Annual Survey of International & Comparative Law

Volume 10 | Issue 1 Article 9

2004

Foreign Direct Investments and Sustainable Development in the Least-Developed Countries

Zakia Afrin

FOREIGN DIRECT INVESTMENTS AND SUSTAINABLE DEVELOPMENT IN THE LEAST-DEVELOPED COUNTRIES

ZAKIA AFRIN*

I. INTRODUCTION

> *"There are many dimensions to sustainability. First, it requires the elimination of poverty and deprivation. Second, it requires the conservation and enhancement of the resource base which alone can ensure that the elimination of the poverty is permanent. Third, it requires a broadening of the concept of development so that it covers not only economic growth but also social and cultural development. Fourth, and most important, it requires the unification of economics and ecology in decision making at all levels."*[1]

The principle of sustainable development is at the very heart of international environmental law. This principle not only recognizes the right to economic development of the developing countries but also emphasizes the importance of environmental protection. Critics of economic globalization have identified that the competition between countries for investment may result in a neglect of environmental concerns; that national governments are gradually losing their influence

* LL.M., International Legal Studies and S.J.D. Candidate, Golden Gate University School of Law.

1. Prime Minister Gro Harlem Brundtland, Sir Peter Scott Lecture (Oct. 8, 1986).

over important domestic issues; and that globalization undermines the traditional balance of power between rich and poor.[2]

In the absence of multilateral instruments imposing environmental liabilities on states and business entities like corporations, globalization has come to mean environmental degradation for many developing countries. The catalyst for the event has been inadequate legal remedies and weak infrastructure of the host governments. This article examines the existing flaws of foreign investment regulations regarding environmental protection in the developing countries. Recommendations to ensure sustainable development in the poor countries will also be presented.

For the purposes of explanation, the discussion will be divided in four parts. First, foreign investment will be defined with specific attention to its emergence in the developing countries with brief mention of the actors in foreign investment as well as their influence on the host country's environment. The second part will present an existing conflict between Bangladesh and Occidental Corporation that portrays a typical condition that a developing country faces with foreign investors today. This part will concentrate on identifying legal issues that could arise from a conflict of similar nature. The third part is an examination of present multilateral, bilateral and other international instruments that facilitate sustainability of environment or contradict it.

The article suggest that international law is still in a dilemma over whether to attend to the monetary benefit instead of addressing environmental issues in this field. The last part includes recommendations upholding the goal of achieving and sustaining environmental development as well as economic activities. It is important to note that despite social and political controversy over the idea of foreign investment, this article will only concentrate on the area of environmental issues affected by foreign investment.[3]

2. Jan McDonald, *The Multilateral Agreement on Investment: Heyday or MAI-Day for Ecologically Sustainable Development?* 22 MELBOURNE UNIV. L.R. 617, 620 (1998).

3. Moreover, the central idea of this paper is to research provisions of international law in general that relates to foreign investment in the developing countries, thus I do not take into account regional agreements like NAFTA.

A. FOREIGN DIRECT INVESTMENT IN THE DEVELOPING COUNTRIES

> *"[G]lobalization must mean more than creating bigger markets. To survive and thrive, a global economy must have a more solid foundation in shared values and institutional practices."*[4]

In the second half of the twentieth century, apart from the international law on the use of armed force, no area of international law has generated as much controversy as the law relating to foreign investment.[5] Yet it has emerged as the most important phenomenon in today's economic relations. In general terms foreign investment means 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.

There exist various different definitions of the term.[6] Despite conflicting opinions of experts,[7] the international community led by the World Bank and IMF is continuously encouraging foreign investment for the developing countries.[8] It could have been the reason for recent dramatic increase in foreign capital flows to developing countries. The flows increased tenfold from 1982 to 1993 and almost twenty fold by 1996, with a 40 percent increase in FDI inflows in 1994-1995 alone.[9] With the success of the globalization process, developing countries thus become more and more vulnerable to the environmental harm caused by multinational corporations. As mentioned earlier, the actors in foreign investment are states and corporations.[10]

B. CORPORATIONS

Even though corporations[11] have been in existence for a long time, in the last few decades they have "become the focus of considerable

---

4. Kofi Annan's Millennium Declaration obtained from www.un.org.

5. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (1994).

