HUMAN RIGHTS, ENVIRONMENT AND DEVELOPMENT: WITH SPECIAL EMPHASIS ON CORPORATE ACCOUNTABILITY

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Introduction

This paper is in two parts addressing interrelated topics which merit separate scrutiny as well.

Part I focuses on the interrelationships between human rights, environment and development. In doing so, the paper is less motivated by philosophical and academic concerns. Rather, it is motivated by concerns of policy and praxis. Environmental degradation is all too often resulting in serious human rights violations. Poverty and failure to realize basic human rights are placing the environment under severe stress. Development can serve as a key vehicle for promoting realization of human rights and protecting the environment. However, all too often, unsustainable development practices are themselves proving to be a main source of human rights violations and environmental degradation. Hence the paper strives to enhance the complementary relationship between promoting and protecting human rights; conserving, protecting and rehabilitating the environment; and achieving sustainable human development.

Part I of the paper begins with an examination of the link between promoting and protecting human rights and promoting and protecting the environment in the context of sustainable human development. It examines existing human rights and how human rights approaches can contribute to existing arrangements for protection of the environment.

It then explores issues related to the recognition, scope and implementation of a human right to environment. It reviews the work of the UN Special Rapporteur on Human Rights and the Environment and her efforts towards gaining recognition of environmental human rights.

It concludes with a preliminary examination of development indicators and how they can be adapted to better examine the complementary relationship between environment, human rights and sustainable human development.

Part II of the paper focuses on corporations, sustainable development and accountability. It begins with an examination of the role of corporations as vehicles of social development (as mandated by the Copenhagen Declaration); of their environmental obligations (under the Rio Declaration); and the call by Secretary-General Kofi Annan for "global compact" (as made in the Davos Forum). The paper then assesses a variety of corporate and industry-wide self regulatory initiatives under their self-professed goal of corporate social responsibility. Such initiatives examined include codes of conduct (corporate, industry or NGO in origin) and social labelling. A section on corporate-community relationships evaluates "good neighbour" agreements. A range of host government measures aimed at securing corporate accountability are analysed including: command and control regulations; community, informal regulation; economic instruments; legislation regarding the right to know, the duty to disclose and the power to act; and toxic auditors. The paper also examines home

government measures such as investment promotion and guarantee schemes and environmental liability.

Both Parts of the paper contain conclusions and recommendations.

I. PROTECTING AND PROMOTING HUMAN RIGHTS AND PROMOTING AND PROTECTING THE ENVIRONMENT IN THE CONTEXT OF SUSTAINABLE HUMAN DEVELOPMENT

Sustainable human development (SHD) is development that places people at the centre of all development activities. The central purpose of SHD is to create an enabling environment in which all human beings lead secure and creative lives. Sustainable human development is directed towards the promotion of human dignity and the realization of all human rights, economic, social, cultural, civil and political. In the context of SHD, Section 1 of the paper seeks to examine the relationship between promoting, protecting and realizing human rights and promoting, protecting and rehabilitating the environment. It begins with a description of how the two growing areas of international law relating to these twin tasks fit into the overarching concept of sustainable human development.

The concept of sustainable development originated with the Report of the World Commission on Environment and Development (WCED), *Our Common Future* (the Brundtland Report) of 1987 which defined sustainable development as "development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs." Conceptually, sustainable development can be conceived of as integrating three "pillars": international environmental law, international human rights law and international economic law. "The integrated structure of sustainable development is such that it requires support from each of the pillars." (McGoldrick: 1996).

In stating that "human beings are at the centre of concern for sustainable development" and that they are "entitled to a healthy and productive life in harmony and nature", Principle 1 of the Rio Declaration of the UN Conference on Environment and Development employed language of human rights law, the second pillar of sustainable development. The emergence of sustainable development has coincided with a broadly increasing consensus in international human rights (McGoldrick: 1996). After it was established in recent years that gross violations of human rights are threats to peace and security under Chapter VII of the UN Charter, there are signs that this concept might be expanded to include "the non-military sources of instability in the economic, social, humanitarian and ecological fields" (Ksentini report, UN Doc S/23500, 31 Jan 1992, para 111-116.).

The third pillar of sustainable development is international economic law. A number of concepts in international environmental law are actually concepts of economic law:

- the concept of internalizing the economic costs of pollution and environmental degradation, referred to in environmental law as "full cost pricing";
- the "polluter pays principle" which seeks to make the polluter fully responsible for all costs of pollution, be they economic, human, social or cultural;

- the concept of environmental responsibility and liability based upon a product's "cradle-to-grave life-cycle"; and,
- the mechanism of "economic instruments" which provide incentives and disincentives regarding desired environmental performance or behaviour.

A new body of international economic law is emerging however, relating to trade and investment, whose impact on environment and human rights is highly questionable, to say the least. Much recent writing and analysis has focused on the human rights and environmental impacts of the Multilateral Agreement on Investment (MAI) and the World Trade Organization (WTO). This body of international economic law, far from being a pillar of sustainable development, is resulting in the unregulated promotion of unsustainable development.

SHD, with its essential goal of creating an enabling environment in which all human beings lead secure and creative lives, has an invaluable role to play in ensuring that international economic law supports and does not erode sustainable development and the promotion and protection of human rights.

In examining the relationship between environmental protection and human rights, the controversial question is whether environmental protection aims at enhancing the quality of human life and is thus a subset of human rights or whether environmental protection and human rights are based on different social values. Another, third approach sees human rights and environmental protection as representing two different strands with "different but overlapping social values." The two strands overlap and can be mutually supportive where environmental values seek to protect human needs or well-being. However, this approach differentiates between environmental protection and human rights when the conceptual underpinnings of human rights are not suitable to address environmental issues. (Shelton: 1991).

"On the basis of these concepts, environmental protection can be achieved through the assertion of existing human rights, the development of new human rights relating to the environment, or a general "right to environment". The latter would lift environmental protection from being a subset of other human rights, such as property, and thus endow it with a status that would have to be balanced against human rights. (Shelton: 1991).

Though both human rights and environmental protection seek to attain the highest quality of sustainable life for humanity, their goals can be in conflict with each other. "The essential concern of human rights law is to protect existing individuals and communities while the aim of environmental law is to sustain life globally by balancing the needs of and capacities of the present with those of the future" (Shelton: 1991).

II. HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION: DYNAMICS OF THEIR INTER-RELATIONSHIPS

The 1972 Stockholm Declaration on the Human Environment recognized the link between human rights and environmental protection stating that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being". The Stockholm Declaration "does not actually proclaim a right to the environment,

but implies that the exercise of other human rights indispensably requires basic environmental health". (Shelton: 1991).

Considering environmental protection as a "precondition to the exercise of fundamental human rights", for instance, has inherent risks because the alleged lack of these preconditions might be and has been used to deny human rights. Another view sees environmental protection not as a precondition for human rights, but as an integral part of their enjoyment. The United Nations Human Rights Committee, for instance, has decided a case that recognized environmental harm as a valid cause of action. In cases before the European Commission on Human Rights and the European Court on Human Rights, existing human rights to some extend afforded environmental protection through the application of the right to life, privacy, and property. Yet it is clear that environmental concerns are not a cause of action in themselves, but have to affect an existing human right granted by the Convention. (Shelton: 1991)

The relationship between environmental issues and human rights is increasingly interdependent. International NGOs such as Greenpeace and Amnesty International work towards shifting their respective areas of concern out of exclusive national jurisdiction under Art. 2(7) of the UN Charter up on the international level and towards restraining government and private actors' power in this respect on the domestic level. (Anderson: 1996).

However, there are tensions between human rights activists and environmentalists. For human rights activists, the urgent problems of survival are more crucial than long-term ecological security. This is reflected in "the anxiety of the affluent (developed nations) to protect the Amazonian rain forests without full consideration of the human lives which may depend upon the forest." (Anderson: 1996). Most people will understandably give preference to immediate basic human needs such as food over long-term environmental concerns. "Such tension cannot be wished away, despite the fashionable view that human rights and environmental protection are interdependent, complementary, and indivisible". (Anderson: 1996). Human rights activists see the challenge as protecting environment for people and not protecting environment from people. Conservation efforts have often failed because they did not command the support and full participation of the communities concerned.

This paper will focus on why environmental matters should be addressed through human rights and, how human rights approaches add to existing arrangements of environmental protection. Michael Anderson suggests three approaches: first, mobilizing existing rights to achieve environmental ends, second, reinterpreting existing rights to include environmental concerns and third, creating new rights of an explicit environmental character. (Anderson: 1996).

Some authors suggest that human rights norms, which are already protected under international instruments and domestic constitutions, play an important role in environmental protection. They suggest that the existing rights protected under international instruments and national constitutions are sufficient to provide environmental protection and that to create new environmental rights would be "superfluous and at worst counter-productive". (Anderson: 1996) Out of existing rights which exist at the international level, environmental protection could evolve.

First, there are the classic civil and political rights. Their importance lies in their ability to "foster an environmentally-friendly political order". (Boyle: 1996). Rights to political participation, to life, association, expression, personal liberty, and legal redress would enable those groups who are threatened with environmental degradation to voice their objections. "These guarantees are necessary preconditions for mobilizing around environmental protection". (Anderson: 1996). The Malaysian Constitution, for instance, protects important political rights, however it is subject to statutory restrictions so that public gatherings, publishing activities, and the operation of non-governmental organizations are all vulnerable to governmental control. On one occasion the government cracked down on environmental NGOs but their members were able to use their broader political rights to achieve their ends as to environmental protection. As such the environmental rights were "silently and undramatically" (Harding: 1996) incorporated into the legal system through existing political rights. However, claiming environmental protection through political rights is not an easy process in practice. In fact, there "are only a handful of cases in which existing civil and political rights have been applied to environmental complaints, and even these have met with mixed success". (Anderson: 1996)

Economic, social and cultural rights contribute to environmental protection through establishing substantive standards of human well-being. "Existing human rights treaties...contain provisions on the right to health, the right to decent living conditions and the right to decent working condition--all of which may bear directly upon environmental conditions" (Anderson: 1996).

The collective right to self-determination as recognized in common Art. 1 of the International Covenants, could also contribute to environmental protection. Common Article 1 of the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights reiterate that all peoples have the right to self-determination, by virtue of which, "they freely determine their political status and freely pursue their economic, social and cultural development". This includes the right to freely dispose of their natural resources. Moreover, "in no case may a people be deprived of its own means of subsistence" (Article 1). It is a severe indictment of the inadequacy of international environmental law that pollution and environmental degradation have made a mockery of these rights for many communities worldwide.

Reinterpretation of Existing Rights

Where the mere mobilization of existing rights, as discussed above, does not prove adequate to protect environmental needs, it is argued that "[E]xisting rights must be reinterpreted with imagination and rigor in the context of environmental concerns which were not prevalent at the time existing rights were first formulated". (Anderson: 1996)

Courts in India have made considerable progress in reinterpreting certain rights to include environmental protection norms. For example, the Indian judiciary has held that the right to life includes the right to live in a healthy environment, a pollution free environment, and an environment in which ecological balance is protected by the state (see below).

Creating New Environmental Rights

This approach involves recognition and implementation of a right to environment and of environmental human rights as discussed in this paper. Within the context of SHD, all three approaches mentioned above show a clear inter-relationship between protecting and promoting

human rights on the one hand and preserving, protecting and restoring the environment on the other:

- development projects and activities which consciously or wantonly degrade the environment, are usually accompanied by human rights denials and violations as well (e.g. certain large-scale dam-building and infrastructure projects).
- development project and activities undertaken through a process that violates rights of participation, transparency, and accountability, are usually accompanied by heavy environmental costs as well (e.g.. unsustainable exploitation of the tropical rain forests).
- development projects and activities which consciously strive to protect and rehabilitate the environment, create an enabling environment in which human beings can lead secure and creative lives-thus promoting realization of all human rights.
- development projects and activities undertaken through a process that respects human rights (including rights of participation and inclusion) are invariably environmentally-friendly as well.

Hence, it is not surprising that this complementarity is recognized and enshrined in the body of international development law that has been recently emerging through the UN Declaration on the Right to Development (1986) and the recent Declaration and Programmes of Action of the UN Global Conferences on Development. This newest of human rights, the right to development holistically integrates both human and environmental concerns and goals.

III. THE HUMAN RIGHT TO ENVIRONMENT

The case for a right to environment comes in the form of claims to a decent, healthy, or viable environment, that is to a substantive environmental right which involves the promotion of a certain level of environmental quality.

Environmental rights, as one author suggests, would give environmental quality comparable status to the other economic and social rights...[and] would recognize the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfilment of other human rights (Boyle: 1996).

Another scholar advocating the broadest recognition of human rights in the environment claims that "the protection and improvement of man's environment arise directly out of

a vital need to protect human life, to assure its quality and condition, to ensure the prerequisites indispensable to safeguarding human dignity and human worth and the development of the human personality, and to create an ethos promoting individual and collective welfare in all dimensions of human existence" (Pathak: 1992).

Environmental rights can be interpreted in different ways. (Shelton: 1991). They can be understood to refer to rights of the environment, i.e. rights that the environment possesses, rather than the right of humans to a healthy environment. This interpretation would particularly concern those in developing countries and those who consider the protection of nature and respect for human rights to be conflicting interests. (Shelton: 1991). An alternative interpretation views environmental rights

as a "reformation and expansion of human rights and duties in the context of environmental protection". The approach taken here represents an additional stage between merely applying existing rights to achieve environmental protection and acknowledging a brand new right to the environment. Such environmental rights would correspond to the ideas of political participation and informed consent." (Shelton: 1991).

