The Role of Law in Sustainable Development: A Case Study of the Petroleum Industry in Nigeria

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Dedicated to Binta and Tida

Abstract

This thesis studies the normative significance of the concept of 'sustainable development' in international law, and suggests ways through which legal norms and processes could contribute to the realization of that objective. It is argued that sustainable development emerged at the international level as a result of several discursive processes involving States, individuals, non-governmental organizations and issue-oriented groups. This conceptual pedigree challenges the traditional view of international law as law made exclusively by States. Since its elaboration by the Brundtland Commission in 1987, the concept of sustainable development has enjoyed increasing acceptance by States, organizations and individuals and has been invoked in a number of judicial decisions. This has prompted some argument that the concept has evolved into a rule of customary international law. This thesis argues that the normative significance of sustainable development is not dependent upon its status as a rule of customary international law. Instead, it is viewed as a legitimate expectation that States and other actors at the international and domestic level should conduct their affairs in a manner consistent with the realization of economic development, environmental protection and social development as non-hierarchical objectives in the interests of current and future generations.

These ideas are pursued in the context of a case study of the petroleum industry in Nigeria. It is argued that in order for the legal regime governing that industry to contribute to sustainable development, it must seek to reconcile economic objectives with environmental and social concerns. To do this, I propose that the precautionary principle, environmental impact assessment processes, the polluter-pays principle and public participation in decision-making need to be introduced into domestic law.

However, the Nigerian situation demands more than structural legal reform. For those reforms to be meaningful, they must be anchored upon a proper governance environment including mechanisms to curb governmental corruption and the abuse of power, adherence to the rule of law, promoting a role for civil society, and enhancing the capacity of legal and judicial institutions for rigorous and consistent application of the law across the full spectrum of social, especially governmental and corporate conduct. The thesis then draws implications for sub-regional (West Africa) and multilateral investment law making.

Résumé

Cette thèse étudie la portée normative du concept du « développement durable » en droit international, et suggère des moyens par lesquels les normes et les processus légaux pourraient contribuer à atteindre l'objectif proposé par le concept lui-même. L'auteur défend la thèse selon laquelle le développement durable a émergé au niveau international comme le résultat naturel de nombreux processus discursifs auxquelles ont pris part des entités telles que les États, les individus, les organisations non-gouvernementales et les groupes d'intérêts (lobby). Ce cadre d'analyse remet en question l'idée traditionnelle selon laquelle le droit international est la création unique des États. Depuis son élaboration par la *Commission Brundtland* en 1987, le concept du développement durable jouit d'une acceptation toujours plus grande des États, des organisations et des individus; sans compter que le concept a été invoqué dans plusieurs décisions judiciaires. Cette évolution a incité quelques auteurs à soutenir que le concept est devenu une règle de droit international coutumier. Dans cette thèse, l'auteur soutient pour sa part que la portée normative du développement durable ne dépend pas d'une reconnaissance en tant que règle de droit international coutumier. Plutôt, le développement durable est considéré comme une attente légitime générale que les États et les autre acteurs qui oeuvrent aux niveaux domestique et international doivent conduire leurs affaires d'une manière compatible avec la réalisation du développement économique, de la protection de l'environnement et aussi du développement social tous compris comme des objectifs, non-hierarchisés, qui font partis des intérêts des générations actuelles et futures.

L'ensemble de ces idées sont avancées et débattues à partir de l'examen d'une décision portant sur l'industrie du pétrole au Nigeria. Cette thèse tente de montrer que, pour que le régime légal qui gouverne cette industrie contribue au développement durable, celui-ci doit rechercher à réconcilier les objectifs économiques et les préoccupations sociales et environnementales. Afin d'atteindre ce but, plusieurs solutions juridiques sont envisageables tels que l'adoption du principe de précaution et du principe de pollueur-payeur, la mise en place de processus d'étude des impacts environnementaux et la mise en place de structures permettant la participation publique au processus décisionnel au niveau domestique.

Toutefois, la situation Nigériane demande plus qu'une réforme structurelle du droit. Pour que ces réformes soient porteuses de vrais changements, elles doivent être

ancrées dans un contexte de gouvernance adéquate qui prévoit des mécanismes réduisant la corruption gouvernementale et l'abus de pouvoir, des mécanismes capables de promouvoir l'adhérence à la primauté du droit et l'importance de la société civile et, enfin, des mécanismes en mesure d'améliorer les institutions légale et judiciaire de façon à ce qu'elles fassent l'objet d'une application suivie, uniforme et rigoureuse dans tous les champs de la société et, plus spécifiquement, auprès de l'élite gouvernementale et corporative. Cette thèse tire des conclusions pour l'ensemble de la région ouest-africaine ainsi que pour l'ensemble du domaine de la création du droit pour l'investissement multilateral.

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Introduction

The process of globalization - the collapse of territorial barriers to free movement of goods, services, capital, and information – has, since the end of the Second World War, brought about significant changes in the structure of international society. One of the implications of this process is a greater confluence of cause and effect relationships between international action and national consequences, and a resultant diminution in the power of the nation-state. The speed at which information travels across borders due to advances in telecommunications and satellite systems, has had unprecedented effects on international economic activity, resulting in never-before-seen increases in global economic output. The annual value of global trade is now estimated at several trillion dollars.[1] Globalization has also meant increasing cross-cultural interaction and influence, mainly resulting from Western media penetration of other societies.

Multinational corporations (MNCs) are one of the principal actors and beneficiaries of the process of globalization. In reaction to the collapse of tariff and non-tariff barriers to international trade that has resulted from eight successive rounds of trade negotiations under the auspices of GATT, and the advances in information and communication technology, these corporations have expanded their production activity across the globe. UNCTAD has recently estimated that there are some 65,000 multinational corporations with about 850,000 foreign subsidiaries, accounting for sales of some $19 trillion in 2001.[2] For many developing country governments, foreign investment by multinational corporations is now seen as a possible engine of economic growth, as a source of capital, skills, knowledge and technology. This perception however developed over several decades, as attitudes towards foreign investment shifted.

During the period following independence in the 1960s, many developing countries adopted policies geared towards economic independence, and therefore largely viewed multinational corporations as neo-imperialist agents of their home states. Foreign investment was routinely discouraged in many sectors of the economy, which were reserved for state-owned enterprises. As detailed in Chapter two, many

[1] United Nations, *Report on the World Social Situation, 2001* (New York: United Nations, 2001) at 40 estimates the value of world trade at $10.7 trillion at the end of 1998.
[2] UNCTAD, *World Investment Report 2002: Transnational Corporations and Export Competitiveness* (Geneva: United Nations, 2002).

developing countries were, during this period, influenced by Marxist thinking and based their development policies on the precepts of dependency theory. Thus, import substitution, state ownership of industry, strict regulation of national markets, and disengagement from the international economy were the hallmarks of development policy during this era.

Interestingly, the 1960s and 1970s was also the period during which the 'law and development' movement emerged and was at its height in the United States. In contrast to the Marxist influences of dependency theory, the law and development movement was based on a Weberian paradigm and emphasized the centrality of law (in its Western incarnation) to processes of economic growth and development. As will be shown in Chapter two, the attempt to transplant Western legal liberalism to developing countries during the 1960s enjoyed a short, unhappy life. Part of the reason for failure was the flawed assumption that Western law could be applied universally, irrespective of social, cultural, and religious context. Yet, a revamped law and development movement regained prominence in the 1990s, following the collapse of communism in the former Soviet Union and Eastern Europe. The new approach, spearheaded by development assistance and finance institutions such as the World Bank, is also based on the introduction of Western law and governance systems to post-communist societies. However, Western law is no longer imposed *carte blanche* as a universal norm. Instead, there is a conscious effort to place legal reform within the context of the particular country's history and culture, and in light of their clearly established development aspirations and priorities.

To return to the direction of economic development policy, the hostile attitude to foreign investment that was displayed by developing countries in the post-independence period changed in the 1980s.This was the result of several factors in the international political economy. First, the economic recession in the industrialized countries implied that these countries had reduced funds available for development assistance. Secondly, the debt burden of many developing countries made them unattractive clients for commercial bank lending. Thirdly, the dynamic 'Asian Tigers' of Hong Kong, Singapore and Taiwan were living success stories of export-oriented and investment friendly approaches to economic development that many developing countries thought worthy of emulation. Consequently, development policy began to shift from import substitution and state control, to privatization of state-owned

enterprises, the encouragement of foreign investment through liberalization of market conditions, and the promotion of export-oriented growth strategies.

In addition to the structure of the international economy, another reason for this paradigm shift was the "Washington Consensus". This describes the view of the Bretton Woods Institutions, held since the 1980s, that the way toward structural adjustment of developing country economies was an emphasis on markets as sources of efficient resource allocation, on privatization of state-owned enterprises, and on the establishment of linkages between domestic and global markets. The consensus also underscored the significance of law to the development process, advocating liberalization of domestic legal regimes so as to provide an enabling environment for foreign investment.[3] In Africa, the immediate result of these shifting perspectives on development policy was that a flurry of new investment legislation was enacted across the continent.[4] The primary objective of this wave of investment law-making was to liberalize domestic markets by removing sectoral restrictions on the entry of foreign investment, and to promote and protect such investment through minimum standards of treatment such as national treatment, guarantees against expropriation, the payment of compensation and due process in determining same, access to third-party (mainly international) dispute settlement, and free repatriation of profits and dividends. At the same time, African countries granted extensive fiscal incentives such as import duty waivers and tax exemptions, and eliminated performance requirements relating to employment generation, local content minima, and export quotas.

This process of liberalization of domestic investment law essentially replicated the process of liberalization of international trade rules. The emphasis was on market conditions, and the creation of an enabling environment for business. From a sustainable development perspective, it is apparent that both these processes of liberalization failed to integrate public interest concerns such as environmental and human rights protection, and equitable distribution of wealth across society.

At the international level, liberalization of international trade has led to a massive growth in economic resources. However, the figures mask important variances between industrialized and developing countries. At the domestic level within developing countries, increases in economic growth fail to account for

[3] D. M. Trubek, "Law and Development: Then and Now" (1996) A.S.I.L Procs. 223, at 224.
[4] N. Kofele-Kale, "Host-Nation Regulation and Incentives for Foreign Private Investment: Analysis and Commentary" (1990) 15 N.C.J. Int'l & Com. Reg., 361.

significant differences in welfare between the rich and poor. According to the United Nations, while global trade has increased at an annual rate of 6.25 per cent between 1980 and 1998 rising to a total value of US$10.7 trillion, this increase was not evenly experienced across the world.[5] On a per capita basis, annual growth stood at only one per cent between 1990 and 1998, while some regions, especially the transition economies and Sub-Saharan Africa, experienced negative growth rates.[6]

In addition to variances in human welfare across and within countries, advances in knowledge and scientific understanding have made it increasingly clear since the 1960s that processes of economic growth were having unprecedented adverse effects on the natural environment. Since the environment provides the basis for survival and the resources for economic growth, a sustainable development critique of processes of economic liberalization holds that limits must be placed on the manner and extent of resource exploitation so that the basis for future economic growth is not undermined.

The aim of this thesis is to study the concept of sustainable development, its normative significance and what the role of law might be in its realization. While ideas underlying sustainable development have been around international and domestic societies for sometime, the concept was brought to international prominence by the report of the World Commission on Environment and Development (the Brundtland Commission) which was published in 1987. The WCED defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[7]

I argue that sustainable development implies a process of decision-making that integrates considerations of economic growth, environmental protection, and social development at all levels of international and domestic policy. The need to integrate environmental protection in development policy and planning can be justified for several reasons: the environment is a life-support system; it is the source of all economic resources and a sink for the by-products of economic activity. The environment also possesses intrinsic value. The other reason for focusing on sustainable development relates to the disparity in levels of welfare, despite the

[5] United Nations, *Report on the World Social Situation 2001, supra* note 1, at 40.
[6] Ibid., During the same period, real per capita annual growth was -4.3% for transition economies, and -0.4% for Sub-Saharan Africa.
[7] World Commission on Environment and Development, *Our Common Future,* (Oxford: Oxford Univ. Press 1987), at 8.

massive amounts of wealth created as a result of globalization. I argue that current levels of poverty in developing countries imply a moral imperative that poverty alleviation and the quest for social development must be prime concerns of governments and people everywhere. The value of studying 'sustainable development', as the concept that brings these three concerns of international society together, and doing so from a legal perspective, can hardly be overstated.

A study on the normative significance of sustainable development makes a few assumptions: first, it is assumed that the view of development as equivalent to economic growth is inadequate because it masks significant variances in human welfare between and within countries. Secondly, measuring development through increases in GDP fails to take into account important externalities of the growth process such as environmental and resource degradation, and the fact that finite as it is, the environment cannot sustain processes of economic growth and industrialization on a business as usual scenario. Thirdly, it is assumed that legal norms could play an important role in shaping discourse and decision-making within national societies and international regimes towards the objective of sustainable development.

In the first chapter of the thesis, I examine the history, meaning, and legal significance of sustainable development and suggest ways through which law could contribute to its realization in domestic and international society. While I make those suggestions, I realize that differences in approach and emphasis may be necessary depending upon the nature of the international regime or domestic law being dealt with. For example, I suggest that the precautionary principle, environmental impact assessment and public participation in decision-making are the key process norms that need to be integrated into most decision contexts so as to facilitate a transition to sustainable development. In the case of Nigeria, I make the further suggestion that the polluter-pays principle needs to be introduced so as to ensure the internalization of the costs of oil production. In effect, my suggestions are not intended to be exhaustive, but rather to contribute to the debate on the range of normative options that could be taken so that law could contribute to sustainable development. In each case, the reform process must be constructed to reflect the particular needs, challenges, and priorities that are encountered.

The rest of the thesis studies the legal regime governing investments in the petroleum industry in Nigeria. I analyze Nigerian law from a sustainable development perspective, using developments in international law and policy relating to sustainable

development as a lens. In Chapter two, I survey the theoretical perspectives on the role of law and of the State in economic development in general, and in foreign investment in particular. I conclude from a Weberian perspective, that legal norms could positively contribute to economic development, but that they do not operate in a vacuum. Responsible governance (accountable officials, effective judiciaries, rule of law, civil society) is indispensable if law is to perform its instrumental function. I then trace the Nigerian government's efforts to assert control over the oil industry following independence in 1960, as well as the various measures adopted to promote and protect foreign investment, and to ensure profitability. I argue that the law is short on corporate and governmental accountability for environmental violations. As well, there remain deep cleavages between the needs of the population for social and economic development on the one hand, and the interests of the government and oil companies for wealth maximization, on the other.

Chapter three addresses the environmental dimension of oil production in Nigeria. Informed by the ecological economics perspective that the environment provides the basis for all economic activity and life on planet earth, I argue that the pursuit of economic processes in Nigeria ought to proceed in a manner consistent with environmental preservation in the interests of current and future generations. I note that both the environmental protection law and the legal regime governing oil production, fail to provide the necessary rules to balance oil production with environmental preservation. In cases where some legal provisions exist, the rules have not been adequately implemented due to government corruption, and systemic problems with law enforcement and judicial systems in the country. As a partial response, I suggest structural legal reform including the introduction of the precautionary and polluter-pays principles, environmental impact assessments of oil production and other development projects, as well as public participation in decision-making, including the engagement of civil society in that process.

In chapter four, I argue that governmental corruption, centralization of power resulting from almost thirty years of military dictatorship and lack of accountability, have generated a deep gulf between the development aspirations of the majority of Nigerian people and the interests of their government officials. Based on insights from social contract theory, I argue that the purposes of governance include the expectation that governments would provide minimum circumstances necessary for citizens to lead lives of dignity and well-being. Thus, the cleavage between

government interests and the social good in Nigeria has important implications for governmental legitimacy in that country. I also argue that the circumstances under which multinational corporations operate in developing countries (deficits in governance, ineffective and inadequately resourced judicial and legal institutions, levels of poverty compared to corporate wealth), provide compelling justifications for the claim that irrespective of the lack of a binding international or national rule requiring corporate social responsibility, multinational corporations ought to do more as responsible members of the societies in which they do business. Moreover, this obligation goes beyond acting in accordance with law; it includes taking steps to improve the material condition of people within the locale of corporate, especially, multinational business.

Finally, I conclude the thesis with the recognition that the real challenge facing prospects for sustainable development in Nigeria is a governance challenge. Decades of autocratic and irresponsible rule by army generals have thwarted the purpose of governance from pursuit of the public interest, to a quest for personal wealth and influence. Competition among political, ethnic, business, religious, clan, and village groups for a share of the national wealth has meant that whenever convenient, legal rules have been ignored, if doing so would yield personal or group financial benefits. The law in Nigeria thus lost its autonomy, and became an instrument for the realization of special interests. Consequently, I conclude that while there is a strong case for structural legal reform both in the form of law revision, and the enactment of new rules, such reforms would have little meaning in Nigeria unless legal autonomy is restored. In other words, Nigeria really needs to revamp its systems of governance with the aim of laying a firm rule of law foundation under which law would be the basis for social conduct by all actors in society. To do this, the country must fully equip and safeguard the independence of its legal and judicial systems so that law could be applied coherently and consistently to all actors in society, including government officials, the business elite, and ordinary citizens. If this happens, law would have regained some its lost autonomy, and be capable of contributing to sustainable development in Nigeria.

Significance of Research

In Chapter one, I argue that sustainable development emerged at the international level as a result of a broad discursive process implicating both state and non-state

actors. Therefore, to the extent that it is possible to talk of sustainable development as a legally significant concept, its emergence challenges the state-centric paradigm of international law-making which is the hallmark of the positivist legal tradition. While I argue that sustainable development is legally significant and thus could contain a number of normative values, I do not believe that it has for now evolved into a binding rule of law. However, one could make a good argument that certain aspects of sustainable development, such as the precautionary principle and environmental impact assessment have traversed the threshold of legal normativity. The concept itself could evolve from its present non-binding stage to binding normativity. Yet, the key issue is that the legal value of sustainable development does not depend on its status as a rule of law. Whether or not the concept itself or aspects of it qualify as a rule, they could still guide deliberation, discourse, and decision-making in a variety of legal and non-legal contexts such as international treaty negotiations, domestic law-making, and judicial and administrative decision.[8] In addition, even in their current state, sustainable development principles could inspire the development of binding norms at the domestic and international level and so contribute to the progressive development of international law. Thus, to the extent that principles of sustainable development have legal value in their pre-legal stage, they challenge the orthodox view that international law is only law made by, expressly consented to, or acquiesced in by States.

By focussing on the protection of the environment *per se,* and advocating limits on human conduct based on what is within the carrying capacity of the environment, sustainable development challenges the traditional linkage between environmental liability and the territorial interests of states. As far as relations between developed and developing countries are concerned, the principle of common but differentiated responsibility under-girds cooperative efforts to protect the global environment in such areas as climate change, ozone depletion and biodiversity protection.

Why a case study on Nigeria? Nigeria is populated by over 120 million inhabitants. This accounts for over half of the population of the sixteen-member Economic Community of West African States (ECOWAS). It also makes Nigeria the most populous country in Sub-Saharan Africa. The country is also endowed with

[8] J. Ellis, *Soft Law as Topos: The Role of Principles of Soft Law in the Development of International*

significant natural resources such as oil and natural gas. This makes Nigeria attractive for foreign investment by multinational companies. In fact, UNCTAD has recently concluded that the oil and gas sector remains one of the most attractive and profitable sectors for foreign investment in Sub-Saharan Africa.[9] In addition, despite all the political difficulties and corruption, Nigeria is still considered, alongside South Africa, Botswana, Cote d'Ivoire and Tunisia, as one of the most attractive destinations for FDI in Africa.[10]

Furthermore, while many different scholars and organizations have studied aspects of the petroleum industry in Nigeria, no legal scholar has done so from a sustainable development perspective. The latest treatment of the legal regime dealing with the oil and gas industry in Nigeria was published in 1997.[11] However, it is limited to a consideration of the oil exploration and production contracts concluded between the Nigerian government and oil companies. Omorogbe's study does not integrate the regulatory implications of a sustainable development approach that are dealt with in this thesis. In 1999, Human Rights Watch published a detailed and useful report on the role and responsibilities of multinational oil companies and the Nigerian government vis-à-vis the Niger Delta. While that report has important implications for sustainable development, especially its treatment of environmental and human rights issues, it does not address a number of important issues such as the governance environment and the role of the emergent principles of sustainable development.[12] Biersteker's study of the process of indigenization in Nigeria focuses on the power play between foreign and indigenous business interests for control of the Nigerian economy, and the role played by a complicit civil service in that regard.[13] His study provides important theoretical background on the role of foreign investment in developing countries, and how special interest groups could come together in order to control the national agenda. It does not address issues relating to sustainable development. Other studies such as those by Okonta and Douglas (2001), Khan

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Environmental Law (Montreal: Unpublished DCL Thesis, McGill University 2001), at 5, 114 -115.

[9] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (United Nations: Geneva, 1999) at 46.

[10] Ibid., at 48.

[11] Y. Omorogbe, *The Oil and Gas Industry: Exploration and Production Contracts* (Lagos: Malthouse Press Ltd., 1997).

[12] Human Rights Watch, *The Price of Oil: Corporate responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 1999).

[13] T.J. Biersteker, *Multinationals, the State, and Control of the Nigerian Economy* (Princeton: Princeton: Princeton Univ. Press, 1987).