6. For different definitions, *see* 8 ENCYL. OF PUBLIC INT'L L. 246; I.M.F., BALANCE OF PAYMENTS MANUAL para. 408 (1980).

7. The classical theory on foreign investment is based on the refutable assumption that it is wholly beneficial to the host country whereas the proponents of dependency theory reject it on the ground that it will not bring about meaningful economic development.

8. WORLD BANK, LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT (1992).

9. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS — A PROBLEM-ORIENTED APPROACH (2001).

10. Corporations are of two different types — state-owned and private; for the purpose of this paper I will talk only about private corporations.

11. MULTINATIONAL CORPORATIONS ARE ENTERPRISES WHICH OWN OR CONTROL PRODUCTION OR SERVICE FACILITIES OUTSIDE THE COUNTRY IN WHICH THEY ARE BASED, REPORT OF THE GROUP OF EMINENT PERSONS, U.N.Doc.E/5500/Add. 1 (1974).

controversy because of their economic and, in some cases political, power, the mobility and complexity of their operations, and the difficulties they create for national states — both 'home' and 'host' states — which seek to exercise authority over them".[12]

For most purposes, corporations are treated as nationals of a particular state, whether the state of incorporation, the state where the corporation's mind and management are located or the state where the corporation maintains its headquarters. This means that they are not international legal persons in the technical sense, prescribing neither rights nor obligations under international law. "The state must be viewed as a sole judge to decide whether its protection will be granted, to what extent it is granted and when it will cease" as per the enforcement of rights of corporations are concerned.[13] It follows that in the absence of written agreements between a state and corporations, the obligations of a corporate entity can not be enforced in an international tribunal; a claim at the ICJ must be brought against the home country, not the corporation itself.[14] This is surprising with respect to the fact that corporations have emerged as dominant actors in the world economy since the 1980s. By 1999 there were an estimated 60,000 corporations with over half a million foreign affiliates.

C. SUSTAINABLE DEVELOPMENT

In the Brundtland Report, the commission recognized two key concepts of sustainable development. One of them is the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given. The other is the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future. Thus, foreign investment could be called an effective tool of achieving sustainable development if it meets the criteria.

However, the reality remains far from satisfying. Whereas the positive role of foreign investment in alleviating poverty is facing uncertainty from various economists, many times they can be seen as contradictory forces against sustainable development. Globalization of market economy and the growth of multinational corporations present a conflict

12. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 421 (4th ed. 2001).

13. *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), Second Phase*, 1970 I.C.J. 3 (Feb.5).

14. Home countries are reluctant to accept claims against an act done outside the territory by the corporations, so the principle of not having "international legal personality" has a negative effect on both corporations and host states.

with the goal of sustainable development which requires local participation and control over development choices.[15]

Environmental disasters, such as the 1984 isocyanate gas leak in Bhopal, India that killed several thousand people, highlight the problems that occur when foreign investment brings environmentally hazardous technologies to countries with neither the environmental law framework nor the technical infrastructure to address the resulting the environmental problems.[16] The export of technologies and practices that are prohibited in the developed countries to the developing countries raises issues of equity and ethics.[17]

One might argue that foreign investment also brings in opportunities for environmental protection and sustainable development. However the tendency to offer lowest possible environmental protection laws to attract foreign investment can prove fatal to the interest of developing countries. In a recent study,[18] researchers concluded that FDI-led integration has done little to promote sustainable industrial development in a developing country. Besides the most alarming effect of foreign investment is trying to get corporations to comply with host country laws, let alone ensuring adequate compensation after an environmental wrong has been done.

