 45.

33 UNRISD, *op. cit.* n. 4, p. 112.

34 See J. Bendell, 'Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement', UNRISD *Technology, Business and Society Programme Paper* no. 13, Geneva, June 2004.

35 See Abrahams, *op. cit.* n. 9, p. 26.

36 *Foreign Direct Investment: The Case for Development*, World Social Forum, Mumbai, India, 18–21 January 2004 and Report of Seminar, June 2004.

Research sometimes views civil society initiatives as responses to failed state regulation, or as 'civil regulation' adapted to the realities of globalization.[37] Whatever nuances may attach, one can discern both positive and negative aspects in such innovation. They reflect dialogue and collaboration[38] and may enhance transparency and democracy, but some have raised concerns about issues of motivation and equity in the process of dialogue.[39] The numerous standards have been hailed as signs of an improved regulatory environment.[40] But proliferation could lead to duplication and confusion.[41]

Civil society interventions as a whole are by definition limited, because of their nature and inherent weaknesses when approached through the theory of the sources of international law. The question arises whether, even as a whole, such efforts are confined to their own niche – limited to their marginal status/non-status in terms of law-making – resulting in the consequent limitation in the 'regulation' which they purport to present and the borderline positions they occupy in terms of the mainstream processes of institutionalized international trade and investment. Civil society initiatives need to be viewed in context, as they do not amount to rules and regulations, but at best to a body of public opinion, values and policy. These can influence the progressive development of international public policy, and ultimately, law, in turn breaking down some barriers between the value-based and norm-based dimensions of the law, and between law and policy. Civil society has contributed to the emergence of a body of global public values and policy, which can have a more useful existence if they can penetrate legal systems. Through pressure groups and lobbying of governmental and intergovernmental bodies, civil society can be instrumental in bringing about guidelines, policies and laws, for instance in the case of corporate social responsibility.

7.4 Specific Non-State Actor Efforts in Relation to Foreign Investment, Development, Human Rights and the Environment

The 1976 OECD Guidelines were intended to improve the climate for investment, and firms were encouraged to make a positive contribution to host countries and their development. With respect to environmental protection, the 1991 Guidelines refer to the requirement for MNEs to take due account of the need to protect the environment and avoid creating environmentally-related health problems. The 2000 Guidelines emphasize the importance of sustainable development

37 Abrahams, *op. cit.* n. 9, p. 26.
38 *Ibid.*
39 *Ibid.*
40 *Ibid.*
41 *Ibid.*

and that MNEs have a vital role to play in achieving this goal. They are encouraged to adopt an environmental management system (EMS), which includes for instance, International Organization for Standardization (ISO) standards. Commenting on the OECD Guidelines of 1976, 1991 and 2000, in particular their provisions with respect to environmental protection and sustainable development, Fitzgerald states that the overall message is that environmental responsibility makes good business practice and financial sense, there being no fundamental conflict between MNE activities and environmental protection.[42] He goes on to state, however, that the guidelines also have several problems, including commitment to MNE interests, lack of provisions for participation of a variety of stakeholders, and a very weak expression of the precautionary principle. Moreover, there is a lack of integration of development interests.

Also on environment and sustainable development, in 1991 the International Chamber of Commerce presented a Business Charter for Sustainable Development and the World Business Council for Sustainable Development was formed in 1995. The Business Charter is a set of voluntary guidelines for environmental protection by member companies. The ICC promotes the Charter as a set of good practices, and does not operate as an enforcement body.[43] In 1992 the German Industry Federation launched the sustainable development guidelines for German companies.[44]

Of the wide range of instruments of self-regulation from private enterprise,[45] many deal with human rights/social interests. Corporate codes lay down the manner in which businesses intend to address their social responsibilities.[46] The 1980s and 1990s saw many companies and industry organizations drafting guidelines.[47] The Caux Round Table was established by senior businessmen from Europe, the USA and Japan, in 1986.[48] The seven principles include those dealing with treatment of employees and customers. An example of a sector-specific code is presented by the Code of Conduct for the Tea Sector of 1995,[49] a 14-point plan

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42 Fitzgerald, *op. cit.* n. 13, at p. 13.

43 Abrahams, *op. cit.* n. 9.

44 Entitled Perspectives 2000, these concentrated on environmental protection, and also the responsibility of industrialized countries to help developing countries (Abrahams, *ibid.*).

45 Jenkins, *op. cit.* n. 13; Fitzgerald *op. cit.* n. 13; M. Kemp, *Corporate Social Responsibility in Indonesia: Quixotic Dream or Confident Expectation?*, UNRISD Technology, Business and Society Programme Paper no 6, December 2001; UNRISD, *Corporate Social Responsibility and Development: Towards a New Agenda?* Report of UNRISD Conference, Geneva, 17–18 November 2003; A. Zammit, *Development at Risk: Rethinking UN-Business Partnerships*, South Centre/UNRISD, Geneva, 2003.

46 As pointed out by Jagers, *op. cit.* n. 20, at p. 132, there are codes drawn up by groups of corporations, or by individual companies. Some codes are made by NGOs and/or governments, usually as guidelines aimed at helping corporations to draw up a code. Some codes deal with human rights obligations for corporations in general, others are aimed at a specific branch, sector or product.

47 Abrahams, *op. cit.* n. 9, p. 6.

48 *Ibid.* http://www.cauxroundtable.org

49 *Ibid.*, p. 7. http://www1.umn.edu/humanrts/links/teacode.html

which requests the tea industry to adhere to the fundamental human rights under the core ILO Conventions. The code was drafted by the International Union of Food, Agriculture, Hotels, Restaurants, Catering, Tobacco and Allied Workers' Association. The International Council of Toy Industries in 1995 produced a Code of Business Practice[50] setting out guidelines for *inter alia* human, labour, health, safety and environmental rights, which toy factories can adopt and follow. The code was intended to influence national laws, and in 1997, the toy industry of Europe created a similar code. These are just a few examples from a vast range of corporate codes, local and global.

A noteworthy development from the NGO sector is Amnesty International's Human Rights Principles for Companies.[51] These state that companies and financial institutions have a responsibility to contribute to the promotion and protection of human rights. All companies have a direct responsibility to respect human rights in their own operations. Their employees and other people are entitled to rights such as the right to life and security, freedom of association including the right to form trade unions, and fair working conditions as well as freedom from discrimination and slavery. Particular care needs to be taken by companies to ensure that their security arrangements do not lead to human rights abuses. AI further states that it believes that the business community has a wider responsibility – moral and legal – to use its influence to promote respect for human rights and that a company's reputation will be increasingly affected by its response – in word and deed – to the violation of human rights and their defence. Offending local values/interfering with domestic politics is used by companies as a reason for their inaction on human rights. But AI points out that the international community has decided, through a variety of covenants and agreements, that the promotion and protection of human rights transcends national and cultural boundaries. Thus, it

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50 *Ibid.*, p. 8. http://www.toy-icti.org/mission/bizpractice.htm. A regional effort in relation to garments and footwear is embodied in the Worldwide Responsible Apparel Production Principles (WRAP) of the American Apparel Manufacturers Association. These require that production takes place under lawful, humane and ethical conditions. In order to obtain WRAP certification, 12 principles need to be addressed by manufacturers, under the Certification Program. This involves self-assessment, independent monitoring, final review and follow-up. Responsible Care is a voluntary initiative, which works with the global chemical industry. Under its Ethics and Codes of Practice it promotes social and environmental responsible management through providing certain guidelines. Individual industries can also adopt codes based on it. Conceived in Canada in 1987 after the Bhopal disaster, Responsible Care has now spread to many countries, which implement their own strategies according to their chemical management problems. Responsible Care collects data from companies on performance and implementation. Companies are re-verified every three years. A National Advisory Committee acts to increase information sharing and dialogue. The FIFA Code of Labour Practices and the World Federation of the Sporting Goods Industry's Model Code of Conduct both in the sports sector, require members to adopt the ILO core conventions.