(1994), Forrest (1993), and Ikein (1990) are from a political-economy and economic development perspective.[14] While they each advert to the legal regime, and Okonta and Douglas in particular bring salient environment and human rights concerns to the fore, none of the studies deal with the nexus between the legal regime and concerns for sustainable development in a systematic, coherent, and comprehensive manner. In part, this thesis fills the void in legal scholarship on the Nigerian petroleum industry. The treatment of the subject matter from a sustainable development perspective (incorporating the economic, social and environmental dimensions of oil production) is consistent with contemporary thinking and research directed at integrating 'non-economic concerns' into globalization. This thesis is also the first work to establish linkages between, and draw implications for Nigerian law from the normative developments that have taken place in the issue-area of sustainable development since the 1972 Stockholm Conference. This, I suggest, is the contribution that this thesis makes to legal scholarship in this area.

The thesis combines doctrinal analysis on sustainable development with a critique of investment law in developing countries using Nigeria as a case study. In proposing that law could contribute to sustainable development in developing countries, I am persuaded by Weberian thinking on legal instrumentalism. My arguments on the role of norms, and the normative significance of sustainable development, benefited from recent insights on international law and constructivism.

[14] I. Okonta & O. Douglas, *Where Vultures Feast: Shell, Human Rights and Oil in the Niger Delta* (San Francisco: Sierra Club Books, 2001); T. Forrest, *Politics an Economic Development in Nigeria* (Westview Press, 1995); S.A. Khan, *Nigeria: The Political Economy of Oil* (Oxford: Oxford Univ. Press 1994); A.A. Ikein, *The Impact of Oil on a Developing Country: the Case of Nigeria* (New York: Praeger, 1990).

Chapter 1: History and Normative Significance of Sustainable Development

1. Introduction

The World Summit on Sustainable Development (WSSD) which was held in Johannesburg from 26 August to 4 September 2002, brought together over 21,000 participants from 191 governments, intergovernmental and non-governmental organizations, the private sector, civil society, academia and the scientific community. The summit objective was to review the progress achieved in the implementation of the United Nations Conference on Environment and Development (UNCED) that met in Rio de Janeiro (Brazil) in 1992.[1] At Rio, international society adopted the concept of 'sustainable development' as a universal value that should be the objective of human development for the future.[2] UNCED action followed the report of the World Commission on Environment and Development (The Brundtland Commission), which defined sustainable development as "development that meets the needs of the present, without compromising the ability of future generations to meet their own needs."[3] The principal outcomes of UNCED were the Rio Principles on Environment and Development, Agenda 21 (which is a plan of action for the achievement of sustainable development) and the Non-Binding Statement of Principles for the Sustainable Management of Forests.[4] The Framework Convention on Climate Change and the Biodiversity Convention were also opened for signature. UNCED

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[1] IISD, *Earth Negotiations Bulletin,* Vol. 22 No. 51, 6th September 2002, at 1. The WSSD was convened by UNGA resolution A/RES/55/199 dated 5 February 2001.

[2] D. Hunter, J. Salzman, and D. Zaelke, *International Environmental Law and Policy,* (New York: Foundation Press, 1998) at 100. **See also** International Law Association, Committee on Legal Aspects of Sustainable Development, "Searching for the Contours of International Law in the Field of Sustainable Development", Final Conference Report (New Delhi: April 2002), at 5.

[3] World Commission on Environment and Development, *Our Common Future,* (1987) at 8.

[4] Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I), 12 August 1992.

itself was preceded by the first global environmental conference held in Stockholm in 1972. Without expressly using the term 'sustainable development', the Stockholm Conference was important in that it laid a foundation for the integrated consideration of environment and development issues, and established a substratum of understanding especially between developed and developing countries upon which future progress was built.

As will be demonstrated in detail in the following section, ideas underlying sustainable development could be traced in the agricultural practices of many traditional communities as well as in state practice preceding the publication of the Brundtland Report. However, it was the Brundtland Commission's formulation that, in the words of one commentator, "catapulted sustainable development to paramount international significance."[5] Currently, the concept continues to be endorsed by an increasing number of States, intergovernmental and non-governmental organizations, corporations, issue-oriented groups, and individuals. Thus, unlike the Stockholm Conference where discussions were held under an aura of mutual suspicion between industrialized and developing countries, and at Rio where environment and development were projected as though they were competing value systems, the focus on sustainable development at the Johannesburg meeting illustrated the first time that international society proceeded to a global summit with consensus over how to approach the environment/development dichotomy. This consensus alone, represented substantial progress. However, there were significant differences of opinion on how to bring about sustainable development in practice. Some of the areas of disagreement included time-bound targets for sanitation, renewable energy and biodiversity loss. There were also major differences between

developed and developing countries over the principle of common but differentiated responsibilities, trade, finance and globalization, as well as the Kyoto Protocol.[6]

Notwithstanding the difficult negotiations, States were able to agree on a number of significant targets and timetables for the implementation of sustainable development. On the issue of poverty eradication, States made a commitment to reduce by half, by the year 2015, the proportion of people living in poverty, who suffer from hunger, and who are without access to safe drinking water and sanitation.[7] On the environment, there was a commitment to the sound management of chemicals and to ensure that by 2020, chemicals are used and produced so as to minimize adverse effects on human health and the environment, taking into account the precautionary approach.[8] States also agreed to 'encourage' the application of the ecosystem approach by the year 2010 and to maintain or restore fish stocks to maximum sustainable yield levels by the 2015.[9] On human health and using year 2000 figures as a baseline, States agreed to develop programs and initiatives to reduce by 2015, rates of infant and child mortality by two thirds and maternal mortality rates by three quarters.[10] On HIV/AIDS, they reaffirmed the commitment to reduce the prevalence of HIV among young people aged 15-25 by twenty-five percent in the most affected countries by 2005 and globally by 2010.[11] Having made these commitments on paper, it is now time for the international community to put together the necessary resources to meet the

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[5] S.L. Smith, "Ecologically Sustainable Development: Integrating Economics, Ecology and Law" (1995) 31 Willamette L.Rev. 261, at 273.
[6] IISD, Earth Negotiations Bulletin, *supra* note 1, at 1.
[7] Johannesburg Plan of Implementation, Paragraph 6 (a), 23, and 38 (a). For the purposes of paragraph 6 (a), people with income levels less than $1 a day, fall below the poverty line.
[8] Paragraph 22.
[9] Paragraph 29 (d) and 30 (a) respectively.
[10] Paragraph 47(f).
[11] Paragraph 48.

above targets. Without these resources, sustainable development will continue to remain a distant dream.

While there is near universal agreement on sustainable development as the appropriate framework for environment and development decision-making, there is much less agreement on its true meaning. International law scholars continue to debate the meaning, legal status and operational problems relating to sustainable development. For example, some thirteen years after the publication of the Brundtland Report, Philippe Sands could still argue that "What 'sustainable development' means in practice remains unclear."[12] However, I would argue the Johannesburg Summit and the instruments adopted thereat introduced greater clarity to the meaning of sustainable development and resulted in important commitments towards making it an operational reality. The Summit Declaration clearly identified economic development, social development and environmental protection as mutually reinforcing pillars of sustainable development to which international society assumed a collective responsibility.[13] The Declaration further recognizes that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development are overarching objectives and essential requirements of sustainable development.[14]

In light of these general policy statements, the conclusion of the World Summit and the adoption of the Johannesburg Instruments provide an opportune time for international law scholars to reflect upon the legal significance of

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[12] P. Sands, "Environmental Protection in the Twenty-First Century: Sustainable Development and International Law" in R.L. Revesz, P. Sands, & R.B. Stewart, *Environmental Law, the Economy and Sustainable Development* (Cambridge: Cambridge Univ. Press, 2000) 369, at 374.

[13] Johannesburg Declaration on Sustainable Development, UN A/Conf.199/L/Rev.2 (4 September 2002), para. 5.

[14] Ibid., paragraph 11. **See also** World Summit on Sustainable Development, *Plan of Implementation,* adopted September 4, 2002 at paragraph 2.

sustainable development and what role law might play in its realization. This thesis is intended to contribute to that effort. The paper aims to add clarity to the meaning and normative status of sustainable development as a legal concept and to make suggestions on how legal norms could contribute to the realization of this objective within national societies and at the international level.

In what follows, part two gives a historical account of the emergence of sustainable development in international discourse. Part three discusses the meaning of sustainable development from a variety of disciplinary perspectives. Part four explores the debate over the concept's normative status and argues that while there may be a legitimate international expectation[15] that States and other actors should conduct their affairs in accordance with the norms, ideals and objectives of sustainable development, this falls short of a binding legal obligation. Part five identifies a set of principles that arguably emerged from the international discourse as 'good conduct norms' for the attainment of sustainable development. I argue that it is through the invocation of these norms in decision-making that law could contribute to sustainable development. The final section summarizes the argument with a few concluding remarks.

On the issue of the role of law in the realization of sustainable development, my main argument is that principles perform a guidance function and that it is through invoking them in decision-making (whether in international treaty negotiations, domestic law-making, judicial decision-making or in corporate management decision) that law could contribute to the realization of

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[15] M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge Univ. Press 1999). See also *infra* note 151 and accompanying text for a discussion of legitimate expectation.

sustainable development.[16] In making that argument, it will become clear that this guidance function does not depend upon the legal status of the principles. While some of them have been accepted as principles of customary international law and therefore could entail international responsibility when not adhered to, others are at best, emerging principles.[17] The claim that domestic and international actors ought to conduct their affairs in accordance with these norms albeit that they have not yet evolved into binding rules, entails an argument that international society has a legitimate expectation that the objectives of sustainable development require adherence to certain standards of good conduct with respect to the environment and human society. In accordance with the Johannesburg Declaration and Plan of Implementation, these objectives could be identified as poverty eradication, changing unsustainable patterns of production and consumption, and protecting and enhancing the natural resource base.[18]

2. A Brief History of Sustainable Development

While the report of the World Commission on Environment and Development (WCED) might have popularized 'sustainable development' in international discourse on environment and development, the underlying idea that humankind needs to live within the carrying capacity of the earth and to manage natural resources so as to meet both current demand and the needs of future generations is not new. Evidence of state practice supporting the idea of sustainable development can be traced back to 1893 when the United States

[16] J. Ellis, *Soft Law as Topos: The Role of Principles of Soft International Law in the Development of International Environmental Law* (Montreal: DCL Thesis, McGill University, 2001) at 5: "[Principles] may be referred to for guidance in the processes through which rules are articulated as well as in processes of interpretation and application of rules."

[17] See *infra,* note 152 and accompanying text for a discussion of these principles.

argued in the *Pacific Fur Seals Arbitration*[19] that the need to prevent unsustainable exploitation of populations of fur seal in the Pacific Ocean justified that country's adoption of unilateral measures to safeguard seal populations. In 1962, the United Nations General Assembly passed a resolution calling on governments to integrate natural resource protection measures at the earliest stages of their economic development plans and called for assistance to be provided to developing countries to that end.[20] This resolution represented a clear statement by the United Nations that given their obvious interdependence, it was undesirable for States to continue to develop and implement economic and environmental policy separately. Recognition of this interdependence subsequently led to the emergence of the principle of integration, which many commentators now regard as one of the pillars of sustainable development.[21] Similarly, the General Assembly's call for assistance to be provided to developing countries in the latter's efforts to integrate environment and development policy has now developed into the important principle of common but differentiated

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[18] Johannesburg Declaration, paragraph 11. **See also** WSSD Plan of Implementation, paragraph 2.
[19] Moore's International Arbitrations (1893) 755.
[20] UNGA Res. 1831(XVII) 1962 entitled "Economic Development and the Conservation of Nature".
[21] ILA Committee on Legal Aspects of Sustainable Development, "Searching for the Contours of International Law in the Filed of Sustainable Development", *supra* note 2 at 7, describing the principle of integration as "...the very backbone of the concept of sustainable development." Dernbach calls it "the bedrock principle for sustainable development"; and Atapattu gives it an even broader reach arguing that it "forms the cornerstone of modern international environmental law." See J.B. Dernbach, "Sustainable Development: Now More than Ever" (2002) 32 Envt'l Law Rep., 10003; and S. Atapattu, "Sustainable Development, Myth or Reality? A Survey of Sustainable Development Under International and Sri-Lankan Law", (2001) 4 Georgetown Int'l Env'tal L.Rev., 265 at 271. In my view, Atapattu's argument probably over-elaborates the role of the integration principle. This is because international environmental law itself is non-integrated, based on a sectoral approach, and patterned along the same lines as the territorial organization of international society. This is one of the reasons why current thinking on international sustainable development law is thought to challenge both general international law, and international environmental law in particular.

responsibilities.[22] The latter is now invoked in almost all international environmental regimes. It could take the form of differential compliance and implementation schedules in favor of developing countries (the climate change and ozone regimes), multilateral funds to support developing country implementation of environmental obligations (the Multilateral Fund under the Montreal Protocol, and the GEF), and in some cases, developing country commitments conditional upon the provision of financial and technological resources by industrialized states (the biodiversity regime). As I will argue later on, implementation of the principle of common but differentiated responsibilities is crucial to the attainment of global sustainable development especially with respect to those issue-areas that are the subject of international agreements.

To return to the history of sustainable development, some jurists have ascribed an even earlier pedigree to the concept. James May argues that a sustainable development ethic and the need to preserve the interests of future generations was a principal theme of Leonardo da Vinci's *Codex Leicester* which was written more than five hundred years ago.[23] Similarly, in his judgment in the *Gabcikovo Nagymaros* case, Judge Weeramantry argued that support for the integration of environmental considerations into economic activity could be found in the agricultural practices of ancient tribes in Sri-Lanka, the *Sonjo* and *Chagga*

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[22]S.R. Chowdhury, "Common but Differentiated State Responsibility in International Environmental Law: from Stockholm (1972) to Rio (1992)" in K. Ginther, E. Denters, and P. de Waart (eds.,) *Sustainable Development and Good Governance* (Dordrecht: Kluwer Academic Publishers, 1995) 322-342; D. French, "Developing States and International Environmental Law: The Importance of Differentiated Obligations" (2000) 49 I.C.L.Q 34-60. See also Principle 7 of the Rio Declaration; and Paragraphs 75, 2, 13, 19 and 37 of the Johannesburg Plan of Implementation.

[23] J.R. May, "Of Development, Davinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States", (1998) 3 Widener Law Symposium Journal, 197 at 198.

tribes of Eastern Africa, the American and European continents, and in Islamic legal traditions – some of which go back as far as two thousand years.[24]

Scholars from other social science disciplines have also argued that the integration of nature and human society could be identified in the cultural and agricultural practices of many autochthonous societies, and that this 'natural economy' was gradually eroded with the emergence of European colonialism.[25] In advocating a return to a co-evolutionary relationship between human society and the other species and ecosystems that constitute the natural environment, Norgaard argues that the Western origin of the idea of 'progress' has led to a linear view of that concept; a view focused on pursuit of the "technical mastery of nature."[26] Under this conception of 'progress', economic production has relied extensively on the use of petroleum hydrocarbons and ignored the cultural norms and practices of many communities that were based on an understanding of, and respect for the mutual conditioning of societal and ecological systems. He argues that:

> This co-evolutionary interpretation ... gives us insight into how development occurred before the use of hydrocarbons, the nature of unsustainable development, and the challenge of the return to sustainability. *Until the use of hydrocarbons, development was a process of social system and ecosystem co-evolution that favored human welfare.* People initiated new interactions with their environment and social

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[24] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* I.C.J. Reps. (1997); separate opinion of Judge C. Weeramantry especially at 97-110.

[25] M. Redcliffe, "Sustainable Development and the Market: A Framework for Analysis", *Futures*, Dec. 1988, 635 at 640. In his study, Redcliffe discussed the relationships between human beings and their natural environment at what he calls three stages of capitalism: first, 'autochthonous societies' were predominantly agricultural communities before contact was made. Their practices were mainly characterized by sustainable resource use and respect for nature. Second, 'post-industrial society', is characterized by concern with environmental sustainability. In other words, the concern in these societies is how to maintain environmental balance in the face of intensive increases in agricultural production. Third, 'structurally-transformed societies' are those in which the primary emphasis in development is the achievement of agricultural growth through the operation of market forces, often supported by state intervention.

[26] R.B. Norgaard, "Sustainable Development: A Co-Evolutionary View", *Futures*, December 1988, 606 at 610.

> institutions - in the form of behavioral norms, myths and organization - developed to reinforce those interactions which were favorable and discourage those which were unfavorable. Through the co-evolutionary process of development social systems increasingly reflected characteristics of the human influenced ecosystems they inhabited, while ecosystems reflected characteristics of the social systems which affected how individuals interacted with the ecosystems. ... The era of hydrocarbons drove a wedge between the co-evolution of social and ecological systems.[27]

Support for sustainable development is not limited to state practice and the cultural norms of indigenous societies. Contemporary non-state actors have also contributed to the increasing acceptance of the concept. For example, in 1980 the International Union for the Conservation of Nature published the *World Conservation Strategy (WCS),* which expressly called for the adoption of a strategy of sustainable development. It encouraged the integration of resource conservation in development decision-making, and identified the following three objectives of conservation strategy: the maintenance of essential ecological processes and life support systems, the preservation of genetic diversity and the sustainable utilization of species and ecosystems.[28] These objectives roughly coincide with the objectives of the Biodiversity Convention.[29]

As part of preparations for the Stockholm Conference, the conference Secretary-General, Maurice Strong, entrusted a group of experts on environment and development with the task of advising him on all the ramifications of the relationship between environment and development.[30] The 'Founex Report' which was submitted by the group of experts, emphasized the complex interrelationships

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[27] Ibid., at 618. [Emphasis added].

[28] IUCN, UNEP & WWF, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland: Switzerland, IUCN 1980), at 1.

[29] Convention on Biological Diversity, 31 I.L.M, 818 Article 1: "The objectives of this Convention, ... are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising from the utilization of genetic resources..."

[30] L.B. Sohn, "The Stockholm Conference on Environment and Development" (1973) 14 Harv. Int'l L.J. 423 at 465.

between environment and development and concluded, *inter alia,* that economic development was the answer to environmental problems in developing countries. The report recommended that in order to address the environmental problems in these countries it would be necessary to address the underlying causes of the problem such as underdevelopment and poverty.[31] By linking environmental protection to the economic development objectives of developing countries, the Founex report gave legitimacy to development concerns in the context of international environmental discourse. Before then, many developing countries had expressed fear that the environmental movement was a neo-imperialist ploy from the West. The environment/development linkage that was established by the Founex Report facilitated greater developing country participation at the Stockholm Conference.[32] Developing country participation was based on the understanding that environmental commitments reached at the conference would not be used to inhibit their economic development efforts.[33] The Stockholm Declaration recognized this nexus between environmental protection and the concerns of developing countries. It called for the integration of environmental concerns in development decision-making and provided in several paragraphs that the pursuit of socio-economic development and the alleviation of poverty are the overriding priorities of developing countries.[34]

Almost a decade after the Stockholm Conference, another group of experts was called upon to study and advise the United Nations Secretary-General on the

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[31] United Nations, *Development and Environment: Report and Working Papers of a Panel of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment* (Paris: United Nations, 1972) at 6, para. 1.5.
[32] P. Birnie & A. Boyle, *International Law and the Environment* 2nd ed., (Oxford: Oxford Univ. Press 2002), at 38.
[33] Ibid.
[34] Stockholm Declaration on the Human Environment, UN Doc. A/conf.48/14/Rev. 1 (1972). See the Preamble, as well as principles 8, 9, 10 and 11. Principle 13 provides for the integration of environment and development in decision-making.

relationship between environment and development and to make recommendations for future action. Under the Chairpersonship of Gro Harlem Brundtland, the World Commission on Environment and Development was established in 1983 and submitted its report in 1987.[35] The report pointed out two features of environmental law and policy that were inconsistent with the interdependent nature of the environment and ecosystems. First, it was observed that environmental law was predominantly structured along the same lines as the territorial organization of states. Secondly, environmental law lacked a unifying philosophy and protective measures only addressed specific sectors or species (i.e. components of the environment) as opposed to the biosphere as a whole. To the extent that international law on sustainable development seeks to protect the environment irrespective of the linkage between sectors of the environment and the territorial organization of states, this law does challenge traditional international environmental law.[36] Since developments in the international economy were having unprecedented impacts on the environment and upon natural resources, the commission concluded that international law lagged behind developments in the international economy.

In order to address this situation, the WCED called on States to reorient economic development paths towards environmentally sustainable development. At the national level this could be accomplished through the systematic integration of environmental considerations into development planning. At the international level sustainable development will, among other things, require cooperation between developed and developing countries, especially in the provision of new financial and technological resources to help developing

[35] World Commission on Environment and Development, *Our Common Future* (1987).

countries meet their environmental commitments. The philosophical basis for the Commission's approach is that since the environment provides the conditions for human survival and the resources for development, it is imperative that current generations of humankind pass onto future generations an environment of quality that permits them to meet their own needs. Despite being criticized for its emphasis on the needs of the human species the idea of 'intergenerational equity' has since its adoption by the Brundtland Commission, been elaborated and popularized by the work of Edith Brown Weiss.[37]

A Legal Experts Group was also constituted to prepare a report on legal principles for environmental protection and sustainable development. In their 1986 report, the legal experts drew up a set of twenty-two legal principles including principles on the fundamental human right to environmental quality, inter-generational equity, conservation and sustainable use of natural resources, environmental impact assessment, international cooperation, and international responsibility to prevent environmental harm.[38] The principles were intended to provide elements for a Draft Convention on Environmental Protection and

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[36] S.L. Smith, "Sustainable Development", *supra* note 5 at 276, arguing *inter alia*, that sustainable development challenges traditional economic and legal approaches to natural resources management, as well as ecocentric approaches to protection of the natural environment.