II. A TYPICAL SCENARIO OF FOREIGN INVESTMENT

> *"The soil has not only lost its fertility but has also become inappropriate for construction of any heavy structure. The gas fire denuded the surrounding 700-acre reserved forest, rich in flora and fauna. The land will be no good for trees, tea, and crops and vegetable for 50 years, according to soil scientists."*[19]

To identify the environmental issues that may arise from foreign investments in developing countries, I will present a case study involving Bangladesh[20] and a U.S.-based corporation, Occidental Petroleum, Inc. Since 1910, the Bangladesh Geological Survey had been conducting an extensive search for tracing gas and oil reserves with much success.

---

15. HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL POLICY 1269 (2d ed. 2002).
16. *Id.*
17. For example pesticides like DDT which are illegal in OECD countries are being produced by subsidiaries of OECD countries' companies in developing countries.
18. KEVIN GALLAGHER ET AL., SUSTAINABLE INDUSTRIAL DEVELOPMENT? THE PERFORMANCE OF MEXICO'S FDI-LED INTEGRATION STRATEGY (2003).
19. Report by Well Flow Dynamics describing the damage in Magurchara gas tragedy.
20. Bangladesh is a south Asian country that earned its independence in 1971, and is now struggling to achieve economic development through an open market system.

Today, Bangladesh is divided into 23 blocks for oil and gas exploration and production.

In 1995, the Bangladesh government awarded three important blocks to Occidental, Inc., U.S. Oil Company[21] under PSCs with PetroBangla, the national oil company of Bangladesh[22]. When Occidental started drilling its first well at Magurchara in Sylhet division, a massive blowout took place on June 15th, 1997. A study conducted by the Ministry of Environment & Forestry and Bangladesh Environmental Lawyers Association (BELA) on June 18th and 19th, 1997 reported[23] that the explosion caused an indigenous tribe called the Khasia to leave their homes immediately; valuable trees, herbs, plants of different types were destroyed; animals, fishes, birds and insects belonging to various species were scorched; the water supply system entirely collapsed; a portion of the nearby tea garden was also affected. The fire continued for a few months before wells were drilled to put a stop to the situation.

Environmentalists said "the region would be facing a very serious loss of green cover and extinction of wildlife species. The damage to the environment was multiplied due to the prolonged period for which the fire continued."[24] An enquiry commission initiated by the government submitted their report on 30 July 1997 concluding that the accident occurred due to utter negligence and inefficiency of Occidental Bangladesh, Ltd. during the drilling on the night of June 14th. The commission also emphasized the fact that there was a lack of supervision, coordination and absence of supervisor, mud engineer, mud logger and drilling crews of Occidental on the spot.[25] The government estimated the damage to be $105 million.[26]

While the compensation issue was pending, Occidental signed a supplementary agreement with Petro Bangla in 1998 without mentioning the compensation issue. Due to its unpopular image in the population at large, Occidental transferred all its working interest to Unocal, another

21. The award has been settled through negotiation.

22. SALIM MAHMUD, MAGURCHARA BLOWOUT IN BANGLADESH: ENVIRONMENTAL AND HUMAN RIGHTS ISSUES. 1 OIL GAS & ENERGY L. INTELLIGENCE (2003), *available at* http://www.gasandoil.com.

23. Audity Falguni, *A Passage to Magurchara: Long tongue of Flre.* THE INDEPENDENT, Mar. 21, 2000.

24. Brundtland, *supra* note 1.

25. *Extension of PSC with Unocal challenged*, THE INDEPENDENT, May 12, 2003.

26. Investigation by the Government also found the company to be liable for $685 million for burning the entire reserve of Magurchara gas reserve of approximately 245 bcf. For the purpose of this paper I will only look at the environmental issues and not engage in debate over 'natural resources' claim.

U.S. company in 1999. Since then, Unocal has denied any responsibility on its part for the gas blowout invoking compensation of $685 million. As for the environmental damage, they demanded a third party investigation to determine the harm done. UNEP has agreed to play the middleman but nothing can be confirmed at this time.

From legal point of view, Occidental or Unocal is bound to pay the compensation for environmental damage as the host country's law suggests. Also, foreign investors are governed by domestic law, so they have to compensate for violation of the environmental clearance certificate requirement.[27] Unfortunately none of the above claims has been answered by either of the corporations.

