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# Development Projects and Project-Affected Peoples: The Need to Advance Sustainable Development by Establishing an International Development Institutions Inspection Panel to Redress Grievances

Ram Anand Shankar

# DEVELOPMENT PROJECTS AND PROJECT AFFECTED PEOPLES: THE NEED TO ADVANCE SUSTAINABLE DEVELOPMENT BY ESTABLISHING AN INTERNATIONAL DEVELOPMENT INSTITUTIONS INSPECTION PANEL TO REDRESS GRIEVANCES

by

Ram Anand Shankar

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**TO**

1. **The Project Affected Peoples of the Narmada Valley and other areas around the world who have been fighting and continue to battle for justice against destructive development projects;**

2. **Mr. M.K. Kabir, for being such a fine friend and guide; and**

3. **My parents, Mrs. Lalitha Shankaran and Dr. P.R. Shankaran, for all that they have done for me...**

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# ABSTRACT

Indigenous and tribal communities are frequently affected by development projects in an adverse manner. Often they do not have any effective way of redressing their grievances, particularly against non-compliance of environmental guidelines and rules by International Development Institutions. This thesis explores avenues open to affected peoples to redress their grievances regarding the negative impacts of development projects.

The thesis begins by defining "Project Affected Peoples," explores the concept of sustainable development, and suggests consequent principles for development projects. Then follows an examination of an existing grievance-redressal mechanism, the World Bank Inspection Panel, which has been mandated to redress complaints from peoples affected by Bank projects. Within this context, the reasons for the formation of the Panel and the Bank's Operational Directives, Policies and Procedures are examined. An assessment of the effectiveness of the Panel's decisions and the degree of the Panel's independence from the Bank management is made. A number of suggestions that could strengthen the Panel's functioning are listed.

This thesis argues that the jurisdiction of the World Bank Inspection Panel might be expanded to encompass other International Development Institutions. These might include those that were identified as members of the Committee of International Development Institutions on the Environment formed in 1980 as one outcome of the 1972 Stockholm Declaration.

The proposed expanded Panel which might now be called the "International Development Institutions Inspection Panel," would have dual roles. First, it would be mandated to respond to grievances from affected peoples about the negative implications of development projects funded by the International Development Institutions. Second, it would be expected actively to advance identified principles of sustainable development, through its decision making and the supporting guidelines. Much, in practice, would depend on its powers of "moral-suasion." Thus it would have to ensure the genuine support of governments at political and bureaucratic levels, empowering over time, the respective national legal instruments. The thesis concludes by suggesting procedures for establishing the newly expanded Panel.

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I visited the Narmada valley in 1993 and observed the effect of the Sardar Sarovar dam on the lives of the Project Affected Peoples. This experience was eventually responsible for the ideas leading to this thesis. Their struggle continues even today. Similarly, millions of other peoples world wide continue to struggle against destructive development projects. Their fight for justice continues. Scholarship is one way of highlighting their plights and influencing the regional, national and international policy making and policy implementation processes. I have served to do just that. The Project Affected Peoples are among those to whom I dedicate this thesis.

Mr. M.K. Kabir, Advocate, High Court, Madras is actually responsible for me having undertaken this Master's program. On that fateful day in April 1995, his advice prompted me to choose the Master of Laws program as against other options. I dedicate this thesis to him.

Finally, my parents, because of whom everything has been possible...their unconditional love and support has enabled me to come this far. I dedicate this thesis to them as well.

When I began this Masters thesis program, I did not realize the difficulties and encumbrances that I was likely to face. It has truly been a learning and a humbling experience. I now realize that the process of planning, constructing and completing a thesis from scratch is one of the most difficult of challenges to accomplish. I have succeeded, because I have had the will. I found the "way," aided by the strength of God or a Higher Being that has been constantly guiding me through various paths and ways including this one.

Of course, I take full responsibility for all mistakes and errors in this scholarship effort.

*Chapter 1*

# INTRODUCTION

## *Purpose*

The aim of this thesis is to explore the possibility of creating an independent mechanism to redress grievances of Project Affected Peoples ("PAPs"), adversely affected by development projects funded by International Development Institutions. The proposed mechanism is the International Development Institutions Inspection Panel ("IDIIP"). However, to reach the goal of creating such a mechanism, the thesis needs to evolve through several stages, concentrating on certain focal points (which are enumerated below).

The importance of these stages of evolution and the need to explore the establishment of the IDIIP arises from the author's own interest in the research area of "Access to Justice." The topic, "Access to Justice," enables weaker sections of society to successfully redress their grievances against wrongs being done to them by either the State or some other equally powerful entity. My association with non-government organizations ("NGOs") and with local communities affected by development projects has made me realize the immense power wielded by entities such as the World Bank. The primary question that has arisen has been the following: "How do ordinary citizens in less developed countries force an entity such as the Bank to follow its own stated Policies and Directives?" Earlier, I had no viable answer to this question.

I have also realized that the Bank's financial clout is compounded many times over by combining its goals with the political power of the State. It is true that local communities are able to redress grievances through existing mechanisms such as the State established judicial system. However, the process is laborious and constant hurdles are put up by the State. The State's aim has been to encourage "development at any cost," as against the necessity of having "careful and measured development," after considering all the pros and cons of a development project. For some time, I have favored the need for an admittedly vague supra-national mechanism to deliver justice to these sections of society.

Over a year ago, I heard of the establishment of the World Bank Inspection Panel ("WBIP"), to redress grievances of PAPs relating to Bank -- funded development projects. The questions that arose then were the following: (1) To what extent will the Panel advance the cause of sustainable development?; (2) To what extent will the Panel's establishment help in imbibing the sustainable development process as part of the Bank's functioning?; and (3) To what extent will the Panel be successful in redressing grievances of the PAPs who approach it?

This research opportunity has prompted me to examine these questions in far greater detail. An important component of the research effort has been to delve deep into the sustainable development process. That has led me to its origins and to the ecodevelopment debate since the early 1980s. The sustainable development debate also has led to the Brundtland Commission and consequently to the United Nations Conference on Environment and

Development ("UNCED"). When this writer was examining the sustainable development process, it became clear that there was a need to identify its components relating to development projects. The questions that arose were the following: (1) How exactly is the sustainable development debate related to development projects?; and (2) What are the components of the sustainable development debate that are of vital importance and need to be considered when planning and implementing development projects? These questions provided a starting point to the task of identifying the principles related to development projects.

Thereafter, I have logically had to relate these principles to the World Bank and to the World Bank Inspection Panel ("WBIP"). When considering the various questions surrounding the Bank, one specific issue that arose was the need to identify the Bank's stated Policies and Directives. I felt that it was imperative to know what the WBIP had to enforce within the Bank when complaints arose before it.

While analyzing the WBIP, its evolution had to be examined. A study of its origins necessitated studying the controversial Narmada case, the consequent Morse Committee Report and the Bank's internal report in response to the Report. The WBIP has been in many ways a product of the Morse Committee Report and NGO pressure. The examination of the WBIP's evolution included examining the Resolution that set up the Panel, its Operational Procedures and the cases that have come up before it, in order to have a complete analysis.

A major part of the effort has been to determine if the Bank has actually learnt lessons from the Narmada case or not. In the course of the research, it became apparent that the Bank has made similar "Narmada" mistakes in later projects as well. Four questions arose from this finding. First, to what extent has the Panel been able to identify these mistakes on the Bank's part. Second, to what extent it has been able to correct these mistakes. Third, to what extent it has been really independent in carrying out its tasks; and fourth, to what extent it has been able to advance the sustainable development process.

These questions have led the writer to analyze the chinks in the Panel's armor, and consequently to recommend reforms to the Panel's functioning and structure. Further, the questions have also required that an analysis be undertaken to determine the Panel's capacity to fulfill the principles of sustainable development, to enable it to successfully function as a grievance redress mechanism and to advance the sustainable development process.

The next point that arose was: "How can grievances be redressed for development projects funded by other International Development Institutions?" This question gave rise to the possibility of expanding the WBIP into the IDIIP. An examination of the advantages of such an expansion and the modalities of functioning of the IDIIP consequently follows. Finally, the proposed IDIIP's role and the need to fulfill the principles of sustainable development relating to development projects have been analyzed in detail. The thesis scheme that has concretized the thoughts expressed here is given below.

*Thesis Scheme*

To facilitate reaching the goal given above, the thesis examines various issues, contained in four chapters. The first chapter comprises the Introduction, which gives the purpose, and the scheme of the thesis. The substantive chapters are chapters 2 - 4. It must be stated at the outset that the dissertation has various focal points. The focal points include: Project Affected Peoples; the sustainable development debate; development projects; grievances redress mechanisms (specifically, the WBIP and the IDIIP). They are examined in various parts of the chapters.

Chapter 2, is entitled "Project Affected Peoples, Principles Of Sustainable Development In Relation To Development Projects And Issues Of Development Assistance." It defines "Project Affected Peoples," and examines the evolution of the sustainable development concept, including an analysis of its principles, most relevant to development projects.

The next topic considered is whether the WBIP has, firstly, been able to function independently as a grievance redress mechanism and, secondly, if it has been able to infuse within its functioning the principles and issues of sustainable development outlined in chapter 2. The aim is also to determine to what extent the Panel is able to advance the sustainable development process through its decisions. This is examined in detail in chapter 3, titled "Grievances Redressal of World Bank Funded Development Projects: An Examination of the World Bank Inspection Panel." This chapter examines development projects, the Bank's role in development projects and the Bank's performance as a

governance institution. It then moves on to detailing the case of the Sardar Sarovar Dam in India, which created numerous problems for all the actors involved – the Bank, the Indian Government and the Project Affected Peoples. The Bank set up the Morse Committee Report to study the effects of the dam. The Committee indicted both the Bank and the Indian Government. The controversy caused by the Report was responsible to a large extent for setting up of the WBIP. The Resolution and Operating Procedures governing the functioning of the Panel and the cases that have come up before it are examined. The chapter concludes by evaluating the Panel and whether it has been able to incorporate the principles given in chapter 2. It also gives several recommendations on how to strengthen the Panel to enable it to advance sustainable development.

Chapter four, is entitled, "Establishment Of An International Development Institutions Inspection Panel." It explores the possibility of expanding the WBIP to have jurisdiction over development projects covered by International Development Institutions, specifically those that are signatories to the Committee of International Development Institutions for the Environment. The Committee was created in 1980. The mechanism suggested is the "International Development Institutions Inspection Panel." The writer argues that advancing the sustainable development process is possible only if such a Panel is set up to redress grievances of PAPs. Such an IDIIP would also incorporate sustainable development principles in its functioning and will ultimately help in advancing the process itself through its decisions. The final section of chapter four concludes by drawing together the main points of the thesis as a summary.

*Chapter 2*

# PROJECT AFFECTED PEOPLES, PRINCIPLES OF SUSTAINABLE DEVELOPMENT IN RELATION TO DEVELOPMENT PROJECTS AND ISSUES OF DEVELOPMENT ASSISTANCE

## 2.1 INTRODUCTION

*Scope Of The Chapter*

Chapter 2 sets out the principles of sustainable development related to development projects. The purpose is to lay down these principles to better understand the functioning of grievance redress mechanisms relating to development projects. The purpose is to determine if the mechanism being considered in the next chapter has incorporated these principles in its functioning. This is the importance of analyzing the principles of sustainable development in this chapter. However, before setting out the principles, one needs to look at the manner in which they have evolved and the various factors that have influenced this evolution.

Part 1 is the general introduction. Part 2 examines and identifies who Project Affected Peoples are. Part 2 also includes a brief definition of the term "development project."

Part 3 deals with sustainable development and with development assistance and consists of three sections. Section 1 of part 3 begins with a brief discussion of the concept of ecodevelopment. It transits to the next section, dealing with the Brundtland Commission Report, which through its study, focused the world's attention on the concept of sustainable

development. Section 3 of part 3 focuses on the UNCED, which furthered the development of various principles relating to sustainable development.

The fourth part discusses two issues: hard and soft law and the importance of principles. The first section is on hard and soft law. It examines to what extent international legal affirmations such as the Rio Declaration are a part of customary international law and consequently to what extent they are binding on nation states. The second section considers the general importance of "principles," in the context of international environmental law and examines its content and scope.

Part five of this chapter leads on to a detailed examination of some of the principles that resulted from UNCED and which are relevant to the functioning of development projects. It consists of nine sections. The first seven sections deal with the relevant principles related to development projects. Sections eight and nine analyze issues of governance and human rights, which also shape and influence the sustainable development debate.

Part six is the overall conclusion to this chapter and it provides the transition and the link to the next chapter.

## 2.2 PROJECT AFFECTED PEOPLES AND INDIGENOUS COMMUNITIES

### 2.2.1 IDENTIFYING "PROJECT AFFECTED PEOPLES"

For the purpose of understanding the implications of sustainable development for development projects, it is essential to have an understanding of who Project Affected Peoples are. A focal point of this thesis relates to PAPs.

This writer has made use of the term "Project Affected Peoples," to describe all categories of peoples affected by development projects. It appears to be the most acceptable term for the purpose of this thesis.[1] The term is broad based and consequently does not discriminate on the basis of class, sex, race, region, religion or category of peoples. The

[1] The World Bank in 1991 set up the Morse Committee to investigate various allegations against the World Bank and the Indian Government regarding non-implementation of the Operational Directives of the Bank. The Committee's Report is dealt with in detail in the next chapter. However, it may be mentioned here that The Morse Committee Report used the term "project-affected" persons in some sections of its Review. The term is not defined by the Morse Committee Review. There appears to be no consistency in the usage of any particular term. Different terms such as "project affected persons," "displaced persons," "tribal peoples," "indigenous peoples" and "potentially affected persons" have been used at different points in the Review. The term "project affected persons" has been used only a few times in the whole Review. The Review uses the term in the following manner: "Under these agreements, the Bank has treated only the people whose villages will be affected by submergence as "project-affected" persons entitled to be resettled and rehabilitated. Our first task has been to consider the measures being taken for the resettlement and rehabilitation of these people." *See* BRADFORD MORSE ET AL., SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW xiii (1992). Another term which has been used to describe peoples affected by development projects is "environmental victims." *See also* Christopher Williams, *An Environmental Victimology*, 23 SOCIAL JUSTICE 16 (1996). The term "environmental victims" has been defined as "those of past, present, or future generations who are injured as a consequence of change to the chemical, physical, microbiological, or psychosocial environment, brought together by deliberate or reckless, individual or collective, human act or act of omission." The author continues that the "etymology" of victim embodies "sacrifice." *Id.* at 21. The author also notes that environmental victims respond in four ways: by passive acceptance, confrontation and litigation, violence or by nonviolent community conflict resolution. *Id.* at 33. This writer does not wish to use this term for this thesis, because the term may not be inclusive in its definition. For example, environmental victims, as the name suggests would be limited strictly to victims of environmental disasters. However, the term "Project Affected Peoples" includes peoples who are both environmental victims and also other victims suffering from the effects of a development project. Therefore, this writer felt it necessary to mention the usage of the term "environmental victims," here and to draw a distinction between the usage of the two terminologies.

term includes within its scope all those peoples who are both directly and indirectly affected by a development project.

Other terms used to describe peoples affected by development projects have included: "displaced persons," "tribal peoples," and "indigenous peoples." However, these terms are exclusive definitions; that is, they exclude from their scope peoples who may not fit into that particular category. For example, the usage of the term displaced persons only connotes those peoples who are directly displaced by a development project. But, development projects affect a larger circle of peoples apart from just displaced persons. For example, they may affect fishermen and women who may be downstream and not directly displaced. A development project such as a dam affects their livelihood because the fish may be affected by the construction of the dam. Similar is the case of farmers who, living slightly away from the project site, may not be displaced from their locations. However, their lands may be affected by the project. The lands may no longer be arable. Therefore, the usage of the term "Project Affected Peoples," solves several of these problems in a definition. The term is inclusive and may be widely applied to all persons affected by projects.

Development projects frequently affect the poorest of the poor in society. The communities generally affected are vulnerable in their positions.[2] These characteristics include their lack

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[2] Enrique R. Carrasco, *Law, Hierarchy, And Vulnerable Groups In Latin America: Towards A Communal Model Of Development In A Neoliberal World*, 30 STAN. J. INT'L L. 221, 222 (1994). According to Carrasco, one view of "vulnerable groups," has been that they are the "chronically poor...whose attempts to pursue whatever they view as the good life have been frustrated by those with access to power." Carrasco quotes Carol Graham of Peru, who describes the informal sector and marginalized sectors as referring to "the complex relationship that the poor have with formal political, economic, and legal institutions and on the poor's response to lack of access to basic legal services because of

of political influence, their lack of awareness of the issues, and their lack of access to legal and other remedies.

At this stage, it is appropriate to provide a preliminary definition of a development project in the following manner (further elaboration occurs in chapter 3):

> A set of activities which are coalesced together within the framework of a project cycle. These activities are planned to contribute to and expand the process of development, particularly relating to economic progress in a given region or country in a specified time frame.

Development projects incur costs and benefits. This thesis is primarily concerned with the negative implications of development projects on Project Affected Peoples. A discussion of the effects of the benefits of development projects is beyond the scope of this thesis.

In many cases, these vulnerable communities are made up of tribes and indigenous communities. This is because development projects, such as dams, hydroelectric power projects, logging and shrimp farms may be located in areas where the tribes and indigenous peoples have made their homes for several centuries. Therefore, for the purpose of this thesis, it is appropriate to have a short discussion of "indigenous communities," and the role of international instruments in advancing the rights of these communities. However, as

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inadequate resources or daunting bureaucratic barriers." *See also* Enrique R. Carrasco, *Chile, Its Foreign Commercial Bank Creditors And Its Vulnerable Groups: An Assessment Of The Cooperative Case-By-Case Approach To The Debt Crisis*, 24 LAW & POL'Y INT'L BUS. 273, 274 (1993), who earlier gave a narrow definition of the term "vulnerable groups" to include children, women, and the elderly who lack (or are likely to lack) the resources to obtain housing, clothing, and the minimum caloric intake. The importance of Carrasco's definition must be noted. Carrasco seeks to limit the definition scope of the term "vulnerable groups," which must be welcomed. His interpretation of the term fits in well with the inclusive definition of the term "Project Affected Peoples" for this dissertation.

stated earlier, indigenous peoples are included as a part of the term "Project Affected Peoples."

### 2.2.2 "INDIGENOUS COMMUNITIES": A BRIEF DISCUSSION

The World Bank's Operational Directive[3] explains the terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups" and "scheduled tribes" elaborately. [4] The Directive states that because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous peoples are commonly among the poorest segments of a population.[5] The Directive continues:

> They engage in economic activities that range from shifting agriculture in or near forests to wage labor or even small scale market oriented activities. They can be identified in particular geographical areas by the presence in varying degrees of the following characteristics: a close attachment to ancestral territories and to the natural resources in these areas; self identification and identification by others as members of a distinct cultural group; an indigenous language, often different from the national language; presence of customary social and political institutions; and primarily subsistence oriented production.[6]

The terms mentioned above describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the

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[3] The Directive is considered in detail in the next chapter. However, for purposes of this section, it is relevant to consider what the Directive states, because it is one of the few Directives which gives various definitions of the term "indigenous peoples."

[4] WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, INDIGENOUS PEOPLES, OP 4.20 – September 17, 1991, issued by the Bank's public information center and also available at the *World Bank Home Page*, at <http://www.worldbank.org>.

[5] *Id.*

[6] *Id.*

development process. For the purposes of the Directive, it is stated that "indigenous peoples" is the term that is used to refer to such groups.[7]

According to one United Nations study, indigenous populations have the following characteristics:

> [A] historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[8]

One author acknowledges that there is no exact definition and full understanding of the term "indigenous peoples," and believes that it is absolutely necessary to have an exact meaning of the term.[9] Another author calls the indigenous peoples "singular" or "special" because

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[7] *Id.*

[8] JOSE R. MARTINEZ COBO, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4. *See also, International Human Rights Standards-Setting: The Case Of Indigenous Peoples*, AM. SOC'Y INT'L L. PROC. 277 (1987), where the relationship between the indigenous peoples, the environment and the earth is discussed. *See generally* Richard Delgado, *When A Story Is Just A Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Douglas Sanders, *The Re-Emergence Of Indigenous Questions In International Law*, 3 CAN. HUM. RTS. Y.B. (1983); Douglas Sanders, *The UN Working Group On Indigenous Populations*, 11 HUM. RTS. Q. 406 (1989); Russell Lawrence Barsh, *The Right To Development As A Human Right: Results Of The Global Consultation*, 13 HUM. RTS. Q. 322 (1991). *See also* Robert K. Hitchcock, *International Human Rights, The Environment, And Indigenous Peoples*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 1, 4 (1994). According to Hitchcock, indigenous peoples also tend to have a feeling of cultural oneness or social identify that many members attempt to maintain. Hitchcock cites the *International Commission On International Humanitarian Issues, Indigenous Peoples: A Global Quest For Justice* 6 (1987), which has given four elements in the definition of indigenous peoples, including: pre-existence; non-dominance; cultural difference; and self-identification. These elements, it may be stated, are important to have a better understanding of the term "indigenous peoples," as they set indigenous peoples apart from the dominant groups in society and mark their special identity. These elements (which have been a part of their traditional lives over a period of time) may well be destroyed when indigenous peoples are involuntarily resettled as a result of a development project.

[9] Mireya Maritza Pena Guzman, *The Emerging System Of International Protection Of Indigenous Peoples' Rights*, 9 ST. THOMAS L. REV. 251, 253-254 (1996). Guzman opines that "a conceptually imprecise definition may prompt adverse legal consequences such as different interpretations from different judicial bodies." This writer tends to agree with

they have been under attack and in spite of that, have existed with by asserting their rights to their natural resources and environment.[10]

*International Instruments And Indigenous Communities*

Principle 22 of the Rio Declaration[11] lays emphasis on participation by indigenous peoples to advance sustainable development. One view is that even if the fundamental aims of the Rio Declaration are affirmed as the basis of future environmental law, the issues relating to indigenous peoples' rights may not get the attention that they deserve in the international arena.[12] It has been opined that the agreements at Rio acknowledge a unique status for indigenous peoples, which is supported by their "traditional reliance on and sustainable

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Guzman's contention. It is extremely important that there be a precise definition for the definition of indigenous peoples. Otherwise, it is quite possible that with different interpretations being applied, indigenous peoples who actually are indigenous peoples may not get the benefits due to them. *See also* Dean B. Suagee and Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, And The Consent Of The Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59 (1994), for a detailed analysis on the origins of the human rights protection measures for indigenous peoples. *See generally* Hurst Hannum, *New Developments In Indigenous Rights*, 28 VA. J. INT'L L. 649 (1988), for a commentary on the international developments regarding indigenous peoples; and Hurst Hannum, *Contemporary Developments In The International Protection Of The Rights Of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1431 (1991); Gudmundur Alfredsson, *International Law, International Organizations, And Indigenous Peoples*, 36 J. INT'L AFF. 113 (1982); Joy K. Asiema and Francis D. P. Situma, *Indigenous Peoples And The Environment: The Case Of The Pastoral Maasai Of Kenya*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 149 (1994); Thomas S. O'Connor, *"We Are Part Of Nature": Indigenous Peoples' Rights As A Basis For Environmental Protection In The Amazon Basin*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 193 (1994).

[10] Keith D. Nunes, *"We Can Do Better": Rights Of Singular Peoples And The United Nations Draft Declaration On The "Rights Of Indigenous Peoples,"* 7 ST. THOMAS L. REV. 521, 522, 525 (1995). Nunes describes in detail the rights of singular peoples, as including the rights to: the tenure to their ancestral homelands; the tenure to their intellectual property knowledge; the religious freedom and protection of the last resting place. *See also* L. Roberto Barroso, *The Saga Of Indigenous Peoples In Brazil: Constitution, Law And Policies*, 7 ST. THOMAS L. REV. 645 (1995). The importance of both articles is that they refer to additional components which indigenous peoples have traditionally had as part of their lives. These components are those which they cherish and would not want to lose by being displaced from their lands, as a result of a development project.

[11] Rio Declaration On Environment And Development. Adopted at Rio de Janeiro, 14 June, 1992. A/CONF 151/5 Rev. 1. Reprinted in ILM 31 (1992) 874. (Hereinafter, "Rio Declaration.")

[12] Dr. Mahnoush H. Arsanjani, *Environmental Rights And Indigenous Wrongs*, 9 ST. THOMAS L. REV. 85, 90 (1996). Arsanjani believes that "the focus of human rights law on indigenous peoples continues to be on the extraterritorial effects of environmental damage."

management of renewable resources."[13] Such a status, it is believed, "invokes collective property rights as well as the political rights necessary to maintain distinct institutions and participate collectively in decision making."[14]

One of the most important international instruments relating to indigenous peoples is the Draft Declaration on the Rights of Indigenous Peoples, 1993.[15] The Declaration has been described as the most important development concerning the protection of the basic rights and fundamental freedoms of Indigenous Peoples.[16] Articles 7, 13, 25, 26, 28 and 30 relate to the environment.[17] These Articles discuss the rights that indigenous peoples have to their

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[13] Russell Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object To Subject Of International Law?*, 7 HARV. HUM. RTS. J. 33, 48 (1994).

[14] *Id. See also* Russell Lawrence Barsh, *United Nations Seminar On Indigenous Peoples And States*, 83 AM. J. INT'L L. 599 (1989).

[15] 34 I.L.M. 541 (1995), adopted on August 26, 1994 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. *See* BARSH, INDIGENOUS PEOPLES IN THE 1990S *supra* note 13 at 75,85, who opines that "although the Declaration will be non binding, that has relatively little practical significance." He believes that "a Declaration with a highly visible, popular, and well publicized review mechanism is likely to generate the requisite diplomatic and public pressure." Barsh also declares that indigenous peoples' efforts to be internationally recognized have begun to bear fruit, as international developments have begun to influence their political struggle domestically. This writer fully agrees with Barsh's opinion. This writer believes that it is necessary to have international pressure on the problems being faced by indigenous peoples all over the world. The Declaration is certainly a step in the right direction. *See also* Russell Lawrence Barsh, *Indigenous Peoples And The UN Commission On Human Rights: A Case Of The Immovable Object And The Irresistible Force*, 18 HUM. RTS. Q. 782 (1996), for a discussion on the rights of the indigenous peoples by the UN Commission on Human Rights, in light of the Draft Declaration. *See generally* Julian Burger, *The United Nations Draft Declaration On The Rights Of Indigenous Peoples*, 9 ST. THOMAS L. REV. 209 (1996); W. Michael Reisman, *Autonomy, Interdependence And Responsibility*, 103 YALE L. J. 401 (1993).

[16] Erica-Irene A. Daes, *Equality Of Indigenous Peoples Under The Auspices Of The United Nations -- Draft Declaration On The "Rights Of Indigenous Peoples,"* 7 ST. THOMAS L. REV. 493 (1995), who calls the Declaration "a dynamic elaboration of human, cultural and social values, basic rights and fundamental legal and political principles, contributing to the protection of the rights of indigenous peoples." Daes also hopes that the Declaration will provide a reason to have a greater and formal role for the indigenous peoples in the operations and decision making of the United Nations system. The point made by Daes must be noted. The Declaration's importance is that it will give the indigenous peoples a due role to play in the policy making process at the macro level, which affects their lives at the micro level. *See also* Erica-Irene A. Daes, *Some Considerations On The Rights Of Indigenous Peoples To Self - Determination*, 3 TRANSNAT'L L. & CONTEMPORARY PROB. 2 (1993); Susan Shown Harjo, *Native People's Cultural And Human Rights: An Unfinished Agenda*, 24 ARIZ. STATE L. J. 321 (1992).

[17] Article 7 states: "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for any action which has the aim of dispossessing them of their lands, territories or resources." Article 13 provides, "States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and

lands. They also recognize the rights which indigenous peoples have in case they are being dispossessed from their lands for any reason.[18] Another important instrument since the 1980's has been the International Labor Organization's Convention No. 169,[19] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, that has been regarded as partially expressive of new norms of customary international law.[20]

The manifestation of international agreements and instruments has been cited as evidence of the dedication and determination with which indigenous peoples and their rights have been protected by the international community.[21] This writer agrees with this point of view, and

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protected." Although Article 13 is not "environmental," in the wider perspective of issues it assumes significance. This is because, in any development project affecting indigenous peoples, the sacred places of indigenous peoples are affected and their burial places are dislocated (as in the Narmada case, to be discussed later). Article 13 puts the onus on the State to protect these sites. Article 25 recognizes the special and traditional relationship that indigenous peoples have with their lands. Article 26 reaffirms the right that indigenous peoples have to own, develop, control and use their lands and territories. Article 28 gives indigenous peoples, "the right to the conservation, restoration and protection of the total environment as well as to assistance for this purpose from states and through international cooperation." Article 30 gives the rights to indigenous peoples to determine and develop priorities and strategies for the development or use of their lands. Article 31 and 37 give a voice for indigenous people in the implementation of the rights provided under the Draft Declaration. Lastly, Article 41 calls upon the United Nations to take necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. Article 41 also urges all United Nations bodies to promote respect for a full application of the provisions of the Declaration. The importance of these Articles is that in the event of the Declaration becoming a binding instrument, States have a duty to protect the rights of indigenous peoples through these Articles. Further, adequate measures will need to be taken if indigenous peoples are resettled or relocated as a result of any development project.

[18] *Id.*

[19] *Convention Concerning Indigenous Peoples And Tribal Peoples In Independent Countries*, 28 I.L.M. 1382 (1989). The importance of the Convention is that it has been among the first international instruments to recognize indigenous peoples' right to self-government.

[20] S. James Anaya, *Indigenous Rights Norms In Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1 (1991), who declares that Convention 169 "carries the basic theme of the right of indigenous peoples to live and develop by their own designs as distinct communities." Moving to the 1990's, the Economic and Social Council in 1992 requested that United Nations agencies ensure that all technical assistance financed or provided by them was agreeable with international instruments and standards applicable to indigenous peoples, and for this purpose, the Council decided to encourage efforts to promote coordination among organizations of the United Nations system and to have greater participation of indigenous peoples in the planning and implementation of projects affecting them. *See* E.S.C. Dec. 255, U.N. ESCOR, Supp. No. 1, at 69, U.N. Doc. E/1992/92 (1992).

[21] Raidza Torres, *The Rights Of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 156 (1991). *See also Indigenous Peoples And The Right To Self - Determination*, AM. SOC'Y INT'L L. PROC. 190 (1993), for

believes that the international community through Instruments such as ILO Convention 169, seeks to protect the rights of indigenous communities against State repression of any sort. Such Instruments also force States to take note of and to protect the rights of indigenous peoples.

It has been suggested that the "rapid emergence of indigenous peoples' human rights as a subject of major concern and action in contemporary international law provides a unique opportunity to witness the application of rights discourse and storytelling in institutionalized, law-bound settings around the world."[22] This suggestion focuses on the growing importance attached to the rights of indigenous peoples around the world and the methods used to increase publicity relating to their cause.

Indigenous peoples have been said to be struggling for the "explicit recognition of their unqualified right to self determination and have been arguing that they are "peoples" under the United Nations Charter."[23] Barsh declares that, "such a recognition would establish that

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a discussion by participants on the conflicts between the rights and needs of indigenous peoples and international objectives and the legal and political strategies for achieving such objectives.

[22] Robert A. Williams Jr., *Encounters On The Frontiers Of International Human Rights Law: Redefining The Terms Of Indigenous Peoples' Survival In The World,* 1990 DUKE L. J. 660, 703. Explaining this line of thought further, Williams makes an effort at explaining the emergence of indigenous rights in international human rights law. According to Williams, "indigenous and oppressed peoples have come to recognize that international human rights law and norms have come to assume a more authoritative role on state actors in the world." He opines that in the period 1980-1990, indigenous peoples have been trying to change the stereotypical impressions that the international legal system holds about such peoples. Williams also declares that "in Latin America and Asia, decisions about the cultural survival of indigenous peoples are made in distant capitals and boardrooms of multinational corporations without ever listening to the views or preferences of indigenous peoples about the rights that matter to them." *See also* Russell Lawrence Barsh, *Current Developments: Indigenous Peoples: An Emerging Object Of International Law,* 80 AM. J. INT'L L. 369 (1986). I fully agree with Williams when he states that policy decisions made in far away places often are made without even the slightest chance being given to indigenous peoples who are affected and others to have a say in the matter. Such decisions are wrong and must not be justified on any ground.

[23] United Nations Charter Article 1 ("respect for the principle of equal rights and self determination of peoples").

indigenous peoples are members of the international community who have legal personality under international law -- they are referred to as subjects of international legal rights, rather than as mere objects of international concern."[24] The recognition of indigenous peoples as subjects rather than as objects is an essential part of their rights. The first part of the process is to realize that indigenous peoples are human beings who are affected by adverse development. The second part is then to determine to what extent they are affected and subsequently, to provide them remedies to improve the situation.

*Concluding Views*

One of the areas that this thesis is concerned with relates to Project Affected Peoples, who are affected by development projects, policies and programs. These peoples have a social and cultural identity distinct from the dominant society and are vulnerable to being disadvantaged in the development process. In many instances, the PAPs encompass indigenous peoples (as in the Narmada case, where a large number of the affected peoples were "tribals," who as noted earlier, fall in the same category as indigenous peoples). This is the reason why a discussion of indigenous peoples and their rights has been incorporated in this section.

It is clear from the above discussion that there is no certain definition of the term Project Affected Peoples and about who generally comprise these Peoples. It is true that international efforts are catching up by addressing the concerns of indigenous peoples,

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[24] BARSH, INDIGENOUS PEOPLES IN THE 1990S *supra* note 13 at 34-35.

through international instruments that protect their rights. However, these efforts are proceeding slowly. It is imperative that serious efforts are made to quicken this process.

The discussion now proceeds to consider issues relating to sustainable development and development assistance.

## 2.3 SUSTAINABLE DEVELOPMENT AND DEVELOPMENT ASSISTANCE

### 2.3.1 ECODEVELOPMENT

*Introduction*

This section briefly discusses the concept of ecodevelopment as it emerged in the 1970's, as a transition to the sustainable development concept in the 1990's. Ingrained within the ecodevelopment concept is the North - South divide. This divide relates to issues of development assistance from the developed to the developing nations. This section begins by discussing the origins of ecodevelopment and its principles. It then considers the north-south divide and issues of development assistance. The section concludes by considering the transition from ecodevelopment to sustainable development.

*Ecodevelopment And Its Principles*

The "ecodevelopment" concept was proposed in the early 1970's to serve as a foundation to build on the development dialogue between developed and developing countries.[25] The

[25] THOMAS G. WEISS ET AL., THE UNITED NATIONS AND CHANGING WORLD POLITICS 196 (1994). According to Weiss, Maurice Strong envisaged the concept at a preparatory meeting for the United Nations Conference on the Human Environment in the early 1970's. Weiss believes that Strong argued "in favor of long-term development as depending on shorter term environmental problems," Strong sought to satisfy the varied north-south interests. Further, Weiss gives evidence of Strong's effort to appease both sides by suggesting that Strong wanted the Northern nations to help their

concept emerged because of a combination of economic development and environmental protection from the mid-1970's to the early 1980's.[26] The attention on ecodevelopment has been declared to continue till the present period, "cast on the concept of sustainable development."[27] The convergence of international environmental law with the law of development to form new concepts and duties has been termed the law of ecodevelopment.[28]

Ecodevelopment principles have been stated to include:[29] the duty to integrate environmental management into developmental policies; the duty to improve environmental capabilities; the duty to ensure that an appraisal procedure is in place to assess the impact of development projects on the environment and the natural resources of the recipient state, and additional duties in the preliminary stages of evolution.[30] The principles outlined by the concept of ecodevelopment provide a starting point, as they may minimize damage done by development assistance. However, they have been accused of not proceeding past "the damage control function to provide a positive way forward towards

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Southern counterparts pay for some of the costs incurred by environmental protection which the Southern countries would be forced to bear.

[26] Carole Klein-Chesivoir, *Avoiding Environmental Injury: The Case For Widespread Use Of Environmental Impact Assessments In International Development Projects*, VA. J. INT'L L. 30 (1990) 517, 522. Chesivoir states that the United Nations, the developed and developing countries adopted the principles of ecodevelopment through the World Charter of Nature in 1982, 22 I.L.M. 455 (1983). However, the author does not give any evidence of such a claim.

[27] *Id.* at 523.

[28] Paul K. Muldoon, *The International Law Of Ecodevelopment: Emerging Norms For Development Assistance Agencies*, 22 TEX. INT'L L. J. 1, 7 (1986).

[29] *Id.* at 30, 38, 43, 49.

[30] *Id.* at 49 - 50. These other emerging ecodevelopment norms have been identified as: the duty to integrate environmental management; improve environmental capabilities; and assess environmental impacts.

sustainable development."[31] The international law of ecodevelopment brings together environmental and developmental concerns for the benefit of natural resources and "the conservation and rehabilitation of local, regional, and global environments."[32] Muldoon states that the international law of ecodevelopment compels development actors, including states and international development agencies to combine environmental considerations and development activities; to better their environmental management and planning policies; and to study and analyze such decisions, activities and plans that may have harmful impacts on the environment.[33]

One of the most problematic questions that has been posed is whether development assistance from industrialized countries to developing countries can inherently lead to sustainable development patterns.[34] The solution has been stated as finding ways and

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[31] Phillip M. Saunders, *Development Assistance Issues Related To A Convention On Forests, in* GLOBAL FORESTS AND INTERNATIONAL ENVIRONMENTAL LAW 278 (Canadian Council on International Law, ed., 1996).

[32] MULDOON *supra* note 28 at 8.

[33] *Id.*

[34] *Id.* at 50, 51. The author declares that the aims of development assistance are unclear since some basic premises regarding the development process itself have been questioned. He states that: "Tied aid may be contrary to the goals of ecodevelopment since recipient countries must then structure their development in line with what the commercial sector of the donor country supplies, rather than its own social, cultural or ecological needs." The author identifies another problem on the arrangement and accomplishment of ecodevelopment norms as being "the agencies' perceived conflict between their obligation not to cause environmental disruption in another state or the global commons and the sovereign rights of recipient countries to determine the priority of environmental factors within their own development programs." Although Muldoon recognizes the importance of sovereignty, he believes sovereignty is a reason for an unwillingness to act on the part of the development actors. In establishing an environmental appraisal structure, he notes that there is a likelihood of disagreement between the donor institution which may prescribe specific environmental guidelines and the recipient country which may have its own laws and regulations, not rising up to the standard of the donor's guidelines. When this happens, Muldoon states that the donnee may come to believe that the donors are unilaterally imposing their standards on them. This writer endorses Muldoon's view. The rancor that Southern States have towards the North is unlikely to fade away. Therefore, the solution that I will suggest is that Northern States be more understanding in dealing with the South. Let the North think back over the years to determine the route that they adopted towards achieving the standards of living that they presently have. At the same time, let the South also be more welcoming of the Northern views to have careful and measured development. Of course, the South should resist domination of any kind from the North. I believe that it is possible to have an understanding provided both sides are willing to talk and come

means to reconcile the particular development priorities of a developing country with the general responsibility of all international actors to preserve international resources.[35]

This writer fully agrees with this viewpoint. The only long term solution is to bury the differences of the past between the Northern and Southern countries and to think of means and ways to forge new partnerships. The South must be given its due share at least now, with the support of the North, in such a way that development and environmental protection go hand in hand. Of course, I accept that it is easier said than done. To put it in practice is very difficult and will require several concessions being made by the North, which to this writer appears unlikely, at least in the near future. It appears unlikely because the North believes that the South is not doing enough about the developmental effects on the environment. Further, in any discussion of North-South relations, the North brings up human rights issues, which infuriates the Southern nations, leading to a deadlock in talks. The South understandably views any moves by the North suspiciously. Also, this suspicion is also psychological, a result of the lingering effects of colonialism. The South is constantly insecure that the North wants to control, dominate and benefit in some "unknown" manner if the South agrees to any of the suggestions made by the North. Therefore, it is a vicious cycle. The only way out is for the North not to link up issues and

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and realize that they both want the same goal, which is development for their peoples. The only difference is on how to achieve that goal.

[35] *Id.* In this context, it may be noted that one role of development agencies has been to help in toning up the environmental capabilities of less developed countries, so that these less industrialized countries are able to fulfill the aims of sustainable development.

to deal with every issue independently. The South will then be a little less suspicious of any moves by the Northern countries.

When the World Bank was established in 1945, it focused only on the development side of the spectrum, ignoring the environmental issues involved. The discussion in the later portions of this thesis will show that it has been forced to incorporate environmental principles within its development oriented goals. Along with other development agencies, which responded to criticism of their environment-development practices, it was one of the signatories to the Declaration on Environmental Policies and Procedures Relating to Economic Development in 1980.[36] The signatories also formed the Committee of International Development Institutions of the Environment ("CIDIE"), to coordinate their environmental policies in line with their development strategies.[37]

As noted earlier, ingrained within the ecodevelopment concept has been the north-south divide, relating to development issues. The next section briefly discusses this divide.

*The North-South Divide*

Developed nations have been accused of having "little or no understanding of the perspective from which the developing nations are casting their position on a particular issue."[38] The essence of North-South discussions on environmental issues has been stated to

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[36] United Nations Environment Program: Declaration Of Environmental Policies And Procedures Relating To Economic Development. Adopted at New York, February 1, 1980. Reprinted in 19 I.L.M. 524 (1980) from the text provided by the United Nations.

[37] CIDIE is dealt with in chapter 4 of this thesis.

[38] C. Russell H. Shearer, *International Environmental Law And Development In Developing Nations: Agenda Setting, Articulation, And Institutional Participation*, 7 TULANE ENVTL. L. J. 391, 408-409, 411, 412 (1994). Shearer also

be influenced by the global economic system. This system puts burdens on the developing countries' policies toward their natural resources and thus "constrains the quest for global cooperation to save those resources."[39] Many factors have resulted in forming the north-south divide. Among them are: poor economic relations in the area of trade; protectionism in industrialized states in favor of their own goods, as against goods manufactured cheaply (through cheap labor); indebtedness; and resources leaving the poor countries for the richer nations.[40] This divide extends to global environmental issues as well.[41] One scholar describes the situation in the form of the following questions that the developed and the less developed world put forward related to environmental issues.[42] The developed nations ask: "How much will it cost us to fix this problem?" The same issue is

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rightly points out that even when developing nations do put forward their worries, their views may be overshadowed by those of the industrialized nations. Shearer also points to the special obligations that developed nations have in assisting in and solving the problems faced by the developing nations. International decision making, it has been opined by Shearer, "ought to be in a global context, and not based simply on the drive for purely national benefit and advantage." In this context, developed and developing nations have been urged to adopt sustainable development practices, which looks at environmental and social problems. Shearer's analysis must be welcomed. As noted earlier, problems may be solved through dialogue only if each side makes an effort to understand the other's point of view. For this, a mature and cautious approach from both sides is necessary, keeping in mind the long term interests of our planet. *See also* Robert E. Lutz, *The Export Of Danger: A View From The Developed World*, 20 N.Y.U. J. INT'L L. & POL. 629 (1988), for a discussion on the north-south divide and the roles that the North and South play in international law.

[39] GARETH PORTER ET AL., GLOBAL ENVIRONMENTAL POLITICS 124 (1991). Porter believes that the suspicions with which the less developed countries have viewed the global economy has also extended to their views on issues relating to global environmentalism. According to the less developed countries, the industrialized countries utilize the global economic system to the impediment of the less developed countries. This is the core issue giving rise to the rancor between the North and the South. For this to be solved, it is imperative that both sides forget the past and make a fresh start from the beginning.

[40] *Id.*

[41] For example, north south economic relations have been said to influence global environmental policies in three ways: as restraining developing nations from taking part fully in global environmental agreements; as being a disagreement ideologically between the developed and developing countries and developing countries not wanting different issues to be linked up by the north (for example: the linking up of child labor policies with investment policies). PORTER *id.* at 125. Similarly developing countries often state that industrialized countries which have been utilizing and consuming 80% of the world's resources now complain about the exploitation of the same resources needed by developing countries for their development. *Id.* at 127-128. This writer fully agrees with the opinions expressed. The issue that is increasing the rancor is the linking of different unconnected issues, as mentioned above. The South tends to view such linkage of issues as domination by the North, in forcing its will down the throat of the South. Such an attitude only fuels mutual distrust, instead of building respect and respect.

addressed in the following manner by the developing world: "How can we possibly afford to fix this problem when there are so many other problems to address?"[43] An important aspect of the north-south divide is that the farther apart the interests of states grow, the ecological degradation tends to be more pronounced.[44] As noted earlier, the North must give a helping hand to the South in solving its problems. After all, a large part of the North has reached the status that they have today by their past colonial practices. By giving a helping hand now, the North will make friends and gain respect among its Southern partners.

This North-South divide focuses the debate on inter-connected issues including "permanent sovereignty over natural resources, the right to development and the global environmental responsibilities of states."[45] The crux of the debate is that the less industrialized countries

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[42] SHEARER *supra* note 38 at 408.

[43] *Id.* quoted at 408.

[44] In order to bridge the gap between the North and South relating to environmental issues and to prevent ecological degradation that occurs as a result, the concept of ecologism has been proposed. *See* Hector R. Leis and Eduardo J. Viola, *Towards A Sustainable Future: The Organizing Role Of Ecologism In The North-South Relationship, in* GREENING ENVIRONMENTAL POLICY 39 (Frank Fischer et al. eds., 1995). The authors propose the concept of "ecologism," to mean "a new system of values which are supported by dynamic ecological equilibrium, social justice, active non-violence and solidarity with future generations." They state: "In ecologism, the environment becomes the fundamental dimension of development, following the generative idea of ecodevelopment or sustainable development. The ecologistic approach proposes a dramatic shift in the present course of development all around the world." *Id.* at 41-42. This concept must be welcomed as it is one more tool to be used to reconcile differences between the North and the South and to prevent environmental degradation, while at the same time, it makes efforts at achieving development.

[45] SAUNDERS *supra* note 31 at 265, 266-267. The author declares that at UNCED, the conflict was not resolved to the degree necessary. *See also* Zygmunt J.B. Plater, *Multilateral Development Banks, Environmental Diseconomies, And International Lending Pressures On The Lending Process: The Example Of Third World Dam-Building Projects*, 9 B. C. THIRD WORLD L. J. 169 (1989). Plater focuses on the administrative process of the multilateral development banks, particularly the World Bank. He also analyses several legal approaches to modify and improve the international development loan process. He cites the example of international development loans for construction of large dam projects, especially in the Third World, which have not been considered in the earlier planning process and by the multinational development banks. Plater identifies the pressure by donor nations in ensuring that the multilateral development banks carry out their reforms. *Id.* at 214-215. *See generally* J.C.N. Paul, *The World Bank, Human Rights And Development: Some Obligations Of The Bank*, 17 DEN. J. INT'L L. & POL'Y 67 (1989); William Wilson, *Environmental Law As Development Assistance*, 22 ENVTL. L. 953, 974 (1992) ("continues to be a need for the development of legal frameworks to facilitate technology transfer, debt for nature swaps, trust fund mechanisms, and other methods of implementing international agreements.") Both opinions add to the debate on the right to development

are asked by the industrialized countries to lessen their progress of development so that the industrialized countries can continue with the current excessive patterns of consumption.[46]

With the increase in activities relating to environmentalism since the 1980's, another tool (in addition to trade and investment) which has emerged in foreign policy has been termed "green conditionalities."[47] A related issue of north-south relations that further adds fuel to the fire is the use of "aid" to coerce and persuade less powerful states to do what is dictated by the more powerful ones.[48] One major concern that the South has is the use of global

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and the efforts to have global environmental responsibilities to control unmeasured development. Both Plater's and Wilson's opinions must be seen in this light.

[46] SAUNDERS *id.* at 266. The author's reaction is that it may be "legitimate to respond that unsustainable development is not development at all, and that destructive practices primarily benefit elite groups." The author continues that one of the worries of the developing countries is that they have to take on the burden of a greater part of the environmental problems at the global level. He states that three approaches have emerged in linking environmental obligations to the needs of the developing countries. They are that "developing countries have a valid claim to recompense for development opportunities foregone through, i.e., by restricting the pace or scope of resource exploitation; developed countries bear a higher degree of fault in the creation of current environmental conditions and should therefore assume more burden involved in remedying those conditions; and regardless of fault or compensation issues, the practical reality is that developing states will require substantial assistance if they are to acquire the financial and technical capacity to take the measures ahead of them." *Id.* 278-279. *See also* John Ntambirweki, *The Developing Countries In The Evolution Of An International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905, 925-926 (1991), where it has been pointed out that a "new environmental order is necessary" to tackle the debate between the rich and the poor to address the problems of dualism between the rich and the poor. The author is in favor of a just international order to help understand the problems of the South. In this writer's opinion, both opinions need to be welcomed. The three approaches given by Saunders puts the issues in perspective. These approaches are examples of concrete examples which industrialized countries need to seriously consider, in order to achieve a just international order and a "new environmental order," as suggested by Ntambirweki.

[47] Ewah Out Eleri, *Africa's Decline And Greenhouse Politics*, 6 INT'L ENVTL. AFFAIRS 133, 138 (1994). The author expresses the fear that "international environmental demands on already weak states would increasingly constrain sovereignty, sacrificing survival and development priorities on the altar of the environmental ideals of the rich." The author accepts that Africa is in a deep development and environmental crisis. Internal mismanagement, external pressures, and natural disasters have taken their toll on the continent. Eleri concludes that against this background, calls for joint sacrifices to mitigate international environmental problems, including calls to mitigate global warming, have been viewed with skepticism. As opined earlier, Eleri's opinion reflects the cynicism with which the South looks at any partnership with the North on any issue. Of course, it is also this writer's opinion that at some point in time, the Southern nations need to stop blaming their sins on the North need to begin taking responsibilities for their lives, actions and their futures.

[48] BARTRAM S. BROWN, THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK 38 (1992). According to Brown, "international aid is a complex phenomenon involving economic assistance, transferred as a result of a political decision, in any of several different legal forms." In fact, there appears to be an ongoing debate about whether aid is given mainly to promote the development of the recipient or to serve the foreign policy goals of the donor. *Id.* at 41. One wonders if aid is used as a weapon to coerce or as an instrument to help? The answer is difficult to point out,

environmental problems by the North to prevent the South from developing industrially and socially.[49]

*The Transition To Sustainable Development And The Brundtland Commission*

The question as to how best to fulfill and shape the "role of satisfying basic human needs within development projects" was described[50] as a significant component of the international debate in the 1970's. Thereafter, as the era moved on towards the 1980's, on one hand, many less developed countries objected that "a basic human-needs approach" drew away the focus from tackling the issues raised by "global inequities."[51] On the other hand, northern donor nations declared that such an approach would "divert scarce resources from economic growth." The need for a new concept that had the same unifying role which ecodevelopment had played in the 1970's thus became necessary.[52] As Weiss notes, the "basic human needs" approach was not the concept that was awaited, since there was no agreement on that term.[53] The "catalyzing" idea that was identified in the World Conservation Strategy in 1980 by the General Assembly, paid attention to the "the

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because there is no definite evidence to state so. When confronted, donor nations always state that aid from their side is given to promote development, with no other goal. Unfortunately, such statements are viewed with skepticism, because the actions of the North betray their statements. Consequently, the South wonders if the North is seeking to control their development by using aid as a tool.

[49] JONAS EBBESSON, COMPATIBILITY OF INTERNATIONAL AND NATIONAL ENVIRONMENTAL LAW 235 (1996). The author opines, "development aid from industrialized countries would be linked more tightly to environmental protection, which has never had the same priority for the South as it has had for the North." This writer does not agree with the pessimism of Ebbesson. It is this writer's opinion that the less developed countries are very concerned about environmental problems, but that in the scale of items, the environment ranks low, compared to issues such as every citizen getting food, shelter and clean drinking water.

[50] THOMAS G. WEISS *supra* note 25 at 202.

[51] *Id.*

[52] *Id.*

[53] *Id.*

sustainability of natural life-support systems as they relate to satisfying human needs."[54] The World Commission on Environment and Development in 1987 focused on the sustainable development debate as the crux of their report, thus highlighting the world's attention on the concept. This focus also completed the transition from ecodevelopment. The discussion next shifts to the Brundtland Commission Report.

### 2.3.2 THE BRUNDTLAND COMMISSION REPORT

*Brief Introduction To The Commission*

The World Commission on Environment and Development,[55] set up in 1983, was asked to formulate "A global agenda for change" by the General Assembly of the United Nations.[56] The Commission was headed by Jo Harlem Brundtland, the former Prime Minister of Norway, and hence was named after her. Specifically, the Commission was asked to propose long term environmental strategies for achieving sustainable development by the year 2000 and beyond. It was asked to recommend ways in which concern for the environment could be translated into greater cooperation among developing countries and between countries at different stages of economic and social development, in order to lead to the achievement of common and mutually supportive objectives that take account of the interrelationships between people, resources, environment, and development. It had to

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[54] *Id.*

[55] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 1 (1987).

[56] United Nations General Assembly Resolution 38/161 of 19 December, 1983. The World Commission on Environment and Development submitted its report titled "Our Common Future," to the General Assembly on 27 April, 1987 (Doc. A/42/427).

consider ways and means by which the international community could deal more effectively with environmental concerns. The Commission was also asked to help define shared perceptions of long term environmental issues and the appropriate efforts needed to deal successfully with the problems of protecting and enhancing the environment, a long term agenda for action during the coming decades, and aspirational goals for the world community.[57]

The Commission, in the course of its work, discussed various other issues. It emphasized as an urgent task the need to persuade nations to return to multilateralism. It stated that finding sustainable development paths ought to provide the impetus for multilateral solutions and a restructured international economic system of cooperation. According to the Commission, these challenges cut across the divides of national sovereignty and of limited strategies for economic gain.[58]

This writer seeks to concretize some of the Commission's thoughts in this thesis. The environment needs to be protected by international partnerships. Concepts of sovereignty must not be permitted to destroy the environment. Sovereignty is an extremely important guard against "poaching" by vested interests in the internal affairs of nation states. However, the rights of the environment and local communities need to be protected. Multilateralism and concerted international action will help in protecting these rights.

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[57] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT *supra* note 55 at 1.

[58] *Id.*

The Commission's views, which have been briefly mentioned are further elucidated upon in the following sections.

*The Brundtland Commission's Definition Of Sustainable Development*

The Commission defined sustainable development as follows:

> Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
>
> > *the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and
> >
> > *the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[59]

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[59] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT *supra* note 55 at 2-1. Proceeding further, the Commission emphasized that development involves a progressive transformation of economy and society. It said that the satisfaction of human needs and aspirations is the major objective of development. The essential needs of vast numbers of people in developing countries, for food, clothing, shelter, jobs were not being met, and beyond their basic needs, these people have legitimate aspirations for an improved quality of life. Sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life. *See* Ben Boer, *Institutionalizing Ecologically Sustainable Development: The Roles Of National, State, And Local Governments In Translating Grand Strategy Into Action*, 31 WILLAMETTE L. REV. 307 (1995). Boer criticizes the Brundtland definition because it is a narrow interpretation of the term "sustainable economic development," and does not pay attention to the continued possibility of ecosystems. Boer quotes a report from "Caring For the Earth" which states that the confusion over the use of the term "sustainable development" has increased because the terms "sustainable development," "sustainable growth," and "sustainable use" have been substituted one for the other, in a manner as if the terms were the same. *Id.* 316-317. *See also* Marc Pallemaerts, *International Environmental Law In The Age Of Sustainable Development: A Critical Assessment Of The UNCED Process*, 15 J. L. & COM. 623 (1996). Pallemaerts believes that the Brundtland definition remains "sufficiently ambiguous, although symbolic and inspiring." *Id.* at 630. This writer does not agree with Boer and Pallemaerts. This writer believes that given the circumstances that for the first time, the Commission analyzed the sustainable development concept, it has done an excellent job. The sustainable development concept is by itself ambiguous and can be interpreted in many ways. Its content and scope are both unclear even today. I do not believe that it is just inspiring and symbolic. Various authors have given various interpretations to the sustainable development concept and none has been able to come up with an absolutely clear definition. This writer accepts the Brundtland definition as being the best interpretation, considering the definition's lack of clarity.

*The Brundtland Report On International Lending Agencies*

Referring to the international lending agencies, the Commission noted that development agencies, particularly the World Bank, "should develop easily usable methodologies to augment their own appraisal techniques and to assist developing countries to improve their capacity for environmental assessment."[60] The Commission stated that the roles of the World Bank and the IMF are very important for "parallel lending" by other similar multilateral institutions. It is essential that sustainability considerations percolate through the Bank's policies when evaluating structural adjustment lending "directed to resource based sectors (agriculture, fishing, forestry and energy), as well as specific projects."[61]

A large part of this thesis is devoted to development projects funded by international lending agencies, in particular, by the World Bank. The Commission's suggestion that lending agencies develop sustainable lending practices needs to be particularly considered. As discussions in the later chapters will show, its suggestions have been honored more in the breach than in practice.

*The Brundtland Report On Vulnerable Groups*

Referring to another crucial area, vulnerable groups (which was dealt with in the former part of this chapter), the Commission notes that the "starting point for a just and humane policy" is the accepting and protecting of their traditional rights to land and other resources that sustain their way of life – "rights they may define in terms that do not fit into standard

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[60] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT *supra* note 55 at 3-11.

[61] *Id.*

legal systems."[62] The institutions that these groups have developed to regulate their rights and obligations are very important to maintain peace with nature.[63]

The Commission opined that traditional rights that have been recognized must proceed together with measures to protect the local institutions that enforce responsibility in resource use. Such a recognition must enable local communities to voice their views on their lives and also must give them a decisive voice in the decisions about resource use in their area.[64] The concluding observation of the Commission is significant. The Commission stated the following: [65]

> [I]n terms of sheer numbers, these isolated, vulnerable groups are small. But their marginalization is a symptom of a style of development that tends to neglect both human and environmental considerations. Hence, a more careful and sensitive consideration of their interests is a touchstone of a sustainable development policy.

In many cases, Project Affected Peoples are composed of vulnerable groups.[66] Vulnerable groups in turn are made of indigenous peoples or tribes or other local communities, who need to be empowered. Sustainable development needs to be particularly concerned with their needs in any development project proposal.

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[62] *Id.* at 4-20.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 4 - 21.

[66] The discussion on vulnerable groups in the former part of this chapter dealt with the term.

*The Challenges And Solutions According To The Commission*

The challenges, according to the Commission, are many.[67] First, the fundamental challenge is integrating environment and development. Second, the challenge is to integrate the policy making institutions (by strengthening existing organizations within and outside the UN system to provide for uniformity of policies). The third challenge is to integrate different policies under these institutions concerning the environment and development.

Some of its solutions are: (i) a major reorientation is needed in many policies and institutional arrangements at the international as well as the national level; (ii) regional and sub-regional organizations must be strengthened within and outside the UN system; and (iii) a six pronged approach for making institutional and legal change at the national, regional and international levels is needed.[68]

Encouraging international cooperation as a solution, the Commission made the following observation:[69]

> National boundaries have become so porous that traditional distinctions between local, national, and international issues have become blurred. Policies formerly considered to be exclusively matters of national concern now have an impact on the ecological bases of other nations' development and survival. This fast-changing context for national action has introduced new imperatives and new opportunities for international cooperation.

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[67] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT *supra* note 55 at 12-5 to 12-8.

[68] *Id.* at 12-6 to 12-9. The six areas include: getting at the sources, dealing with the effects, assessing global risks, making informed choices, providing the legal means and investing in our future.

[69] *Id.* at 12-5.

The Commission noted the fact that bilateral aid agencies provide four times the aid compared to international organizations. It suggested a new focus on bilateral aid agencies in the following three ways:[70]

- New measures to ensure that all projects support sustainable development;
- Special programs to help restore, protect, and improve the ecological basis for development in many developing countries; and
- Special programs for strengthening the institutional and professional capacities needed for sustainable development.

Referring to the legal means to strengthen national and international law, its other solutions included the following:[71]

- Recognizing and respecting the reciprocal rights and responsibilities of individuals and states regarding sustainable development;
- Establishing and applying new norms for state and interstate behavior to achieve sustainable development;
- Strengthening and extending the application of existing laws and international agreements in support of sustainable development; and
- Reinforcing existing methods and developing new procedures for avoiding and resolving environmental disputes.

The Brundtland Commission recommended to the General Assembly of the United Nations that the Assembly call an international Conference focusing on sustainable development.[72]

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[70] *Id.* at 12-28.

[71] *Id.* at 12-20.

This recommendation set the stage for the United Nations Conference on Environment and Development ("UNCED"), which is the subject matter of the discussion in the following section.

### 2.3.3 UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT

*Introduction*

In December 1987, the UN General Assembly noted the Brundtland Report.[73] In December 1989, it called for a conference on the environment and development, to be held at Brazil in June 1992. Resolution 44/228 elaborated, giving 23 objectives of the proposed Conference.[74] The Resolution also authorized the establishment of several Preparatory Committees to prepare the documents for the Conference.[75]

UNCED was organized at Rio de Janeiro, from 3-14 June, 1992.[76] UNCED adopted three non-binding instruments. They were the Rio Declaration on Environment and Development

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[72] *Id.* at 12 - 32.

[73] UNGA res. 42/187 (1987).

[74] UNGA res. 43/196 (1988), and UNGA res. 44/228, which gave the purpose of the Conference, as: "the need to elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of strengthened national and international efforts to promote sustainable and environmentally sound development in all countries." The purpose is the most important among the objectives and therefore, that alone has been mentioned here.

[75] UNGA res. 44/228 (1989).

[76] 176 states attended the Conference, with over fifty intergovernmental organizations and several thousand non-government organizations participating. The full title of the proceedings which have been published is the following: The United Nations Conference On Environment And Development, Report Of The United Nations Conference On Environment And Development, Rio de Janeiro, 3-14 June 1992, A/CONF. 151/26 Rev. 1., (Vols. I - III), UN Pub., Sales No. E.93.I.8. The report is contained in III volumes. Volume I is titled: Resolutions Adopted by the Conference; Volume II is titled: Proceedings Of The Conference and Volume III is titled: Statements Made By Heads Of State or Government at the Summit Segment of the Conference. Two treaties were also opened for signature at the Conference: The Framework Convention on Climate Change, 1992; Done at New York, 9 May 1992. I.L.M. 31 (1992): 849; and the Convention on Biological Diversity, 1992; Done at Rio de Janeiro, June 5, 1992. I.L.M. 31 (1992): 818. *See* NEGOTIATING INTERNATIONAL REGIMES (Bertram I. Spector et al. eds., 1994). *See also* THE EARTH SUMMIT: THE UNITED

(the Rio Declaration),[77] a Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests,[78] and Agenda 21.[79]

*Agenda 21 And The Rio Declaration*

At the third preparatory committee meeting held at Geneva from 12 August -- 4 September, 1991,[80] the term Agenda 21 was introduced by the Secretary General of the UNCED, Mr. Maurice Strong. Agenda 21 was defined as a kind of an Action Plan, emerging from UNCED. It was expected to provide the basic framework and instrumentality to guide the world community on an ongoing basis in dealing with the issues raised at UNCED. Agenda 21 incorporated provisions for monitoring of progress and periodic review and revision.