[37] E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publishers 1989). **See also** E. Brown Weiss "Our Rights and Obligations to Future Generations for the Environment", (1990) 84 A.J.I.L. at 198; A. D'Amato, "Do We Owe a Duty to Future Generations to Preserve the Global Environment?" (1990) 84 A.J.I.L 190. He objects to the theory of intergenerational responsibility on the basis of Parfit's paradox, according to which any attempt to discharge that responsibility will itself lead to a change in the identity of the group of individuals to whom the obligation is purportedly owed. He further objects to Brown Weiss's theory on the basis of its anthropocentric focus. Lothar Gundling, in his contribution, "Our Responsibility to Future Generations" (1990) 84 A.J.I.L 207, argues that one of the challenges to a theory of intergenerational equity, is that there is no equity among members of the current generation. He makes the point that without intra-generational equity (which he interprets as the alleviation of poverty in the developing world), it will be impossible to achieve intergenerational equity.

Sustainable Development. Negotiations at the Rio Conference in 1992 made it impossible to adopt a binding convention. Instead, a non-binding set of Principles on Environment and Development was adopted by states.

From the above discussion, it is apparent that the concept of sustainable development emerged in international discourse as a result of action by a diverse group of actors including, but not limited to States. As a result, to the extent that it is possible to argue that either sustainable development as a concept or elements of it possess normative status, their existence is not explicable on the basis of positivist understandings of legal evolution at international law. I will return to the question of legal status in a later section. The next section looks at the meaning of sustainable development.

3. Meaning of Sustainable Development

Some thirteen years after the Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs",[39] one of the leading scholars on the subject has argued that the meaning of sustainable development remains unclear.[40] Recognizing that a long-term perspective is required for a transition to sustainability, the WCED elaborated that the concept implies "a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional

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[38] R.D. Munro and J.G. Lammers (eds.), *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London: Martinus Nijhoff 1986).

[39] WCED, *Our Common Future, supra* note 3, at 8.

[40] P. Sands, "Environmental Protection in the Twenty-First Century", *supra* note 12, at 374. Sands however notes that international usage of the term reveals four related but separate objectives: (i) to preserve natural resources for the benefit of current and future generations; (ii) standards of exploitation of natural resources that are 'sustainable', 'prudent', 'wise', or 'appropriate'; (iii) equitable use of natural resources vis-à-vis the needs of other states and people; (iv) the integration of environment and development in decision-making.

change are all in harmony and enhance both current and future potential to meet human needs and aspirations."[41]

The Rio Declaration does not specifically define sustainable development. However, by calling for the integration of environment and development in decision-making, the prudent use of natural resources and for international cooperation to reduce poverty in developing countries, the Declaration addresses the principal elements of the concept of sustainable development. Agenda 21 describes sustainable development as "socially responsible economic development" that protects "the resource base and the environment for the benefit of future generations." The Johannesburg instruments clearly identified economic development, social development and environmental protection as co-equal pillars of sustainable development. They further recognize that poverty eradication, the shift from unsustainable patterns of production and consumption, as well as protecting and managing the natural resource base are *sine qua non* for the achievement of sustainable development.[42] Through these provisions, the Johannesburg Declaration and Plan of Implementation have added coherence and clarity to the meaning and principal objectives of sustainable development. Viewed from a historical perspective, the acceptance of economic development, environmental protection and social development as non-hierarchical objectives of international society in the quest for sustainable development acquires fundamental importance. It will be recalled that at both the Stockholm and Rio Conferences, negotiations proceeded from a polarized North/South perspective with the former advocating strict environmental commitments, while the latter emphasized that environmental commitments must not operate to stall their

[41] Ibid., at 46.
[42] Johannesburg Declaration on Sustainable Development, (4 September 2002) Paragraphs 5 and 11; World Summit on Sustainable Development, *Plan of Implementation,* Paragraph 2.

economic development and poverty alleviation objectives.[43] The acceptance of economic development, social development and environmental protection as interdependent and mutually reinforcing objectives of sustainable development therefore marks a significant step forward.

The definition proffered by the Brundtland Commission and the Rio documents has been subjected to severe criticism. The key objections raised by scholars are that the definition is vague, that it is instrumentalist in orientation and fails to give weight to the existential values and needs of non-human species and ecosystems.[44] Other scholars object that by advocating more economic growth (albeit growth of a different character) as a means of reducing poverty and contributing to sustainable development, the Brundtland definition assumes too much about our ability to predict the manner in which the natural environment would deal with the effects of human activity.[45] However, this is less a critique of the Brundtland Commission definition than of the reality of the current international economic order. The wide gap between industrialized and developing countries means that for the latter, some economic growth is

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[43] I.M. Porras, "The Rio Declaration: A New Basis for International Cooperation" (1992) 1 R.E.C.I.E.L., 245: "The development focus favored by the G-77 negotiators was taken by their developed country counterparts as evidence that developing countries were not concerned about protecting the environment. In a world constructed on the basis of binary oppositions, logic dictated that to be pro-development was necessarily to be anti-environment and vice versa." For more insight into the North/South divide over environment and development, **see also** J. A. de Aruajo Castro, "Environment and Development: The Case of the Developing Countries", (1972) 26 I.O., 401-416; A.L. Doud, "International Environmental Developments: Perceptions of Developing and Developed Countries", (1972) 12 Nat. Res. J 520-529; R. P. Anand, "Development and Environment: The Case of the Developing Countries", (1980) 20 Ind. J.I.L., 1-19; J. Ntambirweki, "The Developing Countries in the Evolution of an International Environmental Law", (1991) 14 Hastings Int'l & Comp. L. Rev. 905-928.

[44] S. Atapattu, "Sustainable Development", *supra* note 21 at 268; **also** M. McCloskey, "The Emperor Has No Clothes: The Conundrum of Sustainable Development" (1998-1999) 9 Duke Envt'l L & Pol. Forum 153, at 155 referring to sustainable development as 'a fine phrase without much meaning', and arguing that it is not operational.

[45] S.L. Smith, "Ecologically Sustainable Development", *supra* note 5 at 277.

inevitable if sustainable development is to be achieved. The crucial question remains how to manage such growth so that the environmental resources for future growth are not prematurely exhausted and the ecosystem functions upon which quality of life depends, remain intact. The distinction between exhaustible, though technologically substitutable natural resources and the non-substitutable ecological functions and services has been emphasized by conservation biologists as crucial to sustainable development.[46] The balance between the need for economic growth, human development, and the conservation of natural resources and the environment lies at the heart of sustainable development.[47]

In 1980, the International Union for the Conservation of Nature (IUCN) published the *World Conservation Strategy.* The Strategy, which has been credited with providing "the first intellectual framework for sustainable development",[48] called for conservation and development to be merged in decision-making. 'Conservation' was defined as: "the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs of and aspirations of future generations."[49] This initial definition was revisited in 1991 with the publication of a revised version of the WCS, which defined sustainable development as "improving the quality of human life while living within the

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[46] J. Baird Callicott & K. Mumford, "Ecological Sustainability as a Conservation Concept", *Conservation Biology,* Vol. 11, No. 1, Feb. 1997, 32 at 35.

[47] J.B. Ruhl, "Sustainable Development: A Five-Dimensional Algorithm for Environmental Law", (1999) 18 Stan. Envt'l L.J. 31, at 35: "...sustainable development defines all social problems in terms of three parameters - environment, economy, and equity - and projects them in the dimensions of geographic scale and time. The fusion of the three parameters - the three E's - prevents sustainable development from cascading back into the resourcism-environmentalism dichotomy, and ensures that social equity has equal footing with environmental and economic goals."

[48] J.C. Dernbach, "Sustainable Development", *supra* note 21.

[49] IUCN, UNEP, & WWF, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland: Switzerland, IUCN 1980), at 1.

carrying capacity of supporting ecosystems."[50] By linking sustainable development to the carrying capacity of the earth and by focussing on 'quality of life' as opposed to increases in material wealth, this definition does improve upon the Brundtland definition.[51] The argument is that while material growth is an important factor in human well-being, it is not the exclusive factor. Human well being also depends upon equitable distribution of material resources, upon non-economic concerns such as religious and spiritual fulfillment, pride and dignity for the human person, protection of personal liberties, aesthetic satisfaction, as well as a well-balanced natural environment and resource base.[52]

From these various explicit and implicit definitions of sustainable development, it could be argued that the following ideas underlie the concept: first that economic development should be directed at giving priority to the needs of the world's people, particularly the poor. Indeed, the Rio Declaration provides in its very first principle that "[h]uman beings are at the center of concerns for sustainable development" and that "they are entitled to a healthy and productive life in harmony with nature."[53] Similarly, the Johannesburg Declaration, while recognizing that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development, does give pre-eminence to the need to promote and secure human well-being. Under Paragraph 2, leaders made a commitment to build a "humane, equitable and caring global society cognizant of the need for human dignity for

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[50]D.A. Munro & M.W. Holdgate (eds.), *Caring for the Earth: A Strategy for Sustainable Living* (Gland: Switzerland, IUCN 1991), at 211.

[51] S.L. Smith, "Ecologically Sustainable Development", *supra* note 5, at 278.

[52] R. Goodland & G. Ledec, "Neoclassical Economics and Principles of Sustainable Development" (1987) 38 *Ecological Modelling*, 19 at 36.

[53] Report of the United Nations Conference on Environment and Development, UN Doc.A/CONF.151/26 (Vol. I), Rio Declaration on Environment and Development (1992), Principle 1.

all."[54] The Declaration also acknowledges that the divide between rich and poor people as well as the wide and increasing gap between developed and developing countries pose a challenge to sustainable development.[55]

Secondly, the definitions imply that the pursuit of economic development and poverty eradication by the current generation should not be at the detriment of the environment upon which future generations depend to meet their own needs. The latter idea has now been popularized as the principle of inter-generational equity, which some authors have criticized as an inadequate basis for environmental protection.[56] The argument is that environmental protection should not be based solely on considerations of instrumental value to the human species. Humankind is only one of the many species and sub-species that inhabit the planet and protective measures ought to be based on respect for the totality of the earth's species and not on the domineering influence of one of them. Hence, intrinsic or existential value also provides an ethical justification for protective measures. In addition, the economic system upon which humankind depends for development is itself a sub-set of the larger environmental ecosystem which serves as a finite source of inputs and a sink for outputs from economic activity. Understanding this finite capacity is a compelling reason to place limits on economic activity in the interests of future survival and well being. Similarly, the environment deserves protection in view of the important ecosystem services it provides. Many conservationists have argued that the natural environment should be preserved because it has independent value, irrespective of its many values to

[54] Johannesburg Declaration, paragraph 2.
[55] Ibid., paragraph 12.
[56] See note 37 *supra,* for a critique of the concept of intergenerational equity.

humankind such as a source of raw materials, a sink for waste products, or its role as provider of life-support services.[57]

The interplay of these two underlying ideas has significant practical implications for sustainable development and current paradigms of economic growth. It means that while sustainable development recognizes the legitimacy of economic growth as a means of alleviating poverty in the developing world, such growth is not unlimited. It is limited by the consideration that since the environment provides both the resources for economic activity as well as the ecological services necessary for the sustenance of human and non-human life on planet earth, the good of society demands that economic development must remain within the bounds of what is ecologically sustainable. In other words, economic growth must respect the finite capacity of the natural environment both in terms of the exhaustible nature of natural resources and the limited capacity of the earth to receive wastes.

This challenges the most predominant conception of economic development, which is grounded in neoclassical economic theory.[58] Traditionally, neoclassical economics only concerned itself with the efficient allocation of economic resources. Allocative efficiency is said to exist when an economy reaches a Pareto-optimal state i.e. a state at which no one person can be made better off economically without making someone else worse off.[59] Due to its reliance on the market mechanism, the Pareto standard does not pay any regard to equitable resource distribution nor to non-economic concerns such as rate of

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[57] G.D. Meyers & S.C. Muller, "The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy" (1996) 4 Buff. Envt'l L.J. 1, at 8-9; **see also** Callicott & Mumford, "Ecological Sustainability", *supra* note 46 at 33-34.

[58] S.L. Smith, "Ecologically Sustainable Development", *supra* note 5 at 288.

[59] D. Pearce and E. Barbier, *Blueprint for a Sustainable Economy* (London: Earthscan Pubs., 2000) at 18. **See also** R. Goodland & G. Ledec, "Neoclassical Economics", *supra* note 52 at 20.

natural resource use.[60] In the 1980s, there was some movement on the part of international development agencies and financial institutions to incorporate distributional and environmental concerns into their economic development work. The principal instrument used to integrate these non-economic concerns into project planning was referred to as 'Safe Minimum Standards' (SMS) analysis.[61] Through this method, the regular cost-benefit analysis used to determine the economic viability of proposed projects was supplemented by consideration of social and environmental criteria which must be satisfied for the project to proceed.

While SMS analysis was a progressive departure from exclusive focus on economic criteria, its principal limitation was that it was confined to the micro (project) level. In other words, there was no mechanism to integrate social and environmental concerns into the total macroeconomic framework. In fact, the whole concept of macroeconomic development under neoclassical economic theory is tested by whether the economy has 'grown'; in turn, economic growth is measured by an increase in gross domestic product (GDP) or per capita income.[62] Many economists agree that while such an increase in economic aggregates may be a sign of an expanding economy, it is not an adequate measure of economic development when that term is interpreted to mean improvement in human welfare. Since improvement in human welfare is an important objective of

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[60] Goodland and Ledec, at 21.

[61] Ibid., at 40.

[62] H. Daly, *Steady-State Economics 2nd ed.* (Washington DC: Island Press, 1991) at 16-17 for a distinction between 'growth' and 'development'. At 17 he says: "If we use "growth" to mean quantitative change, and "development" to refer to qualitative change, then we may say that a steady-state economy develops but does not grow, just as planet earth, of which the human economy is a subsystem, develops but does not grow." As argued below (p34-35), the 'no-growth' paradigm fails to take into account the needs of developing countries for poverty alleviation, which is necessary for sustainable development.

sustainable development, measuring progress towards the latter would require a revision of the extant neoclassical economic model.[63]

Along similar lines, Goodland and Ledec object to GDP as a measure of economic development and highlight the following shortcomings: (1) GDP fails to measure income distribution; (2) it is limited to market transactions and therefore does not reflect subsistence production; (3) it merely measures aggregate economic activity which does not necessarily reflect social well-being and (4) GDP accounts do not reflect the value of natural capital stock, being concerned predominantly with the production output from natural resources.[64]

These shortcomings of the neoclassical economic model have led many contemporary economists to rethink the very foundations of their discipline. An influential and controversial group of such economic thinkers has advocated the integration of ecological concerns into mainstream economic thinking, research and policy making. Their work can be traced back to the late 1970s when Herman Daly published the first edition of his seminal work on *Steady-State Economics.*[65] Daly argued that a sustainable economy would require limits to natural resource consumption ('throughput') since the physical laws of thermodynamics make it impossible for a finite environment and natural resource base to meet the consumption demands and waste disposal needs of an ever increasing population of human beings. He defined a steady state economy as one with "constant stocks of people and artifacts, maintained at some desired, sufficient levels of ...[low]

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[63] G.D. Meyers & S. Muller, *supra* note 57, at 21: "...achieving sustainable development requires a major change in traditional economic thinking. On a most fundamental level, achieving [environmentally sustainable development] will require a rejection of the primacy of unfettered economic growth and the role of gross national product as traditional indicators of economic health."

[64] Goodland and Ledec, "Neoclassical Economics", *supra* note 52, at 27.

[65] H.E. Daly, *Steady-State Economics* (Washington DC: Island Press, 1977).

throughput."[66] In their commentary on Daly's work, Meyers and Muller note that *Steady-State Economics* distinguishes between constant increases in natural resource use for the purpose of constant wealth creation (growth) and a progressive and qualitative change in natural resource use and management (development).[67]

Daly's thesis is a fundamental statement of the need for limits to growth, especially in the consumption habits of Western industrialized states. Equally, it recognizes that limits must be placed on the rate of population growth in developing countries. Written shortly after the Stockholm Conference of 1972, Daly's work re-echoes the North/South dichotomy that characterized proceedings at Stockholm. It will be recalled that during that conference, the North insisted that population growth in the South must be controlled in the interest of environmental sustainability. On the other hand, developing countries blamed many environmental problems on the consumerism of the industrialized West.[68] Daly's argument on limits to population growth is also consistent with economic

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[66] Daly, *Steady State Economics*, 2nd *supra* note 62, at 17. In reaching this definition of a steady state economy, Daly reasoned that such an economy would require limits to population growth and physical wealth ('artifacts'). At p 16-17, he said: "What is held constant is capital stock in the broadest physical sense of the term, including capital goods, the total inventory of consumer goods, and the population of human bodies... what is not held constant [are] the culture, genetic inheritance, knowledge, goodness, ethical codes, ... embodied in human beings... Likewise, technology [is] ... not held constant. Nor is the current distribution of artifacts among the population taken as constant. ... If we use "growth" to mean quantitative change, and "development" to refer to qualitative change, then we may say that a steady-state economy develops but does not grow, just as planet earth, of which the human economy is a subsystem, develops but does not grow."

[67] Meyers & Muller, *supra* note 57, at 33.

[68] J. Holmberg (ed.), *Making Development Sustainable: Redefining Institutions, Policy and Economics* (Washington DC: Island Press, 1992) at 20, noting that the 20 percent of the world's population that live in the industrial West, consume 80 percent of global resources. **See also** United Nations Development Program (UNDP), *Human Development Report 1999: Globalization with a Human Face* (Oxford: Oxford Univ. Press 1999), at p4 citing as an example of this consumerism that the 20 percent of world population living in OECD countries consume 84 percent of the world's paper.

thinking going back to the eighteenth century when both Malthus and Ricardo expressed skepticism about unlimited economic growth.[69] The former argued that the limited quantity of available land meant that it was not possible to meet the needs of an ever-increasing human population for food. Similarly, Ricardo argued that the finite quality of natural resources would necessitate limits on economic growth.

Recognition of limits to Western consumerism, developing country populations, as well as economic growth are all very important requirements for environmental sustainability. However, *Steady-State Economics* fails to take the needs of developing countries into account, especially the challenge of poverty alleviation in least developed countries. Since the Rio Conference in 1992 and particularly after the Johannesburg Summit, there is a general consensus that poverty alleviation, environmental protection and some form of economic growth for developing countries must all be pursued together in the interests of sustainable development.[70] It will be recalled that in defining sustainable development, the Brundtland Commission indicated that it contains two key concepts: first, the concept of 'needs' which implies giving priority to the essential needs of the world's poor people and secondly, the idea of 'limitations' imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[71]

Other ecological economists have fortunately supplied the missing link in Daly's analysis. Goodland and Ledec have argued that "a primary goal of

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[69] S. L. Smith, "Ecologically Sustainable Development", *supra* note 5, at 269-270.

[70] Johannesburg Declaration, paragraph 5 and 11; WSSD Plan of Implementation, paragraph 2 & 6.

[71] Brundtland Commission, *Our Common Future* (1987). **See also** Principle 3 of the Rio Declaration: "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"; **and** paragraphs 11 and 12 of the Johannesburg Declaration (2002).

sustainable development is to achieve a reasonable ... and equitably distributed level of economic well-being that can be perpetuated continually for many human generations."[72] For Pearce, " ... development [is a] vector of desirable social objectives, and elements might include: increases in real income per capita, improvements in health and nutritional status, education achievement, access to resources, a 'fairer' distribution of income, and increases in basic freedoms. ...[S]ustainable development is then a situation in which the development vector increases monotonically over time."[73] Barbier takes a needs-based approach to sustainable development. He argues that when applied to the Third World, the concept implies "increasing the material standard of living of the poor at the 'grass roots level'...."[74] For Barbier, this standard of living can be measured among other things, in terms of increased food, real income, educational services, health care, sanitation, water supply and is only indirectly concerned with aggregate economic growth at the national level.[75] He concludes that the primary objective of sustainable development "is to reduce the absolute poverty of the world's poor through providing lasting and secure livelihoods that minimize resource depletion, environmental degradation, cultural disruption and social instability."[76]

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[72] Goodland & Ledec, "Neoclassical Economics", *supra* note 52, at 36. However, when it came to making prescriptions for a transition to sustainable development, Goodland and Ledec draw a distinction between micro and macroeconomics. They suggest that at the project level, "Safe Minimum Standards" analysis should be the instrument used to supplement cost-benefit analysis with social and environmental considerations. On the other hand, at the macroeconomic level, they suggest that "steady-state economics" might provide a useful approach to sustainable development. Consequently, their suggestions for macro-economic sustainability are subject to the same weakness identified with respect to Daly's model.

[73] D. Pearce "Sustainable Development and Cost Benefit Analysis" (London Env'tal Econs. Center Paper, 1988) 88-101, cited in Meyers & Muller, *supra* note 63, at 8.

[74] E. Barbier, "The Concept of Sustainable Economic Development" (1987) 14 Envt'l Conservation, 101 at 103 cited in Meyers & Muller, *supra* note 57 at 7.

[75] Ibid.

[76] Ibid.