Based on political rights, procedural guarantees need to be immediately established in order to create an individual right of action to conserve the environment. Certain rights would have to be established to achieve this goal for example, "prior knowledge of such actions with a corresponding state duty to inform, a right to participate in decision-making and a right to recourse before competent administrative and judicial organs" (Shelton: 1991)

'Environmental rights' (understood as procedural guarantees of information and political participation which have been reformulated and extended specifically to cover environmental decisions), can effectively protect the environment only if coupled with substantive international regulation.

There are counter-arguments to the recognition of a right to environment. The fact that the Rio Declaration failed to recognize the explicit right to "a decent, healthy, or viable environment", strongly underlines the arguments of those who do not accept the need or wish to recognize any such right to environment. (Boyle: 1996) One author believes that it is "misconceived to assume that the cause of environmental protection is furthered by postulating a generic human right to the environment in whatever form". (Handl: 1992). Creating a human right to environment entails a number of problems such as the difficulty in definition, the inefficiency of developing environmental standards in response to individual complaints, and the fundamentally anthropocentric character of viewing environmental standards through a human rights focus. (Handl as quoted in Boyle: 1996 fn. 24).

A. A Human Right to Environment: Does it Exist?

Although existing human rights, if fully mobilized, may offer local and international environmental protection, as discussed above; there are reasonable indications that they may fall short in meeting this end. As such existing human rights instruments may be inadequate for urgent environmental tasks. Therefore scholars argue that a comprehensive norm, which relates to environment is required. Within several international instruments one can find the origins of a substantive right to environment.

The origins of a right to environment can be found in the Stockholm Declaration. Moreover, since 1980 several international and regional human rights instruments have included various statements of a right to environment.

Environmental Rights in Existing Human Rights Treaties Concerned with Civil and Political Rights

The United Nations Charter, 1945 does not define human rights. However, the human right to environment could be interpreted through the concept of "well-being". Similarly, the Universal Declaration of Human Rights, adopted by the General Assembly on December 10, 1948 does not mention a human right to environment. It affirms the right to life and a right to a standard of living adequate for health and well-being. Again, the right to environment could be read into this right.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights affirm that every human being has the "inherent right to life" and the right of everyone "to the enjoyment of the highest attainable standard of physical and mental health" through "the improvement of all aspects of environmental and industrial hygiene".

The right to life and the right to be free from interference with one's home and property are civil and political rights covered by various treaties. In environmental terms the right to life may include a positive obligation on the state to take steps to prevent a reduction of or an extension of life expectancy. For example, by providing better drinking water or less polluted air. Article 8, of the European Convention on Human Rights incorporates the right to be free from interference with one's home and property. The limited case law in this area usually deals with noise pollution for example, in alleged nuisance complaints about excessive aircraft noise at Heathrow Airport the European Court on Human Rights found that the benefits to the community out-weighed the individual's right to bring a claim. However, in the case of *Lopez Ostra v Spain* (20 EHRR 277 of 9 December, 1994), the Court ruled that the applicant suffered health problems from the fumes of a tannery waste treatment plant operating a few meters away from her home.

Economic, Social and Cultural rights include the right to, a healthy environment, a decent working environment, decent living conditions and to health. These rights are covered by various treaties which establish the close relationship between socio-economic development, environmental and human rights concerns.

Under the right to a healthy environment everyone shall have the right to live in a healthy environment and to have access to basic public services. States are obliged to promote the protection, preservation and improvement of the environment. States must adopt the necessary measures to the extent allowed by their available resources and their degree of development to implement these objectives. If necessary, legislation may be required to realize these objectives. However, a state can only promote a healthy environment according to their resources.

The right to a decent working environment imposes obligations on States to give effect to the various rights contained in the Covenant on Economic, Social and Cultural Rights (ICESCR) including reporting mechanisms to secure a State’s compliance with their obligations.

The 1981 African Charter on Human and Peoples’ Rights was the first human rights treaty to expressly recognize the right of "[a]ll peoples" to a "satisfactory environment favourable to their development". Within Europe , the Organization of Economic and Development (OECD) has stated that a "decent" environment should be recognized as one of the fundamental human rights. Furthermore the United Nations Economic Commission for Europe (UNECE) has drafted the Charter on Environmental Rights and Obligations which affirms the fundamental principle that everyone has the right to an environment adequate for general health and well-being. The Organization of American States, introduced a right to environment in its 1988 Protocol of San Salvador.

The European Social Charter aims to ensure the right to safe and healthy working conditions. Art 11 (1) of the ICESCR deals with the right to decent living conditions. This would include requiring a State to take measures to minimize pollution. The right to health covered by Art 12 of ICESCR

provides that State Parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This includes improving all aspects of environmental and industrial hygiene to mitigate pollution. Part 1 of the 1961 European Social Charter requires parties to take appropriate measures in particular to prevent air and water pollution, protection from radioactive substances, noise abatement, food control and environmental hygiene. Article 10 of the 1988 American Protocol to the Inter-American Convention on Human Rights provides that everyone shall have the right to health. Art 24 of the 1989 Convention on the Rights of the Child provides that a child has the right to enjoy the highest attainable standard of health. For the first time in any human rights treaty, there is an explicit link between health and the State of the environment.

National Frameworks

The right to environment has found increasing recognition at the national level in several national constitutions and laws. The following are some examples of nations that have implemented a substantive right to environment within their domestic corpus of law. The Argentinean Constitution in art. 31 states "[a]ll residents enjoy the right to a healthy, balanced environment. The constitution of the Congo in art. 46 provides that "[e]ach citizen shall have the right to healthy, satisfactory and enduring environment". The Korean Constitution Chapter 11, art. 35 states "[a]ll citizens shall have the right to a healthy and pleasant environment. These are but a few examples, in fact over 60 countries as well as several sub-national governments (states) within the US have adopted similar provisions in their constitution (for examples see Popovic: 1996 fn. 75).

The Right to Environment: What Does it Comprise

Scholars are split on the issue of whether the right to environment should be procedural or substantive in character.

Procedural Rights

One view is that the right to environment should be purely procedural. There are a range of procedural rights at both international and domestic levels which are relevant to environmental protection. These include the right to information, the right to receive prior notice of environmental risks, the right to participate in decision-making in environmental issues at both the domestic and international level, the right to environmental impact assessments, the right to legal remedies including standing to initiate public interest litigation and the right to effective remedies where environmental damage is caused. (Anderson: 1996)

A participatory approach leads to environmental protection. This is especially so where marginalized groups and communities who are affected can take part in decisions which concern them. Advocates of procedural rights argue that a single precise formulation of a substantive right to environment is not feasible since "the desired quality of the environment is a value judgement which is difficult to codify in legal language". (Anderson: 1996)

Substantive Rights

Proponents for a substantive right to environment argue that such a right would provide more effective protection. A substantive right can provide more effective protection, and may play a role in defining and mobilizing support for environmental issues. Advocates of substantive rights see procedural rights as lacking, in the sense that they cannot guard against a participatory and

accountable polity that may opt for short-term affluence rather than long-term environmental protection. As such, procedures alone cannot guarantee environmental protection.

It is not easy to define such a right to environment. As du Bois points out "different ethical decisions are at stake". (du Bois: 1996). Is one aiming to protect human health and livelihood, or ecological sustainability or the sustainability or the value of existing natural endowments? Even if its is possible to come up with a definitive interpretation, enforcement of such a complex right would require an enforcement body to balance several competing moral claims.

Does the right to environment entail a right to the prevention of environmental harms or is it only a right to remedy harm once occurred? The majority of the constitutions are not explicit on this issue. The European Union has adopted the precautionary principle. It has suggested that for social actors to know the precise obligations it is better that the right should be defined in detail. One author, advocates an environmental right, which would include topics of resource use, pollution control and land development (Glazenski: 1996). The drafting of an environmental right should draw further on environmental law principles and concepts. An example of these environmental law concepts include: general precepts such as environmental liability, state responsibility and sustainability, as well as more specific principles such as the polluter pays principle and the precautionary principle.

The evolution of Comparative Environmental Law since the Earth Summit '92

Several countries have been adopting laws to combat pollution since the United Nations Conference on the Human Environment held in Stockholm in 1972. However, it was only at and after the United Nations Conference on Environment and Development (the Earth Summit) held in Rio de Janeiro, Brazil in 1992, that the international community, represented by more than 121 Nations, agreed on the adoption of more comprehensive laws to protect the environment as a system.

The international community recognized the concept of sustainable development as integral to the paradigm both for environmental protection and economic development. The 1992 Biodiversity and Climate Change Conventions, together with Agenda 21 (a soft law document) were adopted at the Earth Summit, creating a new international environmental framework.

The framework includes new legal principles and concepts that require from nations a different approach to the regulation of the protection of the environment to achieve their sustainable development goals. New national regulatory systems should incorporate the precautionary principle as well as new tools and concepts such as the need to perform environmental impact assessment studies and devise economic market incentives to promote the protection of the environment.

Due to the international recognition of the sustainable development paradigm and its incorporation into national regulatory systems, the field of comparative environmental law is one of the fields of law that has been growing steadily in the past five years.

A comparative analysis of the environmental laws adopted by several countries since 1992 shows that they have followed different strategies in order to achieve their international commitments with

sustainable development. In fact, some of them have enacted the protection of the environment as a constitutional right while others choose to review their existing sector-based pollution legislation or have adopted environmental regulations incorporating the new legal principles and concepts of Rio:

In Latin America, most States have made fundamental changes in the late 1990s to their legal systems to include environmental protection. The changes range from environmental impact assessment to constitutional guarantees of a clean environment. Some African countries have started to introduce laws and rules on environmental impact assessment. In the Middle East, until the 1990s oil wealth was so great that governments, planners and ordinary citizens hardly considered the risks posed by the mountains of trash, toxic chemicals and air pollutants that wealth engendered. Since 1990, environmental awareness is growing in the Middle East and this growth is reflected in the adoption of several local laws and the creation of government institutions for the protection of the environment in virtually every Gulf Cooperation Council member country. The Secretariat General of the Gulf Cooperation Council and member states are currently conducting a study in cooperation with the Regional Marine Environment Organization and the European Union on the feasibility of imposing penalties and fines on ships which dispose of their ballast illegally in their territorial waters. At present each state imposes its own penalties on ships found guilty of polluting its waters.

In Asia and the Pacific Region, countries such as China, Indonesia, the Philippines and Singapore have recently strengthened their existing environmental laws. The same goes for the ever-increasing body of environmental laws and directives in the European Union.

Environmental Liability

Increasingly, liability for environmental damage is being viewed as a way to integrate environmental costs into the production process. More and more international treaties are not only imposing liabilities upon state parties but upon private actors as well. Conventions in the early 1960s were among the first to impose liability on private actors involved in nuclear accidents. Since then the number of international conventions establishing the liability of private actors, including transnational corporations (TNCs), has increased significantly. A number of Declarations and Statements calling for the imposition of civil liability upon private actors have also appeared on the international scene (for example the 1995 Beijing Ministerial Declaration on Environment and Development and the 1995 Agreements for Cooperation in the Globe Learning and Observations to Benefit the Environment). A number of Conventions also call for the establishment of rules of civil liability. These Conventions impose liability upon the private sector, a clear trend of international law. Moreover, such liability usually tends to be strict, that is, liability without fault. Furthermore, liability extends not only to damage to people and property but also to damage to the environment.

State Responsibility

The term ‘state responsibility’ traditionally relates to injuries resulting from violation of obligations under international law. Such responsibility can be either direct (for acts of the state itself) or indirect and imputed (for acts of its citizens or those under its control). Traditionally, international responsibility was founded on fault imputable to the acting state. As a general rule, the state is not liable for the action of private parties unless such fault can be attributed to the State. Today, there

is a growing trend towards holding States responsible for the transboundary environmental consequences of acts occurring within their jurisdiction.

Sustainability

The principle of sustainability is clearly one of the cardinal principles that will shape the future development of international law. In its recent advisory opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice referred explicitly to the concept of sustainable development after stating that "respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality".

The principle of sustainable development"" has crucial but largely unrecognized implications for the mining industry and other industries that rely on a non-renewable resource base. Such non-renewable resources are, by definition, not self-sustaining. The utilization of non-renewable resource will, inevitably, lead to their depletion and ultimately to their exhaustion. International law will increasingly adopt the concept of sustainability, both at the level of rhetoric and at the level of obligation and performance standards.

In *Vellore Citizens Welfare Forum v Union of India* (AIR (1996) SC 2715) a petition was filed under Art 32 (Right to Life) of the Constitution of India. The petition was directed against pollution, which was being caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. Justice Kuldip Singh, balanced ecological concerns with developmental imperatives. Rendering a judgement in favour of the petitioners, the Court observed that though the leather industry is of vital importance since it generates foreign exchange and provides employment it has no right to destroy the ecology, degrade the environment and pose a health hazard.

The court further observed that the traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. It stated that during the two decades from Stockholm to Rio, "Sustainable Development" has become a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems. The court had no hesitation in holding that sustainable development is part of customary international law though its salient features have to be finalized by the international law jurists.