51 January 1998, AI Index: ACT 70/01/98. In 1991, AI UK Business Group developed a set of Principles for Business aimed at making companies aware of their responsibilities by upholding the human rights of their employees both in UK and abroad. Also see AI, *Global Trade, Labour and Human Rights*, AI, London, 2000.

has made human rights principles based on international standards, to assist companies in developing their role.

The initiatives of civil society cover a range of social (and environmental) issues, a considerable number of which deal wholly or mainly with sustainability, consumer standards and rights or labour/workers' rights. Codes dealing with labour issues include the Clean Clothes Campaign Code of Labour Practices,[52] the Ethical Trading Initiative Base Code, the Fair Labour Association Workplace Code of Conduct, the Federation Internationale de Football Association (FIFA) Code of Labour Practice, Global Alliance for Workers and Communities, Global Framework Agreements, International Confederation of Free Trade Unions and the International Trade Secretariats (ICFTU/ITS) Basic Code of Labour Practice, the Model Framework Agreement of the International Federation of Building and Wood Workers, the Workers Rights Consortium Model Code of Conduct, and RUGMARK.[53] RUGMARK is an initiative against the use of child labour particularly in South Asia). Of the standards, including ethical, social, environmental and consumer standards, the most prominent are the AA 1000[54] of the Institute of Social and Ethical Accountability, the SA 8000[55] on Social Accountability and the Global Sullivan Principles.[56]

From the NGO sector, the 'Core Standards' annexed to the World Development Movement (WDM)'s consultation paper 'Making Investment Work for People' 1999,[57] includes certain obligations for TNCs. They envisage respect for the right to life and the right not to be tortured or subjected to cruel treatment or arbitrary arrest; the promotion of basic human rights, ensuring that they are universally and effectively observed; and ensuring that any security force working for them abide by basic standards. Several religious groups too have been active in this area, for instance, organizations like Christian Aid.[58]

The Asian Human Rights Charter,[59] 'a Peoples' Charter', is a significant development from the Asian continent, especially in the absence of an intergovern-

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52 Abrahams, *op. cit.* n. 9, pp. 26–33.

53 *Ibid.*

54 *Ibid.* This is a tool and standard for social and ethical accounting, auditing and reporting; http://www.accountability.org.uk; in March 2003, the AA 1000 Assurance Standard was established to complement the Guidelines of the Global Reporting Initiative (GRI). The GRI in turn was established in 1997 and became an independent organization in 2002. It engages in dialogue with the different stakeholders to improve Triple Bottom Line Reporting within the Sustainability Reporting Guidelines.

55 *Ibid.*, http://www.cepaa.org/SA8000/SA8000.htm

56 *Ibid.*, http://www.globalsullivanprinciples.org/principles.htm

57 J. Woodroffe, in 'Regulating Multinational Corporations in a World of Nation States', in M.K. Addo (ed.), *Human Rights and the Responsibility of Transnational Corporations*, KLI, The Hague, 1999, p. 131, deals in detail with the proposals of the World Development Movement.

58 See 'The need for legally binding regulation of Transnational Corporations', Christian Aid policy brief for the World Economic Forum and the World Summit on Sustainable Development – Prepcom II, New York, January 2002, http://www.christianaid.org.uk/indepth/0202tnc/transc.htm

59 The Asian Charter for Human Rights was declared in Kwangju, South Korea, on 17 May 1998,

mental treaty on human rights. Emanating from the Asian Human Rights Commission, a nongovernmental organization, it is not legally binding, and needs to be viewed within the inherent limitations of a non-state actor initiative. But the Commission has a significant influence in many Asian states, due in part to the absence of intergovernmental institutions. The Asian Charter is interesting as it posits the protection and promotion of human rights within the globalization context, and the need to counter its negative impacts. As such, it includes provisions on the universality and indivisibility of human rights; the endorsement of international human rights instruments; the significance of traditional culture, religion and spirituality in Asia without derogating from due respect and reverence for universal human rights; common humanity and a just, caring and sharing society; a balance between the private and the public; development as meaning the realization of the full potential of the human person; accountability and public participation; the responsibility of states, the international community, the corporate sector and civil society; sustainable development and the right to life including a healthy environment; protection of workers, disadvantaged and vulnerable groups; constitutional entrenchment; enforcement and implementation especially through the judiciary; pursuit of rights protection at local, national, regional and international levels; and the need for regional and sub-regional institutions and an inter-state convention in Asia.[60]

7.5 Conclusion

On the whole, the interventions of non-state actors create an interesting mosaic. Partnerships between business and NGOs in particular can enhance transnational solidarity and further strengthen an internationally agreed body of values for the public good. They can promote international co-operation, although they have their own drawbacks and limitations.[61] Many of the initiatives reiterate standards of international law – for instance, the core labour conventions of the ILO. From the perspective of development and sustainable development, initiatives both of TNCs and NGOs are favourable as they allow for greater participation, inclusion and accountability, and can thus further good governance and the rule of law.

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in commemoration of the 50th Anniversary of the UDHR. Its architecture involved the collaboration of many individuals, brought together by the Asian Human Rights Commission, Asian Legal Resource Centre, Hong Kong.

60 See S.R. Harris, 'Asian Human Rights: Forming a Regional Covenant', 1 *Asian-Pacific Law and Policy Journal* 17, pp. 1–22.

61 See Zammit, *op. cit.* n. 45. Here the message is cogently on the need for public regulation, in the absence of which, it is argued, there could be a serious risk to development; for a different approach, see OECD, *Corporate Responsibility: Partners for Progress*, OECD, Paris, 2001; also see UNRISD, *Corporate Social Responsibility and Development: Towards a New Agenda?*, *op. cit.* n. 45.

They provide checks and balances – although mostly of a weak variety – to economic globalization, and create a space for ethical globalization. This, in turn, enables a middle path where globalization can take place, within certain limits.

In a situation where governments are under pressure to liberalize and deregulate the economy, but wish to pursue a policy of broader social development, the interventions of non-state actors can have the effect of complementing governmental efforts. But such initiatives need to operate within a larger scheme of regulation by states and intergovernmental organizations, as development should be steered in the public arena, primarily by states. The initiatives of non-state actors operating across borders, cultures and societies would be irrelevant unless linked to the local setting through co-ordination with governmental policies. It is only then that private interests can be balanced with public purpose. The recognition and inclusion of multiple stakeholders is favourable, provided that they operate within context and in perspective, rather than in a universe of incoherence and disconnection. The interventions of non-state actors should be able to support governmental and intergovernmental regulation.[62]

The increase in the participation of stakeholders in processes of sustainable development can be seen as an extension of public accountability to stakeholders and, as such, has a political and social value in itself.[63] An evolving process in this sphere is that of Sustainability Impact Assessment, which will involve the multiple dimensions of economic, social and environmental impacts of policies, plans and programmes, as well as multiple actors including affected parties, business and civil society. From the standpoint of development and sustainable development, initiatives both of TNCs and NGOs are favourable at one level, as they can enhance public participation, and promote and protect social interests. At another level, such initiatives need to operate within a larger scheme of regulation by states, as the popularly elected guardians of the public interest. The recognition of multiple stakeholders is a positive sign, but development is no private business, and the vast majority of peoples affected by decisions may have the greatest stake, but may not necessarily be caught up in the recognized classes of stakeholders. The credibility of organizations themselves, purporting to represent civil society and the public interest, has been subject to question. Non-state actor initiatives can complement, but not command, the responsibility of governments and international institutions in national and international development.[64]

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62 See A. Sood, 'Voluntary Self-Regulation versus Mandatory Legislative Schemes for Implementing Labour Standards: An Issues Paper on the New Regulatory Regime', www.cuts-international.org/voluntaryself.doc and 'Regulating Corporate Behaviour', Briefing Paper, CUTS Centre for International Trade, Economics & Environment, Jaipur, India, www.cuts-international. org/4–2002Bp.pdf

63 As pointed out by C. George, C. Kirkpatrick, 'Putting the Doha Principles into Practice: The Role of Sustainability Impact Assessment', in H. Katrak, R. Strange, *The WTO and Developing Countries*, Palgrave Macmillan, UK/USA, 2004, p. 326.