In thinking about how to inject greater definitional certainty into the idea of sustainable development, I will approach the concept from the perspective that it implicates rethinking neoclassical understandings of economic development.[77] While it does require some growth, particularly for developing countries, sustainable development does go beyond the view of 'development as growth.'[78] In light of developments in international policy and law over the three decades between from 1972 and 2002, the evolution of scholarly opinion and the practice of states and non-state entities, one can safely argue that the concept of sustainable development now has three essential and interdependent components: economic development, social development and environmental protection. The Johannesburg Declaration and Plan of Implementation attest to this clarified meaning of sustainable development.[79]

To facilitate better exposition, I have categorized these triple values as *economic development*, *human security,* and *environmental security.* The concept of human security was popularized by the UNDP and arguably requires

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[77] In the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia),* I.C.J. Reps. (1997) at p90, Judge Weeramantry said, *inter alia,* that: "It is ... the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development."

[78]Meyers & Muller, *supra* note 57: "Measuring the achievement of sustainable development requires more than economic considerations: sustainable development has social, cultural, spiritual, political, and ecological foundations. The measurement of the achievement of [environmentally sustainable development] requires more than concentrating on the quantity of growth: it requires the use and development of quality of life indicators such as basic public health levels, levels of literacy, education levels, and equality of access to social and economic resources. Measuring the achievement of ESD will require a focus not on the amount of growth but on the nature of that growth and the distribution of social and economic assets, and it will require a particular focus on the impact of human activity on local, national and global environments."

[79]Johannesburg Declaration, Paragraph 11 provides that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base are objectives and essential requirements for sustainable development. **See also** paragraphs 2, and 12; **and** WSSD Plan of Implementation, paragraphs 2, 4, 5, 5bis and 6. The latter provides in part that

improving the living standards of people through access to basic needs for education, health care, nutrition, clean water and sanitary facilities.[80] The UNDP identified seven distinct threats to human security arising from economic, food, health, environmental, personal, community and political insecurity. In adopting this broad conception of insecurity, the UNDP sought to depart from the traditional notion of security associated with freedom from fear and to emphasize that a sense of insecurity could equally arise from deprivation, marginalization, and lack of opportunity - the absence of freedom from want. With the objective of developing a theory of 'sustainable human development', the UNDP argued that the quest for human security must proceed alongside the maintenance of environmental balance and the equitable distribution of resources, bearing in mind the needs of current and future generations of humankind. This need for inter and intragenerational equity is based on the 'universalism of life claims'.[81]

The Department of Foreign Affairs and International Trade (DFAIT) of the Government of Canada has also attempted to develop a theory of human security premised on security of the human person as opposed to state security.[82] However, DFAIT's perspective does not change the traditional understanding of security based on freedom from fear. What it does is to refocus the discourse on security from a concern of States, to an emphasis on people. Thus DFAIT posits

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'Eradicating poverty is the greatest challenge facing the world today and an indispensable requirement for sustainable development, particularly for developing countries."

[80] UNDP, *Human Development Report (1994): New Dimensions of Human Development.*

[81] UNDP, *Human Development Report (1994)* at 13: "Universalism of life claims is the common thread that binds the demands of human development today with the exigencies of development tomorrow, especially with the need for environmental preservation and regeneration for the future. The strongest argument for protecting the environment is the ethical need to guarantee to future generations opportunities similar to the ones previous generations have enjoyed. This guarantee is the foundation of "sustainable development". But sustainability makes little sense if it means sustaining life opportunities that are miserable and indigent: the goal cannot be to sustain human deprivation".

an understanding of human security that emphasizes "safety for people from both violent and non-violent threat."[83] This perspective explains the Department's emphasis on the campaign to ban landmines and the then negotiations for an International Criminal Court as significant initiatives towards a "people-centered approach to security."[84] However, while insecurity arising from violent conflict is an important factor in the overall framework of circumstances necessary for the attainment of sustainable development, it is a less inclusive notion of human security than that offered by the UNDP or that this paper seeks to develop.

The concept of human security interpreted in the sense of freedom from want, is also consistent with the theme of all the major global summits held under the auspices of the United Nations since 1972. The Stockholm, Rio, Copenhagen and Johannesburg Declarations all emphasize the need for poverty alleviation, the improvement of living standards of the poor and access to basic needs. The intellectual roots of human security could similarly be traced back to the 1970s and 1980s and the claim of many States and scholars for greater equity in the international economic order and for better terms of trade for exports from developing countries.[85] These claims were formulated in the form of a demand for a New International Economic Order (NIEO) to govern the relations between developing and developed States. The NIEO strategy emphasized the sovereignty of developing states over their natural resources, asked for greater participation of developing states in international economic decision-making, greater market-access for developing country exports, and better terms of trade for primary commodities, which constituted the bulk of exports from developing states.

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[82] Government of Canada, Department of Foreign Affairs and International Trade, "Human Security: Safety for People in a Changing World", (Ottawa: April 1999).
[83] Ibid., at 3.
[84] Ibid.

While NIEO succeeded in mainstreaming the inequities between developed and developing countries in international economic discourse, it was itself unsatisfactory from a sustainable development perspective. The high watermark of the NIEO campaign was in the 1970s, when many developing countries had recently gained their political independence from colonial masters. The international environmental movement was equally at its infancy, having acquired prominence only after the 1972 Stockholm Conference. The newly independent states were predominantly concerned with economic development in its neoclassical sense (i.e. the pursuit of economic growth) and deeply suspicious of the environmental movement. For these reasons, the NIEO strategy failed to fully integrate environmental concerns. This narrow perspective has now evolved. Among other things, this evolution is marked by the International Law Association's reconstitution in 1992 of its erstwhile Committee on Legal Aspects of the NIEO into a new Committee on the Legal Aspects of Sustainable Development.[86]

On the other hand, environmental security requires maintaining ecological balance necessary for the performance of life-support functions and for the environment to continue to serve as a source of natural resources for the use of current and future generations.[87] This conception of environmental security also marks a departure from the traditional conception of security, linked as it were, to the use of military force and protection of the territorial interests of nation states. From an admittedly instrumentalist and homocentric perspective, it is argued that an ecologically balanced environment is essential for human quality of life and

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[85] K. Hussain (ed.), *Legal Aspects of the New International Economic Order* (London: Frances Pinter (Publishers) Ltd., 1980).
[86] International Law Association, "Legal Aspects of Sustainable Development" *supra* note 2, at 2.
[87] J. Brunnée, "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law" (1995) 18 Fordham Int'l L.J 1742.

standard of living and that these therefore provide reasons for the development of protective measures through law.[88] The more traditional understanding of environmental security is associated with the protection of state interests and relates to the prevention or management of conflict over scarce or degraded resources. Such conflicts could arise at the internal or national level and could spill over to the regional and international context.[89] The pursuit of environmental security as an aspect of sustainable development will thus require that attention be paid to the short and long-term environmental effects of current actions and failures to act.[90]

The expansive sense of environmental security that requires maintenance of ecological balance is also consistent with the ecological economist's perspective that the achievement of human welfare through the economic process is a function of the total stock of capital - physical (or man-made), human and natural.[91] Physical capital generally refers to the tangible outcomes of the production process in the form of goods, services, machinery and infrastructure and these generally have a market price. Human capital refers to the endowment of human knowledge, experience and skills that are utilized in the production process. To the extent that labor and innovation are rewarded, this type of capital is also reflected in market prices. On the other hand, the stock of natural capital is

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[88] J. Brunnée and S.J. Toope, "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law" (1994) 5 Y.B.I.E.L., 41 at 46: "An impaired environment, therefore, is relevant to security not only because of the violent subnational and international conflict that it may engender, but because security relates also to our quality of life and standard of living. Degraded ecosystems threaten to destroy 'goods' worth preserving before violent conflict occurs; even if conflict is suppressed for various reasons, the people's security has been damaged when their way of life has been harmed, even destroyed."

[89] Ibid.

[90] Ibid.

[91] Pearce and Barbier, *Blueprint for a Sustainable Economy, supra* note 59, at 20-22.

either not reflected at all (e.g. the value of ecological services) or is inadequately reflected in market prices.

However, even from a material perspective, human welfare is not limited to increases in per capita income. It also includes other social objectives such as improvements in health, nutritional status, educational achievement, access to and equitable distribution of resources as well as protection of basic freedoms. Thus, sustainable development requires that the stock of natural resources should be protected and enhanced so that the maximization of human welfare today does not undermine the basis of welfare for future generations. By advocating that the pursuit of human welfare for current generations should be within the carrying capacity of the natural environment (maintenance of natural capital stock), the theory of ecological economics accounts for both intra and intergenerational justice as essential requirements of sustainable development.[92] While this argument is, like environmental security, instrumental in outlook, it could also be grounded on an ethical imperative; i.e. that non-human species and ecosystems deserve exogenous protection irrespective of whether or not they possess immediate economic value. In fact, Pearce acknowledges that while the sustainability debate within ecological economics is to some extent influenced by the role of natural systems in insulating the economy against "major shocks such as climate change, war and pestilence...", that debate also has a normative component i.e. that sustainability serves the interests of justice. Justice in this context is defined to include three dimensions - justice between generations, within a generation, and justice to nature.[93]

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[92] D. Pearce, "Economics, Equity and Sustainable Development" *Futures,* December 1988, 598-605.
[93] Ibid., at 600.

The only objection to Pearce's theory is that his conception of justice to nature is confined to what he describes as 'non-human sentient beings'. This is a restrictive view of nature, which obviously comprises both sentient and non-sentient species and systems. Therefore, there could be no justification for discriminating between components of nature solely on the basis of whether or not they are capable of perception and feeling. Intrinsic value arguably provides sufficient reason for protection of non-sentient components of nature as well.

Pearce's position must, however, be considered and understood in the overall context of his project. Following Page,[94] Pearce sought to apply Rawls' theory of justice to the intergenerational context. Rawls posited his theory of justice based on a hypothetical 'original position' in which equal members of society embark upon the construction of social rules behind a 'veil of ignorance' which implies that none of them knew their exact position in society.[95] In this original position, because members of society are ignorant about their exact position in society, their entitlement to personal liberties as well as their endowment of material goods, Rawls argues that each person's conception of the good would lead them to agree to rules that fairly distribute the endowment of primary goods. This is Rawls' conception of 'justice as fairness'. Primary goods are rights and liberties, opportunities and powers, income, wealth and self-respect; in other words, those goods of which rational people would prefer more rather

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[94] T. Page, *Conservation and Economic Efficiency: An Approach to Materials Policy* (Baltimore: Johns Hopkins Univ. Press 1977).

[95] J. Rawls, *A Theory of Justice* (Cambridge: Harvard Univ. Press 1999) at 11: "Among the essential features of [the original position] is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like.... The principles of justice are chosen behind a veil of ignorance." The notion of 'equality' among members of society in the original position implies procedural equality. See Rawls, at 17: "all have the same rights in the procedure for choosing principles: each can make proposals, submit reasons for their acceptance, and so on."

than less.[96] Rawls' theory of justice as fairness would therefore result in the adoption of social rules which display two principal characteristics: (1) every member of society would enjoy equal rights to the maximum amount of personal freedom compatible with the freedoms of other individuals (*the principle of equality*) and (2) social inequality could only emerge from positions that were open to free competition and could only be justified on condition that such inequality operated to the advantage of every member of society (*the difference principle).*

In seeking to develop a theory for the conservation of resources, Page extended the hypothetical veil of ignorance to the inter-generational context.[97] In Page's view, where members of society are ignorant about which generation they would be born into, they would in the original position, agree upon rules that ensure a condition of 'permanent livability' i.e. one that assures that sufficient resources are available for the sustenance of each succeeding generation.[98]

One possible reason why Pearce limited his conception of 'justice to nature' to sentient beings could be that the idea of the original position describes a hypothetical *human* society made up of a collection of rational individuals, each of whom possesses their own sense of the good. As already argued, sentience is no reason for excluding non-sentient components of nature from a conservation theory. A more profound objection might be that the exclusion of non-sentient components actually demonstrates the limitations of the Rawlsian theory of justice when applied to the inter-generational need for conservation of the natural environment and resources as well as sustainable development. Indeed Rawls

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[96] Ibid., at 79.
[97] Page, *Conservation and Economic Efficiency, supra* note 94 at 202: "To move to a Rawlsian framework we draw the veil of ignorance a little further. We assume that the representatives are ignorant as to which generation they will be born into..."
[98] Ibid., at 203.

himself acknowledges that his theory of justice is centered on human society and would require revision in order to account for "our relations to animals and to nature...."[99]

While an essentially instrumental argument has so far been made in support of the idea of environmental security, that idea is also consistent with the adoption of environmental protection measures based on the intrinsic value of the environment. That way, the pursuit of environmental security is justifiable irrespective of the anthropocentric value of the environment or the nexus between the environment and state territory.

In sum, this chapter argues that to the extent that it is possible to clarify the meaning of sustainable development, one needs to analyze it from the perspective of the need to pursue economic development, social development and environmental protection as equal and mutually reinforcing objectives. That is the crux of the consensus reached at Johannesburg. The next section looks at the legal status of sustainable development in international law.

4. International Law and Sustainable Development

The popularity of sustainable development has provoked debate within international legal circles about the concept's normative status. The literature reveals several arguments in this respect. First, many scholars argue that sustainable development is too vague a concept and too ambiguous in meaning for

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[99] Rawls, *A Theory of Justice* (1971), as cited in D. Pearce, "Foundations of Ecological Economics" 38 *Ecological Modelling* (1987) at 9: "A correct conception of our relations with animals and to nature would seem to depend upon a theory of the natural order and our place in it.... How far justice as fairness will have to be revised to fit into this large theory it is impossible to say. But it seems reasonable to hope that if it is as sound as an account of justice among persons, it cannot be too far wrong when these broader relationships are taken into consideration."

it to have normative status.[100] Secondly, some are of the view that sustainable development has acquired a place in the international law lexicon and therefore the relevant question is not whether sustainable development is law, but rather how to apply it in specific practical situations.[101] Similarly, Günther Handl argues that sustainable development has become a concept around which legally significant expectations regarding environmental conduct have begun to crystallize and that it might even evolve into a *jus cogens* norm. However, he notes that sustainable development faces a fundamental definitional problem, which renders it difficult to see how the concept could be made to work.[102]

I would argue that the above conclusions are inevitable if one limits the question of legal normativity to the domain of actor conduct. Arguably, concepts and principles could be normative in senses and contexts other than those of actor conduct. In my view, as a framework concept sustainable development could be normative in the context of practical reasoning, i.e. as a guide to deliberation, discourse or decision-making, whether the latter be in the legislative, judicial or administrative context.[103] To my understanding, it is in this sense that Judge

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[100] P.Birnie and A. E. Boyle, *supra* note 32, at 122. **See also** S. Atapattu, "Sustainable Development" *supra* note 21, at. 265.

[101] P. Sands, "Environmental Protection in the Twenty-First Century", *supra* note 12, at 408.

[102] G. Handl, "Environmental Security and Global Change: The Challenge to International Law" 1 YBIEL (1990) 3, at 25-26. **See also** M. McCloskey, "The Emperor has no Clothes", *supra* note 44 at 153: arguing that sustainable development is not an operational concept and that it disintegrates when examined closely.

[103] The idea of law as rhetoric and of legal reasoning as a particular form of practical reasoning, goes back to Aristotle. Its modern elaboration is attributed to F. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge Univ. Press, 1989). **See also** S.J. Toope, "Emerging Patterns of Governance and International Law" in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford Univ. Press, 2000) 91-108; **and** Toope, "Confronting Indeterminacy: Challenges to International Legal Theory" (1990) 19 C.C.I.L. Procs., 209 at 211: "Law emerges in a constant interplay between norm and fact and between means (process) and ends (substance). On this view, international law is best treated as a particular form of practical reasoning..."

Weeramantry argued in the *Gabcikovo* case that sustainable development is a principle of law with normative status.[104]

A third view characterizes sustainable development as a rule of customary international law[105] while a fourth posits that the concept does not satisfy the tests of custom at international law and is at best an interstitial norm.[106] I will discuss each of the latter two views and argue that while they both offer interesting and valuable insights into the normative significance of sustainable development, their principal weakness lies in the transposition of positivist legal thinking to the international sphere. With its emphasis on state structures and the power of sanction in enforcing compliance with legal rules, positivist legal thought is of limited utility in the analysis of international law problems. I will argue that not only should the search for the normative status of sustainable development be outside the context of actor conduct, but further suggest that there is no reason why it should be confined to judicial decision-making, as implied by both Weeramantry and Lowe. To my mind, sustainable development could be normative in the sense of a guide to practical reasoning (i.e. discourse and deliberation) in a variety of decision-making contexts at both the international and domestic law levels. This perspective also allows one to make the further argument that the legal notion of sustainable development implies a legitimate expectation derived from international discourse since 1972 that States and other actors should conduct their affairs in a manner consistent with the pursuit of economic development, social development and environmental protection as equal objectives. The legitimate expectation argument does not require that

[104] See *infra* note 114-115 and accompanying text.
[105] Judge Weeramantry in the *Gabcikovo-Nagymaros* case.
[106] V. Lowe, "Sustainable Development and Unsustainable Arguments" in A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press 1999) at 31-35.

sustainable development norms be binding at international law. Rather, it envisages that it is both possible and legitimate that some norms could only be at the pre-legal stage of development yet provide moral suasion for particular types of behavior or serve as steps towards development of substantive legal norms.[107]

(A) SUSTAINABLE DEVELOPMENT AS A PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW

Under Article 38 of the Statute of the International Court of Justice, the main sources of international law are treaties, custom, and general principles of law. Judicial decisions and the teachings of the most highly qualified publicists are listed as subsidiary sources. In the *Asylum case*, the ICJ laid down the requirements of custom as follows:

> The party which relies on custom... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage, practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial state...[108]

About twenty years later, the Court again pronounced on the constitutive elements of a rule of custom in international law. In the *North Sea Continental Shelf Cases*, the question before the Court was whether state practice since the conclusion of the Geneva Convention on the Continental Shelf in 1958 was such that the equidistance principle contained in Article 6 thereof had developed into a rule of customary international law.[109] The Court said:

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[107] J. Brunnée and S.J. Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building", 91 AJIL (1997) 26, especially at 28 and 31.
[108] ICJ Reports (1950), 276-277.
[109] *North Sea Continental Shelf Cases,* ICJ Reports (1969), 3.

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[110]

The two-pronged requirement for the formation of customary international law is what Byers refers to as a 'bipartite conception'.[111] It requires that in order to qualify as a rule of customary law, state conduct (under a conception of conduct that includes both acts and omissions as well as statements) must go alongside a psychological element that the conduct in question is in compliance with a *rule of law,* and not merely one of morality, courtesy or ceremony.[112]

In making the customary law argument in *Gabcikovo,* Judge Weeramantry argued that sustainable development is not merely a concept as the majority decision concluded. He argued, instead that sustainable development is a principle of law with normative force.[113] Conducting his analysis within the framework of the sources of international law listed in Article 38, Judge Weeramantry reasoned that the case before the Court concerned the operation of two principles of international law - the right to development on the one hand, and the right to

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[110] Ibid., at 44.

[111] M. Byers, *Custom, Power and the Power of Rules, supra* note 15, at 130. **See** *infra* note 126 and accompanying text for arguments that in the *North Sea* cases, the ICJ in fact laid down a third requirement for the formation of custom.

[112] Ibid. However Byers criticizes the bipartite conception as revealing a chronological paradox, which would make it impossible for new rules of customary law to develop. Karol Wolfke argues that the provision in Article 38(b) of the ICJ statute is a 'reverse sequence', because 'one cannot accept what does not yet exist.' **See** K. Wolfke, *Custom in Present International Law,* (Nijhoff Publishers, 1993). **See also** M. Akehurst, "Custom as a Source of International Law" (1974-75) 47 B.Y.I.L., at 32, who points out that the provision requires states to believe that something is already law before it can become law.

[113] At p88 of the report, he said: "The Court has referred to it as a concept ... I consider it to be more than a concept, but as a principle with normative value...."

environmental protection on the other. He further noted that these principles are likely to conflict in their application unless the Courts could identify and apply a principle of reconciliation.[114] Sustainable development, he argued, provides the basis for reconciling these potentially conflicting principles; it is a mediating principle that aids judicial decision and provides scope for progressive legal development. In the words of Judge Weeramantry:

> The problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and the law of the environment. Both these vital and developing areas of law require, indeed assume, the existence of a principle that harmonizes both needs. To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles of law which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result.... *The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development.*[115]

As already indicated, he found support for the concept in the legal traditions and agricultural practices of a number of ancient civilizations. In addition, he argued that current international practice also supports the concept. He cited several multilateral treaties, declarations from international conferences, the foundation documents of international organizations, regional declarations and planning documents, and argued that there is a wide and general acceptance of the concept by the global community.[116] He therefore concluded that: "the principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community."[117]

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[114] Ibid., at 89.
[115] Ibid., at 90. [Emphasis supplied].
[116] Ibid., at 92.
[117] Ibid., at 95.

Alongside Judge Weeramantry, David Luff has also argued that developments in international law and policy since the Stockholm Conference have led to the emergence of sustainable development as a legal institution with obligations for all countries.[118] To support this position, he cited the Rio Declaration and Agenda 21, the Climate Change and Biodiversity Conventions, the Forest Principles, and the Agreement establishing the World Trade Organization. He further noted that since the publication of the Brundtland Report, the concept of sustainable development has been the subject of many authoritative statements and United Nations resolutions. In light of these developments, Luff concluded that there now exists "an international custom compelling States to bolster development processes without depleting the environment and the natural support for their activities."[119]

The argument that sustainable development is a principle of international law is however questioned by many other legal scholars. The general view seems to be that while there is significant state practice in support of the ideas underlying sustainable development, this practice can hardly be attributed to a belief that states are bound to act in the way they do. In other words, the state practice is not supported by *opinio juris*.[120] In a recent review of the development and international legal implications of sustainable development, the International Law Association fell short of concluding that the concept had become a principle of international law. Instead, they categorized it as "an established objective of the international community and a concept with some degree of normative status in

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[118] D. Luff, "An Overview of International Law of Sustainable Development and a Confrontation between WTO Rules and Sustainable Development" 1 *Revue Belge de droit International* (1996), 90 at 94-97.