The Polluter Pays Principle

The polluter pays principle (PPP) seeks to integrate the full social and environmental costs into production processes. If such processes pollute, the polluter must pay the full costs arising from such pollution. Thus the producers are forced to integrate the costs of environmental protection into the price of the final product. Besides its implementation by European Community law, PPP finds expression in the 1990 IMO Oil Pollution Preparedness Convention; the 1987 amendments to the ECC Treaty of Rome; the 1991 Declaration of Francophone Ministers of the Environment; the 1991 G-7 Economic Summit; and the 1989 OECD Council Recommendation.

International treaties can, and do, impose liability upon state parties. But international law treaties are increasingly imposing liability upon private actors engaged in activity, which causes the environmental harm.

Two important developments have taken place in respect of liability. The first of these developments is the increasing adoption of the concept of absolute liability. The second of these is the development of the deep pockets theory. The deep pockets theory is likely to be increasingly favoured, especially in Europe where the polluter pays principle is the keystone of environmental law.

The deep pockets theory is based on the principle that the quantum of damages awarded will be related to the ability-to-pay of the corporation, so that the damages can have a truly deterrent effect; see *M.C Mehta v Union of India* (AIR (1987) SC 1086).

The incorporation of PPP into international law will have obvious implications for the development of national law and liability rules for environmental damage.

Article 130(2) of the EU Treaty sets forth the basic principles of the Community's policy on the environment, which includes the polluter pays principle.

In line with this principle, greater use of civil liability for remedying environmental damage has been advocated by the European Commission. It has been proposed in the draft Landfill Directive that strict civil liability be imposed on operators of landfill sites for damage caused by land filled waste.

The polluter pays principle is also relevant to the cost of running regulatory systems. For example, the regulation on shipments of waste within, into and out of the EC, provides that the full costs of implementing the notification and supervision procedures, including the analysis and inspection of waste shipments, will be charged to the producer of the waste (polluter).

Under the "Polluter pays" principle national authorities should promote the internalization of environmental costs and the use of economic instruments, reflecting the principle that the polluter should bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment (Article 16).

In the United States the nearest embodiment of the premise of the polluter pays principle can be found in the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). CERCLA, also known as the "superfund" law was enacted in 1980 and revised by the Superfund Amendments and Reauthorization Act of 1986 (SARA). CERCLA regulates the remediation of spills or releases of hazardous substances. The Act makes persons who are responsible for hazardous substance release liable for cleanup and restitution costs. CERCLA imposes strict, and often joint and several, liability for restitution of response costs incurred by the government or private party as a result of actual or potential release of hazardous substances.

The Precautionary Principle

The precautionary principle emerged over the past few years as a clear recognition that pollution prevention rather than pollution clean-up must be the priority, even from predominantly economic considerations. The precautionary principle states that substances or activities which may be detrimental to the environment, should be regulated even in the absence of conclusive evidence of harmfulness. In other words "when in doubt, don't." Environmentally dubious activity must be prevented until proven otherwise. The precautionary principle, which manifests a shift from reactive

to preventive approaches to environmental pollution, is now being espoused by binding, legal instruments such as the 1987 and 1991 amendments to the EEC Treaty of Rome; the Biodiversity Convention; and the 1991 IMO Convention on Pollution Preparedness.

Under traditional international environmental law, a showing of actual or foreseeable harm was required before environmentally damaging activities could be regulated. The burden of scientific proof was on the state claiming transboundary damage internationally. However, international environmental law today requires action to control or abate environmental degradation even when there is a lack of scientific certainty.

The Ozone Convention is perhaps the best example of the application of this approach. A stronger version of the precautionary principle goes further by reversing the burden of proof altogether. In this form, it becomes impermissible to carry out an activity unless it can be shown that it will not cause unacceptable harm to the environment. Examples of its use in this sense, include the suspension of industrial dumping in the Oslo Commission area without prior justification to the Oslo Commission, and the moratorium on whaling. The main effect of the principle in these situations is to require states to submit proposed activities affecting the global commons to international scrutiny.

In *Leatch v National Parks and Wildlife Service & Shoalhaven City Council* (81 LGERA 270 (1993)), the Land and Environment Court of New South Wales observed that when there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a treat. Application of the precautionary principle appears to be most apt in a situation of a scarcity of scientific knowledge of species population, habit and impacts.

In *Vellore Citizens Welfare Forum v Union of India,* the Court was of the view that "The precautionary principle" and "polluter pays" principle are essential features of sustainable development. This Court had already held that "polluter pays" is a sound principle in an earlier case. The Court held that the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area". The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

The precautionary principle and polluter pays principal have been accepted as part of the law of the land.

Besides referring to several articles of the Constitution supporting the principles, the Court also referred to several statutes supporting these principles.

The Court held rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law and shall be followed by the Courts of Law.

Intergenerational Justice
In *Juan Antonio Oposa and others v the Honorable Tulgencio S. Factoran and another* (GR No: 101083), the Petitioners were a group of Filipino minors who brought this action on their own, in behalf of generations yet unknown through their respective parents together with the Philippine Ecological Network Incorporated. Their contention was that the country's natural forest was being destroyed at such a rate that the country would not have forest resources by the end of the decade. They prayed for an order directing the Secretary to the Department of Environment and Natural Resources (DENR) to cancel all existing timber agreements and cease from accepting or approving new agreements

The Supreme Court gave due recognition to the principle of intergenerational justice. It upheld the Petitioner's right to sue on behalf of succeeding generations underscoring that every generation has a responsibility to the next for preservation of the environment. This right implied the judicious management and conservation of the country's forests.

Nature and Characteristics of International Environmental Law
Unlike other branches of international law, international environmental law has developed in a piecemeal, *ad hoc* manner in order to address particular problems such as accidental spills from oil tankers, dumping of hazardous wastes, loss of biological diversity, thinning of the stratospheric ozone layer, global warming, tropical deforestation etc.

Treaties are usually negotiated around particular issues in the nature of framework conventions which are flexible, based on consensus, to be followed by protocols which lay down hard obligations.

International Environmental Law contains codes of practice, recommendations, guidelines, resolutions, declaration of principles, standards and "framework" or umbrella treaties which do not fit into the categories of legal sources referred to in Art 38 (1) of the International Court of Justice (ICJ) Statute. Thus, they are not laws in the sense of that article. They are not legally binding as "hard law" represented by custom, treaty and established general principles of law. These instruments are described as soft laws. Nevertheless, they do not lack authority. Some of them become hard law over time. An example is the hardening of UNEP's Cairo Guidelines, the Principles for the Environmentally Sound Management of Hazardous Waste, into the 1989 Basle Convention on the Control of Transboundary Movement of Hazardous Waste.

Soft Law has an important contribution in establishing a new legal order. Such guidelines and norms manifest general consent on certain basic principles. If followed by state practice, they can provide evidence of the *opinio juris* from which new customary laws and principles develop. This could contribute to harmonization of environmental law and standards at the global level.

Some of them are incorporated in recent conventions. For example, the 1994 Energy Charter Treaty spells out three general principles: sustainable development, prevention and "polluter pays" for Parties to observe in implementing their environmental obligations.

American courts have asserted the various principles of the Rio Declaration on Environment and Development in decisions relating to alleged environmental violations. In *Aguinda v Texaco* (1996)

US Dist. LEXIS 16884 (SDNY 12 November 1996), The United States District Court concluded that, "although many international agreements are relevant, perhaps the most pertinent in the present case is the Rio Declaration on Environment and Development". The Court then recited Principle 2, which provides that States have "the sovereign right to exploit their own resources pursuant to their own environmental policies", but that they also have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction". Therefore, although the plaintiffs had not alleged a violation of a treaty, the court was willing to cite the Rio Declaration as evidence of state practice in the United States.

Jurisprudential Basis and Relation to Other Rights

Today, environmental rights are proliferating particularly at the national level. There are different approaches concerning the concept of environmental rights at the international level. Some argue that the right to environment is a natural law norm and therefore a rule of *jus cogens* in international law; or that it is available within the existing human rights system and is implicit in the right to life, health. The opposite argument contends that there is no human right to environmental protection but it would be desirable to create one by way of international treaty, while an intermediate position argues that it is emerging as customary international law (Anderson: 1996).

Conflicts between the right to healthy environment and other rights such as the right to property, occupation etc) are bound to surface. Courts have tried to resolve the issue by balancing environmental protection with the collective right to economic development.

The Right to Environment: How it is Implemented and Monitored?

If effective recognition is to be given to the human right to the environment it must be capable of being enforced by machinery providing an adequate judicial guarantee. The Declaration, adopted by the European Conference held in 1980, provides that "[e]veryone has the right to a healthy environment, conducive to his personal development and ecologically balanced" and that "implementation of the right to conservation of the environment requires individuals, alone or in association with others, to be informed about possible decisions which might affect their environment, to have the opportunity to participate in the decision-making process and, where necessary, to be able to avail themselves of suitable remedies". (Dejeant-Pons: 1993).

The Charter of Paris for a New Europe adopted in November 1990, provides for promoting, public reporting of the environmental impact of impact of policies, projects and programmes. The preamble of the draft charter and convention states that "[e]very person has the fundamental right to an environment and living conditions conducive to his good health, well-being and full development of the human personality".

If this right is to be effectively implemented the substantive right must be complemented by procedural rights. The procedural aspects of this right would involve the right to information, to participation and to suitable remedies.

The Right to Information

"The right to information means that States have to distribute data and information relating to facts, activities, practices or projects with a considerable impact or potential impact on the environment

and to provide access to data and information concerning or potentially concerning the environment. This information should cover not just cases of pollution but all the factors likely to cause environmental damage, such as over-exploitation of resources, erosion, floods, earthquakes etc." (Dejeant-Pons: 1993). The right to information can be interpreted narrowly, as the freedom to seek information or, more broadly, as a right to access or a right to receive it. As such, determining the scope of the right to information may pose problems. This duty can be limited to demanding abstention from interfering with public efforts to obtain information from the state or private entities, or expanded to requiring the state to obtain and disseminate all relevant information concerning public and private projects. However, although a governmental obligation to release information about its own projects can increase public knowledge, it fails to provide access to the numerous private-sector activities that can affect the environment. Information about the latter may be obtained through licensing or environmental impacts requirements, imposing upon the state a duty to disseminate information in connection with these requirements which would serve to provide the public with the broadest basis for informed decision-making (Shelton: 1993).

The State should also give notice to individuals likely to be affected by any situation or event, which could produce effect deleterious to their environment. "Similarly, the "Seveso" directive adopted by the Council of European Communities in November 1988 requires member States to ensure that information is supplied, without their having to request it, to all persons liable to be affected by a major accident originating in a classified storage installation." (Dejeant-Pons: 1993). The directive provides:

member states shall ensure that information on safety measures and on the correct behaviour to adopt in the case of an accident is supplied in an appropriate manner, and without their having to request it, to persons liable to be affected by a major accident...The information shall be repeated and updated at appropriate intervals. It shall also be made publicly available.

On June 7, 1990, the European Community adopted a Directive on Freedom of Access to Information on the Environment. Its aim is to ensure freedom of access to and dissemination of information on the environment by public authorities. It allows any person, upon request, to receive information relating to the environment without having to show an interest. The directive guarantees freedom of access to information in the sense of a human right. Public authorities are required to make information available.

The Right to Participation

The Oslo Draft Charter on "decision-making" covers arrangements for public participation in decisions likely to have a harmful effect on the environment. (Dejeant-Pons: 1993). Public participation is based on the right of those who may be affected to have a say in the determination of their environmental future. The Espoo Convention on Environmental Impact Assessment in a Transboundary Context requires states to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities, the state must take due account of environmental impact assessment, including environmental harm. In a final decision on the proposed activities, the state must take due account of the environmental assessment, including the opinions of the individuals in the affected area.

The Right to Suitable Remedies

The European Court of Justice in *Francovich v. Italy* (ECJ 19 November 1991, Joined Cases C-6/90 and C-9/90, ECR [1991] i-5357), held that the failure to implement a directive could give rise to a right to compensation by the state for those suffering damage as a result. The language of the *Francovich* opinion is broad and the judgement clearly applies to environmental rights created by directives such as the access to environmental information directive. Access to justice in the environmental area varies among the member states of the European Union. In England, the common law of nuisance is often used for environmental protection by those actually harmed, based on *Rylands v. Fletcher* ([1868 1 LR 3 HL 330 [1861-73] All ER Rep 1, H1; aff'g (1866) LR I Exch 265). In contrast to the English jurisprudence, the other members give broad standing to environmental groups.

IV. TOWARDS ENVIRONMENTAL HUMAN RIGHTS: THE WORK OF THE UN SPECIAL RAPPORTEUR

In 1989, several NGOs lobbied the UN Sub-Commissioner on Prevention of Discrimination and Protection of Minorities to undertake a study on the relationship between human rights and the environment. Following up on that study, the Sub-Commission recommended the appointment of a Special Rapporteur on human rights and the environment and in 1991 the UN Human Rights Commission endorsed such recommendation. Accordingly, the Sub-Commission appointed Ms. Fatma Zohra Ksentini, a human rights lawyer from Algeria and a member of the Sub-Commission, as Special Rapporteur. Ms. Ksentini prepared four reports during the period 1991 and 1994 and these reports provide a most thorough examination of the relationships between human rights and the environment.