The next part of the paper will examine these issues in the light of existing international legal norms, both in bilateral and multilateral investment regulations.

III. ENVIRONMENTAL PROTECTION OFFERED BY INTERNATIONAL LAW

> *"Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development."*[28]

The principle of territorial jurisdiction,[29] which is fundamental to the international community organized on the basis of sovereign states and the principle of non-interference of one sovereign in the affairs of other

27. "In Bangladesh, Department of Environment must issue an environment clearance certificate to companies before exploring gas in any part of the country. Occidental applied for it and the DOE demanded fulfillment of certain conditions on its part. Occidental never returned to the claim and started exploring in violation of Environmental regulations of the host country." *Supra* note 4.

28. SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, Art. 14, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter SUB-COMMISSION REPORT], *available at* http://www/.unhchr.ch.html/menu2/2/55sub.htm.

29. One of the jurisdictional basis under international law, the others being nationality principle, effects principle and universal principle.

sovereign states have general implications for the law of foreign investment.[30] These principles suggest that since the corporation is operating inside the territory of the host state, it will be regulated under her laws and violations will be punished by the existing legal system.

In the case mentioned earlier, I have shown that the violation by the U.S. company was condemned by the government of Bangladesh and adequate compensation was sought, unfortunately without success. This is the kind of situation for which international law is expected to offer redress[31] where the host country is unable to enforce its regulation or does not have appropriate institutional framework to address the problem caused by a foreign entity.[32] As I begin to address existing multilateral and bilateral agreements relating to corporate behavior and environmental protection inside foreign investment regimes, a frustrating picture will be painted before the reader.

A. MULTILATERAL INSTRUMENTS

In recent years, much attention has been focused on economic globalization through facilitating trade and investments among countries. However, the existence of conflicting approaches relating to foreign investment and the ideological differences between the developed and the developing countries deterred formation of any multilateral instrument.

Unlike other international institutions dealing with specific economic regimes,[33] none exists for foreign investment. The only multilateral instruments are those relating to settlement of investment dispute,[34] investment guarantee[35] and the WTO agreement. The ICSID convention announces jurisdiction over any legal dispute arising between a contracting state and a national of any other contracting state.[36]

---

30. SONORAJAH, *supra* note 5, at 151.

31. Here consider the role international law plays on trade among nations.

32. For example, in the case of Bhopal Gas tragedy the Indian court could not come up with just compensation for the victims.

33. International trade is governed by the WTO; international monetary relations are administered through the IMF.

34. Convention on the Settlement of Investment Disputes, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

35. Convention Establishing Multilateral Investment Guarantee Agency, *opened for signature* Oct. 11, 1985, 24 I.L.M. 1598 (entered into force April 12, 1988).

36. ICSID Convention, *supra* note 34, Art. 1(2); "The purpose of the centre shall be to provide facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of this convention." *Id.* Art. 25(1); "The jurisdiction of the centre shall extend to any legal dispute arising directly out of an investment, between a contracting state... and a national of another contracting state, which the parties to the dispute consent in writing to submit to the centre . . . ."

However, the consent provision plays a dominant role in order to avoid disputes arising out of environmental concerns.[37] Moreover it certainly doesn't provide any remedy for the violation of host country's law.

There are few guidelines and norms regulating the foreign investment regime and corporate conduct. Though they don't have any legal binding force, these could be regarded as gentlemen's agreement and expected to be followed by the international community.

1. The World Bank Guidelines on Foreign Investment

The guidelines are based on the philosophy that "the greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular".'[38] Unlike the draft code of conduct prepared by UNCTC,[39] it does not make reference to of foreign investment's potential negative effects. It is not surprising that these guidelines seek to emphasize the protection and standards of treatment owed to the foreign investor by the host state. The five main sections deal with the scope with application, admission, treatment, expropriation and unilateral alterations or termination of contracts and settlement of disputes. There is nothing in these guidelines that could help Bangladesh in its current environmental crises.