Maurice Strong gave the purpose of Agenda 21 in the following statement:[81]

> [C]onsideration is to be given to incorporating the basic principles which must guide people and nations in their conduct towards each other and towards nature to ensure the future integrity and

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NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (Stanley P. Johnson, introduction and commentary, 1993), for details on the Conference, including its history.

[77] The Rio Declaration *supra* note 11.

[78] Statement of Principles For A Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus On The Management, Conservation And Sustainable Development of Forests. Adopted at Rio de Janeiro, 13 June, 1992. A/CONF. 151/6/Rev. 1. Reprinted in 31 I.L.M. (1992): 881.

[79] Adoption of Agreements on Environment and Development: Agenda 21, United Nations Conference On Environment And Development, 1992. Done at Rio de Janeiro, 13 June 1992. A/CONF. 151/4.

[80] Report of the Preparatory Committee for the United Nations Conference on Environment and Development, in General Assembly Official Records: Forty Fourth Session, Supplement No. 48 (Doc. A/44/48). *See generally* THE ENVIRONMENT AFTER RIO (Luigi Campiglio et al. eds., 1994).

[81] Agenda 21 consists of four sections, incorporating social and economic conditions, conservation and management of resources for development, strengthening the role of major groups and means of implementation. These four sections consist of a preamble and 40 chapters. *See* AGENDA 21 *supra* note 79. Examining Agenda 21 in detail is beyond the scope of this study, as it would make it too vast and unmanageable.

> sustainability of planet Earth as a hospitable home for the human species and other forms of life. To give effect to these principles will require an accompanying commitment by governments at the Conference to an agenda for action following the conference and leading to the 21st century on the wide range of specific issues that must be addressed by the Conference in accordance with General Assembly Resolution 44/228. The time horizon for the initial phase of this Agenda 21 would be the final seven years of the century, 1993 through [2]000, but it would be specifically geared to meeting the needs and challenges of the 21st century.

Strong's statement puts the purpose of Agenda 21 in perspective. The statement seeks to give its scope as well as its aim. Agenda 21 is to act as a transition from the 20th century to the 21st century and to deal with the various issues raised at UNCED.

The Rio Declaration[82] consists of twenty-seven principles. This Declaration has been described[83] as being a milestone to judge later developments in the field of sustainable development. It has also been commended for having a standard to define and apply the concept of sustainable development.[84] The essential principles out of these twenty seven that are most relevant to development projects are discussed in the later portions of this chapter.

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[82] *Supra* note 11.

[83] PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 50 (1994).

[84] *Id.* The Declaration, according to Sands, balances the interests of environment and development. Sands notes that the "Declaration lost its original title (Earth Charter), due to the insistence of developing countries and that it bears little resemblance to the Universal Declaration of Human Rights, or to the Universal Covenant which the Brundtland Report had called for." *See also* Dr. Ranee Khooshie Lal Panjabi, *From Stockholm To Rio: A Comparison Of The Declaratory Principles Of International Environmental Law*, 21 DENV. J. INT'L L. & POL'Y 215 (1993). *See generally* J. William Futrell, *UNCED And Environmental Law*, C722 ALI-ABA 279 (1992).

*Some General Comments On UNCED*

UNCED's mandate has been described as having been created in the light of the sustainable development concept,[85] and has been categorized as exhibiting the "pro-active role of the world community."[86] Two contrasting viewpoints on UNCED have been offered with regard to its success or the lack of it. On one hand, it has been described as lacking in clarity with regard to future developments.[87] On the other hand, it is argued that its "subordination of internal political and economic processes to the interactive processes of nations" may result in the formation of a successful enterprise where all countries will be

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[85] Alexandre S. Timonshenko, *From Stockholm To Rio: The Institutionalization Of Sustainable Development, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 153 (Winfried Lang ed., 1995). The author believes that the UNCED documents contain references to a new branch of international law, "international law in the field of sustainable development." *See generally* RIO: UNRAVELING THE CONSEQUENCES (Caroline Thomas ed., 1994); M.P.A. Kindall, *Talking Past Each Other At The Summit,* 4 COLO. J. INT'L ENVTL. L. & POL'Y 45 (1993); Rubens Ricupero, *UNCED And Agenda 21: Chronicle Of A Negotiation,* 4 COLO. J. INT'L ENVTL. L. & POL'Y 69 (1993).

[86] TIMOSHENKO *Id.* at 160. *See also* Peter M. Haas et al., *Appraising The Earth Summit: How Should We Judge UNCED's Success?, in* GREEN PLANET BLUES 154 (Ken Conca et al., eds. 1995), who declare that the "UNCED should not be judged on the basis of a single conception such as a case for hope or despair, but it should be judged within the context of a process of increasing attention, sophistication, and effectiveness in the management of environment and development issues." *Id.* at 154. *See also* Marc Pallemaerts, *International Environmental Law From Stockholm To Rio: Back To The Future?, in* GREENING INTERNATIONAL LAW 1(Philippe Sands ed., 1994). A concern expressed by Pallemaerts is that international environmental law is in the danger of becoming an unwanted attachment to international development law and also functioning on a lower level than "economic rationality." *See also* Alexandre Kiss, *The Rio Declaration On Environment And Development, in* THE ENVIRONMENT AFTER RIO – INTERNATIONAL LAW AND ECONOMICS 63, 63-64 (Luigi Campiglio et al. eds., 1994). Kiss concludes that "it should be remembered that the Conference was more of a political meeting tending to respond to environmental and development problems by setting policy principles than an international legislative forum." Kiss also states that UNCED may be looked at in several ways: "like a bottle which is seen to be half full or half empty, according to the optimism or the pessimism of the person contemplating it." *See generally* Nitin Desai, *The Rio Summit: A Year Beyond, in* VALUING THE ENVIRONMENT 10 (Ismail Serageldin et al., eds. 1993). Contrasting opinions of commentators have been stated here in order to give different viewpoints as to the meaning of UNCED.

[87] SANDS *supra* note 83 at 61. *See also* Lakshman Guruswamy, *International Environmental Law: Boundaries, Landmarks, And Realities,* 10 NAT. RES. & ENVT. 43 (1995), for a discussion on the evolution of international law leading to the UNCED; Adronico O. Adede, *The Treaty System From Stockholm (1972) To Rio De Janeiro (1992),* 13 PACE ENVTL. L. REV. 33 (1995), who declares that the Treaty System, from Stockholm to Rio, has been in a period of transition with a new breed of instruments and concepts emerging. The "new breed" of treaties tries to incorporate new concepts and concerns aimed at bringing about sustainable development. Overall, the "new breed" of treaties demonstrate that the international community has become more concerned with the means of implementing the treaties once they become operative. *Id.* at 46.

able to share the natural resources,[88] by having a great effect in increasing global environmental consciousness, by focusing attention on the need for a more equal sharing of resources among countries rich and poor.[89] This writer agrees with the latter statement, that it has had a tremendous effect in increasing international awareness, by focusing attention on the poor. That is the real success of UNCED.

*Some General Conclusions*

There have been many efforts to interpret the UNCED as a success or as a failure. As noted, this writer believes that the real success of UNCED lies in the fact there was renewed focus on the sustainable development concept. As will be seen in the next section, the sustainable development concept has been made a part of state practice after UNCED. UNCED's triumph has been the recognition of sustainable development as a part of everyday life by nation states, without pressure or rewards from the international community. One of the focal points of this thesis is on sustainable development and its principles as advocated by the Rio Declaration.

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[88] Mukul Sanwal, *Sustainable Development, The Rio Declaration And Multilateral Cooperation*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 45, 45 (1993). Sanwal states that the challenge for policy makers will be to use the broadened choices available to link environment and development so as to channel the forces of change in a manner that improves living standards in the developing countries. Sanwal's statement must be appreciated. This writer is also of the opinion that policy makers do indeed need to link environment and development in order for them to be able to change living standards in the Southern nations.

[89] Gunther Handl, *Controlling Implementation Of And Compliance With International Environmental Commitments: The Rocky Road From Rio*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 305, 305 (1994).

## 2.4 HARD AND SOFT LAW AND THE IMPORTANCE OF PRINCIPLES

*A General Introduction*

Two questions arise at this stage. The first is with regard to the non-binding nature of the Rio Declaration and Agenda 21 and whether they are a part of customary international law or not. Such a consideration assumes significance because nation states must implement binding instruments to which they are a party. However, as will be discussed, nation states may still implement decisions as a result of persuasive non-binding instruments.

The second question that needs to be considered relates to the principles of sustainable development that have been enunciated at UNCED. One of the focal points of this thesis relates to these principles, which are analyzed in this part. However, before proceeding on to a substantive discussion of the principles, it is useful to discuss the concept of "principles" seen from the context of international environmental law. A rigid or flexible interpretation resulting in a consequent rigid or flexible interpretation would primarily depend upon the manner in which one interprets the "principles" relating to the concepts (such as ecodevelopment, sustainable development and so on) analyzed in this thesis.

### 2.4.1 HARD AND SOFT LAW

#### 2.4.1.1 The Issues Involved

International law has been classified by scholars as hard and soft law. Hard law in international law originates from custom or treaties. Customs take time to fructify and

treaties take a long time to negotiate. Nations appear to avoid the specific commitments that treaties demand.[90] The result is that resort to soft law leaves large amounts of discretion to states.[91]

According to Professor Handl, "soft law" has been used to direct attention to "international prescriptions" that are assumed to "lack requisite characteristics of international normativity," but may have the "capacity of producing certain legal effects."[92] Another commentator, Professor Reisman, has stated that because international law generally was made up of customary processes, "the line between the agitation for new norms and when those new norms become accepted is extremely blurred."[93]

The Rio Declaration may be considered as soft law, "texts that have moral if not legal force that may serve to develop national and international actions in specific areas."[94] It has been

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[90] *See* Geoffrey Palmer, *New Ways To Make International Environmental Law*, 86 A.J.I.L. 259, 263 (1992).

[91] *Id.* at 269.

[92] Gunther F. Handl et al., *A Hard Look At Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371, 371-372 (1988). Handl believes that the soft law concept tends to blur the line between the law and the nonlaw, because "merely aspirational norms are accorded legal status and the intended effect of its usage may be to undermine the status of established legal norms." In conclusion, Handl states that the soft law epitomizes the shifting characteristics of the international legal order.

[93] *Id.* at 376-377. Reisman proceeds to add that one other appearance of the soft law feature "has to do with the prevalence of aspirational norms in contemporary international law. These very soft norms are often used as a compromise." One of the reasons that Reisman attributes to the increase of soft law usage in international law, is that "the elites who comprise the politically relevant strata of the international system, share a consuming interest in maintaining power." He believes that "while elites may find it possible to reach private agreements among themselves that maximize their own interests, public lawmaking must promise the fulfillment of the unrequited public demands. This factor may account for the proliferation of normative formulations that are produced in international fora, despite that fact that their proponents know well that there is no way of implementing them."

[94] Jayne E. Daly, *Toward Sustainable Development: In Our Common Interest*, 1995 PACE L. REV. 153, 162.

suggested that in practical terms, despite labeling some Declarations as soft law and other Treaties as hard law, the distinction between hard and soft rules lacks clarity.[95]

Sands believes that "the obligations imposed on contracting parties by the treaties are largely "aspirational" (at least for the time being), and may appear no less soft than those found in the declaratory instruments."[96] This writer agrees with this point of view. Obligations imposed by treaties may be interpreted as aspirational, because many a time, nation states may enter into treaties due to various kinds of pressures on them to do so. It may be difficult for nation states to actually fulfill all the requirements of a treaty at a particular point in time. It may however, be possible for them to fulfill the same at a later point in time, depending on how equipped the State is to fulfill them.

According to Palmer,[97] soft law solutions transform the political thinking on any matter. Soft law solutions are responsible for synthesizing divergent views. His explanation for the increase in the use of soft law appears appropriate in the present context. According to him, recourse to soft law is on the rise because of the political advantages that such recourse offers.[98] He describes soft law as having the capability of positively enriching the global

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[95] *See* Peter H. Sands, *UNCED And The Development Of International Environmental Law*, 3 Y.B. INT'L ENVTL. L. 3, 5-6 (1992).

[96] *Id.*

[97] Palmer *supra* note 90 at 269.

[98] *Id.* Palmer states that recourse to soft law gives a great deal of power of choice to states. Palmer also believes that states find it advantageous to take recourse to the soft law choice, because "a climate may be created where a hard law instrument may be produced in the end."

environmental area.[99] Environmental soft law has been said to be an important portion of the process of constructing norms.[100]

For the purposes of this thesis, it appears that the Rio Declaration and Agenda 21 are both pieces of soft law, exhorting governments to keep in mind certain principles when engaging in development. The Rio Declaration and Agenda 21 are very significant instruments to advance the cause of development in a sustainable manner.[101] They were among the first instruments to focus the world's attention on the sustainable development debate and consequently on the world's poor. Having considered some preliminary questions on the status of soft law, the next question that deserves to be examined is: "when does soft law transform into hard law?"[102]

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[99] *Id.* at 270.

[100] *Id.*

[101] *See* Mary William Pat Silveira, *International Legal Instruments And Sustainable Development: Principles, Requirements And Restructuring*, 31 WILLAMETTE L. REV. 239, 241 (1995). For example, Silveira states that implementation of Rio and Agenda 21 are related to international law in three ways. Firstly, the Rio Declaration and Agenda 21 may be seen as basic legal tools of the sustainable development concept, which are backed by "political authority and moral weight." Secondly, Chapter 39 of Agenda 21 compels the studying of effects of all international legal instruments connected with Agenda 21. Thirdly, all forty chapters of Agenda 21 refer to various current or anticipated international legal instruments. This writer disagrees with Silveira. While it is true that both the Rio Declaration and Agenda 21 are basic legal tools of the sustainable development concept, they cannot be said to be backed by political weight or by moral authority. In fact, if they were backed by political weight or moral authority, States would have ensured that they fulfill the commitments made at UNCED by now.

[102] This writer believes that the importance of such transformation is that although soft law may benefit states politically, in reality, for enforcement purposes, hard law alone is binding on states.

### 2.4.1.2 Customary Law: A Brief Discussion

*Introduction: When Does Soft Law Transform Itself Into Hard Law?*

One view, according to Dupuy, is that the totality of the impact of opinions through various nonbinding instruments aids in showing the feelings of the world community.[103] Dupuy continues that a major portion of soft law at present already portrays part of the hard law of the future.[104] Soft law affirmations in international law have been identified as part of a "forerunner to the development of new international law."[105] Can soft law contain legally binding duties or principles of customary law? The objection raised is that customary law may accrue solely with regular state practice.[106] The question that then arises is: how is customary international law formed?[107] It is this question that is examined next.

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[103]GUNTHER F. HANDL ET AL., A HARD LOOK AT SOFT LAW *supra* note 92 at 386-388. *See also* Linda C. Reif, *Multidisciplinary Perspectives On The Improvement Of International Environmental Law And Institutions*, 15 MICH. J. INT'L L. 723, 733 (1994), who declares that soft law creates a situation "where laggard countries may be pressured to stop slowing things down. Because hard law often takes too long, the soft law route can be a vehicle for moving faster."

[104]HANDL ET AL *id.* at 387. Dupuy also adds that "soft norms can help in defining the standards of good behavior, corresponding to what is nowadays to be expected from a well governed state. Even though not compulsory in itself, each of the standards established on the basis of soft regulations serves as a contributing factor in establishing whether, in a concrete situation, a certain state has complied with international law." *See also* James C.N. Paul, *The United Nations And The Creation Of An International Law Of Development*, 36 HARV. INT'L L. J. 307, 326 (1995), who declares that "principles of the international law of development have been hardened by consistent reaffirmation in recent years."

[105]HARALD HOHMANN, PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW 167 (1994).

[106] *Id.* at 167.

[107] *Id.* at 167-169. *See also* Hiram E. Chodosh, *An Interpretive Theory Of International Law: The Distinction Between Treaty And Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 1067 (1995), who proposes a new approach termed the sub-referential threshold relativity (STR), to interpret international law, "that does not define customary law in terms of treaty, but rather according to its own independently defining attributes." The STR approach consists of four steps: "the identification of the standard of recognition; the setting of this standard on a universal scale bounded by polar opposites; the establishment of a threshold or range of recognition for the standard on such scale and the application of evidence of compliance with such threshold standard." Chodosh claims that, "as applied to the distinction between treaty and customary law, the STR approach better meets the interrelated goals of theoretical coherence, practicability, reconcilability and resolving power." It may be stated that if the STR approach works better (one does not know yet, because it has not yet been applied) then, it must be adopted as part of international law.

*The Formation Of Customary Law*

Article 38(1) of the Charter of the International Court of Justice refers to "international custom, as evidence of a general practice accepted as law, as a source of international law."[108] Custom as state practice is evidenced from "diplomatic correspondence, policy statements, press releases, opinions of official legal advisors, international and national judicial decisions"[109] and so on. The requirements of custom may generally be given as duration[110]; uniformity and consistency of the practice[111]; generality of the practice[112]; and opinio juris sive necessitatis.[113] A customary rule is based on state practice, which may be explained as follows:

> [It] consists of an accumulation of acts which are material or concrete in the sense that they are intended to have an immediate effect on the legal relationships of the State concerned; and acts which are relevant only as assertions in the abstract, such as the recognition by a representative of a State at a diplomatic

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[108] THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, 1948.

[109] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (1990).

[110] *Id.* The passage of time forms a part of the evidence of generality and consistency.

[111] *Id.* at 5-6. Brownlie quotes the International Court of Justice in the Asylum Case, ICJ Reports (1950), at 276 - 277, which interpreted the meaning of uniformity and consistency of practice as: "The party which relies on a custom must prove that this custom in such a manner that it has become binding on the other party...that the rule invoked... is in accordance with a constant and uniform usage practiced by States in question, and that this usage is the expression of a right appertaining to the State..."

[112] *Id.* at 6 - 7. Brownlie describes this point as complementing that of consistency.

[113] *Id.* at 7- 8. This element has been interpreted as requiring a "conception that the practice is required by, or consistent with, prevailing international law." Brownlie continues that "the sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of states recognizes a distinction between obligation and usage." Brownlie also maintains that the absolute problem is one of the essence of the burden of proof. According to another definition of custom, it is a "clear and continuous habit of doing certain actions which have grown up under the aegis of the conviction that these actions are, according to international law, obligatory or correct." *See* OPPENHEIM'S INTERNATIONAL LAW 27 (Sir Robert Jennings et al. Eds., 9th ed. 1992).

> conference that an alleged rule exists, are not constitutive of practice and thus of custom, but only confirmatory of it.[114]

A usage has been defined as a "habit of doing certain actions without there being the conviction that these actions are, according to international law, obligatory or correct."[115] As to when a usage turns into a custom, one view is that the answer is one of fact, and not one of theory. The answer may be stated as the following: "Wherever and as soon as a line of international conduct frequently adopted by states is considered by states generally legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law."[116] This writer tends to agree with this interpretation. Such an interpretation appears to be equal in its application between States, whether rich or poor.

According to Professor Akehurst, a Resolution cannot be regarded as declaratory of customary law, if the Resolution is not captioned in declaratory terms.[117] But, he declares that in situations when customary law is unclear, then it may be likely that such a Resolution will shape the future development of customary law."[118] Professor Akehurst does declare that "declarations in abstracto" (such as General Assembly resolutions) are part

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[114]Dr. Michael Akehurst, *Custom As A Source Of International Law*, 47 BRIT. Y.B. INT'L L. 1, 4 (1977). Professor Akehurst also emphasizes that "a State voting in favor of a Resolution must be regarded as accepting that the Resolution is declaratory of customary law, in the absence of a statement to the contrary. Further, a Resolution cannot be regarded as declaratory of customary law, if it is not phrased in declaratory terms."

[115] OPPENHEIM *supra* note 113.

[116] *Id.* at 30. The editors also add that custom is normally a relatively slow process for evolving rules of law, since the practice in question will take time to develop and it will usually only be some time thereafter that the necessary *opinio juris* will grow up in relation to it.

[117] AKEHURST *supra* note 114 at 7.

[118] *Id.*

of State practice, which may then fructify into customary international law.[119] The point of Akehurst's comment for this thesis is that some international environmental commitments begin as declarations. Applying the interpretation given here, such declarations would be a part of State practice and therefore, may fructify into customary international law, over a period of time, after regular usage.

Two additional arguments are made which provide an explanation of customary law.[120] The spontaneous law and instant custom arguments have been said to reach the outcome that soft law affirmations in international environmental law may contain some obligations or principles of customary law. In the case of spontaneous law, the only necessity is a series of statements that permit the outcome that these rules actually are present "within the legal consciousness of the social community."[121] According to the theory of instant custom, a regular acceptance and application of the norm under consideration are the only requirements as proof of the existence of the rule of law. Hohmann also states that the affirmation of states has a larger authority over the composition of customary law, "especially since unilateral declarations can be binding, provided that States rely upon them."[122] Hohmann argues that the following conditions need to be fulfilled if these

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[119] *Id. See a contrario,* Anthony D' Amato, *Human Rights As Part Of Customary International Law: A Plea For Change Of Paradigms,* 25 GA. J. INT'L & COMP. L. 47, 52 (1996), who states that resolutions of the United Nations are not a source of law at all; if they were, the United Nations would be a world legislature. D'Amato opines that such Resolutions only aid the Articles mentioned in the UN Charter.

[120] HOHMANN *supra* note 105 at 171-172.

[121] *Id.*

[122] *Id. See also* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971), for a detailed explanation on the sources of law, and on the value of customs in international law.

arguments are to be confirmed by states.[123] The conditions are: the concretization of the rule of law (by regular practice which demonstrates the effect of the rule); and applicability throughout the world by the fact that the rule is cited in future affirmations and declarations.[124] This writer believes that if a majority of States adopt a particular rule or instrument as a regular practice, then, such a rule or instrument ought to be accepted as part of international customary law by the other member states as well.[125]

As noted above, the formation of customary law is ambiguous and there are no clear answers. However, acceptability and regular usage of a particular rule or instrument by many nation states appear to be key requirements. Acceptability and regular usage give the rule or instruments a legitimacy, which eventually makes such a rule or instrument binding on the nation state. Therefore, it appears to be a slow process of voluntary acceptance to compulsorily being bound by the rule or instrument. For the purpose of this thesis, if instruments of international environmental law, such as the Rio Declaration and others are accepted by States initially, then, that is the first step in the Declaration being made a part of customary international law. The second step is that if States decide to regularly resort to the Declaration, then, as a result of both the earlier acceptance and the regular usage, the

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[123] HOHMANN *supra* note 105 at 172 - 173.

[124] *Id.*

[125] Of course, I realize that such a condition may be extremely difficult to fulfill because, it would be very difficult to compel a few nation states to follow what the majority wants. Further, the question arises: if nation states are forced to follow a particular rule or instrument as custom, is it a valid custom? Can such States stop following the custom the moment they get a chance? The answers to these is unclear, because the subject area, formation of customary law is ambiguous.

Declaration would become binding as part of customary international law and thus binding on nation states.

*The Observance Of Soft Law*

The question has been raised as to why, if soft law norms are not binding, are they actually observed?[126] According to Szasz, sometimes, a few states with specific interest in following the non-binding norm may unilaterally pressure other states to adopt the norm. He also gives two ways of observing soft law even when it might not be binding. They are: firstly, the states decide to adopt the soft law (since the States would not have otherwise accepted to follow the same); and secondly, the states concerned use some instrumentality or other to bring into force the norms that they have promulgated.[127] This writer believes that soft law as such is observed because of both internal and international pressures. Internal pressure includes observations from the media, Courts or other groups that a particular instrument needs to be observed (ostensibly for the good of the country or to highlight the importance of a particular issue).

*Concluding Views*

In future, it is hoped that the Rio Declaration will be transformed into hard law – binding on nation states and to be implemented by them. Simultaneously, it is hoped that serious and concerted international efforts will be made to implement Agenda 21. Although the Rio

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[126] Paul C. Szasz, *International Norm-Making, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 71-73 (Edith Brown Weiss ed., 1976).

[127] *Id.* at 71.

Declaration and Agenda 21 are non-binding at present, and despite the absence of customary law with reference to sustainable development, it has been opined that states may voluntarily bring into force international instruments relating to sustainable development that are in agreement with the Rio Declaration.[128] If State practice is one of the benchmarks of identifying customary law, and national judicial decisions are evidence of state practice, then it is appropriate to give two examples from India and Philippines. These examples show how national judicial decisions have incorporated the concept of sustainable development as envisaged at UNCED as customary law, binding on nation states.

In *Jaganathan & Prepare* vs. *Union Of India*,[129] Justice Kuldip Singh, speaking for the Supreme Court of India, dealt with the concept of sustainable development and specifically accepted the Precautionary and Polluter Pays Principles as part of the environmental laws of India. The Court referred to the World Commission on Environment and Development's Report, "Our Common Future," and also to UNCED. Specifically, the Court declared:[130]

> We have no hesitation in holding that sustainable development concept as a balancing concept between ecology and development has been accepted as a part of the customary international law,

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[128] DALY, TOWARD SUSTAINABLE DEVELOPMENT *supra* note 94. Daly also declares that "the binding nature of international treaties is founded on the principle that a state has the sovereign authority to regulate its affairs, both internal and international. It may consent to be bound to the terms of an agreement, thereby creating legal rights and duties that bind all signatories to the agreement."

[129] Judgment delivered on 11 December, 1996 by Kuldip Singh, J. and S. Saghir Ahmad, J. (on file with this author). The *Jaganathan case* reiterated the principles laid down in *Vellore Citizens Welfare Forum* vs. *Union of India*, JT 1996 (7) SC 375. The factual context of the *Vellore case* dealt with a petition filed before the Supreme Court of India by the citizens forum. The forum wanted the Court to shut down mechanized shrimp farms, which the petitioners claimed were harmful to the environment and unsustainable. In response to the petition, the Court had ordered a Committee to investigate the matter. On receiving the Committee's report and hearing the parties, the Court delivered the above judgment.

[130] *Id.*

> though its salient features have yet to be finalized by International Law Jurists.

The Precautionary Principle in the context of Indian municipal laws was interpreted by the Court to mean:[131]

> 1. Environmental measures: by the state Government and the statutory authorities –must anticipate, prevent and attack the causes of environmental degradation;
>
> 2. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; and
>
> 3. The onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign.

The Court also cited Article 21 of the Constitution of India, which guarantees the protection of life and liberty. Articles 47, 48 A and 51 A were also cited, which mandate the Government to protect and improve the environment. The judgment concluded by declaring that in view of the Constitutional and statutory provisions, the Court had no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the land (India). The Judgment directed that no shrimp culture industry was to be established within the coastal regulation zone. The Court also issued other directions. Industries, which were functioning within 1000 meters from certain lakes (considered to be environmentally fragile) were asked to compensate affected persons, who had been affected by pollution from the industries. The Judges also declared that any

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[131] *Id.*

violations or non-compliance of the directions of the Court, would attract the provisions of the Contempt of Courts Act.[132]

In *Minors Oposa* vs. *Secretary of the Department of Environment And Natural Resources*,[133] the plaintiffs sought an order that the Government of the Philippines discontinue existing and further timber license agreements. They alleged that the deforestation was causing environmental damage. The government argued that the plaintiffs were pursuing a nonjusticiable political case and that the existing licenses could be canceled without violating the due process of law. The Supreme Court of the Philippines ruled that the plaintiffs had standing to represent their yet unborn posterity. They declared that the plaintiffs had adequately asserted a right to a balanced and healthful ecology, that the grantees of the licenses should be impleaded and that the issues were indeed justiciable. The Court declared that:[134]

> Every generation has a responsibility to the next to preserve the rhythm and harmony for the full enjoyment of a balanced and healthful ecology. The minors' assertion of their right to a sound environment constitutes the performance of their obligation to ensure the protection of that right for the generations to come.

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[132] *Id.* These Constitutional Articles were only cited as complementing the "opinio juris" given by the Court. It must be clarified that the judgment was not delivered as a result of the specifics of the Articles mentioned in the Indian Constitution.

[133] 33 I.L.M. 173 (1994).

[134] *Id.* at 185.

*Concluding Views*

The two cases cited above are classic examples of "international soft law" being transformed into hard law. The judgment of the Supreme Courts of India and that of the Philippines are laws of their lands. The Indian Supreme Court has decreed that sustainable development and some of its related principles be incorporated as part of the general environmental laws of India. Although the Supreme Court of the Philippines did not mention inter-generational and intra-generational equity, the principles evolved by the Court reinforce the inter-generational and inter-generational equity principles.

This writer hopes that it is only a matter of time[135] before other governments and judicial bodies recognize the importance of the concept of sustainable development and apply this concept to daily usage, making it a part of the environmental laws of their lands as well. If the motto "thinking globally, but acting regionally," was to be followed in practice, then the application of the sustainable development debate in reality would be a worthy example of the transformation of soft international environmental law into hard law by state practice.

The next section deals with analyzing the concept of "principles," and their content and scope. As noted earlier, the success or failure of the sustainable development concept would depend on the manner of interpretation and the extent of application of "principles," in both national and international laws.

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[135]It may be argued that if the sustainable development concept does indeed fructify into hard law, then, there may not be a need for an international grievances mechanism. However, this writer would disagree with such an argument. Even if the concept were to transform into a hard law, the need for an international mechanism would still be there, since implementation would continue to be a problem. Further, a grievance mechanism would be necessary to advance and strengthen the concept even beyond what is given is any proposed hard law.

## 2.4.2 THE IMPORTANCE OF PRINCIPLES

### 2.4.2.1 What Are Principles?

*A General Discussion*

This section begins with a discussion of the term "principles," in the context of international environmental law, based mainly upon Professor Sands' work. Principles have been said to "provide the legal and philosophical basis for the development and application of sustainable development.[136] Their open textured nature allows them a wide range of meanings, incorporating and reflecting the divergent views expressed in their negotiation."[137] A principle has also been stated as having "the capacity of influencing the interpretation of other legal rules and principles, so as to strengthen or weaken their application."[138] Principles may also "provide an impulse for the development of new legal rules and more precise principles, either by states when entering into new treaties or adopting new national environmental legislation or policies, or by intergovernmental organizations when specifying the general obligations of a treaty."[139]

One observation made concerns the developmental process through which substantive principles of international law might evolve:[140]

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[136] *See* Philippe Sands, *International Law in the Field of Sustainable Development: Emerging Legal Principles, in* SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW 53, 54 - 58 (Winfried Lang ed., 1995).

[137] *Id.*

[138] JONAS EBBESSON *supra* note 49 at 241 - 242.

[139] *Id.*

[140] James E. Hickey, Jr. and Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law,* 14 VA. ENT'L L. J. 423, 438 (1995).

> In the early stages of invoking a novel principle of international law, the substantive implications of a new principle might not be fully appreciated, and precise obligations might not be politically acceptable. In addition, there does not then exist the history of state practice that eventually provides substantive content and specific contours to the principle over time. It is understandable, therefore, that initial articulations would be somewhat unformed and general.

Sands believes that the Rio Declaration represents the end result of efforts by the international community to define a full compendium of principles on international environmental law and policy to advance sustainable development. Accordingly, the Declaration, he says, is based on principles that have been found in earlier agreements and other affirmations. In practice, the legal effect of any principle will have to rely on a culmination of issues, "including its source, its textual context, the specificity of its drafting, and circumstances in which it is being relied upon."[141] At one end, a binding principle "might only be intended to guide parties and international environmental organizations in the implementation of the substantive rules of an international environmental obligation."[142] On the other end, Sands also feels that the Principles in the Rio Declaration may be seen as somewhat clear and meaningful rules, which create justiciable rights in themselves. This writer would favor the latter interpretation, which would mean that legal rights may be created if any of the Rio principles are not fulfilled by the State. The question that arises at

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[141] SANDS *supra* note 83 at 150.

[142] *Id. See also* Philippe Sands, *International Law In The Field Of Sustainable Development,* (1994) BRIT. Y. B. INT'L L. 303, 335, where he lists certain critical issues as part of international law. They are the development of principles of general application; institutional arrangement to develop and implement principles and rules of sustainable development; principles of governance to inform the roles of the various actors; areas with the development of new international regulations; mechanisms and procedures to ensure compliance with obligations and financial resources; and technology transfer needed to give effect to new obligations, in particular those of developing countries.

this stage is: "What consequences flow from the characterization of a legal obligation as a legal principle or a legal rule?"

### 2.4.2.2 Consequences Of A Legal Action As A Legal Principle Or A Legal Rule

According to Sands, this question has hardly been tackled by international courts and tribunals, and "apparently not at all in the context of environmental principles."[143] Discussing the legal effect of principles and their relationship to rules, Sands quotes a discussion of the same from a 1903 case that states:[144]

> A "rule"... is essentially practical and, moreover, binding... there are rules of art as there are rules of government while a principle "expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence."

One of Sands' conclusion is that principles mean legal standards, but these "standards are more general than commitments and do not specify particular actions, unlike rules."[145]

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[143] SANDS *supra* note 83 at 184.

[144] *Id.* Sands cites Bin Cheng, *General Principles Of Law As Applied By International Court And Tribunals* 376 (1953), who cites *The Gentini Case (Italy v. Venezuela)* M.C.C. (1903), J.H. Ralston and W.T.S. Doyle, *Venezuelan Arbitrations Of 1903 etc.* 720, 725 (1904). Cheng has also been cited as stating that positive rules of law may be the "practical formulation of the principles" and the application of the principle to the infinitely varying circumstances of practical life aims at bringing about substantive justice in every case (at 376). *See also* Ronald Dworkin, TAKING RIGHTS SERIOUSLY 24, 26 (1977), where it is stated that: "Principles and rules point to particular decisions about legal obligations in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all or in a nothing fashion... A principle states a reason that argues in one direction, but does not necessitate a particular decision... All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration including in one way or another."

[145] SANDS *id.* at 185. *See also* Howard Mann, *Comment On The Paper By Philippe Sands, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 67, 71 (Winfried Lang ed., 1995), who declares that "sustainable development is a permanent process, and therefore requires an emphasis on process issues for it to be achieved and maintained. The critical element of the process comes from what may be the most essential principle of international law for sustainable development. This is the principle, be it legal or otherwise, of integration."

Two kinds of principles have been identified in international law as being part of customary law.[146] The first deals with substantive principles and rules such as those which have evolved through "treaty making on marine pollution, pollution of international rivers and lakes, atmospheric pollution, and the protection and conservation of flora and fauna."[147] The second type is composed of procedural principles and rules, which have evolved at the same time as the substantive principles and rules.[148]

*Conclusion*

The interpretation of principles is likely to influence the success or failure of a given legal instrument. Principles have the capability to enable the interpretation of rules and other principles in a particular manner. Consequences of applying the substantive and procedural aspects have a definite effect on any legal instrument. Principles may also be said to reflect the thinking of the community of nations, at the national and international levels. The manner in which they interpret the principles also shows to what extent they are serious and committed in applying them to fact situations. It is hoped that the community of nations will interpret the same in a wholesome way, so that the principles may be applied to given situations with the commitment that they deserve.

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[146]Toru Iwama, *Emerging Principles And Rules For The Prevention And Mitigation Of Environmental Harm, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 107, 108-110 (Edith Brown Weiss ed., 1992). *See also* PALLEMAERTS, INTERNATIONAL ENVIRONMENTAL LAW IN THE AGE OF SUSTAINABLE DEVELOPMENT: A CRITICAL ASSESSMENT OF THE UNCED PROCESS, *supra* note 59 at 651, who believes that the Rio Conference was very unsatisfactory with respect to general principles and that the Rio principles were just a reinforcement of customary international law. This writer disagrees with Pallemaert's view and believes that the Rio principles re-enforced existing customary law. Rather, they set out new principles which, it is hoped will become a part of customary law in future.

[147] IWAMA *id.* at 109.

[148]IWAMA *id.* at 111. The procedural principles, which are both customary and conventional, are described the procedural duties of states toward environmental protection. They also add to any substantive principles as well. Examples include the principles of "information exchange, environment impact assessment, prior notification, warning and consultation."

Having reviewed the importance of principles, the next part discusses two issues. The first deals with the meaning of the sustainable development concept and the second deals with the relevant sustainable development principles enunciated at UNCED that relate to development projects.

## 2.5 SUSTAINABLE DEVELOPMENT AND SOME OF ITS PRINCIPLES RELATING TO DEVELOPMENT PROJECTS

*A General Introduction*

Until now, we have considered the evolution of the sustainable development debate, beginning with ecodevelopment, the Brundtland Commission Report and the UNCED. We have also considered the extent to which the international instruments may be applied as part of the national and international customary laws. A brief discussion of the content and scope of the term "principles" followed thereafter. One common feature of all the areas considered till now has been that they are all related to the sustainable development debate in some way. Historically, the concept began with the enunciation of the ecodevelopment idea. Its definition and scope were explored through Brundtland and UNCED. The discussion then proceeded in determining the extent to which instruments (which in turn have sustainable development as their core concerns) may be binding on nation states (the discussion of hard and soft law and the importance of the interpretation of principles). The sustainable development debate deserves to be re-visited because of its importance. Earlier, we only considered a brief reference to its meaning as given by the Brundtland Commission

Report. However, UNCED and its aftermath resulted in renewed examination of its meaning and content.

### 2.5.1 A Discussion Of The Concept Of "Sustainable Development"

Sustainable development is an ambiguous concept. An attempt is made in this section to discuss the parameters of this concept by determining what various scholars have said about the concept. The idea is to find out if the concept has been given a uniform interpretation or not. If it has, then it may facilitate the interpretation and application of the concept. If not, then it may be difficult to apply the same under different circumstances. Therefore, what is given below must not be considered as a random recitation of various views. The central theme in the section below is sustainable development, which has been given varied interpretations by scholars. An attempt is made to collect the views, synthesize them and to reach certain conclusions.

*1. The Brundtland Commission And The Definition Of Sustainable Development*

One scholar declares that "the central theme of the Brundtland definition is far from intuitively obvious, and is a postulate that has been assumed rather than demonstrated."[149] Wirth claims that there is no international agreement on the meaning of "needs,"[150] and that

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[149] David A. Wirth, *The Rio Declaration On Environment And Development: Two Steps Forward And One Back, Or Vice Versa?*, 29 GA. L. REV. 599, 607 (1995). *See generally* Ved P. Nanda, *Development As An Emerging Human Right Under International Law*, 13 DEN. J. INT'L L. & POL'Y 161 (1985), where the author explores the parameters of the right to development from the perspective of developing countries; TRADITIONAL KNOWLEDGE AND SUSTAINABLE DEVELOPMENT (Shelton H. Davis et al., eds. 1993), for a discussion on the relationship between sustainable development and indigenous peoples.

[150] WIRTH *id.* at 606. Wirth declares that the term "needs" is a basic element of the definition with varying views around the world. He also states that there did not seem to be any real evidence to show that the needs of the present peoples or

the sustainable development definition is a "serious challenge to the operational reality of determining the sustainability of a given proposal."[151] Another opinion is that the Brundtland Commission's definition "remains sufficiently ambiguous to avoid directly threatening vested interests."[152] According to yet another view, apart from the Brundtland Commission's focus on intergenerational equity, its definition was so obscure that the "conceptual connection between sustainable development and the finite carrying capacity of the Earth's ecological systems and natural resources," cannot be derived.[153] This writer does not agree with this point of view. As noted earlier, given the circumstances, for the first time, the Commission did an excellent job in focusing on the sustainable development concept. Various interpretations of such an unambiguous concept are possible. Therefore, Wirth's interpretation given above is one such addition.

*2. The Elements Of Sustainable Development And Its Global Character*

According to Sands, four elements have been thought to comprise the concept of sustainable development.[154] They are: the principle of intergenerational equity; the

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their progeny may be satisfied by having economic growth, even if it is only minimal, when simultaneously dealing with the problem of the need to maintain environmental balance and capacities.

[151] *Id.* at 607. Wirth lists a given proposal to include a discrete infrastructure project, such as a large dam, or a broader development policy or program.

[152] PALLEMAERTS, INTERNATIONAL ENVIRONMENTAL LAW IN THE AGE OF SUSTAINABLE DEVELOPMENT: A CRITICAL ASSESSMENT OF THE UNCED PROCESS *supra* note 59 at 623, 630. Pallemaerts continues: "Without challenging the principle of development as the method to satisfy the needs of current generations, it explicitly acknowledged and it is in this that its potential legal significance lies that future generations also have interests, indeed, even rights, which deserve protection." This writer agrees with the point of view expressed by Pallemaerts. The Brundtland Commission definition, it may be stated, does not threaten vested interests at present, and perhaps, there lies the answer as to its acceptability.

[153] Susan L. Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology And Law*, 31 WILLAMETTE L. REV. 261, 277 (1995).

[154] SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *supra* note 83 at 199-200. Sands declares that these four elements are closely related, often used in combination, which suggests that they do not have a well established, or

principle of sustainable use; the principle of equitable use; and the principle of integration.[155] These four elements are the subject matter of later discussions.

It has been argued that many issues relating to sustainable development have a "transnational global character."[156] This global character has the following features: involvement of nonstate actors;[157] and actors that may be geographically distant and the interests of humankind, including those of future generations.[158]

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agreed, legal definition or status. Sands cites various treaties and Conventions that have integrated the principle of sustainable development into their frameworks, without expressly referring directly to the Brundtland Commission Report.

[155]*Id. See also* EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS xi (1986). The experts group points out that the right to development has certain constraints. The right to development cannot be asserted at the community's interest and those of neighboring States whose expectations may be affected. They declare that while advancing sustainable development, "one must examine the rights and responsibilities of States, both bilaterally and in relation to the international community as a whole"; James C.N. Paul, *The United Nations And The Creation Of An International Law Of Development*, 36 HARV. INT'L L. J. 307 (1995). Paul examines the content of the international law of development and lists its contents as having many of the same elements contained in the concept of sustainable development. But, he does not refer to the international law of development as sustainable development.

[156]Ellen Hey, *Increasing Accountability For The Conservation And Sustainable Use Of Biodiversity: An Issue Of Transnational Global Character*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 1, 4 (1995). Hey addresses ways in which accountability may be enhanced for decision-making on the conservation and sustainable use of biodiversity. The article focuses on decision-making focusing on contracts and other arrangements that regulate entry to ecosystems having a negative result on natural resources and biodiversity.

[157]Non-state actors are global in character, because there are many NGOs which have a broad jurisdiction over issues concerning the environment. These NGOs do not limit themselves to any one particular country or region when dealing with environmental issues that are global in character.

[158]*Id. See also* Susan H. Bragdon, *The Evolution And Future Of The Law Of Sustainable Development: Lessons From The Convention On Biological Diversity*, 8 Geo. Int'l Envtl. L. Rev. 423 (1996), where she states that "the concept of sustainable development reflects an international ideology, but that an ideology requires a legal framework by which it may be put into practice. Sustainable development has the potential to transcend traditional boundaries which hold the rights of individual nation-states as virtually sacrosanct." *Id.* at 433. This writer tends to agree with Bragdon's point of view. Indeed, sustainable development does have the potential to transcend traditional boundaries of sovereignty.

*3. Environmental And Economic Sustainable Development*

Ecological sustainable development has also been interpreted to mean "improving and maintaining the well being of people and ecosystems."[159] The concept has also been interpreted to mean the terms "environmental sustainable development," and "economic sustainable development." Brief discussions of these two terms follow.

*(i) Environmental Sustainable Development*

It has been argued that environmental sustainable development means having a positive progress – the development in the future must be better in terms of its nature and amount than it has been in the past. It must also be restricted to being within the maximum limit that the Earth can handle.[160] It has also been characterized as having received its basis from the theory that future generations have rights to succeed to a healthy environment.[161]

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[159]BOER, INSTITUTIONALIZING ECOLOGICALLY SUSTAINABLE DEVELOPMENT: THE ROLES OF NATIONAL, STATE, AND LOCAL GOVERNMENTS IN TRANSLATING GRAND STRATEGY INTO ACTION *supra* note 59 at 318-319. The concept integrates "economic, social and environmental aims, and makes choices among them where integration is not possible." It also means combining environment and development aims at various stages of the decision making process. Additionally, the concept incorporates within itself, the principles of intragenerational and intergenerational equity; the precautionary principle; the conservation of biological diversity and integrity and the internalization of environmental costs. *See also* Celia Campbell Mohn, et al., *Sustainable Environmental Law, Objectives And Tools Of Environmental Law,* SUSTAIN. ENVTL. L s 4.1 (1993), where the author defines the concept of sustainability as "managing natural systems for the perpetuation of the human species at present and in the future." The author declares that the value judgments underlying sustainability include risk aversity, efficiency and intergenerational equity. *See also* THE WORLD BANK, MAKING DEVELOPMENT SUSTAINABLE 69 - 70 (1994), where the Bank notes that as it puts into operation the concept of sustainable development, policymakers are requesting for help in placing monetary values on environmental impacts. Valuation has been explained to mean a "systematic means of incorporating environmental externalities into development decisionmaking." The Bank has also been described as having "three priorities in its economic valuation work: to apply the technique more widely at the project, sectoral, and national levels; to further refine the methodology; and to incorporate a broader range of biological, ecological, and sociological expertise into its methods and results." The Bank's efforts reflect the point being made above, viz., the concept has been used to improve and maintain the well being of peoples and ecosystems.

[160]James P. Karp, *Sustainable Development: Toward A New Vision,* 13 VA. ENVTL. L. J. 239, 253 (1994).

[161] Edith Brown Weiss, *Environmentally Sustainable Development: A Comment,* 102 YALE L. J. 2123, 2123 (1993).

The concept of sustainability has been portrayed as being important to the right to development, since it involves regulating the industrialized areas of the world with developing nations, according them the same treatment, "which is the essence of legal regulation."[162] Singh suggests that "rights and obligations must go hand in hand" and that the concept of sustainability creates equal obligations for both the North and the South.[163]

Four aspects are suggested as the basis of the right to development by a State, whether developed or developing. They are: the need to protect the resources in the environment; the need to conserve the resources and to exploit them only on the basis of their being available in plenty; the need to keep in mind the principles of inter-generational equity; and the need to be certain that progress will not cause injure the environment.[164] This writer endorses these four aspects and believes that they are reflective of the ongoing sustainable development debate that has forced renewed attention on various aspects of the debate, including these aspects.

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[162]Nagendra Singh, *Sustainable Development As A Principle Of International Law, in* INTERNATIONAL LAW AND DEVELOPMENT 4 - 5 (Paul De Waart et al., eds. 1988).

[163] *Id.*

[164]*Id. See also* Nicholas A. Robinson, *Sustainable Development: An Introduction To The Concept, in* THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT 15, 27 - 30 (J. Owen Saunders ed., 1990), who believes that when restructuring sustainable development, the following elements need to be kept in mind: environmental priority, the global perspective, public understanding, technology transfer, integrating national and international environmental laws, and involving NGOs in the civic movement; David Johnston, *Sustainable Development: An Agenda For The 1990s, in* THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT 73 (J. Owen Saunders ed., 1990), for a discussion on the future of the concept; Danilo Turk, *Participation Of Development Countries In Decision-Making Processes, in* INTERNATIONAL LAW AND DEVELOPMENT 341 ( Paul De Waart et al., eds. 1988); Milan Bulajic, *Principles Of International Development Law: The Right To Development As An Inalienable Human Right, in* INTERNATIONAL LAW AND DEVELOPMENT 353 (Paul De Waart et al., eds. 1988); and Paul J.I.M. de Waart, *State Rights And Human Rights As Two Sides Of One Principle Of International Law: The Right To Development, in* INTERNATIONAL LAW AND DEVELOPMENT 371 (Paul de Waart et al., eds. 1988), for discussions and analyses on various aspects of development.

The sustainable development concept has been stated as having arisen when conflicts over environmental issues have taken a leading part of the political debate.[165] Similarly, at the fundamental stage, the "philosophy of sustainable development asserts that environmental quality and the general services performed by natural environments are far more important than past development planning and economic management."[166]

*(ii) Economic Sustainable Development*

The economic influence on the sustainable development debate is evident, as the core concept of sustainable development has been explained through the following statement:[167]

> [Sustainable development is the] directing of global economic efforts toward increasing the present generation's quality of life while recognizing two essential principles: the Earth's finite capacity to accommodate people and industrial development; and a moral imperative not to deprive future generations of natural resources essential to well being and quality of environment.

Another explanation of economic sustainability has been given as the following:[168]

> [Economic sustainability means a] development strategy that manages all assets, for increasing long term wealth and well being.

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[165]David W. Pearce and Jeremy J. Warford, WORLD WITHOUT END: ECONOMICS, ENVIRONMENT, AND SUSTAINABLE DEVELOPMENT 41, 41 (1993).

[166] *Id.* at 43. The authors declare that by increasing the value of the environment, sustainable development shows a better "understanding of the functions by natural and built environments."

[167]SUSAN L. SMITH, ECOLOGICALLY SUSTAINABLE DEVELOPMENT: INTEGRATING ECONOMICS, ECOLOGY AND LAW *supra* note 153 at 262-263. Smith traces the history of sustainable development from the early 1960's to the present era. *See generally* Molly Harriss Olson, *Accepting The Sustainable Development Challenge*, 31 WILLAMETTE L. REV. 253 (1995); Mark Mininberg et al., *Promoting Economic Growth And Environmental Protection: The Institute For Sustainable Development*, 9 CONN. J. INT'L L. 69 (1993); Thomas M. Landy, *Connecting Poverty And Sustainability*, 21 B.C. ENVTL. AFF. L. REV. 277 (1994); Jim Bailey, *Sustainable Development: Searching For The Grail Or A Wild Goose?*, 24 ENVTL. L. 1159 (1994); Christopher Stone, *Deciphering "Sustainable Development"*, 69 CHI-KENT L. REV. 977 (1994), for related discussions on the sustainable development debate.

[168]Peter J. Hammond, *Is There Anything New In The Concept Of Sustainable Development?, in* THE ENVIRONMENT AFTER RIO: INTERNATIONAL LAW AND ECONOMICS 187-188 (Luigi Campiglio et al. eds., 1994).

> Sustainable development as a goal rejects policies and practices that support current living standards by depleting the resource base, including natural resources, and that leave future generations with poorer prospects and greater risks than our own.

The question is whether economically, human beings are able to manage their resources in a sustainable manner. In order to achieve a long term sustainable development in the lives of peoples, it is necessary to live within one's resources. To do so, we need to consider the economical consequences of our actions, so that there is uniform development that takes place.

*4. Sustainable Development In The Global Context*

One other view has been that sustainable development, "as a normative objective, must be understood in a global context."[169] In a global context, the concept has been interpreted to mean that all human beings must be assured of the basic access to and the use of natural resources.[170]

*5. The Effect Of Human Rights Jurisprudence On The Concept*

The emergence of international human rights jurisprudence has had its effect on the sustainable development debate. Sustainable development has also been represented as a

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[169]Gunther Handl, *Sustainable Development: General Rules Versus Specific Obligations, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 35, 39 (Winfried Lang ed., 1995). Handl believes that critical premise of sustainable development as a normative objective, is the existence of an "optimal scale of the global economy." Handl continues that by necessary implication, sustainable development means that as all human beings have an inherent right to the use of natural resources, even if this access is only minimal, there requires to be a large amount of sharing of such resources. This writer fully agrees with Handl's point. Handl's interpretation reinforces a core aspect of the sustainable development debate and that is that human beings have the right to use the resources to the extent that is possible.

[170] *Id.*

structural conception, having a "pillared, temple like structure."[171] The three pillars are made of international environmental law, international human rights and international economic law. Human rights, in this writer's opinion is one of the key elements of the sustainable development process. Although human rights has not been mentioned as a particular principle in the Rio Declaration, nevertheless, it has influenced the sustainable development debate and has enriched it. It is an issue that will be dealt with in greater focus in the following sections.

*Conclusion*

As noted earlier, the definition of the concept of sustainable development is inconclusive and has been interpreted in varied ways. These interpretations only increase its ambiguity. Among the various views expressed, the writer agrees with the definition of the Brundtland Commission.[172] This is because it is important that the combination of the concept of needs and the impact of the state of technology and social organization on the ability of the environment fits the scope of this work.[173] It may be stated that the Brundtland Commission's definition is wholesome and incorporates in it the essential elements related

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[171] Dominic McGoldrick, *Sustainable Development And Human Rights: An Integrated Conception*, 45 I.C.L.Q. 796, 796-798 (1996). The human rights issues relating to sustainable development will be considered at a latter point of this chapter. McGoldrick comments that the advantage of such "a simple structure is that it presents sustainable development as integrating and interactive. It has elements of an objective, a process and a principle."

[172] *See* THE BRUNDTLAND COMMISSION AND THE COST OF INACTION (Alex Davidson ed., 1988), for a series of essays on the implications of not implementing the Brundtland Commission's Report.

[173] *See* MARY PAT WILLIAMS SILVEIRA, INTERNATIONAL LEGAL INSTRUMENTS AND SUSTAINABLE DEVELOPMENT: PRINCIPLES, REQUIREMENTS, AND RESTRUCTURING *supra* note 101 at 239, 243. Silveira also believes that there is a sense that the concept of sustainable development lacks clear meaning. *See also* Jim MacNeill, *The Road To Rio: Setting The Compass in* WINDOWS ON THE WORLD 20-21 (Ian McAllister, ed., 1993), where he states that the Rio Declaration and the sustainable development principles "contain few norms, but they are often expressed in curious ways that effectively reinforce the status quo." As noted earlier, this writer agrees with MacNeill that since the sustainable development concept is vague in itself, its interpretations also will be vague.

to development projects.[174] The question "Development at whose and at what cost?," has a direct relation to the concept of sustainable development. For this question to be answered, the concept of needs and limits placed by industrialization and technology must be taken into consideration. At the same time, development projects must be sustainable, such that the development meets the needs of the present generation, without compromising the needs of the future generations. The other views on sustainable development, it may be stated, are accommodated within the sustainable development definition of the Brundtland Report.

As noted earlier, one of the recommendations of the Brundtland Commission's Report resulted in the UNCED. The discussion now proceeds on to the Rio Declaration, which was part of the UNCED. The Declaration focused on various aspects of sustainable development and stated twenty-seven principles. Out of the twenty-seven principles declared at Rio, I have selected the most relevant principles that may be applied to development projects. To briefly state them, they are that human beings are at the center of

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[174]*See* Larry Lohmann, *Whose Common Future?, in* GREEN PLANET BLUES 222, 223-225 (Ken Conca et al., eds. 1995). The author looks at the post-Brundtland era very critically. The author quotes Brundtland and Maurice Strong in a 1995 Conference who warned of "new environmental threats to our security." The author notes that they dwelt on terms such as "global concept of security," a "safe future," and a "new security alliance." The author wonders: "Had the ex-Prime Minister of Norway and the Chairman of Strovest Holdings Inc. suddenly become land reform activists and virulent opponents of the development projects and market economy expansion which uproot villagers from their farms, communities and livelihoods? Or were they hinting at another kind of security, the security that First World privilege wants against the economic and political chaos that would follow environmental collapse?" The author opines that the Brundtland and UNCED Reports are only for those with power. His conclusion may also be quoted here: "Come the millennium, we may all even be able to form one grand coalition. But until then, it is best to remember the lesson of history: that no matter how warmly it seems to have embraced the slogans of the rebels, the Empire always strikes back." *Id.* at 226. This writer also fully agrees with the opinion of Lohmann, that the third world must be justifiably wary of the designs of the First world's designs. Of course, as noted earlier, a new path of reconciliation is possible and towards that goal, it may be pointed out that "Our Common Future" may tread a new path in environmentalism, but the path must be equitable and just.

concerns for sustainable development (principle 1); equity towards present and future generations (principles 3, 5, 6 and 7); environmental protection as an integral protection of the development process (principle 4); public participation (principles 10, 20 and 22); precautionary approach (principle 15) and environmental impact assessment (principle 17).

### 2.5.2 HUMAN BEINGS ARE AT THE CENTER OF CONCERNS FOR SUSTAINABLE DEVELOPMENT

Principle 1 of the Rio Declaration[175] states the following:

> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Though Principle 1 addresses a substantive standard, requiring a minimally acceptable environment, it does not give the citizens of the world an absolute right. However, such a right is being enforced in individual countries, either through the countries' Constitution or by the judiciary.[176] Principle 1 has been described as "reflecting a shift towards an anthropocentric approach to environmental and developmental issues."[177]

Sands declares that a careful reading suggests that the additional words "and developmental," which appear in principle 2, goes to prove that states may proceed ahead with their own policies. It has also been suggested that the "introduction of these words may even expand the scope of the responsibility not to cause environmental damage to apply to

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[175] RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT *supra* note 11.

[176] For example, in India, the Supreme Court has read into Article 21 (the right to life), the right to a clean and healthy environment.

[177] SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *supra* note 83 at 50.

national development policies as well as national environmental policies."[178] I agree with Sand's interpretation. I believe that the words "environmental and developmental," do expand the scope of Principle 2, by including within it the responsibility not to cause environmental damages.

Developed countries did not want to place human beings right at the center of the environmental and developmental concerns. The developed nations wanted to emphasize that human beings must be at the service of the environment rather than it being vice versa.[179] A similar thought has been that Principle 1 has reduced human beings to "objects of soft law of sustainable development, rather than them being considered as the subject of law."[180] Principle 1 may (like the sustainable development concept) be interpreted in many ways. One interpretation has been given above, with which I agree. Pressures of negotiation between the industrialized and less industrialized countries resulted in human beings being made as objects rather than as the subjects.

One view has supported a human right, which all individuals, peoples and non-government actors are guaranteed by States and other institutions.[181] It has been suggested that at the

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[178] *Id.* Principle 2 may be quoted here: "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."

[179] Ileana M Porras, *The Rio Declaration: A New Basis For International Cooperation, in* GREENING INTERNATIONAL LAW 20, 24 (Philippe Sands ed., 1994). Porras reveals that the Group of 77 nations were firm on placing human beings were at the center of the debate, rather than the environment. By doing this, it would be to subjugate development needs to the environmental needs.

[180] MARC PALLEMAERTS, INTERNATIONAL ENVIRONMENTAL LAW FROM STOCKHOLM TO RIO: BACK TO THE FUTURE? *supra* note 86 at 9. Pallemaerts contrasts Principle 1 to the fact that it contains only an oblique reference to the notion of a human right to environmental protection.

[181] W. PAUL GORMLEY, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION 110 (1976).

"philosophical and moral levels of the hierarchy of international protection," human survival and development of humankind become the primary objective of human rights and environmental law.[182]

*Application Of Principle 1*

In development projects, this Principle provides the basis for claiming rights for the affected people. For example, when a hydroelectric power project is being built, this Principle encourages the Government to realize that human beings are the center of the sustainable development concerns. This means that the building of the hydroelectric power project is only secondary in importance to the rights of the affected people. It also forces Governments to ensure that these affected people, whose lives will be forced to change irrevocably by the building of such projects, may live in harmony with the environment around them. Therefore, no action may be taken which will jeopardize the lives of the Project Affected Peoples as against the environment in which they live. Whatever action is taken by the Government, must be taken only after ensuring that the rights of the affected peoples are protected. In theory, this principle is very idealistic. In reality, this principle is violated rather than followed in practice. That is probably because it is difficult to build development projects, while at the same time seeking to apply this Principle in practice.

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[182] *Id.*

## 2.5.3 EQUITY TOWARDS PRESENT AND FUTURE GENERATIONS

*Introduction*

Principles 3, 5, 6 and 7 reflect the various shades of equity as espoused by the Rio Declaration.[183] Principle 3 talks of intergenerational and intragenerational equity. Principle 5 discusses the duties of States to eradicate poverty in all parts of the world -- this is equity between nations, as it calls for an equitable standard of living between peoples in different nations. Least developed and vulnerable countries are in a special situation and deserve special attention. This is reflected by Principle 6. Concerns of equity are mirrored in Principle 5, which calls for equitable development among nations of the world and consequently, among the peoples in nations. The first half of this section deals with principles 3, 5 and 6. Principle 7, common but differentiated responsibilities, is dealt with thereafter.

Principle 3 states: [184]

> [T]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 5 states:

> All states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of

[183] *See* Jeffrey D. Kovar, *A Short Guide To The Rio Declaration*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 119, 126-127 (1993). Kovar explains the initiation of the equity provisions and how they came about in the Rio Conference, generally as a form of understanding between the Western countries, the Group of 77 and China.

[184] THE UNITED NATIONS, UNCED *supra* note 11.

> living and better meet the needs of the majority of the people of the world.

Principle 6 states:

> The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

Principle 7 states:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

*What Is Equity?*

Equity has been said to guide international standard setting and law making in the process of promoting a new socio-political order of sustainable development. It is meant to inform a general process of law reform, which will also "demand an appropriate adjustment of methods on the part of the science of international law."[185]

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[185]Konrad Ginther, *Comment On The Paper By Edith Brown Weiss, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 29, 30-31 (Winfried Lang ed., 1995). Ginther believes that the time is correct to rethink commonly existing notions beginning with that of sovereignty. He feels that restructuring the international legal order and thereby securing environmental justice will necessitate tremendous support from the main actors of society.

Equity or fairness has been defined as "equal treatment of equals, based on criteria which reflect general agreement in the community."[186] Equity has also been described as having originated from the idea of justice and as "a general principle directly applicable as law."[187]

The relationship between sustainability and equity has been explained by one researcher through the following three themes. They are: maximization of economic growth; economic growth in the context of the environment (which states that growth detrimental to the environment ought to be avoided); and understanding the impact that every day activities have on the quality of life.[188] The merger of equity and sustainability gives rise to the need to know more about the effects on the environment and the people (who may not only be the disadvantaged), as a consequence of actions made on behalf of sustainability.[189] This is an important interpretation. Its significance is that the equity-sustainability merger

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[186] R.I. MCALLISTER, RURAL ELECTRIFICATION POLICY: NEWFOUNDLAND & LABRADOR 13 - 18 (January 1979) (unpublished Report to the Board of Commissioners of Public Utilities, Province of Newfoundland, on file with this writer). The author proceeds to state that equity implies the equal treatment of equals, the community being called upon to define "what an equal is." Contrasting this definition of equity, is the definition of efficiency, which is explained as, "one from which no economic reorganization can result in an improvement in resource allocation. Alternatively, an efficient allocation of resources may be interpreted as one that does not contain any slack; that is, one where there is no way to reorganize production and distribution that would make anyone better off without making anyone worse off. In essence, this states that if society's scarce resources are to be allocated efficiently among the many alternative uses, the price of a commodity should be based on its marginal costs of production." It is important to note the contrasting differences to the definitions given by the author. The importance of the differences is that both equity and efficiency need to be balanced in a manner which will promote and encourage the public good.

[187] SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *supra* note 83 at 124. The concept of equity has been declared to "apply as part of international law to balance the various considerations which it regards as relevant in order to produce an equitable result." Sands further suggests that equity may function as part of international law in order to implement a particular rule. He believes that in the absence of detailed rules, equity fills the gap and gives the discretion of adopting the rights and obligations at a later point in time. This interpretation of equity is advantageous since it affords the discretion to fulfill the rights and obligations at some point in future.

[188] Kent E. Portney, *Environmental Justice And Sustainability: Is There A Critical Nexus In The Case Of Waste Disposal Or Treatment Facility Siting?*, 21 FORDHAM URB. L. J. 827, 830-832 (1994).

[189] *Id.*

results in attention being focused on the disadvantaged sections of society and also looks at the effects of development on them.