The first report (1991) analysed key concepts as well as the provisions of various international legal instruments on human rights and certain constitutional provisions which relate to the environment. The report examined key procedural questions as to who is the holder of the rights, what are permissible limits upon the rights and procedures for implementation. The report also examined the relation of the right to environment to other human rights notably the right to development and the rights of indigenous peoples. A key feature of the report is the delineation of the human rights violations that result from assaults on the environment such as poverty, climate change, deforestation, pollution, and the erosion of biological diversity. The report provides "a few illustrations" of the human rights violated including: the rights to self-determination, to development to take part in the conduct of public affairs, to work, to information and to peaceful assembly, association and freedom of expression. In its preliminary conclusions, the report stresses the close interaction between environment and human rights which justifies the claim to a right to environment. The report calls for effective implementation of such right through recourse to human rights standards. It emphasizes that the right to environment is both an individual right as well as right of peoples. It includes a right to "conservation" as well as a right to "prevention" of ecological harms. Finally, it draws attention to the effects of environmental degradation that are particularly harmful to the rights of vulnerable persons, groups and peoples.

The second report of the Special Rapporteur (1992) contains a careful examination of the national laws of some 49 countries as well as the European Community's draft charter on environmental rights and obligations and other regional instruments. It also reviews the decisions and comments

of regional human rights bodies including the European Commission and the European Court of Human Rights and the Inter-American Commission on Human Rights. It summarizes the jurisprudence evolving from UN human right bodies such as the Human Rights Committee, the Committee on the Rights of the Child, and the Committee on Economic and Social and Cultural Rights. The Report concludes with an examination of the Rio Principles and Agenda 21 of the UN Conference on Environment and Development held at Rio.

The third report of the Special Rapporteur (1993) continues to trace the evolution of the right to environment at national level (in constitutional provisions, legislation and decisions of courts); at regional level; and at international level. The main purpose of the report is to review developments in regard to the recognition and implementation of environmental rights as human rights on the basis of standards and practices developed at such levels. It includes an analysis of the work of the Working Group on Indigenous Populations, the Vienna World Conference on Human Rights, the Commission on Sustainable Development, specialized UN agencies such as WHO, FAO, and the UN High Commissioner for Refugees. The contribution of the International Law Commission and the International Court of Justice are also assessed. The report concludes that there has been universal acceptance of environmental rights recognized at national, regional and international levels and calls for "the immediate implementation" of the human rights component of the right by the relevant human rights bodies and existing mechanisms.

The fourth and final report of the Special Rapporteur (1994) begins by recapitulating the legal foundations of a right to environment contained in international human rights instruments. It elaborates the interrelationships between the right to development, participatory democracy and the environment. It deals with key issues of protection of the environment in periods of armed conflict and the relationship between environment and international peace and security. It carefully details the impact of environmental degradation on vulnerable groups such as indigenous people, women, children and young people, disabled persons and environmental refugees. It analyses the effects of the environment on the enjoyment of fundamental rights notably:

- the right to self-determination
- the right to life
- the right to health
- the right to food
- the right to sale and healthy working conditions
- the right to housing
- the right to information
- the right to popular participation
- freedom of association, and
- cultural rights

The report's final conclusions emphasize the global nature of the problems and the need for a global approach. It reiterates the recognition accorded at national, regional and international levels to the right to environment and underscores the interrelationships between environmental degradation and human rights violations. The report's concluding recommendations call for immediate implementation of the right to environment by relevant human rights bodies at international, regional and national levels. It calls for the appointment of a Special Rapporteur on

Human Rights and Environment by the Commission on Human Rights. Most of all, it calls for the adoption of environmental human rights as set out in Annex 1 to the Report in the form of Draft Principles on Human Rights and the Environment

In May 1994, a few months before Special Rapporteur Ksentini submitted her final report, a group of experts on human rights and international environmental law met for three days in Geneva and produced a Draft Declaration of Principles on Human Rights and the Environment. The Special Rapporteur featured this Draft Declaration as an annex to her final report expressing the hope "that the draft will help the United Nations to adopt ....a set of norms consolidating the right to a satisfactory environment".

The Draft Declaration presents a comprehensive restatement of the essential components of environmental human rights. It is the most important prominent international instrument in the standard-setting process for environmental human rights and reflects the progression towards international recognition of a right to environment. The Draft Declaration represents a restatement and codification of principles already contained in national and international legal systems. The value of the Declaration lies in its use as a reference point for national and international systems and as a vehicle for the development of a formal, binding international legal instrument which would elaborate environmental human rights. But even in the absence of such an international legal instrument, the Draft Declaration can serve as the focal point for the development of institutions and procedure to enhance protection of the rights contained therein, which are also contained in existing international human rights instruments. The Draft Declaration consists of a Preamble and some 27 Principles set out in 5 "parts". An analysis of the Declaration helps underscore the legal foundations of environmental human rights.

The Preamble to the Draft Declaration reaffirms the UN Charter, the UDHR, the two Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, the Vienna Declaration and Programme of Action and "other relevant international human rights instruments". It reiterates "the universality, indivisibility and interdependence of all human rights" and emphasizes the right to self-determination and the right to development. Importantly, the Preamble stresses the connection between human rights and environment:

> "-human rights violations lead to environmental degradation and environmental degradation leads to human right violations".

Part I of the Draft Declaration details key general concepts. Principle 1 reiterates the interdependence and indivisibility of human rights, an ecologically sound environment and sustainable development. Principle 2 reaffirms the right to a "secure, healthy and ecologically sound environment". Principle 3 reaffirms the right to freedom of discrimination in regard to actions and decisions that affect the environment. Principle 4 sets out the principle of intergenerational equity.

Part II of the Draft Declaration details the following substantive environmental human rights:

- the right to freedom from pollution (Principle 5) as an integral part of the rights to life, health, work, privacy, personal security and development. Principle 5 makes clear that the right to freedom from pollution applies "within, across or outside national boundaries".

- the right to the highest attainable standard of health, free from environmental harm (Principle 7).
- the right to safe and healthy food and water adequate to one's well-being (Principle 8)
- the right to a safe and healthy working environment (Principle 9)
- the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment (Principle 10)
- freedom from eviction and the right to participate effectively in decisions regarding resettlement (Principle 11)
- the right to timely assistance in the event of natural or other catastrophes (Principle 12)
- the right to benefit equitably from the conservation and sustainable use of natural resources (Principle 13)
- the right of indigenous peoples to control their land and natural resources (Principle 14)

Part III of the Draft Declaration set out procedural aspects of environmental human rights including:

- the right to information (Principle 15)
- the right to hold and express opinions and to disseminate ideas and information regarding the environment (principle 16)
- the right to environmental and human rights education (Principle 17)
- the right to active, free and meaningful participation and the right to prior assessment of the environmental, developmental and human rights consequences of proposed action (principle 18)
- the right to free and peaceful association for purposes of protecting the environment (Principle 19)
- the right to effective administrative and judicial remedies and redress (Principle 20)

Part IV of the Draft Declaration sets out the following correlative duties:

- of all persons, individually and collectively to protect and preserve the environment (Principle 21)
- the duties of States to protect the environment in all acts of commission or omission (Principle 21) with several correlated duties relating to environmental impact assessment, control licensing, regulation and prohibition, public participation, monitoring and management and reduction of wasteful processes of production and patterns of consumption. The States duties include the duty to "take measures aimed at ensuring that transnational corporations, wherever they operate, carry out their duties of environmental protection and respect for human rights" (Principle 22).
- special duties re destruction of the environment in connection with armed conflict (Principle 23)
- the duty of "all international organizations and agencies" to observe the Declaration (Principle 24).

Part V of the Draft Declaration sets out special considerations:

- to pay special attention to vulnerable persons and groups (Principle 25) including women, children, indigenous peoples, refugees, the disabled and the poor.

- the rights in the Declaration may be subject only to restrictions provided by law which are necessary to protect public order health and the fundamental rights and freedoms of others (Principle 26)
- all persons are entitled to a social and international order in which the rights in this Declaration can be fully realized (Principle 27)

The Draft Declaration has the potential to make significant contributions to protecting human rights and the environment by advancing a standard-setting process, by raising awareness of the public, national governments and international organizations; by advancing the process of creation of implementing monitoring and redress mechanisms; and by facilitating the mobilization of public pressure for the protection and promotion of human rights and the environment. After all, environmental human rights, like all human rights, do not function solely through formal international procedures, although such procedures, and their national counterparts, are indeed important. The principles in the Draft Declaration do address the key issues implicated in the interrelationships between human rights and the environment. Widespread dissemination, discussion and action on the Draft Declaration will help promote and protect human rights and the environment through recognition, implementation and enforcement of environmental human rights.

V. DEVELOPMENT INDICATORS, HUMAN RIGHTS AND ENVIRONMENT

UNDP's Human Development Report since first being published in 1990 has been constantly striving to construct and use several composite indices to measure different aspects of human development. The human development index (HDI) measures life expectancy at birth, adult literacy rate and combined enrolment ratio and adjusted per capita income. In 1997, a human poverty index (HPI) was introduced. For developing countries the HPI measures percentage of people not expected to survive to age 40; adult literacy age; percentage of people without access to safe water, and health services and percentage of underweight children under five. For developed countries, the HPI measures the percentage of people not expected to survive to age 60, the percentage of people living below the income poverty line, and adult functional literacy rate.

A gender-related development index (GDI) has been developed which captures achievements in basic human development adjusted for gender inequality. A gender empowerment measure (GEM) which measures gender inequality in economic and political opportunities focusing on seats held in parliament, female administrators and managers, female professional and technical workers and women's real GDP per capita.

1. The HDI measures development in one simple composite index and produces a ranking of countries. All of the above indicators are quantitative rather than qualitative. They are selective rather than holistic. Although there is always ongoing efforts to refine the HDI, it has stood the test of time and has proved invaluable in monitoring human development by focusing on enlarging peoples choices, access to the resources for a decent standard of living, ensuring human security and achieving equality for women and men.

The HDI without explicitly setting out to do so, does monitor at least one environmental dimension notably the issue of intergenerational equity and justice. Similarly it also does monitor, implicitly

human rights dimensions relating to the right to health, the right to education, the right to an adequate standard of living and the right to freedom from discrimination based on sex.

2. After the Rio Conference on Environment and Development, there has been a move to develop environmental indicators to measure the sustainability of development. A "Working List of Indicators of Sustainable Development" has been developed under the auspices of the UN Commission on Sustainable Development. These indicators fall into 4 categories:

- social e.g.:- poverty reduction, population dynamics, education, health and housing.
- economic e.g.:- GDP per capita, changing consumption patters, resource transfers including ODA and transfer of environmentally sound technologies
- environmental e.g.:- freshwater resources; oceans, seas and coastal waters, land use and management, desertification and drought, deforestation, biological diversity, biotechnology, agriculture, solid wastes, toxic chemicals and hazardous and radioactive wastes,
- institutional e.g.:- for integrating environmental and developmental decision-making, scientific institutions, legal institutions and capacity-building.

The above indicators are being currently tested and refined. They seek to gain insight regarding the progress made in achieving sustainable development.

3. Under the Secretary-General's reform plan for the United Nations, all UN development agencies comprising UNDG (the UN Development Group) have prepared a Common Country Assessment (CCA) which has its own framework of indicators comprising 4 components:

- indicators relating to developmental goals and objectives set forth in the UN conventions, conferences and declarations.
- conference and convention indicators specifically relating to governance, civil and political rights
- basic demographic and economic contextual indicators, and
- thematic indicators on issues of major concern for development in light of specific country settings, priorities, needs and crosscutting issues.

These CCA indicators, it is hoped, will enable changes in the level or quality of development progress to be measured through changes in the values of the indicators. The Common Country Assessment carried out using these indicators, is an essential first step in the preparation of the UNDAF (the UN Development Assistance Framework) for which provisional guidelines have been formulated in September 1998. Applying the CCA and UNDAF frameworks at country level, country strategy notes or strategic frameworks will be prepared for the drawing up of country development programmes in which all UN development assistance will be coordinated. Moreover, responding to the Secretary-General's call that human rights are to be crosscutting theme in all of the activities of the UN, the task of integrating human rights concerns into UNDAF is currently being undertake by a UNDG Ad Hoc Group on the Right to Development.

From the above review, it is clear presently there is very little complementary relationship between the different development indicators in use within the UN system. It is also equally clear that future development indicators should strive urgently to establish such complementary relationship

between human rights, environment and development. In this paper we have established that a strategy of implementation and enforcement of existing international human rights standard can help reduce and prevent environmental degradation from occurring within the context of development activities. Two types of human rights indicators could prove especially useful:

- indicators of violations of human rights or environmental standards
- indicators of progress (or lack of progress) in the implementation of human rights or environmental standards

Both general and disaggregated indicators would be desirable. The indicators of violations could lead to effective remedial measures. The indicators of implementation could help feed into the CCA and UNDAF processes.

UNDP, having adopted a policy of "Integrating Human Rights into Sustainable Human Development", is currently developing a human rights-based approach to SHD programming which will use human rights standards and concepts for situational analysis, as well as for setting of priorities, goals, targets and evaluation criteria in SHD programmes. Admittedly, work is at a very preliminary stage but nevertheless some suggestive, illustrative examples are possible.