2. Norms on the Responsibilities of Transnational Corporations

Multinational corporations have long been actors on the international scene.[40] They have been capable of influencing the course of international events and shaping principles of international law.[41] United Nations organizations have failed to provide a code of conduct for these entities despite efforts since 1972.

---

37. *Id.*

38. WORLD BANK, 2 LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT (1992), *reproduced in* 31 I.L.M. 1363 (1992).

39. Draft U.N. Code of Conduct on Transnational Corporations (1984), 23 I.L.M. 626. This draft convention stated that its object was to ensure "shared the common goal of maximizing the contributions of corporations to the economic and social development of the countries in which they operate and of minimizing their potential negative effects." *International Framework for Transnational Corporations; Report of the Secretary-General to the Commission on Transnational Corporation,* U.N. Doc. E/C.10/1992/8 (1992).

40. A. TECHOVA ET AL., MULTILATERAL ENTERPRISE IN HISTORICAL PERSPECTIVE (1986).

41. SORNARAJAH, *supra* note 5, at 189. The author argues that the idea of the open sea was formulated at the behest of trading companies to ensure that they had open access to the seas to favor their maritime transport interests. Also, that the system of appointing diplomatic agents for the protections of nationals owes its origin to the system of agents appointed by corporations to look after their commercial interests.

Recently the UN Sub-Commission on the Promotion and Protection of Human Rights passed a resolution addressing "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights."[42] The language of the norms bestows upon states the duty to ensure that transnational corporations and other business enterprises respect human rights[43] and to establish and reinforce the necessary legal and administrative framework for ensuring the compliance with the norms on part of the transnational entities.[44] These norms also compiled provisions for providing prompt, effective and adequate reparation for any damage caused by non compliance with the norms.[45]

National courts as well as international tribunals are mentioned as competent platforms to apply these norms in determining damages or for other purposes.[46] Perhaps the most progressive provision in this instrument is the obligation with regard to environmental protection. It states "Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment..., bio ethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development".[47]

But for its legally binding nature, this could have been regarded as a revolutionary step of international law trying to control corporate power in the face of developing countries. However, it could be argued that the resolution passed by the General Assembly might be regarded as customary international law. Even in that instance, these norms must be accepted by the General Assembly.

3. OECD Guidelines

In 1976, the OECD council of ministers adopted a recommendation entitled "The Declaration On International Investment And Multinational

42. SUB-COMMISSION REPORT, *supra* note 28.
43. *Id.*, Art. 1.
44. *Id.*, Art. 17.
45. *Id.*, Art. 18.
46. *Id.*
47. *Id.*, Art. 14.

Enterprises."[48] As its name suggests, the overriding purpose of the declaration was to promote foreign investment, calling on member countries to respect national treatment, minimize conflicting requirements on TNCs by different governments and make transparent incentives and disincentives to investment.[49]

However, the guidelines incorporated a set of voluntary rules of conduct of TNCs in its 1991 amendment. These guidelines include the provision that TNCs should take account of the need to protect environment and conduct their activities in a manner to contribute to the wider goal of sustainable development.[50] They also provide that TNCs collect and evaluate information regarding environmental effect of their activities (among other things), target improved environmental performance and monitor progress toward environmental targets or objectives.[51] The TNCs are expected to provide timely information on the potential environmental impact,[52] engage in communication with the victims of environmental impacts due to their activities[53] and prepare an appropriate environmental impact assessment.[54]

It is very interesting to note that the guidelines do not address the issue of compensating on part of TNCs for any damage caused by their activities. They further prescribe to adopt cost effective measures to minimize environmental impact,[55] maintain contingency plans for controlling environmental damage[56] and improve corporate environmental performance through adoption of standard technologies,[57] development and provision of safe products or services,[58] promotion of higher levels of awareness,[59] and research.[60]

---

48. Organization for Economic Cooperation and Development (OECD), OECD Declaration on International Investment and Multinational Enterprises (July 3, 1998) *available at* http://www.oecd.org/daf/cmis/codes/declarat.htm. The OECD is mainly consisting of industrialized countries of the world.