There are different types of equity that form a part of the legal landscape. They are intergenerational, intragenerational and environmental equities. Brief discussions follow with respect to each type.

*Intergenerational And Intragenerational Equity*

Intergenerational equity embodies the notion that the present generation holds the earth's resources in trust for future generations. Weiss declares that each generation is a guardian as well as a trustee of the planet for future generations and that each generation also gets advantages of a shared ecosystem. As a trustee, the present generation has obligations to protect the planet. The present generation has been given some rights to enable them to protect the planet. These rights include the fact that they make use of the resources of the planet, but only to a limited extent.[190] Intergenerational equity arises in the context of fairness among all generations. Weiss describes the concept as follows:[191]

> [A]s custodians of this planet, we have certain moral obligations to future generations which we can transfer into legally enforceable norms. Our ancestors had such obligations to us. As beneficiaries of the legacy of past generations, we inherit certain rights to enjoy the fruits of this legacy, as do future generations. We may view these as intergenerational planetary obligations and planetary rights.

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[190]EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 17 (1989). *See also* Edith Brown Weiss, *Intergenerational Equity: A Legal Framework For Global Environmental Change, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 385 (Edith Brown Weiss ed., 1992).

[191] WEISS, IN FAIRNESS TO FUTURE GENERATIONS *id.* at 21.

Further explaining the concept, she declares that the theory[192] calls for a minimum level of equality among generations. Her reasoning is that since each generation deserves to succeed to a planet and cultural resource base that is at least of the same level as that of the previous generation, "all generations are entitled to at least the minimum level that the first generation in time had."[193] The statement by Weiss may be considered to be "equal" to all parties and may be stated to be fair. It must be welcomed.

Referring to intragenerational equity, Weiss opines that industrialized countries and societies should donate to less industrialized countries for the costs that the less industrialized countries incur. This is because the industrialized countries are after all going to benefit by safeguarding the general environment and the natural resources. By doing so, they will be able to gain economically from the planet.[194] Of course, the industrialized countries will also gain from the benefits of development. This reasoning by Weiss is certainly equitable in nature. It must be welcomed. After all, as noted earlier, the North must make conciliatory gestures to reduce the rancor that exists between itself and the South. Weiss's suggestion will help in this reduction of conflict.

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[192] *Id.* at 22. Weiss describes the theory as containing two models, as extreme cases of the spectrum. The first is the preservationist model, which "if carried to its full extreme context of unspoiled ecosystems, would promote the status quo over any change." The second model is the opulent model, in which "the present generation consumes all that it wants today and generates as much wealth as it can, either because there is no certainty that future generations will exist or because maximizing consumption today is the best way to maximizing wealth for future generations." Weiss criticizes the second model as overlooking the long term degradation of the planet.

[193] *Id.* at 25. Weiss goes on to state that in reality, future generations may succeed to a richer "natural and cultural resource base," which means they are treated better than previous generations, and this is once again unequal in some way to the earlier generations. Weiss also puts forward the view that the reverse is also probable – that the latter generations are treated unequally, and in fact worse than earlier generations. She declares that "the notion of equality is consistent with the underlying premises of tenancy, stewardship and trusteeship: that assets must be conserved, not dissipated, by those responsible for them so that those coming after receive equal assets."

[194] *Id.* at 27-28.

*Principles 5 And 6*

Principles 5 and 6 may be explained in different ways. As beneficiaries of the planetary legacy, all members of the present generation are entitled to equitable access to the legacy. Intragenerational equity means that within one generation of human beings and other beings, all the beings have equal rights to gain from the results of resources being utilized as well as from enjoying a clean and healthy environment.[195] Intragenerational equity may be comprehended in the national and in the international sense. At a national level, it means "equal access to common natural resources, clean air in local airsheds, and clean water in national watercources and the territorial sea."[196] At an international level, it means equally allocating air, water and marine resources between all peoples. Boer refers to a recent analysis of intragenerational equity as "equity between the earth's inhabitants at any one time."[197]

According to Weiss, countries have begun to realize recently that poor people suffer a larger share of the environmental burdens. This realization is generally dismissed with the

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[195] BEN BOER, INSTITUTIONALIZING ECOLOGICALLY SUSTAINABLE DEVELOPMENT: THE ROLES OF NATIONAL, STATE, AND LOCAL GOVERNMENTS IN TRANSLATING GRAND STRATEGY INTO ACTION, *supra* note 59 at 320 - 321. The concept means that all peoples are assured of fundamental requirements, including a healthy environment, sufficient food and shelter, and cultural and spiritual fulfillment. To fulfill this goal, the author suggests that the industrialized countries transfer wealth and technology to the less industrialized countries. Boer concludes his observations by declaring that this concept is filled with political, economic, social and practical problems. If governments are to implement intragenerational rights, governments must seek to reorganize societies completely, including the manner in which businesses function and the way in which peoples consume goods. Boer's comment hits the nail on the head. He has raised a crucial point, relating to the consumption of goods among the societies in the industrialized countries. Apparently, the US delegation at the Rio Summit had made it clear to the delegations from the less industrialized countries that there was no possibility of discussing the consumption patterns of US citizens during any of the negotiations. This writer believes that unless and until this controversial issue is cleared up, it is not possible to have any fruitful negotiations to reduce the misunderstandings between the North and the South.

[196] *Id.* at 320.

[197] *Id.*

observation that given the choice between jobs and environmental protection, poor people prefer jobs. She feels that putting the choice that way raises a question of fairness, for wealthier communities rarely face that choice. She sees international law as a useful instrument "for setting forth the normative proposition that economic development should not take place on the environmental backs of the poor."[198] Weiss's suggestion needs to be considered with the seriousness that it deserves. For far too long, economic development has taken place on the environmental backs of the poor (from the colonial era to the present era, where the elite develop economically at the cost of the poor). It is time that this inequality stops. For this, it is necessary to keep in mind the earlier meaning given on equity, that there needs to be an innate sense of fairness in addressing development concerns in different sectors of society.

The questions that arise are: "How far into the future should one look? What assumptions should we make about the needs of future generations? Further, are we only talking of application to human generations?"[199] Although there are no firm answers to these questions, it may be stated that it is only fair to be considerate and look well into the future. Sustainable development is a process that is not just one generation long; rather, it is a process several generations long and the present generation must keep this factor in mind.

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[198]Edith Brown Weiss, *Environmental Equity: The Imperative For The Twenty First Century, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 17, 22-23 (Winfried Lang ed., 1995). Weiss also states that the present generation has a bias in favor of itself. *See also* Robin Morris Collin et al., *Where Did All The Blue Skies Go? -- Sustainability And Equity: The New Paradigm,* 9 J. ENVTL. L. & LITIG. 399, 437-438 (1994). The authors note that environmental racism, environmental equity and environmental justice portray the same set of dynamics. Sustainability, they say, "must evolve as law, policy, and as an ethic in the context of stark reality."

[199] BOER *supra* note 59 at 320.

*Environmental Equity, Environmental Policy And Sustainable Development*

The term equity used in the environmental context has been defined as "principles of international ethics to be applied and to give direction to a process of fundamental legal change, ultimately leading to a new order."[200] The term environmental equity has also been used to mean environmental policy, its administration and the need to amend such policies to include vulnerable communities who have been previously left out from in policy decisions concerning the environment.[201] The importance of environmental equity for this thesis must be noted. The need for vulnerable communities to be considered in the policy making process needs to be particularly kept in mind. As discussed earlier, vulnerable communities (who form a part of Project Affected Peoples) are one of the focal points of this thesis and they certainly need to be a part of the decision making process, for any viable and long term sustainable development process to take effect.

Tarlock attempts to create a legal and policy outline for environmental decision making, by involving within such a decision making process equity principles. He suggests four ways to incorporate equity concerns into environmental policy: (1) increased recognition of legitimate individual and group property claims; (2) increased sensitivity to equity claims in

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[200] KONRAD GINTHER, *supra* note 185 at 29, 30.

[201] Robert William Collin et al., *Equity As The Basis Of Implementing Sustainability: An Exploratory Essay*, 96 W. VA. L. REV. 1173, 1177 (1994). In order to plan for sustainability, the authors declare that human being must get used to surviving within the limits of the resources present in the planet at present. This raises related political, social, and economic questions as to the conservation and sharing of the environmental resources. Other questions which also arise are those related to equity, justice, and fairness. In the sustainable global community, all human beings are as strong or are as weak as anyone else. The authors believe that to benefit the sustainable global community, the insertion of equity principles into the sustainable development debate is very important. This point for the purpose of this thesis is important. The infusion of equity principles into the sustainable development debate alone can assure fairness and viability of the goal to be achieved.

environmental impact analysis; (3) a focus on sustainable development and (4) the use of subsidies for environmental protection and equity.[202]

*Common But Differentiated Responsibilities*

Principle 7, common but differentiated responsibility, also reflects principles of equity. It has been revealed that during UNCED, the negotiation for Principle 7 was the most "acrimonious and bipolar debate."[203] The debate focused on the following issues: first, if the Rio Declaration should consider within its scope the concept of common responsibility and second, if it was correct for the Declaration to be "specific and accusatory" and describe the basis for the differentiation of responsibilities.[204]

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[202] *See* A. Dan Tarlock, *Environmental Protection: The Misfit Between Equity And Efficiency*, 63 COLO. L. REV. 871, 884, 889-891 (1992). To illustrate the subordination of equity to efficiency, Tarlock cites the case of the James Bay hydroelectric development project in Quebec. In 1971, the Cree Tribe sought to enjoin the construction of the first phase of the project in an effort to protect their aboriginal hunting and fishing rights. The trial court issued the injunction, but was reversed on appeal. The Quebec Court of Appeals, gave great weight to the need for hydroelectric energy and little, if any, weight to the Indian's cultural claims. Tarlock believes that the problem has since been addressed through increased sensitivity procedures. The author also explains the meaning of the term "sensitivity equity in environmental analysis." Accordingly, "sensitivity is a procedural rather than property solution to the problem of incorporating equity arguments. It recognizes equity claims, generally expressed by communities, represent legitimate concerns. Existing assessment procedures are primarily scientific processes and thus neglect cultural, social, equity claims which are difficult to quantify." He also believes that "equity can also be promoted by allowing those people who are affected by an activity justified in the name of efficiency to veto the activity." Referring to the concept of sustainable development, in relation to equity and efficiency, he declares that "sustainable development is the environmental community's attempt to put real humans back in the landscape and to harness economic incentives to implement environmental objectives." Sustainability, he declares, "means cajoling communities who may not have been treated well in the past to take part in present efforts at environmental protection, even if the past may make it problematic for such peoples to fully be part of the sustainability goal. Providing the required means to attract participation of members includes respecting the properties that such peoples are entitled to." Tarlock's explanation is extremely important. As noted above, participation of the local communities, in particular, the Project Affected Peoples to participate in the sustainable development process will assure the success of the process in the long term. The participation of the affected peoples and local communities alone will make the process appear as equitable and fair.

[203] Ileana Porras, *The Rio Declaration: A New Basis For International Cooperation?, in* GREENING INTERNATIONAL LAW 28 (Philippe Sands ed., 1994).

[204] *Id.* at 28-29. Porras interprets Principle 7 in two different ways. Firstly, Principle 7 means differentiated responsibility to States depending on levels by which they can cause injury; secondly, the principle links differentiated responsibility with the varied capabilities of States.

Common responsibility has been stated as being cogently connected to the principles of "common good, common interest or even to common concerns of mankind."[205] Principle 7 has been stated to have originated from "the application of equity in general international law," and from the realization that the special needs of developing countries need to be considered in the "development, application and interpretation of rules" relating to international environmental law.[206]

This principle contains two elements. The first concerns the common responsibility of states to safeguard the environment at all levels in the globe, including at the regional and national levels. The second element has been described as the necessity to consider differing circumstances, specifically keeping in mind each state's contribution in establishing a specific environmental problem and its ability to prevent, reduce and control such a problem. Referring to the application of the concept in practical terms, Sands notes that firstly, it assures all states to take part in "international response measures aimed at addressing environmental problems."[207] Secondly, he states that putting the concept into

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[205]TIMONSHENKO, FROM STOCKHOLM TO RIO: THE INSTITUTIONALIZATION OF SUSTAINABLE DEVELOPMENT *supra* note 85 at 154 (Winfried Lang ed., 1995). The author states that even if the concepts mentioned have not enjoyed a common interpretation, they are already known in the context of general international law and international environmental law.

[206]SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *supra* note 83 at 217. *See also* WIRTH, THE RIO DECLARATION ON ENVIRONMENT: TWO STEPS FORWARD AND ONE BACK, OR VICE VERSA? *supra* note 149 at 649. He gives the genesis of this principle. Wirth notes that the United States recorded an interpretative statement of principle 7 which stated: "...the United States does not accept any interpretation of principle 7 that would imply...any diminution of responsibilities of developing countries." Wirth believes that if this interpretation is accepted, it can inject an explicit double standard into customary international law of the environment and sustainable development. This writer endorses the viewpoint made by Wirth. Certainly, it appears that if the above interpretation is used, then, it will only serve in exacerbating the differences between the North and the South.

[207] SANDS *id.*. at 217-218.

practice may result in the formation of environmental standards that impose varying responsibilities on different states.[208]

Common responsibility has been defined as "the shared obligation of two or more states towards the protection of a particular environmental resource, taking into account its relevant characteristics, nature, physical location, and historic usage associated with it."[209] Differentiated responsibilities of states for the protection of the environment has been described as "translating into differentiated environmental standards set on the basis of a range of factors, including special needs and circumstances, future economic development of developing countries, and historic contributions to causing an environmental problem."[210]

*Application Of The Equity Principles: Some Concluding Views*

The concept of equity simply means that there needs to be fairness, universality and equality in dealing with peoples of different strata when making decisions that are likely to affect them. Vulnerable communities are generally at the receiving end of decisions, in which they have little or no say. The interface of sustainability and equity means that if a development project is found to negatively affect vulnerable communities, then, I believe that such a

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[208] *Id.*

[209] *Id.*

[210] *Id.* Sands notes that the "special needs of developing countries, the capacities of all countries, and the principle of common but differentiated responsibilities has also resulted in the establishment of special institutional mechanisms to provide mechanical, technological and other technical assistance to developing countries to help them implement the obligations of particular treaties."

project is unsustainable and inequitable. This may be the case even if the project is supposed to benefit certain sections of society.

Many projects are funded by institutions such as the World Bank. In such cases, the concept of equity transcends national boundaries. It necessarily must reach out to the donors who are the citizens of the industrialized countries putting in money into the bank, so that they know where and how equitably their money is being spend. It is only when the donors know therefore, that they may be prepared to do something about the situation, when they find that their money is being misused in less industrialized countries. Equity is international in all its aspects.[211]

The question posed earlier in the thesis: "development at whose cost?" may be revisited in this section. Equity demands that there be fairness in decisions related to developmental issues between the haves and the have-nots. Many a time, it is a tussle between the rich and poor to have the benefits of a development project. The establishment of a project and its

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[211] *See* DALY, TOWARD SUSTAINABLE DEVELOPMENT: IN OUR COMMON INTEREST *supra* note 94 at 166. Daly gives the barriers to sustainable development, seen from the equity context, as state sovereignty and the financial ramifications of having such a development. She cites the proclamation in 1962 of the United Nations General Assembly, which declared that "the right of every state to dispose of its natural wealth and resources should be respected." Although this Proclamation is not legally binding and is soft law, Daly states that it has been relied upon by international tribunals. The only limits to state sovereignty, she declares are the "duty of states to prevent, reduce and control pollution and the duty to cooperate in mitigating environmental risks and emergencies."

However, it must be noted that as detailed in the next chapter, the United States Congress was one of the bodies which took a great interest in the running of the World Bank and listened to the complaints of NGOs protesting against environmental decisions of the Bank. In fact, the Congress applied pressure on the Bank management threatening stoppage of funds if the Bank did not establish an independent Panel to redress grievances. Therefore, the application of pressure from the US Congress is an instance where an external third party has brought pressure on the Bank to enforce an equitable standard in other countries.

long term benefits may well benefit the higher strata of society. It may be appropriate to quote Weiss once again here, who states as follows:[212]

> The duty to ensure equitable use applies in theory within States as well as between States. Within countries, there are often serious problems of access of rural peoples to their surrounding natural resources, since these are frequently harvested for the benefit for the benefit of urban areas in the country. The planetary obligation to ensure equitable use would require that impoverished people be given reasonable access to natural resources, such as fresh water or arable land, or to their benefits.

However, the mere existence and the process of establishing such a project may be extremely unsustainable for the local communities in that area. This unsustainability is also consequently inequitable and such an effort must be abandoned. That is the real result of not fulfilling the conditions of "sustainable equity."

### 2.5.4 ENVIRONMENTAL PROTECTION AS AN INTEGRAL PART OF THE DEVELOPMENT PROCESS

Principle 4 of the Rio Declaration states the following:

> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

One author believes that integration is a "two edged sword." On one hand, Principle 4 may be interpreted by stating that ecological barriers also be considered when formulating a development policy. On the other hand, Principle 4 may be interpreted to mean that it does not support an environmental policy process, if the process does not agree with the

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[212] EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 59 (1989).

conditions of economic development.[213] Sands declares that Principle 4 may also be interpreted as allowing or necessitating the bunching together of environmental criteria with development assistance programs by development actors.[214] The point to be noted is that Principle 4 can be interpreted in many ways, as given above. The interpretation of Principle 4 in different ways, may lead to varied results, including results that may or may not benefit the environment. Therefore, the most advantageous interpretation to assure the full composition of environmental and developmental concerns (to have a measured sense of development, taking into consideration the environmental effects), alone must be adopted in any policy making process.

Integration has been interpreted in at least five different ways.[215] The first refers to "external integration" (where various sectors at the national and international spheres are considered by integrating their concerns in the policy making process).[216] The second refers to "internal integration." (where a unified agency may be placed in charged of coordinating all the work for the government, to ensure that there is full integration of the environmental

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[213]PALLEMAERTS, INTERNATIONAL ENVIRONMENTAL LAW IN THE AGE OF SUSTAINABLE DEVELOPMENT: A CRITICAL ASSESSMENT OF THE UNCED PROCESS *supra* note 59 at 632.

[214]SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *supra* note 83 at 51 (1994).

[215]David VanderZwaag, *The Concept And Principles Of Sustainable Development: "Rio-Formulating" Common Law Doctrines And Environmental Laws*, 13 WINDSOR Y.B. ACCESS TO JUSTICE 39, 44-45 (1993). The author states that integration may be sought through comprehensive environmental legislation, overcoming fragmentation and by mandating that government departments integrate environmental considerations in all decisions. *Id.* at 80.

[216] *Id.* External integration has been explained as the need to include all policy sectors at both national and international spheres, namely, finance, energy, agriculture, and trade, in order to ensure that their plans, programs and budgets integrate economic and environmental concerns. VanderZwaag believes that Principle 4 is an example of the general notion of external integration. The author also identifies environmental assessment review as a "future critical lever" for external integration. *Id.* at 71.

and developmental concerns).[217] The third refers to the term as meaning "interdisciplinary integration" (where lessons from various disciplines need to drawn together to have a holistic effect).[218] The fourth use refers to the necessity for "international cooperation and coordination in environmental management" (to have a healthy understanding of environmental management at both the national and international levels).[219] The fifth use is the need to "manage competing uses in a given area" (where there is a need for efforts by policy makers in the international arena towards integrating the concerns of the environment and development).[220] It may be possible to use some of these approaches in the policy making process in both the national and international fields. A decision as to which approaches to use will depend on the particular circumstances thus meriting the use of a particular approach. A combination of some these approaches will also be helpful. The necessity to have the above approaches arises because, the task of having a healthy balance between the right to development, on one hand, and environmental protection, on the other may become easier.

Principle 4 declares that environmental protection and development are integrated with each other and cannot be considered in isolation. The Principle seeks to make this integration

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[217] *Id.* Internal integration has been interpreted as the need to overcome fragmentation in departmental responsibilities and permitting processes for air, water and land pollution through consideration of cross-media effects and a coordination of governmental control efforts through a unified agency.

[218] *Id.* This term means that in achieving a balance between environmental and developmental goals, lessons must be drawn from disciplines including sociology, engineering, political science, law, economics and ecology.

[219] *Id.* This term has been interpreted as focusing on a harmonized approach to environmental management at both the national and global levels.

[220] *Id.* This term refers to the need for international recognition and for integration of economic and environmental concerns.

very clear because of the scant respect that development has had for the need for environmental protection over the past several years. This principle may be interpreted to mean that although it is accepted that development is a reality that cannot be ignored, it is possible to ensure that only healthy development is encouraged by having adequate protection of the environment.

In the context of development projects generally, the importance of Principle 4 cannot be overemphasized. As later cases will show, the merging of environmental protection and development is essential to prevent lop-sided development from taking place.

### 2.5.5 PUBLIC PARTICIPATION

Three principles in the Rio Declaration discuss the issues relating to public participation. They are Principles 10, 20 and 22. While Principle 10 discusses the principle of public participation in relation to environmental issues and the participation of concerned citizens at the relevant levels, Principle 20 focuses on the participation of women in environmental management and development. Principle 22 focuses on the participation of indigenous peoples and other local communities in environmental management and development. An analysis of the Principles follows after they have been stated. Thereafter, the principles are sought to be applied to development projects. Discussions on two other issues relating to public participation, community based resource management and co-management, are incorporated in the analysis. A brief note on the role of non-government actors in influencing and encouraging public participation is also included.

*The Rio Principles*

Principle 10 states:

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

Similarly, Principle 20 states:

> Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.

Also, Principle 22, on the same lines states:

> Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

*Interpretations Of Principle 10*

Principle 10 has been interpreted in different ways. In particular, the question has arisen if the term incorporates within it a requirement for "direct access" to International Agencies by individual citizens or not. It has been opined that Principle 10 does not contain the

words "direct access" or International Agencies. Therefore, it is unclear because it does not give all the options that are possible for concerned citizens to redress their grievances.[221]

The declaration is silent as to the "access to information" that will be considered "appropriate." Agenda 21 provides some guidance on this aspect. It provides that "individuals, groups and organizations should have access to information relevant to environment and development which has or is likely to have a significant impact on the environment, and information on environmental protection measures."[222]

Principle 10 is said to contain elements of the concept of "international consensus."[223] Although international consensus does not appear as a term in Principle 10 and has not been defined, it may be interpreted to mean the agreement and understanding reached between nations on an issue such as public participation.

Different views of the importance of Principle 10 have emerged. It strengthens the relationship between issues relating to public participation, a democratic set up and

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[221] WIRTH, THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: TWO STEPS FORWARD AND ONE BACK, OR VICE VERSA *supra* note 149 at 645. The meaning of the term "at the relevant level" has been debated – does the term incorporate within it a "direct access" to International Agencies by individual citizens? Wirth contends that the position on this aspect is unclear and declares that the reason for limiting the principle to "information concerning the environment" is equally unclear. Also, the term "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided," has also been stated in earlier United Nations affirmations on this issue in the environmental arena. However, Wirth declares that Principle 10 is a substantial innovation with little precedential motivation.

[222] AGENDA 21 *supra* note 79 at paragraph 23.3.

[223] Neil A.F. Popovic, *The Right To Participate In Decisions That Affect The Environment*, 10 PACE ENVTL. L. REV. 683, 687 (1993). *See also* Robert D. Hayton, *The Matter of Public Participation*, 33 NAT. RESOURCES J. 275 (1995). Hayton discusses the issues relating to strengthening of the provisions of public participation by the International Joint Commission and the International Boundary and Water Commission.

environmental management.[224] This writer believes that the importance of public participation is its relation to a democratic set up and environmental management. This is because people's participation in a full and free manner is one of the core components of public participation. Unless and until there is a proper management structure for the environment, it will be very difficult to make useful progress in protecting the environment. A good democratic set up, by having full and free public participation, it is hoped, will help in creating a sound environmental management structure.

*Principles 20 And 22*

Principles 20 and 22 focus on the participation of particular groups of the populace, namely women and indigenous and other local communities. Principle 20 declares that women's participation is essential to the development process. The importance of women in the policy making process needs emphasis. In many societies and countries, women take the brunt of the household work. The idea behind Principle 20 may be stated to be that if women are given a greater say and role in the decision making process, they will take decisions that are correct and in the best interests of the family, better than the decisions reached by the men in the household. That is the reason Principle 20 states that their role is vital in environmental management and development. That is also the reason Principle 20 declares that the full participation of women is essential to achieving sustainable development. The usage of the term "essential" here means that without their participation

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[224] David A. Wirth, *Reexamining Decision-Making Processes In International Environmental Law*, 79 IOWA L. REV. 769 (1994).

and co-operation, sustainable development cannot take place. This writer agrees with this interpretation as well. The terms "vital" and "essential" reflect their importance.

Principle 22 emphasizes the participation of indigenous peoples and other communities.[225] The participation of indigenous communities is essential to the development process. Generally, women, children, indigenous peoples and vulnerable communities bear the burden of social problems in many less industrialized countries. Therefore, it is essential to include their opinions in the decision-making process. That is the importance of Principle 22. It tries to assure a right that all peoples in different strata of society, especially the underprivileged, will have an important role to play in the policy making process.

*What Is Public Participation?; What Are The Types Of Participation?*

The meaning of participation has been said to involve a real and true interchange of views and ideas related to the policy making process.[226] It has been stated that the right to participate does not solely assure the right to effective participation.[227] The term "effective

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[225]*See* Daniel D. Bradlow, *Human Rights, Public Finance & The Development Process: A Critical Introduction*, 8 AM. U. J. INT'L L. & POL'Y 1, 12 (1992-1993). Bradlow believes that in reality, all individuals and all communities irrespective of their stature, but specifically the peoples at the lower strata of society, must take part in the development process. There is a need to concentrate on the vital role of peoples so that they are able to have access to national and international information in order to be able to make informed decisions. As noted earlier, this is a vital point. The importance of the lower strata of society must be kept in mind and their role in the policy making process is extremely important to any decisions being made, particularly if the decisions are to be a success in the long run.

[226]BOER, INSTITUTIONALIZING ECOLOGICALLY SUSTAINABLE DEVELOPMENT: THE ROLES OF NATIONAL, STATE, AND LOCAL GOVERNMENTS IN TRANSLATING GRAND STRATEGY INTO ACTION *supra* note 59 at 332-333. Boer quotes the International Union for the Conservation of Nature which states that: "Horizontal participation across sectors and geographic regions has to be complemented by vertical participation from national to local levels." The IUCN introduces new elements into the debate, such as, "participatory inquiry, communications/information and education campaigns, round tables and special committees, which are expected to have great impacts on the process. It is a mistake to imagine that participation is entirely a non-government affair. Ultimately, governments need to find appropriate roles as facilitators in participation, and hence to continually increase the effectiveness of strategies."

[227] *Id.* at 691.

participation" has been interpreted to include the components of: environmental education; ready availability of information; the ability to participate in some way in the policy making processes; openness of the process; the ability to study and learn from the mistakes of a project after it is completed; and redressal of grievances through independent judicial institutions.[228]

At this stage, two forms of participation need to be discussed. They are popular participation and meaningful participation.[229] "Popular" participation has been defined as "a process by which people, especially disadvantaged people, influence decisions that affect them. It also refers to both the absolute poor and to a wider range of people, who are disadvantaged in terms of wealth, education, ethnic group or gender."[230] One question that has been put forward is whether popular participation is an absolutely core component of sustainable development.[231] It may be stated that participation as such is a core component of the sustainable development process. However, it cannot be stated that popular participation is a core component of the sustainable development process. This is because participation as a process is voluntary. If the Project Affected Peoples and local communities wish to participate in any project, they may do so. It is certainly not

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[228] POPOVIC *supra* note 223 at 690-691. Popovic also declares that to be able to really educate and give rights to the public, the right to access to information means that such information must be user-friendly and must be capable of being understood by the individuals using them. Such means must encourage participation.

[229] *Annex 2: Common Vocabulary Paper, in* PARTICIPATORY DEVELOPMENT AND THE WORLD BANK 177 (Bhuvan Bhatnagar et al., eds. 1992).

[230] *Id.*

[231] BRADLOW *supra* note 225 at 5, 11. Bradlow questions if popular participation is indeed a core component of sustainable development, and, "whether human rights, the environment and economic development organizations and practitioners share a common definition of popular participation." He also wonders how this common concern may be implemented.

mandatory for them to do so. Further, it is entirely up to the Project Affected Peoples and other communities involved whether or not they wish to participate. If they wish to have a say in the policy making process which directly and indirectly affect their lives, then, they ought to participate in the process. If the PAPs and local communities wish to make the participation a grand success by participating as a majority or in a way that makes it popular, then participation contributes as a component to the sustainable development process.

Meaningful participation has been defined as "providing people with an opportunity to communicate their opinions on developmental policies affecting them to the relevant decision makers."[232] Meaningful participation is a perception on the part of the peoples who participate and make the participation process a success. While participation as such is an essential component of the sustainable development process, meaningful participation is not an essential component and must be left to the wishes of the local peoples and communities.

The next question that arises is: "What is public participation?" Participation has been stated to mean a process that "influences development decisions and not just involvement

[232] *Id.* He opines that "centrality of popular participation to development poses the further question of whether popular participation should be seen as a means to achieving development or as a goal of development." He coins the term, "operationalising participation", which means "translating the essential element of development into universally applicable standards that can be used to test the degree of participation in any development policy or project. Identifying acceptable participation is difficult, because there is neither a universally acceptable definition of participation, nor an agreement on it's function in development."

in the implementation or benefits of a development activity, although those types of involvement are important and are often encouraged by opportunities for influence."[233]

Public participation involves participation in both administrative and judicial forums. A fair and free judiciary in any society helps protect the rights of the common person. Participation in judicial forums is very essential for the voices of the Project Affected Peoples to be heard. If there is a lack of participation in such forums, then it may be very difficult for such forums to be successful. Participation in judicial forums will ensure that the voices of the Project Affected Peoples are heard and that any decision passed by such forums would have taken into account the grievances raised by the affected persons.

It would be simplistic to state that public participation involves simply participation by the public and local people. There are several more components of participation than just that. For example, the following three forms of participation identified by Roark may be mentioned here, as being components of the larger process of participation in addition to simply being participation by local peoples (in a narrow context).[234] They are mobilization,[235] community or international development[236] and empowerment.[237]

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[233] ANNEX 2: COMMON VOCABULARY PAPER *supra* note 229 at 177.

[234]Paula Donnelly Roark, *Participation & Empowerment In Africa*, 8 AM U. J. INT'L L. & POL'Y 121 (1992-1993). *See also* Cynthia C. Cook and Paula Donnelly-Roark, *Public Participation In Environmental Assessment In Africa, in* ENVIRONMENTAL ASSESSMENT AND DEVELOPMENT 84 (Robert Goodland and Valerie Edmundson eds., 1994), for a further discussion and analysis on public participation.

[235]In this form, external actors control the main decisions but the local community continues to take part in implementing the external actors' plans and aims.

[236] Here, external experts identify a problem and also work hand in hand with the local community to find a solution. The community takes part in designing and constructing the development projects and strategies.

*Application Of The Definitions*

Public participation, as embodied through Principles 10, 20 and 22, is among the most important themes of the Rio Declaration, relating to development projects. This is because public participation in projects lends the legitimacy that such projects require. The voices of the local communities are to be incorporated into the decision making process. This will ensure that the project is equitable, as it has the sanction of the local communities who have given their approval to it.[238]

With reference to development projects, monitoring and evaluation of participation must not remain just a process. Monitoring and evaluation should be done in order to strengthen the project process and to advance the positive effects of the projects.[239] Specifically with reference to development projects funded by the World Bank, the implications for the Bank to incorporate participatory approaches within its functioning have been described as: (1)

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[237] ROARK *supra* note 234. Here, the community identifies the problems as they occur and they establish a certain criteria and a classification in constructing answers to such problems. The community runs the entire show while the external actors provide only the technical assistance. Roark also argues that empowerment is the sole and real representation of popular participation as it permits communities to shape their own lives instead of depending upon external actors to shape it for them.

[238] *See* Celia R. Taylor, *The Right Of Participation In Development Projects*, 13 DICK. J. INT'L L. 69, 69, 70 (1994). Taylor introduces the concept of popular participation as "the principal means by which individuals and peoples collectively determine their needs and priorities and ensure the protection and advancement of their rights and interests." Taylor analyzes the necessity of incorporating participation in development projects and recommends ways and means for the World Bank to give actual effect to participatory methods. Popular participation is but one interpretation of the term "participation." Popular participation ensures that a larger number of peoples at the grass-root level take part in the decision making process. This is very important if the development project is to benefit all sections of society.

[239] Norman Uphoff, *Monitoring And Evaluating Popular Participation In World Bank-Assisted Projects, in* PARTICIPATORY DEVELOPMENT AND THE WORLD BANK 135, 135-136 (Bhuvan Bhatnagar et al., eds. 1992). The author states that participation is to be regarded as "both a means and as an end." Peoples taking responsibility for their own development is a better way to achieve improvements in economic and social conditions. Such a measure is touted as being more successful, cost-effective and more sustainable. Participation then also becomes desirable, because it increases human potential, which is said to be among the most fundamental aims of the development process. *Id.* at 85. This interpretation by Uphoff infuses a different kind of an interpretation into the policy making process. Participation where all the peoples are able to take part actively and increase their potential through such participation ensures that participation is successful by benefiting both the local peoples and the project.

focusing on capacity building rather than solely achieving targets; (2) ensuring that the project cycle incorporates components of participation from the initial stages; (3) implementing "design and implementation in a learning-process mode;" (4) functioning by less bureaucratic methods; and (5) strengthening the components of participation at the local levels and in realizing the fact that targeted beneficiaries will be able to give much more than just their money or their physical labor to make the project a success.[240] Monitoring, evaluation of projects and participatory approaches are among the most crucial components of public participation. They need to be taken into account if public participation as a principle is to be successful when applied to development projects.

Imposition of a project on the local people and communities in the name of development does not give it the legitimacy that a project demands. This is because, once again, the question that needs to be answered is: "Development at whose cost?" Why should the local communities be forced to part with their livelihoods, be forced to translocate and so on, if the project does not help them in any way? Such forced parting of the local peoples with their livelihoods and being forced to translocate may be the result of poor participation. Probably if there was full-scale participation on the part of the local peoples and communities in the development project, then, the voices of the peoples who are heard may make a difference and the severity of the consequences may be lessened. However, just because the local communities and peoples participate in the development projects in a complete manner, it does not mean that the effects of the development project on the local

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[240] *Id.*

peoples and communities will be any less severe. The chances of the severity being less increase with fuller participation.

However, if the project does take into account the aspirations of the local communities and incorporates their views in the decision making process, then it is quite possible that the project may benefit them and therefore, actually be useful to their lives. It is not enough if one declares that a project must benefit a mere majority of numbers. For example, a dam project may be shown to benefit over 300,000 people several hundred kilometers away. But, the same project may displace 100,000 people from their habitat. Once again, it is not enough to say that just because the dam project is benefiting a majority group, the project must continue, despite the discontent of the local communities. In such a case, if a project does continue, then there is no public participation and rather, it is an imposition of the views of policy makers on the communities, without giving them any chance to have a say in the policy making process. Lack of public participation is likely to make a project unsustainable and therefore, such a project must be stopped.

One method of encouraging public participation in practice is by having wide publicity about the development project. Wide publicity is to be given to the fact that a development project is taking place and wide publicity is to be given to the fact that views of the community are required. This publicity must also ensure that enough time is given to the local communities to prepare themselves for it. The publicity may be made in the following ways: advertisements in the vernacular press, advertisements on the radio, television, and by

public announcements. The information giving such publicity and also the information on the project must be in the language(s) that may be understood by the local communities. All information on the project must be available at a specified site for a particular period of time. These timings, the site location and the period of time must also be publicized.[241]

Participatory approaches are believed to positively affect governments for the following reasons.[242] Governments get proper data and representative information about the needs, priorities, and capacities of local peoples and the effect of government policies on their lives. Governments modify projects in a way acceptable to the lives of the local peoples and communities. Governments are able to understand what is required from their side, enabling them to respond to the needs of the communities better. Also, governments are able to substitute and supplement unavailable government resources with local resources; and they are benefited when the public identifies and realizes the achievements of the government in trying to help them.[243] The effect that public participation has on government is very important. Public participation helps government be more sensitive and

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[241]The package must also include site visits by the local people sponsored by the authorities. Further, communities must be given the opportunity to question the project authorities on the viability of the project and on whatever else the communities may have doubts on. The action that is to be taken on the queries of the local people must be given in advance – as to what will be done with the concerns and so on. The action taken reports (ATRs), if any, must be shown to the public so that they know what the results of their queries are. Public participation also means that adequate judicial remedies should exist for the public to take their cases to the Court, if they wish to appeal their cases in Courts.

[242] Bhuvan Bhatnagar and Aubrey C. Williams, *Introduction, in* PARTICIPATORY DEVELOPMENT AND THE WORLD BANK 4 (Bhuvan Bhatnagar et al., eds. 1992).

[243] *Id. See also* Bhuvan Bhatnagar, *Participatory Development And The World Bank: Opportunities And Concerns, in* PARTICIPATORY DEVELOPMENT AND THE WORLD BANK 13 (Bhuvan Bhatnagar et al., eds. 1992); Thomas Dichter, *Demystifying Popular Participation: Institutional Mechanisms For Popular Participation, in* PARTICIPATORY DEVELOPMENT AND THE WORLD BANK 89 (Bhuvan Bhatnagar et al., eds. 1992); Thomas F. Carroll, *Capacity Building for Participatory Organizations, in* PARTICIPATORY DEVELOPMENT AND THE WORLD BANK 109 (Bhuvan Bhatnagar et al., eds. 1992), for more discussions and analysis on participation in development projects.

responsive to the needs of the local peoples. It also helps governments to shape policies according to the needs of the local peoples. Wrong policies may be corrected and policies that are on the right track may be further improved.

*Concluding Views*

As noted above, participation has several components within it and has been interpreted in different ways. There is no certain methodology to assure either popular or meaningful participation. Also, in a democratic society, there is no process of compelling Project Affected Peoples to participate in the decision making process.[244] It is difficult to choose just one form of participation that is the "best." Rather, the form of participation that best encourages the local communities to participate in decisions, simultaneously benefiting development projects and being beneficial to the lives of the local communities is the form of participation that I would choose as a core component of the sustainable development process. The Rio principles related to public participation mentioned earlier do not deal with the various forms of participation mentioned here. It is not possible for the principles to go into such detail. Rather, it is necessary to interpret the forms of participation in many different ways, so as to suit the needs of the local peoples and communities.

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[244] Vulnerable groups are also at the receiving end of development policies. Their heritage, their way of life is at stake. Their participation in the development process is absolutely essential to giving legitimacy and for equity's sake in development policies. Many a time, local communities are well represented and cohesive in their protests, often being led by non-government organizations and other activists. The local communities are many a time illiterate. However, the activists are often educated and are assisted by lawyers. The activists and NGOs ensure that the local communities fully participate and are duly heard. Their importance cannot be over emphasized.

The following sub-section will discuss two additional issues relating to public participation: community based resource management and co-management and their importance to development projects. The necessity to incorporate them arises because public participation deals with the participation of a larger group of peoples, at both the micro and at the macro levels. The following two issues deal with the participation of the immediate communities affected by a development project, focusing on participation at the local level, thereby being a part of the public participation debate.

### 2.5.5.1 Community-Based Resource Management And Co-Management

*Community-Based Resource Management*

Community-based resource management ("CBRM") has been "conceived as a process by which people themselves are provided the opportunity and, or responsibility to manage their own resources, define their needs, goals and aspirations and make decisions affecting their well being."[245] The key components in CBRM are community, resources and management.[246] The CBRM process is fundamentally "oriented to begin with opportunities rather than constraints."[247] It recognizes that "technical, social, economic, political and

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[245]COMMUNITY-BASED RESOURCE MANAGEMENT: PERSPECTIVES, EXPERIENCES AND POLICY ISSUES 5-7 (Francisco P. Fellizar ed., 1993). CBRM is said to "recognize that development involves specific resources and peoples. Within a particular setting or context, the quality of life of the population is largely a factor of resource endowment and the manner in which these resources are allocated by humankind. Analysis of CBRM involves treatment of technology and institutions as factors impinging upon population-resource interaction." CBRM as a strategy has been described "as emphasizing the significance of considering or specifying a particular locale or setting where people-resources interaction takes place." It is also said to promote community centered and long term goals.

[246]*Id.* Other essential elements have been described to include community access and control over resources, proper resource value, viable organization and availability of suitable technology.

[247]Manuel F. Bonifacio, *Perspective And Experiences In Community-Based Resource Management, in* COMMUNITY-BASED RESOURCE MANAGEMENT: PERSPECTIVES, EXPERIENCES AND POLICY ISSUES 13-14 (Francisco P. Fellizar ed., 1993). Bonifacio gives a development perspective to the CBRM debate. He states:

psychological" components are essential to its functioning. It has also been described as a "goal oriented action, influenced by a long history of socio-economic and political relationship," aided by support from local peoples and other community organizations.[248] It is a development approach that aims in helping local peoples participate in community issues, thus also aiding them in efforts in getting equitable control of their resources.[249] The following six principles, as part of the CBRM process relating to sustainable development, may be quoted here as indicators of the type of development that a nation state needs:[250]

1) The principle of cultural and social integrity of development to grow within and not be imposed from the outside world;

2) Development to be compatible with and restore diversity, and rely on sustainable forms of resource use;

3) Development to provide the basic necessities of life and secure living conditions for all people, promote equity, and avoid unequal exchange;

4) Development to foster self-reliance, local control over resources, empowerment and participation by the underprivileged and marginalized, and opportunities for action which people can feel is fulfilling;

5) Development to be peaceful, both in the direct sense (the non-use of physical sense) and in the structural sense (violence as embodied in the institutions of society); and

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The development debate is focused on increasing the existing opportunities available in the community. As a result, it is stated that the research approach is not oriented at changing the technical resources of community groups. Rather, its primary role is to discover ways by which such technical resources can be improved. Improvement rather than change is touted as the main concern.

[248] *Id.*

[249] *Id.*

[250] Benjamin J. Bartolome, *Breaking The Barriers To People's Development: The Human Ecological Approach To Community-Based Resource Management, in* COMMUNITY-BASED RESOURCE MANAGEMENT: PERSPECTIVES, EXPERIENCES AND POLICY ISSUES 16, 20-21 (1993).

6) Principle of error friendliness: that is, development to allow for mistakes without endangering the integrity of the immediate ecosystem and resource base.

The importance of the six principles stated above must be emphasized. Each of the six principles, in one way or another, focuses on the advantages of local development as opposed to development imposed on the local communities from outside agencies. As stated earlier, the key components of CBRM are community, resources and management. The principles focus on the importance of community, local resources and management of these local resources by the local community itself. Development must come from within and any imposition of development from outside, without taking into account the unique characteristics of the local needs, is likely to lead to lop-sided development.

*Co-Management*

Co-management is defined as a "way of managing renewable resources that involves cooperation between different levels of society and recognizes the special place of the community in decision making.[251] In co-management, both the government and community groups are given definite management duties.[252] Control of the overall process does not rest

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[251] Marcelle Belliveau, Greg Brown, John Lindley and Chris Milley, An Introduction To Fisheries Co-Management, *prepared for The Coastal Communities Network*, February 1995 1, 5.

[252] *Id.* at 3. One positive benefit of the resource management system has been given as follows:

> "The ability of governments to expend public funds on activities, such as research and enforcement, necessary for resource management. Because the government has assumed responsibility for managing the resource, they must be seen to be undertaking the task with a high degree of responsibility. A second model is where the government representatives are invited as advisors to the community. In this case, the strength of this model has been identified as the commitment of the community to management because they are actively involved in making the final decisions. Decisions made by the local community are seen to be more legitimate than those made by governments – there is a greater likelihood that the harvesters will adhere to the decisions made. Resource users will be more inclined to self police their own regulations, which in turn will reduce the need for a large enforcement agency. Another advantage identified by

with either the government or with the community group. By interacting in a cooperative manner, all resource management questions are sought to be made successful.[253] The differing aims of resource management (between the community which may aim for a short term strategy to utilize the resources) and the government (which aims for a long term productivity of the resources), may be overcome by specific development projects and policies that society considers as the "rational economic strategy."[254] Combining differing views of the government and the community as part of the "resource management structure to develop new economic strategies" is termed as co-management or community based management (although the concepts are similar, they are not the same, as will be pointed out as the discussion progresses).[255] If the community's aims are responsible for achieving the resource management process, "social considerations can be at least as important as biological and economic factors" in the policy making process. Some reasons as to why communities have worked to establish a co-management system include the following factors:[256]

- To lessen serious differences of opinions;

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> the report resulting from the increased legitimacy of management decisions is the participation of harvesters in data gathering activities. People who harvest the resources are reported to be more inclined to collect and report information if they see that it will benefit the community's ability to manage the resources."

[253] *Id.* *See also* K. Kuperan and Nik Mustapha Raja Abdullah, *Small-Scale Coastal Fisheries And Co-management*, 18 MARINE POL'Y 306, 308-309 (1994).

[254] KUPERAN *id.* at 308.

[255] *Id.*

[256] BELLIVEAU *supra* note 251 at 5-6. The concept of co-management does not apply only to fisheries. Many insights and understanding of co-management comes from the management of other natural resources, such as forestry, and water resources.

- To lessen extra investment by companies and industries which are outsiders (that is, other than the local communities, and who will work only with the profit motive but will not care for the local resources as much as the local communities do);
- To equally divide opportunities;
- To have better quality of data and data analysis;
- To increase economic development, and
- To raise awareness relating to the issue of self-determination.

The benefits that all the concerned actors are looking for may be achieved by setting the following goals of co-management. The goals are: co-management as a method to achieve community based development; co-management as a method to decentralize decisions and enabling them to be made at the local level; and co-management as a mode to encourage the participation of local peoples and communities.[257] Community based development through co-management has been touted as a means to improve and protect the natural resources.[258]

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[257]Evelyn Pinkerton, *Introduction: Attaining Better Fisheries Management Through Co-Management – Prospects, Problems, and Propositions, in* CO-OPERATIVE MANAGEMENT OF LOCAL ISSUES 5 (Evelyn Pinkerton ed., 1989). Pinkerton declares that "while the government has the benefit of reduced challenge to its authority, because it shares power and responsibility, the local community has the benefit of increased participation and influence on management decisions." Two functions of resource based co-management have been described as: enhancement and planning and habitat protection. The principle of enhancement and planning shows that the local communities are ready to give financial contributions to the community effort under consideration. Habitat protection gives legal rights to tribes and other local communities to protect their habitats. *Id.* at 7 - 10, 13. Both these principles are useful principles which may be incorporated as part of the public participation principle. They give both a voice and a role to the local communities to have an effective say in the decision making process.

[258]*Id.* at 12. This is because "the efforts of the community as local resource users and as long term users of local habitats are linked together. The community is brought into the system – the more the community enhances the resources, the more the community benefits. In this process of committing themselves to the community/local area, communities are said to have changed their relationship with both the government and among themselves."

Emphasis has been laid on the issue of participatory democracy by using the concept of co-management. The benefits of "participatory democracy" by local communities are said to be greater than generally understood.[259] The greatest benefit is that local groups learn to run their lives without external support. In this sense, co-management has been described as a method of giving back to the local peoples a sense of self-governance.[260]

*Concluding Views*

In development projects, the applications of both principles have given rise to non-government organizations and local communities taking part in community meetings.[261] The local community groups find it useful to take part in such meetings. Their participation in the project at every stage leads to a better understanding of the needs of the local groups and consequently, to an improvement in their lives.[262] In a larger context, it may be reiterated that their application is to foster increased local development, keeping in mind the needs of the local communities, rather than have development fostered from outside, which does not consider the local circumstances.

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[259] *Id.* at 26.

[260] *Id.* at 26. The people's feeling that they are not a part of the government is expected to lessen through the use of co-management. The local communities are expected to be put at ease and the concept is expected to be a bridge between the local communities and the government. Co-management is said to "operate best where external support can be recruited and where external forums of discussion exist; it is also said to operate where the area is not too large and it operates where the local communities are not too large for effective communication."

[261] BETTY ABREGANA ET AL., LEGAL CHALLENGES FOR LOCAL MANAGEMENT OF MARINE RESOURCES: A PHILIPPINE CASE STUDY 30-32 (1996).

[262] *Id.*

The difference between CBRM, co-management and the principle of public participation has been pointed out as follows.[263] While public participation involves representing various public interests outside the immediate community, CBRM and co-management involve the active participation of the local peoples and communities in a close manner in the organization and implementation of the project. This is because, public participation goes one step beyond CBRM and co-management. Public participation is all inclusive – it includes within its scope the local communities, Project Affected Peoples and the public. This writer interprets "public" to mean just more than the immediate communities. A larger interest is involved when one talks about the public. Whereas, on the other hand, CBRM and co-management is more limited in its application to issues and basically is concerned with the participation of immediate communities and Project Affected Peoples rather than the public at large.

[263] *Id.* at 63.

The importance of the principles of community based resource management and co-management needs to be emphasized at this point for the purpose of this thesis. These two concepts are examples of community level management in governance and in solving the problems that communities face. These two principles complement and strengthen the public participation principle outlined above and therefore, need to be incorporated as part of the sustainable development process. The sustainable development process will certainly be enriched by the infusion of issues such as participatory democracy and by the fact that local peoples are responsible for their own lives.

Another factor that has positively influenced the public participation process has been the role of non-state actors. I next briefly turn to a discussion of non-state actors.

### 2.5.5.2 The Role Of Non-State Actors

It is believed that by permitting more opportunities for non-state actors to aid policy makers, the chances that the environmental decision making process is better informed increase.[264] In this connection, NGOs are playing an increasing role in enforcing international environmental standards by aiding policy makers. As part of this environmental decision

[264]David Scott Rubinton, *Toward A Recognition Of The Rights Of Non-States In International Environmental Law*, 9 PACE ENVTL. L. REV. 475, 479, 494 (1992). Rubinton's conclusions are that although non-states have a growing opportunity to take part in international environmental legal proceedings, a full right of standing is not available. He declares: "Without such a right, the ability of decision makers to make informed decisions is compromised since all of the people and other natural objects affected by their decisions are not heard from. Until such a right exists, non-state actors will continue to suffer from their inability to fully participate in the course of events of which they are an integral part and over which they have little control." *See also* Benedict Kingsbury, *Claims By Non-State Groups In International Law*, 25 CORNELL INT'L L. J. 481 (1992); P.K. Menon, *Individuals As Subjects Of International Law*, 70 INT'L L. R. 295 (1992); Dirk Jarre, *Why NGOs? The Role Of NGOs In A Parliamentary Democracy*, 34 EUROPEAN Y.B. 33 (1986).

making process, NGOs in many countries have been accepted by governments as partners in fulfilling local community level projects.[265]

NGOs have the freedom to interfere in issues concerning nation states, without being limited by the nation states' sovereignty.[266] Although the States may use sovereignty to prevent interference in their internal affairs, it may be stated that States do find it difficult to do so. That is because NGOs transcend boundaries and are viewed in many cases by the international community as being fair and as representative of the voices of the peoples who cannot be heard.

The existence of strong NGOs has been identified as a sure sign of democracy and consequently, as an essential requirement for effective environmentalism.[267] The

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[265]Patricia Waak, *Shaping A Sustainable Planet: The Role Of Nongovernmental Organizations*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 345, 346 (1995). Waak credits the NGOs with new ideas, approaches and solutions at the local, national and regional levels. Waak's paper provides a historical perspective of NGO development both within the United Nations and through grassroots movements.

[266]A. Dan Tarlock, *The Role Of Non-Government Organizations In The Development Of International Environmental Law*, 68 CHI-KENT L. REV. 61, 65, 73 (1992). Tarlock declares that NGOs have made a niche for themselves in international environmental law, despite the fact that there has been no specific role created. Tarlock justifies the role that NGOs play, particularly in developing countries, especially since developing countries may lack proper regulatory mechanisms. Under international law, he states that, "NGOs are not bound by the non-intervention principles of international law. They are free to lobby international organizations to use their influence to shape domestic political agendas." Tarlock supports the role of NGOs, stating that their views differ at a basic level from that of nation states. Without being limited by special state interests, NGOs can air and also advance their independent views in a global perspective. His conclusion is that "NGOs, therefore, have the capacity to influence multinational organizational policy and to intervene directly in choices traditionally reserved to individual sovereign states under international law. They cannot alone overcome the difficulty of international law to adapt to the imperatives of protection, but they exercise real power in the international community." It is true that NGOs have a large and significant role to play in both developed and developing countries. In fact, they have a role whether the country is developed or developing. They have a role to play wherever the State fails to do its duty in upholding the laws and regulations and does not protect citizen's rights and the rights of the environment.

[267]Ibrahim J. Wani, *Governance, Poverty, The Role Of Law, And International Environmentalism: A Critique Of The Basil Convention On Hazardous Wastes*, 1 KAN. J. L. & PUB. POL'Y 37, 45 (1991). The author does not explain the reason for such a position. It may be asked as to why only a democracy should foster healthy environmental traditions. In fact, this writer disagrees with such a conclusion and would argue that effective environmentalism may be practiced in any form of governance; David A. Wirth, *Legitimacy, Accountability, And Partnership: A Model For Advocacy On Third World Environmental Issues*, 100 YALE L. J. 2645 (1991); Phillipe J. Sands, *The Environment, Community And*

participation of NGOs in the UNCED has been touted as one example of how NGOs have brought to the fore the importance of the role of public participation in the environmental policy making process.[268] It has been declared that in the light of the tremendous interest in international environmental issues, the role of NGOs is likely to be far greater in the future.[269]

NGOs have been responsible for the empowerment and participation of local peoples in massive Bank-funded projects. This point will be highlighted in the next chapter. NGOs have become recognized as major and important players in the environmental-development scenario. Their influence cannot and should not be diminished. Local communities in

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*International Law*, 30 HARV. INT'L L.J. 393 (1992); Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory Of Environmental Protection, And Some Dark Thoughts On The Possibility Of Law Reform*, 44 Vand. L. Rev. 1209 (1992), arguing that trustees are no better suited to protect the environment than either bureaucrats or private citizens.

[268]Edith Brown Weiss, *International Environmental Law: Contemporary Issues And The Emergence Of A New World Order*, 81 GEO. L. J. 675, 708-709 (1993). Weiss opines that the system today includes national governments, inter-governmental organizations and non-governmental organizations as essential components of the environmental process. Weiss points out the important role that NGOs play. NGOs influence governments directly and indirectly by raising the level of public awareness and also public pressures on nation states. It may also be stated that many of the positive developments in many parts of the world is due to the positive role that NGOs have been playing. For example, in India, NGOs have been playing a dynamic role in shaping both government policy and in influencing public opinion.

[269]Gunther Handl, *Environmental Security And Global Change: The Challenge To International Law*, 1 Y.B. INT'L ENVTL. L. 3, 16-19 (1990). The increase in the role of NGOs has been supported by giving as an example, the calls which have arisen asking NGOs to inspect and serve as mediators and arbitrators in environmental disputes. Handl declares that: "Similar understanding of environmental issues relates to the empowerment at the local level, in the 'think globally, act locally,' maxim." Handl states that this maxim can be fulfilled only if citizens are able to have a say in the concerned environmental policy making process. *See also* Paul H. Brietzke, *Insurgents In The New International Law*, 13 WIS. INT'L L. J. 1, 3-4 (1994), for a discussion on the concept of "insurgents" (who are described as an odd assortment of peoples including nongovernment organizations, intellectuals and ordinary people who empathize with the plight of the disadvantaged). These insurgents use economic, political, and legal means to achieve their aims in the following areas: human rights, development, environmental protection, and self-determination; James C.N. Paul, *The Human Right To Development: Its Meaning And Importance*, 25 J. MARSHALL L. REV. 235, 257 (1992), who discusses the roles of activists, popular groups, organizations, and parliamentary bodies operating outside the official international system. All these authors have sought to highlight the importance of NGOs. It is absolutely true that their role is only likely to increase in the future, particularly since there is likely to be a rise in the level of conflicts surrounding the need to have development at any cost vs. the need to have measured development vs. in turn the need to have environmental protection.

remote parts of many countries trust the non-government organizations much more than they do the government. NGOs in such cases hold considerable sway over local opinion. They can make or break a project. As will be pointed out later, NGOs have been responsible for many of the environmental policies being incorporated by the Bank and other International Development Agencies.

Some of the main players who encourage the process of public participation are NGOs. They encourage local communities and Project Affected Peoples to participate in the policy making process. They also publicize the cases that are in conflict and they help the local communities appear before judicial and administrative forums. They educate the local peoples and Project Affected Peoples of their rights and remedies. Their role therefore is crucial to the success of the principle of public participation.

Of course, I must hasten to add that there is the other side to the conduct of NGOs as well. Many NGOs do this kind of work only with the aim of making money and not for any other purpose; NGOs too are corrupt and constantly engage in a game of one-upmanship vis-à-vis other NGOs. They are secretive about the sources of their funds and many of them are prone to engaging in publicity to ensure that their NGOs are always favored by the Government and by the public. As with any other facet in life, there are good and bad NGOs. However, in general, the role of NGOs needs to be commended. There is no doubt that they are doing a lot of good and selfless work and in most cases, are engaged in protecting the rights of the underprivileged and the poor.

To summarize this part on public participation, it may be stated that public participation as a principle contains within it several components, many of which have been discussed above. They include different interpretations of participation, participation by different peoples, who include women, the underprivileged and the indigenous communities. CBRM and co-management are also important elements of the public participation principle, which may be used successfully in development projects. NGOs play a crucial role in assuring the success of the public participation principle because of their neutral, fair and representative role that they play.

### 2.5.6 PRECAUTIONARY APPROACH

The Rio Declaration in Principle 15 states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost - effective measures to prevent environmental degradation.

The following paragraphs interpret Principle 15 in seven different ways. Thereafter, as part of this interpretation, some key differences between precautionary action and preventive action and between precautionary approach and precautionary principle are pointed out. The limitations of the approach are identified thereafter. The second sub-section seeks to apply the approach to development and other projects.

*Interpretations Of Principle 15*

Varied interpretations of Principle 15 have been offered. For example, it has been suggested that Principle 15 means that states must take informed decisions on projects or activities that may have an injurious impact on the environment.[270] Another view is that the precautionary approach pre-supposes the regulation and even the banning of activities that may be injurious to the environment, even if there is no definite confirmation about the injury or the probable injury that may be caused to the environment.[271] Yet another interpretation is that the approach has evolved from being a new way of safeguarding the environment, to being a principle of law that prescribes guidelines for policy makers and states to act.[272] Whether States take informed decisions on projects and activities, and whether the Principle pre-supposes the regulation and banning of activities or if Principle 15 can be seen as a principle of law, the main factor is to reconcile these different interpretations in order to optimize the effect of Principle 15 when applying it to any fact situation.

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[270] SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *supra* note 83 at 212.

[271] *Id.* Sands suggests two interpretations to the principle. According to the first, which is the traditional approach, the burden of proof is on the individual who is against any activity and that individual must show that such activity causes or is likely to cause environmental damage. Sands also mentions a new approach, by which the individual will only have to show that the activity does not cause the harm. The second interpretation is that international mechanisms must intervene when it is proven that a lack of action in preventing a particular activity may result in injury to the environment. Sands declares that the principle has received broad based support at the UNCED for it to form a part of customary law. At the same time, he notes that States and other international community members do not agree on any particular meaning of the principle. However, Sands describes the principle as guiding the progress and in applying international environmental law in the face of scientific uncertainty. One of the core components of the principle from a legal point of view is that there would have to be some action taken to protect the environment before any scientific proof of harm can be provided. *Id.* at 208. This component is very important from the view point of this thesis. This component would entail that the States take some preventive action before there is any scientific proof of harm.

[272] James Cameron and Juli Abouchar, *The Status of the Precautionary Principle in International Law, in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW 28, 30 (David Freestone and Ellen Hey eds., 1996).

The role of Principle 15 may be seen to influence sustainable development as well as balancing equity between rich and poor nations. For example, the term, "according to their capabilities," in Principle 15 has been interpreted as balancing equity between the rich and poor nations.[273] Similarly, it has been declared that precautionary approaches are a part of the sustainable development concept. This is because precaution has been stated as "being a part of the burden of proof necessary to establish that particular development decisions meet the needs of today while simultaneously satisfying present environmental constraints and preserving the ability of future generations to meet their own needs."[274] The precautionary approach is indeed a part of the sustainable development concept. As stated by the commentator above, the precautionary approach may be successfully used to balance the needs of the present with those of tomorrow. Similarly, the term "according to their capabilities" may be rightly interpreted as balancing equity between different nations. Balancing equity considerations contributes to having sustainable development as well.

The precautionary approach has been expressed in various international agreements and treaties.[275] First, the approach has been said to "link scientific evidence and potential risk

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[273]WIRTH, THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: TWO STEPS FORWARD AND ONE BACK, OR VICE VERSA? *supra* note 149 at 635.

[274]*Id.* at 635. *See also* Gregory D. Fullen, Note, *The Precautionary Principle: Environmental Protection In The Face Of Scientific Uncertainty*, 31 WILLAMETTE L. REV. 495 (1995), for a comment on the evolution of the precautionary principle and its various manifestations in law and policy. *Id.* at 497.

[275]James E. Hickey, Jr. and Vern R. Walker, *Refining Precautionary Principle In International Environmental Law*, 14 VA. ENT'L L. J. 423, 432-438 (1995). Some international treaties and instruments mentioned include The Ministerial Declaration Calling For Reduction Of Pollution, Nov. 25, 1987, 27 I.L.M. 835; Bamako Convention on Hazardous Wastes Within Africa, Jan. 30, 1991, 30 I.L.M. 773; Bergen Declaration on Sustainable Development in the ECE Region, UN Doc. A/Conf. 151/PC/10 (1990), *reprinted in* 1 Y.B. INT'L ENVTL. L. 429, 431 (1990); Protocol on Substances that Deplete The Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541; Convention on the Protection & Use of Transboundary Watercourses & International Lakes, March 17, 1992, 31 I.L.M. 1312 and Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849. The authors state that beyond general propositions articulated in the international instruments mentioned above, they state that "the articulations have not refined the pollution prevention

analysis, to any determination of pollution prevention obligations, by asserting that the necessary degree of precaution is primarily a function of the available scientific data which establishes that necessity."[276] Second, there is a "larger obligation to exercise precaution in proportion to the risk of irreversible permanent damage to human life or health." Third, the fact that the precautionary approach is frequently used, points to the fact that "international legal treaties and legal instruments will continue to invoke precaution and link that precaution to scientific analysis."[277]

The approach requires that intellectual effort be spent to have environmental guidelines. The approach also requires that monetary resources be set up to prevent environmental destruction, although policy makers may not be able to predict the effects of a proposed environmental plan. In such a case, it has been urged that when a doubt arises regarding the future consequences of an environmental activity, a careful and safe decision needs to be taken.[278] This writer fully agrees with this view point. It is better to be safe, than to be sorry, particularly in the case of a development project, which is capable of causing a large amount of destruction.