64 See A. Seidman, R.B. Seidman, T.W. Walde (eds.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, KLI, The Hague, 1999, where the importance of a

Principle 10 of the Rio Declaration, an emerging legal principle, states that environmental issues are best handled with the participation of all concerned citizens at the relevant level. It includes the concepts of access to information, the opportunity to participate in decision-making processes, public awareness and effective access to judicial and administrative proceedings including redress and remedy. The interventions of civil society, NGOs and TNCs fortify this principle, and also derive legal backing from it. They also further realize the emerging global legal pluralism, and more realistically represent the structure of modern global society.

TNC voluntary codes come closer to the body of soft law and the progressive development of public international law than civil society initiatives. Thus, their joint and collective efforts in partnerships and multistakeholder initiatives may enhance their overall abilities to infuse the bodies of international public values, policy and, finally, law with the underlying value systems which can influence the law. This may, in turn, advance consistency/coherence between the law's own dual embodiment of norms and values.

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sound legal framework based on stable and predictable legally binding rules, appropriate processes for law-making and enforcement, and well-functioning public institutions are stated to be the key elements pre-conditional to good governance and development.

Chapter Eight

REFLECTIONS

This closing chapter will review the contents of this study as a whole, through the line of its central argument.

8.1 Introduction

This book in fact considered the issue of adverse effects of foreign direct investment activity on development, human rights and the environment in developing countries. From a legal perspective, the absence or inadequacy of justice, equity and sustainability illustrated by the case examples were indicative of a vacuum in international law. This, in turn, has implications for the law and its implementation at different levels, including the regional and national. The imbalance between protection and promotion of economic interests, on the one hand, and human rights and the environment, on the other, underlined the need for enhancing and ensuring broader social interests, including economic development, in the context of sustainable development. The reality in fact and the perceived *lacunae* in law justified a critical evaluation of the relevant legal framework, its actors, structures and processes, as well as its different dimensions, levels and value implications. This involved the analysis of the international legal framework and the related regional (here, South Asian) and national (here, Sri Lankan) legal regimes as well as the connected interventions of state and non-state actors, with a view to exploring the legal ground for enhancing the capacity of the law to further sustainable development. The central research question thus addressed the issue of how public international law can serve as a medium for the advancement of economic development while simultaneously protecting and promoting human rights and conserving the environment in the context of foreign direct investment.

Posited within the interconnectedness and multifaceted nature of globalization and the realistic need to take a balanced view of it, as well as the basic necessity of development in developing countries and the need for the law to play a role in it, the research of legal literature revealed a means of sustenance in an oasis of international public values, nuanced by the shaded and jaded manifestations of ideals and morals, ethics and policy, soft and hard law. For the most part, this body of values lay in the twilight zone/grey area between law and non-law. *Given the congenital weakness of much of this body of values/value laden soft law, in*

terms of validity as sources of law under Article 38(1) of the Statute of the International Court of Justice, the central argument in this study advocates recognition and implementation of this body of values, through the pluralism and diversity of laws and legal processes, bound together by broader approaches to interpretation and a degree of innovation and imagination. Alternatives and complimentarities are considered, with a view to bridging gaps between law and policy as well as values and norms, rationalizing the dual functions of international law. It requires also the exploitation of the contradictions in the international legal system, efforts to maintain its inner coherence, and endeavours to safeguard neglected interests. Such a project can make this body of law a protective shield to neglected interests, both at the international level between states, and at the national level, between communities. Hereby, the issue of a balance between the interests of foreign direct investment, development, human rights and the environment could be further explored.

8.2 The Context and Concepts of this Study

The issues in this study needed to be analysed within the context of the surrounding realities in international relations and law including globalization, development and the regulation of foreign investment. The currents of globalization makes the regulation of foreign investment more complex, but the diversities involved may lead to the accommodation of alternatives and a plurality of solutions. Socially and environmentally inclusive approaches to development mitigate the conflicts between investment, development, human rights and the environment. The regional and domestic contexts of South Asia and Sri Lanka further coloured the contextual fabric underlying this study, and provided parallels in the conceptual sense – for instance, in their traditions in spiritual and non-economic values and Buddhistic notions of the middle path. The ideals of justice, equity and sustainable development were posited as the apex values of the developmental approach and the theoretical framework constructed for this analysis, where the most seminal of all values is that of fairness. Justice is perhaps the most phenomenal of values that the law can aspire to, and also has the ability to balance between different claims, making it especially suited to this study, which is firmly embedded in its connection with a value system. Equity is similarly of far-reaching significance given its complimentarity to justice and fairness, its relative flexibility and malleability – assets in the light of the lawful adjustments necessitated by this study. Sustainable development can play a key role here, particularly given the following features of this concept: it essentially balances the conflicting claims of private interests and public purpose; participation is one of its central themes as it affords all sections an opportunity to be part of decision-making; inter- and intra-generational equity, accountability and responsibility are integral components; and the concept has attained a measure of recognition in international law. International law is to be viewed in its dual functionality as a value system and

a regulatory framework. In the dialogic space between political power and transnational social forces, it can therefore perhaps perform a third function: that of reconciling the aspiration to values with the application of norms. Towards the realization of the goals described above, as well as for bridging the gap between the two main functions of international law, the international legal process/means, it was argued, should have a certain orientation: the law should provide a path to fairness; it should enable the balancing of conflicting interests and the reinforcement of mutual and universal interests; it needs to be realistic and dynamic enough to change with time, space and circumstances; it should be internally coherent and have means of implementation. Public interest litigation was to be analysed as a regional innovation which can serve several purposes, including the implementation of sustainable development, the domestic incorporation of international law and policy in the form of soft law, democratic participation in development, and upholding the rule of law primarily through the judiciary.

The methodology of the theory and sources of public international law was selected for evaluation of the international legal framework, because it was the most appropriate means to analyse the substance and the legal value of relevant laws. Since much of the law and policy – which give a sense of direction to this study is in the nature of soft law, it is argued here that soft law does have moral, ethical as well as legal value. A diversity of alternatives flow from this argument, including the legal value of international resolutions, public interest litigation, corporate codes, civil society initiatives and the progressive development of international law.

Flowing from their direct and related relevance, the substantive areas identified for analysis were: transnational corporations and public international law, standards in the three most relevant constituent branches of international law: economics, human rights and environment; the roles of home and host states; regional and national arrangements; and the interventions of non-state actors, primarily TNCs and NGOs. Evaluation of each of these takes place with particular regard to broader interpretations and lawful adjustments, bringing the legal system closer to the body of international public values.

8.3 Transnational Corporations and Public International Law

The complex nature and structure of TNCs is further complicated by difficulties in their regulation, including the fact that their activities are clearly global, while their regulation is mainly local, along with some international as well as home state controls. In addition, there is a growing body of interventions by international organizations, corporate codes and civil society initiatives. Changes in the basic principles of public international law involve some fundamental, substantial and far-reaching adjustments. Such a process of change would necessarily be slow and controversial, if at all it is ever realized. Many questions arise in this context,

with regard to the constantly changing dynamics of international relations. While discussion on these aspects is enlightening, it tends to be presently confined mostly to the academic level.