49. HUNTER, *supra* note 15, 1410.

50. *See, e.g.*, The OECD Guidelines for Multinational Enterprises (2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

51. *Id.*, Art. 1.

52. *Id.*, Art. 2.a.

53. *Id.*, Art. 2.b.

54. *Id.*, Art. 3.

55. *Id.*, Art. 4.

56. *Id.*, Art. 5.

57. *Id.*, Art. 6.a.

58. *Id.*, Art. 6.b.

59. *Id.*, Art. 6.c.

60. *Id.*, Art. 6.d.

Even the provision relating to providing adequate education and training among employees[61] and contributing to the development of environmentally efficient public policy[62] fall short of what is needed in this area. Moreover, these are merely recommendations and do not have binding force.

From the above discussion it is evident that none of these guidelines or norms creates any specific duty or liability on part of the corporations to consider environmental impacts of their investments. Nor do they provide for any adequate remedial requirement for damage caused by the TNCs. Thus, in a conflict like Bangladesh, the developing countries are left with their domestic regulations and bilateral investment treaties.

B. BILATERAL INVESTMENT REGULATIONS

In the absence of any multilateral instruments regulating foreign investment, the regime is currently operated through bilateral investment treaties. Though a recent phenomenon,[63] these treaties embody the principle rules in this area. There exist a large number of bilateral investment treaties between industrialized capital exporting countries and developing countries that have, as one of their objectives,[64] increasing the legal protection of the private bodies investing under the treaties.

It doesn't come as a surprise that the bilateral treaties include in themselves encouragement and protection of foreign investment as their statement of purpose and mostly deal with treatment of foreign investment, repatriation of profit, nationalization and compensation, compensation in cases of emergency situations, protection of commitments, dispute resolution, etc.[65]

A typical U.S. investment treaty with a developing country includes the provisions relating to standards of treatment, expropriation, losses from armed conflict or internal disorder, transfers and convertibility of payments, settlement of disputes, among other things.[66] The treaty between Bangladesh and the United States is no different, concerned only with the treatment and protection of the investor. Bilateral treaties depend totally on the parties and their priorities over investment.

---

61. *Id.*, Art. 7.
62. *Id.*, Art. 8.
63. "According to a list of treaties that appears in (1989) 4 ICSID Rev 189, the first bilateral investment treaty was the one concluded between Germany and Pakistan in 1959." SONORAJAH, *supra* note 5, at 225.
64. Some critics argue that to be the sole objective of BITs.
65. SONORAJAH, *supra* note 5, at 225-276.
66. HENKIN, *Supra* note 12, at 808-813.

Whereas developing countries want to present themselves as attractive place for investment, the developed countries find businesses for their corporations.

There is no hard and fast rule that issues other than investor protection can not be included in bilateral agreements where both the parties overlook the environmental, labor or human rights issues relating to investment. Whether because of diplomatic pressure or irresistible temptation of capital, developing countries like Bangladesh fail to demand environmental or labor safeguards in writing from corporations.

IV. THE WORLD ORDER IN AN ENVIRONMENTALIST'S WAY

> "*The fabric of life is unraveling, but the vast majority of people are unaware of it. The economies and technologies of this century have provided us with standards of living that past kings could have only dreamt of, but they have come at the cost of natural capital — destroying and dispersing a one-time bonanza of fossil fuels, other minerals, soils, biological diversity and fresh water. The impact of the earth's dominant animal now threatens the ecological life-support systems that underpin the human economy.*'"[67]

The emergence of environmental law is the latest phenomenon in international law. It is yet in the phase of formation. A major milestone can be said to be in a 1972 Stockholm declaration where the international community for the first time recognized the importance of integrating environment and development. Since then, there have been multilateral and bilateral instruments addressing specific environmental issues as well as soft laws like the Rio Declaration, General Assembly resolutions, arbitral decisions like the trail Smelter Arbitration, etc.

Unfortunately there has not been any unified approach to address the environmental issues altogether. Some important areas of environmental challenges, like the cases of foreign investment, are not attended at all. I want to suggest a few changes to the present system that would lead to sustainable development even in foreign investment scenarios.