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obligation into a predictive substantive rule of precautionary obligation." The authors wonder if "precaution is a recommendation, an obligation or some intermediate duty." They also opine that "the level of environmental risk that triggers precautionary measures remains unsettled." *Id.* at 437. Their analysis of the articulations of the precautionary principle in international instruments lead them to conclude that "uncertainties and ambiguities in the articulations of the precautionary principle have allowed sovereign nations to sign agreements they otherwise might not have signed because precautionary obligations are likely to be unenforceably vague." However, they contend that the precautionary principle having become "a widely accepted international political practice, the next phase should be to strengthen the content of future articulations to refine and develop the substantive obligation to exercise precaution." *Id.* at 438. *See also* James P. Karp, *Sustainable Development: Toward A New Vision*, 13 VA. ENVTL. L. J. 239, 261-262 (1994).

[276] *Id.*

[277] *Id.*

[278] BOER, INSTITUTIONALIZING ECOLOGICALLY SUSTAINABLE DEVELOPMENT: THE ROLES OF NATIONAL, STATE, AND LOCAL GOVERNMENTS IN TRANSLATING GRAND STRATEGY INTO ACTION *supra* note 59 at 321.

The Food and Agricultural Organization (FAO) has clearly differentiated between the precautionary principle and the precautionary approach in the following statement:[279]

> In fisheries, the concept of precaution has been expressed as 'precautionary principle' or 'the precautionary approach.' Although the two terms relate equally well to the concept of caution in management, they are differently perceived. The first, because of slack usage, has developed a negative undertone. Radically interpreted, it has sometimes led to an outright ban of a technology and is sometimes considered incompatible with the concept of sustainable use. The second is apparently more generally acceptable because it implies more flexibility, admitting the possibility of adapting technology, consistent with the requirement for sustainability.
>
> ...Fisheries management is unlikely to threaten the future of humanity and as a consequence, radical interpretations of the principle may rarely be justified. Of particular relevance is in this regard is the fact that, in its Rio Declaration, as well as Agenda 21, the UNCED referred to the need for a precautionary approach and not to the principle itself.

Louka also gives the differentiation between the precautionary principle and the precautionary approach.[280] The precautionary approach is a "conservative version" of the precautionary principle. The author does not explain what this interpretation actually means. The precautionary approach, which includes "cost-benefit" components, has been identified as an "alternate, more temperate version."[281] Principle 15 makes use of the term

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[279] S.M. GARCIA, THE PRECAUTIONARY APPROACH TO FISHERIES WITH REFERENCE TO STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS 6-7 (1994).

[280] Elli Louka, *Cutting the Gordian Knot: Why International Environmental Law Is Not Only About the Protection of the Environment*, 10 TEMP. INT'L & COMP. L. J. 79, 82 (1996). Louka also gives the difference between preventive action and precautionary action. Preventive action is taken when "it is reasonably foreseeable that substantial harm will occur." Precautionary action is taken when "there is significant risk that substantial harm will occur." Louka does not however give the origins of preventive action. The utility in this differentiation is to understand when preventive action or precautionary action need to be taken in the case of any environmental damage.

[281] *Id.* The thrust of Louka's article focuses transnational interests in the light of the precautionary and other principles.

"approach" rather than "principle" to describe the use of the term "precautionary." According to this writer, it is probably because the usage of the term "approach" was construed to be less rigid than usage of the term "principle," that Principle 15 uses the term "approach."

The conspicuous characteristic of the approach is that it does not address any particular regulatory guidelines – several types of mechanisms may be used to implement it.[282] The approach has been described as requiring the following elements:[283] safe production facilities; state of the art technology; good environmental practices; detailed measures of environmental impact assessment; comprehensive research to have a better sense of the future possible options; and legal, administrative and technical measures to aid in fulfilling the requirements of the principle.[284] These measures as derivations of the precautionary approach are very important and must be noted. It may also be observed that they are the requirements of the approach which may be used in any fact situation to ensure that a particular project is safe and does not cause harm to the environment.

The precautionary approach is supposed to ensure that a substance or an activity that may cause harm to the environment is stopped from doing so although there may not be definite evidence linking that substance or activity to the probable environmental injury.[285] In this

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[282]David Freestone and Ellen Hey, *Origins And Development Of The Precautionary Principle, in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW 12-13 (David Freestone and Ellen Hey, eds., 1996).

[283] *Id.*

[284]SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *supra* note 83 at 208. According to Sands, the precautionary approach has been adopted in several international environmental treaties since 1989.

[285]James Cameron and Juli Abouchar, *The Precautionary Principle: A Fundamental Principle Of Law And Policy For The Protection Of The Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 2 (1991). *See also* Alexandre Kiss, *The*

regard, it may be appropriate to also state that the precautionary approach in modern international environmental law has been described as recognizing "not only duties to prevent harm or risk when concrete danger is suspected, but also, in the case of potential risks."[286] This is one of the positive features of the approach, which needs to be noted. The approach helps avert potential environmental risks as well as real danger. It can therefore be a potent tool in preventing environmental harm from occurring.

Principle 15 has various limitations. It states that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." This statement may be interpreted to mean that if there are no threats of serious or irreversible damage, then, States may remain silent. Damage need not be serious or irreversible for it to be harmful. Damage to both human beings and the environment can be harmful even without being serious or irreversible. This appears to be a lacuna. Further, no definition of the terms "serious" or "irreversible" have been provided. Also, the statement declares that lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures. This may be interpreted to mean that lack of scientific knowledge cannot be an

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*Rights And Interests Of Future Generations And The Precautionary Principle, in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW 19-28 (David Freestone and Ellen Hey eds., 1996). Kiss discusses the relationship between the precautionary principle and future generations. Precaution must be used when an activity may cause damage over a long period of time or which may last forever and in those cases "where the benefit to be derived from a particular activity is completely out of proportion to the negative impact which that activity may have on the environment." In such cases, the environment is preserved for the future generations. This, according to the author, is the "meeting point between the right of future generations and the precautionary principle." It may be stated that this is another facet of the precautionary principle: the use of the principle to the advantage of the future generations. By preventing harm to the environment today, the environment may be preserved for the generations of the future in an intact manner.

[286]HARALD HOHMANN, PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW 341 (1994).

excuse. If there are other non-scientific reasons and excuses, then perhaps States may have an excuse for not doing anything about a particular problem. This part of the statement also appears to have a lacuna, which needs to be corrected.

Viewing the principle from a scientific and policy analysis angle, the precautionary approach accepts the fact that science will not prescribe definite policy prescriptions. The approach accepts that standards are required to be set in order to tackle any unclear factors in the entire policy making process.[287] When the fact of scientific uncertainty has been identified, the principle is said to increase the possible responses from legal and economic mechanisms.[288] The legal and economic mechanisms fill the chasm caused by the absence of proper scientific certainty. This means that the precautionary principle is not solely dependent on the scientific angle. Law and economics both can provide answers by filling in much needed gaps. One can only state that the best mechanisms that may be afforded economically may be installed once the scientific results reveal the lacunae that need to filled.

Four criteria have been said to flesh out the approach.[289] The first is to formulate the environmental goal and the environmental condition that call for invoking the approach; the second is to identify the scope within which the principle has to be applied; the third is to

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[287]Konrad von Moltke, *The Relationship Between Policy, Science, Technology, Economics And Law In The Implementation Of The Precautionary Principle, in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW 97, 101 (David Freestone and Ellen Hey eds., 1996).

[288] *Id.*

[289]HICKEY *supra* note 275 at 441. The authors in their article suggest criteria to refine the precautionary principle, to remove what they term as the "present uncertainty (i.e., to provide more than just platitudinal support for pollution prevention)." They seek to provide a dose of "predictability" which they believe is absent.

prescribe the "human activities" for which the precautionary approach is necessary; and the fourth is to clearly pinpoint the measures that need to be taken before proceeding with any specific activity.[290] These four criteria are important because they clarify the scope of the approach. Clarifying the scope will help in understanding better the effect of the approach when it is implemented.

*Application Of The Precautionary Approach*

The precautionary approach is of importance as one of the basic approaches related to development policies and projects. Although the significance of the precautionary approach is very wide, for the purpose of this scholarship, its importance may be seen in the context of a discussion of development projects as well as a current debate regarding the necessity of building large dams.[291] Large development projects affect the environment in many ways: firstly, they are responsible for the relocation of the lives of hundreds and sometimes, millions of people who have to be rehabilitated. Secondly, apart from the damage to human beings, they also upset the balance of nature in the area where they are being built. For example, they damage the flora and the fauna, which in many cases belong to rare species. Therefore, environmental protection is a necessity against such degradation. This

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[290] *Id.*

[291] *International Team Proposed To Review All Large Dams*, THE HINDU, April 15, 1997, at <http://www.indiaserver.com>. The report is on the recent meeting held at Gland, Switzerland, organized by the World Bank and the International Union for the Conservation of Nature. The report states that one of the proposals at the meeting was to form an impartial international committee to investigate whether large dams were at all necessary. This was because, various alternatives had emerged other than building large dams and the alternatives were never examined by funding agencies. *See* LARGE DAMS: LEARNING FROM THE PAST, LOOKING AT THE FUTURE (Tony Dorcey et al., eds, 1997), for a detailed discussion on the impact of large dams.

environmental protection may be enforced in the form of the precautionary approach. That is the significance of the approach.

When applied to national legislation, it is believed that the key objectives of pollution prevention and waste minimization may be facilitated through four legal routes, using the precautionary approach. The first route is by legislating and reversing the burden of proof, by making it illegal to make or utilize chemicals. The second legal route is when the legislation necessitates chemical registration before use, the precautionary principle should be applied along with a proper public debate to assess the risk. The third route to "legalize" precaution, is to necessitate the submission of waste management programs prior to issuing an authorization to pollute or cause harm. The fourth route, is to implement legislation aimed at reducing pollution through different means such as providing grants for research into "pollution reduction technologies and requiring industries to plan for toxic reduction."[292]

Applying the precautionary approach as envisioned in principle 15, States will be duty bound to determine whether there are alternatives to large scale "mega" development projects, when serious or irreversible damage is likely to occur. This determination would depend on each and every given circumstance, but would generally depend on whether or not the damage that has occurred has harmed the environment and human beings. If it is found that damage caused is causing serious or irreversible damage, then, it may be

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[292]VANDERZWAAG, *supra* note 215 at 77-78.

worthwhile in examining the alternatives. But, there are no firm criteria for determining this. If alternatives exist, then, it is essential to examine them. If this examination of alternatives is not done, then, one may conclude that such a project is unsustainable and therefore, must not proceed. In this writer's opinion, it is essential to make the determination as to whether or not a particular project is unsustainable and whether there are any viable alternatives. If this determination is not made, then, it may be concluded as above.

### 2.5.7 ENVIRONMENTAL IMPACT ASSESSMENT

The purpose of this section is to elucidate on Principle 17 of the Rio Declaration. This section also tries to explain the importance of Principle 17 with reference to its application to development projects. Some of the lessons that need to be kept in mind when undertaking an EIA for development projects and when affecting Project Affected Peoples are mentioned.

This discussion begins by first identifying two definitions of EIA. An analysis follows on the effect of the Principle. The final section of this part deals with the application of the environmental impact assessment Principle on development projects.

Principle 17 of the Rio Declaration states: [293]

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[293]WIRTH, THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: TWO STEPS FORWARD AND ONE STEP BACK, OR VICE VERSA? *supra* note 149 at 632. Wirth lays emphasis on three aspects of Principle 17. First, he points out that phrase "as a national instrument" means a universal global criterion, which may be applied within the domestic jurisdiction; second, the phrase "likely to have a significant impact," and the word "likely" imply a greater standard before the EIA criterion apply; third, although most international instruments tackle the issues relating to projects and

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

The above definition states only when an EIA may be undertaken. Its inherent limitation is that it does not specify what an EIA contains or what its components are. The following explanation of EIA by Wirth describes the concept in detail, giving forth its components: [294]

> A component of a planning process by which environmental considerations are integrated into decision making procedures for activities that may have adverse environmental effects. The emphasis in EIA is on the collection and analysis of information relating to the environmental consequences of a proposed action. EIA is a process oriented technique distinct from substantive environmental standards and requirements. The principal purpose of environmental impact assessment is to facilitate informed decision making through a thorough scrutiny of anticipated environmental effects. With the assistance of this analysis, an informed decision maker should be able to assess the advisability of proceeding with proposed actions and to modify proposals to eliminate or mitigate their adverse environmental effects.

Wirth's explanation makes it clear that the EIA is not just a definition. It is a planning process, consisting of several components, which complement the decision making process.

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other activities which need sanction by the government, principle 17 urges even private firms to evaluate the environmental effects of their planned activities. The importance of principle 17, as interpreted by Wirth requires to be emphasized. EIA targets even private firms, which are urged to do an impact analysis before going ahead with a project, which may have an adverse or potentially adverse impact on the environment. Although discussing the scope of private firms and their role in this study is beyond the scope of the thesis, it must be noted that private firms do have a vital role to play in protecting the environment and must use EIA as a tool to protect the environment.

[294] *Id.* at 629. A large number of international instruments urge or prescribe the application of EIA measures at the national level. Wirth gives some of the examples as including the following: Protocol on Environmental Protection to the Antarctic Treaty, opened for signature Oct. 4, 1991, 30 I.L.M. 1461 (1991) (not in force); Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, June 21, 1985; Convention for the Conservation of the Red Sea and Gulf of Aden Environment, February 14, 1982; Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, March 23, 1981 and United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, UN Doc. A/Conf./62/122 (1982), 21 I.L.M. 1261 (1982). *Id.* at 631-632.

Ultimately, the aim of EIA is to reduce or eliminate adverse environmental effects when undertaking a development project. Principle 17 and Wirth's explanation need to be read together to have a better understanding of the full effects of using EIA, particularly when it ought to be used and to clarify its purposes.

An initial reading of Principle 17 will reveal that it has some limitations. Firstly, the extent of a significant adverse impact is not clear. Once again, as with the precautionary approach, it is possible that a particular activity may not be adverse but can still be harmful. For example, a project may be "adverse" if the project has any negative long term effects. But, the project may not necessarily be harmful, just because it has negative effects.[295] If so, it may be interpreted that an EIA need not be required. Another limitation that emerges is that EIA is to be subject to a decision of a competent national authority. The definition of a national authority is not given – so, who is to determine what constitutes a national authority? Also, if the EIA is beyond the competence of a national authority, it may mean that if a particular activity is beyond the competence of a national authority, then, there need not be an EIA. Of course, this is no fault of the EIA Principle, but is identified as a limitation and as a lacuna, which needs to be addressed. Sands states that "the language is general, does not describe the basic elements of the process, and includes limitations."[296] Some of the limitations have been identified above.

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[295] The writer contends that the difference in the usage of the language is subtle but exists.

[296] SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW *supra* note 83 at 579.

Since planning is an important part of the environmental process and benefits communities overall, EIA prevents negative results from activities that may injure the environment.[297] Increasing awareness of international environmental risks that may originate as a result of local reasons implies that EIA procedures ought to be expanded and applied more forcefully in the international arena, particularly when there is a transaction involving international financial aid.[298] This can be done by detailed procedures that make those receiving the aid accountable for their actions to the donors.

EIA is one of the significant provisions relating to development projects. It may be stated that if a proper EIA is done, then normally, there should be no problem. A thorough EIA is likely to determine the chinks in the armor and a project may be determined to be sustainable or not. However, it is only in the recent past that full scale EIAs have been undertaken for development projects. This is believed to have happened because of the environmental movement as recently as in the 1980s.[299]

Three specific lessons have been cited by the United States Agency for International Development (USAID) as lessons learnt from implementing EIA.[300] The first lesson

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[297] *Id.* at 580. Sands believes that references to environmental impact assessment abound in Agenda 21. Agenda 21 endorses the need for individuals, groups and organizations to participate in EIA procedures.

[298] Peter S. Thacher, *Changing Requirements For International Information, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 91, 106 (Edith Brown Weiss ed., 1992). Thacher opines that a regime which prescribes openness needs to be encouraged. This can be done with the aid of the UN programs, which has a lot of experience in this area.

[299] For example, in India, it is now believed that a proper EIA would not have permitted the Narmada project to be established. Inadequate EIAs were conducted at that time, and no arguments were entertained. It was only in 1996 that a detailed EIA procedure was formulated by the Government of India. Another dam project in the Himalayas, the Tehri project has been dogged with controversies. Several EIAs have been conducted, with conflicting reports. However, the Government has accepted the ones that have been in favor of the project.

[300] James Hester, *USAID's Experience In Environmental Impact Assessment*, C 933 ALI-ABA 467, 472-474 (1994).

identified a main weakness in the practice of EIA as lack of "follow up on monitoring."[301] The second lesson emphasized was the participation of the public in some types of projects. Public participation has an effect in a wholesome manner on "project quality, feasibility, acceptability, and economic return of investment."[302] The third lesson was that in the long run, EIA must be "responsive, rather than obstructive, to project design and implementation needs."[303] These three lessons from the USAID experience are universal in their application. Therefore, it may be suggested that considering the utility of these three lessons, they may be applied to other aid agencies as well. With respect to Principle 17, it may be stated that it is necessary to incorporate some of these points within its scope, by being more specific.

One reason given for multilateral development institutions not having been brought under the focus of EIAs until the recent past are because of the barriers created by international boundaries.[304] Multilateral development bodies get funding for the projects that are from different donors and sources. These factors make the consistent application of guidelines difficult.[305]

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[301] *Id.* Hester predicts that less financial commitments will initiate the practice of establishing improper EIAs as a normal routine.

[302] *Id.* Hester believes that USAID has realized "the direct link between public participation, promotion of democratic principles and the empowerment of affected communities." Hester's suggestion is: "What works in short is this: start early, and keep people involved." This suggestion appears to be a sound one. Of course, in reality, useful suggestions such as this one are not utilized to their full credit.

[303] *Id.* at 472. The role of EIA is to reduce adverse impacts to acceptable levels.

[304] KLEIN-CHESIVOIR *supra* note 26 at 528.

[305] *Id.* The author notes that EIAs in developed countries may be blamed for infringing on the sovereignty of developing nations. However, she believes that EIAs promote cooperation and foster understanding between the North and the

Referring to the World Bank, EIA is a fairly recent phenomenon, as it was incorporated within the Bank only since the early 1980s.[306] It may be stated that the EIA is a malleable phenomenon, "varying in breadth, depth, and type of analysis," according to the particular type of project being considered. EIAs are generally fulfilled at the same time or as part of the engineering feasibility study, and may drag on for over a period of time.[307] The need for an EIA is to make certain that the development options being examined are environmentally safe and sustainable, and that any negative environmental side effects are identified as early as possible. Such an identification will enable an appropriate reworking of the project design.[308] EIAs also increase the qualities of projects by reducing or completely negating any adverse effects.[309]

EIA has been described as "self-limiting" and an inadequate answer to present rates of environmental destruction.[310] This comment needs to be taken note of. The rate of

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South. *Id.* at 537. A social benefit touted as a result of EIAs is that they record social phenomena in the South, by having better social services planning. *Id.* at 538.

[306] R.J.A. Goodland, *The World Bank's Environment Assessment Policy*, 14 HASTINGS INT'L & COMP. L. REV. 811, 812 (1991).

[307] *Id.* The author gives the purpose of EIAs as critiquing a project's overall impact on the environment; analyzing the effects on health, cultural property, tribal peoples, and the effect on resettlement caused by the project. Goodland continues that EIAs make use of the following tools to fulfill the study: the findings of the project country's environmental studies and action plans; the "policy framework; legislation; and institutional capabilities" of the country.

[308] *Id.* at 812-813.

[309] *Id.* According to Goodland, EIAs enable project designers and concerned staff to tackle environmental issues in a time bound manner; "to reduce the need for project conditionality" and to reduce cost overruns. *See also* THE WORLD BANK, THE WORLD BANK AND THE ENVIRONMENT (1993); THE WORLD BANK, MAKING DEVELOPMENT SUSTAINABLE (1994); and THE WORLD BANK, THE WORLD BANK AND THE ENVIRONMENT (1992), for details on the environment impact assessment process practiced by the Bank.

[310] Barry Sadler, *Environment Assessment And Development Policymaking, in* ENVIRONMENTAL ASSESSMENT AND DEVELOPMENT 3-4 (Robert Goodland and Valerie Edmundson eds., 1994). Sadler terms a promising approach to ensure that policymaking takes account of sustainability principles as Strategic Environment Assessment (SEA). However, to date, it has been noted that practical experience with SEA in policies, plans and programs has been limited.

environmental destruction and the planet's degradation is proceeding at such a vast speed, that it is difficult to imagine how even well planned EIAs will actually be able to protect the environment in future. Of course, it is hoped that what little is remaining of the planet's resources and natural heritage will be protected by a proper application of EIAs. This is the reason that it is self-limiting, because it focuses mainly on the proposal brought forward and may surpass the efforts of EIA at controlling the same. However, it may be stated that EIA is a useful mechanism and that it must be applied wherever possible.

*Application Of The EIA Principle*

A method of reducing and if possible, completely halting global ecological deterioration is to recognize and analyze the probable environmental impacts of activities prior to their being established. Despite the limitations given above, it may be generally stated that EIA is a realistic and plausible tool and vehicle for halting environmental deterioration.[311]

EIA is one of the most important methods to protect the environment and ensure the advancement of sustainable development. Proper EIAs need to be fulfilled, if the project is to be termed as legitimate. Further, to bolster the credibility of the EIA, it needs to be done by institutions and persons with credibility and integrity. EIA is an inherent part of the sustainability process. If an EIA is not conducted, then, it may be safely assumed that one of the criteria to determine if a project is sustainable or not has not been fulfilled and the result will be that the project must be shelved. Similarly, if the EIA conducted reveals that a

[311] KLEIN-CHESIVOIR *supra* note 26 at 517.

project is unsustainable, then also, the project must be shelved. In either case, the EIA is used as an essential tool to fulfill the sustainable development criterion.

Another key point to be kept in mind is the fact that "informed decision making" is one of the reasons for a proper and full EIA. This is because, the results of a thorough EIA will prompt the authorities to take appropriate decisions after informing themselves of the EIA results.

*Issues Of Governance And Human Rights*

In addition to the various principles analyzed above, two additional issues also influence development projects, the Project Affected Peoples, grievances redress and ultimately, the sustainable development process itself. They are the issues of governance and human rights. For a project to be sustainable and successful, both issues are significant and need to be kept in mind. This is because sustainable development as a concept is holistic in nature and carries within it several components. Although governance can stand on its own feet, it requires some support from principles that have been discussed earlier, including public participation. Similarly, an issue such as human rights too is independent in nature, but is complemented by the principles discussed above. These two issues are important enough to merit a deeper discussion in the following sections.

## 2.5.8 ISSUES OF GOVERNANCE

*Introduction*

Issues of governance greatly influence the lives of Project Affected Peoples and are also likely to influence the functioning of any grievances redressal mechanism. Effective governance enables peoples affected by projects to play an active role in governing their own lives, instead of permitting either the project sponsors or bureaucrats in far away national and international capitals from making decisions that affect their lives.

This section is divided into four sub-sections. The first begins with a brief discussion of the meaning of governance. The section then proceeds to link governance with the concepts of environmental security and development projects. The second section discusses global governance and the third section, grass-roots governance. The part concludes in the fourth section. Some of the main conclusions are that the process of governance is symbiotic between grass roots and global governance and that Project Affected Peoples must be assured of a role in exercising power over their own lives by participating in governance decisions.

*Governance, Development Projects*

Governance in the context of World Bank operations has been defined as "the manner in which power is exercised in the management of a country's economic and social resources for development."[312] The Bank has identified three distinct forms of governance: the form of political regime; the manner in which authority is wielded in managing a country's

[312] THE WORLD BANK, DEVELOPMENT IN PRACTICE: GOVERNANCE, THE WORLD BANK'S EXPERIENCE xiii (1994).

economic and social resources; and the capability of states to design, construct and fulfill policies.[313] It may be stated that these three forms of governance may be used successfully to propagate and encourage governance when dealing with local communities and also in order to have a successful project.

Accountability has been identified as the crux of "good governance;" it has been pointed out that accountability means making States responsible for their actions.[314] Governance may be expressed as the interaction of the governed and the power that is wielded by the governors.[315] An equation to determine "good governance" has been given as equaling the sum total of good decision-makers, good decisions and good implementation.[316] This writer would add a fourth component to further enrich the equation given. This fourth component deals with the role of the local peoples in the process of governance. I am convinced that unless and until local communities are involved wholeheartedly in the governance process, the role of governance will not be as successful as it ought to be.

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[313] *Id.*

[314] *Id.* at 12. At the political level, good governance implies making the governors accountable to the governed by the exercise of political power (in a democratic set up). The analysis also notes that the Bank has been incorporating so-called voice mechanisms in its projects to encourage popular participation and NGO involvement. The mechanisms developed make certain that local groups and the citizens have a voice in the decision making process. This mechanism encourages momentum to advance sustainability; it also makes sure that the community is satisfied with the planned project in every possible way.

[315] This point is well analyzed in Andrew Hurrell and Benedict Kingsbury, *The International Politics Of The Environment: An Introduction, in* THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 1, 1-47 (Andrew Hurrell and Benedict Kingsbury eds., 1991).

[316] Robin Sharp, *Organizing For Change: People Power And The Role Of Institutions, in* THE EARTHSCAN READER IN SUSTAINABLE DEVELOPMENT 309, 317 (John Kirby et al., ed. 1995). Sharp declares that to be able to achieve a sustainable global goal depends on the ability of peoples being able to participate in the policy making process which influence and affect their lives and that of their progeny. It also demands the equitable sharing, between the North and South, of the costs of adjustment to a sustainable society. *Id.* at 326. The point made here is important for this study. The comment reflects on the role of public participation; and equitable sharing between the North and the South, which have both been discussed in former sections of this chapter.

To understand the importance of governance in relation to Project Affected Peoples and the environment, it is necessary to briefly discuss the relationship between environmental security, the governed and governing bodies. This relationship, and particularly the concept of environmental security has been used to refer to the community's state of assurance in the following manner:[317]

> [A] community's state of assurance is that its stability as a community will not be threatened by a lack of proper management of the natural resources it deems to be the necessary parts of its identity – i.e., the community's specific cultural, historical, and philosophical context within which the community defines itself. Such a concept rests on the assumption that each governing body is accountable to the community as a whole for the sort of environment dictated by the community's identity. A threat to environmental security comes from the inability of a governing body to ensure this desired quality of environment.[318]

The politics of gaining control over environmental security has resulted in "intracommunity motivated and intercommunity motivated threats to environmental security."[319] Environmental security has two other varied planes. On one hand, it has been declared that while focusing on the environmental dimension, "environmental security" seeks to maintain

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[317]Bernard A. Weintraub, *Environmental Security, Environmental Management, And Environmental Justice*, 12 PACE ENVT'L. L. REV. 533, 546 (1995).

[318]*Id.* Weintraub states that the governors directly or indirectly may seek to create discord in the community environmental management system, forcing the governed to be wary of the governors' ability to be certain of the required quality of environment. At the same time, the governors may not want to manage the resources according to the way in which the governed want it to be managed. An important point to note is the explanation that a "community may not be able to engage effectively in intercommunity natural resource trade because of large economic disparities in wealth between the communities." According to Weintraub, such inequalities ensure that poor communities become even more vulnerable to negative ecological effects and in the end, add to the evil of instability. It may be stated that the process of good governance would seek to remove the disparities between the rich and the poor. This would be possible by giving the local communities an essential and major role to play in the policy making process.

[319]*Id.* at 550. Weintraub notes two ways by which a governing body may lessen the possibility of instability. The first method is for the governing body to increase its reputation and name among the governed; the second way is to expand and emphasize intercommunity relations.

the minimum "resource supplies and life-support systems."[320] On the other, environmental security has been interpreted as maintaining a balance between conflicts caused by environmental degradation.[321] The relationship between environmental security, the governors and the governed highlight the conflicts faced by the governors and the governed. Environmental security seeks to balance the interests between the governors and the governed even as conflicting efforts may proceed on parallel planes to achieve the following two opposite goals. On one hand, the goal is to have an increased form of development. On the other, the goal is to have a measured form of development, with the need to protect the environment.

In cases of development projects, the role of governance is even more important. Projects, in the guise of development, may dislocate the lives of the local people completely, without offering them any alternatives. Development projects may also benefit only those who have the money and power rather than those who most need them. In such cases, it is essential that local peoples be given the right to voice their legitimate concerns when such projects take shape. This voicing of concern is a core component of the governance process.[322]

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[320]Jutta Brunnee, *Environmental Security In The Twenty-First Century: New Momentum For The Development Of International Environmental Law*, 18 FORDHAM INT'L L. J. 1742 (1995).

[321]*Id.* Brunnee believes that a larger meaning of environmental security is very vital since, over a long period in time, security can be provided, "only if security in the environmental sense is emphasized." Common environmental interests are expected to encourage and foster global understanding and thereby, ensure security.

[322] WEINTRAUB *supra* note 317 at 565-567. According to Weintraub, "many threats to environmental security originate in the relationship between a governing body and the community it represents." He declares that "the dynamic of environmental security presumes that every governing body is a governing body because, at least to some extent, it manages the community's relationship to its natural resources, i.e., its environment."

*Global Governance*

*Introduction*

Governance at both the national and international levels influences the lives of peoples at the community level. International instruments and concerted action on the part of actors at the international level may positively influence the principles of governance. This section seeks to examine the process and effects of global environmental governance on local communities and its role in national and international levels. Admittedly, the concept of global governance is vague and so, the following section discusses the concept in general terms, rather than in any specifics.

The sufficiency of international environmental law to monitor and fulfill the instruments entered into at the Rio Conference gains importance, when examining the role of governance in the sustainable development process.[323] One of the main topics of UNCED was the issue of governance. Sands believes that UNCED has established facets of governance in the following fields: participation of States in international law making; the policy making framework of international institutions; and NGO participation in national and international policy making processes.[324] In this connection, a brief mention needs to be made of the United Nations Commission for Sustainable Development ("CSD"). It was formally established in February 1993 to monitor progress in the implementation of Agenda

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[323]HANDL, CONTROLLING IMPLEMENTATION OF AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THE ROCKY ROAD FROM RIO *supra* note 89 at 309. Handl observes that "well designed institutions and processes" do not by themselves alone ensure good governance. *See also* THE POLITICS OF GLOBAL GOVERNANCE (Paul F. Diehl ed. 1997), for a series of essays on various forms of global governance.

[324] *Id.*

21 and activities related to the integration of environmental and developmental goals through the United Nations system.[325] Certainly, the CSD was established with lofty aims. However, only time will tell if the CSD's establishment has served the required purpose of integrating the opinions of various groups in society. A useful CSD will play a grand role in furthering the principles of governance; a "tame" CSD is likely to remain yet another institution in the vast UN system.

Governance means that all functions must be implemented in such a way so as to involve the people who are the most affected by the decisions made. Such an implementation is touted as most successful.[326] However, to better coordinate global issues, such decisions to have better and effective governance needs to be implemented at the international arena as well.[327]

It is hoped that the process of infusing democracy into environmental governance will be actively pursued by States and Organizations in time to come, in whatever form possible, including when "negotiating treaties, monitoring compliance, or delivering financial and technical assistance."[328] According to French, "global environmental governance may

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[325] *See* <gopher://gopher.un.org:70/00/esc/cn17/1996> for details on the functioning of the CSD. The CSD provides a forum for multilateral discussions from governmental and non-governmental representatives, the private sector, vulnerable groups, women's sector and so on.

[326] *See* Maurice F. Strong, *Beyond Rio: Prospects And Portents*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 19, 32-34 (1993).

[327] *See also* John Ntambirweki, *The Developing Countries In The Evolution Of An International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905, 927 (1990-91). The author attempts to assess the contribution of the Third World nations to the evolution of an international environmental law. He calls for the new and realistic international environmental order as a basic necessity, to pay equal attention to the environmental problems of both the North and the South.

[328] Hilary F. French, *Reforming The United Nations To Ensure Environmentally Sustainable Development*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 559, 598 (1994).

sound like a hopelessly utopian concept. But it is, in fact, well on the way to becoming a hard reality. In fact, such governance is proving to be a practical and probably unavoidable response to otherwise unmanageable threats."[329] This statement is an optimistic one, shared by this writer as well.

Opinions on international environmental governance vary between the North and South. It has been suggested that the fissures related to environmental issues are deep, particularly over which criteria are to be given preference on the environmental agenda.[330] One reason for the fissures and conflicts that arise with reference to international environmental governance is said to "lie within the substance of the issues themselves and not with international institutions." It has therefore been concluded that if environmental problems were viewed as a real danger to all states (both North and South), then, international institutions would be ready to tackle such dangers. The answer given has been to enlarge the scope of global environmental governance.[331] The commentator has hit the nail on the

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[329] *Id.* at 602. The difficult barriers that NGOs and other community groups face in international gatherings has been pointed out by French – lack of facilities for public review, participation and discussion; lack of hearings on a continual basis; and no means to bring forward "citizen suits"; and many international organizations are shut out to the public and public access to documents is many times severely limited. Agenda 21 has been cited by French as encouraging democratization of international environmental law making. *Id.* at 599. These barriers are among those which need to be overcome. One way of doing it is by ensuring that local communities have a say in the decision making process. *See also* STRONG *supra* note 325 at 32-33, who believes that to foster global cooperation, the United Nations is the right Organization to achieve the same; it is pointed out as being the "newest, least understood and least supported of the various levels of governance." Strong is very optimistic in supporting a strengthened United Nations as the core of a new world order. This author does not share the same optimism that a reformed United Nations will do in contributing to the new world order or to bolster world governance. This is because of the image that the world body has portrayed as being bureaucratic and not doing enough to achieve developmental goals.

[330] Elisabeth Zoller, *Institutional Aspects Of International Governance*, 3 IND. J. GLOBAL LEGAL STUD. 121, 125 (1995). *See generally* Philippe Sands, *The Environment, Community And International Law*, 30 HARV. INT'L L. J. 393 (1989); Peter H. Sands, *UNCED & The Development Of International Environmental Law*, 8 J. NAT. RESOURCES & ENVTL. L. 209 (1992-93).

[331] ZOLLER *id.* at 130.

head through the above analysis. The point that needs to be kept in mind is that global environmental governance is an issue that plays an important part in the sustainable development process. The importance of global environmental governance also lies in the fact that it can act as a tool to equitably solve problems between the North and the South.

The Commission on Global Governance, constituted by the then Secretary General, Mr. Boutros Boutros Ghali in 1993, made the following declaration:[332]

> Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.

This statement by the Commission is the crux of their report. With regard to global environmental governance, the Commission notes that the Rio Conference did much to lay the legal, intellectual and institutional groundwork for a concerted drive to achieve sustainable development. The Commission acknowledges that there remains an overall lack of direction regarding "where to go next." In this regard, the Commission calls for reforming of the United Nations.[333] Reforming of the United Nations alone is not enough. That is because the United Nations is not the only body that makes policies affecting global

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[332] THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE, OUR COMMON NEIGHBORHOOD 2 (1995).

[333] *Id.* Their main recommendation is to avoid duplicity in the working of the various departments. They call for the abolition of superfluous departments and ask for the merging of various departments to fulfill the needs of the UN body. *See also* Dr. Nafis Sadik, *Reflections on the International Conference on Population and Development and the Efficacy of UN Conferences*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 249 (1995). Dr. Sadik believes that the question of obligations and responsibilities should be decided by the United Nations, because of its membership and mandate.

governance. It is one of the institutions. Global governance as a process is infused with elements of policies from different international institutions. Unless and until all these institutions combine together to make a common policy, it may not be possible to achieve anything spectacular by simply reforming the United Nations alone.

*Grass-roots Governance*

Having discussed global governance, I now move on to briefly discussing the importance of grass-roots governance. The Morse Committee Review which studied the Narmada case in India emphasized the importance of grass-roots governance and stated the following:[334]

> People who live in the villages and depend on the resources of the valley should have played a central part in determining the Projects' impact. Both their knowledge and vulnerabilities are integral to any understanding of what is at issue. ...the failure to consult has fueled intense opposition to the Projects...in the case of the tribal people, they must be given a decisive voice in the formulation of resource policy in their areas.

Grass-roots governance may be said to be the devolution of the principles of governance at the grass-roots level. The real success of administration and policy making is when grass-roots level community groups are able to govern their own lives, instead of policy makers governing the lives of the community groups from state capitals, several thousand kilometers away. A practical example of grass-root governance may be given by citing the

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[334] MORSE *supra* note 1 at xxv and 355.

Constitution of India. By its 73rd and 74th Amendments, the Indian Constitution has conferred direct power to the people in the urban and rural areas for the first time.[335]

As noted earlier, grass-roots governance as a concept cannot survive just by itself. As an evidence of this broader point, an interpretation of the Morse Committee statement made above reveals that the grass-root governance exists with the cooperation of other principles of sustainable development, such as public participation and the infusion of the role of NGOs in the governance process.

More grass-roots organizations and non-government organizations must be involved in policy making and in democratizing international environmental governance. This will enable more public participation. Decisions at the international level must be made keeping in mind the aspirations and needs of the grass-roots community groups.

*Concluding Views*

The process of governance must be symbiotic. Decisions from the grass-root levels need to influence the decisions at the global level and decisions from the global level need to percolate down to the grass-root levels. A holistic approach to the principles of governance is that both national and international strategies are required simultaneously to effect a positive influence on local communities in governing their own lives. Sustainability also

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[335] THE CONSTITUTION OF INDIA, Part IX and IXA, introduced by the 73rd and 74th Amendment Acts, 1992 (w.e.f. 24-4-1993 and 1-6-1993) respectively. The Acts devolved power to the local panchayats (which are age old institutions of self government in the rural areas) and municipalities (in the urban areas). It ensured that local peoples at the grass root level were able to make decisions on most local matters (hitherto made from the State capitals). The Acts were passed to give peoples the Constitutional right to have a say in the decisions being made to affect their lives. The example from the Indian Constitution illustrates the importance of local communities and peoples being given the opportunity to participate in governance over their own lives.

includes within its borders the role of the communities who are affected by the project. The voice of the Project Affected Peoples in the policy aspect lends the project the credibility and legitimacy that the project requires.

Unless and until the Project Affected Peoples are assured of a role in exercising power over their own lives by participating in governance decisions, it may be safely assumed that a project may be declared to be unsustainable. It is the firm opinion of this writer that grass-root and global types of governance complement the other. Successful governance at the local level is likely to percolate to the higher levels, and eventually to the global arena, where international actors are increasingly making macro-decisions that affect lives at the micro-level. Global and national governors therefore have to understand the importance and manner in which local governance functions for any international or national policy making process to be successful at all levels of the polity.

### 2.5.9 ISSUES OF HUMAN RIGHTS

*Introduction*

Project Affected Peoples have certain human rights which are inalienable to their being, by virtue of their being humans. Many of these rights are guaranteed by international and national instruments. However, despite such guarantees, the rights of the affected peoples are regularly violated. This then, takes us on to another important area that deserves our attention: the issues of human rights linked with development projects and Project Affected Peoples.

One of the first questions that arises is: Can a development project be sustainable if there are human rights violations against the Project Affected Peoples affected by such development projects? Though this question is examined as part of this section at a later stage, the answer would have to be in the negative. This is because violations of human rights of Project Affected Peoples would make the project unsustainable. Human rights are supposedly guaranteed by international and national instruments. Nevertheless, the rights of Project Affected Peoples are violated both by the State and by the sponsoring international development institutions. The next section turns to a discussion of the human rights issues concerned with development and development projects.

The sustainable development process as related to development projects consists of several components. One of these elements is human rights -- the rights that all human beings are granted as inherent rights because they are humans.[336] People who are affected by development projects, although poor, vulnerable and in many cases, indigenous peoples, are still human beings. They are entitled to be protected by human rights protection laws that are applicable to other human beings, including those whom the development project may benefit much more than it will benefit the Project Affected Peoples. Many of these rights

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[336] *See generally* PALLEMAERTS, INTERNATIONAL ENVIRONMENTAL LAW IN THE AGE OF SUSTAINABLE DEVELOPMENT: A CRITICAL ASSESSMENT OF THE UNCED PROCESS *supra* note 59 at 645-648. Referring to UNCED, the author wonders that "considering UNCED proclaimed so emphatically that humanity was its central concern, one is entitled to wonder if this humanistic profession of faith is reflected in the texts by a reinforcement of human rights in their relation to the protection of the environment and to economic and social development;" Makau Wa Mutua, *The Ideology Of Human Rights*, 36 VA. J. INT'L L. 589 (1996), for a focus on the content of human rights. The article attempts to link human rights norms and the fundamental characteristics of liberal democracy as practiced in the West; Jose Ayala-Lasso, *Making Human Rights A Reality In The Twenty-First Century*, 10 EMORY INT'L L. REV. 497 (1996), for an overview of the role of the newly constituted United Nations High Commissioner for Human Rights in strengthening the principles of human rights.

are protected by International Conventions and Instruments that have incorporated provisions including the right to life to be enjoyed by all human beings,[337] the freedom of expression,[338] and the right to environmental information.[339] Although there are several international instruments protecting various human rights, it has been pointed out that the interaction of human rights and development has remained unclear in UN theory and practice.[340] Suffice to note that the growing interaction of human rights and the environment in the international arena is "slowly but steadily becoming a reality."[341]

Policy makers must necessarily consider the human rights dimension of the project that affects these Project Affected Peoples.[342] A project in which human rights violations occur is unsustainable and therefore, such a project needs to be re-evaluated carefully. There are several human rights issues that need to be considered when establishing a development

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[337] UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948, Article 3.

[338] *Id.* at Article 31; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966, Article 19.

[339] At present, this right appears to be a part of only the Rio Declaration in Principle 12, discussed in the former part of this chapter. Therefore, including this right as a human rights provision based solely on Rio may be criticized as giving too much importance to Rio.

[340] David P. Forsyth, *The United Nations, Human Rights, And Development*, 19 HUM. RTS. Q. 334, 335 (1997). The author wonders: "Are they two distinct concepts? Are human rights, in whole or in part, an element of sustainable development? Does the United Nations endorse and support democratic development?" The author's assessment is that the United Nations, has been supporting "democratic development as the preferred form of development" and it plans to encourage forms of popular participation in socioeconomic activities. *Id.* at 335.

[341] *See New Customary Law: Taking Human Rights Seriously?*, AM. SOC'Y INT'L L. PROC. 229 (1993), for a useful discussion on the relationship between human rights and international law.

[342] *See* HANDL, CONTROLLING IMPLEMENTATION OF AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THE ROCKY ROAD FROM RIO *supra* note 89 at 316-317. Handl's question is, "Do human rights violations in a would be borrowing country reflect upon good governance and are thus likely to be relevant to the performance of the loan or the lender's ability to monitor and supervise project implementation?" Handl quotes chapter 38 of Agenda 21, which provides that implementation of Agenda 21 and other conclusions of UNCED shall conform with the principles of universality, democracy, transparency, cost effectiveness and accountability. Handl believes that NGO decision making process; participation of local communities as part of the development debate and access to materials on sustainable development by the public contribute in tackling human rights aspects of the development debate.

project. Among them are issues concerning the rights of Project Affected Peoples who are forcefully relocated as a result of such development projects; the question as to when they may be classified as environmental refugees; and the right to a clean and healthy environment to which the community may be entitled.[343] Other related issues include the amount of compensation to be paid to the Project Affected Peoples as well as to the local peoples and non-government organizations whose legitimate protests are shackled by using oppressive force against them. A brief discussion of the salient human rights issues follows in the next few pages.

However, before discussing the human rights issues in detail, it is appropriate to begin by briefly[344] discussing the United Nations Special Rapporteur's Report[345] on the relationship between human rights and the environment. The report gives a new insight on the human rights issues affecting the environment. Her report covered several issues relevant to human rights and the environment, including the legal foundations of environmental human rights; sustainable development; political participation; indigenous peoples; protection of the environment; and the impact of environmental protection on vulnerable groups.[346] The

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[343]Apart from the Draft Declaration on Human Rights prepared for the Ksentini Report, this right does not appear to be enshrined in any other international instrument.

[344]It is beyond the scope of this thesis to deal with the Special Rapporteur's Report or with the Draft Declaration on Human Rights prepared to supplement the Special Rapporteur's Report in detail, as it will make this study unwieldy.

[345] U.N. Doc. E/CN.4/Sub.4/1994/9. This report is popularly known as the Ksentini Report, named after the Special Rapporteur who authored it, Ms. Fatma Zohra Ksentini. *See also* David P. Forsyth, *The United Nations, Human Rights, And Development*, 19 HUM. RTS. Q. 334 (1997). Forsyth states that the relationship between human rights and development has never been clear in UN theory and practice.

[346] Neil A. F. Popovic, *In Pursuit Of Environmental Human Rights: Commentary On The Draft Declaration Of Principles On Human Rights And The Environment*, 27 COLUM. HUM. RTS. L. REV. 487, 491 (1996). Popovic notes the conclusion of the Ksentini Final Report, "There is now a universal awareness of the widespread, serious and complex character of environmental problems, which call for adequate action at the national, regional and international levels." Popovic also discusses the Draft Declaration on Human Rights and the Environment (prepared by experts for the Ksentini Report),

other areas being covered in this part include the forceful relocation of environmental refugees and the impact of development projects on Project Affected Peoples.

At present, the Special Rapporteur's Report is only a Report, and an encouragement on the part of states to follow a new direction.[347] It is hopefully only a question of time before some of its recommendations are seriously considered by nation states.[348]

*The Ksentini Report*

The Ksentini Report came to several conclusions[349] and recommendations relating to the recognition and implementation of environmental standards as a human right. In a preliminary report, the Special Rapporteur noted that both substantive and procedural components form part of the environmental rights of human beings.[350] One of the report's conclusions was that there has been a deviation from environmental law to the "right to a clean, healthy and decent environment."[351]

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which has recognized human rights application to environmental issues. The author also notes significantly that neither environmental human rights in general nor the Draft Declaration in particular will save the world. Indeed, such exposition of the rights call for the reassessment of existing obligations. Popovic also comments on the salient features of the Draft Declaration. This writer agrees fully with Popovic's point of view that it is time to reassess existing obligations and to strengthen these obligations.

[347]The Report still has not been transformed into a piece of soft law. It is yet to be adopted by the Human Rights Commission.

[348]I realize that I am being quite optimistic when stating this, but am stating so because I believe that States will realize the importance of human rights as they have never before and therefore, will be compelled under both international pressure to take steps to redeem the situation.

[349]These conclusions are based on a study of national and international human rights law and of international environmental law.

[350] Preliminary reports submitted include UN Doc. E/CN.4/Sub.2/1991/8 and UN Doc. E/CN.4/Sub.2/1992/7.

[351]Alan Boyle, *The Role Of International Human Rights Law In The Protection Of The Environment, in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43, 44-46 (Alan Boyle and Michael Anderson eds., 1996). It may be noted that this writer finds the meaning of such a shift unclear in the Report. Boyle states that the Report has espoused some rights as a part of current international law, which may be fulfilled by human rights organizations. The substantive

The Report encompasses the 27 principles of the Draft Declaration of the Principles on Human Rights And The Environment (which were formulated for her Report by experts).[352] The Declaration incorporated various substantive rights from other international affirmations. The Declaration re-emphasizes the importance of environmental rights and obligations in the international field. The Declaration supports the environmental rights as having clarity and being independent.[353] Part I discusses the relationship between the environment, development and human rights. Principle 1 explicitly states that human rights, and ecologically sound environment, sustainable development and peace are interdependent and indivisible. Principle 2 declares that all persons have the right to a secure, healthy and ecologically sound environment.

Part II assures several personal rights to human beings, including the right to freedom from pollution and environmental degradation(principle 5) and the right to the highest attainable standard of health free from environmental harm; principle 10 assures human beings that they have the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment. Part III gives human beings political and civil rights, including the right to information concerning the environment (principle 15); the right to hold and express opinions and to disseminate ideas and information regarding the

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elements as part of human rights are the right to development, life, and health, while the procedural elements are due process, public participation, and access to suitable remedies.

[352]Several participatory rights are included as part of the Ksentini Report, such as the right to environmental information; the right to disseminate ideas and information; the right to participate in planning and decision making processes; the right to the freedom of association to protect the environment; and the right to effective remedies in administrative and judicial proceedings.

[353] BOYLE *supra* note 351 at 44 - 45.

environment (principle 16); the right to an active, free and meaningful participation in planning and decision making activities and processes that may have an impact on the environment and development, including the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions (principle 18); and the right to associate freely and peacefully with others for purposes of protecting the environment. Part IV calls on all peoples and States to protect the environment. Part V declares that special attention be paid to vulnerable groups and persons (principle 25) and declares that all persons are entitled to a social and international order in which the rights of the Declaration are fully realized.

The fact that the Special Rapporteur has recognized the relationship between the environment, development and human rights and the fact that she has crystallized this recognition in the form of the Draft Declaration gives the Ksentini Report the importance that it deserves. The Ksentini Report benefits all Project Affected Peoples affected by development projects. More important, the Special Rapporteur's effort may hopefully result in the Draft Declaration being enshrined as a part of conventional law in time to come.[354]

We next move on two other sub-issues that are also part of the human rights debate affecting the rights of Project Affected Peoples in development projects, forceful relocation and environmental refugees. At what point in time does forceful relocation become a human rights violation and at what point in time are the Project Affected Peoples forced to

[354]It must be stated clearly that this is the writer's own hope more than a prediction. There exists no evidence at all at present about the status of the support extended to the Report. The future would of course depend on how many countries support the conclusions reached by the Special Rapporteur.

become environmental refugees as a result of their being displaced? The United Nations High Commissioner for Refugees, Ms. Sadako Ogata, expressed her view during UNCED that "environmental degradation is not only a cause but also a consequence of refugee movements."[355] These are issues that are sought to be discussed in greater detail in the following section.

*Forceful Relocation And Environmental Refugees*

Many international instruments contain provisions for the protection of populations relocated, the International Labor Organization, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Brief discussions follow about these Instruments.

The International Labor Organization Convention 107, adopted in 1957,[356] "Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries," had several provisions providing for the protection of populations relocated as a result of economic development (economic development is

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[355]Ms. Sadako Ogata, United Nations High Commissioner for Refugees, Statement at UNCED, June 10, 1992, *quoted in* Gregory S. McCue, Notes, *Environmental Refugees: Applying International Environmental Law To Involuntary Migration*, 6 GEO. INT'L ENVTL. L. REV. 15, 151 (1993). McCue outlines the magnitude of the current problem of forced environmental migration.

[356]ILO Convention 107 was replaced by Convention 169 in 1989. Convention 107 was replaced because it was criticized for attempting to deal with indigenous peoples only in the post-war period. Provisions in Convention 169 remain the same as in Convention 107 with respect to displacement. *See also* Russell Lawrence Barsh, *An Advocate's Guide To The Convention On Indigenous And Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209 (1990), for a detailed interpretation and explanation of the Convention provisions; Maria Stravapoulou, *Indigenous Peoples Displaced From Their Environment: Is There Adequate Protection?*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 105, 114 (1994).

one of the related causes why development projects occur).[357] The provisions relating to displacement continue in ILO Convention 169 adopted in 1989.

*Displacement And Project Affected Peoples*

Displacement disrupts the normal lives of Project Affected Peoples. The sudden dislocation from one place to another threatens the life, liberty and security of those displaced.[358] Such being the case, it may be stated that the provisions of the Universal Declaration of Human Rights and other international instruments are violated by forced relocation. Article 12 of the Universal Declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights, 1966 prohibit arbitrary interference with an individual's home and privacy. Further, Article 17 (2) of the Universal Declaration of Human Rights provides that "no one shall be arbitrarily deprived of his property." Article 25 of the same Declaration provides that "everyone has the right to a standard of living adequate for the health and well being of himself and of his family."[359]

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[357]Article II provides that the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy is to be recognized; Article 12 provides that the populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations. Sub-clause (2) states that when the removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees. Sub-clause (3) states that persons so removed are to be fully compensated for any resulting loss or injury.

[358]The life, liberty and security of human beings are guaranteed by international instruments such as the Universal Declaration of Human Rights and by the International Covenant on Political and Civil Rights. *See also* the 1949 GENEVA CONVENTION RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS, June 8, 1977, 16 I.L.M. 1442 (1977), which provides in Article 17, that "should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition."

[359]The International Covenant on Economic, Social and Cultural Rights, 1966, contains several provisions which are similar in nature: Article 1, which provides for the right to pursue freely one's own economic, social and cultural development; Article 10, which provides for the protection of the family; Article 11, which provides for the right to an

The linkage between displaced peoples returning to their lands and the question of adequate compensation being paid to them has been explored by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.[360] For example, in its final report, the Sub-Commission has made the following declaration through Article 27:

> Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied, or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Similarly Article 28 is also very progressive in its approach and states:

> Indigenous peoples have the right to the ...restoration...of the total environment and the productive capacity of their lands, territories and resources, as well as to the assistance for this purpose from States and through international cooperation.

Certain basic components need to exist to protect the rights of indigenous peoples who are displaced. For example, it is essential that the displaced persons may need to be classified as environmental refugees,[361] particularly if they are indigenous peoples. This is because of the disruption of their lives, especially the fragile connection that they have had with the

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adequate standard of living, shelter and food; Article 12, which provides for the right to physical and mental health; and, Article 13, which provides the right to education. Similar provisions in the International Covenant on Civil and Political Rights, 1966, are also violated by forced relocation.

[360] U.N. Doc. E/CN.4/Sub.2/1993/26 (8 June 1993).

[361] This suggestion that they be "classified" as environmental refugees is a suggestion made only by the writer and by none else. It is hoped that such a classification will strengthen their rights more.

environment. Also, there should be guarantees for their basic human rights, when they are forced to be relocated.

Project Affected Peoples are normally vulnerable because of their positions.[362] Relocating them only adds to their trauma. Therefore, displacement must be monitored and if permitted, must be restricted to only rare and essential cases.[363] The human rights of Project Affected Peoples when being relocated include: their right to an equally arable and cultivable land; their right to be compensated; and their right to facilities that they are entitled to in the new location and adequate compensation.[364]

*Compensation In Cases Of Displacement And The Rights Of Oustees*

However, it may be possible that the government after considering various options, decides that the establishment of the development project is essential for various reasons. In such a case, the communities who are asked to relocate must be adequately compensated and adequately rehabilitated. Relief, rehabilitation and compensation are a part of the package to be offered to oustees. However, if the oustees are not properly rehabilitated or compensated, then, are not the rights of the oustees being violated? What is adequate

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[362]The "positions" that they are placed in include their lack of empowerment in their being aware of their rights; their poverty and therefore, consequently, their being relegated to the position of second class citizens behind the rich and politically more powerful communities (who many a time are beneficiaries of projects, which uproot the poorer people); and lack of political influence in policy making which affects their lives.

[363]*See* Maria Stravoupoulou, *The Right Not To Be Displaced,* 9 AM. U. J. INT'L & POL'Y 689, 738 (1994). Stravoupoulou interprets the meaning of the term "necessity" as the existence of a pressing social need which must be assessed in the particular circumstances at hand.

[364]*See* MORSE *supra* note 1 at xviii, where the review notes that when the committee members approached affected villagers and inquired from them the plans of the Government to compensate the villagers as landless laborers, the response of the villagers was: "We are farmers, not laborers." This simple statement by the villagers exposes the ignorance of policy makers and governments in ensuring wholesome rehabilitation and provision of alternative resources to the villagers.

compensation? Is inadequate compensation a human rights violation? I seek to answer these questions in the following paragraphs.

If oustees are not properly rehabilitated or compensated, then, their rights have certainly been violated. There is no definite understanding of the nature of what adequate compensation means. Adequate compensation may be said to include monetary value in terms of the market value of the lands that oustees have been displaced from; compensation in the form of either money (which should be paid calculating the amounts that would be necessary to place the ousted family back in the position that they were in before their displacement), or other alternatives, such as livestock, grains or both.

This writer believes that inadequate compensation is indeed a violation of the human rights of the Project Affected Peoples. That is because, inadequate compensation would mean that the ousted peoples are unable to lead full and wholesome lives or at least up to the standard to which they were living earlier and so, they are unable to enjoy and live life in the manner that they would have preferred. Further, these peoples have been forced to lead such a life, due to circumstances beyond their control, such as a resettlement. Any infringement on their right to choose the way they want to live would consequently be a violation of their human rights.

*Environmental Refugees*

The term environmental refugee has been defined as: "...those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked

environmental disruption that has jeopardized their existence and / or seriously affected the quality of their life."[365] Another definition describes them as "people who migrate because of serious environmental disruptions that make their habitats unlivable temporarily or permanently.[366] Forced oustees become environmental refugees when they have been involuntarily displaced by an event, which may be environmental in nature (such as a development project), which has seriously disrupted the quality of their life.

Environmental refugees are said to comprise the "largest and the fastest growing group of displaced persons in the world."[367] Individuals displaced due to environmental causes are in a gray region since international legal instruments do not provide them with adequate protection.[368] For example, the Refugee Convention's definition of the term "refugees" is

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[365] STRAVOUPOULOU, THE RIGHT NOT TO BE DISPLACED, *supra* note 363. The author finds that internally displaced persons fall outside the scope of the 1951 Geneva Convention because they have not crossed the international border. Unless the conditions under the 1949 Convention and the 1977 Protocols are met, internally displaced refugees are not protected under international humanitarian law. It must be stressed by this writer that at present, there is no legal significance for the term "environmental refugee," in international law. Instead, the discussion on environmental refugees is purely in the nature of academic endeavor.

[366] MCCUE *supra* note 355 at 153.

[367] Michelle Leighton Schwartz, *International Legal Protection For Victims Of Environmental Abuse*, 18 YALE J. INT'L L. 355, 374 (1993). *See* Manfred Woehlcke, *Environmental Refugees*, 43 AUSSENPOLITIK 287, 288 (1992). Woehlcke has stated that position very clearly in the following words: "only those persons are regarded as international refugees who have crossed the borders of the state whose citizens they are. This means that the large number of internal refugees, who are probably no less jeopardized than the "genuine," i.e. internationally recognized refugees, are not given refugee status; they merely rank as displaced persons." The author proceeds to state that environmental refugees are not covered "by the internationally recognized definition of a refugee, even though they may be in similarly serious jeopardy as the genuine refugees." This writer fully agrees with the opinion of Woehlcke. As long as the conditions of environmental refugees are not recognized as comparable to the "traditional" definition of refugees under the Refugee Convention, their condition will not improve at all. *See also* Katherine M. Weist, *Development Refugees: Africans, Indians and the Big Dams*, 8 J. REFUGEE STUD. 163 (1995), for an analysis on the effects of the removal of displaced populations removed involuntarily because of the construction of development projects in Africa and in North America; Karen Jacobsen, *Refugees' Environmental Impact: The Effect Of Patterns Of Settlement*, 10 J. REFUGEE STUD. 19 (1997) for a discussion on the various environmental effects of settlement and for an examination of the role of the host community in this settlement process; Gaim Kibreab, *Environmental Causes And Impact Of Refugee Movements: A Critique Of The Current Debate*, 21 DISASTERS 20 (1997), for a discussion on the relationship between insecurity, environmental change and population displacement.

[368] STRAVOUPOULOU, THE RIGHT NOT TO BE DISPLACED, *supra* note 363.

cited as being deficient as it overlooks the large numbers of peoples whose rights to health, food and employment are endangered by environmental degradation and disasters.[369] As noted, unless and until environmental refugees are given the same considerations that "traditional" refugees receive under the Refugee Convention, the problems faced by environmental refugees will not be fully appreciated as a human rights problem. This also calls for a contemporary definition of environmental refugees and their rights through international instruments such as those discussed earlier, including the ILO Convention, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

*Impact Of Development Projects On Project Affected Peoples*

Improper assessment of the development project may result in the oustees' lands being destroyed by a development project even before they are fully rehabilitated. Such a half baked project may also destroy the environment around the areas where the oustees have their livelihoods. In such a case, it may be stated that the destruction of the environment amounts to a violation of their right to a clean and a healthy environment, which in turn may be construed as a violation of their right to life.[370] It may be noted here that "development based relocation" has been difficult to define as one of the immediate reasons of

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[369]SCHWARTZ *supra* note 367 at 379 (1993). A suggestion has been to expand the definition of the term "refugee," to include environmental refugees within the scope of the definition offered by the Convention Relating to the Status of Refugees.

[370]The Indian Supreme Court has repeatedly reiterated this position. *See* *M.C. Mehta* Vs. *Union Of India* (1988) 1 SCC 471; *Rural Litigation And Entitlement Kendra* Vs. *Uttar Pradesh* AIR 1985 SC 652, 656.

displacement, since such relocation accrues from "a policy that is supposed to benefit the national or local welfare, if not the people relocated directly."[371]

*Conclusion*

The issue of classifying Project Affected Peoples ("PAPs") as environmental refugees is not a clear one. PAPs need help – they must benefit from the development policies and projects that are established. Only that is equitable and fair to them. However, in many cases, relocation is unavoidable. When this is the case, they must be given the best deal possible. Forced relocation leads to PAPs becoming environmental refugees. Voluntary relocation is where the PAPs are satisfied with the rehabilitation and relief measures and agree to move on their own. However, at times, even though rehabilitation and relief measures are granted to the PAPs, they are forced to be relocated because they are not willing to move out voluntarily. In such cases, utmost care must be taken to adjust them to the cultural and social changes that await them. And, they must be relocated in areas where they will be benefited most by the development project. Proper relief and rehabilitation measures will avoid the PAPs from becoming environmental refugees.

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[371] STRAVOUPOULOU, THE RIGHT NOT TO BE DISPLACED *supra* note at 363 at 702. If certain conditions for aiding the participation and for protecting the livelihoods of the people affected by projects are fulfilled, the hardships that such Project Affected Peoples undergo may not be any different from the conditions of refugees or other displaced persons. The author notes that halting "development displaced people from falling into refugee like conditions is the primary goal of resettlement policies." The author declares that the reasons for a "development induced displacement" are difficult to pinpoint and to be dealt with in international legal terms. Quoting other scholars, the author adds that "development in itself cannot legitimize any form of displacement or, in more extreme terms, that development projects resemble lawless activities and therefore, should somehow be regulated." The author encourages a policy of compensation and rehabilitation for all those who are relocated. These comments are fully endorsed by this writer, who also believes that one of the key elements of forced relocation is providing compensation and rehabilitation to the victims.

This section concludes by noting a suggestion that has been made for a new international Convention, based not on in refugee law, but in international environmental law, that will protect persons displaced as a result of development projects.[372] The suggestion notes that such a Convention would tackle the situation in the following way: by utilizing a novel method to identify the affected persons and providing them with solutions, rather than solely proceeding under refugee law. The new Convention would thus add credibility to the ever increasing field of international environmental law.[373] A new international Convention for Project Affected Peoples must be welcomed. However, a new Convention would be likely to complement existing International Instruments. This writer envisages that the main purpose of the Convention would be to identify and fructify the rights of Project Affected Peoples, in conjunction with other International Instruments. Of course, for such a Convention to come into force, the international community needs to recognize the enormity of the problem that the Project Affected Peoples all over the world are facing. This recognition of the enormity of the problem is likely to take a long time.

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[372] McCUE *supra* note 355 at 178.