[119] Ibid., at 97.

[120] S. Atapattu, "Sustainable Development", *supra* note 21, at 282. See also V. Lowe, "Unsustainable Arguments", *infra* note 106 and accompanying text.

international law."[121] The Committee did not specify the said normative status, but proceeded to discuss the legal status of individual principles of international law relating to sustainable development.[122] The only conclusion that can be drawn from the Committee's work is that they could not identify or agree upon a definitive legal status for sustainable development.

With respect to the position taken by Weeramantry and Luff, I would argue that despite the wide-scale endorsement of sustainable development and its underlying idea of integrated decision-making, the reality of state conduct precludes a conclusion that it is a binding principle of law. For example, despite broad consensus on the principle of common but differentiated responsibility as a means of implementing sustainable development commitments at the international level, many industrialized countries have failed to live up to the commitments reached at the Millenium Summit and at the Monterrey Conference on Financing for Development. These commitments require them to contribute 0.7 per cent of GNP towards development assistance to developing countries, and 0.15 to 0.20 per cent of GNP as assistance to least developed countries. In light of this gap between political rhetoric and practical action, it is probably more plausible to argue that there is a legitimate international expectation that states would behave in furtherance of the objectives of sustainable development. While some elements of this expectation may be normative, it is hard to conclude that there is now a binding legal principle of sustainable development.

On another note, it is apparent from the above discussion of his opinion that for Judge Weeramantry, the tests of customary international law are predominantly state-centered. Throughout his analysis, he sought support for the concept in the actions of states such as treaties, conference declarations, or

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[121] International Law Association, *supra* note 21, at 5.

domestic state practice. Despite a reference to the practice of international organizations and financial institutions, his analysis was situated within the overall logic that States are the principal actors within these organizations. In sum, while Judge Weeramantry gave a very insightful account of the evolution and contemporary significance of sustainable development, one cannot help but notice that his analysis is influenced by traditional notions of legal pedigree at international law, notions that were themselves influenced by hierarchical thinking about sources of law. This is the hallmark of the positivist legal tradition. While no one can deny the continuing predominance of states in international lawmaking, current practice shows that a broad range of non-state actors are also involved in international legal processes both formally as observers in international fora, and informally as norm-entrepreneurs,[123] in the form of epistemic communities[124] and government networks.[125] As already indicated, several non-state actors were involved in the emergence of sustainable development at the international level, including the Founex and Brundtland Committees, as well as the IUCN.

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[122] Ibid., at 8-10.

[123] M.E. Keck & K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); M. Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996); S.J. Toope, "Redefining Norms for the 21st Century", (1995) Can.C.I.L.Procs., 191, at 197.

[124] P.M. Haas, "Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control", (1989) 43 I.O., No.3, 377-403; **and** P.M. Haas, Banning CFCs: Epistemic Community Efforts to Protect the Stratospheric Ozone", (1992) 46 I.O., No. 1, 187-224. See *infra* note 139-142 and accompanying text.

[125] A.M. Slaughter, "Governing the Global Economy through Government Networks" in M. Byers (ed.,) *The Role of Law in International Politics: Essays in International Relations and International Law* (2000). See *infra* note 136 - 137 and accompanying text.

(B) SUSTAINABLE DEVELOPMENT AS INTERSTITIAL NORM

The view that sustainable development has not only traversed the threshold of legal normativity, but has actually matured into a rule of customary international law has predictably been subject to substantial scholarly commentary. I have already referred to the views held by Birnie and Boyle, Handl, and Atapattu. However, no one has offered a more complete critique of Judge Weeramantry's argument than Professor Vaughan Lowe, who proffers an alternative explanation of the normative status of sustainable development. While Lowe agrees with Judge Weeramantry that sustainable development could be normative in some sense, he maintains that it would be erroneous to suppose that the concept's normativity lies in the domain of constraining actor conduct. In making this argument, he departs from the premise that at least on one reading of the ICJ judgement in the *North Sea Continental Shelf Cases*, a putative rule of customary international law must possess a 'fundamentally norm creating character' (i.e. an internal criterion) in addition to the traditional external tests of state practice and *opinio juris*.[126] It would be recalled that one of the issues before the Court in those cases was whether the equidistance principle had evolved into a rule of customary law despite its original formulation in treaty law. In considering that question, the ICJ reasoned that in order for a purely conventional rule to make the transition to a customary obligation, "it would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of

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[126]V. Lowe, "Unsustainable Arguments", *supra* note 106; **and** V. Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Generation Changing?" in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford Univ. Press 2000) 207-226. See also A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law International, 2002), at 49 arguing that the ICJ in fact laid down a third criterion for the formation of customary international law.

law."[127] The Court then proceeded to discuss the twin elements of state practice and *opinio juris* and concluded that for a treaty rule to evolve into a customary obligation, there must be extensive and virtually uniform practice on the part of states whose interests are specifically affected by the rule and that such practice must have been based on the belief that it was required by law.[128]

Based on the above reasoning by the ICJ, Lowe argued that sustainable development lacks a 'fundamental norm-creating character', and as such, it cannot constrain action. Since it lacks this substratum of normativity, it is impossible for the concept to evolve into a customary rule binding upon states and other actors.[129]

Having dismissed the notion that sustainable development could be normative in the sense of constraining actor behavior, he went on to suggest that the concept could be normative in the arena of dispute settlement. He writes:

> International lawyers are perhaps excessively concerned with the aspect of the norm which demands that states and other legal persons bound by the norm conduct themselves in compliance with it. There are other aspects of normativity. Norms may function primarily as rules of decision, of concern to judicial tribunals, rather than as rules of conduct. Where disputes are submitted to such tribunals by agreement between the parties to the dispute, as is always the case in international law, the submission entails an authorization to 'reason judicially' even where the reasoning implicates norms that may not have been established through processes of international law formation. ... It is in the area of these norms that I believe the search for the normative force of the concept of sustainable development should be sought. Sustainable development can properly claim a normative status as an element of the process of judicial reasoning. It is a meta-principle, acting upon other legal rules and principles - a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.[130]

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[127]North Sea Continental Shelf Cases, ICJ Reps., 1969, at para.72.

[128] Ibid., at para. 74.

[129] V. Lowe, "Unsustainable Arguments" *supra* note 106 at 23-24: "... the concept of sustainable development is inherently incapable of having the status ... of a rule of law addressed to States and purporting to constrain their conduct. ... 'Sustainable development' cannot be a norm – constraining behavior. Any such norm must be couched in normative terms."

It would be apparent to any careful reader of Lowe's argument that while he disagrees with Judge Weeramantry at a semantic level (customary v. interstitial norm), their underlying ideas about legal normativity remain the same. To both, law emerges from the actions of central institutions – States in the opinion of the Weeramantry, and Courts and States in the view of Lowe. This direct transposition of domestic law thinking to the international sphere arguably limits the influence of their respective explanatory models.

Secondly, for both Lowe and Weeramantry, the normative role and application of sustainable development is confined to the dispute settlement context; in the hands of judges, sustainable development could operate as some sort of 'intervening principle' mediating between the interstices of potentially conflicting legal principles. To my mind, the only difference in their analysis is that while to Weeramantry sustainable development forms part of the 'international common-law', Lowe approaches it from the perspective of a metaprinciple that is derived from outside the international legal system and exercises a 'broad equity' on the application of primary norms. Moreover, some scholars have expressed concern that by ascribing to interstitial norms the role of resolving conflicts between substantive rules of law, Lowe places too high an expectation on these norms. Resolving conflicts and overlaps between rules, the argument goes, is a judicial function that must be exercised by judges and supported by practical reasoning.[131] Similarly, Dworkin makes the point that where two principles conflict ('intersect' is the term he uses), a decision-maker must resolve the conflict by taking the relative weight of the principles into account.[132] This implies that the resolution of such a conflict requires reasoning

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[130] V. Lowe, "Unsustainable Arguments", at 31.
[131] J. Ellis, *Soft Law as Topos, supra* note 16, at 114.
[132] R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1999) at 26.

and a balancing act (in other words, human agency) that could not be possibly performed by another principle.

(C) SUSTAINABLE DEVELOPMENT AS A GUIDANCE NORM

It is hardly surprising that the attempt to import domestic law thinking to the international sphere, and to determine the question of international legal normativity through the prism of centralized decision-structures such as the court system has been less than satisfactory. International society lacks the sort of hierarchical decision-structures that are responsible for law making and implementation at the domestic level. In particular, there is no central legislative organ at the international level. Moreover, whereas treaties and custom continue to be the prime constructs of international norms, other legal forms do exist. For example, resolutions of international organizations, declarations of international conferences and even unilateral statements have in certain contexts, been held to be normative.[133] Furthermore, it is perfectly possible to have law in the process of development. These pre-legal or contextual norms do not meet the tests for the existence of binding rules but they do not lack all normative force. As already argued, they could either guide discourse and deliberation and so indirectly influence behavior or, they could themselves evolve into hard legal norms.[134]

Another feature that is a direct result of the absence of central decision structures at the international level is the multiplicity of actors that contribute to the development of international norms. It is becoming a trite proposition that

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[133] *Nuclear Tests Cases* (1974) ICJ Reps. 252 at paragraph 43.

[134] J. Brunnée and S.J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law", 39 Colum. J. Trans'l L (2000) 19 at 47: "... law cannot be understood as a fully realized system sprung full-born from the head of a sovereign, or

whereas States continue to be principal international actors, a variety of non-state actors do influence international governance in general and international legislation in particular. Non-governmental organizations, issue-oriented groups and even individuals have, through what Toope calls 'conscious promotion'[135] of specific issues and causes, influenced international affairs in various ways.[136] For example, in response to claims about the erosion of the nation-state as a result of the globalization of the world economy, Slaughter has denied that the contemporary State is disappearing. Rather, she maintains that the State is disaggregating into component institutions (networks) which continue to perform functions within national governance systems. At the same time, these networks are involved in ongoing interaction with their colleagues and counterparts from other countries with respect to issues of common concern.[137] For Slaughter, these "governmental networks" manifest "a new era of trans-governmental regulatory co-operation."[138]

Similarly, in a pair of very instructive and convincing studies, Peter Haas discusses the role of epistemic communities in the development and implementation of two environmental protection regimes.[139] At the regional level, a network of like-minded ecologists were instrumental in shifting governmental policy towards adopting rules and institutions for the control of pollution in the

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bequeathed intact from the implicit terms of a social contract. Law can exist by degrees, so it is possible to talk about law that is being constructed...."

[135] S.J. Toope, "Redefining Norms" *supra* note 123, at 197.

[136] A.M. Slaughter, "Government Networks", *supra* note 125; P.M. Haas, Epistemic Communities", (1989); and Haas, "Banning CFCs", *supra* note 124.

[137] A.M Slaughter, "Government Networks", *supra* note 125, at 177-205.

[138] Ibid., at 178. Examples of government networks include the Basle Committee on Banking Supervision, the International Organization of Securities Commissioners, and the International Association of Insurance Supervisors.

[139] P.M. Haas, "Epistemic Communities"; and Haas "Banning CFCs" *supra* note 124.

Mediterranean sea.[140] In some cases, members of the epistemic community had access to policy-making government officials and used this access to advocate for policy change. In other cases, they actually took control of governmental decision-making positions and in that way, succeeded in adopting policies consistent with their beliefs. In particular, in developing countries such as Algeria and Egypt which were originally opposed to the idea of Mediterranean pollution control in view of its development implications, members of the ecological epistemic community were instrumental in bringing these initial regime laggards to support the pollution control and environmental protection measures incorporated in the "Med Plan".[141] These epistemic community efforts were replicated at the international level during negotiations for the Vienna Convention on the Ozone Layer. In this case, a transnational epistemic community made up of officials from UNEP, the United States Environmental Protection Agency (EPA), the U.S. State Department as well as many international atmospheric scientists, succeeded in convincing government negotiators to adopt a strong treaty to control CFCs, even in the face of significant scientific uncertainty about cause and effect relationships.[142] Other international relations scholars have similarly studied the influence of non-state actors on international policy debates and

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[140] The Mediterranean Action Plan was negotiated under the auspices of UNEP and involved 18 developed and developing states along the Mediterranean Sea.

[141] Haas, "Mediterranean Pollution", *supra* note 124 at 392-394. Also at p388 he says: "The countries that have been the most supportive of the Med Plan are those in which the epistemic community has been strongest. [In other words], the variance in compliance with the Med Plan is largely explained by the amount of involvement of the epistemic community in domestic policymaking."

[142] Haas, "Banning CFCs", *supra* note 124 at 191 quoting the head of the United States delegation to the Ozone negotiations Richard Benedick as follows: "in a real world of imperfect knowledge and uncertainty, we, as policymakers, nevertheless have the responsibility to take prudent actions for the benefit of generations yet to come... Even in the face of the scientific uncertainties ... we nevertheless believe that the nature and extent of the long-term risks require a prudent insurance policy in the form of international controls.... If we are to err in designing measures to protect the

normative development.[143] Their work, together with the ones cited above, show that it is no longer accurate to view international law as resulting exclusively from the actions of states. On the contrary, international rules and contextual norms emerge from complex patterns of interaction between states and other actors at the international level.[144] One of the principal weaknesses of the positivist legal theory is its inability to explain the variety of actors and contexts through which international norms emerge. This has prompted international scholars to search for alternative explanations of international normativity.

The policy science approach propounded by Lasswell and McDougal, and developed by W.M. Reisman and his associates, argues that international lawmaking is a communicative process whereby the communicator directs a message (makes a prescription) to an audience who are expected to conduct their affairs in accordance with the communicated word. They argue that in order for such a message to qualify as a rule, it must possess three qualities: it must have a 'policy content' (i.e. require or prohibit conduct), it must have an 'authority signal' (the communicator must have legitimate authority to order others around) and thirdly, there must be a 'control intention' (the potentiality of enforcing compliance).[145] Otherwise known as the New Haven School, this approach bears

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ozone layer, then let us, conscious of our responsibility to future generations, err on the side of caution."

[143] M.E. Keck & K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); M. Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996).

[144] S.J. Toope, "Emerging Patterns of Governance", *supra* note 103 at 100: "... international law is not just about what States say in formal agreements; nor is it shaped only by State practice matched with formal and continuing consent. Law emerges through processes of interaction amongst various actors in international society, though primarily States, and is solidified through a growing expectation of authority. Authority arises from processes which are seen to be legitimate, and is confirmed in the actual behavior of relevant actors."

[145] M.S. McDougal, H. Lasswell, and W.M. Reisman, "The World Constitutive Process of International Decision" (1966-67) 19 J of Legal Edu. 253; Also W.M. Reisman, "International

obvious resemblance to the positivist emphasis on a determinate sovereign as the source of law and upon sanctions as the basis of compliance. To this extent, it does have limitations as far as international lawmaking is concerned. However, what is significant (and where I think the New Haven School marks an improvement on positive law scholarship), is that the approach recognizes that a plurality of actors participate in the communicative process and that this involves both formal institutions such as states, courts and international organizations, ("those formally endowed with decision competence") as well as other actors who, though not formally conferred with decision competence, "nonetheless play an important role in influencing decisions."[146] Additionally, the New Haven School recognizes that law does not always emerge from the acts of a single authority or institution, but that it could arise from a variety of sites of social interaction. In addition to multiple actors at the international level, the conception of a diffuse process of normative development as propounded by the New Haven School, accords more with the horizontal nature of international society. Yet, the McDouglian paradigm has not been spared criticism. The principal objection seems to be that the emphasis on the pursuit of human dignity reduces international law to a mere instrument for spreading post-war American liberalism upon an international society with vastly differentiated priorities, values and challenges. An overly instrumentalist conception of law, goes the argument, fails to recognize the internal essence of law, what Fuller refers to as law's 'internal morality'.[147]

Lawmaking: A process of Communication" (1981) ASIL Procs., 101; and W.M. Reisman, "The View from the New Haven School of International Law", (1992) ASIL Procs., 118.

[146] W.M. Reisman, "The View from the New Haven School of International Law", (1992) ASIL Procs., 118 at 122.

[147] Toope, "Patterns of Governance", *supra* note 103, at 100; also Toope, "Confronting Indeterminacy", *supra* note 103 at 209-210.

Many contemporary international law and international relations scholars have sustained the process of disengagement from positivist explanations of lawmaking that was commenced by the New Haven School. I have already made reference to Anne-Marie Slaughter's work on government networks and noted Peter Haas' contribution on epistemic community efforts in environmental regime building. Brunnée and Toope have also argued against the conception of international law as the handiwork of a single sovereign authority or institution. Arguing from the perspective of lawmaking as a creative entrepreneurial activity, they make the fundamental point that because law emerges from patterns of social practice, it is a continually evolving phenomenon.[148] As such, legal normativity is not 'an all-or-nothing proposition.'[149] On the contrary, it is perfectly possible and legitimate that norms and standards of behavior that were initially aspirational in nature could subsequently develop into binding rules of conduct depending on the issues, needs, problems and priorities within the social setting in which norms operate. The implication of this new wave of legal and international relations scholarship is a gradual de-emphasis on the role of the state (or conversely, an emphasis on the complementary role of a plurality of non-state actors) in the development of international legal and other norms.

The question of plural actors at the international level and lawmaking as a continuum from the pre-legal to a binding stage are among the main themes of this chapter. In discussing the evolution of sustainable development, I referred to the role played by a range of actors, mainly independent (non-state) experts and NGOs in advancing consensus over sustainable development as the appropriate paradigm for the consideration of environment and development issues. Arguably,

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[148] Brunnée and Toope, "International Law and Constructivism", *supra* note 134.
[149] Ibid., at 47.

the knowledge generated from this international discourse provided shared understandings that made it possible for States to reach agreement at Stockholm and at Rio.[150] For example, it is inconceivable that the Stockholm Declaration would have been as successful as it was without the participation of developing countries. Developing country participation was in turn made possible by the fact that the Founex Report established a nexus between environment and development. Similarly, potentially little could have been accomplished at Rio (indeed that conference might not have taken place at all) if it were not for the work of the Brundtland Commission and its endorsement of the concept of sustainable development. Therefore, to the extent that one could talk of a prospective legal principle of sustainable development, its genesis must be explained on the basis of action on the part of both states and a variety of non-state actors.

Having said that, one must ask the further question if indeed sustainable development does qualify as a normative principle? I will argue that the most plausible case that could be made is that there is a legitimate international expectation that States, organizations, corporations and individuals should conduct their affairs in accordance with the objectives of sustainable development but that this falls short of a binding legal obligation. Arguably, this expectation arises from the international discourse that has taken place over the past thirty years.[151] The legitimate expectation could also be grounded upon the fact that

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[150] On shared understandings, **See** M. Byers, *Custom, Power and the Power of Rules, supra* note 15, at 147-149; Toope, "Emerging Patterns of Governance", *supra* note 103, at 95: "...some 'common meanings' may emerge through the interaction of various actors (including States) in bilateral and multilateral fora, these intersubjective meanings in turn allow for the evolution of legal rules."

[151] M. Byers, *Custom, Power and the Power of Rules, supra* note 15, at 106-126 for a discussion of the principle of legitimate expectation. However while inspired by his explanation, I differ from Byers in our conceptions of the role of the principle of legitimate expectation in international law. For Byers, legitimate expectation operates to explain the basis of non-consensual rules of

sustainable development implicates two essential interests of international society. The first relates to the indispensability of the environment as a life-support system and the second is the moral imperative to fight global poverty.

While it is hard to defend the argument that sustainable development is a principle of customary international law, it is possible to identify some elements of the concept that have crossed the threshold of normativity and thereby qualify as rules of international law. It is also possible to identify a set of principles and norms of international law relating to sustainable development that must be taken into account at the domestic level and within international legal regimes in order to realize sustainable development. I argue that it is by invoking these principles in domestic and international legal regimes and decision-making processes that law could contribute to the realization of sustainable development. The next section discusses the role of principles in the evolution of legal regimes towards sustainable development.

5. The Role of Principles

An understanding of lawmaking as a continuous social enterprise rather than the sole prerogative of a hierarchical authority is fundamental to the analysis of how law could contribute to the attainment of sustainable development. This is

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international law such as customary international law. He explains the existence of customary rules on the basis of a shared understanding that where States acquiesce (i.e. fail to object) to putative rules of customary law, that creates an expectation on the part of other States that the former's conduct would be in accordance with the new rule. For Byers then, legitimate expectations represent some form of international estoppel. On the other hand, my argument is that legitimate international expectations could arise even in the context of norms in the process of creation (i.e. pre-legal or contextual norms). In this sense, while the legitimate expectation may fall short of a binding rule, it could serve both as moral suasion for state behavior in accordance with the norm, and more importantly, could operate as an instrument for the evolution of the pre-legal norms to binding ones.

because the concept of sustainable development is not a static notion. Rather, it depicts, in the words of the World Commission on Environment and Development, 'a process of change' in human activities so that the natural resource base upon which current and future generations of humanity depend for the satisfaction of their needs and aspirations is not undermined.[152] Since the transition to sustainability could not be an over-night process, the evolution of law towards sustainable development must as well be a gradual process.[153] I argue here that legal systems could contribute towards this transition through incorporating certain principles which appear as 'good conduct norms' necessary for the realization of sustainable development.