International law is premised on the centrality of states, inter-state relations, state practice and state sovereignty. The core problem under consideration raises basic issues which are unique to the fabric of international law. They relate to the actors, structures and processes of international law, and certain general principles and concepts are pertinent for discussion. These are with regard to the application, relevance and appropriateness of international legal personality, international jurisdiction, international responsibility and international minimum standards. In relation to international legal personality for TNCs, a degree of functional personality rather than full subject status could provide a balanced solution. As for international jurisdiction, the protection of global public values may be advanced where the TNC has the nationality of the home state, or the effects doctrine/objective territorial principle is applied. The idea of international public values and their protection is advanced furthest through the concept of universal jurisdiction as well as the extraterritorial application of national legislation. On the other hand, each of these bases of jurisdiction also has its own limitations and drawbacks. The innovative application of territorial jurisdiction through host states – for instance, through public interest suits upholding principles of sustainable development – can also play a useful role in balancing conflicting interests. International responsibility can be relevant, especially where TNC activities have been approved by the state, where the latter has failed in its due diligence obligations, or where the notion of aggravated responsibility applies. The last of these is interesting as it arises in the context of international public values/community obligations/obligations *erga omnes*. On the one hand, international responsibility may have drawbacks, including negative impacts on diplomatic relations, while on the other hand, the expanding body of law relating to corporate social responsibility and the progressive development of international law would tend to enhance the argument for its imposition. The application of international minimum standards and, more significantly, the consideration of the converse situation in terms of its application, present further possibilities in relation to the amelioration of justice, equity and sustainable development.

Change in relation to these principles and concepts is hard to achieve and may evolve with time. But the temporal dimensions for such processes are far from certain. Initial consideration around these four issues has shown that changes with respect to each of them is partly favourable, but they all tend to have some limiting or negating factors to a greater or lesser degree, and involve some complexity. Desirability and necessity for change are not essentially co-related to feasibility in each situation. Change is not easily forthcoming, as it usually involves state practice, which is complicated by the centrality of power and politics, which are phenomenal to international relations, policy and law. However, multidimensional approaches and the pursuit of a middle path between the sterile vacuum,

on the one hand, and the potent bounty, on the other, could be a useful exercise, also in view of the transition from government to governance. In view of the limitations with regard to change in general principles, it is necessary to explore the decentralized branches of international law, as well as other related features of the international legal system, including local and regional arrangements and interventions of state and non-state actors.

8.4 International Law Standards: Three Dimensions

Sustainable development presents a *via media* for the infusion of non-economic values, morals and ethics into the economic terrain. To some extent, and in the absence of a better alternative, it responds to perennial calls in development studies for a more just, equitable and participatory form of development. In terms of efficacy, the internalization of sustainability in development could reduce the gap between precept and practice in development theory. But it is necessary to contexualize sustainability, to make development projects consistent with national policies and priorities.

Having to some extent surpassed the arena of public policy into the more esoteric preserve of the law, sustainable development has at least a semblance of credibility in terms of the law, bringing it within the legitimate sphere of legal discourse. However, it still has some way to go to satisfy the technicalities of the law. The evolving international law of sustainable development consists of both binding obligations and soft law, and is closely connected to the emerging system of global public values. Greater interaction between international, regional and domestic legal arrangements would enhance the realization of sustainability. For sustainable development to be realistic, it should be practicable and feasible. The need for coherence would appear to require that international law as a whole reflects the values of sustainable development.

The application of sources theory in international law posits sustainable development in a somewhat weak position, but it does have a *de facto* existence both as a value system and normative framework, and influences decision-making in several ways. It is, in fact, being incorporated in decisions at different levels, and the practice – as represented, for instance, by public interest litigation in the East or the Triple Bottom Line in the West – may sometimes have to inform the principle. There appears to be a process of crossfertilisation between principle and practice, national and international, local and regional, and state and non-state. The interventions of significant actors – including business, civil society, the legal profession and the judiciary in home and host states – vary according to different circumstances, especially between countries of the North and the South. There is an interface of several influences, which may even at times pull in different directions, although ostensibly for the same cause.

The law and policy relating to sustainable development at the international level tends to neglect the development dimension. Certain intermediary processes – including the progressive development of international law, soft law and policy in the nature of company codes of conduct, public interest litigation and environmental/social/strategic/sustainability impact assessments – can help to reduce the gap between values and norms. This is due to various reasons, such as their extension beyond the domains of purely state legislative and executive action which make up state practice, the conventional contributor to public international law; their relatively participatory nature embracing the actions of non-state actors, the legal profession, the judiciary and civil society; and their inclusion of in-built mechanisms for implementation. They can serve to promote equilibrium between legitimacy and justice, paving the way to a higher level of fairness, by overcoming some of the weaknesses of the status of sustainable development in international law. The success of the law's bridging function here depends on the ability to adopt a broad approach to interpretation.

International human rights law needs to be analysed from the perspective of sustainable development, to evaluate the law relating to its social dimension. Inspired by morals, ethics and values that surpass the law, conceptions of human rights have considerable potential when viewed through a developmental perspective.[1] Further, rights-based approaches to development make human rights, labour and the environment intrinsic values in the development process. As a medium in upholding human dignity, human rights concepts can be purposively viewed in the broader context of sustainable development, equity and social justice. Expressions of human rights provisions in international instruments range from binding obligations to soft law, public policy and values. In certain situations where human rights are fundamental, they could amount to *jus cojens*, and take precedence over other issues. Some issues of fundamental values take on the character of *erga omnes* rather than *inter partes*, again elevating them to a higher plane. Human rights law contains many possibilities and some drawbacks, and its utility value depends to some extent on approaches to interpretation, incorporation and implementation of relevant norms. The call for state intervention in this sphere contrasts with the processes of globalization, which usually entail the rollback of the state.

The gradual transition of nomenclature, concept and approach from rights of individuals and communities to responsibilities of all, including business and gov-

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1 See O. de Schutter, 'Transnational Corporations as Instruments of Human Development', in P. Alston, M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement*, OUP, Oxford, 2005, p. 403, for interesting perspectives on the role of TNCs as potential tools in the realization of human development. He suggests a focus on tools for structural and macro-economic issues in relation to FDI in developing countries and the related legal framework, a change of approach of developed states which have consistently looked at investor protection rather than TNCs as promoters of human development, and a heightened role for multilateral lending institutions to promote such a role for TNCs in lending policies.

ernments, augurs well for the pursuit of equilibrium between private and public interests. With the passage of time, changes in the international economic atmosphere and transition from reliance on general standards to evolution of specific standards, accountability and responsibility are becoming increasingly important. Rights and responsibilities are co-relative, and the increasing emphasis on responsibilities, on the one hand, together with the system for the recognition and enforcement of rights, on the other, are mutually complementary phenomena which could, in a symbiotic process, eventually result in higher standards of social justice and equity. However framed, the importance lies in functionality and how it will work for all concerned.

There is much scope for the progressive development of international law in this sphere, given the considerable body of soft law and public policy emanating from international organizations, TNCs and NGOs. To be effective, this should ideally lead to the emergence of binding obligations, as 'progressive' development should take place. Cohesiveness is lacking, as many resolutions exist on related topics, with little or no overt connection. It is advisable to have more efforts at convergence and co-ordination of related issues in institutional organization, rather than divergence and duplication.

History bears witness to changes in the relationships between and among the different generations of rights, necessitating intergenerational equity in the equation. The adverse impacts of globalization on human rights are multidimensional, and this reinforces the principle of indivisibility of human rights.[2] International human rights obligations should be viewed through the prism of the principles of universality and indivisibility of all human rights.[3] Cohesion is necessary, and one means of rationalization of laws and policies from multiple sources is to subjugate all measures to human rights law, which is also supplemented by TNC codes and NGO interventions. But the basic standards should be set by human rights law, because it is the most all-embracing of the different systems of standard-setting, and has thus more capacity in terms of enforcement with a degree of consistency, certainty and predictability.

The Millennium Declaration[4] recognizes in Art. 5 that the central challenge today is to ensure that globalization becomes a positive force for all the world's peoples, and calls for broad and sustained efforts to create a shared future, so that it becomes inclusive and equitable. It calls for shared responsibility of all

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2 The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, preliminary report of the UN Special Rapporteurs on Globalization and Human Rights, E/CN.4/Sub.2/2000/1315 June 2000.