[373] *Id.* McCue outlines the norms of international environmental law that need to be incorporated in a new Convention and how such norms may tackle the problems caused by "forced environmental migration." The author also describes the effect of the proposed new Convention in practice through a fund and also how it would solve the impact of the refugees on their host states. The Convention proposed is "expected to be more efficient and would address the problems of migrants where they currently live rather than use a resettlement mechanism." The Convention would consider and focus on the situation relating to efficient resource allocation. McCue envisages that the Convention will function from the office of the Under-Secretary General at the United Nations. McCue concludes that although the proposed Convention attempts to solve concerns expressed by various global actors, it would continue to function within the current limitations of the global community. *Id.* at 189-190. This writer fully supports the idea of a new Convention for Project Affected Peoples, affected by development projects. However, at the same time, this writer is of the opinion that it will take a long time for such a Convention to actually fructify.

*Civil And Political Rights*

There are certain civil and political rights that are guaranteed by international law. These rights include the right to information, the right to participate in the political system, the right of freedom to participate in rallies, meetings, the right not to be physically and mentally traumatized and the right to approach an established judicial and administrative forum.[374]

As human rights are one of the essential conditions of sustainable development, the project becomes unsustainable as a result of such rights violations and therefore, must be stopped. Of course, most times, Governments do not bother about violations at all. However, even if Governments do not bother, international lending institutions should. The onus should be placed on the international development institutions to compensate the PAPs for their rights having been violated. This is something that is possible to be incorporated within the functioning of the international institutions as a result of international pressure. By such incorporation, the project may once again become sustainable for it to proceed.

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[374] Some of these international legislations are the Universal Declaration of Human Rights (1948), The International Covenant on Civil and Political Rights (1966), and The Indigenous and Tribal People's Convention (1989). To further illustrate, in the Universal Declaration of Human Rights, Article 3 assures that everyone has the right to life, liberty and security of person. Article 5 declares that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. Article 8 states that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law. Article 9 declares that no one shall be subject to arbitrary arrest or detention. Article 13 gives the right to freedom of movement within the borders of every state. Article 19 assures that everyone has the freedom of opinion and expression. Similarly, Article 20 gives the right to freedom of peaceful assembly and association. The International Covenant on Civil and Political Rights also gives similar rights to all persons. For example, Article 3 (2) states that each State Party undertakes to ensure that persons whose rights or freedoms are violated shall have an effective remedy. Article 9 assures every one of the freedom to liberty and security of person. Similarly Article 10 assures that all those arrested shall be treated with humanity and with respect for the inherent dignity of the human person. Article 19 states that every one shall have the right to hold their own opinions. This right includes the freedom to seek and receive information. The right to peaceful assembly is again recognized in Article 21. The Convention Concerning Indigenous And Tribal Peoples In Independent Countries, ILO Convention 169, has already been discussed earlier in this chapter.

*The Right To A Healthy And Clean Environment And The Right To Life*

The right to a healthy environment has been said to refer to the satisfaction of a vital need.[375] Pathak gives eight criteria classifying the human right to a healthy environment as a fundamental human right available to all human beings.[376] According to him, the right to a healthful environment is "rooted in the right to an acceptable quality of life, extending to the right to life itself."[377] According to another scholar, "the necessity of the right itself is not disputed; rather, the differences of opinion concerns the problem of how to classify and enforce the right."[378] In this context, the term "environmental rights" has been interpreted

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[375] R.S. Pathak, *The Human Rights System As A Conceptual Framework For Environmental Law, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 205, 210 (Edith Brown Weiss, ed., 1992). Pathak quotes philosophers such as W.J. Winslade and gives the meaning of a vital need as needs, "whose satisfaction would be in the interest of, and would be wanted and desired by, nearly all intelligent and rational persons under ordinary circumstances...alternatively, one might say that vital needs are those needs which are at least necessary conditions for reaching and maintaining a decent standard of living."

[376] *Id.* at 212-214. The eight criteria are: "human rights as general rights; human rights being more fundamental and basic than other rights; human rights as essential and enduring and unvarying in identity; the right to a healthy environment being regarded as a vital aspect of the right to life, "for without a sound environment, it would not be possible to sustain an acceptable quality of life or even life itself;" the inalienability of human rights; regarding their status, human rights are those "grounded in reality and not in mere convention," inherent in human beings as a result of individuals being the owners of their human personalities and ; the identification of a human right by its status as a conceptual source of bodies of rights constituting the general corpus of law." Pathak believes that the right to a healthy environment fulfills these criteria and therefore qualifies as a human right. At this stage, it must be stressed by the author that there is no evidence on record to determine the nature of nation states' opinions of Pathak's views. It may also be noted that Pathak's views are more in the nature of academic discussion.

[377] *Id.* at 217-218. Pathak traces the right to a healthy environment to the Preamble of the United Nations Charter Article 1(3), which refers to "promoting and encouraging respect for human rights and fundamental freedoms." Pathak then states that if the right to a healthful environment is treated as an aspect of the right to life, such a right may be founded in Article 3 of the Universal Declaration of Human Rights, in Article 6(1) of the International Covenant on Civil and Political Rights and in Article 12 (2) of the International Covenant on Economic, Social and Cultural Rights (which obligates the state to provide for the improvement of all aspects of environmental hygiene). Pathak's conclusion is that if the right to a healthful environment may be traced to both the International Covenants mentioned above, then, "it may be exercised not only as a right against the state to ensure against environmentally harmful acts but also as a right to call upon the state to provide the conditions for a healthful environment – it becomes both a positive and negative right."

[378] Iveta Hodkova, *Is There A Right To A Healthy Environment In The International Legal Order?*, 7 CONN. J. INT'L L. 65, 79-80 (1991). Hodkova opines that two central international legal fields must be considered when dealing with the right to a healthy environment: the existing body of human rights and the developing body of international environmental law. The author declares that the right to a healthy environment is beyond nascency and must not be "denied to humanity any longer;" *See also* W. Paul Gormley, *The Legal Obligation Of The International Community To Guarantee A Pure And Decent Environment: The Expansion Of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85 (1990).

as rights that are part of the environment, rather than humans who have rights to a safe and clean environment.[379]

The right to a healthy environment has also been interpreted as an extension of the right to life and the right to health. Article 12 of the International Covenant on Economic, Social and Cultural Rights states that the right to health includes the "improvement of all aspects of environmental and industrial damage." The advancement of the right through Article 12 is believed to be the starting point for the right to a healthy environment being recognized in time to come.[380]

The Universal Declaration of Human Rights, 1948, through Article 3 states that, "everyone has the right to life, liberty, and security of person."[381] The right to a healthy environment means safeguarding both states' own harmful acts and also those of individual entities. The

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[379]Dinah Shelton, *Human Rights, Environmental Rights, And The Right To Environment*, 28 STAN. J. INT'L L. 103, 117 (1991). Shelton agrees that such an interpretation would be a worry for peoples who interpret the safeguarding of environmental rights and respect for human rights as interests which are in dispute, certainly if viewed from the view of developing countries. Shelton concludes that human rights and environmental protection are basic tenets of current international law. Shelton acknowledges that the efforts of rights are to foster and have the best standards of human life. In this regard, the author states that both rights complement each other. This is because, "human rights depend upon environmental protection," and safeguarding the environment in turn can be done only by fulfilling the rights to information and public participation and political activity. This writer also believes that human rights and environmental protection complement each other and reiterates that protection of one would automatically entail the protection of the other.

[380] A.A. Cancado Trindade, *The Contribution Of International Human Rights Law To Environmental Protection, With Special Reference To Global Environmental Change, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 244, 280 (Edith Brown Weiss ed., 1992). *See also* Final Statement, *International Congress on a More Efficient International Law On The Environment And Establishing An International Court For The Environment Within The United Nations System* (1989), 19 ENVTL. POL'Y & L. 138 (1989); W. Paul Gormley, *The Right To A Safe Environment*, 28 INDIAN J. INT'L L. 1, 13 (1988).

[381] UN Doc. A/8II (1948), adopted on 10 December, 1948.

right consequently implies that states, individuals and non-state actors are expected to fulfill certain duties in help achieve this right.[382]

Project Affected Persons must be assured of a right to a healthy and clean environment wherever they are. When people are relocated, they have a right to a clean and a healthy environment. It must be ensured that sanitation facilities are in place and that there is no pollution from external sources. If this is not done, it is a violation of the rights of the PAPs to a clean and healthy environment.[383] It is also a violation of their right to life.[384] The violation of the right to a clean and healthy environment disrupts both the basic features of the sustainable development principles and in turn, makes the project unsustainable.

When the environment suffers, a direct consequence is that people suffer; and when people suffer, it is probable that human rights may be affected. When human rights are impacted, then, certain procedures and rules come into play to help protect the peoples from

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[382]TRINDADE *supra* note 380 at 291. *See also* Robin Churchill, *Environmental Rights In Existing Human Rights Treaties, in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 89, 102-105 (Alan Boyle and Michael Anderson eds., 1996), for details on provisions relating to the right to a clean and healthy environment in various international instruments. Churchill describes the right to a decent living condition and the right to health as those which have accrued over a period of time, according to availability of States' resources.

[383]*See* James T. McClymonds, *The Human Right To A Healthy Environment: An International Legal Perspective*, 37 N. Y. L. SCH. L. REV. 583, 583 (1992). In the article, McClymonds points to two contrasting principles which influence the right to a healthy environment. The first is the right to development which less industrialized countries lay claim to and the other involves the sovereignty issue. The author studies the "development of international human right to a healthy environment" by examining the scope of the right and also by analyzing its content. The author concludes that the right to a healthy environment needs to progress before the right is accepted as a human right. The lacunae in the right identified are: the absence of the right to file claims by individuals before international judicial bodies; the absence of standards to "determine liability and compensation for environmental harm;" and the barrier of sovereignty. The author's belief is that unless these gaps are filled up, the right cannot be achieved. *Id.* at 633. This writer also agrees that per se, it would appear that unless these gaps are filled, the right to a healthy environment cannot be fulfilled.

[384]*See* Michael R. Anderson, *Individual Rights To Environmental Protection In India, in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 199 (Alan Boyle and Michael Anderson eds., 1996). The Indian Supreme Court has held that the right to a clean and healthy environment is an inherent part of Article 21 of the Indian Constitution, which is the right to life, in *M.C. Mehta* vs. *Union Of India*, A.I.R. 1987 SC 1086.

suffering.[385] The State has a great responsibility and a fiduciary duty to safeguard its citizens from violations that affect their humanity.[386] It has also been suggested that states have a basic responsibility not to contribute to environmental degradation, as such deterioration of the environment is likely to harm its citizens. States are also entrusted with a positive obligation to halt environmental deterioration.[387] However, in many cases, the State itself actively abets and sponsors the violations.

*Concluding Views*

States and sponsoring international institutions must take the responsibility for their actions. The responsibility cannot and must not be shirked. As mentioned earlier, it is difficult to pin down states with respect to human rights violations. However, it is possible to pin down sponsoring international institutions under international pressure. It is hoped that the fructifying of soft law into hard law in the areas of human rights laws is only a question of time. It has been suggested that human rights and their obligations complement the other – when the rights are recognized globally, so should the obligations be recognized.[388]

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[385] POPOVIC *supra* note 346 at 489. In this article, Popovic identifies and analyzes the content and the extent to which relevant norms, rules and procedures safeguard human and environmental rights. The author discusses the United Nations Special Rapporteur's Report.

[386] *See* SCHWARTZ *supra* note 367 at 359 (1993), who describes a theory that environmental harm is justiciable when the injured party shows a connection to an existing human right, including the right to life. Shwartz also explains a second theory that environmental harm is justiciable since all people have a right to live in a clean and safe environment. A third theory relates to intergenerational equity. However, these three theories are unclear about their enforceability. But, Shwartz suggests that all three theories are persuasive of the argument that States must not contribute to any form of environmental harm and also that States must take positive steps in halting environmental injury.

[387] *Id. See* James Cameron and Ruth Mackenzie, *Access to Environmental Justice And Procedural Rights In International Institutions, in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 129 (Alan Boyle and Michael Anderson ed., 1996), for an examination of the rights that exist with respect to human right violations by international institutions.

[388] Katarina Tomasevski, *Monitoring Human Rights Aspects Of Sustainable Development*, 8 AM. U. J. INT'L L. & POL'Y 77, 78 (1992-93). Tomasevski declares that a global acceptance of rights and obligations must breach national sovereignty. A great level of increased consciousness of the seriousness of human rights brutalities has consequently resulted in more concern and has forced States to take some action.

International institutions must be penalized for human rights violations against PAPs. This is possible only if international institutions are made accountable for their actions in the international fora. In this regard, it may be stated that the amalgamation of human rights with governance and the democratic process has been emphasized earlier[389] – they are after all two sides of the same coin.

This leads the discussion on to the next area, relating to redressing grievances by Project Affected Peoples. A vital barrier to completely incorporate human rights in the development process has been the absence of adequate redressal mechanisms for peoples who are injured by "development interventions."[390]

## 2.6 OVERALL CONCLUSIONS

This chapter has considered various issues. Among them have been the initial examination of Project Affected Peoples; issues relating to the evolution of the sustainable development

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[389] *See* Barbara Bramble, *Response To Katarina Tomasevski*, 8 AM. U. J. INT'L L. & POL'Y 103, 106 (1992 - 93). Bramble cites the proceedings of one of the preparatory meetings to UNCED, held at Paris in December 1991. The final document at that meeting asked all Governments to expand and encourage "participatory democracy." It also demanded that governments make certain that citizens and community groups have unlimited access to any information relating to "products, processes and projects" which may harm the environment or the health of human beings. Other demands made were to further progress in establishing in international law, mechanisms to study and evaluate the fact that human rights are indeed being followed and to democratize the policy making process of international lending agencies and to make government functioning more open and answerable to the general public.

[390] TOMASEVSKI, *supra* note 388 at 83. Tomasevski acknowledges that "while human rights obligations reach far beyond governmental self restraint, their precise definitions in the context of sustainable development are lacking." The author calls for a "human rights impact assessment" ("HRI") as a new tool to evaluate impacts of proposed development impacts on the rights of human beings. The new HRI assessment is based on two issues: "development cooperation" as a continuing reality and the fact that human rights are considered as global. This type of an impact assessment is expected to create "participatory mechanisms for keep watch over and analyze planned development policies. The author believes that if "international human rights law were put into practice," it would be among the top of the list of items to which attention is paid when dividing resources. The HRI is an interesting proposition and deserves more attention to be paid to it by the international community. Such an assessment would probably change the manner in which human rights are being assessed by the international community, for the better.

concept, beginning with ecodevelopment, proceeding to the Brundtland Commission Report, the UNCED; incorporation of the instruments as binding or non-binding instruments on nation states; an examination of the importance of "principles;" and finally a discussion culminating on the relevant principles of sustainable development and the two additional issues of governance and human rights that also influence the sustainable development debate and which affect the lives of Project Affected Peoples. At this stage, it is essential to make a transition to begin examining another area in this thesis.

The sustainable development debate in the context of the thesis will contain a serious lacuna without the infusion of another focal point into the discussion. That area deals with grievances redressal. Project Affected Peoples may be identified, concepts enunciated, principles laid down and legal instruments made either binding or persuasive on nation states to follow the guidelines given. However, the circle is still not complete. What do the Project Affected Peoples do if the guidelines given are not followed scrupulously? Moreover, which forum can they go to if one of the actors in the drama is an international agency, which is not bound by national laws or decisions of national tribunals?

While it is true that national judicial decisions may be binding on the government and Courts do direct the State to apply the given guidelines, financial and political compulsions often prompt Governments to ignore such decisions. In such cases, the Project Affected Peoples are back to square one to debate on the solutions that may continue to defy them. Project Affected Peoples require a sustainable, effective and independent mechanism to

redress their grievances particularly if (as mentioned earlier), one or more of the actors happen to be a powerful international lending and development institution. The effectiveness of such a mechanism would be determined by judging whether or not the mechanism infuses sustainable development principles in its functioning and also seeks to advance those principles and ultimately the process of sustainable development through its decisions. The main purpose of the mechanism would however be to redress grievances of Project Affected Peoples.

The next chapter considers the World Bank Inspection Panel, an independent body set up in 1992 to serve just the main purpose mentioned. Chapter 3 evaluates the viability of the Panel and assesses its independence to determine if it is a suitable mechanism capable of redressing the grievances of Project Affected Peoples who may be adversely affected by World Bank-funded development projects, in a timely fashion; if it is capable of infusing in its functioning the principles and issues relating to sustainable development contained in this chapter; and if it is capable of advancing those principles and the sustainable development process through its decisions.

*CHAPTER 3*

# GRIEVANCES REDRESSAL OF WORLD BANK FUNDED DEVELOPMENT PROJECTS: AN EXAMINATION OF THE WORLD BANK INSPECTION PANEL

## 3.1 INTRODUCTION

*Purpose And Scheme*

While the principles of sustainable development relating to development projects have been laid down in the chapter 2, the focus of this chapter is on the effectiveness of the Bank's grievances redress system and the sustainability practices of the Bank which have resulted from establishing such a system. The World Bank[391] does not lack in Policy statements and in Directives in implementing and determining the direction of development projects. However, the rigorous enforcement of these Policy statements and Directives by the Bank appears to be the biggest problem.

The World Bank Inspection Panel was set up in 1993 to redress grievances by local communities affected by the projects funded by the Bank. The question that arises is "How effective has the Panel been in protecting community and environmental interests of the

[391]The World Bank consists of a combination of institutions, the International Bank for Reconstruction and Development and its affiliate, the International Development Association and the International Finance Corporation. The IBRD was established in 1944 (following the Bretton Woods conference) and is the oldest of the World Bank institutions. It is owned by the governments of 179 member countries.

Project Affected Peoples and in fulfilling the principles of sustainable development outlined in chapter 2?"

This chapter discusses the development of the World Bank Inspection Panel from six perspectives. I begin part 2 by briefly introducing issues relating to the World Bank and its relation to sustainable development, development assistance, development projects and the merits of constructing dams.[392] This part also briefly examines the role of the Bank as a governing institution. In the next part, I discuss some relevant and important Operational Directives of the World Bank.

In the fourth part, I examine a case study, the Sardar Sarovar dam project on the river Narmada in India. Narmada ended as a fiasco for both the Bank and the Government of India. The controversies of the Narmada case forced the Bank to establish the independent Morse Committee Review to examine the role of the Bank and to determine if the Narmada project should continue to be funded by the Bank. The Review is also examined in the fourth part.

The failure of the Narmada Project followed by the Morse Committee Review findings culminated in efforts to compel the Bank to establish an independent body to redress grievances of Project Affected Peoples arising out of Projects funded by the Bank. This independent body is the World Bank Inspection Panel ("WBIP"), set up in 1993. Part five

[392]This chapter generally looks at dam-based development projects, as examples of development projects. Dams are among the largest development related projects undertaken by the World Bank. They have also been responsible for large scale environmental damage.

examines the Panel's procedures and the cases that have come up before it. An analysis of the Panel's effectiveness follows next, in part six. This part concludes by making several recommendations to strengthen the Panel's functioning.

## 3.2 SUSTAINABLE DEVELOPMENT, DEVELOPMENT ASSISTANCE, DEVELOPMENT PROJECTS AND WORLD BANK GOVERNANCE

### 3.2.1 Sustainable Development And International Development Institutions[393]

The World Commission on Environment and Development in 1987 defined sustainable development to mean development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[394] In the same breath, the Commission remarked that "the major priority is for sustainability considerations to be diffused throughout the work of international financial institutions."[395] The roles of the World Bank and the IMF have been referred to by the Commission[396] as very important, as their lending operations are used on a comparative basis in cases of lending by

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[393]The core principles of sustainable development which have been dealt with in the preceding chapter may be identified as: human beings being the center of concerns of sustainable development; equity towards present and future generations; environmental principles being integrated as part of the development process; public participation; the precautionary principle; environmental impact assessment; the capacity of local peoples to govern their lives; and human rights as an integral part of the development process.

[394]WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 2 - 1 (1987). The concept contains within it two key sub-concepts: the concept of needs, meaning the essential needs of the poor, and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs. *See generally* Upendra Baxi, *The New International Economic Order, Basic Needs And Rights: Notes Towards Development Of The Right to Development*, 23 INDIAN J. INT'L L. 225 (1983); Paul Schachter, *The Evolving International Law Of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976); Inamul Haq, *From Charity to Obligation: A Third World Perspective On Concessional Resources Transfer*, 14 TEX. INT'L L. J. 389 (1979), for details on the international law of development in relation to the third world.

[395]WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT *Id.* at 3 - 11. They also observed that in the past, development assistance has not always helped advance sustainable development.

[396] *Id.*

other lending agencies.[397] The Commission urged the Bank to take note of sustainability considerations when appraising "structural adjustment lending and other policy oriented lending directed to resource based sectors – agriculture, fishing, forestry and fishing and energy in particular – as well as specific projects."[398]

The question to be answered is how effective the international development institutions have been in integrating sustainable development issues as part of their work. An important component of the work of international financial institutions has been in the area of

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[397] *See also* Jill A. Kotvis, *Environmental Issues In International Project Finance*, 745 PLI/COMM 243 (1996). Kotvis explores the entire gamut of project finance and development projects, in relation to multilateral finance institutions. She identifies the key environmental policies and procedures of several multilateral lending institutions. She believes that the World Bank is one institution which has successfully incorporated several positive environmental policies in its project financing policies. Her conclusion is that developing countries need to have a set of guidelines relating to environmental protection if they want projects to be established there. *Id.* at 311; *See also* Robert S. McNamara, *Providing For Environmental Safeguards In The Development Loans Given By The World Bank Group To The Developing Countries*, 5 GA. J. INT'L & COMP. L. 540 (1975), where McNamara has urged the need to realize the amalgamation of environment and development policies in Bank funded policies; Comment, *Controlling The Environmental Hazards Of International Development*, 5 ECOLOGY L. Q. 321 (1976), for a list of cases documenting the environmental damage that bank-funded projects have caused in developing countries; Ernest Stern, *Prospects Of Development Financing In The 1980's*, 32 AM. U.L. REV. 146 (1982), who discusses three themes: the growth prospects for developing countries in the 1980's; prospects for supply of capital to meet their financing needs and implications for the role of the Bank. *Id.* at 146; William Wilson, *Environmental Law As Development Assistance*, 22 ENVTL L. 953 (1992), who believes that currently most environmental lawyers focus their efforts on domestic environmental issues. Wilson believes that "such a focus is misplaced because developed nations continue to insist that the developing nations improve their environmental performance." For this reason, the author opines that environmental lawyers must share their knowledge and assist developing countries. *Id.* at 953-954.

[398] *Id.* The Commission wanted the Bank to develop simple ways of shoring up their appraisal methods and to aid less industrialized countries in increasing their environmental assessment capacity. The Commission noted that the Bank has been re-working its lending policies considering the environmental concerns and sustainable development policies. The Commission wanted the Bank's actions to be followed by a reformation of the Bank's internal functioning. On the impact of the Bank on projects and the debt crisis, *see* RICHARD E. FEINBERG ET AL., BETWEEN TWO WORLDS: THE WORLD BANK'S NEXT DECADE (1986). *See also* STEPHEN HELLINGER ET AL., AID FOR JUST DEVELOPMENT 155-156 (1988). Some of Hellinger's recommendations are that the Bank consult the vulnerable and marginalized communities so that their views are integrated into the Bank's policy making process; that the Bank incorporate as its partner, local community level organizations which fully represent the views of the local peoples; and that the Bank construct a NGO advisory unit as part of the Bank's operations. Hellinger also calls for the Bank and other agencies to be answerable to both the citizens of the donor nations as well as the citizens of the recipient countries. This writer fully agrees with Hellinger's submission. This is because, after all, on one hand, it is the citizens of the donor countries who are paying for the running of the developing institutions and on the other hand, it is the citizens of the recipient countries who are being affected by the supposed "largesse" of the Bank, through its policies. Therefore, both groups of citizens have a right to know the development institution's policies and plans.

development projects,[399] bilateral assistance, structural adjustment policies and so on. Multilateral financial institutions have contributed to bringing in some reforms while carrying out the "global environmental agenda," including collecting funds, integrating environmental concerns into the development process and making policies to increase the effect of international financial resources on the sustainable development process.[400]

Have sustainability considerations been infused into development projects funded by the World Bank?[401] This question is discussed a later stage in this chapter. As the Brundtland

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[399] *See* Jerome Levinson, *Multilateral Financing Institutions: What Form Of Accountability?*, 8 AM. U. J. INT'L L. & POL'Y 39, 39-40 (1992), who declares that the main aim of Multilateral Financing Agencies funding practices is to aid in encouraging greater economic growth rates. *See also* Zygmunt J.B. Plater, *Damming The Third World: Multilateral Development Banks, Environmental Diseconomies, And International Reform Pressures On The Lending Process*, 17 DEN. J. INT'L L. & POL'Y 121, 121-122 (1988), for an analysis on Bank projects and processes, which has been described as making an "official shift in the late 1980's in its willingness to recognize the seriousness of policy and procedure to reform the development loan process and to make it more rational and less prone to environmental disasters." One of the focal points of the article examines several legal means to reform and recommend positive changes to the international development process, "concentrating on the practical example of several recent cases of donor-nation pressure on the multilateral development banks." One of the conclusions is that NGOs must take credit for many positive changes in the development loan process. It is my opinion that indeed, a large part of the credit for the effort to make development institutions accountable and take responsibility for their actions must go to the NGOs. They have been and continue to play an important role in shaping both public opinion on the functioning of these institutions as well as forcing the development institutions to react to the public pressure and accordingly compelling them to reform their policies for the better.

[400] Andrew Steer and Jocelyn Mason, *The Role Of Multilateral Finance And The Environment: A View From The World Bank*, 3 IND. J. GLOBAL LEGAL STUD. 35, 37 (1995). The authors believe that developing countries are changing their attitudes from a 'development at any cost perspective' to one where environmental rights are integrated with the development process. The authors point out five challenges which face the multilateral financial institutions in the global environmental era. They are that a great deal needs to be learnt from the past projects; lessons need to be learnt in carefully allocating financial resources; proper use of resources; forging new partnerships with NGOs; and creating new ways of evaluating the process of progress. *Id.* at 44-45. The five challenges noted here, which face multilateral financial institutions are extremely important and must be taken into account in the policy making process. It may be mentioned here that each of these challenges will be discussed at various points in this chapter. *See also* Ian Brownlie, *The Methodical Problems Of International Law And Development*, 26 J. AFRICAN L. 8 (1982); Maurice Flory, *Adapting International Law To The Development Of The Third World*, 26 J. AFRICAN L. 12 (1982); F. Parkinson, *The International Monetary Fund In Economic Development: Equality And Discrimination*, 26 J. AFRICAN L. 21 (1982), for discussions on the interaction between development, international law and international institutions.

[401] *See* Ibrahim F.I Shihata, *Human Rights, Development, And International Financial Institutions*, 8 Am. U.J. Int'l L. & Pol'y 27 (1992), for a discussion on the essence of development (which includes higher incomes, better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom and a richer cultural life.) *Id.* at 28. Shihata also claims that by enlarging the scope and types of lending to adapt to the changing requirements of the recipient countries, the Bank has sought to expand its role beyond the restricted views in the Articles of Agreement. *Id.* at 29-30. *See generally* PHILLIPPE G. LE PRESTRE, THE WORLD

Commission correctly pointed out, the role of the Bank is being used as a benchmark by other institutions as well. If sustainability considerations are being infused in all of the Bank's functions and work, then it may well be possible that the same considerations are replicated in other institutions as well.

Critics have been particularly harsh of the Bank's policies over its past 50 years of existence. For example, there have been calls for the Bank to be completely disbanded.[402] The demand has been to restructure the Bank and for it "to literally remake itself," if it is to have a meaningful role in the new world order.[403]

The Bank has been accused of being a Northern-dominated international agency which does not see the global environmental emergency as a "common future," but sees its work in a prejudiced manner, from the viewpoint of the industrialized North, in terms of an

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BANK AND ENVIRONMENTAL CHALLENGE (1989); CHERYL PAYER, THE WORLD BANK: A CRITICAL ANALYSIS (1982); MICHAEL COLBY, ENVIRONMENTAL MANAGEMENT IN DEVELOPMENT: THE EVOLUTION OF PARADIGMS (1990); MICHAEL BRUNO, DEEP CRISIS AND REFORM (1996) for discussions on the Bank's role in financial reforms and in development; Elizabeth H. Dallam, *The Growing Voice Of Indigenous Peoples: Their Use Of Storytelling And Rights Discourse To Transform Multilateral Development Bank Policies*, 8 ARIZ. J. INT'L & COMP. L. 117 (1991), who discusses the rights of indigenous peoples in international forums and in the development process.

[402]Bruce Rich, *World Bank / IMF: 50 Years Is Enough, in* 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK 6 (Kevin Danaher ed., 1994). Rich contends that the Bank is an institution which is "out of time and place." Rich states that the US and other industrialized countries have been funding the Bank, without caring with whom the Bank was doing business as it was used by the Western countries as a tool of the cold war. Rich's conclusion is that "the world (which has provided the Bank with a name), has had enough lies and enough secrecy." *Id.* at 12 -13. This writer agrees with Rich's opinions. Transparency is an absolute must if the term "development" is to have a wholesome meaning. Probably the Bank is trying to make a new beginning in this regard through its establishment of the Inspection Panel.

[403]*Id.* It must be noted that Rich does not define the term "new world order." In fact, it may be stated that though this term has been used often by many scholars, it remains ambiguous in its scope and content. *See also* Kevin Danacher, *Introduction, in 50* YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK 4 (Kevin Danacher ed. 1994), who quotes Martin Khor, the Director of the Third World Network. Khor suggests that the present day policies of the Bank are a remnant of the colonial era and that the countries in the South have become more dependent on the ex-colonial powers than they ever have been. Khor accuses the Bank and IMF of playing the role that "our ex-colonial masters used to play." It must be stated that Khor's accusation is not far from the truth. Many people in the third world perceive the Bank and the IMF as supra-constitutional authorities, which appear to get away with many decisions which may not be perceived in a country's national interest.

"environmental apartheid" by which the rich North grows richer, greener and cleaner and the already poor South grows poorer and more polluted.[404] Although a creation of the North, because of its aims to aid development in less industrialized countries, which have been vested in it as a financial lending agency, the Bank should ideally be the leader in advancing the principles of sustainable development.[405] It is hoped that the incorporation of reforms on the environment and the establishment of the World Bank Inspection Panel is the first step in its march towards being equitable in seeking to achieve its development aims of both the north and the south.

### 3.2.2 The Role of The World Bank in Development Projects

*What Is Development?*

According to the United Nations Declaration on the Right to Development, development has been defined as:[406]

> [A] comprehensive economic, social, cultural, and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free, and meaningful participation in development.

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[404]Vandana Shiva, *International Institutions Practicing Environmental Double Standards, in* 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK 102 (Kevin Danacher ed. 1994). *See also* RICHARD E. FEINBERG ET AL., BETWEEN TWO WORLDS: THE WORLD BANK'S NEXT DECADE (1986), for suggestions on the process that the Bank should adopt in mediating between North and South, instead of being a "servant" of only the most powerful shareholders.

[405]*See* Kevin Huyser, *Sustainable Development: Rhetoric And Reform At The World Bank*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 253 (1994), who explores the Bank's recent changes and suggests the steps that it must follow in order for it to meet the goal of globally promoting sustainable development. *See also* John W. Head, *Evolution Of The Governing Law For Loan Agreements Of The World Bank And Other Multilateral Development Banks*, 90 AM. J. INT'L L. 214 (1996), who discusses the loan agreements of the Bank in carrying out its private sector lending.

[406]UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT, preamble, G.A. RES. 128, U.N. GAOR, 41ST SESS., U.N. DOC. A/RES/41/128 (1987).

Similarly, at the 1995 Copenhagen Conference on Social Development, governments urged:[407]

> [A] political, economic, ethical and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and ethical values and cultural backgrounds of people.

Development is a holistic process involving various components, including environmentalism, economics and human rights considerations. Such components contribute in making the development process sustainable. Any meaningful consideration of development and development projects must necessarily include a discussion of its components. Before proceeding with the role of the Bank in development projects, a brief discussion on what constitutes a development project follows.

*Development Projects: A Brief Discussion*

A project may be defined as "a group of activities that are intended to accomplish some clear goals, over a specified time period, drawing on a set of agreed upon human, financial and other resources."[408] In Bank parlance, the term "project" means "a proposal for a capital investment to develop facilities to provide goods or services."[409] Development projects have been the basic units used as a foundation for "aid programming."[410] Development

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[407] COPENHAGEN DECLARATION ON SOCIAL DEVELOPMENT AND PROGRAMME OF ACTION OF THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT, U.N. DOC. A/CONF. 166/9 (1995), Copenhagen, 6-12 March 1995, adopted at the 14th. plenary meeting on 12 March 1995, paragraph 25.

[408] IAN MCALLISTER, WORKING WITH NEIGHBORS: UNIVERSITY PARTNERSHIPS FOR INTERNATIONAL DEVELOPMENT 17 (1996).

[409] JOHN A. KING, ECONOMIC DEVELOPMENT PROJECTS AND THEIR APPRAISAL 3 (1967).

[410] MCALLISTER *supra* note 408 at 20.

projects link "first generation" activities (portrayed as "short-term, somewhat ad hoc individualism") with "third-generation" models (described by "broader policy and programming networks").[411] Another representation of a development project is that of a cycle – with a beginning, several measured stages in the middle and a conclusion.[412]

The following seven questions play an important role in identifying development projects:[413] (1)What is the reason for the project being identified?; (2) Who is identifying the project (what is the participation by local communities in the identification process?); (3) Who is interested in the project being established?; (4) Who gains in the long-run and how do they so gain?; (5) Who finances the project costs in the short and long term?; (6) How sustainable is the project?; and (7) Have environmental considerations been incorporated in its functioning?

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[411] *Id.* *See also* THE PROJECT CYCLE, PLANNING AND MANAGING DEVELOPMENT PROJECTS (Ian McAllister and Ethel Langille eds., 1977), for a discussion on the project cycle and its interaction with planning and funding of projects; WARREN C. BAUM AND STOKES M. TOLBERT, INVESTING IN DEVELOPMENT 6-8 (1985), for a detailed analysis on the World Bank's handling of development projects. It is appropriate to quote the authors on the content of and significance of projects:

> Projects are undertakings planned carefully, having specific objectives and a specific life span. Projects entail specific sets and consequences of activities and are often planned to benefit particular groups of peoples in certain geographic areas, or other identifiable groups in specific ways. Bank projects are initiated, planned, negotiated, implemented, monitored, evaluated, and audited according to procedures that revolve around the concept of the project cycle. The project concept provides a disciplined and systematic approach to analyzing and managing a set of investment activities.

[412] MCALLISTER *id.* at 20. The author notes that "all projects have implications." Projects use resources (human, land, capital) and produce positive gains (" capacity to be more flexible, new training, new buildings, healthier citizens, an improved environment and new revenue streams for a business"). *See also* WARREN C. BAUM, THE PROJECT CYCLE (1985), who gives details about the project cycle, which has been used in dealing with the Bank's projects for over two decades.

[413] Id. at 24.

In reality, Bank-funded development projects are selected to meet identified, exact requirements or to make use of distinctive possibilities (which may be the existence of natural resources or other special opportunities).[414] The project appraisal is accomplished by "measuring it against the estimated real marginal rate of return on newly invested capital in the country."[415]

*The Role Of The Bank*

The role of the Bank in the development process is huge, particularly its role in development projects, which directly or indirectly affect billions of people around the world. The World Bank is the biggest and "most visible" of multilateral financial agencies in the development finance sector. "With a portfolio of 148 billion dollars financing about 1900 projects" in less industrialized countries, the Bank continues to be the "single most influential development agency in the world and is leaving its imprint on the environment and on the fate of poor people in a large number of countries."[416]

The Bank's dominance and authority in development policy funding includes "funding of research, training, technology transfer, planning, and other forms of institutional support" in

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[414] JOHN A. KING *supra* note 409 at 4.

[415] *Id.*

[416] *See* Korenna Horta, *The World Bank And The IMF, in* GREENING INTERNATIONAL INSTITUTIONS, 131, 132-133 (Jacob Werksman ed., 1996). Reference is also made to the Wapenhans Committee Report (named after the then Vice-President of the Bank, Willi A Wapenhans), who led a task force to write an internal World Bank study, on the status of the implementation of the Bank's projects. The report exposed the fact that there was a complete breakdown in the ability of the Bank to monitor the manner in which its projects were implemented. The report revealed that "37.5% of all recently evaluated World Bank projects" were found to be unsatisfactory by the Bank's assessment standards. *See also* Jacob Werksman, *Greening Bretton Woods, in* GREENING INTERNATIONAL LAW, 65 (Philippe Sands ed., 1994); Thomas Hutchins, *Using The International Court Of Justice To Check Human Rights Abuses In World Bank Projects,* 23 COLUM. HUM. RTS. L. Rev. 487 (1992), who discusses the theoretical possibility of victims of human rights abuses of Bank-funded projects having recourse to the International Court of Justice to vindicate their loss of rights.

recipient nations.[417] Developing countries are in fact said to change their policies and standards for entire areas following suggestions from the Bank and also because of the need to abide by the Bank's conditions.[418]

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[417]Bruce M. Rich, *The Multilateral Development Banks, Environmental Policy And The United States,* 12 ECOLOGY L.Q. 681, 686-687 (1985). The article examines how the United States can encourage multilateral development banks develop proper environmental management practices. The author hits the nail on the head by noting that the Bank is prejudiced in favor of "large-scale, capital-intensive projects" and that it does not consider smaller-scale, less expensive projects "because doing so does not use their staff time economically." The consequences of such a policy for poor recipient nations is disastrous. The author cites the example of the Inter-American Development Bank which has funded many successful smaller projects for many years and declares that the Bank too can do the same. Rich concludes with the observation that several Bank policies are a form of "biological deficit financing that the developing world, and ultimately the donor nations and banks themselves, can ill afford." *See also* Kim Reisman, Note, *The World Bank And The IMF: At the Forefront Of World Transformation,* 60 FORDHAM L. REV. 349 (1992), where Reisman declares that the Bank focuses on long-term development and concentrates its resources mainly on reconstruction issues. The note also examines the origins, development and objectives of the Bank and the IMF. The reluctance of the Bank to examine equally viable and financially less expensive projects appears to be a trend in the Bank's policies. This will become amply clear when the case studies are being considered at a later stage. *See also* Enrique Carrasco et al., *Income Distribution And The Bretton Woods Institutions: Promoting An Enabling Environment For Social Development,* 6 TRANSNAT'L L. & CONTEMP. PROBS. 1, 3-4, (1996), for a detailed analysis on the Bank since its origins. One of the questions which the authors seek to answer is whether "the Bank can effectively contribute to the enabling environment for social development envisioned at the Social Summit, especially relating to intra-country income distribution?" Their answer is that the Bank may be able to contribute to an enabling environment, provided various restructuring measures are implemented. The authors suggest that the Bank's Inspection Panel (discussed in the latter part of this chapter) may be permitted to hear grievances petitioned by the affected parties who are affected by the Bank's failure to comply with its antipoverty policies. However, the authors accept that at present, the Panel's procedures and powers do not mandate the hearing of grievances relating to adjustment lending. They also note that even if the Panel's procedures were amended to hear grievances related to adjustment lending, the Panel could not hear such matters, because the Bank has no explicit policy or procedure in this regard.

[418]RICH *id. See also* Daniel D. Bradlow, *The World Bank, The IMF, And Human Rights,* 6 TRANSNAT'L & CONTEMP. PROBS. 47 (1996). Bradlow notes that the Bank and the IMF both lack adequate policies for dealing with the human rights implications of their operations. The author states that while the Bank has taken some steps in tackling the various human rights impacts of its projects, it still has a long way to go. Bradlow terms the Bank's human rights restructuring efforts as lacking clarity and having an undefined goal. Bradlow therefore, calls for a uniform "International Financial Institution human rights policy," which would tackle both the "operational and institutional human rights issues" in the course of the work done by the Financial Agencies. Bradlow proposes that the Bank have an "expected human rights impact indicator," to determine the effect of Bank policies. This indicator requires the Bank to identify the possible human rights which are likely to be affected. Another important suggestion is to incorporate a "post evaluation mechanism" into Bank functioning. *Id.* at 78 - 83. *See also* Ved P. Nanda, *Human Rights And Environmental Considerations In The Lending Policies Of International Development Agencies: An Introduction,* 17 DEN. J. INT'L L & POL'Y 29 (1988), for a discussion on the way in which International Development Agencies should address human rights concerns in their policy making process; Ibrahim F.I. Shihata, *The World Bank And Human Rights: An Analysis Of The Legal Issues And The Record Of Achievements,* 17 DEN. J. INT'L L & POL'Y 39 (1988), for a general discussion on the Bank's record in the human rights arena.

The World Bank has learned numerous lessons, of relevance to this discussion. Its Operations Evaluation Department (which is the in-house impartial oversight unit), has declared that the general lesson from development projects such as the Narmada case (discussed at a later stage of this chapter) is that the "social dimensions of civil works projects" require more focus from both the Bank and the recipient states. In particular, it has been pointed out that the "efficacy, efficiency and sustainability" of Narmada - type projects are influenced and rely on "participation and institutional development to ensure effective operation and maintenance and good water management."[419] Although not a central discussion point of this study, at this stage, it is important to briefly discuss the merits of dams, which the Bank has acquired a specialty in constructing. Dams are large projects that have direct and indirect effects on the lives of millions of peoples and on the environment. A large part of the Bank's controversial record is due to the role of dams which it has funded around the world. It is also pertinent to briefly consider the alternatives to large dams.

### 3.2.3 "To Dam Or Not To Dam" And The World Bank

One view on the construction of dams has been to determine if a proposed dam is likely to be beneficial or harmful and if such a construction will improve the environment as a whole as well as the well-being of humans, or whether the dam will spoil the environment and

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[419]The World Bank, *Learning From Narmada, Precis No. 81, 1996,* (visited January 20, 1997) <http://www.worldbank.org>, for a full precis prepared by the Operations Evaluation Department of the Bank in 1995 assessing the effects of the Narmada Project.

negatively affect humans.[420] Another view has it that two challenges exist for those who are concerned about the impacts of dams: the first is to inform the public of the positive impacts of dams and the second is to persuade those funding the project to rectify the negative aspects of the projects under consideration.[421]

Dams are constructed for three major reasons – to provide electric power, for irrigation and to prevent floods.[422] Dams are established in the hope that they will play a vital role in a region's economic development. However, the negative effects of dams can be monstrous and include economic,[423] social,[424] environmental[425] and administrative[426] effects. The impacts of dams and reservoirs may be direct,[427] and indirect.[428] The World Bank, although

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[420]Jan A. Veltrop, *Impact Assessment Of Dams And Reservoirs: The Work Of The International Commission On Large Dams, in* ENVIRONMENTAL ASSESSMENT AND DEVELOPMENT 75, 82 (Robert Goodman et al., eds. 1994).

[421] *Id.*

[422]Miranda Rose, *To Dam Or Not To Dam,* (posted April 1, 1994 and visited April 26, 1997) <ftp://www.alternatives.com/library/envdams/wa257.txt>. Rose discusses the positive and negative effects of dams.

[423]Economically, the negative effects include the drastic increase of water demand, water supply and deterioration of water quality and reduction of its availability, affecting the economy.

[424]*Id.* The social effects include the resettlement of project affected people, who may number from anywhere between hundreds to millions. That in turn disrupts and totally changes their life cycles.

[425]The environmental effects include causing irreparable damage to the flora, fauna and causing disappearance of already rare animal species. The destruction to fish is also another serious negative effect. Ecological changes may also result in the conversion of the river which has been dammed into a large lake. The climate changes that affect dams have also been documented. *See* Earth Island Journal, *Climate Change Dooms Dams,* (visited April 26, 1997) <http://www.earthisland.org/ei/journal/f96-28.html>. The article describes how the world's dams are being destroyed by the greenhouse effect and the world's changing climate.

[426]Administrative, because to plan out the construction of dams and the consequent resettling and compensation of affected people, requires great deal of planning, money and efforts. Many a time, this can and has led to chaos in planning.

[427]VELTROP, *supra* note 420 at 76 - 78 (Robert Goodman et al., eds. 1994). Direct impacts are on soils, vegetation, wildlife, wetlands, fisheries, and climate in the upstream and downstream portions of the dam. Downstream impacts include migratory fish, water logging, spreading of diseases, and saltwater intrusion. Creation of a reservoir submerges agriculture and forest lands and affects human populations directly.

[428]*Id.* Indirect impacts are caused as a result of construction work and other secondary developments. As part of the construction, new roads to reach the site, camps for the crew and communication lines are set up. Reservoirs are also affected by the development of land and water resources in the catchment areas above the dams.

having acquired a specialization in constructing dams, has also had several failures with them. Some of these failures include: displacement of indigenous peoples; effects on rare and endangered wildlife; losses of archaeological sites; deforestation; effect on water quality; loss of fish; seismic effects; mud-slides; negative impacts on human displacement; outbreak of waterborne diseases; irrigation problems; and a totality of miscellaneous unforeseen impacts.[429]

Despite these failures, the Bank continues to fund dam construction projects, particularly large dam projects.[430] An expert from the World Bank, Robert Goodland, supports dams in

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[429]Zygmunt J.B. Plater, *Multilateral Development Banks, Environmental Diseconomies, And International Reform Pressures On The Lending Process: The Example Of Third World Dam-Building Projects*, 9 B.C. THIRD WORLD L.J. 169 (1989), for details on dams and dam building projects by the World Bank. International Rivers Network, *Press Release - April 6, 1995*, (posted April 5, 1995 and visited April 26, 1997) <ftp://alternatives.com/library/envdams/wa060020.txt>. The report quotes from a leaked internal memo which charges that several Indian dams are unsafe by present standards. *See also* Zygmunt J.B. Plater, *Damming The Third World: Multilateral Development Banks, Environmental Diseconomies, And International Reform Pressures On The Lending Process*, 17 DEN. J. INT'L L. & POL'Y 121, 121-122 (1988), where the author focuses on World Bank projects and processes, specifically on multilateral development Bank loans used to construct "large capital-intensive" dams. Plater comments:

> Dam construction offers one discreet sector of development assistance initiative that can be viewed on its own terms. It is an area in which major problems have indeed surfaced over the years in the Bank and other MDB projects, and it is an area in which the Banks have encountered vociferous opposition from a very effective coalition of Western and Third World environmental non-governmental organizations. Dam building offers useful opportunities to examine how engineering and financing decisions can go astray, as well as offering a limited opportunity to applaud the Bank's recent development reform efforts.

Plater concludes that large international development projects, such as dam projects in poor countries, lead to several uncomfortable results, which go to show that the policies have not considered these negative consequences earlier at the planning stage. Plater believes that the failure of the international development loan process to monitor, evaluate and to imbibe these negative effects are because of "internal institutional dynamics." *Id.* at 152. This writer fully agrees with Plater's opinion that the failure to imbibe the negative effects is a result of "internal institutional dynamics." As later case studies will show, the Bank has failed to imbibe lessons from its past experiences. Outside pressure was constantly exerted on the Bank to imbibe such policies. However, the Bank did not do so. Such a failure can only be pointed out to be caused by the Bank's internal institutional process, which have refused to change.

[430]The Bank's Operations Evaluation Department has justified large dams as technically, financially and economically viable as well as socially and environmentally useful. In fact, referring to investment in large dams, the OED has declared that large dams play a significant role in economic development. *See also* THE WORLD BANK, LEARNING FROM NARMADA *supra* note 419.

spite of many of them having negative effects, which he believes can be corrected. His main worry is that if policy makers cannot build dams, they will fall back on coal burning projects.[431] Another reason of the Bank for continuing dam construction projects may be provided in its own words:[432]

> Large dams produce needed public goods, including clean energy and drinking water, and enjoy economies of scale. They can be a principal source of water for irrigated agriculture, which in many countries is vital to achieving adequate supplies of food and alleviating poverty. But investments in large dams need to be prepared thoroughly, appraised rigorously, and implemented effectively. Their efficacy, efficiency and sustainability depend on participation and institutional development to ensure effective operation and maintenance and good water management.

A related point that needs consideration whether viable and cheaper alternatives exist to large dams, and why are these alternatives not explored and supported by the Bank? As discussed in the earlier chapter, the precautionary principle needs to be applied when considering viable alternatives to large dams, particularly if there is a possibility that large dams may cause environmental damage. This discussion will also assume significance in the later portions of this chapter, particularly when discussing the Narmada and other cases. For example, in the Narmada case, viable and cheaper alternatives were put forward.[433]

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[431]Goodland suggests that good design can eliminate most impacts. *See* Pratap Chaterjee, *To Dam Or Not To Dam? Policy Makers Want To Know* (posted May 31, 1995, visited April 26, '97) <ftp://alternatives.com/library/envdams/wj35.txt>.

[432]LEARNING FROM NARMADA, *supra* note 419.

[433]*See* Patrick McCully, International Rivers Network, *Sardar Sarovar Project, An Overview,* (posted May 30, 1994 and visited April 26, 1997) <ftp://alternatives.com/library/envdams/nardam.txt>. The report quotes Ashvin Shah, working with the American Society of Civil Engineers. Shah states that "the SSP is based on outmoded 1950's ideas of water development, and its planning has failed to benefit from the past four decades of experiences with irrigation and water conservation schemes in India and elsewhere." Shah claims that with "large scale implementation of decentralized, small rainwater harvesting schemes, 50% more than the water to be collected by the Sardar Sarovar Project may be collected." Shah's comment is noteworthy, because Shah is not the only individual to have given such suggestions.

Other World Bank funded projects have also had opponents to the Projects suggesting viable alternatives.[434] However, it appears that the Bank has not taken these claims seriously.[435]

As opposed to large dams, there are various equally viable alternatives available, such as constructing equally effective, but cheaper smaller dams (this point is discussed when analyzing the Narmada case). The alternatives will not result in the environmental degradation that large dams cause. However, these alternatives are rarely examined. This is because large dams are a "big business." Lending agencies lend millions of dollars and the returns are much more. Vested interests in countries also encourage large dams because of the financial rewards. On the other hand, the alternatives are not as financially rewarding. Therefore, there is no serious attempt to look at them.

At a workshop held recently at Geneva,[436] dam builders and some of their strongest critics came together to review the development effectiveness of large dams and to establish internationally accepted standards that would improve the assessment, planning, building, operating and financing of these projects. The participants focused on three priority areas: economic and engineering considerations, social considerations and environmental

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Other individuals too have given such suggestions to the Bank and for unknown reasons, the Bank has never considered these suggestions seriously.

[434]The Arun III and Rondonia cases, to be discussed later in this chapter.

[435]One reason for the Bank's unwillingness to consider alternatives may be stated as the Bank's desire to generate more finances from large dams as opposed to the smaller projects. The writer believes that the Bank being a "development institution," its first and foremost duty is to support initiatives towards development, in its letter and spirit, rather than develop projects based on purely the profit motive.

[436]IUCN, *Press Release: Proponents And Critics Of Dams Agree To Work Together, April 11, 1997* <http://w3.iprolink.ch/iucnlib/info...press_releases/dams_agreement.html>.

sustainability.[437] The workshop concluded by deciding to set up a "World Commission," by November 1997, with a two year mandate and the following seven terms of reference:[438]

- To make an assessment of existing, new and proposed large dam projects so as to improve existing practices and social and environmental conditions;
- To determine the value of dams in terms of their development effectiveness;
- To create effective frameworks which will be capable of determining the alternatives for energy and water resources development;
- To establish and encourage internationally acceptable standards to design, plan and implement the operations of large dams;
- To ensure that affected peoples are better off after the construction of large dams;
- To determine how benefits, costs and risks may be shared at the global, national and local levels; and
- To suggest interim reforms of existing policies and guidelines, where required.

It remains to be seen to what extent this Commission will be successful in providing some solid answers in the future. This writer is skeptical of the Commission's purpose even at this stage. This is because nowhere in the Report is it mentioned that the Commission's recommendations will be binding on the Bank. This takes the situation back to square one:

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[437] *Id.*

[438] Tony Dorcey et al, *Summary Report Of The Workshop, in* LARGE DAMS: LEARNING FROM THE PAST, LOOKING AT THE FUTURE 9-10 (Tony Dorcey et al. eds., 1997). The Report states that the Commission will be have five to eight members, headed by an internationally recognized chairperson. The results of the Commission's efforts would include suggestions on policy, guidelines, best practices and codes of conduct.

it is yet another body which will make numerous recommendations which the Bank may or may not accept, at its discretion. In fact, this writer believes that it is a waste of money and energy in investing anything in such a toothless Commission.

The Bank's decision making process relates to its governance power as well. Its decisions influence the lives of millions of peoples. The decision making power that the Bank wields leads on to the next point for discussion, the role of the Bank as a governance institution.

### 3.2.4 Governance And The World Bank

The World Bank has been referred to as a governance institution, exercising power through its financial clout to legislate and even to change the constitutional framework of recipient countries.[439] It plays this legislative role mainly by putting forward conditions to be fulfilled on the loans that it provides. It is now much more than an ordinary lending agency - - it has emerged as a quasi - law making institution. It takes part in its governance role mainly by ordering compliance with legal and structural changes that it may put forward.[440]

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[439]Johnathan Cahn, *Challenging The New Imperial Authority: The World Bank And The Democratization Of Development*, 6 HARV. HUM. RTS. J. 159, 160 (1993). According to Cahn, this alteration is done as "Bank-approved consultants often rewrite a country's trade policy, fiscal policies, civil service requirements, labor laws, health care arrangements, environmental regulations, energy policies, budgetary policies, resettlement requirements and procurement rules."

[440]*Id.* at 160. Cahn describes this process of legislating by stating that the Bank uses its "power of the purse" to legalize and create policy concentrating on "macroeconomic and social objectives." Its main technique to achieve its objective is by using the process of "conditionality." As Cahn explains: "The loan imposes conditions, and those conditions frequently amount to the writing of legal rules otherwise within the legislative and policy making control of the recipient government." These rules, states Cahn, "influence a country's sectoral economic environment, its development objectives, and ultimately the welfare of its citizens." Cahn also declares that lending agreements between the Bank and recipient countries remove the difference "between international and domestic, public and private law, making World Bank influence pervasive at all levels of the law's domain." *Id.* at 161, 171. An interesting example is from the state of Haryana in India. According to news reports, the Haryana electricity Minister resigned from his post protesting against the government's decision to privatize the inefficient and uneconomical electricity sector. The Minister said that suitable reforms would set right the public sector electricity board, without privatizing it. He accused the World Bank of being the culprit behind this privatization move. The Minister also accused senior electricity board officials of kow-towing to the Bank's line, as they had been offered plum positions by the Bank. Of course, the Minister did not substantiate his

The Bank's internal policy making process,[441] including its method of deciding on projects and plans, has been described as having "failed spectacularly."[442] In fact, the process has been noted as being constitutionally unaccountable to, and unamendable by citizens of borrowing countries whom it is meant to serve.[443] The Bank has been accused of having made decisions in favor of large projects which may relocate resources to benefit the rich and the powerful.[444] As an institution which acts as a governance institution, which may be unaccountable to both its donors and recipient nations for its policies, it has been pointed out that the Bank has lent billions of dollars for huge infrastructure projects, which have led to real and evident environmental destruction.[445]

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allegations. *See* the archives of the newspaper Indian Express at <http://www.expressindia.com>, dated February 10, 1997. News reports have recently appeared on a new and unprecedented Bank policy to be announced in the near future where it will add another condition to provide loans to recipient countries: the borrowing nation must fulfill new "anti-corruption criteria." This means that the Bank will set standards to determine to what extent countries are fighting corruption. This writer opines that such criteria are a direct affront to sovereignty and would be unacceptable. *See* the archives of the newspaper, Indian Express at <http://www.expressindia.com> dated August 11-12, 1997.

[441]The Bank's policy making process is broader than the project cycle. For purposes of this study, the analysis is limited only to the project cycle.

[442] *See* Patricia Adams, *The World Bank is not Financially Sound,* USA TODAY, Sept. 1995, at 28, 29.

[443] *Id. See also* ANN THOMSON, THE WORLD BANK AND COOPERATION WITH NGOS (1992), for details on the interaction of NGOs and the Bank, particularly as NGOs have emerged as an instrument to pressurize the Bank in its lending policies.

[444]*Id.* A particularly stinging accusation has been that the Bank's "single most destructive accomplishment has been to free third world governments from the need to deal with their own problems, thereby undermining the growth by democratic institutions." *See also* Barbara Connolly and Robert O. Keohane, *Institutions For Environmental Aid: Politics, Lessons And Opportunities,* ENV'T, June 1996, at 41. The authors describe the attitude of donor institutions through the following statement:

> [h]istory of development assistance reveals two time-honored traditions: coordination failures and organizational inertia, that substantially contribute to aggregate ineffectiveness in environmental aid. When donor institutions confronting new environmental problems proceed with a "business as usual" attitude, their unwillingness or inability to coordinate approaches to suit the new problems can have a number of negative effects. It can result in a use of financial mechanisms that do not always fit the problems, neglect of certain recipients' environmental priorities and duplication or incompatibility of aid efforts.

[445]Stephanie C. Guyett, *Environment And Lending: Lessons Of The World Bank, Hope For The European Bank For Reconstruction And Development,* 24 N. Y. J. INT'L L. & POLITICS 889 (1992). The author quotes critics who contend that the Bank's public statements are primarily designed to diffuse criticism without making appreciable improvement in

The brief discussion provided on the role of the Bank as a governance institution makes it clear that the Bank wields enormous power to change people's lives forever wherever its influence permeates. However, such enormous power must be wielded responsibly and according to a set of rules. As will be seen in later discussions, non-government organizations and public interest groups have accused the Bank of not playing according to any set of rules. Stung by the accusations, the Bank responded. In a bid to give transparency to its decisions, it established several "Operational Policies and Directives" and an "Operational Manual Statement." The Bank is obliged to follow these Policies and the Directives.[446]

## 3.3 OPERATIONAL DIRECTIVES OF THE BANK

### *Introduction*

On the basis of a 1979 study by the International Institute for Environment and Development, the World Bank group, with other multilateral financing agencies, signed a declaration in New York in 1980, "pledging the support of these institutions for the creation of systematic environmental assessment and evaluation procedures for all development activities."[447] Integration of environmental concerns into the process of development

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the outcome of the loans. Because quantification of environmental damage has been difficult, World Bank economists and engineers have encountered trouble defining environmental damage as important to productive purposes, evaluated in terms of achieving an acceptable rate of return.

[446]*See* The World Bank, *World Bank Home Page* <http://www.worldbank.org>, for the purpose of the Policies and Directives. The Operational Manual Statements stipulate that the Bank staff shall follow the Policies and Directives given in the Manual Statements in all Bank funded projects.

[447]*See* Ibrahim F.I Shihata, *The World Bank And The Environment: A Legal Perspective*, 16 MD. J. INT'L L. & TRADE 1, 2 (1992). *See* 19 I.L.M. 524 (1980). *See also* JEREMY WARFORD ET AL., THE EVOLUTION OF ENVIRONMENTAL CONCERNS IN ADJUSTMENT LENDING: A REVIEW (1994), for a discussion the environmental aspects of adjustment lending since 1988; MOHAN MUNASINGHE, ENVIRONMENTAL ECONOMICS AND VALUATION IN DEVELOPMENT DECISIONMAKING (1992).

assistance at the Bank became a reality in the mid 1970's when the Bank incorporated the Operational Directives, Guidelines and Best Practices into its policy making and implementation process.[448]

In 1987, the World Bank group embarked on a second major effort to incorporate environmental concerns into all aspects of its work.[449] The Bank believes that it has succeeded in this effort.[450] Even after 1987, the Bank has been incorporating new guidelines relating to the environment as part of its Directives and policies. An effort has been undertaken to integrate environmental concerns into all levels of project planning from the processing of the loan financing, to project design and proposal, project implementation and finally in the post project audit scenario.[451] According to the Bank's Fiscal 1993 report on the Environment,[452] the Bank has been making efforts to infuse environmental considerations into all its lending policies. Accordingly, all investment projects are at

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for a discussion on how environmental economics helps in efficiently making use of natural, human and capital resources to advance sustainable development, as seen in the light of Bank policies.

[448] KOTVIS *supra* note 397at 6.

[449] WORLD BANK, MAKING DEVELOPMENT SUSTAINABLE – THE WORLD BANK GROUP AND THE ENVIRONMENT, Fiscal 1994 xi (1994). The environmental section of the Bank was expanded. Several new environmental procedures were put into place. This followed as a result of the links between the natural environment and economic development.

[450] *Id.*

[451] *See also* GUYETT *supra* note 445, at 897-899. Guyett gives a history of the World Bank's approach to environmental problems in the last 20 years. Important changes relating to environmental issues occurred during the tenure of former Presidents Robert McNamara and Barber Conable. In 1971, during McNamara's tenure, the Bank created the office of Environmental and Scientific Affairs and the position of Environmental Advisor to help analyze environmental aspects of the Bank's loans. The next major effort was in 1987, when President Conable restructured the Bank, by infusing environmental procedures to analyze effects of loans. Environmental units were set up for this purpose. The new guidelines greatly influence thinking on the environment.

[452] WORLD BANK, WORLD BANK AND THE ENVIRONMENT, Fiscal 1993 57 (1993).

present being assessed for their environmental impacts, which has also resulted in suitably changing their planning and designing policies.[453]

Before proceeding to the next section, it is necessary to clarify the full scope of the Directives that are to be discussed in later parts. Many of the Directives to be discussed in the following sections did not come into force until after the Narmada case.[454] However, the Bank did have in force its Operational Manual Statement ("OMS") No. 2.36: Environmental Aspects of Bank Work,[455] OMS 2.33 (Tribals) and OMS 2.34 (Involuntary Resettlement).

The following sections give a detailed account of the Operational Procedures which are in force at present at the Bank. The purpose of such an exercise is twofold. First, the purpose is to give an idea of the current policies and procedures of the Bank, for a later analysis of sustainable development principles and the Bank. Secondly, since current policies and procedures govern the functioning of the cases after Narmada, it is necessary to have an idea of these policies when discussing those cases at a later stage. Since the provisions in the Operational Manual Statements at the time of the Narmada case have continued to exist thereafter as well, in the amended and expanded policies and procedures of the Bank, the OMS 2.36, 2.33 and 2.34 are not being discussed prominently. Thus, when the cases after

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[453] *Id.* at 5. The report also quotes the Agenda 21 commitment entered into at Rio in 1992 in order to make development more sustainable.

[454] *See* GUYETT *supra* note 445, who states that while the Sardar Sarovar Project was initiated prior to the 1987 reforms, the Bank did have environmental guidelines under the Environmental Advisor and OESA which played no role in the outcome of SSP decision. *Id.* at 907.

[455] *See* IBRAHIM F.I. SHIHATA, THE WORLD BANK INSPECTION PANEL 137 (1994), where the OMS has been reproduced.

Narmada are discussed and compared with the lessons and failures of Narmada, the post-Narmada cases are criticized for their failures, on the same grounds on which Narmada failed. The comparison therefore, is an equal and a balanced one.