How does one identify these principles? How do they differ from rules of law? To my mind, rules and principles differ at both a substantive and functional level. At a substantive level, it has been argued that one of the features that distinguishes principles from rules is that principles are open-ended, couched in general terms and that they lack specificity.[154] Dworkin makes a similar point when he argues that rules require specific courses of action, whereas a principle "states a reason that argues in one direction, but does not necessitate a particular decision."[155] In discussing his 'concept of right', Rawls argued that the principles

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[152] World Commission on Environment and Development, *Our Common Future* (1987), at 46.

[153] Dernbach, "Sustainable Development", *supra* note 21 distinguishing between substantive and procedural integration of environment and development and noting that emphasis on procedure or process suggests an understanding of sustainable development as a journey. Conversely, an emphasis on substantive goals suggests that sustainable development is a destination. But note Fuller's useful insight that the existence of law must be determined by adherence to both procedural and substantive values, even though it is hard to imagine that a law could meet the tests of internal morality (i.e. procedural fairness), and be unjust, unfair or unequal in its substantive outcome. See Brunnée & Toope, "International Law and Constructivism", *supra* note 134, at 57.

[154] D. Bodansky, "The United Nations Convention on Climate Change: A Commentary" (1993) 18 Yale. J. I.L., 451, at 501.

[155] R. Dworkin, *Taking Rights Seriously, supra* note 132, at 26. At p24 he wrote: "Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion."

of such a concept must possess certain features including generality, universality and publicity.[156]

With respect to rules, Thomas Franck has identified 'determinacy' as one of the elements that is relevant to the question of rule legitimacy.[157] Finally, one must make reference to the work of Lon Fuller who argues that legal legitimacy must be determined predominantly by tests of internal morality including generality (in the sense of non-discrimination) of rules, rule clarity and the avoidance of contradiction.[158] At a substantive level therefore, rules differ from principles with respect to the degree of their specificity. Rules formulate specific standards of actor conduct whereas principles are more general in character.

Instead of operating as guidance norms in the area of actor conduct, principles provide frameworks for decision that could be invoked in deliberation geared towards the construction of legal rules as well as in the application of legal rules in a judicial or administrative context. As I have already discussed, both Judge Weeramantry in the *Gabcikovo case* and Vaughan Lowe in his commentary, have attributed this rhetorical function to the principle of sustainable development, even though the former seemed to argue further that sustainable development could potentially also affect actor conduct. At a functional level therefore, it is arguable that while rules prescribe courses of action and as such

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[156] Rawls, *A Theory of Justice,* Rev'd Ed., (1999) at 113-116. Other conditions of a concept of right though less relevant for our purposes, are that such a concept must impose an ordering of conflicting claims, and that they must operate as the 'final' court of appeal in practical reasoning.

[157] T.M. Franck, *The Power of Legitimacy among Nations* (1990).

[158] L. L. Fuller, *The Morality of Law* (1969) at 42-43, cited in J. Brunnée and S.J. Toope, "International Law and Constructivism", *supra* note 134 at 54. Other tests of internal morality as laid down by Fuller are promulgation, limiting cases of retroactivity, not asking the impossible, constancy over time, and congruence of official action with underlying rules. External morality, on the other hand, relates to the substantive outcomes of the legal system. Here, rules of rule-making systems are tested for fairness, justice and equality. For an example of international law scholarship directed to the issue of fairness, see T.M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford Univ. Press 1995).

operate to regulate conduct, principles guide discourse, deliberation, discussion and argument, including deliberation geared towards the construction and interpretation of legal rules.[159] In this manner, while principles of law may not bind actor conduct, by being taken into account in rule making and interpretation, they could serve as instruments of legal development and change. I would argue that this is the normative role of principles of law. Through the exercise of this role, the principles discussed below could contribute to the evolution of legal regimes towards sustainable development.

To return to the question about how one could identify principles of sustainable development, I argue that the discursive processes entailed in the Founex and Brundtland Reports, the work of the IUCN and other NGOs and individuals as well as the inter-state discourse that took place in preparation for, and at the Stockholm and Rio conferences, have generated a set of shared understandings of good conduct that ought to be taken into account in making environment and development decisions.[160] It is these understandings of good conduct that I refer to as sustainable development principles. I argue that by invoking these principles in processes of rule making, rule-interpretation and rule application as well as a variety of non-legal decision contexts, legal regimes could contribute to the attainment of sustainable development.

Since the Rio conference, many legal scholars have made attempts to identify legal principles of sustainable development. Phillipe Sands argues that as a principle of international law, sustainable development requires recognition of inter and intra-generational equity, the sustainable use of natural resources, common but differentiated environmental responsibilities and the integration of

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[159] J.D. Ellis, "Soft Law as *Topos*", *supra* note 16.
[160] Toope, "Emerging Patterns of Governance", *supra* note 144 at 95; and *supra* note 150 and accompanying text.

environment and development in decision-making.[161] He also discusses sovereignty over natural resources and the responsibility to avoid environmental harm, the preventive and precautionary principles, environmental impact assessments and the polluter-pays principle. However, these are presented as separate environmental principles parallel to the principle of sustainable development. As will become apparent below, my argument is that sustainable development is the overarching objective and that these other principles operate towards the realization of that objective.

For Boyle and Freestone, the elements of sustainable development are sustainable utilization, integration of environment and development, the right to development and intra and intergenerational equity. They identify environmental impact assessment and public participation in decision-making as the procedural aspects of implementing sustainable development at the national level and that these function to legitimize decisions.[162] The Foundation for International Environmental Law and Development (FIELD) argued that while the concept is still subject to some uncertainty in meaning, it is possible to identify intra and intergenerational equity, sustainable use, and the principle of integration among the core elements of sustainable development.[163] For Dernbach, sustainable development implies adherence to the principle of integrated environment and development decision-making, the polluter-pays principle, sustainable consumption and population levels, the precautionary principle, intergenerational

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[161] P. Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles" in W. Lang (ed.), *Sustainable Development and International Law* (Dodrecht: Martinus Nijhoff 1995) at 53-66. **Also** P. Sands, *Principles of International Environmental Law,* (Manchester: Manchester Univ. Press 1995) especially at 183-220.

[162] A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford Univ. Press 1999) at 8-16.

[163] FIELD, *Report of a Consultation on Sustainable Development: The Challenge to International Law,* R.E.C.I.E.L., at r5-r6.

equity, citizen participation and common but differentiated responsibilities for developed and developing countries.[164]

After a ten year study aimed at elucidating principles, norms, and rules of international law which could constitute the normative framework for sustainable development, the International Law Association recently came up with two sets of principles presented as a "framework of international law in the field of sustainable development."[165] The first set of 'general principles' include: (1) observance of the rule of law in international relations, including international economic relations; (2) the duty to cooperate towards global sustainable development; (3) the observance of human rights; and (4) the principle of integration. The first of these four principles, in effect, restates the general principle of good faith in international relations especially as regards the observance and implementation of international treaty obligations. As far as treaty law is concerned, the principle of good faith is widely accepted and uncontroversial. What might be more controversial and likely to face opposition by industrialized countries is that part of the principle which purportedly states a duty to abstain from measures of economic policy that are detrimental to the sustainable development opportunities of third countries and peoples. Acceptance of an international legal duty of this nature could quite conceivably lead to an argument that agricultural subsidies adopted by one country or regional economic grouping that operate to displace exports or reduce market share for a developing country, are a violation of customary international law and should therefore entail international responsibility. The duty to cooperate is also widely recognized in international law and has featured in many international instruments such as the United Nations Charter, and the Stockholm and Rio Declarations.

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[164] Dernbach, "Sustainable Development" *supra* note 21.

The ILA also identified a second set of 'specific principles' of sustainable development. These are: (1) sovereignty over natural resources and the duty to protect both the domestic and transboundary environment; (2) the sustainable use of natural resources; (3) intergenerational equity; (4) intra-generational equity; (5) common but differentiated responsibility; (6) common heritage of humankind; (7) the precautionary principle; (8) public participation and access to information; and (9) good governance and democratic accountability. With respect to legal status, the ILA recalled that the principle of sovereignty over natural resources is well established in international law. They also noted that while intergenerational equity has been recognized in various international instruments including the Stockholm and Rio Declarations as well as UNCLOS and the Biodiversity and Climate Change Conventions, its legal status remains unclear outside these specific contexts. Intra-generational equity was classified as being at best an emerging principle of international law in the field of sustainable development. The principle of common but differentiated responsibilities was said to have a firm status in various fields of international law including human rights, international trade, and international environmental law.

I will argue that to a significant extent, the received learning is influenced by the felt need to determine the normative status of sustainable development in international law. In other words, much of the scholarship was directed at the distinction between legal and non-legal norms and how these affect actor conduct within domestic and international societies. While the distinction between binding and non-binding norms is useful, with respect to the role of law in sustainable development, the distinction is largely rhetorical. I am not convinced that the usefulness of the concept of sustainable development depends on its status as a

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[165] International Law Association, *supra* note 2 at 6.

rule of customary international law. My approach to sustainable development is to treat it as an overarching societal objective towards the realization of which law has an important role to play.

However, I do argue that it is possible both to identify specific principles relevant to sustainable development and in some cases, determine their normative status. With respect to the identity of principles of sustainable development, I argue that inter and intragenerational equity, the principle of sovereignty over natural resources and environmental responsibility laid down in Principle 21 of the Stockholm Declaration, as well as common but differentiated responsibilities are all significant in that that they give substantive content to the idea of sustainable development. Common but differentiated responsibility has additional significance because it is a means of providing financial and technological resources for sustainable development in developing countries.[166] The fact that the principle of sovereignty over natural resources and environmental responsibility is now widely recognized as a principle of customary international law gives it added significance as well.[167]

As already noted, the principles of inter and intra-generational equity are both said to be emerging principles of international law.[168] In a 1995 case between

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[166] Principle 7 of the Rio Declaration. The Johannesburg Plan of Implementation recalls Principle 7 and the commitment of states to common but differentiated responsibility as an important instrument for the realization of sustainable development. See paragraphs 2, 13, and 19 of the Plan of Implementation.

[167] *Legality of the Threat or Use of Nuclear Weapons* ICJ Reps., (1996) at paragraphs 30: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now a part of the corpus of international law relating to the environment." **Also** P. Sands, *Principles of International Environmental Law, supra* note 161 at 190-191. **Contra** M. Pallemaerts, "International Environmental Law from Stockholm to Rio: Back to the Future?" (1992) 1 R.E.C.I.E.L 254, at 256, argues that the addition of the words 'and developmental' at Rio effected a change in the customary rule. Sands responds that "a careful reading suggests that the additional words merely affirm that states are entitled to pursue their own development policies."

[168] International Law Association, *supra* note 21 at p8-9.

New Zealand and France before the ICJ, Judge Weeramantry noted that intergenerational equity is "an important and rapidly developing principle of contemporary environmental law."[169] Edith Brown Weiss has considered a number of international human rights instruments and concluded that there is adequate support for a theory of generational rights in international law.[170] This view was supported by a 1993 decision of the Philippines Supreme Court.[171] The decision arose out of a class-action suit brought on behalf of current and future generations of children in the Philippines on the basis that the issue of timber licenses by the government was causing extensive environmental damage and as such, violated the rights of present and unborn generations. The Court rejected the government's objections that the plaintiffs had no standing to bring the claim and that the issue of the licenses was a political matter.

While the idea of fairness to future generations is an important feature of sustainable development, it is unrealistic to seek to safeguard the needs of future generations if poverty and deprivation pervades the lives of many people currently living on earth. Indeed Brown Weiss does recognize that intra-generational equity is an important component of fairness between generations:

> ... the fulfillment of intergenerational obligations requires attention to certain aspects of intragenerational equity. As is well known, poverty is a primary cause of ecological degradation. Poverty-stricken communities, which by definition have unequal access to resources, are forced to overexploit the resources they do have so as to satisfy their own basic needs.[172]

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[169] *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case (New Zealand v. France),* ICJ reps., 1995, Dissenting Opinion of Judge Weeramantry, at 17.

[170] E. Brown Weiss, "Our Rights and Obligations to Future Generations", *supra* note 37.

[171] *Minors Oposa v. Secretary of the Department of Environment and Natural Resources,* 33 ILM 173 (1994).

[172] Brown Weiss, "Our Rights and Obligations to Future Generations", *supra* note 37 at 201. **See also** the remarks of former Indian Prime Minister Indira Gandhi at the Stockholm Conference: "How can we speak to those who live in villages and in slums about keeping the oceans, rivers and the air clean when their own lives are contaminated at the source. Environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and

Gundling has also argued that it will be impossible to attain intergenerational equity without fairness between members of the current generation.[173] Sustainable development implies both environmentally sensitive and people-centered development.[174] This has important implications for the current international economic and legal order. It would require that the inequities that characterize current international economic relations such as limited market access for commodities from developing countries be addressed. It also implies that substantial international effort and resources must be directed towards poverty alleviation in developing countries.[175] The gap between developed and developing countries and the need for intra-generational fairness has necessitated the adoption of differential financial and compliance obligations in many international environmental regimes. The rationale for such differential treatment is that industrialized countries are principally responsible for the world's most serious environmental problems ranging from climate change, to ozone depletion, to loss of biological diversity. In addition, compared to developing countries, the developed countries have more financial and technological resources at their disposal. Fairness demands that these countries shoulder more of the remedial burden.

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technology." Quoted in K. Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1997) 16(2) Wisc. I.L.J, 353, at 389.

[173] L. Gundling, "Our Responsibility to Future Generations, *supra* note 37.

[174] Johannesburg Declaration and, Plan of Implementation, paragraphs 11 and 2 respectively, provide that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development.

[175] Paragraph 6 of the Johannesburg Plan of Implementation: "Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development, particularly for developing countries." States therefore agreed to take actions at all levels to reduce by half, by the year 2015, the proportion of people whose income is less than $1 a day.

Along the same lines, I do not approach 'integration' as a separate principle, but as a methodological instrument that enables decision-makers to make a transition from a sector-based (environment v. development; trade v. environment), to a more holistic approach to development planning. To many commentators, integration provides the single most important instrument for the attainment of sustainable development.[176] An example from the issue-area of international economic law might support this argument. It is clear that as originally conceived and developed, the international trade regime was directed exclusively at trade concerns; non-trade issues such as the environment and human rights were traditionally considered to be outside the purview of the trade regime. However, as international understanding of environmental issues grew, in particular, about how international economic activity has affected the natural resource base, there has been a gradual shift towards integrating environmental issues in international trade discourse and regime building. For instance, the Uruguay Round Agreements now refer to sustainable development as an objective of the trade regime, and the WTO has had a Committee on Trade and the Environment since 1995. At the Fourth WTO Ministerial Meeting held in Doha in November 2001, Ministers reaffirmed their commitment to the objective of sustainable development and expressed their conviction that trade liberalization and environmental protection as well as the promotion of sustainable development could be mutually supportive.[177] Paragraph 51 of the Declaration specifically mandates the WTO Committees on Trade and Environment and on Trade and

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[176] Dernbach, "Sustainable Development", *supra* note 21 refers to it as: "the bedrock principle of sustainable development"; Atapattu, "Sustainable Development", *supra* note 21 at 271, refers to it as: "the cornerstone of modern international environmental law"; and the ILA Committee on Legal Aspects of Sustainable Development, *supra* note 2 at 7: integration "serves as the very backbone of the concept of sustainable development."

[177] WTO Ministerial Declaration, WT/MIN/(01)/DEC/1 adopted at Doha, on November 14, 2001, paragraph 6.

Development to each act as a forum for identifying and debating the environment and development aspects of the negotiations so that the objective of sustainable development could be reflected in the new round of trade negotiations.[178] Similarly, the parties to NAFTA had to conclude an Environmental Side Agreement and establish a Commission on Environmental Cooperation before the United States Congress gave its stamp of approval to the tripartite trade agreement. Despite the less than satisfactory progress in international trade regimes vis-à-vis environmental protection and sustainable development, these examples do show that there is some movement towards the integration of economic and non-economic concerns.

Having argued that the principles so far discussed give content to the idea of sustainable development, it is now time to consider the other group of principles - those through which legal regimes and decision-making procedures could contribute to sustainable development. In making this argument, it would become clear that my emphasis is on the process of normative development and the contribution of law to sustainable development, rather than on determining the legal status of sustainable development as such. Arguably, there are three principles relevant to the question of how legal regimes could contribute to the realization of sustainable development. They are the precautionary principle, the environmental impact assessment principle and public participation in decision-making. I will briefly discuss each of these principles.

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[178] For a detailed discussion of this provision and its implications for sustainable development in the trade regime, see A. Marong and M. Gehring, "Sustainability Challenges of Paragraph 51 of the Doha Ministerial Declaration", in *Bridges* Year 6, No. 1 (Jan. 2002) at 17.

(A) THE PRECAUTIONARY PRINCIPLE

Before its introduction in international environmental regimes in the 1980s, ideas underlying precautionary action were implicit in the domestic law of many States. Examples include the United States *Endangered Species Act,* and the Indian *Forestry Act* of 1927.[179] Explicit reference to the precautionary principle as a matter of domestic law commenced with a German air pollution statute enacted in 1976. That year, the German government also formally adopted the *Vorsorgeprinzip* as a general principle of environmental policy.[180]

The significance of the shift to a precautionary approach should be viewed against what Trouwborst calls the "traditional model of environmental decision-making" at the domestic level.[181] Under that model, environmental policy and law were based on the presumption that science can, in most cases, predict with accuracy the effects of human activity on the environment and natural systems. This implied that measures to protect the environment were only justifiable when conclusive proof of harm could be established.[182] The international law variant of this model is the assimilative capacity approach.[183] Assimilative capacity was

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[179] A. Trouwborst, *Precautionary Principle, supra* note 126, at 13-16.

[180] Ibid., at 17. See also K. von Moltke, "The Relationship between Policy, Science, Technology, Economics and Law in the Implementation of the Precautionary Principle" in D. Freestone & E. Hey (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague: Kluwer Law International, 1996) 97-108, especially at 102: "...the German equivalent of the precautionary principle - the *Vorsorgeprinzip* - can be viewed as the germ cell of the broader international debate."

[181] Trouwborst, *Precautionary Principle, supra* note 126, at 11.

[182] Ibid., at 11.

[183] Ibid., at 18 citing O. McIntyre & T. Mosedale, "The Precautionary Principle as Norm of Customary International Law" (1997) 9 J.E.L. 221 at 222: "Simply stated, the assimilative capacity approach assumes that: science can accurately predict threats to the environment; science can provide technical solutions to mitigate such threats once they have been accurately predicted; there will remain sufficient time to act; and, acting at this stage results in the most efficient utilization of scarce financial resources. [...] The precautionary approach is based upon an entirely new set of assumptions, including: the vulnerability of the environment; the limitations of science

grounded on a number of assumptions about the predictive value of science including the assumption that science was capable of determining with accuracy the rate at which substances discharged into the environment would biodegrade, as well as the rates at which depleted natural resources would regenerate. These assumptions however proved largely illusory. In reality, there is widespread scientific uncertainty about the assimilative capacity of the environment and the effects of pollution on a variety of environmental media and ecosystems. This uncertainty became the basis for a new approach to regulatory action; instead of relying on the capacity of the environment to absorb pollutants and the accompanying uncertainty about safe levels of pollution, the precautionary principle provides a basis upon which to consider arguments that regulatory measures may need to be adopted even without full scientific proof that harm will ensue.[184] It is an anticipatory, prudential approach to environmental decision making.

The precautionary principle was brought onto the international stage as a result of proposals made by Germany at the North Sea Ministerial Conferences.[185] It was initially widely endorsed in the issue-area of marine environmental protection in the North Sea. Both the London and Hague Declarations expressly endorsed the principle and called for action to control dumping substances into the North Sea even before a causal connection could be established by scientific

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to accurately predict threats to the environment; and, the availability of alternative, less harmful processes and products."

[184] J. Cameron & J. Abouchar, "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment" (1991) 14 (No.1) B.C. Int'l & Comp.L.Rev., 1-27.

[185] D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle" in D. Freestone and E. Hey (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague: Kluwer Law International 1996), 4.

evidence.[186] More progress in adopting precautionary action came through the work of the Oslo and Paris Commissions, which adopted instruments for the operationalization of precautionary thinking. For example, they required that the best available technology be applied to land-based sources of pollution and that any dumping of industrial waste in the period before the adoption of the Convention be based on the 'prior justification procedure (PJP).'[187] The effect of this procedure was to require States to show evidence to the Commission that land-based alternatives were not available before they could issue a permit for dumping industrial waste at sea. From the Oslo and Paris Commissions, the precautionary principle found its way into the OSPAR Convention.[188] At the multilateral level, it was adopted by UNEP's Governing Council, and as a guiding principle in the implementation of the London Convention.[189] It was also adopted by members of the Economic Commission for Europe in their 1990 Ministerial Meeting held in Bergen, Norway.[190]

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[186] Paragraph VII of the 1987 London Declaration provides inter alia: "... in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolute clear scientific evidence." The Preamble to the 1990 Hague Declaration also noted that the Conference participants "will continue to apply the precautionary principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic and likely to bioaccumulate even when there is no scientific evidence to prove a causal link between emissions and effects."

[187] Freestone and Hey, *supra* note 185 at 6. The PJP was adopted by OSCOM Decision 98/1 of June 14, 1989.

[188] Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), September 1992, Article 2(2) (a).