4. The right to work under the international human rights treaties and conventions of the ILO. A preliminary task would be to identify the content of the right to work and its component and related rights which would include:

1. The Right to Employment and to Free Choice of Employment -- "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (Article 6 (1) CESCR).
2. The Duty of the State to:
- "take appropriate steps to safeguard this right,"
- to take steps "to achieve the full realization of this right" including "technical and vocational guidance and training programmes", and
- to adopt "policies and techniques to achieve steady economic, social and cultural development and full and productive employment" (Article 6(2) CESCR).

3. The Duty of the State to provide such "full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual" (Article 6(2) CESCR). This duty clearly prohibits the so-called development/human rights trade-off policies of governments which promise development first and human rights and freedom later. There can be no bargaining away of freedom for bread. Both must be ensured.
4. The Right to Justice and Favourable Conditions of Work including fair wages, equal pay for equal work, safe and healthy working conditions, equal opportunity of promotion, rest, leisure, limited working hours, and periodic holidays with pay (Article 7 CESCR).
5. The Right to Form and Join Trade Unions of one's choice (Article 8(1) (a) CESCR).
6. The Right of Trade Unions "to function freely" (Article 8(1) (c) CESCR) and "to establish national federations and confederations" and "join international trade union organizations" (Article 8(1) (6) CESCR).
7. The Right To Strike (Article 8(1) (d) CESCR)
8. The Right to Social Security including Social Insurance (Article 9 CESCR). This right is important as laying the basis, both for provision of unemployment insurance and for protection of traditional

self-provisioning livelihoods as well as common property resource management systems.
9. The Right of Everyone to an Adequate Standard of Living for oneself and one's family (Article 11 CESCR and Article 7 UDHR).
10. The Right of Economic Self-Determination including the right to development and the right to livelihood (Article 1 of both CESCR and CCPR). "In no case may a people be deprived of its own means of subsistence".
11. Freedom from Slavery and Forced Labour (Article 4 UDHR).
12. Freedom of Movement and Residence within the borders of each State (Article 13 UDHR) which prohibits residence restrictions on access to jobs.
13. Protection Against Unemployment (Article 23(1) UDHR). From the above enumeration of component rights of the right to work, it becomes self-evident that several (if not all) of those rights are capable of being monitored.
For purposes of monitoring the right to work, it is useful to distinguish between the

different roles that States and governments might play: protection, promotion, progressive realization of the right, selective or systemic violation of the right. At least five specific aspects of government behaviour merit monitoring in respect of the right to work:

1. Progressive realization
2. Violations
3. Non-discrimination
4. Affirmative action
5. Duty to Protect existing jobs and livelihood.

Measures and Indicators can then be developed in respect of:
(a) employment, underemployment and unemployment;
(b) terms and conditions of employment;
(c) worker health and safety conditions (especially in hazardous industries which often demand "voluntary suicides" and in situations of economic vulnerability where "job blackmail" is all too common);
(d) associational rights and the right to organize
(e) discrimination: against women, minorities or migrant workers in respect of access to work;
(f) elimination of jobs through structural adjustment and privatization programs.

6. For a final, illustrative example, consider the pioneering work in progress of an NGO Task Force Detainees of the Philippines (TFDP). TFDP is currently developing standards and indicators for economic, social and cultural rights to respond to the needs of victims of human rights violations arising from "development aggression" which is defined to include the following practices:

- demolition
- land use conversion
- labour contractualization
- displacement
- environmental destruction

For each of the above practices of "development aggression" TDFD is developing typologies of:
- CASES: e.g.:- illegal logging,
- RIGHTS VIOLATED

- INDICATORS

With data and documentation generated by using the above measures and indicators, TFDP will be ideally placed to embark upon a strategy of enforcing human rights standards, at national and international levels, to mitigate, halt, redress and prevent environmental degradation. Thus providing very pragmatic and real-life examples of the symbiotic relationship between promoting and protecting human rights while protecting and promoting the environment.

VI. CONCLUSION AND RECOMMENDATIONS

This paper proceeds from a concern that present-day levels and practices of environmental degradation must stop if the environment local, national, regional and global is to retain its capacity to sustain human life as an integral element of ecological systems. Moreover, as the UN Special Rapporteur on Human Rights and Environment clearly demonstrates, "assaults on the environment" result in serious human rights violations. Such human rights violations must stop. Moreover, as the Preamble to the Draft Principles on Human Rights and Environment

states, "human rights violations lead to environmental degradation and environmental degradation leads to human rights violations". This vicious cycle must stop.

More effective protection of the environment becomes the prime objective and three main approaches are possible:

- implementation and enforcement of existing international and national human rights standards to defend and protect the environment,
- development of environmental human rights and implementation and enforcement thereof, as the final report of the UN Special Rapporteur on Human Rights and the Environment recommends, and
- articulation, recognition, implementation of a right to environment.

In addressing the policy and pragmatic choices involved, it is imperative that one transcends:

- the philosophical and ethical debate which has the "deep ecologists" rail against the anthropocentric nature of human rights and seeking to protect environment from people, rather than for people
- the positivist legalistic debate focused on the subject of rights and perplexed by the notion that an abstract entity such as "the environment" can be a holder of rights.

There is a clear moral, legal and pragmatic imperative for adopting the first of the above three approaches, namely enforcement of existing human rights standards. Such standards are binding and mandatory and need no extraneous justification for their enforcement. The fact that such enforcement brings with it additional gains regarding environmental protection is an incidental but highly desirable outcome.

The second of the above approaches, focusing on environmental human rights (as recommended by the UN Special Rapporteur) also merits strong support. First and foremost, there already exists a number of national, regional and international human rights mechanisms which could be relied

upon to monitor, implement and enforce such environmental human rights, now. The final report of the UN Special Rapporteur on human rights and the environment contains detailed recommendations in this regard, which recommendations deserve fullest support from UN, international and bilateral agencies, governments, professionals and civil society at large.

The third of the above approaches, focusing on a right to environment requires a more nuanced approach. It is extremely unlikely that, at the international level, consensus can be reached as to the definition, scope and context of an international right to environment. More likely, the attempt at trying to force such a consensus may well impede the highly desirable process of securing international recognition of the environmental human rights contained in the Draft Principles annexed to the UN Special Rapporteur's final report. So, rather than to expend resources and energies on the search for consensus on an international right to environment, it is recommended that such resources and energies be directed instead at the national level. It would be much easier to define and elaborate the right to environment at the national level. Indeed, the national constitutions of some 60 countries have already attempted that task as is elaborated in the second and later reports of the UN Special Rapporteur. Such an effort at the national level may well help establish at a later point of time that "state practice" has given rise to a customary rule of law recognizing an international right to environment.

Finally, there is an important, if as yet not addressed role for development indicators in helping to monitor implementation, realization or violations of both human right and the environment. Such monitoring would be invaluable in securing the more effective promotion and protection of human rights. But, for that to happen, developing indicators will need to integrate more fully, both environmental dimensions (as has been developed and is being currently tested in the indicators of sustainable development) as well as human rights dimensions (as is being currently developed by the UN Development Group within the UNDAF framework). Such efforts should be accorded the highest priority and should not be deflected or retarded by the seemingly unending ethical, philosophical and legal debates around human rights, and environment and, in particular around the right to environment.

PART TWO

CORPORATIONS AS VEHICLES FOR SOCIAL DEVELOPMENT

A. The Mandate from the UN World Summit on Social Development, Copenhagen

The World Summit on Social Development at Copenhagen (1995) marked a paradigm shift from development through aid, to development through trade and investment. This paradigm shift heralded a key role for corporations (national and transnational) as "vehicles for social development". Critics of such paradigm shift caution that it would be both extremely fortuitous and extremely rare that a perfect, or indeed even workable fit could be found between the national development priorities of a country and its peoples on the one hand and the priorities of a corporation, especially the global priorities of a transnational corporation, on the other hand.

Endeavouring to strike a balance, the Copenhagen Declaration and Programme of Action of the World Summit on Social Development added three core elements to the global consensus on development:

1. The role of the state in development must be one of providing an enabling environment for sustainable social development. This was elaborated in detail in Commitment I of the Copenhagen Declaration and Programme of Action.

2. The role of the corporation and the private sector as a key vehicle for social development was clearly recognized.

3. The role of NGOs and civil society was similarly recognized as key participants and protagonists in social development.

The Copenhagen formula thus envisages a balanced tripartite relationship between corporations, communities, NGOs and civil society; and the state. Corporations were clearly seen as the key vehicle for social development.

Public interest about corporate environmental and social responsibility, and their role in creating a sustainable economy has developed over the past 25 years. In 1970, there were only 7,000 multinational corporations (MNCs. They are also referred to as transnational companies or TNCs). By 1994 there were 37,000 MNCs with over 200,000 globally-spread affiliates (Eric: 1994). On the global level they are the most significant source for trade, technology transfer and economic growth through their role in Foreign Direct Investment (FDI) of which a third (a total of US$70 billion) is currently in developing countries (Warhurst: 1994)

The role of the state in development was reappraised at Copenhagen. Instead of being a prime actor for social development through state corporations and public enterprises, the state was to play a supportive role to corporations by providing, in the words of the Copenhagen Declaration, "an enabling environment for sustainable development". In other words, the state was to provide an enabling environment for corporations to function as key vehicles for social development. During the incredible expansion of MNCs over the past 25 years, noted above, MNCs have been lauded for their contributions towards improved social development, through providing jobs, paying taxes, building an industrial base, enhancing efficiency, earning foreign exchange and transferring technology. However, they have also been criticized and linked publicly to interference in sovereign affairs, deepening disparities in wealth, poor labour conditions, corruption, transfer pricing, pollution incidents, health and safety failings, and the disrespect of human rights (Warhurst: 1998).

Hence, the Copenhagen Declaration envisaged that NGOs, community and civil society organizations would also play a key role as participants and protagonists in social development especially in securing the accountability of corporations in respect of the

environmental and human rights impacts of the activities of such corporations. This meant that part of the task for the state in providing "an enabling environment for social development " was to provide an environment in which NGOs and civil society organizations would function autonomously and effectively and act as a check on corporate excesses. Part of the task of the

state, as well, was to provide a level playing field in which all corporate actors would be made to strictly comply with international and national standards relating to human rights, workers rights and the environment.

B. The Secretary-General's Compact

"At the January 1999 meeting of the World Economic Forum, held annually in Davos, Switzerland, the UN Secretary-General presented a 'compact for the next Century' whereby he asked the business community to help advance universally agreed principles on human rights, labour and the environment, not only because it is the right thing to do, but because it will protect their interest in an open global market." (Labonne: 1999). He alluded to the fact that the private sector has an important role to play in support of sustainable development, as it is the primary provider of jobs and income-generating opportunities.

He called upon the world's business leaders to initiate a global compact of shared values and principles "which will give a human face to the global market." His theme was "Responsible Globally: Managing the Impact of Globalization." He told businessmen to "embrace support and enact a set of core values in the area of human rights, labour standards and environmental practices." The Secretary-General suggested two ways to implement the compact: working through international agencies such as the UN, and taking action in individual corporate spheres. He asked them to ensure that human rights, decent labour and environmental standards be upheld in their own businesses. (World Economic Forum: 1999)

The corporate response to the Secretary-General's call will need to be carefully assessed and reacted, to in light of such assessment. If an approach of "corporate social responsibility" proves inadequate, there will be no choice but to pursue an approach of corporate legal accountability. Indeed, a proactive pursuit of the latter approach could well catalyze real momentum towards the former approach.

C. Corporate Obligations Relating to Sustainability from the Rio Summit

The Rio Summit on Environment and Development (which preceded the Copenhagen Summit and the Davos Forum) unequivocally adopted the concept of environmental and social sustainability of development. Developmental activities could no longer place economic profits and economic sustainability above environmental, human and social sustainability. Development that converted renewable resources into non-renewable ones by profligate overuse (e.g., wanton deforestation) was proscribed. So too was development, which compromised the abilities of future generations to meet their own needs. Sustainable development was required to meet the twin challenges of furthering:

- Intragenerational justice: development which promotes both growth and equity and human capacity-building within and between nations today; and,
- Intergenerational justice: development which meets the needs of the present generations without compromising the ability and capacity of future generations to meet their own needs.

Seven years after the Rio Summit many commentators and scholars are asking the question as to how far have we come? Is the concept of sustainable development, embodied in the Declaration,

able to meet the criteria of a legal standard? Will it be universal, mandatory, enforceable and lead to decisions regarding which people can be sanctioned? There have been some steps forward: a decision by the International Court of Justice last year in a dispute involving Slovakia and Hungary, (the Gabcikovo-Nagymaros dispute, Hungary v.Slovakia 1997 ICJ (Sept. 25)) and a very important concurring opinion by the Vice President of the Court announced that sustainable development, along with environmental impact statements, are customary principles of international law.

Seven years after the Rio Summit, environmental groups are expressing concerns about globalization of the world economy achieved through policies of privatization and deregulation which have diminished the capacities of States to enforce the criteria of sustainable development, against all of the actors within the sovereign control of the State.

In light of the Copenhagen Summit mandate to corporations to be key vehicles of social development, environmentalists are demanding that attention be directed trend of growth of corporate power without a corresponding growth of corporate accountability. Environmental critics are calling attention to the growing gap between rhetoric and performance. Between what in international human rights terminology are obligations of conduct and obligations of result.