At paragraph 2, OMS 2.36 states that the Bank has steadily increased its attention to the environmental opportunities and risks introduced by the development process since 1970.[456] The OMS discusses various issues including the scope of environmental concerns, the Bank's environmental policies, the environmental responsibility in the Bank, economic and sector work, environmental components of projects and the project cycle.[457] Responsibility for all aspects, including the environmental dimensions of a Bank project, sector and economic work, lies with regional staff.[458]

The Morse Committee Report[459] on this aspect may be quoted. As part of the terms of reference, the Morse Committee had to make its assessment with reference "to existing

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[456]The Bank, the OMS notes, has found that economic development necessitates a careful management of resources. By noting the environmental impact, the negative effects can be prevented or lessened at an acceptable cost to the recipient countries. The OMS also notes that economic advantages of environmental protection may overcome the costs of fulfilling such guidelines.

[457]According to paragraph 3 of the OMS, the Bank interprets environmental concerns to mean natural and social conditions of all organisms, particularly mankind, and including future generations. These concerns include "human ecology and occupation health safety." In paragraph 8 of the OMS, the Bank states that rather than adopting environmental standards, the Bank's approach is adjusted towards local circumstances and it understands that there are large differences between its developing member states. The Bank's policy is to individually assess each after considering all the circumstances and also taking note of the ability of the government to protect the environment. The Bank periodically publishes environmental guidelines culled out from various national and international sources. The guidelines suggest acceptable changes to be implemented in Bank operations unless the recipient nation's environmental conditions are stricter. Paragraph 9 gives the principles behind the guidelines: Each project affecting renewable natural resources should function within the specified environmental capacity and such projects must not result in serious ecological destruction, including affecting public health. Further, there should be no displacement of people or severe problems to vulnerable groups. Projects should follow standards of all international environmental agreements to which the recipient country is a party. Projects should not cause major changes to natural areas which are designated as World Heritage sites or Biosphere Reserves or other such protected areas.

[458] *Id.* at paragraph 10.

[459] *See* the later discussions on the Committee for full details.

Bank operational directives and guidelines with respect to project-related relief and rehabilitation ("R & R") and environmental assessments and safeguards, keeping in mind that several of these directives were promulgated and/or amended after these loans/credits were approved in 1985."[460] The Committee duly took into account this reference in its functioning.[461] I am also adopting a similar approach as the Committee did, by considering (in brief) the previous Directives and in some detail, the existing Directives and Procedures.

In addition, the strengthened and amended policies and procedures of the Bank have also set new benchmarks for the Bank to follow in its development projects. As noted, these policies and procedures are important to discuss the relationship of sustainable development practices with the Bank and also to determine to what extent the Bank has been successful in implementing all its policies.

Despite the presence of the OMS, "Environmental Aspects of Bank Work," and the Operational Manual Statements on "Involuntary Settlements" and "Tribal People in Bank-Financed Projects," during the initiation and pendency of the Sardar Sarovar Project ("SSP"), the Bank did not enforce the provisions of these Statements that it ought to have

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[460] MORSE ET AL., *supra* note 1 at 360.

[461] *Id.* at 37. It is best to quote the Committee here on this point:

> As required by our Terms of Reference, we have gone beyond 1985, the year of the credit and loan agreements in presenting this review of Bank policy. ...At the very time when the Independent Review was being set up, the Bank had, in its 1990 and 1991 directives, set the highest standards of any aid or lending organization in the world for mitigating adverse consequences to human well-being caused by involuntary resettlement.

and was legally obliged to. Some of these environmental concerns, represented in the Operational Policies, are discussed in the following section.

### 3.3.1 ENVIRONMENTAL ASSESSMENT[462]

Operational Directive 4.00, on environmental assessments, came into force in October 1989. The purpose of environmental assessment is to ensure that the development process and objectives are environmentally fool-proof and sustainable, and that any environmental effects are identified at the earliest point in time in the project cycle. This will enable appropriate amendment of the project design.[463] Further, the assessment helps reduce costs and also delays in implementation of the project since any future environmental problems would already have been solved. The assessments also act as a mechanism for inter-agency coordination and to satisfy the concerns of affected community groups and NGOs. In addition, they have a significant role in supporting and adding to the environmental assessment capacity in the recipient country.[464]

According to the Directive, environmental assessment is part of the borrower's responsibility. The Directive lists different types of environmental assessments, which

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[462] WORLD BANK OPERATIONAL MANUAL, OPERATIONAL DIRECTIVE 4.00, ANNEX A, October 1989, available from the World Bank Public Information Center and at the *World Bank Home Page* (visited March 20, 1997) at <http://www.worldbank.org>. *See also* ENVIRONMENTAL ASSESSMENTS AND NATIONAL ACTION PLANS, WORLD BANK, OED Precis, Number 130, December 1996, distributed by the World Bank's public information center and available at the *World Bank Home Page* at <http://www.worldbank.org>. The precis quotes the 1992 Rio Summit which called on all countries to prepare national environmental action plans to accelerate environmentally sound and sustainable development. The study also notes that the Bank has trained both Bank staff and recipient countries in the Environmental Assessment process.

[463] *Id.* at paragraph 3.

[464] *Id.*

would normally include: existing environmental baseline conditions; potential environmental impacts; systematic environmental comparison measures; environmental management training; and monitoring.[465] In addition, regional environmental assessments are used when it is expected that many impacts from projects are expected in a localized area. Regional environmental assessments compare alternative developmental scenarios, and recommend environmentally sustainable growth rates and land use patterns and policies.[466]

Because environmental issues generally involve national, regional and local government agencies, and cover a large range of responsibilities, coordination among government agencies is crucial. The Directive puts the onus on the borrower to take the views of affected groups and local NGOs fully into account in project design and implementation, and in particular in the preparation of environmental assessments. This is vital to imbibe both the character and scope of any social or environmental impact, and the acceptability of planned mitigation strategies.[467] The success of environmental assessment depends on developing suitable environmental capability and on comprehending the complete role of the concerned agencies.

The Directive states at paragraph 16 that though environmental assessment is the borrower's responsibility, the Bank's task manager aids and keeps watch on the process.

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[465] *Id.* at paragraph 5.

[466] *Id.* at paragraph 6.

[467] *Id.* at paragraph 12.

Since project and country conditions, national legislation, and institutional experience varies among borrowers, both the recipient and the Bank need to use their judgment in implementing the procedures in order to design and implement projects that are environmentally safe and economically sensible, and which also conform with the environmental laws, policies, and procedures of the borrower.

Paragraph 25 of the Directive states that the borrower should submit the final environmental assessment report to the Bank prior to Bank appraisal. The Bank's appraisal reviews both the procedural and substantive elements of the environmental assessment with the borrower. Finally, the Staff Appraisal Report summarizes the environmental assessment more completely, and includes: environmental baseline conditions; alternatives considered; mitigating and compensatory actions; capability of environmental units and measures to strengthen them; environmental monitoring arrangements; and the borrower's consultations with affected groups and NGOs. This report is the basis for the formal environmental clearance prior to authorization of negotiations by the Regional Vice President.

One of the very first Directives to be complied with when a project is being undertaken by the Bank is that on Environmental Assessment. It is clear that the Bank has incorporated several useful provisions relating to environmental assessment in its Directives. If all these provisions are applied rigorously, there may not be a problem. However, compliance with the Directives appears to be a consistent problem with Bank practices, as later cases will

demonstrate. The Directive on Environmental Action Plans, which complements the Environmental Assessment Directive, is considered next.

### 3.3.2 ENVIRONMENTAL ACTION PLANS

Operational Directive 4.02, which came into effect in October 1994, sets out requirements for Environmental Action Plans ("EAP").[468] An EAP describes the country's major environmental concerns. identifies the principal causes of problems, and formulates policies and actions to deal with the problems.[469] Also, when environmental information is lacking, the EAP identifies priority needs and notes how essential data and related information systems will be developed. The EAP provides the preparation work to integrate environmental considerations into a country's overall economic and social development process. It is a "living document" that is expected to contribute to the ongoing process to aid in government-aided efforts in creating a detailed national environmental policy, which forms a part of the overall policy making process.[470]

The Bank encourages and helps recipient countries to prepare and implement EAPs. The Directive states that although the Bank may provide advice, the responsibility for preparing and implementing the EAP rests with the borrowing government and the EAP is the recipient country's plan. The Bank only encourages recipient countries to prepare and

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[468]WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.02, Environmental Action Plans, October 1994, issued from the Bank's public information center and at the *World Bank Home Page* (visited March 20, 1997), at <http://www.worldbank.org>.

[469]*Id.* at paragraph 2.

[470]*Id.*

implement EAPs. It does not compel them to do so. It also appears that no punitive results will befall the borrowing country if it does not make such a plan.

The Directive proceeds to state at paragraph 4 that the borrowing country is encouraged to secure support for the EAP by taking into account the views of NGOs. However, it is only an encouragement -- it does not compel the concerned governments. It must be noted that both the Environmental Assessment and Environmental Action Plan Directive put the onus on the local governments to prepare and implement, although the Bank demands that they be incorporated in the policy documents when the Project is being considered by the Bank.

Two questions then arise. They may be enumerated as follows: (1) Will the plans being prepared by the Governments be viewed with integrity -- Will such plans be prepared in an impartial manner? and (2) What is the role of the Bank? -- Is it just to lend money and not bother about assessing the viability of the project before that? The answers to these questions appear to be quite clear. Governments have an inherent stake in ensuring that a project proceeds without obstacles. Therefore, governments may find it difficult to make plans which are absolutely neutral in nature. Such plans may not also be viewed as having integrity, since the government is an interested party. An option would be to give the responsibility to third parties, who may be perceived by the public as neutral, so that they may carry out the tasks.

The Bank's role as a development agency proceeds far beyond just lending money for projects. Its role demands that it act responsibly in focusing on the consequences of such

lending for each project. This role therefore demands that the Bank take absolute and unequivocal responsibility for its actions. Its actions include lending money for a project and the incidental effects that such lending of money has on the communities affected by such a project, and also the effects on the environment. Therefore, it follows that the Bank must not let a borrowing government undertake the environmental assessment plans.[471] Instead, the Bank must take full responsibility for the assessments. This assumption of responsibility by the Bank is one of the environmental concerns that is integrated with the process of development.

### 3.3.3 NATURAL HABITATS[472]

Operational Directive 4.04 on natural habitats came into force in September 1995. This Directive is very important because large projects are invariably located in areas of natural habitats. The Directive states that the conservation of natural habitats is essential for long term sustainable development. The Bank states that it supports and expects borrowers to apply a precautionary approach to manage natural resources to advance sustainable development practices.[473] Paragraph 4 states that the Bank does not support projects which

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[471]It may be argued that such an approach by the Bank may not allow development of an indigenous capacity and the Bank's decision may be assailed on that ground. I would believe that such an argument would be unwarranted. The Bank, having a dual role as financier and development agent, is endowed with a duty to ensure that its projects are carried out in the best way possible. For this purpose, it is best if it does the assessments directly or indirectly, by appointing neutral third party contractors to accomplish the same.

[472]*See* the WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.04 – September 1995, issued from the Bank's public information center and also at the *World Bank Home Page* at <http://www.worldbank.org>.

[473]Similarly, according to Operational Directive 4.07, Water Resources Management, effective since July 1993, the Bank involvement in water resources management entails support for providing potable water, sanitation facilities, flood control, and water for productive activities in a manner that is economically viable, environmentally sustainable and socially equitable.

either transform or destroy a large portion of critical natural habitats. The only exception is if there are absolutely no other alternatives available.

In deciding whether to support a project with anticipated negative effects on a natural habitat, the Bank considers the borrower's capacity to conserve the habitat and its ability to use appropriate mechanisms to lessen the negative effects.[474] According to the Directive, the Bank once again expects the borrower to take into account the views, roles, and rights of groups, including local NGOs and communities, when formulating its policy.[475]

The Directive on Natural Habitats appears to be flawed on two grounds. First, the Directive states that the Bank does not support Projects that involve a degradation of critical natural habitats. However, the exception provides that even projects in critical natural habitats may proceed, if there are no other alternatives for siting. Second, the Directive also states that the Bank "expects" the borrowing government to consult with NGOs and other community groups. The first exception is problematic. There is no justification for destroying a critical natural habitat to use that habitat for a "development" purpose.[476] The term "critical" implies that the habitat is extremely fragile;[477] therefore, all out efforts must be made to

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[474] WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.04, *supra* note 472.

[475] *Id.*

[476] Of course, this may be an idealistic statement, requiring full protection of a critical natural habitat. In most development projects, destruction is likely to happen; the question is which habitats may be allowed for such a development purpose and to what extent. These factors vary depending on a case to case basis. Strong and concerted opposition to a development project in a critical habitat may well result in the project being shelved; on the other hand, disjointed efforts may result in the project continuing and in the eventual destruction of a critical habitat.

[477] It must be noted that the Bank has not defined "critical." The term "critical" may be interpreted to mean the value of the habitat, and not the fragility. However, since the usage of the term "critical" appears to be unclear, this writer has interpreted "critical" to mean fragility and not value.

protect such a habitat. Regarding the second point, I believe that the World Bank "expecting" a borrowing government to fulfill a certain task is different from the Bank "ensuring" that a particular task is fulfilled. It may be reiterated that the Bank has a responsibility to ensure that the borrowing government consults with NGOs and other community groups. By doing so, the Bank will be seen as being open in its policy making process and may be able to avoid many controversies in relation to projects.[478]

### 3.3.4 SAFETY OF DAMS[479]

Operational Policy 4.37 was adopted by the Bank in September 1996. The Bank through this Directive has disclaimed all responsibility for the safety of the dams that it funds. Accordingly, it states that the owner has full responsibility for the safety of the dam, irrespective of the funding sources or construction status. Because of severe results caused by the failure or malfunction of a dam, the Bank is anxious about the safety of new and existing dams it funds or on which a Bank-funded project is directly dependent. In fact, a

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[478] *See* JOHNATHAN CAHN, *supra* note 439 at 185-186. Cahn interprets meaningful development to include citizenry participation. This writer fully agrees with such a interpretation. This is because, as noted earlier, unless and until citizens of a recipient, whose lives will be changed quite drastically by the infusion of a development project, have a say in the type of changes that they are going to be exposed to, a wholesome development is not possible.

[479] WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.37 – September 1996, issued through the Bank's public information center and at the *World Bank Home Page* at <http://www.worldbank.org>. *See also* WORLD BANK LENDING FOR LARGE DAMS: A PRELIMINARY REVIEW OF IMPACTS, WORLD BANK, Operations Evaluation Department Precis, Number 125, September 1996. The Bank through its Operations Evaluation Department examined the outcome of 50 completed large dams funded by the Bank. The review found that projects have a mixed record in their treatment of displaced persons and on their effects on the environment, but that the Bank's resettlement and environmental policies have positively affected results "on the ground." In most of the cases reviewed, the study notes, "benefits have far outweighed costs, including the costs of adequate resettlement programs, environmental safeguards, and other mitigatory measures." The study therefore declares that the Bank should continue to support the development of large dams provided they strictly comply with Bank guidelines and fully incorporate the lessons of experience. According to this writer, it is only expected that the Bank would support the dams that it has funded. This is despite various experts from outside who have declared that there have been serious problems with Bank-funded dams.

recent leaked memo from the Bank reveals that most Indian dams are unsafe and the memo has warned of consequences of dam bursts.[480]

It appears that this Directive is flawed as well. The Bank has been unwilling to take a firm stand on this issue, conveniently shifting the responsibility on to the borrowing government. The Bank should take full responsibility for all projects that it funds.

### 3.3.5 ENVIRONMENTAL POLICY FOR DAM AND RESERVOIR PROJECTS[481]

Operational Policy 4.00 (Annex B) on the Environmental Policy for Dam and Reservoir projects, came into force in April 1989. Dam and reservoir projects help improve water supply for irrigation and households, provide power, control floods, and reduce fossil fuel depletion and the environmental effects of fossil fuel burning. However, there may be adverse as well as beneficial environmental impacts. The Directive states that the Bank will normally finance projects only in compliance with this annex.[482] Paragraph 4 states that negative environmental impacts must be prevented, lessened or compensated by suitable amendment to the project design. While doing so, the need to balance environmental, economic, social and other factors must be kept in mind.

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[480]International Rivers Network, *Press Release - April 6, 1995*, (posted April 5, 1995 and visited April 26, 1997) <ftp://alternatives.com/library.envdams/wa060020.txt>.

[481]WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OD 4.00, Annex B -- April 1989, Environmental Policy for Dam and Reservoir Projects, available through the Bank's public information center and at the *World Bank Home* Page <http://www.worldbank.org>.

[482] The exceptions as to when the Bank will depart from this "normal" practice are not given.

The Directive continues that environmental analysis is essential in decisions on the need for a project, its type, size, location, and area of influence. Viable alternatives are preferable because they reduce or remove many negative environmental effects mentioned earlier. The effect on the surrounding ecology by building the reservoir area prior to inundation needs to be studied. Referring to the environmental effects of involuntary resettlement resulting from dam construction, the Directive states that the lands surrounding a dam area are generally more productive than lands that are farther away, and are therefore occupied with more dense populations than other areas.[483]

The Bank's appraisal includes assessment by environmental specialists, analysis of sector investment operations, supervision of the environmental monitoring system, dam construction contractor's performance and also the auditing of completion reports by borrowing countries. This appraisal seeks to ensure that all of the Bank's guidelines are satisfactorily followed.[484]

Paragraph 15 states that major dam and reservoir projects should be used to shore up environmental capacity at the national and regional levels. Examining the issue of inter-sector benefits, the Directive states that "potential environmental implications are often better anticipated by involving the agencies responsible for environment, health, tourism,

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[483] *Id.* Displacement of the lowland population to the uplands often endangers the environment, as more people and livestock have to survive on a reduced resource base.

[484] *Id.* at paragraph 10.

social affairs, municipal and industrial water supply, agriculture, livestock, fisheries and navigation."

Paragraph 18 states that for large dams and projects having major environmental implications, the borrower should normally engage an advisory panel of independent and internationally recognized environmental specialists. Further, it is stated that, depending on circumstances, panel reviews are normally held once or twice a year during preparation and implementation. Paragraph 19 provides that community organizations, research centers, environmental advocates, and other NGOs can aid in the process to improve project design and implementation. The Directive approves of various mechanisms for consultation including having public hearings and national workshops.[485]

It may be stated that the Directive concerning the Environmental Policy for Dam and Reservoir Projects serves the purpose of protecting environmental concerns. Tapping resources from NGOs and community groups to provide insight on project design and implementation is a correct step and must be welcomed. The Bank's appraisal by environmental specialists to determine that all its guidelines are being followed is a positive step. By doing so, the Bank has taken the responsibility for its actions. If the same type of guidelines are followed for the other Directives as well, then it may be possible to have sustainability considerations fully integrated into the Bank's functioning.

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[485] *Id.*

### 3.3.6 INDIGENOUS AND TRIBAL PEOPLES[486]

Operational Directive 4.20, on Indigenous and Tribal Peoples came into force in September 1991. OD 4.20 replaced Operational Manual Statement 2.34 of 1982, "Tribal People in Bank Financed Projects."[487] OD 4.20 provides policy guidance to (a) ensure that indigenous people benefit from development projects, and (b) prevent or lessen anticipated negative effects on indigenous people. It states that special attention is required where Bank investments affect indigenous peoples, tribes, ethnic minorities, or other groups whose social and economic status restricts their capacity to assert their interests and rights in land and other productive resources.

The Directive defines the terms "indigenous peoples" and "tribal groups" to mean social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process.[488] "Indigenous peoples" is the term that has been used by the Directive to refer to such groups.[489]

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[486] WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.20 -- September 17, 1991, issued by the Bank's public information center and also available at the *World Bank Home Page*, at <http://www.worldbank.org>.

[487] *See* MORSE *supra* note 1 at 26. OMS 2.34 is similar to OD 4.20 in many respects. Paragraph 6 of OMS 2.34 exposed the dilemma that the Bank faced in its championing of tribal interests. It posed the question, "How can the government harmonize its interest in the development of a major hydro potential with the need to safeguard the rights of tribal people in the project area?" The Bank sought to answer the question by stating that, "these were matters for judgments guided by the principle that Bank assistance should help prevent or mitigate harm, and provide adequate time and conditions for acculturation." Paragraph 7 affirms the need to demarcate tribal areas and to conserve tribal integrity, by recognition, demarcation and protection of tribal areas containing those resources required to sustain the tribal people's traditional means of livelihood and the maintenance of the tribe's integrity and embodiments. Paragraph 8 acknowledges that the design of an appropriate tribal component depends upon a detailed, contemporary knowledge of the peoples to be affected.

[488] WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.20 *supra* note 486.

[489] The Bank's definition of indigenous peoples has already been dealt with in detail in the earlier chapter. This chapter deals only with the environmental guidelines to protect them from adverse effects.

Paragraph 6 affirms that the Bank's broad objective towards indigenous people is to make certain that as part of the development process, they are assured of full respect for their dignity, human rights, and cultural uniqueness. [490] The Bank accepts that the issue of indigenous peoples affected by development projects has been a controversial one. Paragraph 8 declares that decisions concerning indigenous peoples must evolve as a result of their informed participation in the decisions. Core features of the Bank's policy include identification of local NGOs and infusion of knowledge into the project by having experts to identify problems.

Paragraph 9 accepts that cases will occur, "especially when dealing with the most isolated groups, where adverse impacts are unavoidable and adequate mitigation plans have not been developed." In such situations, the Directive declares that the Bank will not proceed with the project unless the plans are suitably amended by the recipient country.

The Directive puts the onus on the borrower by declaring that "a full range of positive actions by the borrower must ensure that indigenous people benefit from development investments."[491] The Directive also provides a strategy for local participation. It states that mechanisms should be planned and maintained to enable participation by indigenous people

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[490] The Bank Directive gives two sides of the issue to deal with indigenous peoples. One side is to protect indigenous groups whose cultural and economic practices make it difficult for them to deal with powerful outside groups. The advantages of this approach are the special protections that are provided and the preservation of cultural distinctiveness. The other side of the argument is that "indigenous people must be accumulated to dominant society values and economic activities so that they can participate in national development. Here the benefits can include improved social and economic opportunities, but the cost is the gradual loss of cultural differences."

[491] *Id.* at Paragraph 15. The rest of the Directive goes on to include several components which must be incorporated in a development plan by the borrowing country when the project affected people are indigenous peoples.

in the decision making process. However, it also admits that no foolproof methods exist to guarantee full local level participation.[492]

The Bank's Directive on Indigenous Peoples must be welcomed. It appears that an honest attempt to follow this Directive will result in their interests being fully protected. There are however several questions that need to be answered regarding the effect of development projects on indigenous peoples. Some of them may be stated as follows: (1) At whose cost do development projects occur?; (2) How are indigenous peoples affected by such projects?; (3) What do they get out of it?; (4) Should they be on the receiving end by being affected by such projects or should they be beneficiaries of such projects?; and (5) If they are not beneficiaries, can such a project affect them negatively? The discussion in the next paragraph reveals that the Bank has not answered these questions.

It appears that development always compromises certain sections of society. It may be stated that generally, the indigenous peoples being the poorest of the poor are the hardest hit by development projects, and lose out on several factors. This point is illustrated in the Narmada case study being considered later in this chapter. Without their being beneficiaries, projects do affect their lives in a negative manner. It appears that even today, the answer remains unclear as to the benefits that indigenous peoples get out of such projects. As in the Narmada and other cases, governments claim that indigenous peoples will be integrated into the mainstream. However, indigenous peoples may not want to be integrated. They may

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[492] *Id.* at paragraph 15 (d).

just want to continue their lives undisturbed. The problem is that indigenous peoples' views are not fully considered when undertaking any project which affects their lives.

Unfortunately, it appears that the Bank's stand on the questions given above is largely ambiguous. For example, as mentioned earlier, the Bank has stated that "the Bank will not proceed with the Project until all their (indigenous peoples) interests are protected".[493] However, this statement alone may not be sufficient to protect and guarantee all the rights and interests of the indigenous peoples, nor does it satisfactorily answer the questions put forward.

Further, the Bank has acknowledged that it cannot guarantee full local participation. The bank may be unable to give such a guarantee; that is only understandable. However, it is probable that the local populace is likely to participate, since it is in their interest to do so. The acknowledgment on the part of the Bank (that the Bank will not proceed with the Project until the interests of the indigenous peoples are protected), appears to connote that the Bank has done its best all along to ensure that all interests of the Project Affected Peoples are protected. The Bank's acknowledgment does not amount to much, without any concrete follow up on its part. The Bank must state unequivocally the steps that it proposes to take in actually protecting all the interests of the indigenous peoples in the decision making process.[494]

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[493] *Id.*

[494] After all, the Bank has acknowledged that indigenous peoples are among the poorest. Therefore, it may be stated that in such a case, the Bank has an additional obligation to do all that it can to ensure their participation in projects. For this

## 3.3.7 INVOLUNTARY RESETTLEMENT[495]

Operational Directive 4.30, on Involuntary Resettlement, came into force in June 1990. Development projects that displace people involuntarily generally give rise to severe economic, social and environmental problems.[496] Involuntary resettlement may cause severe long term hardship, impoverishment, and environmental damage unless appropriate measures are carefully planned and carried out. The objective of the Bank's resettlement policy is to make certain that displaced people get benefits from the projects which are responsible for resettling them. Involuntary resettlement is an integral part of project design and must be tackled from the initial project preparation stage.[497]

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purpose, it may encourage NGOs, the media and public interest groups to be involved in aiding the indigenous peoples in the decision making process.

[495]WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.30 – June 1990, Involuntary Resettlement, distributed through the Bank's public information center, and available at the *World Bank Home Page*, at <http://www.worldbank.org>. OD 4.30 replaced Operational Manual Statement 2.33 of 1980. *See* MORSE *supra* note 1. OMS 2.33 was in force at the time the Sardar Sarovar Project was initiated. Many provisions of OMS 2.33 are similar to OD 4.30. OD 4.30 added on several more provisions. According to paragraph 1 of OMS 2.33, bank assisted projects sometimes require that people living in the area be moved to another location, either permanently or for a long period. It acknowledges that such resettlement often causes hardship, disruption and constraint on future development unless required preventive action is taken. The Statement describes the policy to be followed by Bank Staff in projects that require involuntary resettlement. Paragraph 2 states that "the Bank's general policy is to help the borrower to ensure that, after a reasonable transition period, the displaced people regain at least their previous standard of living and that so far as possible, they be economically and socially integrated into the host communities. Measures to be taken in this regard should be clarified before and agreed upon during loan negotiations." Paragraph 3 acknowledges that "resettlement of people is necessary in order to execute projects that entail a major change of land use including the construction of dams, canals, highways" and so on. Paragraph 17 acknowledges that the Bank realizes the human suffering and difficulty caused by involuntary resettlement, and therefore tries to avoid it whenever possible. Paragraph 18 stresses the need for a resettlement plan. Paragraph 19 relates to the value of assets and the method of calculating compensation for the lost assets. For example, it states that compensation procedures must equal the market prices. Paragraph is extremely important. The market value of the land are normally much higher than the State controlled value. Therefore, for the benefit of the affected persons, it is essential to follow this Statement in toto.

[496]Some problems include "dismantling production systems, loss of productive assets and income sources, relocation of people to environments where their productive skills may be less applicable and increasing the competition for resources." Other problems include "weakening of community structures, dispersion of kin groups, diminishing of cultural identity and traditional authority."

[497] WORLD BANK OPERATIONAL MANUAL *supra* note 495.

The Directive states that the following policy consideration must be taken into account. Involuntary resettlement must be avoided or lessened whenever possible, by looking at other alternatives. But, where displacement is unavoidable, resettlement plans should be developed. It states that all involuntary resettlement should be planned and implemented as development programs, and resettlers must be given enough resources and chances to get benefits from the project.[498] In pursuit of this objective, paragraph 4 states that where a huge population is displaced, a detailed resettlement plan, timetable, and budget must be created. The idea is to either improve the economic condition of the resettlers or at least to bring them back to their original economic condition.[499] Once again, the Bank puts the onus of responsibility for resettlement on the borrower.[500]

Referring to the type of resettlement, the Directive states that most displaced people wish to be resettled as part of a "pre-existing community."[501] The difficulties of a resettlement must be reduced by shifting people in groups and by lessening the chances for them to be

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[498] *Id.* at Paragraph 3. The policy states that displaced persons should be compensated for their losses at "full replacement cost prior to the actual move;" that they should be assisted with the move and supported during the transition period in the resettlement site and that they should be assisted in their efforts to improve their former living standards, income earning capacity and production levels. It specifically states that particular attention needs to be paid to the needs of the poorest groups to be resettled. Other components of the policy are that community participation in planning and implementing resettlement should be encouraged; resettlers should be integrated socially and economically into host communities so that adverse impacts on host communities are minimized and that land, housing, infrastructure and other compensation should be provided to the adversely affected population. It also adds that the absence of legal title to land by such groups should not be a bar to compensation.

[499] The Directive states that experience indicates that cash compensation alone is normally inadequate. Voluntary settlement may form part of a resettlement plan, provided measures to address the special circumstances of involuntary resettlers are included. Preference should be given to "land based resettlement strategies for people dislocated from agricultural settings." If suitable land is unavailable, "non land based strategies built around opportunities for employment or self employment may be used."

[500] *Id.*

[501] *Id.*

scattered. It lays importance on involving involuntary resettlers and others in the planning process from the beginning.[502] To obtain cooperation, the Bank needs to inform the resettlers by giving them various options and also by informing them of their rights.[503] The success of a resettlement plan is likely to be achieved once the responsibility is shifted from the project sponsors to the resettlers as early as possible.[504]

The Directive on Involuntary Resettlement is one of the most important provisions relating to environmental protection. Invariably, large scale projects such as those which are Bank funded, involve resettling of the project affected people in their hundreds, sometimes in the thousands. Unless and until involuntary resettlement provisions are successfully fulfilled, the project should not be permitted to proceed. If the Directive is followed in letter and in spirit, then there probably will not be a problem. However, the problem is that this provision has been followed more as an exception than as a rule.[505]

Further, a question which needs some more examination is whether it is proper to proceed with a project if it is not possible to give the same type of land to the resettlers that they lost. Will an "almost comparable" type of quality of land do instead of an "exact" quality of land?" This writer believes that the least that the Bank and concerned parties may do is

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[502] *Id.*

[503] *Id.* at paragraph 8. It urges that cooperation of NGOs be taken as they can provide valuable assistance and can ensure viable community participation.

[504] *Id.* I have discussed only the salient features of the Directive. The Directive includes several other components, such as a successful socio-economic survey, legal framework, alternative sites and selection, valuation of and compensation for lost assets and so on.

[505] An appropriate example is the Narmada case, where hundreds of thousands have been sought to be resettled without proper implementation of resettlement plans.

give an equal type of land to the Project Affected Peoples, and that the Project ought not to proceed if this condition is not fulfilled. The Project Affected People are losing out on several grounds. An unequal type of land would mean that they lose out completely on their livelihood, and such a project should not proceed.

It is hoped and expected that the Bank will have answers to some of the questions raised above before it proceeds with projects which involve relocation on such a large scale. As stated earlier, the Bank has incorporated several provisions as part of its policies and Statements concerning environmental protection. However, as some of the case studies beginning with Narmada and post-Narmada will demonstrate, many of these provisions have not been followed as they should have been followed. Future projects will perhaps shed more light on the matter. Also, it is hoped that further discussions and public pressure on the role of Bank in the projects that it funds will ensure that the Bank implements the various provisions that it has established.

This part has considered various Operational Directives and Policies of the Bank. It is clear that the Bank has incorporated several useful policies as well as some which enable it to shirk responsibility for its actions. But, overall, the Directives and Policies appear to have been made in good faith. The next part deals with the Sardar Sarovar Project, which exposed the fact that the Bank had not followed many of its own Directives and Policies that it was obliged to. The next part also deals with the Morse Committee Report which indicted the Bank, and with the Bank's responses to the Report.

## 3.4 THE CASE OF THE SARDAR SAROVAR DAM[506]

### *Introduction*

The controversy caused as a result of the funding of the Narmada project by the World Bank was one of the factors which drew public attention to the issue of accountability of the Bank in implementing its policies. It is widely regarded that the Narmada case, the resulting review committee report and pressure exerted on the US Congress[507] (to influence the Bank

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[506]The project titled the *Narmada River Development (Gujarat) Sardar Sarovar Dam and Power Project* came into effect on January 6, 1986, through Development Credit Agreement No. 1553-IN and Loan Agreement No. 2497-IN. The dam is being constructed on the river Narmada and hence it has been called the Narmada Dam project.

[507]*See* Maurizio Ragazzi, *Introductory Note*, 34 I.L.M. 503, 504 (1995); *See also* Korinna Horta, *The World Bank And The International Monetary Fund, in* GREENING INTERNATIONAL INSTITUTIONS 131, 144 (Jacob Werksman ed., 1996); DANIEL D. BRADLOW, *International Organizations And Private Complaints: The Case Of The World Bank Inspection Panel*, 34 VA. J. INTN'L. 553 (1994), who support this view. *See also* Ian Bowles and Cyril F. Kormos, *Environmental Reform At The World Bank: The Role Of The U.S. Congress*, 35 VA. J. INT'L L. 777 (1995), who discuss the appropriate role of the U.S. Congress in influencing the Bank decision making process. The authors evaluate Congress' role in promoting environmental reform at the Bank, by considering four factors: the costs and benefits of congressional involvement; the role of NGOs in congressional involvement; the role of the political parties and the outlook for the future. *Id.* at 835-836. The authors also ascribe many positive points as compared to the minor costs of congressional activism. The benefits include openness related to lending policies of the Bank; ensuring that there is accountability in the project planning and implementation process and lessening adverse impacts of projects. As opposed to this, the costs have been enumerated as "the restricted maneuverability of the executive branch in pursuing its policy objectives and the frustrations associated with congressional mandates that are at times incompatible." *Id.* at 835. They also credit the environmental NGOs in providing information to Congress from their site visits. *Id.* at 836; John M. Updegraph III, Note, *Large-Scale, Capital Intensive Development Projects In The Third World: Congressional Influence Over Multilateral Development Bank Lending*, 13 B.C. THIRD WORLD L. J. 345 (1993), who studies the difficulties of large-scale, capital intensive MDB projects in the third world and analyses the minus points of existing United States laws to correct such difficulties. The author states that the US Congress should insist on the Bank supplying information on projects and loans. *Id.* at 368. The author's conclusion is that Congress' use of the "power of the purse" will accelerate the required reforms in the Bank *Id.* at 369; BARTRAM S. BROWN, THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK 7 (1992), who examines the politicization of the Bank by various external influences. The author notes that "the concentration of the voting power is in the hands of the principal contributor countries, such as the US, which means that the power may be used for purposes unrelated to the Bank's goals and such an occurrence would constitute a politicization of the Bank." Brown's contention about the voting power is significant. The voting power is proportional to the amount of money that principal contributing countries give to the Bank. In fact, this power may be used in a manner that is good or bad. The U.S. and other major contributing countries may pressure the Bank to change its policies in a positive manner. This power may also be used in a negative manner to force the Bank to impose conditions on other countries in accordance with a contributing country's foreign policy, which may not necessarily be the same as that of the Bank's policy.

in its decision making process) by non-government organizations prompted the World Bank to set up the WBIP.[508]

### 3.4.1 THE FACTS OF THE CASE

The Sardar Sarovar is a dam on the Narmada river in north west India. It has been the centerpiece of a plan to bring irrigation to 1.8 million hectares, along 75000 kilometers of canals, in what would be the largest such system in the world. The project was also designed to bring drinking water to around 40 million people, and to generate electricity. However, the construction of the dam entailed the displacement and resettlement of around 200000 people in three states in India. It has been further estimated that another 150000 people will be impacted by the construction of the canals leading out of the dam. The Bank agreed to provide a loan of $450 million to finance a part of the construction in an

[508]To translate this Declaration into reality, the development assistance agencies set up the Committee of International Development Institutions of the Environment in 1980, to pursue the goals of the 1980 Declaration. *See* 19 I.L.M. 524 (1980). The US Congress has also put tremendous pressure on the Banks, to evaluate their environmental performances, by influencing the voting patterns among the Board of Directors. *See Draft Recommendations On The Multilateral Development Banks And The Environment: Hearings Before The Subcommittee On International Development Institutions And Finance Of The House Committee On Banking, Finance And Urban Affairs*, 98th Congress, 2d Sess. (1984); *Environmental Impact Of Multilateral Development Bank-Funded Projects: Hearings Before The Subcommittee On International Development Institutions And Finance Of The House Committee On Banking, Finance, And Urban Affairs*, 98th Congress, 1st Sess., (1983). The US House of Representatives has incorporated as law the need to force multilateral lending institutions to improve environmental capabilities. The provision requires the US Executive Directors on the Boards of the Banks to strengthen the number of environmentally-related material; involve environmental and health ministers in the planning process and use NGOs and indigenous communities in the project preparation process; to increase amount of funding for environmentally beneficial projects; provide training in environmental and natural resource planning and management and to evaluate within the US the anticipated environmental effects of loans. *See* Further Continuing Appropriation for Fiscal Year 1986, Act of Dec. 19, 1985, Pub. L. No. 99-190, 1985 U.S. Code Cong. & Admin. News 1185, 1309, *quoted in* MULDOON *supra* note 28 at 29.

agreement between the Bank, the Federal government of India, and the States of Gujarat, Maharashtra and Madhya Pradesh.[509]

There are two sides to the Narmada case. Supporters of the project have claimed the dam will bring benefits to over 40 million people, irrigation to over 1.8 million hectares of land and will provide hydro-electric power at a cost of displacing comparatively few people. They have also said that the persons to be displaced are tribal people whose lands are made of steep, rocky ground and degraded forests and therefore, the land that they would lose would be of marginal value.[510]

On the other hand, opponents decry the project by stating that the benefits mentioned may never materialize, that adequate drinking water will never reach the drought prone areas of the states and that irrigation benefits have largely been overestimated. It has been consistently argued that adequate measures have not been undertaken to resettle families

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[509] *See* MORSE ET AL *supra* note 1. The review committee report has been considered as neutral and among the most authoritative concerning the Narmada case and the World Bank's role in it. Some of the statements made also reflect the author's experience with the Narmada case, as a result of a series of interactions with the main non-government organization (the *Narmada Bachao Andolan*, meaning "Save the Narmada Struggle"), and having worked with them at the Narmada valley in 1992-1993. The NBA has been consistently projecting the issues before the national and international media. *See also* Narmada Bachao Andolan, *Supporting Document No. 2, Overview of Project,* (posted on May 30, 1994 and visited on April 23, 1997) <ftp://alternatives.com/library/envdams/nardam.txt>. The document gives detailed information on the Project. Full scale construction of the dam began in 1987. The dam is a 1210 m (3970 feet) long wall of concrete across the valley. It is designed to impound a reservoir with a full level of 139 m (455 feet). The bed of the river at the dam site is at 17 m (56 feet) and the planned height of the dam above the river bed is 129.5 m (425 feet). The main canal leading from the reservoir is scheduled to be 460 km (286 miles) long, eventually reaching the state of Rajasthan. It is 250 m (820 feet) wide at its head near the dam and planned to be 100 m (328 feet) wide at the Rajasthan border. A network of secondary canals totaling 75,000 kms (46, 600 miles) in length is planned to deliver the irrigation water to farmers.

[510] *Id.* at chapter 1. SUPPORTING DOCUMENT NO. 2 *id.* The report quotes support for the dam for the fact that the Project claims to irrigate a "command area" of 1.8 million hectares (4.5 million acres) of land in Gujarat and 75,000 hectares (185,000 acres) in Rajasthan; have an installed power generation capacity of 1450 megawatts; provide domestic water to over 2.35 million people in 8235 villages and 135 towns in Gujarat and in preventing flooding (a common phenomenon annually) downstream. Other claims of support include the solving of the drought problem.

displaced by the projects. Another point put forward is that rehabilitation measures according to guidelines established by the Bank and the Federal Government of India have not been complied with in a fair, just and equitable manner.[511] The opponents also cite the lack of proper environmental and social impact assessment studies in opposing the dam.[512]

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[511] SUPPORTING DOCUMENT NO. 2 *id.* The report estimates the cost overruns of the Project at $11,400 (US). The NBA has listed several problems with the Project. Although about 28,600 acres of land is officially classified as forest land, the actual amount of land is much greater. It estimates that the numbers of Project Affected Persons (one PAP comprises of one family unit) has increased six fold from 1979, now totaling 207, 500 people. At least half of them are tribal peoples, belonging to different groups collectively referred to as Bhils. An important point brought out is that canal affected people (i.e., peoples affected by the construction of the canals) are not recognized as Project Affected and therefore, they are ineligible for compensation packages as the reservoir PAPs. Families who have already lost land to canals have received cash compensation far below current land prices. Another startling fact revealed is that over 42000 adivasis (a form of tribal peoples) will be displaced by the Shoolpaneshwar wildlife sanctuary in Gujarat planned to compensate for the forests and wildlife lost to the reservoir. There have been no arrangements made to resettle or compensate these people. The dam is planned to store and eventually divert all the water in the Narmada, except during the wettest monsoons. This will dry up the river downstream destroying the livelihood of at least 10000 fisher persons families. Afforestation schemes supposed to compensate for the trees lost to the reservoir are taking over large amounts of adivasi land. Although the Adivasis have been cultivating this land for generations, they often have no legal rights to it and therefore receive no compensation for land lost to tree plantations. Referring to secondary displacement, the report states that large numbers of people are dependent on the forest and agricultural land being taken over for resettlement sites. No measures have been taken to compensate these people. Finally, referring to the resettlement conditions, the report states that the stress and impoverishment caused by resettlement has increased death rates among the oustees. The resettlement areas lack grazing lands, firewood, drinking water, and cremation facilities; the lands are of poor quality; are flood prone and there are disputes over ownership of the lands with the host communities. The "traditional" way of life is destroyed – villages, hamlets and even families are split up by the resettlements. *See also* Ashish Kothari, *Irrigation Project Threatens Endangered Mammal* (posted on February 16, 1995 and visited on April 23, 1997) <ftp://alternatives.com/library/envdams/wf210034.txt>. Kothari brings to light the fact that the wild ass, (equus heminous khur), one of the world's most endangered mammals, is now under further threat from the Sardar Sarovar Project. The author also reports that considerable wildlife will be lost along some stretches of the command area. The Rann of Kutch, in Gujarat is a unique salt desert and wetland ecosystem. Several species have adapted to its harsh conditions. The author also notes that there are serious information gaps in the impact assessment of the Project, especially on the impact on biodiversity.

[512] During my field visit to the Narmada valley, in May - July 1992, I observed that the most cherished possession of the displaced tribal people was their way of living and their ancestral lands, which were sought to be taken away in the name of development. Another consistent observation was the lack of measures to adequately rehabilitate the displaced tribal people. In fact, many times, I observed that the tribal people had been provided with lands which were no where near equal to the lands from where they were being ousted. In the course of my interaction with various persons and organizations, a point which cropped up often was that the construction of the dam was an election gimmick and essentially a battle between us and them (the have nots and the haves), with the politicians taking the side of the haves (who happened to be the rich farmers) who were consistent in the donation of funds to all political parties. The tribals and the project affected people kept asking : "Development at whose cost? And what are we getting out of such development?" It is also interesting to note that all political parties have vehemently supported the dam construction. To gain maximum political mileage from the dam issue, the parties have at one point or another accused each other of not supporting the construction as faithfully as the parties making the accusations have been. I must also mention that it was very troubling to see the sufferings and the confusion of the poor and tribal peoples. Time and again, I felt that they had no adequate voice to be heard. Another relevant point to be noted is the human rights violations which the affected

There was steady and mounting criticism of the Bank's role in the Narmada dam issue over a period of time, particularly in the early 1990's.[513] Responding to the growing concerns about the dam and the role of the Bank, the then World Bank President, Lewis T. Preston, on March 21, 1991, appointed an Independent Review, the Morse Committee,[514] to probe the entire controversy, with very wide terms of reference. The following section will deal with the Independent Review's report, with a particular focus on its views of Bank policies.

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peoples in the valley have suffered. There has been a systematic effort to oppress opponents of the dam by the State governments, particularly that of the Gujarat government. Tribal people and representatives of the main NGO opposing the dam (the Narmada Bachao Andolan) have been repeatedly coerced, beaten up and harassed. I have met and talked with several such victims of state abuse and violence. In fact, things came to such a situation that in response to a public interest litigation filed before the Supreme Court of India, a commission of inquiry was ordered into the violence against the opponents and the case resulted in police and administrative personnel being prosecuted and compensation being awarded to the victims.

[513]Apart from NGOs in India, several NGOs outside India also participated in this protest. The Narmada case regularly made it to the front pages of newspapers in India. In fact, the issue of inadequate relief and rehabilitation was also raised by concerned Congressmen in the U.S. Senate. *See also* Narmada Bachao Andolan, *Support Document 2* (posted May 30, 1994 and visited April 23, 1997) <ftp://alternatives.com.library/envdams/nardam.txt>. *See also* Narmada Bachao Andolan, *Constrained Review Report Released -- Supreme Court Rejects Government Response* (posted December 14, 1994 and visited April 23, 1997) <ftp://alternatives.com/library/envdams/wj030024.txt>. *See also* Praveen Swami, *Narmada Home-Truths: A Movement Makes Some Headway,* FRONTLINE, January 27, 1993. Both sources discuss the establishment of the Jayant Patil Committee to investigate the charges against the construction of the dam by the then Environment Minister, Kamal Nath, in response to the fast unto death by the chairperson of the Narmada Bachao Andolan, Medha Patkar. The Union Government was forced to release the review report, under directions of the Supreme Court. The report made clear that there were serious problems with resettlement and that the conditions under which environmental approval for the project was given had been broken. Further, the report also indicated that there may be less water in the dam than had been assumed. The reports also quote the Madhya Pradesh Legislative Assembly, which called the conditions of the oustees from Madhya Pradesh as unsatisfactory and the attitude of the Gujarat Government as apathetic. *See also* Lori Udall, *Sardar Sarovar: Uncertain Future* (posted on May 15, 1995 and visited on April 23, 1997) <ftp://alternatives.com/library/envdams/ww160024.txt>. Udall discusses a confidential World Bank evaluation, conducted by the Bank's Operation Evaluation Department of the Sardar Sarovar Project, which describes the future and sustainability of the Project as uncertain. However, despite criticizing the Project, the report also justifies the Project and declares the rationale for the Project as sound.

[514]Bradford Morse, the Chairperson of the committee was a former Congressman and the former Administrator of the United Nations Development Program. Thomas R. Berger, the Deputy Chairman, a human rights lawyer from Canada, has headed several commissions of inquiry in Canada.

## 3.4.2 THE MORSE COMMITTEE INDEPENDENT REVIEW

*Introduction*

The terms of reference to be followed by the Committee were issued on March 14, 1991. According to the terms of reference,[515] the objective of the Morse Committee was to conduct an assessment of the entire project including the relief and rehabilitation of the population displaced and affected by the construction of the dam as well as the effect of the environmental impact of all aspects of the projects. As noted earlier, the assessment was asked to make reference to existing Bank operational directives and guidelines, including considering the directives and guidelines which were amended or which came into force even after the project was approved in 1985.[516]

*Bank Policies Considered By The Committee*

The Review relied on the Bank's Operational Manual Statements (mentioned very briefly earlier) on "Social Issues Associated With Involuntary Resettlement in Bank Financed Projects", and "Tribal People in Bank - financed Projects," apart from later Statements which were in force at the time of the Review's functioning. The Review also referred to the Sardar Sarovar Credit and Loan Agreement of 1985 relating to the Sardar Sarovar Projects. The Agreement was entered into between the Bank and the Indian Government. The agreement provided that the Federal government in India and the three concerned State

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[515] MORSE ET AL. *supra* note 1 at 359-360.

[516] *Id.* at 358-361.

governments each agreed to adopt and implement resettlement and rehabilitation plans for the oustees of the dam and canal projects, satisfactory to the Bank.[517]

The Review discussed a number of issues relating to tribals, displaced persons, hydrology, and management before reaching the conclusions that it did. For example, the Committee considered in detail whether the tribals in the valley, who were the project affected persons, were indeed tribals under the Operational Manual Statement 2.34. The Review found that the tribals in the valley fit the various components of the definition. Most of the tribal peoples of the submergence areas had only poor yield economies, were isolated or semi-isolated, had not been assimilated at all or were only partially assimilated into the dominant society's way of life. A large part of their economy was gained from agricultural subsistence and they depended on the forests and rivers for their survival. These groups were also found to be generally illiterate (illiteracy rates were estimated at between 75% - 95%). The groups were also found to be clustered very closely with their ancestral lands. Also, the groups had an indigenous leadership. Further, the Review found that the groups had lost tenure over their traditional lands and had weak enforcement capabilities against encroachers. The Committee concluded that "disregard for the people who come within the Bank's definition of tribals is inconsistent with Bank policies." These policies, created in

[517] *Id.* at chapter 2. The agreements reiterate the provisions in the Operational Manual Statements of the Bank. One of the main objectives is that all oustees, shall promptly after their displacement be able to improve or at least regain the standard of living they were enjoying prior to their displacement and shall be allotted irrigable land in the State in which they choose to resettle. This objective was meant for both landed and landless oustees.

1982 and reiterated in 1991 were supposed to empathize with the tribals. The Review also noted that the Bank's policies arose from a human rights perspective:[518]

> Continuing confusion about who the tribals are, and persistent denials that they represent a distinctive part of the cultures of the submergence area, raises a large question mark over the very possibility of their being successfully resettled and rehabilitated.

Referring to the peoples to be displaced by the canals, the Review states that:[519]

> The Sardar Sarovar canal is planned to be the largest in the world. Somehow, those vulnerable to its construction were excluded from the resettlement benefits the Bank's policy deems to be essential. A canal of this magnitude involves more than just engineering and construction. The Bank's policies for people must have, and be seen to have, the priority they deserve.

Referring to the issues of hydrology and water management, the Committee noted that based on the studies that it carried out, "we have found that there is compelling evidence that the Sardar Sarovar Projects will not operate as planned."[520] In the final analysis, the Committee recommended that it would be only correct and proper if the required studies were conducted and the data from such studies made known for informed decision making before undertaking any more construction. The Review expressed severe concerns about the environmental impact of the Projects. Implementation of the Projects meant that the Bank

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[518] *Id.*

[519] *Id.*

[520] *Id.*

should reconsider the types of human and environmental impact studies that were still needed.[521]

The Independent Review criticized the Bank for failing to comply with its own guidelines on rehabilitation and resettlement ("R & R") and on the treatment of tribal peoples. The Review also cited the non-insistence by the Bank on proper preparation of R & R plans and State government policies for non-implementation of the provisions of the Narmada Water Disputes Tribunal.[522] Another point the Review referred to was regarding the inadequate resettlement components in the Project, which did not meet the needs of those whose lands were going to be submerged.

Referring to the entire project in the social and environmental context of the Narmada valley, the Review made the following observation:[523]

> There is a need to consider the Projects in the social and environmental context of the Narmada valley as a whole, to consult, inform, and involve the people affected by the Projects...The opposition, especially in the submergence area, has ripened into hostility. So long as this hostility endures, progress will be impossible except as a result of unacceptable means.

Keeping in mind all the issues which it considered, some of the salient ones of which have been mentioned above, the Review declared that the project proceeded on the basis of very

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[521] *Id.*

[522] The Narmada Water Disputes Tribunal was set up in the 1980's to adjudicate disputes arising out of the dam. The Tribunal had agreed to the dam construction, provided certain conditions relating to rehabilitation and resettlement were fulfilled. However, none of the conditions were fulfilled and the Review duly took note of this non-implementation.

[523] MORSE ET AL., *supra* note 1.

little understanding of the human and environmental impacts, without proper plans to reduce the adversities. The Review noted that the "direct impacts" were unknown. It declared that the needs of women, the elderly, and secondary displacements had not been considered. The Review said that as the numbers of problems accumulated, those affected "felt growing indignation, resulting in the steady mounting of political opposition." Some of the main conclusions reached were the following: [524]

> All projects start with assessments of their engineering costs and financing structures. These are minutely considered. But if the balance sheet fails to include the human distress caused by uprooting large numbers from their traditional homes and lands, the Bank's 1980 and 1982 policies are unlikely to be achieved. Lack of proper planning can lead to economic, political and financial failure. As Bank experience has shown, those who may pay the most direct and extreme price of such failure are the oustees.
>
> [T]he Sardar Sarovar projects as they stand are flawed, that resettlement and rehabilitation of all those displaced by the projects is not possible under prevailing circumstances, and that the environmental impacts of the projects have not been properly considered or adequately addressed. We have discovered fundamental failures in the implementation of the Sardar Sarovar projects. Moreover, we believe that the Bank shares responsibility with the borrower for the situation that has developed.

Other important findings include:[525]

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[524] *Id.* at xv - xviii. The Review pinpoints several factors as contributing to the failure of resettlement and rehabilitation. Relations between policy sponsors and Project Affected Peoples have generally been at a problematic level. The oustees have generally been isolated rural peasant or tribal populations; and have the lowest status in societies. Rehabilitation and resettlement policies are generally flawed because of shoddy planning; lack of public consultation and participation. Lack of national support plans and absence of welfare systems are contributing factors. The Review also notes that although Bank policies lay down various guidelines, many projects have commenced without adequate data.

[525] *Id.* at chapter 17.

> (a) The Bank and India both failed to carry out adequate assessments of human impacts of the Sardar Sarovar Projects. Many of the difficulties that have beset implementation have their origin in this failure. (b) This inadequate understanding was compounded by a failure to consult the people potentially to be affected and (c) Insufficient account was taken of the principles enshrined in the credit loan agreements and the Bank's Operational Manual Statements outlining its policies."

A significant point made was that the Committee suggested a full review of Bank procedures to ensure that Bank's policies were being carried out. They also suggested that the Bank should determine if the problems of the Sardar Sarovar Projects occurred in other projects as well, since the Review findings meant that the Bank had to shore up its overall quality control.[526]

The World Bank pulled out of the Sardar Sarovar project shortly after the Morse Committee submitted its report.[527] In fact, the Federal government of India decided to cancel the remaining part of the loan from the Bank on August 23, 1993, after it became public through the media that the World Bank was likely to impose several strict conditions to be followed in continuing with the financing of the project. This was done as a face saving

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[526] *Id. See also* GRAHAM SEARLE, MAJOR WORLD BANK PROJECTS (1987), who discusses the pros and cons of several Bank-funded dam projects, along with the Bank policies.

[527] *See* Pradeep S. Mehta, *Fury Over A River, in* 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK 117, 118 (1994), who quotes Medha Patkar, the leader of the Narmada Bachao Andolan, the NGO spearheading the anti-dam movement:

> The Bank, which was eager to go ahead even at a high human cost, was cornered. The Indian government, which still basically considers environmental issues to be nonsense when weighed against prospects of running water and electricity, now prefers to bury its head in jargon like "self-reliance." Ironically, this was farthest from their minds when the decision was taken to implement this highly unscientific and unsuitable project.

This writer fully supports Patkar's view. I believe that political considerations prompted the Government of India and the State Governments concerned to rush into the Project in the first place; the bravado exhibited in deciding not to accept any more Bank funding was also a result of political considerations – the Governments did not want the voters to think that they had allowed the Bank to dictate the Government's policies.

gesture. The Indian Federal government gave the excuse that it was possible to raise the money for the dam through other sources and that there would then be no need to repay the loan and the interest on such a loan.[528]

### 3.4.3 THE BANK'S LESSONS FROM NARMADA[529]

What did the World Bank learn from the Narmada case? Did it suitably modify the project finance process? How did it view the Narmada case in the light of future projects? Some of these questions have been answered by the Bank in internal reviews brought out by it much after it pulled out from the Narmada project.

The Operations Evaluation Department ("OED")[530] conducted a study of the Sardar Sarovar Projects, "Learning From Narmada." The study, done by the Bank's South Asia Region Office, referred to some of the salient observations of the Morse Committee Report and came to various conclusions. This internal review compared its findings with those of the Morse Review.

The OED analyzed the provisional performance ratings of the Narmada Project in 1996 (four years after the Bank pulled out of the Project).[531] In making the performance ratings,

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[528] *See* the archives of the newspapers, INDIAN EXPRESS and THE HINDU, dated Jan. - April 1993, which give details of the Narmada case at the following addresses: <http://www.expressindia.com> and <http://www.indiaserver.com>

[529] *See* LEARNING FROM NARMADA, PRECIS NO. 81, 1996, *supra* note 419.

[530] The Operations Evaluation Department (OED) is the in house investigation unit of the Bank, which undertakes impartial studies to determine the effects of Projects once the Projects are under way or when they have been completed. Its recommendations influence Bank policy. They do not bind the Bank in any way.

[531] THE WORLD BANK HOME PAGE, *supra* note 446.

it took account of the delayed but substantial progress on physical structures; the improved R & R policies adopted by the states; the progress made in resettlement; the link between construction and progress on resettlement; and the view of independent consultants that significant environmental damage had not occurred and was unlikely to occur. To rate the Bank's performance, it also took account of the Bank's failure to follow its own guidelines on involuntary resettlement, indigenous peoples and environmental protection.[532] The OED's assessment was that although the outcome of the dam and power Projects were marginally satisfactory,[533] the Bank's performance in the Projects was unsatisfactory.[534] It declared that "satisfactory R & R is key to success."[535]

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[532] *Id.*

[533] *Id.* In terms of institutional development, it rates the Projects as modest. In terms of sustainability, the Projects have been rated as uncertain.

[534] *Id.* Looking ahead and analyzing the potential of the Project in the next 20 to 30 odd years, the OED believes that it is not too late to make the Projects a successful developmental venture. Accordingly, it notes: "Based on the facts and assumptions presented in the Bank's completion reports, the Projects would realize an economic return of over 10% when completed." But, the OED admits that there are major unknown factors to deal with in the project. They include: assessment of the hydrological factors; conflicts with reference to the final maximum water level in the reservoir and the financing arrangements for the overall project development.

[535] *Id.* The OED believes that the dam construction must be amalgamated with the R & R program. It accepts that the R & R program has faced repeated hurdles. In fact, it brings out the sorry state of affairs with respect to R & R in the following observation: "In Gujarat, non-governmental organizations have been usefully involved in the R & R program, but in the other two states (Maharashtra and Madhya Pradesh), confrontation persists between project authorities and local NGOs. Maharashtra has recently adopted satisfactory policies on R & R, but about half the villages that are to be flooded are not cooperating with the final counting of people or with the administration of R & R arrangements. Madhya Pradesh's rehabilitation grant to landless families and adult sons is less attractive than those of other states, and its capacity to implement the R & R program is weaker. An earlier assumption that most of the Madhya Pradesh families to be affected by the dam would move to Gujarat seems unlikely to be fulfilled, so that much more land in Madhya Pradesh may need to be procured to compensate them, a process that is likely to be cumbersome. Completion of R & R arrangements for the families affected by the dam will require strengthening implementation capacity in both Maharashtra and Madhya Pradesh." This is a significant point, because, in this writer's opinion, implementation capacity was one of the crucial areas that was missing in the areas that I had visited. Without adequate capacity to implement the projects, it is very difficult to determine how the project can be successfully carried out. Implementation capacity, in this writer's opinion is an area exclusively in the domain of the Bank. The failure of the Bank to shore up its implementation capacity has shown the lack of planning on the part of the Bank.

The OED, speaking on behalf of the Bank, asserted that resettlement of people displaced by projects supported by the Bank "has always been, and still is, the responsibility of the borrower agency, but all projects that the Bank supports must conform to the Bank's guidelines."[536] The Bank believes that "mastery of R & R issues may yet emerge out of the current painful Narmada experience."[537] The OED states that the Bank should have "clearly" and "promptly" investigated matters raised by NGOs, or other interested individuals, about ongoing projects and ought to have raised them with the Indian Government at the earliest opportunity. A significant observation by the OED is that the Bank "should not respond on the borrower's behalf or substitute for the borrower in implementation." This statement reveals that the Bank is still not ready to take full responsibility for its actions.[538]

The OED believes that the Narmada Projects have had a far reaching influence on the Bank's understanding of the hurdles in seeking lasting development, on its procedures in dealing with portfolio management, and on its openness in having a public review of the

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[536] *Id.* The OED has identified seven factors to succeed in resettlement programs. They are the following: government commitment, a strong implementing agency; clear policies and guidelines that define resettlement criteria; complete and full planning; policies to aid resettlers regain their prior economic condition; public participation by the local communities; realistic estimates of resettlement costs and enough funds to be allocated.

[537] *Id.* In the Narmada Projects, compliance with the Bank's guidelines in the beginning could have avoided many of the negative consequences of environmental and R & R requirements. According to the OED, "evidence from projects reviewed by the OED confirms the importance of proper preparation of projects before they enter the portfolio." The OED states that "if a borrower is genuinely committed to a task, it will take the actions needed to accomplish it. Equally, the Bank's operational directives to its staff are no substitute for staff commitment to effective implementation, rigorous monitoring or timely use of remedies. The Bank, rather than the borrower found itself tagged as the non-performing party (with respect to the R & R aspects of the Projects)."

[538] *Id.*

policies and projects.[539] Three lessons that appear to have emerged from the Projects are that government ownership ought to be assured, social and environmental assessments should be implemented prior to a loan agreement being signed and the staff must discuss and try and solve differences of opinion with recipient governments before commencing implementation. The evaluation review acknowledges the fact that the Bank's experience with the Narmada projects propelled it to create an independent inspection panel.[540]

The impacts of the Morse Committee Report have been widely felt within the Bank. The Bank was obliged to respond to many of the findings of the Morse Report in its internal review. The point is that though the OED has made it appear that the Bank has learnt several lessons from Narmada, one wonders to what extent has the Bank been able to put them into regular practice, after the issuance of the Report. Unfortunately, it appears that the same allegations that plagued the Narmada case and which were sought to be corrected by the Bank, continued to haunt the Bank in other cases as well. Some of these cases are points of discussion at later points of this chapter.

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[539] According to the OED, several implications from the Narmada experience have been incorporated into the "Next Steps" action plan that the Bank is presently implementing to improve the management of its portfolio.

[540] *Id.* Another interesting point to note is that following the Narmada experience, the Bank reviewed the resettlement aspects of all projects active in 1986-1993. This review found that "R & R should be considered right from the outset of project identification." Satisfactory R & R is easier when national policies are supportive and when public participation is one of the key points of the R & R plans. With respect to resettlement, an OED review of resettlement components in 49 completed projects found Bank guidelines broadly appropriate but poorly applied.