3 *Ibid.*

4 A/RES/55/2 of 18 September 2000. Similarly UNGA Resolution A/RES/55/215 of 6 March 2001 'Towards Global Partnerships' stresses that efforts to meet the challenges of globalization could benefit from enhanced co-operation between the UN and all relevant partners, in particular the private sector, to ensure that globalization becomes a positive force for all.

nations, and multilateral exercise of such responsibility through the UN. Some fundamental changes need to take place in law and policy, to transform the Millennium Declaration from rhetoric to reality. Like a view through a kaleidoscope, the landscape of human rights is in a process of constant change, and takes on different complexions depending on the interrelationships of the various forces within the broad spectrum of norms, policies and values. This is a terrain in which ethics, morals and values are as important as the law, inspire the law, and constitute its driving force. To translate them into effective legal standards is neither easy nor impossible. Here the dual roles of international law in aspiring to values and resorting to norms call for synergy.

The economic arm of sustainable development was evaluated through considering international economic law principles *vis-à-vis* sustainable development. The traditional function of much of international economic law, including international investment law, has been almost exclusively the protection of economic interests. This is natural, given that the economic domain is the *raison d'etre* of this branch of the law. However, there is some internal inconsistency when one considers that the international law relating to development is an integral part of international economic law, and merits treatment which is analogous or equal to that of international trade, investment or monetary matters. The legal status of much of the law on development is limited, and international economic law tends to neglect developmental concerns. Viewed through a broader lens – that of international law as a whole, particularly international environmental law, international human rights law and the overarching concept of sustainable development – this shortcoming is magnified. International economic law as a whole should be informed by, and be reasonably consistent with, sustainable development, given the inextricable links between economic and other values.

There have been efforts to deal with developmental, social and environmental obligations within the framework of international economic law and relations. Corporate social responsibility initiatives from the business sector and civil society have become common at least in more advanced economies. But it is necessary to coherently incorporate this concept into the international economic legal system. The relationships between standards which are binding and non-binding, international and national, private and public, and state and non-state are complex. International standards, which may formally be non-binding on states, may be enforced through voluntary initiatives. The soft law element which emerges in voluntary interventions may influence evolution of international standards. NSA initiatives form a body of policy which can inform the law, and there is ideally a process of their crossfertilization with international public policy and law, which could ultimately lead to emergence of some common standards. What exists in this sphere is a multitude of laws and policies of varying values and degrees of hardness or softness emanating from multiple actors with little or no connection *inter se*. This leads to some confusion and is not satisfactory, unless there is a move towards some degree of consistency and unless the most binding laws are also

informed by ethical and social standards. Moreover, the law should be informed by developments in other social sciences like sociology, where equitable and participatory development, social inclusion and empowerment constitute basic concepts.

The obvious solution would be a multilateral instrument for investment regulation, and the strongest argument is for the development and existence of firm principles. State and non-state actor initiatives become necessary in the light of the unwillingness/inability of the community of states to impose liability directly on TNCs. Again, national controls will only work effectively when buttressed by a strong body of international rules. But the experience so far is that the international community is unable to reach a consensus, due to different reasons which include the problem of the relationship between multilateral rules and domestic priorities; the balance between the rights and obligations of TNCs and states; the conflicts and asymmetries between home and host states, also given the North-South context; the crosscurrents including global public values and lack of overall coherence. The making of investment rules encompass multiple overlapping levels, for instance – multilateral, macro-regional, national/bilateral and sub-national/micro-regional. These levels interact with and may eventually contradict each other, creating problems of systematic co-ordination. The state of development of regulation is highly variable between levels and even within each level. The existence of several levels, systems and sub-systems, local, regional and multilateral, and the numerous nuances within/between these levels/systems/sub-systems complicate reaching consensus.

One alternative course is to find some clarity and coherence in the laws and policies that do exist, and to work towards solutions within this framework. One key towards such an exercise could be focusing on the points of convergence and carving out from these an appropriate body of standards. Such a scheme should give high priority to implementation and enforcement at the domestic level. The convergence of international economic law – including development-related law, international human rights law and international environmental law – is strongest where the economic law dimension is weakest, for instance, with regard to the right to development, or sustainable development. Conversely, where a pure liberalization agenda is sought, the law tends to be strong and binding. From an institutional perspective, the interests of foreign investment have the strongest support and structures, while the quest for social justice takes place within weaker institutions, and often outside the mainstream actors in international law. Any coherent system that can be rationalized out of the complex web would need to be supplemented and implemented by home and host states as well as non-state actors. Solutions may lie in the waters that roll between the high tide of economic interests and the low tide of the public interest, and in the currents of global public values which transcend, cut across and overcome narrow and linear distinctions.

Whether at the international or local level, one change that has to take place is a movement away from a culture of social and political exclusion to one of

inclusion and participation as well as precaution. At the local level, many of the TNC-related problems flow from the exclusion of vital groups and issues from the decision-making process. Similarly, at the international level, for instance, one reason for the failure of the MAI was the exclusion of broader social interests as well as developing-country interests and their participation. The shift from exclusion to inclusion becomes all the more important when one considers the power relationships involved – as governments at the local level, developed-country governments at the international level and TNCs at all levels are not on an equal playing field, with affected groups at the local level and developing countries at the international level. The disparity in economic and political power necessitates that for justice, equity and a true balancing of interests, some affirmative action in favour of neglected interests is required.

Ideally, efforts at reconciling the seemingly irreconcilable should emerge within the broader context of overall development policy at all levels. Institutional integration is a significant factor in the quest for convergence, where the same institutions are assigned the role of integrating the protection and promotion of economic and other concerns. In the case of the Board of Investment of Sri Lanka, for instance, it is the role of the BOI to facilitate foreign investment, while at the same time applying the laws on environmental and labour protection through specialized units within the institution. In some components of international economic law, as in the area of development, it is possible to discern the role of international law more as a value system, and in others – as in international trade – more as a normative framework. And the different roles are not always mutually compatible or reconcilable.

In the South Asian region, there is relatively more integration of conflicting interests brought about through civil society efforts, as at the governmental level, there is a far-reaching move towards liberalization, with limited attention to convergence of broader issues. This would not be useful for the region in the long term, and sustainable development needs to be internalized in law and policy-making. Fairness must be factored into the globalization and development processes, especially in the light of huge populations, abject poverty, vast inequality and limited resources in the region.

International consensus representing attempts to forge justice and equity – for instance, the Millennium Development Goals – need to have a more effective impact on global law and policy, especially international economic law. For there must indeed be some compatibility between the vast conserves of international solidarity and goodwill pronounced through international consensus, on the one hand, and the concrete regulatory frameworks, on the other. Principle 10 of the Rio Declaration recognizes the rights of individuals to participate in decision-making processes, to have access to information, judicial and administrative remedies. This study advocates the realization of this principle through a variety of means, including public interest litigation, civil society initiatives and corporate codes, which can fortify the weak position of soft law and policy including this

principle itself, weaving them into the web of laws that can lay down standards which can, in turn, be implemented. The intercourse between soft laws and hard laws, as well as that between values and norms need to be enhanced.

8.5 The Roles of Home and Host States

Home and host states can be important players in the regulation of TNCs and in making corporate activity more consistent with international, regional and national standards. Globalization, declining state sovereignty and market-based reforms in effect delineate the boundaries of state interventions, for which, however, there is still a certain residuary space, given the gaps and shortcomings in international regulation, and because TNCs are essentially governed by local laws. Home and host states not only have rights with regard to regulation of TNCs, but also duties with respect to sustainable development, and in some situations, for instance, in joint ventures, host states can be equally responsible with business. In many developing countries, the need for good governance and accountability apply as much to governments as to businesses. States influence the making of multilateral investment treaties (which have been influential in the development of international law in pursuance of both economic and social interests), and bilateral investment treaties (which have advanced mostly the rights of investors).