What can corporations do in respect of their increasing obligations to sustainable development? The business community, in making its contribution to sustainability may concentrate on the following areas: finding renewable energy resources; continuing good environmental management; continuing good natural resource stewardship; and maintaining a responsible attitude to their employees and to the communities in which they operate (Lasswell: 1999). Corporations are pursuing continuous improvements concerning health, safety and environmental aspects of their operations, their products, their services and their use of material inputs. Management systems such as ISO 14000 enable corporations to recognize their potential impact on the environment. ISO 14000 integrates environmental awareness into all aspects of business activities, products and services, enabling the business to determine the extent to which impacts can be monitored and controlled. ISO also helps business allocate resources where they are more needed to protect the environment and suggests opportunities for ventures grounded in sustainability. Environmental management systems are expected to drive development toward sustainability, using technology and innovation in response to the wishes and demands of political societies and environmentally conscious consumers. (Lasswell:1999)

In order to incorporate environmentally sensitive management systems corporations are implementing in-house information and educational awareness programs that inform their management structure of environmental and socially sensitive issues. One such system companies are turning to is the development of intranets "for company eyes only with safety, health and environmental components." An intranet component can allow management to understand how to integrate safety, health and environmental considerations into their operations down at the facility level, at the plant level. The site can provide information to plants and facilities throughout the world. One company has reported in its environmental business plan an $18.5 million savings solely due to its safety, health and environmental intranet site. This site also contains tools for hazardous waste, tracking, chemical inventories and online training.

Today, the global economic landscape is awash with (critics would say littered with) a panoply of corporate and industry self-regulation initiatives. A rigorous assessment of such initiatives must be undertaken if the balanced, tripartite relationship between state, corporations and civil society, envisaged by the Copenhagen Declaration as essential for social development, is to be achieved and maintained. Is corporate self-regulation the harbinger of genuine corporate social responsibility? Or is it cosmetic, or worse, a mere token and properly characterized as "too little, too late"? Below, we review some of these initiatives and briefly examine how such initiatives have functioned.

CORPORATE SOCIAL RESPONSIBILITY AND SELF-REGULATION

Corporate social responsibility in the realm of the environment is a growing phenomenon within the boardrooms and management levels of major national and international corporations. Corporations are responding to pressure with a growing awareness of the necessity to meet environmental issues head on. There has been a proliferation of self-regulatory initiatives and organizations that advocate the self-regulatory model for effective environmental compliance. A number of companies have begun producing free-standing environmental reports or featuring environmental information in their annual reports. However before examining the steps corporations have begun to take, it is essential to understand the development and drivers behind corporate social and environmental responsibility and sustainable development.

Increasingly corporations are being called upon to be more pro-active in taking responsibilities for their actions. "Particularly in developing countries, in the absence of a strong state and empowered stakeholders, it is argued that MNCs should develop their own models of environmental and social responsibility, that go beyond acting within their more narrowly-defined legal obligations, both to shareholders and/or host governments." (Warhurst and Lunt: 1997)

Therefore corporations more and more are forced to turn to issues of social and environmental responsibilities. One source of this growing awareness has been the growing interconnectedness between human rights and sustainable development.

The concept of human rights has evolved over the years, but recently it has enjoyed an unprecedented importance. The Universal Declaration of Human Rights marked a watershed event in bringing human rights issues to the fore. A commentator explains its significance: "[i]t sees human rights as ‘natural rights-moral entitlements-which all people possess by virtue of their humanity, not their social, civil or economic status. As a result…human rights are considered universal, immutable concepts which govern ethical behaviour and which cannot be violated." (Warhust: 1998)

The nexus between corporate social responsibility and sustainable development appears in a number of Principles and Resolutions that emerged from the 1992 Rio Declaration and Earth Summit and Agenda 21. For example, Principle 10 of the Rio Declaration promotes the disclosure and dissemination of information on environmental performance. Principle 16 of Rio Declaration calls for the increased incorporation of economic instruments and environmental protection. Agenda 21 also "requests industry to contribute to the development and transfer of clean technology and the building of local capacity in environmental management in developing

countries." (Warhust: 1998) The Oxfam Global Charter for Basic Rights, for instance, is an attempt to provide a framework for addressing the relationship of human rights against which corporate self-regulation can be assessed. (Oxfam Charter: 1999)

A. CORPORATE/INDUSTRY CODES OF CONDUCT

Corporate Codes of Conduct Under the World Business Council for Sustainable development (WBCSD)

Corporate social responsibility (CSR) is the ethical behaviour of a company towards society. This concept is based on the acknowledgement that a corporation's image can be damaged by activities which are otherwise perfectly rational in economic terms. According to the World Business Council for Sustainable Development, "this means management acting responsibly in its relationships with other stakeholders who have a legitimate interest in the business—not just shareholders." (WBCSD: 1998)

CSR is an integral part of sustainable development, and has made its way to global policy. Firms have been motivated by the growing awareness of environmental and social responsibility. Accusations of social and environmental injustice can severely damage corporate reputation.

Companies are consequently under pressure from both outside and within to be more open and more accountable for a wide range of actions, and to report publicly on their performance in social and environmental arenas. In order to satisfy these growing responsibilities corporations are beginning to "argue for a more inclusive approach to commercial life, where business values are neither different nor fenced off from those of society." (WBCSD: 1998) As such, some corporations are moving towards a better understanding and institutionalization within their management structure of any social and environmental consequences arising from commercial decisions, both negative and positive. It therefore makes "sense to have a continuous dialogue with a broad group of interested parties in society." (WBCSD: 1998)

On closer analysis, CSR is not a purely ethical concept, but a long-term economic strategy. The potential damage to the image of a company is assessed in financial terms and perceived as more detrimental to shareholder value in the long run than the short-term profit made by "unethical" conduct. This is openly acknowledged by the WBCSD when it states that "[m]anagers must consider and satisfy the needs of this broader group of peoples or "stakeholders" *in order to create maximum shareholder value*." (WBCSD: 1998 - emphasis by the author).

There have been other initiatives to provide codes for corporate conduct at different levels ranging from single corporations to umbrella organizations of specific industries and general business associations. Most prominently, the 1991 International Chamber of Commerce Business Charter for Sustainable Development stipulates non-binding principles for environmental management. Others include the Caux Round Table Principles for Business (www.cauxroundtable.org) and the University of Ottawa International Code of Ethics for Canadian Business (aix1.uottawa.ca/hrrec/busethics/codeint.html). On the specific industry level, the petrochemical industry provides an excellent case study of he growing body of regulatory codes concerning social and environmental responsibility. It is important for industry to take a proactive role in promoting environmental and social responsibility in connection with their operations. Several organizations relating to the petrochemical industry have drafted more specifically designed voluntary guidelines

and codes of conduct (see Rosenfeld: 1998 and Armstrong: 1998). On the corporate level, Shell, General Motors, Novartis and Western Mining Corporation are examples of single corporations incorporating CSR into their general business policies or their specific project conduct. The policies include, for instance, health care for workers and locals, a management awareness program on human rights, and early local community consultation. (WBCSD: 1998; Corporate Hospitality, The Economist, September 27, 1999 at p. 71).

Although voluntary, these guidelines encourage conscientious best practices. They are none the less voluntary, and as such unenforceable. Therefore these voluntary codes cannot be a substitute for legislation. However, countries in the process of formulating environmental regulations may find it useful to draw on voluntary guidelines as appropriate.

Other NGOs from different backgrounds have also drafted standards for voluntary compliance. Amnesty International, for instance, has produced a checklist of human rights principles to assist multinational corporations. The principles are taken from human rights instruments such as the Universal Declaration of Human Rights, Conventions of the International Labour Organization, the United Nations Basic Principles on the Use of Force and Firearms, the UN Conduct for Law Enforcement Officials and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. (Amnesty International: 1998). They include freedom from slavery (important in respect of forced labour etc.) and discrimination, healthy and safe working conditions and freedom of association (Warhurst: 1998).

In 1997, SA8000 set forth by the Council on Economic Priorities (CEP) also provided a new standard for social accountability that incorporates human rights issues as a major component of the overall benchmark. The SA8000 standard has been designed for independent verification by an outside auditor, and by reference to several human rights instruments covers the basic issues of child labour, forced labour, health and safety, trade union rights, discrimination, discipline, working hours and pay (Warhurst: 1998).

Another standard are the CERES Principles originally established in 1989 by the Coalition for Environmentally Responsible Economics (CERES) as the Valdez Principles. CERES is a non-profit membership organization comprised of leading social investors, environmental groups, religious organizations, public pension trustees and public interest groups.

Besides broadly defined environmental principles concerning, for instance, protection of the biosphere, sustainable use of natural resources and energy conservation, one of the main tenets of the CERES principles is disclosure. CERES expressly acknowledges the implications of a voluntary standard by stating that "while CERES is a program of continuous future improvement toward that elusive goal of environmental management perfection, it is not a certification of corporate environmental policies." Sun Company, Inc. (Sun) was the first Fortune 500 company to endorse the CERES Principles. (Geltman et.al: 1997).

Industry codes are a product of industry-wide negotiation and consensus and might lead to the adoption of standards at the lowest common level of consensus. In this sense, individual corporate codes or policies can be more advantageous. Yet industry codes apply to all corporations within the industry association, which enables the exercise of peer group pressure for compliance and

precludes any one corporation from obtaining an unfair commercial advantage by reducing environmental safeguards. This - perhaps minimum - standard provided by industry association codes can prevent a race to the bottom and thus be indispensable to host countries. However, both industry codes and corporate codes usually fail to provide for independent, third-party monitoring of implementation and for effective grievance and redress mechanisms.

B. Environmental Labelling

Beginning in the early 1990s the concept of environmental labelling gave consumers an additional reason for the choice of products.

Environmental labelling seems ideal in combining environmental protection with the free-market philosophy of consumer choice and is widely supported by consumers, environmentalists, producers and governments. However, critical voices have followed the proliferation of different voluntary and mandatory labels in the last decade. Consumers find it increasingly difficult to assess the accuracy the information on the label and to place trust in labels printed by the manufacturers themselves. On a broader scale, developing countries complain that eco-label schemes in developed countries can amount to discriminatory trade measures because the producers in developing countries are unable to meet the required standards and thus lose their competitive advantage. (Gesser: 1998; Lash: 1997) The developed countries argue that eco-labels merely level playing field for competition by giving the consumer the information he wants in order to make his choice. Disputes have arisen between Austria and Malaysia over the label "containing tropical timber" and between the EU. and Brazil, over a life-cycle for kitchen paper towels and toilet paper. However, this argument has so far not been decided by either a WTO panel or the ECJ. In its 1991 report on the US-Mexican dolphin/tuna case, the WTO dispute resolution panel concluded that the US policy of requiring tuna products to be labelled "dolphin-safe" (leaving to consumers the choice of whether to buy the product) did not violate GATT rules because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced. (www.wto.org). However, this report was never adopted and is of limited legal impact.

CORPORATION-COMMUNITY RELATIONSHIPS

A. "Good Neighbour" Agreements

In order to ensure sustainable and stable operations of corporations, it is essential that a new "social contract" be negotiated between communities and the companies to ensure that communities obtain new terms and conditions, which better safeguard their long-term interests. (C. Dias: 1994) One means of addressing the concerns of community and ensuring their fullest and most effective participation is through the development of a Model Community—Industry Sustainable Development Contract popularly known as Good Neighbour Agreements. Good Neighbour Agreements implement the concepts of the standards discussed above by possibly including binding corporate commitments to community participation and benefits, access to information and monitoring and local government participation.

Negotiating "the new social contract" has not proved easy, as examples from Texas—the home of one of the largest concentration of petrochemical companies— have shown. Although companies such as Exxon, Arco and Merichem have made first steps towards community participation, the extent of their commitment, for instance, in respect of making their hazard assessment available, is

still in dispute. On the positive side, however, the Manchester local community achieved an agreement with Rhone Pulec about the operation of a chemical plant which had previously injured several people by pollution accidents. The agreement, reached with the help of an environmental organization and the support of politicians, is said to have been the most far-reaching at the time. The agreement provided, inter alia, for environmental and safety audits, hazard assessments, inspections by citizens. Besides being a legally binding contract, it was also part of the permit for an incineration installation.

The agreement is a landmark which goes far beyond the generalities and vague promises of "openness" and accountability of the Responsible Care Program of the Chemical Manufactures Association.

Towards the New Social Contract

The Manchester Community agreement with Rhone-Poulenc identifies key elements essential to a new social contract between corporation and community, through recognition of key rights. These include the community's right to know hazards, inspect the plant, negotiate directly with the company and hold the company accountable.

In recent years a "reinvention of regulation" has been advocated which places importance on two particular objectives – pollution prevention and environmental justice. Perhaps the Rhone-Poulenc-Manchester agreement will prove to be a harbinger of change. Good Neighbour Agreements (GNAs) have proved a good alternative. GNAs achieve environmental excellence by delegating power to local stakeholders to bargain with local industries and to engage in creative decision-making. This consultation results in environmentally superior results in terms of pollution prevention and environmental justice while meeting the needs of local industries at the same time. (Adriatico: 1999. For examples of GNAs see Lewis: 1997; <http://www.envirolink.org/ogs/gnp> and <http://www.yawp.com/ican/neigbor.html>) Companies with something to hide will undoubtedly fear and resist such agreements. But companies with confidence in their operations and who truly believe in accountability and responsibility will, albeit reluctantly at first, accept such agreements as the wave and way of the future.