### 3.4.4 SOME CONCLUDING VIEWS ON THE NARMADA CASE

As mentioned earlier, the Narmada case has been politically very sensitive. Therefore, all governments in power, both at the Federal and State levels, have either consistently supported the project or have consistently remained silent when controversial questions about the projects have been raised. In the midst of the controversy surrounding the dam, both Federal and State governments appear to have forgotten the peoples of the valley, who have become victims both as oustees without proper rehabilitation and seemingly as pawns in the game played by politicians. Feeling frustrated at any tardy progress made with regard to the relief and rehabilitation, the Narmada Bachao Andolan, the organization at the forefront of the anti-dam agitation, filed a public interest litigation before the Supreme Court of India in early 1994. They alleged violations of human and environmental rights and also lack of proper environmental impact assessments. Judgment has been reserved and is expected to be delivered in the near future.[541]

The Morse Report and the internal Bank review have raised several questions of international importance. Again and again, both reports have brought into focus the fact

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[541] *Id. See also* THE INDIAN EXPRESS HOME PAGE at <http://www.expressindia.com>, dated Nov. 16, 1996. As recently as March 3, 1997, the State of Madhya Pradesh filed an affidavit before the Supreme Court of India against the State of Gujarat. The affidavit stated that only 688.05 hectares against the need of 4064 hectares was available to settle the remaining 2032 project affected families in 38 villages at a dam height reaching 81 metres. This was besides the problems of land lying shallow for long, high salinity, heavy waterlogging. Also mentioned was the fact that the Government of Gujarat had not yet furnished plot wise details for the land allotted to the project affected families. The Government of Madhya Pradesh had earlier filed an application before the Supreme Court requesting that construction of the dam be resumed (which had earlier been stayed by the Court) to the original 112 metres, instead of the Court ordered 81 metres. Considering all the facts and also the affidavit of the Government of Madhya Pradesh, the Court dismissed the application, saying that the Government of Gujarat had not fulfilled the basic conditions of relief and rehabilitation. *See* the archives of the newspaper *Times Of India*, dated March 4, 1997 at <http://www.timesofindia.com>. As recently as Nov. 14, 1996, the Chief Minister of Gujarat made a public announcement that the construction of the dam would proceed despite any opposition to it. *Id.*

that human beings are the center of development concerns. In this connection, the Morse Review has stated:[542]

> There is no doubt that in the national interest, people can be required to resettle. However, certain minimum conditions and standards of human rights must be observed even when the national interest is involved. They reflect the inalienable human rights of the oustees.

The writer believes that the preceding observation by the Morse Report sets the issues in the correct perspective. Development with a human face is the need of the hour. This has been established by the Morse Report and has been reiterated by the internal Bank review. Although several policies and guidelines did exist at the time of the Narmada Projects being initiated, they were not followed by the Bank for one reason or another. The non-implementation of provisions which existed may only be attributed to the absence of a strong enforcement and oversight mechanism within the Bank.

It is appropriate to consider in the next part how the Bank has actually put into practice what it has learned from the Narmada case, the Morse Committee Review and the Bank's OED Report in redressing grievances of project affected peoples. The Bank appears to have put into practice the lessons that it has learnt by establishing a supervisory mechanism to redress grievances. This oversight mechanism is the World Bank Inspection Panel, created in 1994. The following discussion will reveal that the Panel does not compel the enforcement of

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[542]MORSE *supra* note 1. The focus of both the Morse and the Internal Bank Reviews were narrowed to rehabilitation and resettlement issues. Other secondary issues were also considered, including water management, hydrology, the effects on the lower and upper streams and so on. But, these issues remained as secondary in nature. As a result, the focus of this work has got narrowed down to R & R issues.

provisions by the Bank. Rather, it acts as an impartial and independent mechanism to hear grievances from people affected by Bank funded projects, on the non-implementation of the Operational Directives of the Bank. As far as the tribal people and others affected by the construction of the Narmada dam are concerned, the establishment of the World Bank Inspection Panel has come at a time far too late to be able to help them.

## 3.5 THE WORLD BANK INSPECTION PANEL

### 3.5.1 RESOLUTION ESTABLISHING THE PANEL

*Introduction*

The Resolution[543] setting up the Panel deals with the composition of members, the powers and procedures, the Bank's response (to the Panel's investigation) and the Panel's response to the Bank management's position. The general mandate of the Panel is given in the Operational Procedures of the Panel, which are discussed as the next part. This section is divided into the following sub-sections. The substantive portion of the section begins with the first sub-section, which is the composition of the Panel. The discussion then proceeds to the second sub-section, which discusses the powers and procedures of the Panel when a

[543]WORLD BANK INSPECTION PANEL, 34 I.L.M. 503 (1995) 521. The Resolution is dated September 22, 1993, bearing No. 93 - 10. The Resolution setting up the Panel was passed by the Executive Directors of the Bank, on the recommendation of the Bank President. For purposes of the Resolution, "Operational Policies and Procedures," consist of the Bank's Operational Policies, Bank Directives and Bank Procedures, but does not include Guidelines, Best Practices and similar documents and statements. In fact, it was recently clarified by the Executive Directors that the Panel's mandate does not extend to reviewing the consistency of the Bank's practice with any of its policies and procedures but, is limited to cases of alleged failure by the Bank to follow its Operational Policies and Procedures with respect to the design and appraisal on the borrower's obligations under loan agreements. However, in all cases, such failure "should have had, or should have threatened to have, a material adverse effect." Further, the term "project" which may be investigated by the Panel has been clarified to mean "projects under consideration by the Bank and those already approved by the Executive Directors."

request is made to it by the requesters. The next sub-section deals with the Panel's responses to the request. A part of the response from the Panel is to pass on the matter to the attention of the Bank management, for the management's response. The fourth sub-section deals with the Bank management's response to the Panel. If the Executive Directors endorse the Panel's response, then the Panel may proceed ahead with the investigation. In such a case, the Panel investigates and reports its findings to the Bank management for further action. This is dealt with in sub-section 5. Sub-section 6 deals with miscellaneous provisions of the Resolution that need mention.

*1. Panel Composition*

The Panel is composed of three members, belonging to three different nationalities. The members are nominated by the World Bank President, after consultation with the Executive Directors,[544] and can serve only for a single term of three to five years.[545]

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[544] *Id.* at paragraph 2. The members are selected on the basis of their integrity and fairness. If previously employed by the Bank, they may serve on the Panel only after two years have elapsed since the end of their employment. Members may be removed from office for cause. Members work full time, are considered as officials of the Bank, enjoying its privileges and immunities. Members cannot be employed by the Bank after serving as a member of the Panel.

[545] *Id.* at paragraph 3. The first members of the Panel are to serve in the following manner: one member is to serve for three years, one for four years and one for five years. Each vacancy is to be filled thereafter for a period of five years.

*2. Powers And Procedures Of The Panel In Response To A Request*[546]

The Panel may receive requests for inspections by an "affected party," which is not a single individual, but a "community of persons such as an organization, association, society or other groups of individuals, or by the local representative of such party or by another representative," where the party submitting the request contends that appropriate representation is not locally available[547] (the Executive Directors must agree that the party submitting the representation cannot be locally represented and so, must sanction such a substitution of request -- paragraph 12). The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or an omission of the Bank as a result of a failure of the Bank to follow its Operational Policies and Procedures with respect to design, appraisal and/or implementation of a project financed by the Bank.[548]

The "affected party" has recently been interpreted to include any two or more persons who share some common interests or concerns.[549] The resolution also gives the option to the

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[546]The procedures are given in paragraphs 16-23. All requests are to be in writing, stating all relevant facts, the harm suffered by the party and the alleged omission or action by the Bank. The requests are to explain the local remedies exhausted by the complainant, including specifying the measures taken to bring the issue to the Bank's attention, with the Bank's response (paragraph 16). Paragraph 18 gives the Bank 21 days to file its intention to comply with the Bank's relevant policies and procedures. the Panel then determines if the request meets the eligibility criteria set out in paragraph 12. If it does meet the eligibility criteria, the Panel recommends to the Executive Directors as to whether the matter should be investigated.

[547] The Executive Directors must agree to this substitution of representation (paragraph 12).

[548]Exceptions to paragraph 12 where the Panel may not consider requests are enumerated in paragraph 14, and include the following complaints. The responsibilities of third parties, such as the borrower, involving a potential borrower, which does not involve any action or omission on the part of the Bank, procurement decisions by the Bank's borrowers and matters where the Panel has already made a recommendation (unless there are new circumstances that would justify the hearing of a new request), and cases where a request is filed after the Closing Date of the loan financing period and cases where over 95% of the loan financing the project has been disbursed.

[549]On October 17, 1996, the Board of Directors clarified some of the provisions of the Resolution establishing the Panel. *See* THE WORLD BANK HOME PAGE *supra* note 446. The Bank's clarification on this point is based on the legal opinion

Executive Directors to ask the Panel to formally institute an investigation. As to whether the Bank will fund any request made to the Panel, it was recently clarified by the Executive Directors that the Bank will make significant efforts to make the Inspection Panel better known in borrowing countries, but will not provide technical assistance or funding to potential requesters.[550]

*3. Panel's Responses To A Request*

Before hearing a request, the Panel must satisfy itself that the requesters have exhausted local remedies available to them. The Resolution states that the "subject matter of the request must have been dealt with by the Bank." This statement may be interpreted to mean that the requesters should have approached the Bank at first with their representation and then, finding that there has been no response from the Bank, they may approach the Panel.

The Panel is also to satisfy itself that the alleged violation is of a serious character (paragraph 13). It must be noted here that the term "serious character" is not defined. This is a lacuna. What may be extremely serious in one case may not appear to fit the definition of the term, as interpreted by the Panel members. It could result in potentially unequal results. This is an area which will be dealt with in the recommendations at a later stage.

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of Dr. Ibrahim Shihata, the Bank's General Counsel on January 3, 1995. *See* Dr. Ibrahim Shihata, *Role Of The Inspection Panel In The Preliminary Assessment Of Whether To Recommend Inspection - A Memorandum Of The Senior Vice President And General Counsel*, 34 I.L.M. 503, 525 (1995). It must be noted that the General Counsel has not provided a proper rationale for such an important interpretation. He argues that "a number of persons each acting in his own single capacity cannot submit a complaint". Instead, he states that only a group with a 'commonality of interests' is eligible to bring a request for investigation. Also, he does not distinguish between a group with a "commonality of interests" from one that is merely a collection of individuals, each of whom is differently affected by a particular project.

[550] *Id.*

*4. Endorsement By The Executive Directors To Proceed With The Panel's Investigation*[551]

The recommendations by the Panel on whether or not to proceed are dealt with by the Executive Directors. If the Executive Directors endorse the Panel's recommendation, then the Chairperson of the Panel designates one or more of the Panel's members to have primary responsibility for conducting the inspection as a result of their earlier investigation, which is endorsed by the Executive of the Bank.[552] They shall report their findings to the Panel within the time limit to be set by the Panel (paragraph 20).[553]

The problem as it appears is that the Executive Directors may choose not to endorse the Panel's recommendations. In such a case, when the Panel does not have the power to proceed with the investigation (this has happened in a case which has come up before the Bank, viz., the Arun III case, to be discussed later), it means that its powers are being

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[551]The Resolution mandates that the Bank shall respond to the Panel's findings. According to paragraph 16, requests for inspection shall be in writing and shall state all relevant facts, including the harm suffered by or threatened to such party or parties by the alleged action or omission of the Bank. The requests are to explain the steps already taken to deal with the issue, as well as the nature of the alleged actions or omissions and shall specify the actions taken to bring to the Management's attention and Management's response to such action. Paragraph 17 states that the Chairperson of the Panel is to inform the Executive Directors and the President of the Bank immediately on receiving a request for inspection. According to paragraph 18, within 18 days of being notified of a request for inspection, the Bank management shall provide the Panel with evidence that it has complied or intends to comply with the Bank's relevant policies and procedures. According to paragraph 19, within 21 days of the receiving the Management response, the Panel is to determine if the Request meets the eligibility criteria set out in the earlier paragraphs. It shall recommend to the Executive Directors if the matter should be investigated or not. The Panel's recommendations are to be distributed to the Board for a decision within the normal distribution period.

[552]Paragraph 22 mandates that the Panel shall consider all relevant facts, and shall conclude with the Panel's findings on whether the Bank has complied with all relevant Bank policies and procedures.

[553]The Panel members are provided with the right to access all pertinent Bank records, and to consult with the relevant staff. According to paragraph 24, all Panel decisions shall be reached according to consensus and in its absence, the majority and minority views shall be stated. Paragraph 21 states that the borrower and Executive Director (representing the concerned country) are to be consulted on the subject matter both before the Panel's recommendation on whether to proceed with the investigation and also during the investigation.

curtailed by the management's decision to either authorize the inspection or to refuse to endorse the Panel's recommendation for an investigation. This is another lacuna in the Panel's independence. The Arun III case and the Executive Director's refusal to endorse the Panel's recommendation for an investigation, led to tremendous pressure from NGOs. The fact that the Bank withdrew from the project at a later stage is an entirely different matter. At the earlier point in time, the Bank management effectively put to use the provisions giving it the power not to endorse the Panel's recommendation.

*5. Results Of The Panel's Investigations And The Bank Management's Response*

If the Executive Directors do endorse the Panel's recommendations, then the Panel proceeds with its investigation and gives its findings. In response to the Panel's findings, the Bank has six weeks to prepare a report to the Executive Directors with the Bank's recommendations in response to the Panel's findings. Paragraph 23 mandates that the Bank shall inform the complainant of the results of the investigation and of action taken by the Bank, if any, within two weeks of the Executive Directors' consideration of the matter. It must be noted here that the no time has been prescribed for the Executive Directors to consider the matter. This is a gap which needs to be remedied. It may be stated here that at this stage as well, the Resolution does not compel the Bank Management to be bound by any recommendation of the Panel. The Rondonia case, to be discussed later, reflects this conflict. Therefore, although the Panel may be independent in its functioning, it lacks the power to enforce its findings on the Bank. This also appears to be a major chink in the

armor in the Panel's functioning. The final section of this chapter addresses this gap and recommends remedial measures to be taken.

*6. Miscellaneous Provisions*

Paragraphs 25 and 26 set out the modalities for the submission of reports. Paragraph 22 states that the request, the Panel's recommendation and the Board's decision are required to be made public by the Bank after the Board has considered the request for an inspection. The provisions do not explain the meaning of the term "considered," thereby leaving it to be ambiguous. Also, the Panel is required to furnish an annual report to the President and Executive Directors concerning its activities, which shall also be made public by the Bank.

## 3.5.2 OPERATIONAL PROCEDURES OF THE INSPECTION PANEL[554]

*Introduction And General Mandate*

The Operational Procedures were adopted by the Panel on August 19, 1994, and mandate how the Panel is to function within the parameters of the Resolution establishing the Panel. The introduction to the procedures reiterates salient features of the Resolution and sets out the purpose and functions of the Panel.[555] Most provisions of the Operational Procedures expand upon the Resolution as detailed in the previous section. The Procedures also

[554]34 I.L.M. 503 (1995) 510. Adopted by the Panel on August 19, 1994. *See* THE WORLD BANK HOME PAGE *supra* note 446 for the full text.

[555]*Id.* at 511.

contain some additional provisions for preparing the request and guidance that the Bank offers to the Requester.[556]

This section briefly considers the mandate as given by the Operational Procedures and consists of two sub-sections. The Panel's role, as mandated by the Operational Procedures, is set out in the first sub-section. The second sub-section considers the additional provisions in the Resolution and discusses some additional provisions relating to the Panel's functioning.

*1. The Panel's Role*

The Operational Procedures give the reason for the Panel's establishment. It states that the Panel has been established to provide people directly and adversely affected by a Bank-financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures. It also adds that "this forum is available when adversely affected people believe that the Bank itself has failed, or has failed to require others, to comply with its policies and procedures, and only after efforts have been made to ask the Bank Management itself to deal with the problem."[557]

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[556]Paragraph 8 permits requests to be in a language other than English, if the local people are unable to obtain a translation. Paragraph 12 specifies the documents to be attached to the request and includes all correspondence with Bank staff, notes of meetings with Bank staff, a map or diagram, if relevant, showing the location of the affected party or the area affected by the project and other evidence supporting the complaint. The Office of the Panel is prepared to meet with potential requesters to advice them on how to prepare and submit a request (paragraph 15).

[557]*Id.* Paragraph 22 clarifies the requests that fall outside the mandate of the Panel. Such requests include those which do not show that remedies have been exhausted by approaching the Management; requests from an individual or non-authorized representative of an affected party; requests in the form of any correspondence, which are not requests for an inspection; and requests which are clearly frivolous, absurd or anonymous.

According to the Operational Procedures, the Panel's purpose and functions are described as follows:[558]

> The role of the Panel is to carry out independent investigations. It function is which will be triggered when it receives a request for investigation is to inquire into and recommend; it will make a preliminary review of a request for inspection and response of Management, independently assess the information and then recommend to the Board whether or not the matters complained of should be investigated. If the Board decides that a request shall be investigated, the Panel will collect information and provide its findings, independent assessment and conclusions to the Board.

The provisions list the participants of the preliminary review as the requester, Management and any other individual or entity invited by the Panel to present information or comments and also, any person who has an interest with satisfactory evidence will be entitled to submit the same to the investigation.[559]

*2. Provisions Relating To The Panel's Functioning*

Once the Panel has received the Management's initial response, the Panel will conduct a preliminary review in order to determine whether conditions required by provisions of the Resolution exists.[560] Initial studies may also be commissioned by the Panel to aid in the investigation.[561] If there is no response from the Management within the required 21 days

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[558] *Id.* at Introduction.

[559] *Id.*

[560] *Id.* paragraph 35. Although it may not investigate the Management's actions in depth at this preliminary stage, it will determine whether Management's failure to comply with the Bank's policies and procedures meets the following three conditions: whether such failure has had, or threatens to have, a material adverse effect; whether the alleged violation of the Bank's policies and procedures are of a serious character; and whether remedial actions proposed by the Management do not appear adequate to meet the concerns of the Requester.

[561] *Id.* paragraph 36. Once an investigation is approved by the Board, the Panel decides on the appropriate methods of investigation. It frames an initial schedule for the conduct of the investigations, includes any interim findings and frames

time, the Panel shall notify the President and the Executive Directors and will send a copy to the Requester.[562] According to paragraph 40, the Panel is to "promptly" inform the Requester about the Board's decision whether or not to investigate the request. It shall also send the Requester with a copy of the Panel's recommendation. The Board is also charged with the duty of making the Request publicly available with the Panel's recommendations on whether or not to proceed with the inspection, once the Board has considered the Request.

If the Board permits the Panel to investigate the Request, then the Panel conducts further investigations. The Panel is to submit its final report to the Management and to the Board. Within six weeks of the Panel's final report, the Management is to submit its report to the

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additional procedures (paragraph 42). The methods of investigation include holding meetings with Bank staff, the Requester, government officials, affected people, project authorities and representatives of local and international non-governmental organizations; holding public meetings in the project area; visiting project sites; requesting written or oral submissions from concerned participants; hiring independent consultants to do research on specific issues relating to the Request; and researching Bank files. Annex 2 of the Operational Procedures is the guidance form on how to prepare a request for inspection.

[562] *Id.* at paragraph 28. Paragraph 29 discusses about clarifications which the Panel may want from the Management. The Panel may ask for additional clarifications from the Requester based on the Management's clarifications. Whether or not the clarifications arrive on time, the Panel will go ahead and make its recommendations to the Executive Directors within the 21 day period. The Panel's recommendation, according to paragraph 31 is to be done on the basis of the Request, Management's response and any further information that the Panel may have requested and received from the Requester and / or Management and / or any third parties, or any findings of the Panel during this stage. Paragraph 34 states that if on the basis of the Management's response and clarifications, the Panel determines that the Management has failed to demonstrate that it has followed, or is taking adequate steps to follow the Bank's policies and procedures, the Panel may conduct a preliminary review to determine if conditions as required by the provisions of the Resolution exist. Consequently, paragraph 35 provides that the Panel will determine if Management's failure to comply with Bank's policies and procedures fall within the following three criteria: if such a failure has a material adverse affect (it should be mentioned that the term "material adverse affect" has not been defined); if in the judgment of the Panel believes that the alleged violations of the Bank's policies and procedures are of a serious character; and if Management's remedial actions do not appear to be adequate enough to meet the concerns of the Requester on to the application of the Bank's policies and procedures. If the Board authorizes the Panel to go ahead with the preliminary investigation, then, according to paragraph 36, it may make an initial study, which may either be a desk study and/or field study. According to paragraph 39, the Board decides whether or not to accept or reject the Panel's recommendations. There appears to be a lacuna here as well, since no time limit has been prescribed for the Board accepting or rejecting the Panel's recommendations.

Board giving its recommendations on the Panel's findings. Paragraph 54 also states that once the Panel receives a copy of the Management report, the Panel will notify the Requester.

Paragraph 55 states that within two weeks of the Board considering the Panel's Report and the Management's response, the Bank is to inform the Requester of the investigation results as well as action decided by the Board, "if any." The term "if any" may be misinterpreted. If the Board does not give any decision or does not prescribe any action, then, a strict interpretation of the clause would mean that the Bank will be unable to inform the Requester of the action decided by the Bank, since the Bank would not have taken any action, according to the above scenario. This problem may be avoided by charging the Panel with the responsibility of informing the Requester of the results of the investigation.

Paragraph 56 states that after the Bank has informed the Requester, it shall make publicly available the Panel's report, the Management's recommendations and the Board's decision. The case may arise that the Bank does not inform the Requester. The question that then arises is in such a case, according to this provision, the Bank need not make the information publicly available. This also appears to be another lacuna. This may be rectified by stating that the Bank shall publicly make available the information at the same time as it informs the Requester.

As later discussions evolve, it will be seen that there exist chinks in the Panel's armor. However, the Panel is a first attempt on the part of the Bank to redress the affected local

community's grievances. The Panel has applied the Powers and Procedures discussed above in considering a few cases that have come before it. The next part deals with such cases.

### 3.5.3 CASES THAT HAVE COME BEFORE THE INSPECTION PANEL

*Introduction*

The Panel has received seven requests until now. The facts and circumstances of the cases relevant to the study are briefly explained below.[563] The cases dealt with include the Arun III Hydroelectric Power Project in Nepal, the Pangue/Ralco Hydroelectric Dam Project in Chile, the case of the Expropriation of Foreign Assets in Ethiopia, the case of the Emergency Power Project in Tanzania, Rondonia Natural Resources Management Project, the Jamuna Bridge Project in Bangladesh and the Yacyreta Hydroelectric Project in

[563]For example, the Pangue/Ralco hydroelectric dam project case is not directly relevant to the study here. This is because the case concerns the World Bank's sister concern, the International Finance Corporation. However, since the Panel was approached, the case is mentioned here very briefly. In November 1995, the Panel received a fifth Request for Inspection, from a Chilean non-government organization representing people living in the project area, against the Pangue dam built on the river Biobio in Chile. In 1992, Endesa, a Chilean private utility began construction of Pangue on Biobio. Endesa was supported in its funding efforts by the International Finance Corporation ("IFC," the arm of the World Bank that funds private sector projects). The IFC provided a loan of $70 million to Endesa. The requesters alleged that the IFC's participation in the construction of the Pangue/Ralco complex of hydroelectric dams on the upper BioBio River was in violation of a number of IFC and World Bank policies. The violations included World Bank policies on environmental assessment, environmental policy for dam and reservoir projects, indigenous peoples, involuntary resettlement, management of cultural property, wild lands protection and project supervision. On December 1, 1995, the Chairman of the Panel informed the Requesters and Executive Directors of IBRD, IDA and IFC that the Request was inadmissible since the IBRD/IDA Resolutions that established the Inspection Panel restricted its mandate to the review of alleged violation of Operational Policies and Procedures which related to the design, approval or implementation of projects financed by the IBRD or IDA only. The IFC's policies and functioning was not covered within the mandate of the Panel. However, on December 6, the World Bank President, James D. Wolfensohn sent a letter to the claimants promising that he would take personal responsibility for an "impartial internal" review into the allegations against the dam. The Pangue case raises an important question on the jurisdiction of the World Bank Inspection Panel. Would it not be logical for the various branches of the Bank to be covered by the Panel and not just the World Bank alone. To expand the jurisdiction of the World Bank would mean the amending of the Resolution establishing the Panel. This is an area which will be examined in greater detail in the next part. This writer believes that there is an urgent need to do so.

Paraguay. Each of these cases are analyzed, by detailing the Request made, the initial review of the Request by the Panel, the Bank Management's response, the recommendation of the Panel whether or not to pursue an investigation and the decision of the Executive Board of Directors to accept or reject the Panel's recommendation.

The cases provide an insight into the working of the Panel and in determining its effectiveness. One purpose of these cases is to determine if the establishment of the WBIP has been able to and will be able to prevent mistakes such as Narmada from recurring. Another purpose is to determine the extent to which the WBIP has been able to apply the principles of sustainable development relating to development projects, in order for the Bank to be able to advance the sustainable development process. Each of these cases discusses the Operational Directives that the Bank is obliged to implement but allegedly has not.

The Panel is a first for the Bank. Like all new mechanisms, there is a need to tie the loose ends and to strengthen the existing provisions as time goes by. The cases and analysis of the Panel's functioning will also help in determining if the WBIP may be expanded in the form of the 'International Development Institutions Inspection Panel' (considered in the next chapter), to oversee the application of environmental procedures and policies by other International Development Institutions which fund development projects.

## 3.5.4 ARUN III HYDROELECTRIC POWER PROJECT IN NEPAL[564]

*The Claim*

In October 1994, four citizens of Nepal, acting through the Arun III concerned group (a coalition of NGOs protesting against the Project), requested the WBIP to investigate the proposed Arun III hydroelectric Project. The request for inspection was filed before the International Development Agency decided to lend money to the Arun Project.[565] The Bank continued to proceed with its funding of the project, since there was no prohibition on the continuance of Bank funding on any project, just because a complaint was filed against the Bank. The Project envisaged the construction of a 225 meter high dam across the Arun river and the construction of a 122 kilometer access road to the dam.[566] The World Bank,[567]

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[564]*See* THE WORLD BANK HOME PAGE *supra* note 495, for details relating to the response of the Bank management and the progress of the Arun case.

[565]*See* BRADLOW, INTERNATIONAL ORGANIZATIONS AND PRIVATE COMPLAINTS, *supra* note 507; Daniel D. Bradlow, *A Test Case For The World Bank*, 11 AM. U. J. INT'L & POL'Y 247 (1996). *See also* Korinna Horta, *The World Bank And The IMF*, *in* GREENING INTERNATIONAL INSTITUTIONS 131, 145-146 (Jacob Werksman ed., 1996).

[566]Environment Defense Fund, *Monster Of The Himalayas* (posted December 1, 1994 and visited April 25, 1997) <ftp://alternatives.com/library/envdams/wd050013.txt>. The access road was expected to pass through the Conservation Area of the Makulu Barun National Park, described as one of the last pristine ecosystems of the eastern Himalayas. The road construction was also expected to accelerate deforestation significantly and lead to a loss of agricultural land. Further, the majority of the people in the Arun valley who are farmers would have their livelihoods threatened by the loss of farm and forest lands due to irreversible changes brought on by large scale public works and new settlements for the thousands of laborers.

[567]Stephen Mills, *Sierra Club Charges World Bank With Violating Environmental Policies* (posted January 9, 1995 and visited on April 25, 1997) <ftp://alternatives.com/library/envdams/wj160028.txt>. The Sierra Club declared that the dam represented the kind of foreign aid "rat hole" propagated by the Bank. Said Mills, "One would think that after years of local and world wide opposition to such environmentally destructive projects the Bank would have learned a few things. Maybe 50 years is enough." Mills also accused the Project of representing the " 'anti-thesis of sustainable development' – a mega project in a small country for the benefit of a small urbanized elite of industry, government officials and foreign contractors." Mills' accusation is important – it is an oft repeated and a common feeling among NGOs and others. The Bank should do everything that it possibly can to advance the cause of sustainable development. On the other hand, because of the lack of transparency and skewed policies, it appears to the public eye that the Bank is unsupportive of the sustainable development process.

the Asian Development Bank and other bilateral aid agencies[568] were proposing to finance the proposed $764 million dollar project.[569]

*The Case Against The Bank*

The allegations were that the Bank did not study alternatives to the proposed project and did not meet the criteria set out in Operational Directive 10.04 (regarding economic evaluation of the Bank's investment operations), that the Bank failed to meet all the requirements set out in the Bank procedures, and that the Bank violated Operational Directives 4.01, 4.20 and 4.30 (relating to adequate environmental assessment, adequate benefits to indigenous communities and adequate compensation for involuntary resettled people respectively). Another point was that the effect of the Project on the Nepalese economy would be to

[568]Urgewald, *Arun III, Germany I* (posted February 25, 1995 and visited on April 25, 1997) <ftp://alternatives.com/library/envdams/wm010030.txt> and Urgewald, *Arun III, Germany II* (posted March 15, 1995 and visited April 25,1997) <ftp://alternatives.com/library/envdams/wm080025.txt>. The reports give excerpts from the German Federal Audit Office which investigated the Staff Appraisal Report of the German Bank for Reconstruction's plan to fund the Arun III Project. Germany wanted to delay its decision on Arun III until the Nepalese Government and the Inspection Panel decided on the status of Arun III. The Audit report cast doubts on various aspects of the Project. First, it declared that the judgment criteria and target projections of the Bank were based on calculations and forecasts which were questionable. Second, it questioned the economic viability of the project. Third, referring to the environment, it declared: "In spite of the measures designated for the minimization of environmental damage, the Bank cannot exclude the possibility that the already damaged environment in the Arun valley will be further adversely affected by the construction of the road and the power plant." Fourth, it declared that the Project was expected to considerably burden the Nepalese economy in the medium term and would strongly limit Nepal's scope of action in development issues to overcome significant bottlenecks in the country's industrial development. Fifth, the report accepted that the inhabitants of the Arun valley and the people directly affected were informed very late about the project. Sixth, the Report revealed that out of the targeted 450,000 people to be affected by the Project, only 5000 persons were actively involved in the information about the Project. The Audit concluded by stating that the decision by the German Bank to finance the Project had not sufficiently taken into account the numerous risks that are likely to emerge from the Project. In the Audit's view, the Project was not ripe for a decision, especially in view of its economic viability, sustainability and the minimization of risks.

[569]*See* Pratap Chatterjee, *Nepali Dam First Before Complaints Board*, (posted October 12, 1994 and visited April 25, 1997) <ftp://alternatives.com/library/envdams/wo124.txt>. $764 million has been reported to be the annual budget of Nepal.

crowd out other possible development projects and to create undue risks to the future of Nepal.[570]

An important accusation made[571] was that the Bank had not devoted enough time or effort studying possible alternatives to the dam.[572] Approximately 450,000 people from 10 ethnic groups were expected to be affected adversely by the Project. Apart from the effects on humans, wildlife and forests also face significant long term impacts.[573]

*The Bank Management's Position*

The Panel registered the complaint in October 1994. The Bank management responded within the 21 day period. However, they insisted that their response be kept confidential. According to the Resolution and the Operational Procedures establishing the Panel, the Panel's Report, the Management's recommendations and the Board's decision must be

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[570] *See* THE INSPECTION PANEL REPORT ON REQUEST FOR INSPECTION: NEPAL: PROPOSED ARUN III HYDROELECTRIC PROJECT AND RESTRUCTURING OF THE ARUN III ACCESS ROAD PROJECT, Request No. RQ 94/1,3 (Dec. 16, 1994), available at the Inspection Panel Office at Washington. *See also,* THE WORLD BANK HOME PAGE, *Nepal: Proposed Arun III Hydroelectric Project And Restructuring Of The Arun III Access To Road Project* (visited January 20, 1997), at <http://www.worldbank.org>. *See also Inspectors Find Dam Project Violates World Bank Rules* (posted on December 24, 1994 and visited on April 25, 1997) <ftp://alternatives.com/library/envdams/wj030015.txt>. The report quotes Martin Karcher, the former head of the Bank's human resources department who retired from the Bank to protest the Bank's decision to fund the Arun Project. Karcher indicts the Bank and states that "the project's benefits will not trickle down to the poor, the overwhelming majority of whom live in the rural areas that will not be served by the project."

[571] MILLS *supra* note 567.

[572] *Id.* Nepalese citizen organizations had proposed a more sustainable approach to hydropower development, based on local knowledge and indigenous capacity. This alternative approach was based on decentralized, smaller scale hydropower development, and emphasized public participation and practical projects that took advantage of local knowledge, skills, materials and equipment. This approach would result in much greater social and economic benefits for the Nepalese, while providing sufficient electricity for the country, starting with those who needed it most in the rural areas. A shocking revelation by the Sierra Club was that the Nepalese Government was willing to consider alternative energy projects, but that the Bank was unyielding in its pressure on the Government not to proceed with such alternative projects.

[573] *Id.*

made public.[574] The Bank claimed that the material was sensitive and so, wanted confidentiality. This is again a lacuna. The Bank management may interpret the Resolution and the Operational Procedures in a manner which may be against the interests of the Panel's purpose and functioning. It is suggested that only the Panel must have the power to interpret its provisions in a manner that it deems fit and the Bank management must be bound by such an interpretation.

On December 16, 1994, the Panel recommended to the Board that an investigation be authorized.[575] On February 2, 1995, the Board of the Executive Directors of the International Development Agency authorized the Panel to further investigate whether the policies and procedures of the Bank had been observed relating to environmental assessment (in terms with the determination of Operational Directive 4.01), indigenous people (in terms with the determination of Operational Directive 4.20) and involuntary resettlement (in terms with the determination of Operational 4.30) and to determine whether these three Operational Directives were followed in substance by the Bank. It must be reiterated once again here that the need for the Bank management to endorse a recommendation of the Panel (as in this case) is a serious weakening of the Panel's independence.[576]

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[574] *Id.* at paragraph 56 of the Operational Procedures.

[575] *Id.*

[576] *See* The Ecologist, *The Inspection Panel And Arun III,* (posted February 24, 1995 and visited April 25, 1997) <ftp://alternatives.com/library/envdams/wm010029.txt>. The environmental journal "Ecologist" had written a letter to the World Bank expressing concern that the Panel had only been authorized to look at three areas, omitting other areas for which the claimants and the Panel had indicated that there was a case to answer. The Ecologist report faulted the

*The Panel's Investigation And Recommendations*

The Panel evaluated the Regional Action Plan[577] ("RAP"), and noted that such an "ambitious" plan placed a heavy burden on resources of Nepal and on the Bank. It further noted that the Bank lacked the institutional experience to implement such a plan and therefore, implementation of such a plan would be difficult.[578]

The Panel declared that there were "apparent violations of Bank policy" in the planning and design of the Arun III Project.[579] The Panel also added that the clear identification of problems was "an essential first step in a better approach to Arun III by [the] IDA."[580]

Another point made was that although the Management established high standards in these policy areas, it was incumbent on staff to meet them.[581] This point may be considered as significant because, the Panel made it clear that the staff was obliged to maintain the high standards that the Bank had incorporated as part of its Procedures and Policies and that difficulty in maintaining such standards was no excuse.

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Bank, and stated that if the Panel was truly independent, it would not need authorization from the Bank to pursue its investigations.

[577]The RAP was an innovative approach by the Bank for the first time ever, in seeking to strengthen the Nepal government's capacity to deal with such a large and complex project – by focusing on a holistic perspective of development, including women's programs, education, development of local enterprises, environmental conservation and research activities, preservation of sacred sites, monuments and folk heritage.

[578] *Id.*

[579]*Inspectors Find Dam Project Violates World Bank Rules,* (posted December 28, 1994 and visited April 25, 1997) <ftp://alternatives.com/library/envdams/wj030015.txt>.

[580] *Id.*

[581] *Id.*

The Panel based its recommendations to the Executive Directors on the Request, the Bank response, additional information and clarifications that the Panel sought from the Bank and the requesters, and the site visit conducted by one of the Panelists.[582] The Panel faulted the Bank's compliance with specific aspects of all three Operational Directives mentioned above. The Panel noted that the Arun III Project did not follow the comprehensive approach required by the three Directives, but followed a piecemeal approach which did not comply with Operational Directive 4.01 (environmental assessment). Secondly, the Panel observed that institutional structures necessary to monitor the environmental assessment of the project would not be in place before project implementation and construction began.[583]

Similarly, the Panel also observed that Operational Directive 4.30 (involuntary resettlement), had not been observed by the Bank, which failed to enforce covenants in the Credit Agreement. The Panel also reported that it found families seriously affected by the Project, who had sought rehabilitation, but did not receive any assistance.[584] According to the Panel, at least 1400 families were affected, including two of the Requesters.[585]

Turning to compensation, the Panel noted that the Bank did not pay adequate attention to this issue. According to the Panel, compensation paid purely in the form of money was

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[582] *See* THE INSPECTION PANEL REPORT ON REQUEST FOR INSPECTION: NEPAL: PROPOSED ARUN III HYDROELECTRIC PROJECT AND RESTRUCTURING OF THE ARUN III ACCESS ROAD PROJECT, Request No. RQ 94/1,3 (Dec. 16, 1994), available at the Inspection Panel Office at Washington. *See also,* THE WORLD BANK HOME PAGE, *Nepal: Proposed Arun III Hydroelectric Project And Restructuring Of The Arun III Access To Road Project* (visited January 20, 1997) <http://www.worldbank.org>.

[583] *Id.*

[584] The similarity between the Inspection Panel's finding on this score and the finding of the Morse Independent Review is striking.

[585] The Panel also found that provision for access to jobs/training was not adequately addressed.

unsatisfactory. The Panel opined that such compensation should also take the form of land, jobs, and training.[586] This recommendation by the Panel is noteworthy, because in many cases, this writer has noticed that compensation in the form of money is of no significance, as it has no value whatsoever. The affected peoples would rather have compensation in the form of more practical and useful items, such as cows, other domestic animals, land and so on. This is a point that will be reinforced in the recommendations.

Referring to absence of examination of alternatives, the Panel noted that, "if a less restrictive assessment, including a wider range of hydro resources, could be undertaken, it would result in expanding the number of economically and environmentally acceptable options."[587]

Referring to the status of indigenous people, the Panel noted that the correct approach would be to ensure that "adequate anthropological surveys" along with well intentioned impact assessment plans ought to be implemented prior to any construction. The surveys and plans must be followed by close monitoring of the relevant population groups during the progression of the project. The Panel indicated that the Bank's treatment of indigenous people did not satisfy the standards required of such a project. The Bank did not conduct proper and full surveys of vulnerable populations and failed to establish proper and adequate monitoring procedures.[588] Adequate anthropological surveys will certainly help in

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[586] *Id.*

[587] *See* Lori Udall, *World Bank Inspection Panel & Arun Dam*, (posted October 3, 1995 and visited April 25, 1997) <ftp://alternatives.com/library/envdams/wwax0105.txt>.

[588] *See* THE INSPECTION PANEL REPORT ON REQUEST FOR INSPECTION *supra* note 582.

identifying the population groups who will be affected by the projects. This is again a very positive recommendation.

*The Bank's Response*

After the Panel submitted its report, the Bank President, James Wolfenson, decided to cancel the Project. According to the Bank, the reasons included Nepal's lack of capacity to implement the Project, it inability to substantially increase the electricity rates (to make the Project viable in the long term), and the fact that Nepal would be running too large a risk by implementing the Project because the Project was likely to cause cuts in spending in other social sectors. The President of the Bank had this to say when announcing the cancellation of the Project:[589]

> The judgment made over a year ago came out in favor of the Project. Irrespective of whether that was the right or wrong decision at the time, I have concluded that under today's circumstances and with the information at my disposal, the risks to Nepal are too great to justify proceeding with the Project.

*Conclusion*

The Arun III Case was the Panel's first case. Several questions have been raised by concerned NGOs about the Panel's independence during the proceedings of the Arun III case before the Panel. According to one commentator, since the Panel ought to take independent decisions on allegations by affected persons towards the Bank, a conflict of interest takes place between the Bank's legal counsel to advise and represent Bank

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[589] *Id.*

management as against the need for the same counsel to provide independent and objective advice to the Panel. Reflecting on the Bank's General Counsel who contended that "Bank officials ought not to be subject to pressure or influence from outside sources," the same commentator contends that "the Bank being a public institution entrusted with taxpayer's money, the public has a right to know how that money was being spent."[590] This writer fully agrees with the views expressed by the independent commentator, Lori Udall. There is a dire need to have a completely independent counsel advising the Panel, as opposed to the existing system of having the Bank's in-house legal unit advise both the Bank and the Panel. This issue is specifically addressed in the recommendations at the end of the chapter.

One interesting fact which emerged in the Arun case was that after the Panel submitted its report recommending that the Bank withdraw from the Project, the Bank President appointed Maurice Strong, a renowned international environmentalist, to confirm the findings of the Panel. It was only after he supported the Panel's findings, that the Bank finally announced its decision to withdraw.[591] The question as to why this review by Strong was necessary remains unanswered. It is hoped that this case does not set a precedent for the future. If the Panel's recommendations were made as final and binding, then assuming

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[590] *See* UDALL, *supra* note 587. Udall raises several points in a letter to the Bank's President regarding the Panel's independence. She accuses the Bank of undue interference in the Arun III claim -- she quotes the Bank's Vice President of South Asia, D. Joseph Wood, who interpreted the Panel's Recommendation before the Executive Directors, to mean that the Panel did not have enough information upon which to base its request for a full investigation. Wood asked that the Bank management be permitted to give the Board more information before the Board voted on the Arun III Project. Commenting on the Bank management claim that their response to the Arun III Project was "confidential," Udall notes that such an action violates principles of due process and fairness. *See also, Letter To Lori Udall From Ibrahim F.I Shihata,* (posted July 10, 1995 and visited April 25, 1997) <ftp://alternatives.com/library/envdams/wwax0105.txt>.

[591] BRADLOW, A TEST CASE FOR THE WORLD BANK *supra* note 565 at 280.

that if Strong had given a contrary decision to that of the Panel's, the Bank would be obligated to follow the Panel's recommendations. This is yet another point which will be re-visited in the recommendations.

Nevertheless, the Panel took a bold stand in its recommendations. Despite any allegations of Bank interference in the Panel's work, the members of the Panel were independent in their decision making process and did not bow down to the Bank. Many of the Panel's observations are similar to the Morse Independent Review Report discussed earlier. The mere presence of Directives is not enough. There needs to be a mechanism to ensure that the Directives and Policies are implemented. The Panel's other cases in the following sections will throw more light on its functioning and on the nature of the Bank's response.

### 3.5.5 EXPROPRIATION OF FOREIGN ASSETS IN ETHIOPIA

*Brief Facts*

In April 1995, the Inspection Panel received a Request alleging that the International Development Association had failed to observe the provisions of Operational Manual Statement 1.28[592], when it granted several credits to Ethiopia. The request also stated that the Bank was at present negotiating more financial assistance with the Transitional Government of Ethiopia ("TGE"), even though TGE had refused to deal with the

[592]OMS 1.28 makes certain that the borrower has followed all bank procedures including providing of compensation to those affected by a project.

Requester's claim for compensation for a previous government's expropriation of their assets and blocking of their bank accounts.[593]

*The Panel's Response*

On May 19, 1995, the Panel sent a memorandum to the Bank stating that it was not accepting this request because: (1) the Requester had not exhausted local remedies before submitting the Request; and (2) the Requester failed to establish how this lack of compensation was the consequence of any alleged acts or omissions of the Bank, as required by paragraph 12 of the Resolution.

To an external observer, this case demonstrates that the Panel was able to make decisions which offer a correct interpretation of the Panel Resolution. The Panel's decision showed that it could act independently and as a neutral body by recognizing cases which have not exhausted local remedies. The Panel is not there just to entertain complaints against the Bank. It is capable of assessing whether cases are really valid before it decides to entertain them. However, details from within the Bank, during the decision making process of the Panel with respect to this case, expose a different picture. The Bank management has been accused of making a "serious attempt to undermine the integrity and independence of the Bank," when the Ethiopian request was being handled by the Panel.[594] There is no way of

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[593] *Supra* note 582.

[594] *Id. See also* Lori Udall, *World Bank Inspection Panel And Arun Dam*, (posted October 3, 1995 and visited April 25, 1997) <ftp://alternatives.com/library/envdams/wwax0105.txt>. Udall discusses how the Bank interfered in the functioning of the Panel with regard to the Ethiopian case. Udall points out how on May 30, 1995, the Managing Director of the Bank, Richard Frank, sent a memorandum to the Board stating that the Ethiopian request fell completely outside the mandate of the Panel and therefore should not have been considered, because according to Frank, the absence of compensation was not a consequence of the IDA's actions or omissions. Udall views Frank's memorandum to the Board of Executive Directors as a "serious attempt to undermine the integrity and independence of the Bank."

determining whether the alleged Bank pressure on the Panel to reject the case actually resulted in the Panel deciding so, or if it was because the Panel's decision was based on its own independent reasoning. In the absence of any firm evidence, this writer opines that the benefit of the doubt be given to the Panel, unless there are similar instances in the future (marking a trend), which may then cause one to suspect the Panel's motives.

### 3.5.6 EMERGENCY POWER PROJECT IN TANZANIA

*Brief Facts*

On May 16, 1995, a Request was made to the Panel, with respect to a power project in Tanzania. The Bank loan for $50 million was to finance new diesel fired generators at the Ubango plant in Tanzania. Diesel would be brought to the plant from the port to the site of the plant on the outskirts of Dar-Es-Salaam by a regular convoy of tanker trucks. The Requesters submitted that this constant traffic was an environmental hazard.[595] The Requesters also claimed that there was no need for IDA financing since there was private sector financing available on reasonable terms (from the firm they owned or worked for).[596]

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Udall has noted that job of establishing whether to initially accept or reject a claim under the Resolution was clearly the Panel's mandate. The Panel, and not the Board or the Bank management, ought to be given sole power to interpret any Resolution of the Bank. This is a point fully endorsed by the Bank. Any outside interference in any manner will only weaken the Bank's independence. In fact, this point figures as a recommendation in the later portion, because this lacuna is a chink in the armor that needs to be filled up.

[595] *See* Pradeep Chatterjee, *Environment: Tanzanian Company Denied World Bank Probe*, (posted September 13, 1995 and visited April 25, 1997) <http://www.lead.org/ips/demo/archive/09_13_95/3.html>. The article brings out several interesting facts about the case. One of the requesters, Reginald John Nolan, an Irish businessman and Tanzanian resident who submitted the request, was allegedly one of the original contractors for the Project. However, his bid was rejected. Nolan is said to have maintained that his proposal was environmentally more sound. The complaint was therefore unexpected because the Panel was created to provide recourse for local citizens, as opposed to disappointed contractors, who believed that Bank financed projects would have adverse environmental and social impacts. The report also quotes Nolan's lawyers as stating that Nolan's request was thwarted by powerful vested interests in the Bank.

[596] *Id.*

*The Panel's Response*

The Panel did not recommend an investigation because it found that the Management had considered alternative financing and had adequately reported to the Executive Directors about it prior to their approval of IDA's financing. However, the Panel found that the Requesters were not eligible to file such a claim since they could not possibly suffer any adverse effects from the alleged violation. The Panel therefore refused to entertain their Request. The Executive Directors of the Bank endorsed the findings of the Panel thereafter.

*Conclusion*

The importance of this case is that it brings to the fore the possibility of misuse of the Panel by vested interests. Misuse will tend to damage the credibility of the Panel in the long run and will only cast further doubts on its independence. The Panel's creation was in good faith. Exploitation of the Panel process may also invite the Bank management to impose restrictions on the functioning of the Panel, which will be to the detriment of the entire process. It is therefore absolutely necessary for non-government organizations and public interest groups to safeguard against any abuse of the process.

### 3.5.7 RONDONIA NATURAL RESOURCES MANAGEMENT PROJECT

*Facts*

On June 19, 1995, the fourth request was made to the Panel. The Request related to the execution of the Rondonia Natural Resources Management Project. The World Bank was funding the $167 million Rondonia Project in the State of Rondonia in Brazil, South

America, for Agriculture/Livestock and Forest Recovery Plan of Rondonia (commonly known as the Planafloro project).[597]

The general objective of the Project was to strengthen the system of inspection and control of protected areas in the State of Rondonia.[598] Specifically, the aims were to encourage creation of a new model of sustainable development through a series of initiatives for the protection and management of natural resources, including "socio-economic and ecological zoning, promotion of agroforestry systems, recovery of degraded lands, environmental protection, creation and management of extractive reserves and other conservation units, sustained forest management, environmental education and support to the indigenous communities."[599]

Requesters claimed that the Bank's lack of enforcement of several covenants of the legal documents related to this Project caused adverse effects on their incomes and health, and on the environment.[600] The overall goal of the complaint was to increase accountability and improve implementation of the loan.[601] The accusations documented by a report[602] against the Project involve two indigenous groups of peoples, the Kaninde and the Board of Indigenous Nations and Peoples of Rondonia. The report noted that nearly 400 families who

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[597]World Forest Campaign News, *World Bank Pressures State Of Rondonia* (posted February 13, 1997 and visited April 25, 1997) <gopher://forests.org:70/00/brazil/wbpress.txt>.

[598]Center For International Environmental Law, *World Bank Inspection Panel/Rondonia Claim* (posted January 19, 1995 and visited April 25, 1997) <gopher://forests.org:70/00/brazil/planfor.txt>.

[599] *Id.*

[600]WORLD BANK PRESSURES STATE OF RONDONIA *supra* note 597.

[601] *Id.*

[602] *Id.*

should have taken possession of plots allotted to them have been unable to do so, because the plots were not ready. Also, it alleged that millions of cubic meters of hard wood were stolen from the indigenous areas in question. Further, the report stated that squatters were encouraged to invade the area and build roads to transport the stolen hardwood. It also declared that the damages caused to the indigenous population adversely harmed human kind as a whole, because a "specific biodiversity" (the term was not defined by the Commission) was being destroyed.[603]

*The Panel's Response*

In this case, the Panel did not recommend an investigation immediately, since the Executive Directors of the Bank decided that it needed more factual information to decide whether an investigation should be carried out. The Panel conducted an "Additional Review" of the Request for inspection and of the information provided by Management and the Requesters. On Dec. 8, 1995, the Panel submitted to the Board of Executive Directors a report on the Additional Review, and on December 20, 1995, Management submitted to the Board a "Status Report" on project implementation, which included a Plan of Action dealing with the principal issues raised by the Panel. At this stage, the Panel recommended that an investigation be undertaken.[604]

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[603] *Id.*

[604] *Id.*

*Bank Management's Decision*

The Board considered the Request for Inspection, Management's response and the subsequent Additional Review on January 25, 1996. The Executive Directors "thanked the Inspection Panel for providing invaluable insight and thorough assessment of the issues, which allowed staff and Management to examine critically responses to the difficulties faced in the implementation of this complex operation."[605]

The Press release by the Bank noted that the Executive Directors recognized the efforts made by the Government of Brazil and Bank Management. The Directors felt that the proposed plan of action (presented by the Bank management) was aimed at addressing the principal issues raised by the Panel in connection with the Request for Inspection. In light of the action plan presented by the Management, and the follow-up underway, the Executive Directors concluded it would not be advisable to proceed with the investigation as recommended by the Panel.[606] However, in view of the complexity of the Project and the desire of the Bank to help assure its success, the Executive Directors agreed to review

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[605] WORLD BANK HOME PAGE, *supra* note 446.

[606] *See* Center for International Environmental Law, *Rondonia Planafloro Inspection Panel Claim*, posted to news groups by CIEL on September 2, 1995 <cielus@igs.apc.org>. The CIEL news report has urged the authorization of a full inspection into the Planafloro claim, as it would increase confidence in "the Inspection Panel as a mechanism that provides citizens an opportunity to protect their rights with respect to Bank projects. Rejecting a full probe will raise serious questions about the independence of the Panel and the Board's commitment to increasing accountability and improving quality at the Bank." The report also cites four of the technical issues raised by the Bank, in objecting to an investigation by the Panel. The report terms them as "nit-picking." The issues raised were that more specifics had to be provided about the alleged damage; some parts of the claim failed to identify specific policies; some of the allegations were not linked to any specific harm and that since some of the policies were not in force earlier, no action could be taken.

Management's progress report in six to nine months and to invite the Inspection Panel to assist in that review.[607]

*Rondonia Revisited: Nine Months Later...*[608]

Nine months later, the Panel was asked to assist in reviewing the Rondonia Project. The Inspection Panel revisited Rondonia and reviewed the Bank's progress for the Board of Executive Directors. In its report released at Washington in the first week of April 1997, the Panel noted that the Bank had improved its supervision of the Project, along with "administration at the technical and accounting as well as the managerial level."[609] The Panel also reported that four years after the Bank approved the environmental protection plan for Rondonia, deforestation had actually increased to "high historical levels" of nearly 450,000 hectares per year.[610] The Panel stated that "although no new date was set for submitting the restructuring plan (offered by the management) to the Bank's Executive Board," it was "hopeful that the Bank wants to stay involved and remains committed to strengthening natural resources management in this region."[611] The Panel's report issued to the Executive Directors on March 25, 1997 concluded that "there were mixed results, but

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[607] WORLD BANK HOME PAGE *supra* note 446.

[608] Worldwide Forest Campaign News, *World Bank To Overhaul Amazon Project* (posted April 20, 1997 and visited April 25, 1997) <gopher://forest.org:70/00/recent/overhaul/txt>. The pertinent point to be noted here is that although the Bank states it posts all information pertaining to the Inspection Panel immediately, that is not true. The NGOs and public interest groups are much better organized and more committed in providing up to date information to the public than the Bank is.

[609] *Id.*

[610] The Panel based its findings on an analysis of satellite imagery. Richard Bisell, the Chairman of the Panel has been quoted as stating that almost 90% of the forest loss was believed to have been caused by illegal loggers. Bissell also has acknowledged that the Project has not come up with a completely satisfactorily formula for grass roots participation.

[611] WORLDWIDE FOREST CAMPAIGN NEWS *supra* note 608.

that despite continued problems, locally affected peoples considered continuation preferable to ending Bank involvement."[612] The Executive Directors reviewed the Panel's report on April 3, 1997 and accepted its findings in full.

*Conclusion*

Rondonia established that to a great extent, the Panel process can work successfully, provided it is allowed to function independently. Initially, it appears that the Bank management tried creating obstacles in the path of the investigation. However, pressure from NGOs and public interest groups compelled the Bank into postponing the decision on Rondonia. Consequently, the Bank decided that the Panel could review the progress of the project in the future. The Panel did just that. It found that although the Bank's compliance with conditions had increased, there were several problems to be sorted out. The Panel once again came out with its report identifying the loose ends, which it felt were not irreparable. In this case, it appears that the Panel acted as an effective oversight mechanism. However, the ball now rests in the Bank management's court. It remains to be seen to what extent the Bank management will strive to fulfill the recommendations of the Panel.

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[612] WORLD BANK HOME PAGE *supra* note 446.

### 3.5.8 JAMUNA BRIDGE PROJECT IN BANGLADESH[613]

On August 23, 1996, the Panel received a sixth Request for Inspection regarding the Jamuna Char Integrated Development Project from a non-governmental organization representing the people in the Project area. They claimed that their livelihood, work and property rights have or may have been harmed by the partly Bank-financed Project. They alleged that applicable policies and procedures of the $200 million funded IDA project on resettlement, environmental assessment and NGO participation had not been observed.[614]

The Chairman of the Panel registered the Request on August 26, 1996, and IDA Management submitted its response on September 23, 1996. The Panel began its Review of the Request and Response, and on November 26, 1996, recommended that an investigation was not required at that point in time. The recommendation noted that "the 1993 Resettlement Action Plan (which was initiated by the Bank as part of its resettlement policies), did not specifically identify and provide for char dwellers as project affected

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[613] The author has been forced to work with the limited information available on this case. This case highlights the need for a better information package from the Bank. The Bank claims that all information on the Panel is regularly put out through the Bank's public information center and on the Bank's home page. However, the truth is otherwise. For the majority of the cases being dealt with by the Panel, there is only cursory information of each case before the Panel. Further, the information is in the form of press releases, which is extremely brief and omits most of the important details. The Bank charges $15 (U.S) for each document that is available, including information on the Panel's decisions about particular cases and so on. For public interest groups, NGOs and others, this is an amount that they can ill afford. The author characterizes the levy of this amount as an obstacle to public information on decisions of great regional, national and international importance. On the other hand, as noted earlier, the non-government organizations and public interest groups have a lot more information on each case being dealt with by the Panel.

[614] *See* THE WORLD BANK HOME PAGE *supra* note 446. The Jamuna Bridge Project has been described as the largest infrastructure project in Bangladesh. The Bank has described the Project in the following words: "Construction of the bridge over the Jamuna River will provide the first key link between the eastern and westerns parts of the country. Cross-river transport of passengers, freight, and transmission of power will facilitate economic growth." *Id.* The Bank has noted that the Asian Development Bank and the Japanese Government are also providing an additional $200 million in funding to the Project.

peoples."[615] The Panel also concluded that the "Erosion and Flood Policy, issued by the Bank on September 7, 1996 after the Request was filed could constitute an adequate and enforceable basis for IDA to comply with its policies and meet the char dwellers concerns."[616] On April 8, 1997, the Executive Directors accepted the Panel recommendation and asked the Bank management to submit a progress report in April 1998 on the follow up to the measures recommended by the Panel to compensate the char dwellers. The Board also decided to invite the Panel to provide comments at that time.[617]

### 3.5.9 YACYRETA HYDROELECTRIC PROJECT

*Brief Facts*

The Inspection Panel received on September 30, 1996 a request for inspection from a non-governmental organization, *Sobrevivencia* (Survival) - Friends of the Earth, Paraguay, representing persons who live in the project area who claimed that their rights/interests had been directly, materially and adversely affected by acts and omissions of the Bank in funding the Yacyreta Project. Yacyreta is a 70 kilometer long dam spanning the Parana river where it forms the border between Argentina and Paraguay. Although construction began in 1993 and the reservoir started filling in 1994, the Project has not yet been completed.[618] The Requesters alleged that the Project was nine years behind schedule and

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[615] *Id.*

[616] *Id.*

[617] *Id.*

[618] *See* Center For International Environmental Law, *Paraguayan Dam Victims File Complaint With Development Banks* (posted September 30, 1996 and visited April 26, 1997) <http://www.im.org/im/programs/hidrovia/pr960930.html>.

three billion dollars over budget and that electricity produced by the dam would be three times more expensive than the market rate for power in the region.[619]

The Request claimed that people living in the Project area had been and would be potentially, directly and adversely affected in their standards of living, health and economic well being as a result of the filling of the Yacyreta Reservoir and the Bank's omissions and failures in the preparation and implementation of this Project. On November 1, 1996, the Inspection Panel received from the Bank Management its response to the Request for Inspection.[620]

*Present Status*

In accordance with the Resolution establishing the Panel (discussed earlier -- Paragraph 6 of the Resolution), the Panel reviewed the Request for Inspection and the Management's response. On December 24, 1996, "the Panel recommended an investigation, which was rejected by the Executive Directors."[621] Instead, the Board asked the Inspection Panel to "undertake a review of the existing problems of the Yacyreta project in the areas of environment and resettlement and provide an assessment of the adequacy of the Action Plan as agreed between the Bank and the two countries within the next four months."[622] On

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[619] *Id. See* THE WORLD BANK HOME PAGE *supra* note 446.

[620] *Id.* There appears to be a lacuna in the information being supplied by the Bank. This case is another classic example on lack of information being supplied by the Bank. there is no information as to what the content of the Bank's response is. All materials released from the Bank simply state that the response from the Bank was received and they do not mention the consequent action on the part of the Panel.

[621] WORLD BANK HOME PAGE *supra* note 446.

[622] *Id.*

September 16, 1997, the Panel submitted the above review to the Executive Directors. The Review is to be discussed at a future undetermined date.

*Concluding Views*

Yacyreta is a crucial test case for the Panel's independence. This is because the Panel is at a stage where it will be judged post-Arun and Rondonia on its independence and neutrality. It remains to be seen as to how the Panel deals with it. It also remains to be seen what the response of the Executive Directors will be to the Review submitted by the Panel. Any attempt on the part of the Bank to interfere in this case will invite suspicion of the Bank's motives regarding the Panel's functioning. On the other hand, if the Panel is allowed to function independently as it is supposed to and its recommendations made in the review are followed up by the Executive Directors as well as by the Bank management, it will be a welcome sign regarding its independence.

### 3.5.10 SOME REFLECTIONS ON THE WORLD BANK INSPECTION PANEL

*Introduction*

Some of the requesters in these cases had their grievances redressed effectively by the Panel – others did not. At this stage, it is necessary to clarify the meaning of the terms "grievances redress," "oversight," "enforcement," and "review," and their usages in relation to the Panel. This writer opines that the Panel functions with the dual role of a grievances redress and an oversight mechanism. It functions as a grievances redress mechanism, since requesters approach the independent Panel in order to redress their grievances against the

Bank. The Panel also functions as a oversight mechanism, since it oversees the implementation of the Bank policies and procedures by the Bank in its development projects. The term "review" may be used as a synonym for the term "oversight," (as the Panel does review decisions of the Bank and examines if all its stated policies have actually been followed or not). However, the Panel is **not** an enforcement mechanism because, under the present mandate and Operational Procedures governing the Panel, the Panel's interim and final recommendations and findings are not binding on the Bank. The Bank may choose to either endorse or reject the findings. Only if the Resolution and the Operational Procedures are amended to make the Panel's findings and recommendations binding on the Bank, will the Panel function as both a grievances redress and as an enforcement mechanism.

In the cases discussed, the Panel's functioning, its powers and procedures become clear to some extent.[623] Some of the Panel's procedures and powers appear to be flawed. This section reflects on the functioning of the Panel's procedures and identifies the flaws. Identification of the flaws in the functioning of the Panel is the first step in rectifying any

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[623] *See* Kristine J. Dunkerton, *The World Bank Inspection Panel And Its Effect On Lending Accountability To Citizens Of Borrowing Nations*, 5 U. BALTIMORE J. ENVTL L. 226, 226-227 (1995), who declares that the Panel had only been partly successful in making the Bank accountable. The author expresses concern that the Panel may be shifting from its "intended role as a functional, competent and serious accountability mechanism," to becoming a "public relations tool for the Bank and a political liability for borrowing nations." The author also believes that if the Panel continues the same way on its present path, affected citizens in recipient countries nations would be in the same position they were when there was no Panel to approach.

This writer does not agree with the pessimism expressed by Dunkerton. On the contrary, this writer is of the opinion that the Bank is on the right track. A monolithic organization whose first attempt has been to create the Panel requires time for improvements to be made. In fact, it may be stated that these initial hitches are symptomatic of the growing pains of a new establishment.

chinks in the Panel's armor. The recommendations to correct the flaws will be made in the following part.

The effect of clarifying that an affected party means "two or more persons sharing a commonality of interests" is still unclear. This clarification was issued only recently (November 1996), but its portents are disturbing. Firstly, it is quite possible that two complainants may not share the required "commonality of interests" when filing a complaint. Instead, they may well be filing the complaint based on different reasons but having the same allegations -- that the Bank violated its policies and procedures. There appears to be something more than that meets the eye -- why was this clarification issued after two years of the Panel having been set up?

Had this clarification been in force when the Arun complaint was filed, the requesters may not have succeeded in pursuing their request. This is because they may not have possessed this required commonality of interest -- the project would have affected each Requester in a different manner. Consequently, they cannot then argue that they have a common interest in the Project which they are jointly seeking to protect before the Panel.

This clarification will also appear to limit access to the Panel. Of course, one needs to wait for the next case to determine how this interpretation is used. Therefore, one should not draw a hasty conclusion at this early a stage. Nevertheless, unanswered questions remain regarding the motive of the Bank.