Home states can exercise substantial control over TNCs based in them and their interventions can take place in several ways – for instance, through national laws for the control of companies abroad, inter-governmental institutional arrangements (such as the ILO core conventions or the OECD Guidelines) and extraterritorial application of national laws (like the US application abroad of the Alien Tort Claims Act). Both extraterritorial measures and the assertion of universal jurisdiction by national courts can influence the development of international public values, which can have an impact on the progressive development of international law. It has also become commonplace for developed countries to advocate the inclusion of social interests in international economic arrangements. Extraterritoriality allows access to justice and can enhance standards by spreading the application of corporate social responsibility across boundaries. There are, on the other hand, factual, legal and political complexities – including the undesirability of variation in standards, the possible adverse impacts on diplomatic relations and conflict with international law, unpredictability, uncertainty, inconsistency, dependence – and the confusion that can ensue from the multiplicity of standards. These in turn reiterate the need for an international legal framework as well as for the evaluation of the many means of regulation that currently exist, as home-state control alone is quite inadequate.

When TNCs operate within the territory of host states, their national laws should normally apply and they can adopt laws and policies which aim to influence their activities. As host states have territorial control, they have a basic duty to

attune their regulatory interventions in keeping with national development and other policies. However, the global existence and operations of TNCs, as well as international competition for foreign investment, make the issue of host-state control less straightforward. Host states often lack the laws and implementation methods for effective regulation. This is where international legal frameworks can advance fairness and consistency. Technically, TNCs can be sued in the host state, but decided cases illustrate the complexities involved. In South Asia, the progressive application in public interest suits of public law, public international law and international public values embodied in soft law and policy have crafted for the region a distinct approach with regard to the role of host states. The evolution of a body of regional jurisprudence on sustainable development could have significant ramifications, provided that TNCs can be subject to the jurisdiction of local courts. Constitutional and legislative measures as well as activism in the judiciary, legal profession and civil society have together extended the horizons of the law, enhancing synergy between norms and values. Cases from some host countries have illustrated the usefulness of alternative dispute resolution methods like negotiation, mediation and ombudspersons, and other mechanisms like impact assessments. All these can serve to implement emerging principles, soft laws and policies for sustainable development – for instance, the precautionary principle.

The legislative and executive abilities of both home and host states at the policy-planning and implementation levels can be limited by diverse constraints which do not necessarily apply to the judicial arm. In home states, judicial attitudes to international jurisdiction and responsibility, *forum non conveniens* and lifting the corporate veil, for instance, have made fundamental inroads. As for host states, judicial receptivity to the implementation of sustainable development principles for example, have a similar effect. States have discretion in designing value standards in national constitutions and legislation. Most higher judiciaries have the power of judicial review, to adjudicate on the conformity of new laws and, in some instances, even present laws, with the constitution, its entrenched values and norms. The principle of constitutionalism, which has emerged in certain Sri Lankan cases involving the regulation of globalization, can bring laws and their implementation closer to constitutional values like justice, equity and human rights. If applied in many states, its impacts could eventually penetrate the international legal system through state practice, and ultimately influence the progressive development of international law. There is also ample scope for further developments at the regional level and regional intergovernmental institutions, given the limitations of state interventions, and the dynamics that prevent full international consensus.

8.6 Regional and National Arrangements

The jurisprudence on the innovation of public interest litigation as a specific example from the geographical region of South Asia including Sri Lanka provides some

interesting insights into a reasonably viable instrument for the operationalization of sustainable development. In cases of PIL, basically the test for *locus standi* is liberalized from the need to be an aggrieved person, to simply being a person with a genuine and sufficient concern. This enables a relatively larger group of persons to gain access to justice, including concerned members of the citizenry, underprivileged members of society and persons forming part of a numerous class of plaintiffs. This, in turn, makes such litigation particularly useful in development and environment issues. While PIL leads to many positive results, one drawback has been the tendency to equate sustainable development with environmental protection, and thereby replicate the international tendency to fail to focus adequately on problems of underdevelopment in developing countries and the pursuit of development. Another possible ramification is that development decision-making by judges could be piecemeal rather than holistic. Given certain ground realities in the states of South Asia – such as their common heritage of a colonial past and inappropriate institutions and structures, relatively poor governance and an enlightened and active civil society, legal profession and judiciary – it is understandable that PIL became popular in the region. It offers a means towards ensuring a measure of responsibility and accountability, and of upholding the rule of law. An independent judiciary is considered in this study to be a core institution for the upholding of the rule of law. This position derives support from Article 38(1)(d) of the Statute of the ICJ, which includes judicial decisions as subsidiary means for determination of rules of law.

The environmental impact assessment process offers an invaluable tool for sustainable development. Corporate governance and corporate social responsibility can be practical tools in developed countries, where a certain level of stability and maturity of economy, industry as well as government may enable market mechanisms and corporate initiatives to work. In developing countries including those in South Asia, the pre-requisite is good governance of the government itself, as well as that of business, a factor well illustrated in the case law. The level of economic and corporate development still to be attained may make private initiatives more difficult to achieve, although CSR is now an emerging concept in several developing countries. PIL provides some checks and balances for keeping governmental action, often tied up with private sector activities, within the boundaries of the law. The experience of South Asia in EIA as well as PIL shows some promise in the direction of bridging the gap between the principle and practice of sustainable development and between the law in its ideal aspirations and its normative limitations. One result of domestic implementation of the international law relating to sustainable development is that soft and non-binding international laws can have a real impact on people's lives and livelihoods, particularly in many developing countries where concerns like environmental values and social justice are not always integrated in development.

As far as the human rights dimension is concerned, when localized to Southern Asia, there is a *lacuna* in the context of regional co-operative arrangements by

governments, and this applies also to the Asian continent as a whole. Some comparative study does throw light on the obligations on these states, where the judiciary, the legal profession, civil society and PIL have acted in the promotion and protection of human rights, social justice and good governance. Certain public interest suits have helped to give life to the relevant human rights provisions. Procedural and participatory rights like those embodied in Article 10 of the Rio Declaration, including access to justice, information and participation have played a key role in decisions involving investment, environment, development and human rights. Corporate Social Responsibility is beginning to evolve as a concept in South Asian states. In Sri Lanka, efforts are underway to introduce CSR, and the initial response by some companies is encouraging.[5] CSR is both more expensive and complex than shareholder value, making it more difficult to practice in LDCs.

PIL and constitutionalism have also been used in the sphere of international economic law issues. Steered by NGOs, the legal profession and the judiciary in Sri Lanka, for instance, interesting inroads have been made in relation to balancing business and social interests. However, there are limitations, such as *ex-post facto* operation, and the possibility of piecemeal solutions. Besides, it involves the judicial arm of the government rather than the executive or the legislative, and could lead to conflicts of approach between these different branches, as it is the latter that conventionally decides on national development policy. In principle, however, there is no reason why the judiciary should not enter the realms of policy, particularly in the face of large-scale dissatisfaction of the public with the other branches of government.

The discussion of regional and national arrangements illustrated how the law can be brought closer to justice, equity and sustainable development. It demonstrated that it is possible to find paths towards bridging gaps of many sorts. It showed how international law can be implemented through some adjustment, innovation and interpretation at the domestic level. Large-scale application of such methods of implementation may conversely, influence international law, through state practice. South Asia requires more integration through intergovernmental arrangements for economic, social, human rights and environmental endeavours. Regional and national arrangements, even within certain limitations, have helped in balancing conflicting interests, and have advanced sustainable development further than that permitted by the inherent limitations of international law sources and theory. Many public interest suits are based on constitutional rights, including equality, liberty and the right to freedom from cruel, inhuman and degrading treatment. The concept of constitutionalism, which was the basis of some domestic judicial decisions, may also be useful for analogous consideration at the international level.

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5 Ceylon Chamber of Commerce, Sage Training, *The CSR Handbook*, Ceylon Chamber of Commerce, Colombo, 2005; reactions are bound to be mixed, and for CSR in India, see P.P. Guptara, 'The Limits of Corporate Social Responsibility in India', http://www.southasian.org.uk/intro_social.html

8.7 The Interventions of Non-State Actors

Together with several other sections of civil society, NGOs are increasingly involved in issues of governance, and so are business entities. In the area of sustainable development, the Triple Bottom Line, corporate accountability and corporate social responsibility, there is a growing body of initiatives by business as well as NGOs. These can supplement laws made through states, the most legitimate means for upholding the rule of law. Regulations made through state agency, at the domestic, regional or international level, have a relatively higher degree of universality and impartiality, and can be enforced with some level of consistency and predictability.