Reinventing regulation redefines the traditional roles of industries, regulators and private citizens. Environmental management is evidence of this transformation. EMSs and auditing programs demonstrate a proactive approach and corporate initiative to improve environmental performance. Corporate initiative stands in stark contrast to the conventional attitude of industries to address environmental problems only after receiving a government directive.

GNAs potentially provide the procedure by which citizen input can be incorporated into a company's EMS and decision making process. The stakeholders ensure the external accountability of a local industry's EMS and environmental auditing practices. In addition, GNAs allow citizen participation to augment the "watchdog" functions of regulatory agencies. The symbiotic relationship that develops between industries, regulators and private citizens is characteristic of GNAs.

B. Environmental Organizations & Corporate Accountability

Environmental organizations are active in securing corporate accountability. The approaches taken

by the numerous organizations range from individual actions chosen for their public relations value and aimed at raising public pressure through symbolic effect, to less prominent lobbying work and co-operation with corporations in developing better products or standards. One of the most well known organizations, Greenpeace International, has used all these means. In Germany, for instance, Greenpeace worked together with an electric appliance manufacturer to develop an environmentally friendly refrigerator. However, the increasing power of, and competition between environmental organizations, sometimes combined with a zeal close to self-righteousness, has attracted criticism. One of Greenpeace's most successful actions in respect of public relations has also made Greenpeace the centre of a current debate about the power and accountability of environmental organizations themselves. When Shell simply abandoned its oil platform "Brent Spar" to put it out of service, Greenpeace activists entered the platform and stayed there in protest, claiming that the platform contained large amounts of toxic material. After public pressure had forced Shell to transport the platform to a dock and dismantle it, Greenpeace was criticized, inter alia, by the BBC, for deliberately misrepresenting the amount of hazardous material. Although the BBC subsequently apologized to Greenpeace, the ball of public accountability is also in the court of environmental organizations. (www.greenpeace.org)

C. Courts

Besides environmental and local groups, courts also play an effective role in halting environmental crimes. In May 1997, the Supreme Court of India ruled that the import of hazardous wastes as defined by the Basel Convention into India was prohibited. The Central Pollution Board in its environmental guidelines for ship breaking industries has also declared that old vessels containing or contaminated with any of the above substances (lead, cadium, PCB) are hazardous materials. The role of the national and international courts in re-interpreting existing human or citizens' rights to protect environmental goods has been discussed above.

D. Public & SHAREHOLDER PRESSURE

As we have seen, one of the most effective means used by environmental organizations in influencing corporate conduct is public pressure. Following public concern about genetically modified food, two of largest UK supermarket chains and the UK arms of fast food chains have recently decided to exclude GM ingredients. (The Guardian, Monday 20 December 1999).

A more direct way of addressing corporations is the exercise of shareholder influence. Shareholders can be a powerful force to be reckoned with if they believe that their financial interest or even moral concern is affected by the corporation they partially own.

Monsanto, one of the world's largest agrochemical and plant biotechnology corporations and second biggest agribusiness in the world, had long dismissed public concern about its production of the so-called terminator technology, a special type of genetically modified (GM) crops. After GM crops were being destroyed by US activists, supermarkets in Europe disavowed GM products and India and Zimbabwe banned the use of the technology, Monsanto's stock lost 35% of its value in a year, while Wall Street as a whole went up 30%. In October 1999, the company announced that it would no longer pursue research into the Terminator technology. It recognized that the company's confidence in biotechnology has been regarded as arrogance and condescension. (The Guardian, October 9, 1999 at 15)

In the Ogoni case discussed earlier, Shell Transport and Trading in the UK faced its shareholders charge on issues of human rights abuses and environment. Shareholders holding about 12 percent of the shares of the company adopted a special resolution demanding an improvement in environmental accountability and business ethics. (Financial Times, 24 March and 2 April, 1997, pp. 1 and 20, 25 respectively.)

HOST GOVERNMENT MEASURES

A. Environmental Regulations

In recent years, host governments faced with a continuing decline in the quality of the environment, have responded by adopting a plethora of environmental policies, laws and regulations, and by expanding and reorganizing administrative agencies in order to better enforce such laws. A complex range of regulations and institutional mechanisms have evolved, aimed at controlling the adverse environmental effects of industrial development. The main instruments of regulation are command and control regulations and community regulation.

Command and Control Regulations

There has been a proliferation of command and control regulations both in developing countries and developed countries. The norm in environmental regulations is that Governments set standards and procedures to restrict the amount and types of pollution allowable. (i.e. they set maximum permissible discharge levels of minimum levels of acceptable environmental quality).

The standards are mandatory and are backed by sanctions which punish breaches of permissible limits. The regulations may be incorporated directly in statute law or may take the form of statutory instruments. Sometimes they may also be incorporated directly into contract, agreement or license. The license can be revoked if environmental standards are breached. Regulations standards, which vary from country to country can be classified as emission standards, which control the actual amount of pollution which is discharged from a particular source, quality standards, which control the quality of the environment into which pollution is emitted, and process or products standards, which do not specify the permitted pollution, but prescribe a specific production process or the quality of the end product.

Critics argue that command and control regulations have not always proved an effective way to control pollution, as they often tend to define both floor and ceiling requirements.

Command and control regulations may cause particular problems for developing countries in that they require high skills and resources on the side of the legislator and particularly the government enforcement agencies. Traditional government regulatory approaches have focused on penalties for pollution offences. Unless the penalties are severe enough and their enforcement reasonably strict and comprehensive, polluters may chose to prefer try evading or even paying the fine rather than incurring the cost of abatement.

Even where modern "best available technology" approaches have been implemented, critics argue that even when aiming to achieve flexibility in respect of technological change, command and control approaches are conceptually flawed as they are based on pollution abatement rather than prevention.

While, clear well enforced environmental legislation is certainly required, economic liberalization and the emergence of new environmental stakeholders at all levels from the global to the local, represent a broadening of the available instruments with which to achieve environmental goals.

Community Regulation
In developing countries where formal regulation is weak or absent, many communities appear to have struck bargains for pollution abatement with local factories. This phenomenon is called "informal regulation".

Acting in their own self-interest, communities pursue levels of environmental quality which are desirable and feasible under local conditions.

Widespread informal regulation in a developing country represents a promising foundation for a decentralized regulation policy. Local communities, the media and market forces can be powerful allies in the struggle against industrial pollution.

For example in 1993, Indonesia introduced the Program for Pollution, Control, Evaluation and Rating known as PROPER. The program was designed to receive pollution data from factories, analyze and rate their environmental performance, and disseminate the ratings to the public.

The idea behind PROPER was simple: by providing information about pollution in a form that non-specialists could understand, the initiative sought to tap the growing power of the media and public opinion to promote cleaner industry. It was envisaged that public performance ratings would attract two major allies to the pollution reduction effort: local communities, which would pressure nearby factories with poor ratings to improve; and the financial markets, which might react adversely to firms with low ratings.

The rating system was well understood by the public. The results were covered in the national press. Companies with poor ratings were given a chance to improve their performance before their names and ratings were disclosed. The primary force driving these improvements was concern about potentially strong negative responses from local communities and markets. The program has been effective in moving poor performers toward compliance and in motivating some firms to control pollution beyond the required level to invest in pollution prevention equipment.

PROPER'S ratings are also designed to reward good performance and to call public attention to polluters who are not in compliance with regulations. Armed with this information, local communities can negotiate better environmental arrangements with neighbouring factories, firms with good performance can advertise their status and earn market rewards, investors can accurately access environmental liabilities, and regulators can focus their limited resources on the worst performers. Transparency is also increased because the environmental agency is subject to scrutiny.

Public disclosure models have also been adopted, or are envisaged, in Indonesia, the Philippines, Colombia and Mexico.

Community pressure and negotiated agreements for cleanup and compensation are common when polluters are identifiable and employment alternatives are not too scarce. The surprising strength of this informal regulatory system raises a hopeful prospect for cost-effective pollution reduction. With better information and some legal support, community-level negotiators might well play a valuable regulatory role.

B. Economic Instruments

There are emerging concerns shared by both governments and industry about the limits and constraints associated with the regulatory approach. Regulators, bureaucrats, environmentalists, business persons and citizens have come to recognize that market-based instruments belong in our portfolio of environmental and natural resource policies. The growing interest in the use of economic instruments stems mainly from a perceived lack of incentives for continuous improvements and an interest in finding more cost-effective ways for both government and industry to achieve these objectives.

There is no clear, agreed definition of what constitutes an economic instrument. It is clear, however, that the term "economic instruments" does not mean the complete withdrawal of government form environmental regulation. Economic instruments involve intervention by government in the marketplace through mechanisms such as pollution taxes and charges; tradable pollution permits; resource quotas; deposit-refund systems (as with glass, bottles); performance bonds; resource saving credits; differential prices (as with unleaded versus leaded gasoline); special depreciation processions; and the removal of subsidies and barriers to market activity.

The main perceived advantage of all economic instruments is that they use market mechanisms to change corporate conduct. A firm's compliance costs tend to be lower with economic instruments. The governments' administrative costs may be lower as well, because administrative enforcement is in part replaced by market forces pressuring the companies into finding innovative and cost-effective solutions. Economic incentives in the form of taxes or charges generate income which can be earmarked for environmental improvement measures. (Ogus: 1994)

However, economic instruments require that environmental goods are valued and priced in specific monetary terms. After a period in which the implementation of economic incentives was the height of regulatory fashion, critics argue that the "biggest disadvantage of economic instruments lies in the difficulties in computing environmental costs accurately so as to prevent the concept of 'full-pricing' from being little more than an educated guess, instead of being a scientifically precise calculation." (Schmidheiny: 1992)

C. Mixed Approaches

The reality in all countries today is that environmental policy is implemented and enforced through a complex mix of command and control regulations, community regulation, corporate and industry self-regulation and economic instruments. Some of the criteria guiding policy makers in finding the optimal mix include efficiency, cost-effectiveness, permitted flexibility of industry response, predictability, creating a level playing field for competitors and transparency of compliance.

D. Right to Know and Power to Act Legislation

An important new instrument for advancing environmental policy and compliance is legislation

creating the right to know, the duty to disclose and the power to act. Participation is intrinsic to good governance. Indeed, participatory development can be thought of as a local-level reflection of good governance. Transparency enables people affected by development plans to know the options available to them. Accountability of government structures and officials to local organizations reinforces macro accountability. Due process of public hearings and other local-level consultations ensure that people affected by development activities can voice their concern, debate alternatives, voice and negotiate compensation.

Right to Know

The right to know is especially important in environmental matters, since environmentally harmful activities are often long-term effects and can often not be assessed without access to scientific information. Another example is government decisions to issue permits to mining companies may displace people and deprive them of their lifestyles and livelihoods, has the government a duty to notify them not only to know about the permit, but also about the potential effects?. The Brundtland report argues that when the environmental impact of a proposed project is particularly high, public scrutiny of the case should be mandatory and wherever feasible, and the decision should be subject to prior approval, perhaps by referendum. The right to know can only be effective and have meaning if there is a right to participate. Several countries (e.g. India and the U.S.) have been enacting and implementing right to know legislation.

Duty to Disclose

The judicial correlative of the right to know is the duty to disclose. This duty may vest in the corporation, in federal or local government or both. The duty to disclose may relate to the stockpiling of ultra-hazardous substances, to pollutants or discharge of effluents; to hazardous processes and practices or to accidents, leaks or disasters.

European Union

In the area of environmental information in Europe, the most significant development in recent years is the adoption by the European Community of Directive 90/313/EEC on freedom of access to environmental information. The Directive represents a radical break with the tradition of official secrecy in most member states in that it gives anybody an actionable right to access environmental information from public authorities. Under the earlier Seveso directive (Directive 96/82/EC of 24.7.1982), industry has to provide full information to "competent authorities" specified by national laws, and the information selectively made available by these authorities to the public.

The Power to Act

The right to know and the duty to disclose would be meaningless without the power to act upon what one knows and in respect to what is disclosed. The power to act usually amounts to the community's right to inspect; the right to demand enforcement and implementation of standards by appropriate government agencies; the right to move judicial authorities for appropriate directives, orders redress or remedies; and the right to demand corrective and/or preventive measures from the company involved.

In the Indian case of *Bombay Environmental Action Group v. Pune Cantonment Board* (Bombay High Court, A.S. Writ Petition No. 2733 of 1986) for instance, the court held that the concept of an

open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression.

E. Environmental Auditing

Environmental auditing is usually defined "as a tool for evaluating a firm's current and past compliance with environmental regulations." (Harris: 1996). In the United States, the environmental audit as defined by the EPA and adopted by several industries means "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."(Harris: 1996) These definitions have evoked controversy about whether they are sufficiently broad to include inspections, assessments, surveys, and evaluations, or whether they provide only little guidance to environmental managers or attorneys. (Harris: 1996)

"During the last decade or so environmental auditing has expanded from essentially a transaction tool to a multi-faceted business policy." (Harris: 1996) For example, as business liability grew so did the use of the environmental audit. There are several legal and economic benefits associated with the environmental audit. For instance, "[a]lthough environmental auditing program can be expensive to administer, they are a proactive tool that can prevent and reduce fines and penalties assessed by regulatory agencies for non-compliance." (Herbert: 1993) Environmental auditing can benefit a corporation financially because of the substantial savings involved in changing corporation's environmental policies. In the legal sphere the main benefit of an environmental auditing program is to allow corporations to determine whether they are working within the applicable environmental regulations. This is increasingly important due to the fact that civil and criminal environmental liability is on the rise.