[189] Decision SS.II/4, UNGA, Official records, 45th Session, Supplement No. 25 (A/45/25), p. 26; and Resolution LDC 44(14) on the Application of the Precautionary Approach to Environmental Protection within the Framework of the London Dumping Convention, Annex 2, Doc. LDC 14.16, December 30, 1991. The resolution noted inter alia, that the Parties shall be guided by a 'precautionary approach to environmental protection' when implementing the convention.

[190] Ministerial Declaration on Sustainable Development in the ECE Region (Bergen Declaration) paragraph 7, noting among other things, that: "In order to achieve sustainable development, policies must be based on the precautionary principle."

The most well-known formulation can be found in principle 15 of the Rio Declaration on Environment and Development which provides that: "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The Plan of Implementation adopted at the end of the Johannesburg Summit not only reaffirmed the commitment of States to the Rio Principles and Agenda 21, in paragraph 22, States are expressly called upon to take into account the precautionary approach as set out in principle 15 of the Rio Declaration.[191] The principle is also incorporated in many international environmental treaties, including the Vienna Convention and Montreal Protocol on the Protection of the Ozone Layer, the Climate Change Convention, the Preamble to the Biodiversity Convention and the Bamako Convention Banning the Transboundary Movement of Hazardous Wastes into Africa.[192]

In the area of economic law, the 1992 Maastricht Treaty amends Article 130r (2) of the EEC Treaty to the effect that the European Union's action on the environment "shall be based on the precautionary principle." Similarly, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures enables WTO Members to "provisionally adopt sanitary and phytosanitary measures" even in cases where the relevant scientific evidence is insufficient.[193] In the *Beef Hormones case,* the WTO Appellate Body found that the precautionary principle was not only reflected in, but has been incorporated into the SPS Agreement. However, while one could argue that historically, invoking the precautionary principle is not inconsistent with WTO law, the principle is not fully integrated

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[191] WSSD, Plan of Implementation, 4th September 2002.

[192] Preambular paragraph 5 of the Vienna Convention; Preambular paragraphs 6 and 8 of the Montreal Protocol; Article 3 (3) of the FCCC; Paragraph 9 of the CBD; Article (3) (f) of the Bamako Convention.

[193] WTO, Agreement on the Application of Sanitary and Phytosanitary Measures (1994), Art. 5(7).

into that law. At best, its operation seems to be limited to provisional measures. This is borne out by Article 2(2) of the SPS Agreement, which requires that SPS measures adopted by WTO Members be "based on scientific principles" and must not be "maintained without sufficient scientific evidence." In the *Beef Hormones* case, the Appellate Body declined to rule on the EC's argument that the precautionary principle had matured into a rule of customary international law.[194] They noted that: "The status of the precautionary principle in international law continues to be subject to debate ... [and] whether it has been widely accepted by Members as a principle of customary international law appears less clear. We consider ... that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract question."[195]

Unfortunately, this was a lost opportunity for the Appellate Body to clarify the status of the precautionary principle in WTO law. One could argue that historically, the precautionary principle has always been implied in GATT law. Article XX paragraphs (d) and (g) of GATT 1947, respectively, permit the adoption of trade measures necessary to protect human, animal or plant life or health, and for the conservation of exhaustible natural resources. Such measures are subject to two conditions: first, they must not operate as disguised restrictions on international trade; and second, they must not result in arbitrary discrimination between countries where the same conditions prevail. There is no express requirement in Article XX that the measures be based on scientific evidence or a risk assessment. At least tacitly, these provisions could support the adoption of precautionary trade measures to protect plant and animal life and health, and to

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[194] *EC Measures Concerning Meat and Meat Products (Hormones) (Canada and United States v. European Community),* 16 January 1998, AB-1997-4, *WTO Doc.* WT/DS26/AB/R and WT/DS48/AB/R, at www.wto.org.
[195] Ibid., at paragraph 123.

conserve exhaustible natural resources. Secondly, the Preamble to the WTO Agreement provides that global trade in goods and services should be conducted in accordance with the objective of sustainable development. One way of doing this would be to take the precautionary principle into account when interpreting provisions of the trade regime. As recognized in the *Vienna Convention on the Law of Treaties,* treaty interpreters could resort to the preamble to help determine the object and purpose of a treaty. In the *Shrimp-Turtle Case,* it was held that the Preamble could add color, texture and shading to the interpretation of the WTO Agreements.[196]

In *Beef Hormones*, the Appellate Body did not broaden its analysis to reflect the above considerations. Indeed, it appears that even after acknowledging the possibility that the precautionary principle might have received 'authoritative formulation' within international environmental law, the Appellate Body did not think that this was a development that should affect their reasoning or decision on the SPS Agreement. This approach seems to go against the Appellate Body's own earlier injunction that WTO law must not be interpreted in 'clinical isolation' from the rest of public international law.[197] At the end of the day, the Appellate Body in *Beef Hormones* concluded that apart from Article 5(7), no other provision of the SPS Agreement provides for the application of the precautionary principle. It further concluded that the EC had not brought sufficient scientific evidence of the

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[196] *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* 20 September, 1999, WT/DS58/AB/R, at para. 153.

[197] Appellate Body Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products,* - 1998. **See also** G. Marceau, "A Call for Coherence in International Law - Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement", 33 (5) J.W.T., (1999) 87-152. She argues that while it is permissible to use non-WTO rules to interpret and apply provisions of the WTO Agreements, WTO adjudicating bodies have no mandate to enforce general legal rights and obligations arising under public international law, i.e. they are not tribunals of general jurisdiction.

danger of growth hormones and therefore had not complied with the relevant risk assessment criteria.[198]

Before the Appellate Body of the WTO was presented with the *Beef Hormones* case, it was the ICJ that had an opportunity to pronounce upon the legal significance of the precautionary principle and other "new norms and prescriptions of international environmental law."[199] Among the complex legal issues before the ICJ in the *Gabcikovo case* was the legality of Hungary's unilateral termination of work on a dam project that was the subject of a treaty signed between that country and Czechoslovakia in 1977. Hungary justified her action on the basis that there was insufficient scientific evidence of the environmental, ecological and water quality impact the project might have. Hungary also expressly invoked the precautionary principle both as a general international law obligation and as a requirement of the law of transboundary watercourses.[200] Among other things, Hungary argued that the previously existing obligation not to cause substantive damage to the territory of other states had "evolved into an *erga omnes* obligation of prevention of damage pursuant to the 'precautionary principle'."[201] Unfortunately, the ICJ failed to rule on the specific legal status of the precautionary principle. Only Judge Weeramantry expressed willingness to consider the precautionary principle as part of what he perceived to be the international law principle of sustainable development requiring continuing environmental impact assessment of development projects.[202]

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[198] See Trouwborst, *Precautionary Principle*, *supra* note 126, at 165-169 for a detailed discussion of the *Beef Hormones* case.
[199] Case Concerning the *Gabcikovo-Nagymaros* Project (Hungary v. Slovakia) ICJ Reps. (1997).
[200] Paragraph 31 of Hungary's Application in the *Gabcikovo-Nagymaros case.*
[201] Trouwborst, *Precautionary Principle, supra* note 126, at 163.
[202] Jude Weeramantry, Case Concerning the *Gabcikovo-Nagymaros* Project, at p113: "EIA, being a specific application of the larger general principle of caution, embodies the obligation of continuing watchfulness and anticipation."

At the domestic level, the Supreme Court of Canada has recently invoked the precautionary principle to uphold the validity of a by-law adopted by a local municipality to restrict the use of pesticides within the municipality to specified locations and for enumerated activities.[203]

The widespread endorsement of the precautionary principle has prompted some scholars to argue that it is now an emergent principle of international law.[204] Philippe Sands takes a more cautious position. He argues that the principle has now received sufficient support to allow a good argument to be made that it reflects a principle of customary international law.[205] The most recent and comprehensive study on the subject reached the following conclusion on the legal status of the precautionary principle:

> ... the precautionary principle can, firstly, be qualified as a general principle of international environmental law; ... Secondly, it is a weighty principle of environmental treaty law that has been incorporated in over fifty multilateral agreements. Thirdly, ... precautionary state practice is of such uniformity and generality, and the evidence of *opinio juris sive necessitatis* accompanying it of such persuasiveness, as to support the conclusion that contemporary customary international law also requires states to apply the precautionary principle.[206]

Despite this wide and general endorsement and the arguments about its international legal status, the precautionary principle is still subject to at least two interpretations.[207] First, it could be interpreted to require that regulatory measures be adopted to avoid environmental harm even in the face of scientific uncertainty. It is in this sense that the precautionary principle effects a paradigm shift from an

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[203] *114957 Canada Ltée (Spraytech Société d'arrosage) v. Hudson (Town) 2001, SCC 40,* paragraph 30-32 Justice L'Heureux-Dubé posited that: "... reading section 410(1) [of the Cities and Towns Act] to permit the Town to regulate pesticide use is consistent with principles of international law and policy. ... The interpretation of By-Law 270 set out here respects international law's "precautionary principle". ... In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action."

[204] J. Cameron and J. Abouchar, "The Precautionary Principle", *supra* note 184.

[205] P. Sands, *Principles of International Environmental Law, supra* note 161 at 213.

[206] Trouwborst, *Precautionary Principle* (2002), *supra* note 126, at 286.

assimilative to an anticipatory approach to environmental regulation.[208] Secondly, the precautionary principle could be interpreted to imply a shift in the burden of proof. In the absence of a precautionary approach, the burden of proof lies on the opponent of a proposed project to prove that the project is potentially harmful to the environment and should therefore either be suspended or modified. In contrast, where the precautionary principle is interpreted so as to shift the burden of proof, the proponent of a project would have to demonstrate that the project will not harm the environment or human health in order to gain approval for it to proceed.

The broad-based support for the precautionary principle is testimony to its acceptance as a good conduct norm that is crucial for the realization of sustainable development. By basing regulatory action on the potentiality of environmental harm rather than on proof that harm will occur, and by presuming that the environment is vulnerable to a wide range of human activities, the precautionary principle introduces an anticipatory approach to development planning. In this manner, legal regimes and decision processes based on the precautionary principle help to balance the pursuit of economic development with the need for environmental preservation. This balance is the hallmark of sustainable development, rendering the precautionary principle indispensable whenever legal regimes aspire towards preserving the environmental basis for economic development in the interest of current and future generations.

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[207] D. Bodansky, "Scientific Uncertainty and the Precautionary Principle", (1991) 33 Env't 4.
[208] Trouwborst, *Precautionary Principle, supra* note 126, at 19 describing it as: "the philosophical shift of paradigm from prediction to precaution...."

(B) ENVIRONMENTAL IMPACT ASSESSMENT

The purpose of Environmental Impact Assessment is to provide adequate and timely information on the likely environmental and social consequences of development projects and on possible alternatives and mitigating measures.[209] Because EIAs invariably consider both environmental and social impacts of projects, the appellation 'environmental impact' is in reality a misnomer. For this reason, 'sustainability impact assessments' might be a more apt description of the process.

First introduced in the United States jurisdiction of Michigan in the 1960s, the EIA procedure became a national standard in the United States in 1972 with the enactment of the National Environmental Protection Act (NEPA).[210] It then gained support at the regional level when the European Economic Community issued its first directive on EIA in 1985 requiring EIA for projects that "are likely to have significant effects on the environment."[211] Then in 1991 the Espoo Convention extended the EIA requirement to projects likely to have transboundary environmental impacts.[212]

At the international level, although the Stockholm Declaration does not explicitly require EIA, it does call for rational planning as a tool for reconciling conflicts between environment and development.[213] Similarly, Principle 17 of the Rio Declaration requires EIA to be adopted as a national instrument with respect to projects that are likely to have significant adverse impact on the environment

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[209] A. Kiss and D. Shelton, *International Environmental Law* 2nd ed., (New York: Transnational Publishers, 2000) 44.
[210] 42 U.S.C §§ 4321-4370 (1988). See D. Young, "The Application of Environmental Impact Statements to United States Participation in Multinational Development Projects", (1992) 8 Am. Univ. J. Int'l L & P, 309-337.
[211] EC Directive 85/337, June 27, 1985. See P. Sands and D. Alexander, "Assessing the Impact" (1991) 141 New Law Journal, 1487.
[212] Article 2 Espoo Convention (1991) at 30 ILM (1991) 802.

and subject to "a decision of a competent national authority." This weak EIA language arguably makes it unclear whether the EIA requirement is limited to public sector projects, and whether the requirement extends to projects that might have environmental impacts beyond the limits of national jurisdiction. Arguably, one can make a strong case that there is a customary obligation to take into account the transboundary environmental effects of projects located within the limits of national jurisdiction. This obligation can be traced back to the arbitral decision between the United States and Canada over the operation of the *Trail Smelter*, which deposited fumes from the factory's plant in Trail, British Columbia, onto the territory of Washington State. This resulted in damage to crops, land, trees and agriculture in the United States. The Tribunal held Canada legally responsible for the transboundary emissions, and ordered it to pay compensation to the United States.[214] The responsibility to prevent transboundary environmental harm is now considered part of the *corpus* of customary international law.[215]

The World Charter for Nature and Agenda 21, also include provisions on EIA.[216] The EIA procedure is also implied by the UNEP Principles on the Utilization of Shared Natural Resources. In the area of development finance, the

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[213] Principle 14.

[214] *Trail Smelter Arbitration,* 16 April 1998, 1 March 1941; 3 R.I.A.A. 1907 (1941): "Under the principles of international law ... no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another[,] the property or persons therein, when the case is of serious nature and the injury is established by clear and convincing evidence."

[215] Principle 21 Stockholm Declaration and Principle 2 Rio Declaration. **Also** *Legality of the Threat or Use of Nuclear Weapons,* ICJ Reps., 1996. **See also** United Nations, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development,* (Geneva: 26-28 September, 1995) paragraphs 51-55.

[216] Paragraph 11 (b) and (c) of the WCN; and *inter alia*, paragraphs 7.41 (b), 8.4, 8.5 (b), 10.8 (b), and 23.2 of Agenda 21.

World Bank requires EIA for some Bank-funded projects.[217] The Johannesburg Plan of Implementation calls for the utilization of environmental impact procedures to enhance corporate social and environmental responsibility.[218]

EIA requirements have also been incorporated in many international treaties. Examples include the Law of the Sea Convention, as well as the Climate Change and Biodiversity Conventions.[219] As already stated, the EC adopted a Directive on EIA in 1985; and the Espoo Convention on EIA was adopted by the UNECE in 1991.[220]

Like the precautionary principle, the widespread endorsement and application of the EIA requirement has resulted in arguments that it is an emerging principle of international law.[221] Sands ascribes a more restricted scope to the EIA requirement, suggesting that the procedure might now qualify as a principle of regional customary law.[222] In his separate judgment in the *Gabcikovo Nagymaros* case, Judge Weeramantry noted that EIA had gained such strength and international recognition that the ICJ could no longer fail to take notice of it. He argued that the EIA requirement was not limited to considering the environmental impact of projects at their commencement, but implies "a continuing assessment and evaluation as long as the project is in operation." He

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[217] See Principle 5 of UNEP's Principles on the Utilization of Shared Natural Resources; and A.O. Adede, "Utilization of Shared Natural Resources: Towards a Code of Conduct" (1979) 5 E.P.L., 66 at 69.
[218] Paragraph 17(e).
[219] See section 204 (2) and 206 of UNCLOS relating to activities that may cause marine pollution, or significant harm to the marine environment; Article 4 (1) (f) of the FCCC; and Articles 7(c) and 14 (1) (a) of the CBD.
[220] Council Directive 85/337/EEC, OJ L 175, 5 July 1985, 40; Espoo Convention 25, February 1991, 30 ILM (1991), 802.
[221] R.D. Munro and J.G. Lammers (eds.), *Environmental Protection and Sustainable Development, supra* note 38, at 58-62.
[222] Sands, *Principles of International Environmental Law, supra* note 161, at 594.

argued that this need for continuous monitoring was dictated by considerations of prudence, thereby linking the EIA requirement to the precautionary principle.[223]

Again, I am less concerned with the normative status of EIA than with its process value as a method of bringing together the objectives of economic development and environmental and social concerns. By providing a mechanism through which the potential effects of development projects on the natural environment and upon societies are considered both before their commencement and during their operation, the EIA process could serve as an important method of ensuring environmentally and socially sound economic development – development that is consistent with the carrying capacity of the earth and not unjustifiably disruptive of social systems. Thus, by incorporating the EIA requirement into legal regimes at the domestic, regional and international levels, lawmakers could make an important contribution to sustainable development. However, in order to for this to occur, two further elements must be present. First, the findings of the EIA report must be taken into account in decision-making. This is the test of effectiveness. It implies that the EIA process must not be used as a mere public relations exercise. There is no point in conducting an impact assessment if the findings of the study would not affect the decision whether the project would go ahead, or whether it should be modified to minimize environmental and social costs. Secondly, it is imperative that the EIA process must involve members of the public, especially communities whose interests are likely to be affected by the project and NGOs with an interest in environmental and social (including human rights) issues. Indeed, public participation is not only relevant to the EIA process; it could also operate to legitimize decision-making in

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[223] *Case Concerning the Gabcikovo Nagymaros Project,* (1997) separate opinion of Judge Weeramantry, at 111.

general. For this reason, it is the third and final principle of sustainable development to which I shall now turn.

(C) PUBLIC PARTICIPATION IN DECISION-MAKING

The principle that members of the public need to be consulted and their views taken into account when projects that are likely to affect their lives and environment are planned, now enjoys substantial support in international legal instruments. The Stockholm and Rio Declarations, Agenda 21, as well as environmental treaties such as the Climate Change and Biodiversity Conventions call for public participation in decision-making and for making environmental information available to the public.[224] The United Nations Declaration on the Right to Development provides that free and meaningful participation of all citizens is an important ingredient of the development process.[225] At the regional level, the Economic Commission for Europe has adopted a Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[226] The Convention provides, *inter alia*, that access to information, public participation in decision-making and access to justice in environmental matters are necessary for the fulfillment of the right to live in an environment adequate for personal health and well-being.

With respect to development projects, public participation provides an avenue for project proposers and government agencies to take the views and

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[224] Stockholm Declaration, Paragraph 7 of the Preamble; Principle 10 of the Rio Declaration; paragraph 23.2 of Agenda 21.

[225] United Nations Declaration on the Right to Development, UNGA Res. 41/128 (Dec 4, 1986).

[226] Aarhus Convention, 38 ILM 1999, 517. See also the commentary to Article 12 of the IUCN Draft Articles on Environment and Development which notes that: "Public participation in the decision-making process concerning the environment is now considered to be a fundamental ingredient of sustainable development..."

concerns of all relevant stakeholders into account in project design and implementation. In this way, public participation in development decision-making tends to confer legitimacy on the process. It is also consistent with good governance.[227] The rationale is that by allowing scope for public participation, stakeholders develop a sense of ownership of the project. In view of their involvement from the initial stages of project planning, local communities develop a perception of legitimacy which is absent in situations where they are not consulted. Similarly, public participation requires a broader governance space that will permit action by civil society actors in issues such as environmental protection, human rights and social development. This is particularly significant in countries where levels of governmental responsibility and accountability are low, and where governmental and business interests often come together against the public good. In such situations, non-governmental actors could monitor the actions of government officials and the business sector, as well as serve as critiques of government policy. Such external monitoring could help correct both governmental and market failures.

The perceived legitimacy of decision processes that results from public participation could, in turn, lead to fair and sustainable decision outcomes. The Rio Declaration not only provides that people are at the center of concerns for sustainable development, it also institutionalizes public participation as an essential process value for the realization of sustainable development.[228] It has

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[227] In 1997, the United Nations Development Program (UNDP) defined good governance as a system of governance that ensures: "...that political, social and economic priorities are based on a broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources." See UNDP, *Governance for Sustainable Development* (1997) online at www.undp.org

[228] Rio Declaration Principle1; Principle 10 provides *inter alia* that: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. ... States shall facilitate and encourage public awareness and participation by making information widely available."

been argued that popular participation is "the principal means by which individuals and peoples collectively determine their needs and priorities, and ensure the protection and advancement of their rights and interests."[229] Agenda 21 provides that "one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making."[230] Likewise, the Johannesburg Instruments call for public participation in decision-making relating to natural resource conservation and the promotion of sustainable development.[231]

Experience with development projects shows that both public participation and popular acceptance are crucial to project success. In the case of the World Bank funded *Sardar Sarovar* dam project in India, the government failed to adequately consult stakeholders such as farmers, city dwellers and local engineers, who objected to the project on account of its potential environmental and social impact. Ultimately, when those effects began to materialize, the government was forced to cancel its loan agreement with the World Bank and the project failed as a result.[232]

Similarly, lack of consultation with local populations and failure to take into account the needs and concerns of indigenous people go a long way in explaining the difficult relationships that oil companies have had with local

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[229] "Global Consultation on the Right to Development",E/CN.4/1990/9 Rev. 1 (September 26, 1990) at 65-66.

[230] Agenda 21, paragraph 23.2.

[231] Paragraph 23 of the Political Declaration provides in part that: "... sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels." Paragraph 24 (b) of the Plan of Implementation calls on States to "Facilitate access to public information and participation, ... at all levels, in support of policy and decision-making..."

[232] C.R. Taylor, "The Right of Participation in Development Projects" in K. Ginther et al, *Sustainable Development and Good Governance* (1995) at 207. **See also** R. Khan, "Sustainable Development, Human Rights and Good Governance", in K. Ginther et al, at 420. She points out

communities in Nigeria, communities on whose land oil production takes place.[233] In the area occupied by the Ogoni ethnic group for example, relationships between the oil companies and the local inhabitants deteriorated so badly that the Shell Oil Company, the biggest producer in the country, had to suspend operations since 1993. This scenario could have been avoided if the oil companies and the government had provided mechanisms for consultation and local level participation. All the stakeholders could have discussed issues relating to how local people's concerns could be integrated into oil production processes and revenue sharing arrangements. Participatory processes would have provided an avenue for local people to input their own ideas on corporate social investment, and given them an opportunity to identify local environmental and agricultural priorities in the context of government's emphasis on oil production.