Corporate codes are weak in enforcement, as they usually amount only to policy statements. The corporate social responsibility movement is not likely to succeed without being embedded in a framework of binding rules. However, codes may add value through their contribution to a body of public policy and, eventually, law, which can influence national and international standards. They could lead to a form of law in the nature of the old *lex mercatoria* and can influence the progressive development of international law. As non-state actor initiatives may be accommodated in the grey zone between law and policy, they on the one hand do not satisfy the formal tests of legal validity. But on the other hand, they tend to have high ethical and moral value in terms of ideals and goals. International standards which are not binding on states may be enforced through corporate codes and, conversely, codes can lead to the evolution of such standards. They can have several benefits – for instance, the emergence of standards, maintained through good faith, in the absence of mandatory regulation. In view of the 'race to the bottom', voluntary standards can ensure a 'minimum standard' in the public interest. Large-scale application of self-regulation may have an impact on state practice. But self-regulation has many shortcomings and moreover, the public interest is too sacrosanct to be entirely delegated/relegated to private business. Corporate codes have evolved mostly in advanced economies, and developing countries still rely largely on state regulation, although private sector initiatives are now on the increase. They are less practicable in developing countries, given the ground realities of hampered economic development and maturity, lower standards in governance and regulation, and frequently the need for accountability by governments themselves.

There is scope for a stronger role for international organizations. Partnerships between the UN, states and other sections of society – as called for by recent UN instruments – would be a positive step, as the emerging structure of international society will only be reflected through broader participation of new actors. Repeated events of unruliness by certain groups opposed to global economic and political processes, underline the need for the primacy of the rule of law. Civil society initiatives amount, at best, to a body of public opinion, values and policy but can influence the progressive development of international public values, policy and, ultimately, law. The Declaration on the Right and Responsibility of Individuals,

Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[6] emphasizes the important role of civil society in the promotion and protection of human rights and basic freedoms. The partnership approach may lead to some coherence in what is currently a rather disconnected array of rights and responsibilities advocated by a plethora of actors. The Social Forum[7] (for economic, social and cultural rights) which held its first session in August 2002 was set up because of the felt need for a new process or mechanism within the UN system with broad participation, reflecting the new structure of international society, and also in view of the new challenges posed by globalization, like the relationship between globalization and economic, social and cultural rights. Cohesion is needed, and one means of rationalization of numerous laws and policies from multiple sources would be to subjugate all other measures to international law. The hierarchy of the sources of public international law would determine their comparative values.

Many NSA initiatives reiterate, endorse and seek to enforce standards of international law. They complement international law, advance minimum standards and further their implementation. The increasing role of non-state actors furthers the realization of Prin. 10 of the Rio Declaration, encompassing participatory rights in sustainable development. They influence the development of a body of international public values, policy and soft law, which helps break down the distinctions between values and norms, as well as law and policy.

8.8 Reflections on a Perspective

This study concludes with the thesis that the gaps that emerged in the course of this inquiry can be cemented at two levels: at the concrete level, between soft law and legally binding norms of hard law; and at the abstract level, between values and norms. These two processes, in turn, are interconnected because the values are embodied predominantly in soft law. Thus, to argue in favour of the accommodation of soft law in the international legal system, through a diversity and plurality of legal processes, is also to enrich the normative content of international law, bringing it closer to human, community and international value systems, to some extent bridging the gap between the dual functionalities of public international law, legitimacy and fairness, law and justice.

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6 UNGA Resolution 53/144, adopted on 9 December 1998. In August 2000, the UN Secretary-General appointed a Special Representative for Human Rights Defenders. Her work is based mostly on the 1998 Declaration, which recognizes that human rights defenders must be broadly understood as including all those striving for the promotion, protection and realization of social, economic and cultural rights, as well as civil and political rights. In her first report (E/CN.4/2001/94), the Representative Hina Jilani stated that she believed her mandate to be broad enough to include those defending the right to a healthy environment, the rights of indigenous peoples or engaging in trade union activities. Also see A/RES/56/163 of 20 February 2002.

7 E/CN.4/Sub.2/2002/L.11/Add.1

A critical evaluation of public international law shows that originally it made almost no provision for the protection and promotion of economic development, human rights and the environment in the context of foreign direct investment in developing countries. International law in relation to economics, society and the environment, each evolved in its own niche, with little or no linkage, and economic concerns were certainly the priority for promotion and protection. As the law evolved, specialized and expanded, the situation improved, subject to certain limitations. Integration and interconnection increased as a more holistic approach emerged, especially in the context of sustainable development. A composite view of international law shows that its constituent branches sometimes pull in different directions, due to conflicting interests, global politics and power dynamics. In comparison with the economic globalization agenda steered by many hard laws and conventions, laws for social and environmental regulation are often of weak legal status, and consist of a curious amalgam of hard law, soft law and policy. However, the international legal ground of values and norms as a whole, especially in the three areas under consideration, cover a vast terrain. Further, the international legal landscape is both enriched and complicated by the concomitant existence of regional and national arrangements, interventions of home and host states as well as non-state actors, particularly NGOs and TNCs.

Given the potential value of international law in context, the pursuit of points of convergence and integration seems a worthwhile project. The divergence that emerges from the decentralization of international law both in terms of its constituent branches and in terms of parallel arrangements can lead to inconsistency, conflict and incoherence. Coherence would be closer at hand if the norms, policies and structures of the constituent branches can be rationalized to some extent. International instruments, particularly in the field of sustainable development, are beginning to develop the notion of integration in the form of a legal principle. A useful step in the process of integration is to strengthen the role of international institutions, particularly within the UN system, and enhance co-ordination between the agencies dealing with different branches of international law.

Virtually all the actors involved in regulation could have certain vested interests which, in turn, raise questions about their objectivity. Their attempts at regulation each have their respective strengths and weaknesses. The efforts of NGOs and TNCs, in particular, cannot take the place of regulation through states – which still constitute the basic foundations of sovereignty at the national, regional and international levels – and their multilateral actions through international organizations. Again, this point highlights the need for strong engagement on the part of international and multilateral institutions, which can – through their nature and structures – capture the universal project of global public values. However, the interventions of non-state actors, especially self-regulation by TNCs, may contribute towards the progressive development of international law and thus influence legal norms at some stage. The less than wholesome status of international law, the preponderance of soft law and policy, and the weaknesses of implementation

of international norms also point to the need for more action at the regional and domestic levels, to enforce and implement laws at the international level. Soft law, *lex ferenda* and international public values can inform the development of international law as well as legal development at the regional and national levels.

Academic opinion to the effect that the universal recognition of human rights calls for the constitutionalization of international law and foreign policies based on human rights and the principles of the rule of law, limitation and separation of government powers, social justice, democratic peace, and national as well as international constitutionalism warrant further consideration. The idea of constitutionalism at the national level also emerged from several cases of public interest litigation. Discourses on constitutionalism and constitutionalization are diverse, ranging from the constitutionalization of WTO law, in effect, making them a constitution, to the constitutionalization of human rights law to promote a balance between the plethora of laws protecting trade and investment, and the neglected protection of broader social values. An enlightening approach from the perspective of sustainable development is the argument for a constitutionalized WTO, which considers the economic development needs of states and takes account of the skewed playing field of international trade and its effect on the economic prospects of developing countries.[8] According to this view, trading democracy, legitimacy and community are the greatest challenges facing the WTO, and not trading constitutionalization, and the WTO should not be described as a constitution as it *inter alia*, risks emphasis on economic goals and free trade, over other, equally important social values.