---

67. Paul R. Ehrlich, forward to HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL POLICY (2d ed. 2002).

A. A UNIFORM CODE FOR THE PROTECTION OF ENVIRONMENT THROUGH AN ORGANIZATION

The field of international law has not developed in any systematic or strategic manner. Rather it flourished ad hoc in response to specific environmental problems. But there is no universal declaration or convention that establishes a binding set of rules regarding environmental issues. Even a comprehensive framework doesn't exist in the world today.

A uniform code establishing binding principles in environmental rights and responsibilities is what the world needs. The same agreement might create a new, powerful international environmental organization. The current international exclusive organ for environment is the UNEP (United Nations Environment Programme), a body of the United Nations. Though it hosts a number of environmental convention secretariats,[68] it acts merely as a catalyst, advocate, educator and facilitator to promote the wise use and sustainable development of the global environment.[69] It does not have the legal personality to make rules, enforce compliance or determine liability in cases of violation of law. An organization formed by a multilateral convention may award all the powers mentioned necessary for ensuring better environmental safeguards.[70] The first step toward an environment-friendly investment regime is to have an International Environmental Organization formed through a multilateral instrument approved by all the countries.

B. MULTILATERAL INVESTMENT AGREEMENT

Perhaps the most frustrating picture of the environmental regime is its silence on foreign investment. Foreign investment is solely dependant on bilateral investment regime. The diplomatic pressure certainly does not allow parties to negotiate any environmental safeguards in the language of the treaty. Once the investor is inside, it is even harder to enforce the national environmental regulations on them either for

68. The Ozone Secretariat, the Montreal Protocol's multilateral fund, CITES, the Convention on Biological Diversity, the Convention on Migratory Species, and a growing family of chemicals-related agreements, including the Basel Convention and the recently negotiated Stockholm Convention on Persistent Organic Pollutants.

69. Additional information available at www.unep.org.

70. In this context a comparison may seem important; the UN was formed through the UN charter in 1948, the WTO was formed by WTO Agreement in 1995; both of them being the most successful international organization ever. Recently the International Criminal Court was also formed through a multilateral agreement with the hope of being successful like the prior two.

inadequate infrastructure[71] or for the fear of losing further corporate investments.[72]

In the present situation a multilateral agreement among countries could ensure developing countries' environmental interests as well as sustainable development. Critics might argue that the effort to negotiate a multilateral instrument was destroyed because of the opposition from the developing countries. It is important to note in this context that the draft of the proposed investment agreement was not prepared in a due manner.[73] The world deserves a multilateral agreement on foreign investment affecting environment which will ensure, among other things,

- Active participation in the negotiation process by key countries both developed and developing
- Transparent rules and mechanisms to comply with those rules
- Specification of goals of the agreement
- Domestic integration of the rules of the agreement and help capacity building, education and public awareness on these issues
- Creation of specific rights and liabilities
- Financial and technical assistance for developing countries for achieving environmental improvement, infra structure build up and compliance facilitation

C. CONTROLLING CORPORATE CONDUCT

Under international law corporations are considered as individuals, thus without legal standing in the international courts. The problem that arises from this principle is one of procedure. The home states are not eager to accept corporate misconduct as their liability and the host country is left with domestic remedies.

However, corporations can be held liable as an individual under international law. The principle of international criminal law finds

71. *See* In re Union Carbide Corp. Gas Plant Disaster at Bhopal India in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986).

72. *See* National Coalition Gov't v. Unocal, Inc., 176 F.R.D. 329, 349 (C.D. Cal. 1997); Doe v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997).