For the same reason, a sound environmental program may attract and maintain investors who will want to seriously assess the environmental compliance of a corporation before investing. Besides, an extensive environmental auditing program can foster favourable publicity and convey a positive corporate image to the public (Harris: 1996).

HOME GOVERNMENT MEASURES

A. Investment Promotion and Guarantee Schemes

Two of the more prominent and innovative organizations that tie investment to environment and social responsibility are the Overseas Private Investment Corporation (OPIC) and The Multilateral Investment Guarantee Agency (MIGA).

OPIC (U.S.)

OPIC is a U.S. government agency with the mission to facilitate the participation of private capital and skills from the United States in the economic and social development of less developed countries and areas, and countries in transition to market economies. (www.opic.gov).

OPIC has instituted certain environmental standards used to determine whether a given project will pose an unreasonable or major environmental, health or safety hazard, or will result in significant degradation of national parks or similar protected areas. These standards are drawn from various sources including World Bank guidelines, World Health Organization guidelines and input from a

host of NGOs. However, the enforcement if these standards through the cancellation of political risk insurance has proven difficult. When PT Freeport threatened litigation against OPIC's measures, OPIC had to retreat in the face of substantial legal costs. (OPIC: 1998).

MIGA

MIGA is an international organization and belongs to the World Bank Group. Founded in 1988, it insures investments in developing countries against non-commercial risks. MIGA has instituted a comprehensive environmental assessment policy for all proposed projects that seek its investment guarantees. In addition, MIGA requires that all assessments consider natural and social aspects in an integrated way and takes into consideration 'country conditions; the findings of country environmental studies; national environmental actions plans…the project sponsor's capabilities related to the environment and social aspects; and obligations of the country under international environmental treaties and agreements relevant to the project.' (http://www.miga.org)

B. Environmental Liability

In developed countries, environmental standards are becoming increasingly stringent and have moved from regulating pollutants such as sulphur dioxide (SO2), to controlling, for example, the quality and quantity of industrial wastes, the transboundary shipment of hazardous waste, acid mine drainage, and heavy metals releases.

Liability rules are a means of ensuring compliance with these standards. Compliance can be achieved through a variety of legal means ranging from preventive measures and clean-up duties to the imposition of financial liability and environmental performance bonds. Financial liability, for instance, is a relatively recent phenomenon, which owes its evolution largely to the development of "Superfund" legislation in the United States, under which the Environmental Protection Agency (EPA) and States, can determine liability for the remediation costs hazardous sites by naming of one or more previous site owners operators.

LAW AGAINST LAW: THE EROSION OF THE GLOBAL RULE OF LAW

There is a growing concern that the newly emerging body of international trade and investment law is supplanting pre-existing international law relating to human rights, labour and the environment. The 1992 Convention on Biological Diversity (CBD) for example, appears to be on a collision course with the 1996 Agreement on Inter-Related Aspects of Intellectual Property Rights (TRIPS) under GATT. The conflict is epitomized by the case involving India's neem tree, as described by Jacoby and Weiss (1997): The neem tree is known as "curer of all ailments". Indians, have, for years, used the neem bark to clean their teeth, neem-leaf juice to prevent skin disorders and to control parasitic infections; and neem tree seeds as a spermicide and insecticide. Alerted to the useful properties of the neem seed, researchers have identified Azadirachtin as one of the seeds active substances. Azadirachtin is a powerful insecticide that is not harmful to humans. In 1992, the U.S. patent office issued to W.R. Grace and Co. a patent covering both a method for stabilizing Azadirachtin in solution and the stabilized solution itself. While the natural neem extract has a shelf life of only a few weeks, the stabilized solution retains its potency for several years thereby making it more useful to the pesticide industry and to the farmers.

On the one hand, the Grace story is one of successful Western improvement and commercialization of traditional biocultural knowledge. But on the other hand it is seen in the eyes of some traditional people, as a classic example of inequity and commodification of knowledge. A coalition of 200 organizations from 35 different countries filed a petition with the US Patent office seeking to invalidate the Grace patent. The petition was dismissed. The petition reflects the growing anger of developing countries against corporations that invest in improving traditional technologies and profit from their commercial development, without compensating the traditional people who provided essential materials. Developed countries do not protect, or even recognize, any intellectual property rights in traditional knowledge or traditional plant varieties. Yet, the U.S. and other developed countries are pressuring developing countries to adopt and enforce Western-style intellectual property rights and to fully comply with the TRIPS agreement.

Art 27 of the TRIPS Agreement allows patenting of "microorganisms, non-biological and microbiological processes and plants. This raises the question whether patent rights, or a sui generis system of property rights, should be granted on material or information derived from natural sources." (Tejera: 1999). The provisions in the TRIPS agreement fail to provide adequate intellectual property protection for traditional knowledge. (Tejera: 1999).

The agreement states that if nations fail to create intellectual property laws or conform under the TRIPs agreement, the WTO can impose sanctions upon them. (Tejera: 1999)

In contrast to TRIPS, the CBD recognizes that knowledge is held by indigenous communities instead of just a single owner. (Tejera: 1999) however, the CBD is criticized for permitting governments of developing countries to sell indigenous peoples' knowledge instead of preserving it. (Sarma: 1999). The CBD has specific provisions relating to access to genetic resources and the sharing of benefits. It also contains provisions relating to the transfer of technology and financial resources to developing countries.

The CBD provides a substantive and procedural framework for negotiations between providers and users of genetic resources aimed at achieving equitable results. In respect of IPRs, under Art 16 (5) and Art 22 of the CBD, if a country can establish that IPRs run counter to conservation, sustainable use and/or equitable benefit sharing it might be justifiable to exclude such IPRs (Kothari: 1999). However, this is subject to national legislation and international law. TRIPs is "international law" in that sense and limits the autonomy of signatory nations under Article 3 of the CBD since actions taken pursuant to Article 3 may infringe the TRIPS agreement. The TRIPS agreement as latter in respect of CBD, would prevail over CBD according to the Vienna Convention on the Law of Treaties, if both the states are parties to both the Conventions. However, as CBD deals with the protection of public interest, which is not recognized by TRIPS, the public interest provisions of CBD should prevail over TRIPS.

In order to minimize the negative impacts of TRIPS, it is desirable to come with up regimes, which underscore conservation, sustainable use and equitable benefit sharing. Intellectual property rights should be developed so as to accommodate the concerns of indigenous peoples as well as environmental concerns regarding the conservation of biological diversity.

Besides developments at the international level, there are considerable developments at the national level. Developing countries such as: Costa Rica, Eritrea, Fiji, India, Peru, Philippines are enacting legislation which responds to the TRIPS and CBD controversy. Developing countries are concerned with protecting indigenous knowledge from being "pirated" and used in IPR claims by industrial/commercial interests: and, with regulating access to biological resources so that "biopiracy" by the industrial countries would be arrested and communities would be able to gain control and benefits from their use.

Some countries such as India are passing their own legislation to conserve biodiversity and to protect the rights of its scientists, breeders and farmers. Although such legislation enables countries to protect their resources, it tends to impede free trade and is contrary to TRIPS. The conflict has been analysed in terms of a cultural clash between North and South, "in which the North expects signatories [of TRIPS] to conform their national IPR laws to its Northern-based PR provisions." (Sarma: 1999).

So far, no charge has been brought by one country against another country challenging that its IPR regime has violated Art 8(j) of the CBD by not giving adequate protection to the informal innovations of indigenous or local communities. The CBD does not have dispute resolution mechanisms unlike the GATT Dispute Panel under the WTO.

Countries like India have suggested that all IPR applications, which are related to biodiversity, and biodiversity related knowledge, should be posted on the Clearing House Mechanism (set up under the CBD) giving concerned countries and communities/persons an opportunity to object if they feel that their rights have been incorporated by some countries in their domestic legislation. Other mechanisms suggested to protect indigenous and local community knowledge mainly focus on other forms of IPRs such as copyright and know-how licenses (see Posey et. al.: 1996), community-based IPR and resource rights regimes (see Shiva and Holla-Bhar: 1997, www.grain.org); Posey et. al. (1996), granting only "defensive" IPR with anti-monopolizing clauses. Legal challenges or even civil disobedience have also occurred.

The above conflict of law between TRIPS and CBD is but one example of the serious problem of law against law: international trade and investment law versus international environmental and human rights law. For instance, the right to do business under the NAFTA Agreement has been successfully invoked by corporations against Canadian provincial and federal environmental policies and laws. A corporation manufacturing ethyl (a gasoline additive banned in several European countries) sued the government of British Columbia for enacting legislation banning the use of ethyl. The government was forced to make a settlement running into millions of dollars. Similarly, a corporation in California, importing water from Canada, has sued the Canadian government challenging its policy of banning the export of Canadian freshwater.

Coupled with policies of privatization and deregulation, recent international trade and investment law (under WTO, NAFTA, APEC) are leading to a serious erosion of the global rule of law, creating problems of access, price, quality and leading to violations of human rights caused or accompanied by environmental degradation. This is a problem, which merits both greater recognition and effective redress.

CONCLUSION AND RECOMMENDATIONS

It is important to note that the Copenhagen Declaration approach of relying upon corporations to be the key vehicle for social development is taking place at a time of rapid economic globalization. However, as the 1999 UNDP Human Development Report indicates, the least developed countries, with 10% of the world's population, have a share of only 0.3% of world trade--half the share they had two decades ago. For 44 developing countries, with more than one billion people, the ratio of global trade to GDP has been consistently falling. The terms of trade for the least development countries have declined a cumulative 50% over the past 25 years. More than one-half of all developing countries have been bypassed by foreign direct investment, two-thirds of which has gone to just eight developing countries. The least developed countries lose $6 billion a year in trade imbalance, of which $1.2 billion is in sub-Saharan Africa alone. Globalization offers opportunities for poverty alleviation but only if it is managed carefully and with greater concern for global equity.

Moreover, as a result of economic globalization achieved through privatization, we are witnessing the abdication by governments of their responsibility to provide and ensure basic services such as clear water and health. Privatization is creating problems of access, price and quality. Moreover, economic globalization is being achieved through deregulation and this had led to a serious global erosion of the rule of law. Decision-making authority is being transferred outside governments to corporate board rooms and international organizations of trade and finance and is being exercised in a manner that is not transparent, participatory or accountable.

We are increasingly hearing about a much-touted paradigm shift from development through aid to development through trade and investment. However, as one commentator puts it, "The paradigm shift may be many things. But is clearly not development. Under such paradigm shift, development will be consumption driven rather than being directed by the needs and priorities of the country. By definition, it will not be sustainable since growth can only be sustained in this paradigm by ever-escalating levels of production and consumption. Unless we end the race to consume, we may well end the human race. Moreover, such a paradigm of development is destructive to human and humane values celebrating instead the values of selfishness and greed". (Dias: 1999)

In any event, in the current context for social development, twin tasks need to be addressed with urgency:

- The accountability of international institutions of development, finance and trade to the standards contained in international human rights law, environment law and labour law must be established. It is euphemistic and disingenous for the World Bank to recognize that it is sometimes (often) involved in "risk-prone projects" that create "project-affected peoples". Is it equally disingenous for the International Monetary Fund to disclaim responsibility for the human, social and environmental impacts of the structural adjustment programmes it prescribes so stringently.

- The accountability of transnational corporations to the above preexisting laws, must also be secured as a matter of urgency. After the World Summit on Social Development, corporations are being viewed as main vehicles for social development. Under the present

> regime of economic globalization, transnational corporations have been entrusted with unparalleled authority and power. But there have been no corresponding accountability mechanisms to address the exercise of such powers. Recognizing this fact, Secretary-General, Kofi Annan, in his speech at Davos, has called upon corporations to make a social compact by adopting the international human rights framework. But, clearly, the matter is too important to be left solely to the volition of the corporate actors.

Moreover, the trend of erosion of the rule of law, globally, needs to be arrested. Corporations, suing to enforce their right to do business under NAFTA-type agreements, cannot be allowed to override the well-established, preexisting bodies of human rights, environment and labour law.

Corruption in business transactions and economic affairs must be effectively addressed. Corruption constitutes a serious drain on resources available for development. Monies, sitting idly in Swiss banks, represent a lost opportunity for financing development. Moreover, the moral costs of corruption and abuse of power and authority contribute greatly to the erosion of governance and the rule of law. But it should be clearly recognized that a serious effort in fighting corruption requires concerted and complementary action in both the home country and the host country of the investor.

The corporate, self-regulation model does have a role to play. But it cannot serve as a substitute for corporate accountability and liability: both civil and criminal.

There is a continuing need to employ regulatory models. But such models need to be debureaucratized, made more flexible and balanced by efficacious use of economic instruments as well.

Existing Codes of Conduct on Multinationals Corporations (such as ILO Code) need to be used more effectively and imaginatively. Additionally, efforts should continue, in bodies such as the UN Commission on Sustainable Development, to initiate global negotiations around a legally binding code of conduct on transnational corporations.

Finally, as the reports of the UN Special Rapporteur on Human Rights and Environment recommend and detail, existing international human rights standards and mechanisms should be fully utilized to ensure the fullest accountability of corporations: multinational and national. Only then can the Copenhagen Declaration hope of corporations becoming key vehicles of social development begin to move from the realm of rhetoric to reality.

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