Having embarked on a course of inquiry which conceptually viewed public international law as both a value system and a regulatory framework, and methodologically utilized the theory and sources of this body of law, this study led to a more basic issue at a deeper level of abstraction: the apparently concentric circles of the high ideals of justice and theory, and the formal, technical doctrine of the sources of international law:[9]

> The doctrine of the sources of international law is a professional project not directed at revealing 'justice' or 'truth'. . . . Sources discourse is agnostic or aporetic about normative ideals such as justice, truth, morality, and so forth, or about the ability of the science of the law to know about them. Because such objectives seem to be out of reach, or are, in any case, excluded from the tasks of sources theory, theoretical contemplation turns to the decisions and judgments of practical thinking: correctness and rightness. If one cannot really find what is just or true or moral, etc., the decision could as well be correct according to the rules of the game.

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8 D. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System*, OUP, Oxford, 2005.

9 T. Skouteris, 'The Sources of International Law: Tales of Progress', *The Hague Yearbook of International Law*, 2000, p. 11.

Thus there emerged in the course of this inquiry some basic questions which do not necessarily have answers, and a sense of the need to bridge the grey area between the 'is' and the 'ought' and between law and justice. The conceptual values could sometimes be attained through the application of the methodological tools, particularly where one adopts a broad, purposive approach. But sources of law deal with legitimacy rather than rightness, leaving a certain vacuum as they cannot effectively distinguish right/wrong, just/unjust. The research revealed a hiatus between the role of international law as a value system and its concomitant role as a regulatory framework, which had the chamelion-like quality of being shaded by its particular environs. So at a superficial level, this gap manifested itself in variations in case examples of foreign investment, human rights and the environment. At a deeper level, this cleavage could be contextualized in relation to actors, structures and processes of public international law and its constituent branches, as well as a more complex web involving regional and national arrangements, states and non-state actors. This study points to the need for the quest for some balance between the law as it should be and the law as it is: fairness and legitimacy. Somewhere between the esoteric universe of values or ideals that international law purports to posit at the one level, and the mundane regulatory framework of norms or standards it constitutes at another level, there should exist an intermediate tier related to another function of the law or legal processes, the means or skills: the building of bridges between values and norms. This would further the realization of values. The processes through some coincidence of semantics envisage: imagination, integration, incorporation, implementation, interpretation, intervention, innovation, internalization and institutionalization. They require cutting at the edges, pulling at the margins and cementing the rough surfaces of public international law.

With regard to the final observations in this inquiry, the approach suggested by Rosalyn Higgins to international law as a normative system/process rather than as rules is interesting as it virtually eliminates the distinction between *lex lata* and *lex ferenda*, permits an interpretation/choice compatible with values, and offers tools for authoritative decision-making on a problem for which international law has no rule, i.e., *lacunae*:[10]

> The further one moves away from positivism and rules, the less important becomes the distinction between *lex lata* and *lex ferenda* . . . If law as rules requires the application of outdated and inappropriate norms, then law as process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve. But it is only to the rule-based lawyer that this is to be classified as 'law as it should be' standing in contrast to 'law as it is'. To the law as process, this is in large measure a false dichotomy, a cleavage that we can ourselves banish out of existence.[11]

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10 R. Higgins, *Problems and Process: International Law and How We Use It*, OUP, Oxford, 1994, p. 10.
11 *Ibid.*

With regard to the related issue of *lacunae*, Higgins argues that whereas the rule-based approach will mean the absence of a solution, the process approach still leaves tools for decision-making by the use of analogy, by reference to context, by analysis of the alternative consequences for instance.[12] The third result of the process approach, is that the focus is on a variety of phenomena, including state practice and decisions by a variety of authorized decision-makers, all of which make up the fabric of international law. This relates, in turn, to the perception of international law as an authoritative system of decision-making available in a decentralized system to all authorized decision-makers, not centred only on the International Court of Justice.[13]

Short of such a far-reaching approach, the present study found that although sources theory was useful and indeed constituted the methodology used herein, some rethinking was required. The range of soft laws emanating from multiple actors and the important role for international organizations raise basic issues about traditional doctrines of sources and their hierarchy, and this is connected with the centrality of sovereignty, the bedrock of international law. The primacy of sovereignty mandates that contributions to the making of public international law emerge primarily from states and their practice, usually confined to the legislative and executive branches of the state. It also accounts for the significance of the distinction between *lex lata* and *lex ferenda*, in turn related to positivism and sovereignty, legitimacy and authority.

Turning to the issue of values, one may further pose the question: 'whose values?' and conventional international law would invariably envisage the values of the state. This raises the question whether a state is capable of having values. Given the contemporary structure of the international community and the ever-increasing voice of transnational civil society, this also leads to the issue whether values of the state alone sufficiently represent the values of both national and global communities. The answer is complex, as values are basically human values, and they emerge from individuals, families and societies, which ultimately contribute to forming the state, and eventually, global society. International society today consists of a plethora of actors, far surpassing the idea of the nation state. Together, these actors create a vast body of public values as in the context of corporate social responsibility. International public values do not always make the transition to public international law. Democracy and good governance, social justice and participation, justice and equity, all cornerstones of the supreme value of fairness point to the need to include the values of this much larger class of actors, in the mainstream. If one considers as to who has failed the victims of the Bhopal disaster for instance, the answer is complex, as there are several actors involved, including states, non-state actors as well as legal systems, both domestic

12 *Ibid.*
13 *Ibid.*

and international. Together they represent, it could be argued, a set of universal values, a common conscience of humanity.

Many of the norms, policies and initiatives discussed in this study point to the emergence of a body of international public values, with a communitarian spirit. Together they point to a degree of global solidarity at one level. But again, when efforts are made to concretize these values through international agreement, the centrality of state practice, the interest in self as against community, or country as against the global community becomes a point of conflict. At all levels – individual, family, society, country, region or humanity as a whole – it flows from human nature that one's individual interests are preferred over larger community interests, creating a conflict between the parts and the whole. In the light of non-consensus at the multilateral level, in turn preventing a multilateral investment agreement, possible alternative paths, such as a broader approach to the interpretation of the sources of law, justify consideration. Conventionally, bilateral investment treaties have almost exclusively provided for the interests of TNCs without taking into account the possible harm that may be caused by them. Equilibrium requires that the parallel development of an emerging body of international public values should be reflected in the international legal system through structural linkage with the sources of international law.

This study also pointed to the need for redefining and rationalizing some norms of international law. The need for rethinking accepted norms and notions can be rationalized by the need for international law to be realistic, through evolution with the effluction of time and change in circumstances. The filling of the gaps in international law can be enhanced by a holistic view of the international legal system. The contradictions and internal inconsistencies within it indicate a degree of incoherence, so that it appears as though international law is sometimes not at peace with itself.

The landscape of (international) law viewed against the multidisciplinary contours of development studies shows that within the boundaries of its inherent inhibitions, it has still made a contribution to this vast terrain. Just, equitable and sustainable approaches to development are perpetual pursuits in development theory – the paths to which usually lie in other social sciences like economics and sociology – as the law is of low visibility in this domain. International law, as well as the discipline of the law as a whole, does have some seeds of potency, which, if sown on the fertile soil of broad, holistic approaches to law/legal process, may bear fruit. Many answers may lie within the bounds of the law, whose primary strength lies in its ability always to endeavour, and sometimes to attain, the goal of building bridges, of searching for synthesis, of aspiring to synergy. The success of the law's bridging function here requires a sense of innovation, the depth that recognizes global social structural changes indicating the need for legal pluralism; and the broadness of approach that goes beyond conventional boundaries, without surpassing the lawful limits of public international law. In the complex web that made up the different concepts, dimensions and levels of discourse in this

study, several gaps that emerged in this process, can, to some extent, be bridged by the law: those between principle and practice, international, regional and national; law and policy; economics, development, human rights and the environment. Somewhere on the road from Utopia to legal positivism,[14] the law and its process have, I believe, a role to play in bridging the gaps between law and justice; legitimacy and fairness; and the aspiration to values and the application of norms. The horizon lies before us, but to some extent, we choose the distance that separates us from its reach.

14 An expression from C. Tomuschat, *Human Rights: Between Idealism and Realism*, OUP, Oxford, 2003, p. 3.

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