Another chink in the armor of the Panel appears to be the fact that the Operational Procedures state that the Bank will not support funding of investigations or claims made by NGOs and community groups. Per se, this appears to be an acceptable statement. After all, it is quite possible that there may be spurious claims, which the Bank should not be expected to fund. However, if the claims succeed before the Panel and the Panel accepts the contentions of the NGOs or community groups bringing forward the claims, then, it may be only appropriate that the Bank reimburse the parties which have brought forward such complaints before the Panel. Such an action will serve the interests of justice and will be fair to the parties concerned. After all, if the claims succeed before the Panel, then, it means that the Bank has been in the wrong and that the parties have succeeded in bringing to light such wrongful actions on the part of the Bank.

Another limitation on the Panel's independence is the fact that the Bank's legal counsel advises both the Bank and the Panel on issues and clarifications that come up before them. Since the Panel has an independent office and is supposed to function in an independent manner, then, it follows that it must also have an independent legal counsel, unconnected with the Bank and with any of the Bank's affairs, to advise the Panel on any matters in which the Panel may require legal advice. Unless this is done, the Bank's legal counsel's advice to the Panel may well be said to be tainted. Such advice will be viewed suspiciously by the members of the public and NGOs.

Yet another point that deserves to be reiterated is the fact that the Bank is not bound by the Panel's recommendations and findings. As noted earlier, this is a major flaw if the Panel is to function independently. This flaw needs to be corrected forthwith. Further, the Panel's recommendations need to be "final" as far as the Bank's management is concerned. This will prevent any other body or person from reviewing the Panel's decision and either affirming or disagreeing with it. Even if the reviewer disagrees with the Panel's decision, if the Panel's recommendations are made final and binding on the Bank, then, the Bank would have no choice but to accept the same.

The lack of clarity on the term "serious character" needs to be corrected. As noted earlier, the Panel could interpret the term to the disadvantage of Requesters, who come before it with a genuine complaint.

The Panel's jurisdiction must be expanded to include the two private sector sister concerns of the World Bank Group, the International Financial Corporation ("IFC") and the Multilateral Investment Guarantee Agency ("MIGA").[624] After all, if the same standards are applied to all members of the World Bank group, then, they must also be judged and complaints against them must be heard in a uniform manner. Further, the Panel's independence and its purpose may be whittled. This can happen if the Bank decides to

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[624] *See* Center For International Environmental Law ("CIEL"), *Draft Proposal For An Independent Review Panel* (posted August 15, 1997 and visited November 25, 1997) at <http://www.igc.apc.org/ciel/ifcres.html>. The CIEL home page has made a draft proposal for an Inspection Panel by expanding the existing World Bank Inspection Panel to cover the IFC and the MIGA. The CIEL has noted that "the extension of the WBIP to the IFC and MIGA raise new issues to how a review mechanism should function in the private sector. In particular, the Panel process must be clear and consistent and provide certainty for investors, must protect business confidentiality, must protect against abuse by potential competitors, and must be conducted under reasonable time limits." *Id.* Based on these concerns, the CIEL has offered its proposal.

divert the funding of all its "troublesome" projects through the IFC. Then, in such a case, it will not be heard by the WBIP, because it lacks the mandate to hear complaints against the IFC.

Another gray area which deserves to be corrected is that the WBIP must have the sole power to interpret the provisions of the Resolution and its Operational Procedures in the manner that it deems fit. This will ensure that the Bank does not seek to impose its version of the interpretation on the Panel. In fact, any such interpretation by the Panel must be also made final and binding on the Bank.

Since the WBIP was established, there have been seven requests / complaints made to the Panel. In only one case ( the Arun III case), has the Panel carried out a full scale investigation, and its result was accepted by the Bank Management. The Bank withdrew from the Project. The Rondonia case established that the Panel could be effective, if allowed to function as it was supposed to, and without any interference from Bank management.[625]

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[625]The Panel has had only limited experience with seven cases. However, this does not limit the ability to draw forth conclusions on the Panel's functioning.

After the completion of the writing of this thesis, 3 more cases came up before the Panel. Brief details follow.

**Jute Sector Adjustment Credit, Bangladesh:** The IDA extended a credit of $247 million to the Bangladesh government in implementing its reform of the jute sector. On November 25, 1996, a Request was made relating to an IDA credit for a Sector Adjustment Program. The Request was filed by some of the intended beneficiaries, comprising of private sector jute mill shareholders. The Requesters claimed that "their rights/interests were adversely affected by IDA's acts and omissions." *See* WORLD BANK HOME Page *supra* note 446. On March 14, 1997, the Panel recommended that IDA's Executive Directors should not authorize an investigation. The Panel stated that "based on experiences of the adjustment credit program during the past three years, emerging political forces, and earlier lessons pointed out by the Bank's Operations and Evaluation Department, an extension of the closing date of credit without revisiting the basic design concepts with the government and Requesters may not be an adequate solution. Close supervision during this extension with regard to financial discipline might at least meet some of the Requesters' concerns. The closing of the program without a new approach in place, however, would presumably meet none of their expectations from the reform

In the next and final part, I seek to determine to what extent the Panel has been and will be able to advance sustainable development in development projects funded by the World

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program." The IDA Management informed the Board that an upcoming Jute mission would evaluate the success of the adjustment program. If the evaluation concludes that no progress has been achieved, the June 1997 closing date for the Project would not be extended. *See* WORLD BANK HOME PAGE *supra* note 446. In this context, the Panel recommended that an investigation into violations of IDA policies and procedures alleged in the Request would serve no useful purpose. The Board immediately accepted the Panel's recommendation.

The Jute Sector recommendation by the Panel needs to be looked at with a pinch of salt. One can interpret the Panel's actions as sheer frustration with the Bank's policies. The Panel said that without going into the basic design concepts, simply examining the Bank's violation of its policies and procedures alone would serve no purpose. This means that the entire decision making process cannot be compartmentalized. The Board of Directors conveniently accepted the Panel's recommendation without looking at it in a holistic manner. This indeed is a matter of regret and reveals the Board's intent, which is insincere.

**Itaparica Resettlement and Irrigation Project, Brazil:** On March 19, 1997, the Panel accepted a Request from over 121 individuals who alleged that their standards of living, health and economic well being had suffered under the Bank-sponsored $232 million resettlement program (designed to benefit the population affected construction of the Itaparica hydroelectric dam, in which the Bank had no role in funding). On June 24, 1997, the Panel recommended an investigation. On September 9, 1997, the Executive Board of Directors did not authorize the Panel to proceed ahead with its investigation. The Board voted very closely on the decision (48% for an investigation and 52% against it). The Board took into account the Government of Brazil's Action Plan (which was assisted by the Bank) to ensure completion of works providing infrastructure and technical support to resettlers. The Board however asked the Panel to assist in supervision of the Action Plan and also asked the Panel to review progress of the Plan in 12 months. *See* WORLD BANK HOME PAGE *supra* note 446. *See also* Center For International Environmental Law, *Inspection Panel Update*, visited November 25, 1997 <http://www.igc.apc.org/ciel/pritsi.html>.

The outrageous decision by the Board deserves to be condemned in the strongest terms possible. One can only wonder: "Why waste taxpayer's money in creating a supposedly independent Panel, if none of its recommendations are going to be followed up fully?" It is hoped that donor governments will take note of the actions of the Bank Management and that of the Board and that they will intervene and will pressure the Bank by reconsidering their funding options to the Bank. Hopefully, with increased awareness by the public and pressure from the NGOs, more Board Directors will be directed by their respective Governments to vote in a manner which protects global environmental concerns as well as the interests of the Project Affected Peoples.

**National Thermal Power Corporation's Power Generation Project in Singrauli, India:** On May 12, 1997, the Panel accepted a Request from residents of Singrauli, who claimed that people living in the project area have been harmed and will continue to be so harmed because of the Bank's violation of its own policies and procedures in implementing the Project. The Bank Management did acknowledge some violations in its response of June 3, 1997, in areas relating to involuntary resettlement, environmental assessment and project supervision. On July 24, 1997, the Panel recommended an investigation. On September 2, 1997, the Bank Management presented to the Board of Directors an Updated Action Plan to rectify the problems raised in the Panel's initial review. On September 11, 1997, the Board authorized the Panel to conduct its investigation **only in Washington** (emphasis mine) to "further determine the extent to which the Bank adhered to its own policies and procedures under the Project (with reference to the policies on Involuntary Resettlement, Environmental Assessment, Indigenous Peoples, Public Participation and Bank Supervision)." The Panel has been asked to complete this desk-investigation from Washington by December, 1997.

This decision by the Board also deserves to be severely condemned. What use is it if the Panel does a in-house desk investigation on a Project, which is 10,000 kms away? A Panel is not required for that purpose – the Bank's own Operations Evaluation Department can do that job. These restrictions and conditions certainly can be interpreted as affecting the functioning of the Panel. Perhaps one way to bring upon public pressure on the Board would be that the Panel members could resign in protest. Unless some such drastic action occurs, the utility of the Panel's continuance must be questioned.

Bank. I seek to do this by applying the facts from Narmada, the subsequent lessons learnt from the Bank, and the cases that have come up before the Panel.

## 3.6 THE PANEL'S CAPACITY TO FULFILL AND ADVANCE THE PRINCIPLES OF SUSTAINABLE DEVELOPMENT

*Introduction*

This part has three sections. First, an analysis is made of the effect of the principles of sustainable development (that were analyzed in the earlier chapter) on the Panel. Second, I make some recommendations with respect to strengthening of the Panel. The third section concludes this chapter.

### 3.6.1 THE EFFECT OF THE PRINCIPLES OF SUSTAINABLE DEVELOPMENT ON THE PANEL

*Sustainability, The Bank And The Panel's Importance*

Have the lessons of Narmada as analyzed by the Operations Evaluation Department been successfully applied in the cases after Narmada? This question deserves to be answered at this stage. The claims by the OED that the Bank has learnt lessons from Narmada appear to be suspect. Three items were considered by the OED as significant. They were the following: (1) Assuring government ownership of lands; (2) Social and environmental assessments to be completed before a loan agreement was signed; and (3) The resolving of problems relating to the projects before their implementation.[626]

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[626] LEARNING FROM NARMADA *supra* note 419.

It may be stated with fair certainty, that the Bank appears to have failed in applying the above three lessons to the two major cases that came before the Panel, i.e., in Arun and Rondonia. In both Arun and Rondonia, the allegations were that none of the above three concerns were addressed. Although two mistakes in a wide portfolio of projects may be said to be permissible, the point to be noted is that the Bank did not learn from its past lessons. If it had learnt from Narmada, then, it is likely that it would not have made similar mistakes after Narmada. The fact that the Bank did not apply the Narmada lessons to Arun and Rondonia, makes the Bank's motives appear as suspect.

Further, it also appears as if the Bank is not keen on diffusing elements of sustainability in its functioning, as the World Commission for Environment and Development required. This would obviously call for additional measures to ensure that all the Bank's Directives and Policies are followed in toto. The Panel is not mandated to ensure this. If it were to be, then, its mandate clearly needs to be broadened. As noted earlier, from just an oversight mechanism, the Panel must be established as an enforcement mechanism. Some of the recommendations given later are to strengthen the Panel from an oversight mechanism to an enforcement mechanism. At this stage, it is appropriate to determine if the Panel has the capacity to protect Project Affected People by advancing sustainable development with regard to the general principles of sustainable development.

*The General Principles Of Sustainable Development And The Panel*

The Narmada, the Arun III and the Rondonia cases have shown the necessity and importance of observing the principles of sustainable development for the projects to be sustainable and successful. Some significant principles brought out by these cases are listed below. Simultaneously, the capacity of the Panel in fulfilling these principles and consequently, advancing sustainable development is analyzed.

*1. Human Beings Are The Center Of Concerns Of Sustainable Development.*

This principle has been re-affirmed by the facts of all three cases. It is abundantly clear that the Bank management did not keep human beings as the center of concerns. This fact has been reiterated by the Morse Committee findings. Arun III and Rondonia also confirmed the Morse Committee's findings. Obviously, the Bank did not learn from the lessons of Narmada in its dealing with the latter two cases. Therefore, it may be said that there was a failure on the part of the Bank management in advancing this principle when dealing with the latter projects. However, this failure was corrected by the Panel, as part of the Bank's oversight mechanism.

The Arun III Project required the Panel to declare that the Bank had not done its duty with respect to the Project Affected People in both Arun and Rondonia. The Panel's findings established that the Panel was able to protect the rights of the Project Affected People and consequently, was able to keep them as the center of concerns of the development projects that Arun and Rondonia represented.

### 2. *Equity Towards Present And Future Generations*

The Bank has failed to follow the principles of equity towards the present and future generations. The failure on the Bank's part has been witnessed in the Narmada, Arun III and Rondonia projects, which represented cases of unequal development.

Development may be stated to be unequal when the categories of people who are adversely affected by a project do not benefit from such a project. The indigenous and vulnerable groups of people did not benefit from Narmada. The same may be said for the peoples of Arun III and Rondonia. As explained earlier, non-government organizations and public interest groups have stated that only the elite were benefited by the Projects and not the poor in the Project Affected Areas. Such a situation then, falls squarely within the case of the lack of intra-generational equity rights being observed.

Narmada, Arun III and Rondonia also represented cases where inter-generational rights were not being observed. The future generations of the Project Affected Peoples will not be able to enjoy the qualities of the pristine nature and traditional way of life that their forefathers had enjoyed.

The Panel has been able to protect the rights of the people in both intra-generational and inter-generational equity cases. The Panel's findings prompted the Bank to cancel the Arun Project. That helped in protecting the rights of the Project Affected Peoples as opposed to helping only the elite who may have been benefited by Arun. Similarly, its findings in Rondonia prompted the Bank to re-think its approach to the entire issue.

The Arun decision helped the future generations of the Project Affected People in continuing to be able to live where their ancestors have lived. Hopefully, this would be the case of the Project Affected Peoples in Rondonia as well.

*3. Environmental Protection As An Integral Part Of The Developmental Process*

The environment is to be protected as part and parcel of the development process. Arun threatened to destroy fragile and critical natural habitats. So did Rondonia. The flora and fauna have been threatened by both Arun and Rondonia. The Panel's decision in Arun definitely established that environmental protection is one of the core principles of development. Its findings in Rondonia have reiterated the same. This principle has been protected by the Panel in its work.

*4. Public Participation*

Public participation is one of the core principles of sustainable development. Without effective public participation, there cannot be a wholesome development project.

The Panel in its recommendations has noted that there was not adequate public participation in the Projects involved. It has noted that in Arun, the local communities affected were not given the opportunity to participate fully in the development process. It reiterated these findings in the case of Rondonia as well. It may be stated that the Panel has been able to fulfill this condition as well.

### *5. Precautionary Principle*

The precautionary approach as a core concept of the sustainable development process needs to be applied in the case of every development project. The Morse Committee Review stated that alternatives to the Sardar Sarovar dam had not been carefully studied. The Inspection Panel noted the same findings in the case of Arun as well. Nepal being a poor country may be excused for not having had the resources to study equally effective alternatives. However, that excuse does not apply to the Bank, with its vast resources. As mentioned earlier, NGOs and public interest groups have declared that equally effective and cheaper forms of alternatives were available. However, it appears that the Bank did not pursue these alternatives seriously. The Panel in Arun affirmed so. By stating that alternatives were not studied in Arun, the Panel has tried to apply this principle as well, for it to be able to advance sustainable development.

### *6. Environmental Impact Assessment*

An EIA needs to be conducted before any development project is finalized. Arun and Rondonia established that the Bank did not learn adequate lessons from the Narmada fiasco. This is because the Panel did mention in its findings that there was a lack of environmental impact assessment. This is one of the core findings that prompted the Bank to abandon Arun. It remains to be seen as to the outcome of Rondonia. However, it may be stated for the purpose of this analysis that the Panel has been able to reiterate this condition through its work.

### *7. Governance By Local Peoples*

The twin issues of governance and human rights have not been tackled adequately by the Inspection Panel. This is not because the Panel lacks the will to do so; rather, it is because the Panel lacks the mandate to do so. As stated in the earlier chapter, governance by the local communities over decisions made affecting their lives is one of the core principles of sustainable development. Adequate mechanisms are necessary to enable local communities, indigenous and tribal peoples to govern their lives, particularly in cases where development project decisions may completely change their lives. However, at present, it may be stated that it is beyond the mandate of the Panel to ensure that there are adequate provisions guaranteeing that the local peoples are able to govern their own lives.

### *8. Human Rights*

The issue of human rights is similar to that of the governance issue discussed above. It is beyond the Panel's mandate to protect the human rights of the Project Affected Peoples, NGOs and public interest groups. In the Narmada case, the Morse Review noted that state sponsored violence against NGOs protesting the construction of the dam was a fact. As noted in the Arun section, there have been similar allegations in the Arun case as well. The Bank did not award any compensation to the protesters in the Narmada case, although the Review findings established that they were fighting for a just cause all along. The Panel has been unable to recommend any compensation in the Arun case. This is because the Panel lacks the mandate to do so. This is a major chink in the armor of the Panel, which leads me on to recommendations for strengthening the Panel's functioning.

### 3.6.2 RECOMMENDATIONS

The Panel needs more teeth, although the Panel is a welcome first step for an organization which has never had any such mechanism in its past fifty odd years of operation. This writer believes that the following recommendations will strengthen the working of the Panel a great deal in the long run, in order to make it truly independent. After all, it is expected that the Panel will exist as long as the Bank does. As the 21st century approaches, it may be expected that the demands for the Bank's functioning being made more open will only increase. It is essential therefore, that the Panel's features and powers be strengthened suitably to prepare the Bank for the next century. Also, the increase in international awareness of the human rights situation concerning Project Affected Peoples is on the increase. This being the case, it is imperative that the mechanism by which they seek to redress their grievances is strengthened adequately to reflect their needs. Some of the recommendations also aim at converting the Panel from its present status as an oversight mechanism to that of an enforcement mechanism. This writer believes that it is only when the Panel is able to enforce its findings against the Bank and when the Bank is bound by those findings, can the Panel be said to be truly independent and effective. At present, it is neither fully independent nor is it totally effective.

1. The Panel must be given the power to enforce its findings. The Bank may be able to profusely thank the Panel for its findings and so on, without ever being compelled to enforce the Panel's findings. The power to be able to enforce its own findings will mean that the Panel then, becomes independent in both letter and in spirit. A related

point is that the Panel's findings must be "final." This will then prevent any other reviewer from reversing the Panel's findings.

2. The Panel must be able to at least publish all its findings to the media at its discretion. This includes all correspondence and materials given to the Panel by the Bank. The full contents of the material must also be published through the internet. A related point is also that these materials must be available to interested persons free of charge. The right to information is a fundamental principle of human rights and more so when involving development projects.

3. The Panel's powers must be amended to be able to give it the power to recognize human rights violations against Project Affected Peoples, NGOs and other public interest groups for their struggles, particularly if the Panel finds that these groups are fighting for a righteous cause.

4. It follows that the Panel must have the power to compensate. At present, Requesters approaching the Panel are not compensated by the Bank to bring their requests to the Panel. Where the Requests succeed, the Requesters must be compensated by the Bank for their efforts. The Panel must have the power to compensate those whose human rights have been violated. The Panel must also have the power to intervene and award funds in the form of compensation to Project Affected Peoples in cases where it supports the findings of the public interest groups operating in the Project Affected Area. The mode of compensation in both cases above, whether compensation for

violation of human rights or as funds when the Bank intervenes, must be left to the Panel's discretion. As noted earlier, the compensation could take the form of land, livestock and other non-monetary items, depending on the different circumstances that come up before the Panel.

5. The Panel must have the power to identify governance mechanisms established by local communities which help in local communities governing their own lives, without decisions being imposed on them, in cases where the Bank has overlooked such governance mechanisms, when administering and implementing development projects. The Panel should give appropriate suggestions and follow it up with suitable directions to the Bank so that the Bank ensures that governance is one of the key elements followed in all its projects and project sites. The Panel must make clear that global and grass root governance are two sides of the same coin; and that for a genuine sustainable development process to take effect, one must complement the other.

6. The Panel must apply the precautionary principle through its decisions. It can do so through directions and decisions even under the existing Bank policies and procedures, by suitably interpreting the same. Such directions and decisions will ensure that where there are equally viable and cheaper alternatives, the Bank would compulsorily have to opt for viable alternatives.

7. The Panel must make clear through its decisions that one of its prime responsibilities is to advance the cause and aims of the sustainable development process, by incorporating

these principles in its decisions and functioning. Such a declaration would instill even more confidence in its functioning. Further, to make such a declaration, the Panel does not require any permission or amendments – it can do so under its present structure. It is certainly not violating any of the provisions of the Resolutions or Operational Procedures if it does so.

8. It is absolutely imperative that the Panel has its own legal counsel, who should be absolutely independent of the Bank. The Panel must be able to make its decisions by seeking the advice of this counsel for all matters.

9. The term "serious character" needs to be clarified immediately. There should not be any vagueness about such terms, particularly since any misinterpretation could lead to an unequal treatment of complaints (which may be very genuine), resulting in loss of the Panel's credibility.

10. All concerns of the World Bank Group must be made amenable to the WBIP's jurisdiction. Such a step will prevent the Bank from diverting any of its problematic projects through its other concerns and thus whittling the powers of the Panel.

11. The WBIP must be able to interpret the Resolution and Operational Procedures under which it functions as well as the Directives and Policies of the Bank in a manner that it deems fit. The Panel's interpretations must be final and binding on the Bank

management. This will prevent any interpretation occurring from any other quarter, which may whittle the Panel's powers or which may weaken a case before the Panel.

The writer is of the opinion that the incorporation of these recommendations in the functioning of the Panel will serve to make the Panel truly independent, effective and dynamic. It will then really have served the purpose for which it was established.

### 3.6.3 Conclusion

The World Bank does not lack in having Directives and Policy Statements for implementing and determining the direction of development projects. Through these Directives and Policy Statements, the Bank seeks to protect community and environmental interests.

However, what it does lack is an effective mechanism to ensure that these Directives are implemented. The World Bank Inspection Panel has been created to fill this lacuna. Its roles represent the three sides of a triptych:

- To act as an oversight mechanism of the Bank, to ensure that the Bank follows its stated policies and procedures in all development projects that it funds;

- To redress grievances of the project affect peoples; and

- To advance the process of sustainable development through its decisions.

Its establishment must be welcomed. Given the constraints that the Panel has faced in the last 3 years since its establishment, it has encountered difficulties. But, it has tried to be as effective as possible in protecting community and environmental interests and in consequently being able to advance the cause of sustainable development. However, the laurels must not stop here. For the Panel to be completely independent and fulfill all the principles of sustainable development in a wholesome manner, the recommendations listed above must be incorporated in its functioning.

Given the success of the Panel with respect to development projects funded by the World Bank, can the Panel's functioning be replicated in other areas as well, for example with respect to development projects funded by other International Development Institutions? This question is the subject matter of discussion in the following chapter.

*Chapter 4*

# ESTABLISHMENT OF AN INTERNATIONAL DEVELOPMENT INSTITUTIONS INSPECTION PANEL

## 4.1 INTRODUCTION

*Purpose*

The purpose of this section is to link the previous chapters with the aim of this chapter, as evidenced by the above title. Chapter 2 identified "Project Affected Peoples," gave the principles and issues of sustainable development related to development projects and also engaged in an examination on the sustainable development debate. However, the gap in the sustainable development debate remained. The circle of discussion concerning the sustainable development debate was completed in chapter 3 by analyzing the functioning and viability of a grievances redress mechanism, specifically the World Bank Inspection Panel. The sustainable development cycle includes having an effective and viable mechanism to redress grievances about development projects. Otherwise, as mentioned in the previous chapter, despite having guidelines and principles of sustainable development which ought to be applied by development institutions in implementing their projects, the sustainable development cycle is incomplete. As part of the analysis in chapter 3, the Panel's ability to incorporate the principles and issues relating to sustainable development in its functioning and its role in advancing the sustainable development process through its

decisions was examined. Several recommendations were made to strengthen the Panel and its role in advancing the sustainable development process.

While the World Bank Inspection Panel's limitations have been set out in the earlier chapter, one other limitation is the fact that the jurisdiction covers only development projects funded by the International Bank for Reconstruction and Development and the International Development Association of the World Bank Group. It does not either have jurisdiction over any other sister concern in the Group, nor does it have jurisdiction over other International Development Institutions. The question that therefore arises is: "How do project affected peoples redress grievances about development projects funded by other International Development Institutions?" After all, just as the World Bank Inspection Panel's establishment has helped advance the sustainable development process, there is a similar need to establish a suitable mechanism to advance sustainable development with respect to development projects funded by development institutions other than the World Bank.

This chapter proceeds one step ahead and seeks to answer this question. Its aim is to explore the possibility of expanding the jurisdiction of the World Bank Inspection Panel by establishing an International Development Institutions Inspection Panel ("IDIIP"), to redress grievances about development projects funded not only by the World Bank, but also those funded by other International Development Institutions as well.

*Scope*

This final chapter has three parts. The first part gives the purpose and scope. The second part, containing four sections, and admittedly speculative in nature, first makes out a case for expanding the jurisdiction of the World Bank Inspection Panel. It then charts out an option by giving the modalities for such an expansion into the International Development Institutions Inspection Panel. The third section of the second part reiterates the principles and issues relating to sustainable development from chapter 2, which an expanded Panel would have to incorporate in its functioning. The fourth section briefly explores the relationship between the IDIIP and the Commission for Sustainable Development ("CSD"). The third part concludes the thesis by recapitulating the main points of the thesis in the form of a summary.

## 4.2 EXPANDING THE JURISDICTION OF THE WORLD BANK INSPECTION PANEL

*Introduction*

The biggest obstacle to achieving a global mechanism to redress grievances for all non-Bank funded development projects appears to be that of individual nation states opposed to any infringement of their sovereignty. This writer believes that at least for the present, it may not be possible to breach the obstacle of sovereignty. A suggestion has been to establish a global environmental body or institution that would have sole jurisdiction over all global environmental problems and disputes.[627] Disputes related to development

[627]According to one commentator, such a body would function on the lines of the previously existing General Agreement on Trade and Tariff and the current World Trade Organization. *See* DANIEL C. ESTY, GREENING THE GATT 79-81 (1994).

projects, may be considered as global in nature. Several actors, national and international, are involved in the project implementation process, apart from the fact that global natural resources and biodiversity may be affected. Such disputes could therefore, conceivably fall within the jurisdiction of such an environmental body.[628] It is beyond the scope of this paper to examine each of these possibilities in detail. That is because, while each suggestion assumes that nation states will voluntarily give up their sovereignty to the new body, I am convinced that sovereignty is a hurdle that cannot be overcome at the present point in time.[629]

However, the end result of having a viable mechanism may yet be achieved, by expanding the jurisdiction of the World Bank Inspection Panel, to cover the functioning of International Development Institutions.[630] For the purpose of this thesis, International

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[628]The suggestions made include the following. (1) The creation of an "International Environmental Legislature." *See* Geoffrey Palmer, *New Ways To Make International Law*, 86 AM. J. INT'L L. 259 (1992); (2) The establishment of a "Global Environmental Organization." *See* ESTY *supra* note 607; (3) The formation of an "International Environmental Court." *See* Amadeo Postiglione, *A More Efficient International Law For The Environment And Setting Up Of An International Court For The Environment Within The United Nations*, (1990) 20 ENVTL. L. 321; and (4) The setting up of an "Earth Parliament for Indigenous Peoples." *See* Chris Wold, *An Earth Parliament For Indigenous Peoples: Investigating Alternative World Governance*, 4 COLO. J. INT'L L. & POL'Y 197 (1993). The common thread in all these proposals is that nation states should give up their sovereignty to be covered by the jurisdiction of each of the bodies in the suggestions made.

[629]Without examining the suggestions in detail, at the outset itself, I have decided that calls in these suggestions that nation states voluntarily give up their sovereignty is impractical at the least and improbable at the worst. The North-South divide discussed in chapter 2 clearly mentions the rancor that Southern developing countries have, caused by the attitudes of the Northern industrialized countries, particularly when it comes to environmental issues. To reiterate, the feeling commonly expressed by Southern countries is that at present, since the North is developed and industrialized (by having exploited the environment to industrialize itself), the Northern countries suddenly realize that the environment has been over exploited and that the degradation caused is affecting the lives of their citizens. So, they want regulations to be imposed. However, it is only now that the Southern countries also want to "develop," and in their case too, as was the case with the Northern countries earlier, the environment has been the victim. Therefore, to this writer's understanding, there is no possibility that any of the Southern countries will surrender their jurisdiction to satisfy the Northern countries' desire. Further, the rancor has increased because the industrialized countries have also sought to link environmental issues with trade and other issues, which is unacceptable to the South.

[630]The Inter-American Development Bank ("IDB") and the Asian Development Bank ("ADB") have recently established their own Independent Inspection Panels, on the lines of the World Bank Inspection Panel. The IDB's Panel came into existence in early 1996. A critique from the CIEL notes that "the Bank has done nothing to inform potentially affected

Development Institutions may be defined as those Institutions which have signed the 1980 Declaration Of Environmental Policies And Procedures Relating To Economic Development,[631] discussed in the next section. This proposal then limits the scope of the research to a great extent, making it manageable.

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parties of their ability to file a claim. Due to obscurity and lack of independence from IDB control, the mechanism has reviewed only one claim." The claim reviewed by the IDB Panel has been the Yacyreta Project (discussed earlier), which was jointly funded by the World Bank as well as by the IDB. However, no significant progress in the review has occurred after the IDB reviewed the Project. *See* Center For International Environmental Law, *The IDB Independent Inspection Mechanism* (visited November 25, 1997) at <http://www.igc.apc.org/ciel/idb.html>.

The Asian Development Bank's Inspection Panel came into existence in early 1997. The Inspection involves three stages: "the application, review of the request of Bank Management, and the final decision by the Board." *See* CIEL, *The ADB Inspection Panel* (visited November 25, 1997) at <http://www.igc.apc.org/ciel/adb.html>. The procedure as summarized by the CIEL, is that:

> All requests must first go to the Bank Management, which has forty five days to respond. Parties unsatisfied with Management response can appeal to the Board Inspection Committee. The Committee solicits additional information from the Management and consults with at least one expert from the roster of experts (who are independent and who can be called upon any time to review or inspect the Bank's role in particular development projects). Based on the information given by the expert, the Committee decides whether to recommend an inspection to the Board of Directors. The Board then decides whether to convene a panel of three outside experts to investigate the claim. Once the Board authorizes an investigation, the Panel will conduct a full investigation and submit recommendations to the Board. The Board then makes a final decision, based on the Panel report and Management's response, regarding a time table for taking any necessary action.

No case has come up before the ADB's Inspection Panel till date. The above is a brief summary of the Panels as set up by the IDB and the ADB. This writer is not analyzing the functioning of these two Panels in detail as it would be beyond the scope of this study. Suffice to note that the WBIP is proving to be a good example in encouraging other Institutions to set up similar Panels.

[631] *Infra* section 4.2.2 of this text. The question may arise as to why I have chosen IDI's which have signed the Declaration. One option would have been to state that the definition would cover all "IDIs." However, by doing so, it would be extremely difficult to bring all the IDIs on to a common platform and the discussion as far as I am concerned, would be largely academic. However, the Declaration brought together many International Development Institutions onto a common platform. This writer believes that it is certainly easier to deal with an issue where the parties have already come together for some reason and have committed themselves in some form, and then to further develop this commitment, rather than to try and assume that they will come together under a future common umbrella. The Declaration is in existence; it has therefore, become that much easier in honing and fine tuning the commitments made in it.

### 4.2.1 THE CASE FOR EXPANDING THE WORLD BANK INSPECTION PANEL

Five years ago, had it been said that the World Bank, the world's largest lending institution would establish an independent Panel to redress grievances about development projects funded by the Bank, such a claim would have been immediately dismissed as implausible by critics. Nonetheless, concerted NGO and media pressure has ensured that the Bank did set up such a Panel. To briefly trace the developments of the Panel's establishment, at least three suggestions emerged in the beginning of the 1990's as "suitable grievances redress mechanisms" for the Bank.[632] The first was to establish an Independent Commission, to constitute a permanent version of the ad hoc Morse Review Committee. The second proposal was to create an Independent Evaluation unit within the Bank, to function outside the control of the Bank management. The third proposal was to have an ombudsman to investigate complaints from the public about the Bank's implementation of its Operating Policies and Procedures. The Bank finally decided on establishing an Independent Inspection Panel, by incorporating many of the suggestions made in the three proposals above.[633] For a monolithic organization such as the Bank, the creation of the Panel, nearly 50 odd years after its inception, has undoubtedly been a big step.

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[632]Daniel D. Bradlow, *International Organizations And Private Complaints: The Case Of The World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 565-568 (1994). Bradlow also gives details of some the pressures which the Bank faced, which forced it to establish such a Panel. Among them have been pressures from the NGOs and the internal "Wapenhans Report" (discussed in chapter 3), which criticized the Bank's functioning. Bradlow also states that the Bank's Inspection Panel has modeled many of its functions on Bradlow's suggestions to have an ombudsman. *Id.* at 568.

[633]*Id. See also* IBRAHIM F.I SHIHATA, WORLD BANK INSPECTION PANEL (1994), who gives details of the history of the Panel; Johnathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 190 (1993), who has called for the creation of a watchdog agency within the Bank.

Four years after the creation of the World Bank Inspection Panel, I am now making a concrete proposal to further expand the World Bank Inspection Panel to cover jurisdiction over other International Development Institutions as well. In order to preempt critics who may decry such a proposal as a "pie in the sky," it may be pointed out that as stated above, that concrete suggestions made years ago proposing a redress mechanism for the Bank (which probably sounded incredulous at that point in time), finally fructified over a period of time into reality, in the form of the WBIP. Therefore, it is submitted that the proposal presently being made, though ambitious in nature, is probably workable over a period of time and may well fulfill the role of a mechanism to advance the process of sustainable development, in the same fashion that the World Bank Inspection Panel did. At this stage, it is appropriate to enumerate the advantages[634] in favor of a case for such an expansion:

They may be enumerated as follows:

1. The proposed expansion would be able to advance the sustainable development process more effectively. It could do this by hearing complaints on development projects funded by various IDIs, other than just the World Bank;

[634]Though a detailed discussion of the disadvantages would be beyond the scope of this study, it is useful to briefly mention some of them here. They may be listed as follows: the realistic chances of such an expansion every taking place may be questioned; whether or not such an expansion will ever work is another question that needs to be tackled – there are likely to be turf wars between the different organizations to control the functioning of the new Panel; another disadvantage may be that a new Panel may well become "yet another" international body to be contended with for its possible bureaucracy; the functions that will be performed by an expanded Panel may be performed by one or more existing UN Agencies; and lack of any definite proof that an expanded Panel will solve the problems of Project Affected Peoples.

2. Project Affected Peoples from all over the world would have a forum to approach to redress their complaints;

3. Such an expansion would directly make the Institutions accountable to an international and neutral forum for their actions and non-actions. Indirectly, such an expansion would make the Institutions answerable to the citizens of the recipient countries who bring complaints against the Institutions;

4. Such an expansion would ensure that the IDIs actually implement their stated Policies and Directives;

5. Such an expansion would help in keeping a check against any excesses against Project Affected Peoples, affected by such funding;

6. Such an expansion would focus attention on the concerned International Development Institutions in the media and elsewhere. This will help donor countries in assessing their support for the concerned IDIs;

7. Such an expansion would save overall administrative costs for the different IDIs which may individually want to establish Inspection Panels; and

8. Such an expansion will prevent overlapping of jurisdiction (if claims are filed by Project Affected Peoples against more than one IDI with different individual Inspection Panels). An expansion will also prevent multiple claims being filed for the same project with

different IDI Inspection Panels where more than one IDI may be jointly funding the project.

### 4.2.2 THE MODALITIES FOR SUCH AN EXPANSION OF JURISDICTION

On February 1, 1980, several International Development Institutions signed the Declaration Of Environmental Policies And Procedures Relating To Economic Development.[635] The Declaration established the following principles. It accepted that economic and social development was necessary to alleviate major environmental problems and to have an integrated relationship between societies and their environment. The Declaration noted that it was equally important to pursue economic development and social goals so that adverse environmental effects were prevented, or at least lessened.[636]

The Declaration recognized the differences in perceptions over environmental problems between the North and the South.[637] Therefore, it called for a development process that was both sensitive to everyone's needs and at the same time, responsible.[638] It also reiterated the support of the signatories in instituting procedures to thoroughly study all development activities, policies, programs and projects.[639] Such a study would ensure that correct steps

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[635] 19 I.L.M. 524 (1980).

[636] *Id.*

[637] *Id.* Preamble at 524.

[638] *Id.* at 524.

[639] *Id.* at paragraph 1 at 525.

were taken to follow the principles and recommendations for action as given by the United Nations Conference of the Human Environment held in 1972.[640]

The Declaration also emphasized the need to commence a process of having cooperative negotiations between Governments and organizations to ensure the integration of proper environmental guidelines in designing and implementing economic development activities.[641] The signatories also committed themselves to support project proposals "specially designed to protect, rehabilitate, manage and otherwise enhance the human environment, the quality of life and resources."[642] Other commitments included cooperating in research and studies, in supporting the training of operational staff and in preparing and disseminating information on the "environmental dimension of economic development activities."[643]

Signatories to the Declaration were both original and subsequent. The original list of signatories of the Declaration included the African Development Bank, The Arab Bank For Economic Development In Africa, The Asian Development Bank, The Caribbean Development Bank, The Inter-American Development Bank, The World Bank, The Commission Of European Communities, The Organization Of American States, The United Nations Development Program and The United Nations Environment Program.[644]

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[640] *Id.* at 525.

[641] *Id.* at paragraph 3 at 525.

[642] *Id.* at paragraph 4 at 525.

[643] *Id.* at paragraph 7 at 525.

[644] *Id.*

Subsequent signatories included the African Development Bank, The European Investment Bank, The Nordic Investment Bank and the Central American Bank for Economic Integration.[645] All the signatories formed the Committee of International Development Institutions on the Environment (CIDIE), which has been meeting every year since then to discuss matters related to the implementation of the declaration and to exchange environment-related information.[646]

CIDIE has been described as having achieved little in the past seventeen years since it was created.[647] A report from the United Nations Environment Program's Executive Director has stated that "CIDIE has not yet truly succeeded in getting environmental considerations firmly ingrained in development policies."[648]

But the World Bank, one of the major players within the CIDIE, has claimed that the CIDIE has played a key role in coordinating work and facilitating information exchange on the full range of sustainable development.[649] Similarly, the Bank reported that at the 1991 CIDIE

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[645] Ibrahim F.I Shihata, *The World Bank And The Environment: A Legal Perspective*, 16 MD. J. INT'L L. & TRADE 1, 6 - 7 (1992).

[646] *Id.* This writer questions the amount of information emanating from the CIDIE on environment-related issues. This is because although the CIDIE has been touted to be a centralized information body, it appears that most environment-related decisions continue to be made through individual institutions. Therefore, one may well question the CIDIE's effectiveness, since apart from rhetoric, not much appears to have actually been established.

[647] Jacob D. Werksman, *Greening Bretton Woods, in* GREENING INTERNATIONAL LAW 65, 72 (Philippe Sands ed., 1994).

[648] *Id.*

[649] Mohamed T. El-Ashry, *Foreword, in* ENVIRONMENTAL ECONOMICS AND NATURAL RESOURCE MANAGEMENT IN DEVELOPING COUNTRIES ix (Mohan Munasinghe ed. 1993).

annual meeting, CIDIE heads called for a global partnership among CIDIE members and other organizations.[650]

This writer firmly believes that it is time that the CIDIE members gave full support to the Declaration that they signed in 1980. As a first step, it is proposed that the World Bank Inspection Panel's jurisdiction be expanded in order to create the IDIIP, which would include the members of the CIDIE. This also means that the WBIP would then no longer exist, as the IDIIP would have jurisdiction over the World Bank as well. However, to be able to this, it is assumed that the members of the CIDIE would consent to their being brought within the expanded Panel's jurisdiction. Further, as discussed in the earlier chapters, non-government organizations will have a major role in pressuring these International Development Institutions (by influencing international donors and also by mobilizing public opinion) to acquiesce to the supervision of the IDIIP.

The expanded Panel may be re-named as the "International Development Institutions Inspection Panel" ("IDIIP"). The issue that now needs to be discussed relates to the modalities of the functioning of such an expanded Panel.

### 4.2.2.1 The Proposed IDIIP's Functions

The core functions of such a Panel may be mandated as follows:

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[650]Mohan Munasinghe, *Introduction, in* ENVIRONMENTAL ECONOMICS AND NATURAL RESOURCE MANAGEMENT IN DEVELOPING COUNTRIES x (Mohan Munasinghe ed. 1993).

(1) The IDIIP would function as a decision making body on complaints from either one or more project affected person or persons or from a person or persons representing projects peoples, including NGOs against any of the signatories of the CIDIE have acquiesced to the IDIIP's jurisdiction. The complaint would have to specify the non-implementation of any of the environmental guidelines or Operational Procedures or Directives or other environmental rules which are to be followed on a uniform basis by the IDIs in planning, designing and implementing development projects.[651] As discussed under the requirements in the next sub-section, it is imperative that all guidelines, procedures and Directives be made uniform for all the IDIs.

(2) The IDIIP's decisions must clearly specify that its findings are a part of the process of advancing sustainable development;

(3) The IDIIP must incorporate the principles relating to sustainable development in its decision making process. One of the IDIIP's primary goals would be to ensure that sustainability considerations are infused into the development projects funded by the IDI's;

[651]This function alone is *adapted from* David G. Victor, *Pragmatic Approaches To Regime Building For Complex International Problems, in* Global Accord 453, 456-457 (Nazli Choucri ed., 1993).

(4) The IDIIP shall have the power to compensate the Project Affected Peoples in any of the circumstances given below. The mode of compensation shall be left to the IDIIP's discretion, depending on the circumstances of each case.

- The IDIIP may intervene to fund the expenses incurred by the Project Affected Peoples in bringing a complaint before the Panel, provided the Panel's decision is in their favor;

- The IDIIP may compensate the Project Affected Peoples for damages in the event that the Panel is satisfied they have undergone any human rights violations; and

- In the event that the Panel finds that they have suffered in any other manner because of the development project and therefore, deserve to be financially compensated, at the Panel's discretion (this again applies the principle of intervenor funding).

(5) The IDIIP shall ensure that wide publicity is given to all its proceedings and decisions, free of cost and that all its proceedings and decisions are also distributed on the internet promptly;

(6) The IDIIP's findings shall be binding on the International Development Institutions against whom it has delivered a decision; and

(7) The IDIIP shall regularly liaise with the Commission for Sustainable Development ("CSD"), and shall provide the CSD with any information that it may want about any of the proceedings or about its decisions.[652]

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[652] *Infra* at paragraph 9 of section 4.2.3 of this text. This point has been discussed in greater detail in the next section, giving reasons for the need for such a liaison.

Attention should be paid to the requirements to have an efficient and effective IDIIP. It is assumed that the recommendations to strengthen the World Bank Inspection Panel given in the previous chapter will be incorporated when expanding the Panel. At the risk of repeating some of the requirements mentioned in the earlier chapter, the following requirements need to be incorporated in the IDIIP's functioning in order to support the IDIIP in carrying out the functions given above:

(1) The IDIIP shall make a prompt beginning;[653]

(2) The IDIIP's functioning shall be transparent in every aspect;

(3) The IDIIP's existence and functioning needs to be well publicized. The Panel must be accessible to all the project affected peoples who are affected by development projects funded by the CIDIE members. In order to do this, all International Development Institutions which are undertaking development projects must publicize the existence and functioning of the IDIIP in the project areas to the project affected peoples as a routine matter. It must be clearly expressed that it is the right of the project affected peoples to approach the IDIIP to redress any of their complaints if the Institutions are not complying with any of the Institution's own policies or procedures or rules or of the laws and regulations of the recipient country where the project is located. This will

[653] *Id.* at 468 - 470. The purpose of taking an organizational initiative such as expanding the function of the IDIIP is precisely because the Panel should begin its task without further delay.

enable the IDIIP to be accessible to all the project affected peoples should they choose to approach the IDIIP;

(4) The IDIIP must function in an equitable and fair manner;

(5) The IDIIP must adopt a cooperative approach, rather than an intrusive approach with the recipient States in which the development projects occur;

(6) The IDIIP must give a significant role to NGOs to participate in the functioning of the Panel;

(7) The IDIIP must consider all grievances in a time-bound manner;

(8) The IDIIP shall be supported by an independent Operational Staff, who shall not be employed or have any interest in any of the International Development Institutions which have surrendered their jurisdiction to the IDIIP;

(9) As in the case of the World Bank Inspection Panel, the IDIIP shall situate its office at a location independent of any of the locations of the IDIs;

(10) The IDIIP's panel members shall meet with NGOs at their discretion to listen to their grievances. However, such grievances should not deal with the subject matter of any of

the decisions which the IDIIP may be concerned with. Such discussions with the NGOs must deal only with the functioning of the IDIIP and with any of its procedures to be able to function in a better manner;

(11) The IDIIP shall have a neutral and independent legal counsel, unconnected with any of the IDIs to advice the IDIIP on any matter;

(12) The IDIIP's decision shall be both final and binding on the IDIs;

(13) The interpretation of all procedures, guidelines, directives and policies of the IDIs as well as the interpretation of the Resolution and Operational which govern the functioning of the IDIIP shall be done solely by the IDIIP in the manner that it deems fit. Further, any such interpretation by the IDIIP shall be final and binding on the IDIs.

(14) The IDIIP's finances shall be pooled in a general fund based on the proportional budgets of the International Development Institutions who have acquiesced to the IDIIP's jurisdiction;

(15) The IDIIP's Panel members shall meet with the representatives of the IDIs who form the CIDIE in order to suggest any reforms in the IDIIP's functioning or to clarify any concerns with the Panel members, related to the responses of any of the IDI's or with regard to particular amendments to be carried out to positively contribute to the IDIIP's

functioning. The possibility of involving representatives of NGOs in such meetings should be seriously explored. Their presence is likely to make such a meeting legitimate and more transparent;

(16) The IDIIP and the IDIs who are CIDIE signatories are equal partners having common aims in the process of advancing sustainable development. This should be recognized and appreciated by all parties concerned. They complement each other. They must function in a cooperative manner to ensure success, in order to advance the process of sustainable development. There are no adversaries in this game plan. The IDIIP and the IDI's are two sides of the same coin – the coin would be disfigured without either; and

(17) It is absolutely imperative that all environmental guidelines, procedures, policies and other rules be made uniform for all the International Development Institutions. Different rules and policies followed by different Institutions will result in chaos and will become a formidable hurdle in the IDIIP's functioning in the future. As noted earlier, this requirement is one of the first steps which must be done in the event of expanding the World Bank Inspection Panel to create the IDIIP.

The functions and the requirements set out above, are likely to help in the creation of an efficient and effective IDIIP. These functions and requirements are only the initial start in enabling the IDIIP to advance the process of sustainable development. The next section

proceeds to reiterating the principles of sustainable development which the IDIIP would have to incorporate in both its functioning and when giving its findings.

### 4.2.3 REITERATING THE PRINCIPLES OF SUSTAINABLE DEVELOPMENT TO BE INCORPORATED IN THE IDIIP's FUNCTIONING

*Principles Of Sustainable Development And The IDIIP*

*1. Human Beings Are At The Center Of Concerns Of Sustainable Development*

The IDIIP will have to ensure that the International Financial Institutions, that it oversees in its functioning always keep human beings as the center of concerns, rather than merely development. Human capacity building to serve human needs should be seen as the top priority by the IDIIP. Capital projects only warrant pursuit when, in some fashion or other, they can be seen to improve or sustain the welfare of peoples of the world's ecosystem.

*2. Equity Towards Present And Future Generations*

Lessons learnt from the World Bank Inspection Panel, it is expected, will be applied to the functioning of the IDIIP. If that be so, then particularly less empowered communities such as children, women and indigenous communities must have an important place in IDIIP's policy making process with regard to intra-generational equity. This policy would be essential to prevent the elite from any single generation solely reaping the benefits.

As regards inter-generational equity, the IDIIP must keep in mind that in general, project affect peoples are from less empowered communities. The future generations of these communities must benefit from reforms and the assistance of the IDIs only so far as the

reforms do not remove from these communities the ability for them to enjoy the traditional way of life that their forefathers enjoyed. Only such development is equitable and fair.

### *3. Environmental Protection As An Integral Part Of The Development Process*

The IDIIP would have to keep in mind that environmental protection is contained within the developmental process. Both of them are inseparable and in fact, complement the other. In order to advance sustainable development, it is essential that both processes are allowed to grow together.

### *4. Public Participation*

Public participation is undoubtedly one of the core principles needed in order to advance the process of sustainable development. Enshrined within it are the principles of co-management and community based resource management. Interpreting the principle in a holistic manner, a policy making institution such as the IDIIP would have to ensure that all the IDIs within its jurisdiction make certain that their development projects have given the public a "popular and effective" way of participating in the decision making process.

### *5. Precautionary Principle*

Apart from just ensuring that alternatives to large scale development projects are explored by the IDIs, the IDIIP would have to ensure that the precautionary approach is applied by the IDIs. Such an effort would involve the IDIs making certain that they anticipate the various problems that the development projects are expected to cause and take steps to prevent them.

### *6. Environment Impact Assessment*

The need for EIA is again one of the core components of the sustainable development process. As noted with the WBIP, any violation of the EIA process should result in questioning the viability of the project in the long run. Lack of an EIA may also result in making the project unsustainable. The IDIIP will have to ensure that the principles of impartiality, fairness and honesty are the key elements of an EIA process.

### *7. Governance*

The IDIIP should seek to ensure that the policies of the IDIs seek to transfer power in the decision making process to the communities and peoples. The governance principle may complement the principle of public participation. Once the power is transferred to the local communities, the local communities and peoples must be involved in the decision making process and the ultimate hope is that they will succeed in making development decisions for themselves.

### *8. Human Rights*

Unless and until human rights norms are applied in reality to every situation, and the human rights of the project affected peoples and the NGOs supporting them are protected in every way possible, it may be stated that development projects are unsustainable. To prevent the violation of human rights, the IDIIP must insist that the IDIs incorporate human rights norms as part of their day to day functioning. The IDIs must learn to take responsibility for all human rights norms being observed by the States where the projects are conducted.

*9. Coordination And Implementation Of International Environmental Policies*

The IDIIP must coordinate international environmental policies with international institutions such as the Commission for Sustainable Development. The CSD is supposed to function as the "eyes and the ears" of the General Assembly in ensuring follow up to the Agenda 21 commitments. The IDIIP would have an important role to play in indicating to the CSD the trends in the sustainable development process that it has come across in the process of its investigations and findings that it has given. This is because of its perceived intimate knowledge in regulating the affairs of the IDIs and the development projects funded by the IDIs.

### 4.2.4 THE IDIIP's RELATIONSHIP WITH THE COMMISSION FOR SUSTAINABLE DEVELOPMENT

The discussion on coordination and implementation of international environmental policies above logically takes the discussion forward to a brief examination of the role of the proposed IDIIP and the Commission for Sustainable Development in this section.

The CSD was established in 1992 as a result of the UNCED. It was established as a functional commission of the Economic and Social Council ("ECOSOC"), with an Advisory Board and a Secretariat. The CSD's mandate is to provide for improved institutional arrangements at the international level to strengthen the United Nations system and its coordination with other international organizations.[654] The Commission was to

[654] United Nations General Assembly Doc A/47/191 (1992).

ensure follow-up of UNCED, enhance international cooperation, and examine the implementation of Agenda 21 at the regional, national and international levels.[655] One of its primary functions as prescribed by the General Assembly includes the following:

> [M]onitoring progress in the implementation and developmental goals throughout the United Nations system and evaluation of reports from all relevant organs, organizations, programs and institutions of the United Nations system dealing with various issues of environment and development, including those related to finance.[656]

Referring to the role of the CSD, an expert group constituted by the Department for Sustainable Development and Policy Coordination in 1996 made several recommendations with reference to the functioning of the CSD. It recommended that the CSD invite relevant organizations, universities, non-governmental organizations and other specialized groups to report on legal developments relevant to the principles of sustainable development in international law.[657] The group also recommended that the CSD establish a Monitoring Network among expert organizations and secretariats, both within and outside the United Nations System, to monitor the development and application of principles of international law for sustainable development. Another key and pertinent recommendation of the Group to the CSD was that an obligation existed on the part of international institutions and

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[655] *See* Chris Mensah, *The United Nations Commission On Sustainable Development*, in GREENING INTERNATIONAL INSTITUTIONS 21, 27 - 229 (Jacob Werksman ed., 1996).

[656] UNITED NATIONS GENERAL ASSEMBLY DOC A/47/191 (1992).

[657] Department For Policy Coordination and Sustainable Development, *Report Of The Expert Group Meeting On Identification Of Principles Of International Law For Sustainable Development, Geneva, 26 - 28 September, 1995*, paragraph 161-166 (visited June 15, 1997) <gopher://gopher.un.org:70/00/esc/cn17/1996/backgrnd/law.txt>.

participating states to accept collective supervision of their compliance with agreed norms.[658] In terms of accountability, the Group noted that the duty to accept external compliance controls was considered as extending also to intergovernmental organizations, as illustrated by the creation of the World Bank Inspection Panel.[659]

Although the relationship between the IDIIP and the CSD would be limited, it is suggested that the CSD can better monitor the development and the application of principles of international law for sustainable development related to development projects by getting all information on development projects from the decisions that the IDIIP has made. This will enable the CSD to have an accurate picture of the situation at the regional, national and international levels, at least in those cases where information from the IDIIP is available. It is proposed that the reports of the cases before the IDIIP be given to the CSD by the IDIIP. Thus, by having such comprehensive information before it (admittedly limited to only those cases which come up before the IDIIP), the CSD will be in a position to perform the role of coordinating and reporting progress on the development - environmental sectors. This would be at least with respect to development projects which have come up before the IDIIP, to the General Assembly in a more effective manner.

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[658] *Id.*

[659] *Id.* Compliance has been defined by the Group as a dynamic process involving both governments and non-State actors and individuals. Compliance covers not only the enactment and application of national laws for the purpose of treaty implementation, but also relates to the application of laws which are enacted and to the changes in behavior requested of the targeted actors. At the international level, compliance may require national reporting or on site monitoring as well as monitoring through international institutions, on the basis of a scientific consensus achieved through a continuous process of information exchange.

*Concluding Views*

This part has touched upon four main issues: the proposal to expand the World Bank Inspection Panel into the International Development Institutions Inspection Panel; the modalities of the expansion, including detailing some the IDIIP's functions; a reiteration of some of the key principles of sustainable development which the IDIIP would have to incorporate in its functioning and in its findings; and the useful role that the IDIIP can play in disseminating information on development projects that come up before it to the Commission for Sustainable Development.

The proposed IDIIP would be the sole world forum to redress grievances arising out of problems from the IDIs - funded development projects. Therefore, it would have a fiduciary duty towards the project affected peoples who come to it to redress their grievances against powerful national and international interests. Their faith in the IDIIP will be made or broken depending on how the IDIIP functions. If it functions in a transparent, independent and efficient manner, it will rightfully earn bouquets from citizens and citizen groups from all over the world. If it fails in performing the role that it has been entrusted with, then, it will have failed thousands of project affected peoples, who are often among the poorest and least empowered in many societies and who would otherwise probably have no other forum to approach. The IDIs will be answerable to the global community through the IDIIP. A uniform global process will hopefully be put into motion all over the world among the various IDIs in enabling them to carry out their goal of development assistance with a human face. These efforts, it is hoped will also advance the continuing process of

sustainable development. Therefore, it is absolutely imperative that the next logical step be taken after the formation of the World Bank Inspection Panel -- and that is to expand the WBIP into the IDIIP, to serve as a mechanism which would serve to advance the principles of sustainable development. The next and final part concludes the thesis by recapitulating the major points of the thesis in the form of a summary.

## 4.3 CONCLUDING THESIS SUMMARY

This thesis highlights the importance of having a grievances redress mechanism as part of the sustainable development process. As mentioned earlier, the sustainable development cycle would be incomplete without the presence of a grievances redress mechanism. This is because, ultimately, the complaints that crop up against a particular authority, which may be the State or an international development institution or such other body, need to be voiced and redressed in an effective manner. A complaint may be defined as a procedure by which the Project Affected Peoples approach an authority which has the required jurisdiction to hear their grievances. The complaint may be made by the Project Affected Peoples in a region where a development project is being implemented to the effect that the International Development Institution funding the project has violated their rights and has failed to fulfill the Operational Policies and Procedures which the IDI is bound to follow.

If their complaints are not redressed in a prompt, effective and satisfactory manner, then, it is quite likely that such a non-redress of the grievance will set into motion its own chain of events. These events could include the complainants using violence as a means to redress

their frustration and anger and could well lead to the non-viability of a particular project in the long run.

The World Bank Inspection Panel is one such existing mechanism, created as a grievances redress mechanism. The Bank was forced to create the WBIP due to international pressure after nearly 50 years of its existence. At present, the WBIP functions as an oversight and grievances redress mechanism. It is hoped that with the recommendations made, the WBIP will be transformed into an enforcement mechanism, in addition to the functions mentioned above.

It is time that a similar mechanism be established to redress grievances of complaints from other International Development Institutions-funded development projects. To facilitate matters, the proposed IDIIP could replace the functioning of the World Bank Inspection Panel. Unless and until some mechanism such as the IDIIP is formed, there is bound to be a gap in the sustainable development cycle.

The sustainable development process may appear to be unclear initially. The process may be stated to be a compendium, containing several components within it. The existing components within the sustainable development process related to development projects have been highlighted. They include the Project Affected Peoples; the North-South divide; the origins of the sustainable development debate, leading to Rio and thereafter; the concept of sustainable development; the definition of the term "principles," seen in the context of international environmental law; the process to determine whether instruments are binding

or otherwise; the principles of sustainable development; a consideration of project planning and development projects and the role of the World Bank in development projects; the Policies, Procedures and Directives of the Bank; the World Bank Inspection Panel, including its origins (the Narmada case, the Morse Committee Report and the Bank's response); and the Resolution and Operational Procedures relating to the WBIP. The suggested future process which would continue from those mentioned above and which have also been analyzed included the suggestions to strengthen the Panel and ultimately, the creation of the IDIIP by expanding the WBIP's jurisdiction.

All these components fit perfectly into the jigsaw puzzle, called the sustainable development cycle. The missing links in the cycle were filled up by examining a grievances redress mechanism, the WBIP, which hopefully in the long term, will be replaced by the IDIIP. Both the WBIP (at present) and the IDIIP (in the future) are to ensure that the poor and underprivileged people have a door to knock on, when their rights are violated. This door may not be the door of the State or the national judicial system, which may have no control over an international institution, but the door opens to a mechanism (although imperfect in some ways), which could highlight their grievances to the global community at large and which could redress their grievances, so that justice is done.

To conclude, it may be stated that the "access to justice" procedure by the underprivileged, in this case, the Project Affected Peoples is a part of the sustainable development process.

Further, through its decisions, the grievances redress mechanisms, the existing WBIP and the proposed IDIIP, are important tools to advance the cause of sustainable development.

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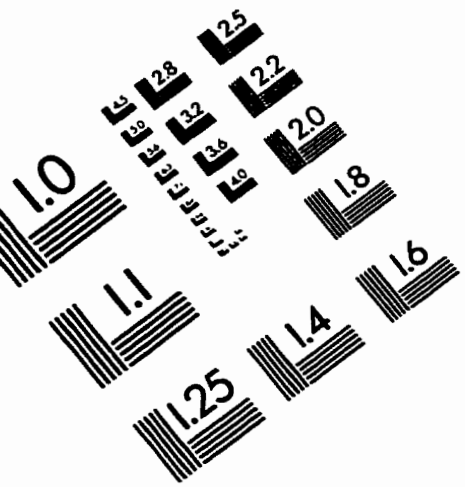


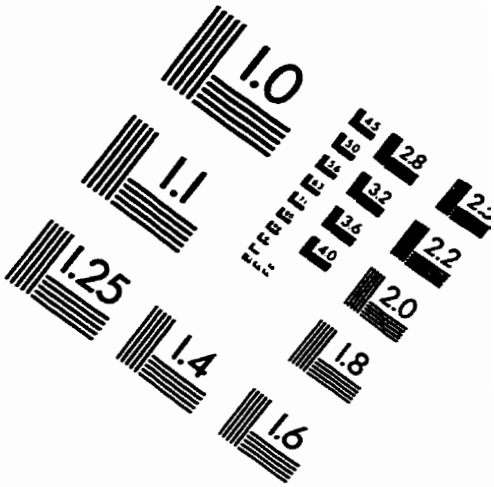


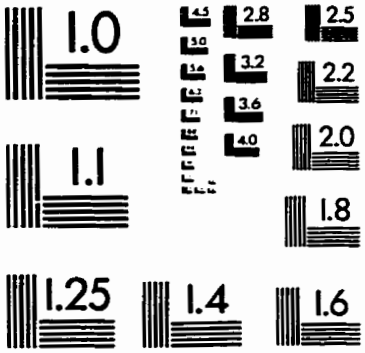


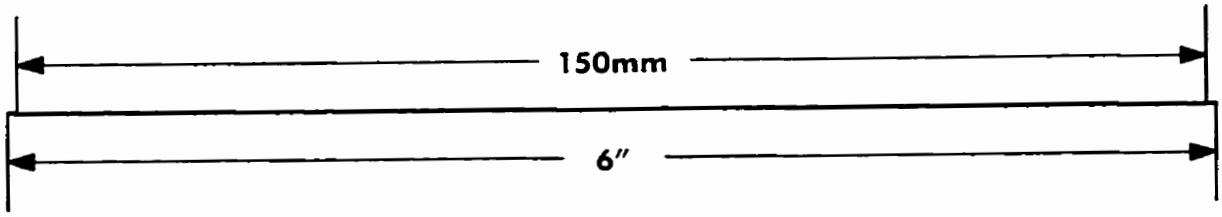


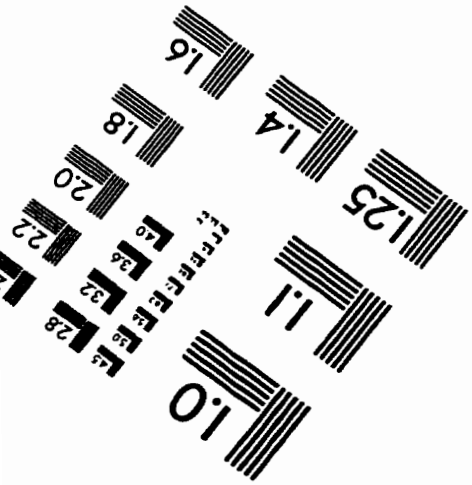


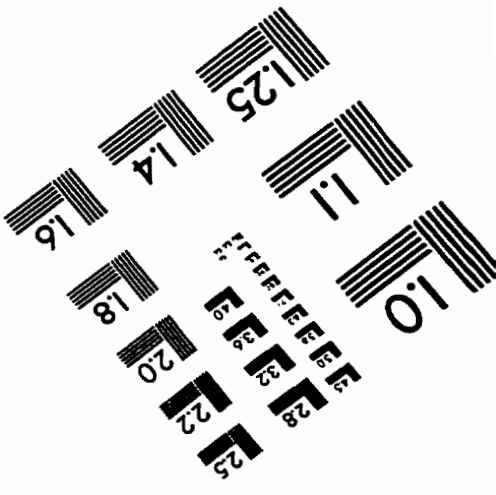


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