73. The draft of the multilateral agreement on investment (MAI) was created by the OECD countries, kept secret for some time and awarded many new rights to investors.

individuals liable irrespective of their origin or state responsibility.[74] The law relating to corporations could be based on the current status of individuals under international law. Some might fear that it would entail more rights on corporations but considering the facts that international law does not confer rights directly on individuals except in exceptional cases[75] even though it holds individuals liable for grave crimes, this proposal seems reasonable. However this rule of liability and environmental impact assessment requirement must be incorporated transparently in a multilateral instrument brokered by the United Nations.[76]

D. AN INTERNATIONAL ENVIRONMENTAL COURT

It might seem too ambitious but an international environmental court could be the perfect platform to enforce environmental regulations and punish the violation of any such rules. It should be designed after the International Criminal Court. States, corporations, even individuals would be held liable for causing environmental damage but only the state or non-governmental organizations would be allowed to bring claims. It is about time that international environmental law is no more considered a branch of environmental law or public international law, but rather exists as an independent identity itself.

E. STRENGTHENING DOMESTIC REGULATIONS

Perhaps the most realistic recommendation is to strengthen the domestic environmental regulation of developing countries. Again, a human rights approach to address environmental degradation issues caused by foreign investment must be incorporated in the domestic legislation. Governments will be bound to create pressure on corporations if they are under public scrutiny. If we look at the statistics of foreign investment,[77] developed countries are on both ends of exporting and receiving foreign investment. The reason they praise the notion of foreign investment is partly the strict environmental regulations that prevent them from endangering their eco-system. However, a question may arise about how

74. Consider the Nuremberg, Rwanda or Yugoslavia trials for genocides and war crimes. Even the recent international criminal court is able to exercise jurisdiction over individuals.

75. As in the case of the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

76. The UN has shown reasonability in drafting its code of conduct for corporations which maintained that foreign investment might have some negative effect and must be subject to certain obligations.

77. "Top five outward investors countries are USA (24%), UK (14%), Germany (11%), France (7%) and Japan (6%); investment recipients are USA (24%), China (10%), UK (8%), France (6%) and Belgium (4%);" DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH (2000).

this would solve the problem of corrupt governments ignoring public opinion as in many developing countries.

F. EXTRATERRITORIALITY OF JURISDICTION

The mandatory provision of home country jurisdiction over corporations in the absence of adequate remedy from other forums could prove to be fruitful in this area of law. The idea is to propose the flipside of foreign direct investment — foreign direct liability. Powerful nations have, however, invented processes to avoid that kind of jurisdiction.[78] The bilateral investment agreements or multilateral agreement on investment can include detailed provisions to this effect. It is important to note that the preference should be given to the victim's choice of forum and it should not pose any threat to sovereignty of the affected state.

V. CONCLUSION

> *In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human need and aspirations.*[79]

As some experts point out that the reason for environmental unsustainability is caused by the mass consumption of the rich and the struggle of the very poor to stay alive.[80] This leads us to question the very basic argument in favor of foreign investment. Whether "northern industrial consumer lifestyles and their imitations now in nearly all countries of the third world"[81] are the root cause for all environmental crises needs the serious attention of economists. Until then, international law must come up with precise regulations concerning both foreign investment and corporations. Trying to minimize the gap between the

---

78. The use of the *forum non conveniens* doctrine by United States courts in cases like In re Union Carbide Corp. Gas Plant Disaster at Bhopal India in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986) and Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (1990); and the *Law of Comity* doctrine in cases like Sequihua v. Texaco, 847 F. Supp. 61 (S.D. Tex. 1994) and Aquinda v. Texaco, 945 F. Supp. 625 (S.D.N.Y 1996); and the various restrictions on availing the Alien Torts Claims Act before the 1980s can be considered in this context. The Alien Tort Claims Act provides that district courts shall have jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Alien Tort Claims Act, 28 U.S.C. 1350 (1988).

79. United Nations World Commission on Environment and Development, Our Common Future (1987). More commonly known as the "Brundtland Report," the report derives its common name from Gro Harlem Brundtland, Prime Minister of Norway, who chaired the World Commission on Environment and Development during the preparation of the report. *Id.* at ix..

80. Paul Ekins, *The Sustainable Consumer Society: A Contradiction in Terms?,* 3 INT'L ENVTL. AFF., no. 4, at 242-57 (1991); GALLAGHER, *supra* note 18.

81. Ekins, *supra* note 80.

north and the south would definitely help. To create an investment environment complementing sustainable development demands mutual respect and compassion.