To summarize, it is worth recalling that in discussing the significance of sustainable development from an international law perspective, I have eschewed the traditional analysis of sources of international law as laid down in Article 38 of the ICJ Statute. In part, this is based on the belief that Article 38 reflects an unduly narrow positivist understanding of legal development. I have argued that in view of the dearth of centralized decision structures at the international level, analyzing international law problems from the perspective of positive law thinking could at best, yield partial answers.

Inspired by recent international relations and international law scholarship on the role of persons and groups in international governance and regime building, I argued that the emergence of the concept of sustainable development and its constituent elements and principles, is attributable to a discursive process during

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that roughly 145,000 hectares of forestland would have been submerged by this project, as well as the displacement of some 300,000 inhabitants.

which a multiplicity of actors including States, NGOs, epistemic communities and individuals interacted. This analysis showed that to the extent that one could speak of a legally significant concept of sustainable development, its genesis is not attributable to exclusive state action. One of the implications of this analysis is that a state-centric approach to international lawmaking hardly reflects present day reality.

Finally, I argued that while sustainable development is a legally significant notion, the concept is not yet a binding norm of international law. I have approached it from the perspective of a legitimate expectation that States and other actors would conduct their affairs in accordance with the objectives of economic development, social development and environmental protection in a non-hierarchical order. In my view, a more useful line of inquiry would be to investigate how law could contribute to the realization of sustainable development. I concluded that legal regimes and decision-making processes could so contribute by incorporating the precautionary principle, the principle of environmental impact assessment, and public participation in decision-making. I also noted that other principles such as inter and intra-generational equity, common but differentiated responsibilities, the principle of sovereignty over natural resources and responsibility to avoid harm to the environment, give substantive content to sustainable development.

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[233] Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999).

Chapter 2: Investment Law and Sustainable Development in West Africa: A Case Study of the Petroleum Industry in Nigeria

1. Introduction and Theoretical Framework

Any analysis of the role of foreign investment in development will be incomplete without a theory of the role of law and the responsibilities of the State in the domestic economy. While substantial literature exists on the nexus between law and development, most scholars depart from the erroneous assumption that the law and development movement began in the middle of the twentieth century.[1] The fact however, is that the law and development movement of the 1960s marked only the second phase of scholarship in this area. In the aftermath of the Second World War and the acquisition of independence by former colonies in the 1960s, the United States government through USAID, the Peace Corps as well as foundations such as the Ford and Rockefeller Foundations, tailored their foreign assistance programs in order to promote the adoption of Western economic and legal institutions in the developing world. In part, this was intended to counter the spread of Communist ideology to the emergent states.[2] However, while the 1960s advocacy of American legal liberalism marked the heyday of the law and development movement, historically, it was Max Weber who first articulated the nexus between law and economic development.[3]

Weber gave three possible explanations for social order: Firstly, before the advent of modern law, order was based on faith in tradition and the infallibility of rulers.[4] Because the dictates of tradition varied along social, political, ethnic or religious lines, this led to legal particularism and a conflict of jurisdictions. Secondly, in some places, social order derived from loyalty to the charismatic qualities of a ruler, leading to compliance with the social norms laid down by him.[5] The third explanation, representing Weber's principal insight, was his linkage of the development of a capitalist economy in Europe with the existence of a rational legal system. Legal rationality in the Weberian paradigm includes three elements: (1) the

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[1] A. Carty (ed.), *Law and Development* (New York: NYU press, 1992) for a collection of essays that reflect this type of scholarship.

[2] L. Cao, "Law and Development: A New Beginning?", Book Review of *Law and Development,* by A. Carty (ed.), (1997) 32 Texas Int'l L.J., 545, at 546.

[3] F.N. Botchway, "Good Governance: the Old, the New, the Principle, and the Elements" (2001) 13 Florida J.Int'l L. 159, at 167; M.G. Gopal, "Law and Development: Toward a Pluralist Vision", (1996) ASIL Procs., 231.

[4] Botchway, "Good Governance", at 167.

autonomy of law from other social structures; (2) the purposive construction of legal norms, and their capacity for systematic observation; and (3) the principled and consistent application of legal norms across the full spectrum of social activity.[6] What distinguishes legal rationality from the traditional forms of social ordering is that the system of law that is created supposedly reflects the views and aspirations of members of society, as opposed to the dictates of a particular ruler. In addition, the obligation to obey law arises as an incidence of the individual's membership of society rather than out of primitive loyalty to a charismatic ruler. Furthermore, the coherent application of the rational legal order implies limitations on the conduct of all members of society, including rulers. The upshot is that a rational legal system reduces levels of arbitrariness, abuse of discretion and uncertainty in decision making, thereby introducing greater predictability in social interaction, including interactions of an economic nature. For Weber, these were the qualities of law that underlay the success of capitalist development in Western Europe.

Influenced by Weber's insights, the 'law and development' movement emerged in the United States in the 1960s. The movement was projected as a "specialized area of academic study ... concerned with the relationship between the legal systems and development with particular reference to the social, political and economic transformation of the developing world."[7] The movement was given impetus by a growing belief and interest in social engineering through law, by academic interest in law and society, and by the U.S. government's foreign assistance programs intended to further American ideological and economic interests.[8]

Informed by these motivations, the United States Congress passed the Foreign Assistance Act,[9] which authorized the Agency for International Development (AID) to integrate human and social values into the government's development assistance programs. The objective was to ensure the participation of developing country people in the process of economic development, to prevent capture of the development

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[5] Ibid.

[6] L. Cao, "Law and Development", *supra* note 2, at 548. Other scholars have formulated the elements of legal rationality differently. Botchway lists the following elements: (1) a legal code consisting of rationally accepted norms and obeyed by the relevant members of society; (2) a generalised system of abstract rules having the qualities of logic and consistency; and (3) obedience, which is based on membership of the society and not owed to the individual ruler. I believe that these elements generally map into the list given by Cao, and referred to in the text.

[7] Botchway, "Good Governance", *supra* note 3, at 172.

[8] Ibid.

[9] 22 U.S.C. § 2218 (1970), Title IX.

process by the power elite, and to facilitate trickle down of benefits.[10] It was assumed that legal systems and law reform would play a significant role in this development process. The Center for International Studies at New York University was asked to study the relationship between legal systems and processes of development, and to investigate the feasibility of transferring American legal institutions and processes to developing countries as part of the United States assistance program.[11]

During the same period, economic thinkers began reflecting on the significance of development. Modernization theorists argued that nations undergo three stages of economic development: nation building, industrialization, and welfare.[12] It was believed that law was instrumental to the progress of industrialized countries through each of these stages and that this process could be replicated for developing countries. 'Law and development' scholars therefore prescribed the adoption of 'modern' (Western) law in place of customary law of particular societies as a necessary foundation for economic takeoff. Customary law was thought to be too uncertain and variegated, thus lacking the degree of predictability necessary to protect contractual relations, private property and market stability. Thus, modern law was *sine qua non* for economic development to take place. In other words, influenced by Weberian thought, law and development scholars sought to establish a nexus between the 'legal foundations of capitalism' and economic development in developing countries.

However, the absolute validity of the supposition that law could lead to economic development is attenuated by the underdevelopment of many Latin American countries despite the fact that many of them have had Western legal systems since the nineteenth century.[13] A more plausible thesis is that law is one of a

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[10] T.M. Franck, "The New Development: Can American Law and Legal Institutions Help Developing Countries?" in A. Carty (ed.), *Law and Development* (New York: New York Univ. Press, 1992), 3.

[11] Ibid.

[12] Botchway, "Good Governance", *supra* note 3, citing T. Banuri, "Development and The Politics of Knowlegde: A Critical Interpretation of the Social Role of Modernization Theories in the Development of the Third World", in F. Appel & A.A. Marglin, *Dominating Knowledge* (1990). **See also** Cao, "Law and Development", *supra* note 2, citing Rostow as identifying five sequences of development: (1) traditional society; (2) preconditions of takeoff arising from contact with external forces; (3) industrial take-off and economic growth; (4) maturity and linkages with international economy; (5) mass-consumption in place of basic subsistence.

[13] D.F. Greenberg, "Law and Development in Light of Dependency Theory" in A. Carty (ed.), *Law and Development* (New York, NYU Press, 1992) 129, at 133-135 citing Turkey, Brazil, Chile, Mexico, and Ghana as examples of countries that adopted various structural legal reforms during the 1970s and before, along lines suggested by advocates of legal liberalism, but where the expected economic improvements never materialised. In some countries such as Brazil and Chile, legal reforms were

number of variables including democratic governance, public accountability, and participatory decision processes that work together to provide an enabling environment for economic development. According to Cao, one of the reasons why American legal liberalism failed to lead to economic development in developing countries is that many of these societies had not developed traditions of pluralist democracy that could prevent centralization of power and the abuse of law for the pursuit of special interests.[14] However, it is also true that part of the reason for failure was the naïve belief in the universalism of Western legal values, irrespective of the peculiarities of culture and tradition in developing countries.[15] In many developing countries (especially African societies), the locus of authority was the community, the family or some other social grouping. Gopal argues that the emphasis on, and commitment to individualism that was the hallmark of modern law, operated to undermine these traditional authority structures.[16] In addition, since the nascent post-independence state was not adequately stable to provide an alternative source of authority, the result was "increasing lawlessness, violence and declining social integrity" in developing countries.[17]

The collapse of the Soviet Union marked the beginning of the third phase in 'law and development' thinking and scholarship. But before addressing that phase, a few words must be said about the 'other side' of the discourse on law and development. Marxism, and its intellectual progeny dependency theory, offered an alternative vision to modernization and the role of law in development. It is worth noting from the start that unlike Weber, Marx placed less emphasis on law, which he viewed as derivative from, and therefore, secondary to the basic economic structure of

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actually followed by economic slowdown and greater income inequality. **See Also** Botchway, "Good Governance", *supra* note 3 at 176.

[14] Cao, "Law and Economic Development", *supra* note 2 at 550.

[15] T.M. Franck, "The New Development", *supra* note 10 at 18. Franck notes that there are significant differences between American and other legal cultures, and that few countries in the world rely on courts, lawyers, and litigation, in the same way that Americans do. Conditions of poverty in developing countries also mean that most people rely on governments, rather than Courts and lawyers for dynamic political action. For these reasons, Franck warns against the 'mass exportation of American legal paraphernalia' to other countries. **See also** Gopal, "Law and Development", *supra* 3, at 235 for similar concerns over universalising American legal traditions.

[16] Gopal, "Law and Development", *supra* note 3 231.

[17] Ibid. **See also,** D.M. Trubek, "Toward a Social Theory of Law: An Essay on the Study of Law and Development", in A. Carty (ed.), *Law and Development* (New York, NYU Press, 1992) 39, at 54 where he argues that American legal liberalism "is clearly ethnocentric in interpreting diverse cultures in terms of Western history.... [As] a result, the conception cannot deal effectively with the realities of legal life in the Third World."

society.[18] For Marxist thinkers, the focus of analysis must be the fundamental structure of the economy. It is for these reasons that Marxism emphasizes the distinction between labor and capital, and views the latter as exploitative of the former in a state of capitalist production.

After the colonial period, adherents to dependency theory transposed Marx's ideas to analyze the economic relations between developed and developing countries. For dependency theorists, the major cause of underdevelopment in the Third World was colonialism. While developing countries had acquired political independence, the economic structure established during the colonial era, continued to prevail. In effect, many developing countries still serve as sources of raw material for their former colonial masters, with little avenue for self-reliant industrialization. As to the role of law, dependency theorists argued that colonial laws had both facilitated the internal exploitation of developing countries and structured international economic relations so as preserve the peripheral standing of the Third World.[19] This structure of the international economy led to growth and higher standards of living in the 'paradigm-setting states', while underdevelopment and poverty prevailed in the 'paradigm-receiving states'.[20] The argument is at the heart of the center-periphery thesis. Unlike the emphasis on legal autonomy by Weber and the modernization scholars, dependency theorists viewed law as significantly conditioned by the social, political and religious forces in society. As a way out of the pattern of dependent development created by colonialism, *dependentistas* proposed state control of the economic sector and import substitution measures.[21] However, developments in the international economy have made these prescriptions less popular. They have in most countries been replaced by export-oriented growth strategies, privatization of state-owned

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[18] L. Cao, "Law and Economic Development", *supra* note 2 at 552; **see also** R. Sarkar, *Development Law and International Finance, 2nd ed.*, (The Hague: Kluwer Law International, 2002) at 32.

[19] Cao, "Law and Economic Development" *supra note* 2 at 552. On the various usages of the term "Third World", **see** K. Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1997) 16(2) Wisc. I.L.J. 353, at 356-362. Mickelson uses the term to describe a "distinctive voice, or, ... a chorus of voices that blend ... in attempting to make heard a common set of concerns." The usage in this thesis refers to the 'underdeveloped' or 'developing' countries of the World, even though I realize that it is had to draw any generalizations between these countries such as levels of GNP.

[20] The terms 'paradigm-setting' and 'paradigm-receiving' states is borrowed with gratitude from E. Kwakwa, "Regulating the International Economy: What Role for the State?" in M. Byers, (ed.), *The Role of Law in International Politics* (2000), 227 at 228. The terms reflect the imbalance between industrial and developing countries with respect to rule making and agenda setting within international economic circles. They mirror the centre-periphery distinction in the discourse on dependency theory.

[21] D.F. Greenberg, "Law and Development", *supra* note 13 at 145-147; Sarkar, *Development Law, supra* note 18 at 32.

enterprises as well as the promotion and protection of foreign investment through economic deregulation. Those developments bring us to the third phase of law and development scholarship.

According to some scholars, the third phase began in the 1990s when former Soviet and East European states started to adopt Western forms of governance based on the rule of law, as well as capitalist economics and popular culture.[22] For other scholars, the third phase began with the popularization of 'good governance' by international development and finance institutions such as the World Bank.[23] Both groups of authors refer to the legal reform programs conducted by the World Bank and bilateral development agencies in the former Soviet Union and Eastern Europe, following the collapse of communism. In their transition to market-based economies, these countries have sought governance systems based on the rule of law and independence of the judiciary, along lines similar to the 1960s emphasis on Western legal models.[24] An important difference must however be noted between the 'new law and development' and the 1960s phenomenon. The new programs no longer seek wholesale transplantation of Western law to recipient countries, but rather endeavor to construct legal reform to fit the specific legal traditions and culture of the particular country. Sarkar for example argues that law reform in developing countries should be based on the "Janus Law Principle".[25] In other words, like the Roman God Janus, law reform must be placed in the context of a country's past legal history, and tailored in light of its future development aspirations and challenges.

The new 'law and development' movement has thus shifted from the 1960s universalist claim in favor of American legal liberalism, to a contextualized reform process informed in part by the local circumstances, needs and aspirations of individual countries. For example, as one of the leading institutions involved in legal assistance to developing and transition economies, the World Bank emphasizes that for legal reform to be successful, countries must themselves develop a sense of ownership and a commitment to the process. As a guide to the Bank's work in this area, it is emphasized that (1) countries must make a clear choice as to the direction of

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[22] R. Sarkar, *Development Law Finance, supra* note 18 at 38; D. M. Trubek, "Law and Development: Then and Now" (1996) ASIL Procs., 223-224.

[23] Botchway, "Good Governance", *supra* note 3 at 165: "The "new" good governance championed by the international development institutions may be described as the third phase of the [law and development] discourse."

[24] Sarkar, *Development Law and Finance, supra* note 18 at 38 arguing that the 'scramble' to adopt Western forms of governance gives 'new legitimacy to Western universalists'.

legal reform; (2) legal reform priorities and training of personnel must be based on the particular circumstances of each country; and (3) local lawyers need to be involved in the reform process, while external consultants should assume advisory roles in support of the clearly established priorities set by the country itself.[26]

Trubek posits that in addition to the collapse of communism, three other factors underlie the emergence of the new 'law and development' movement. Firstly, the international human rights movement of the 1970s and 1980s laid emphasis on the protection of fundamental rights at the domestic level as an important aspect of the development process.[27] Secondly, the "Washington Consensus" marked a paradigm shift away from central planning and import substitution forms of development planning, to an emphasis on the role of markets in efficient resource allocation, privatization, and linkages to the global economy. The implication of this shift was a resurgence of the modernization thesis that legal rules and institutions were crucial to lay a foundation for the successful operation of markets.[28] Thirdly, the 'project of rights' and the 'project of markets' referred to above, were reinforced by globalization of the world economy, which underscored the need for a certain convergence of legal structures so as to facilitate the operations of global economic actors.[29]

Two main conclusions can be drawn from the above discussion of the nexus between law and development. First, development was essentially equated with progress or economic growth; secondly, a Western legal system - purposive, autonomous, and coherently applied to all members of society - could promote freedom of contract, protect private property and enhance the predictable operation of market forces. These legal foundations of the market economy are deemed critical for the economic development of developing states.[30]

While I concur in the value of legal instrumentalism, including the role of law in promoting economic development, I am unable to agree with the view of development as growth professed in the modernization literature. I argued in the previous chapter that sustainable development, conceptualized to encompass economic growth, environmental balance and social development, ought to be the

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[25] Ibid., at 39.
[26] World Bank, *The World Bank and Legal Assistance: Initial Lessons* (1995) in Gopal, "Law and Development", *supra* at 231-232.
[27] D.M. Trubek, "Law and Development", *supra* note 22 at 224-225.
[28] Ibid.
[29] Ibid.
[30] Ibid.

objective of international and domestic society. In addition, neither economic development nor the further transition to sustainable development, is capable of realization through legal rules alone. As will be demonstrated in the case of Nigeria, legal reforms are unlikely to be effective if they are not supported by an adequate governance structure, including mechanisms to ensure governmental accountability through regular free and fair elections, transparent processes of decision making and competent judicial systems to prevent arbitrary and capricious government action. In other words, for legal rules to perform their social instrumentalist function, law must assert its own autonomy, its freedom from capture by special interest groups, including corrupt officials.

Having briefly explored the theoretical discourse on the role of law in economic development, it is now time to reflect upon the role of the State in that regard. This is important because in every society, government is (or should be) the principal agent of economic development. The manner in which government performs this role is influenced by one's perception of the proper role of the State in development.

Theoretical explanations of the nature of the State can be categorized into two main schools of thought: the orthodox view, again associated with the thinking of Max Weber views the State as an institution that "(successfully) claims *the monopoly of the legitimate use of physical force* within a given territory."[31] Within this State, centralized administrative and legal structures serve as instruments for the pursuit of collective/public interests, the mediation of public and private interests, and the provision of frameworks within which private relationships can be structured and disputes settled.[32] According to this view, as an autonomous entity, the State's action

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[31] B.R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press 1999), 8-9, citing Max Weber, "Politics as a Vocation", in H.H. Gerth & C. Wright Mills, (trans.,), *From Max Weber: Essays in Sociology,* (Boston: Routledge & Kegan Paul, 1958), at 77. [Emphasis in original]. Weber's thought has influenced the requirements for statehood at international law. Article 1 of the 1933 Montevideo Convention provides that a state exists where there is a defined territory, population and government with capacity to enter into relations with other states. For analysis of these elements, see I. Brownlie, *Principles of Public International Law* 4th ed., (Oxford: Clarendon Press 1990) at 72-73.

[32] N. Kofele-Kale, "The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations in Developing Countries" (1992) 23 L&P of Int'l Bus., 619, at 634-635. He notes however, citing Stephan, that "[t]he state must be considered as more than the 'government'. It is the continuous administrative legal, bureaucratic and coercive systems that attempt not only to structure relationships *between* civil society and public authority in a polity but also to structure many crucial relationships *within* civil society as well." A. Stephan, *The State and Society: Peru in Comparative Perspective* (1978) at xii, in Kofele-Kale. **Contra,** Roth, *Governmental Illegitimacy, supra* note 31 at 9, who notes that in international law, the Weberian institution is more

is not constrained by competing class or group interests, be they of internal or external provenance. The State is therefore able to pursue an independent public interest agenda. In view of the lesser dichotomy between State and societal interests, the State becomes the principal instrument for the realization of societal/public interests.[33]

I will argue that societies that display greater confluence between governmental and public interests, and where official responsiveness to the needs of society is high, enjoy a greater perception of legitimacy. Conversely, where governments (such as the military dictatorships that came to power in Nigeria since 1960) utilize the State apparatus and resources for the satisfaction of private interests and at the expense of the interests of the majority of society, determinations of the question of legitimacy must go beyond the sociological fact of the existence of public institutions and the exercise of coercive power, to a normative investigation into the purpose for which power was acquired in the first place. As a social contract between rulers and citizens, the exercise of the functions of government must be to the benefit of the people and safeguard public interests such as environmental protection and social development. Consequently, the improper exercise of governmental power at the expense of the public interest could operate to de-legitimize the government.[34] This internal dimension of governmental legitimacy could be a useful framework for analyzing the responsibilities of governments towards their people and the environment.[35] My approach to internal governmental legitimacy differs from these

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properly referred to as the 'government' to distinguish it from the abstract idea of the 'state'. While for many practical purposes the State and its government are often coterminous, there are instances in which the government, as the representative institution of people within a defined territory, could be considered in isolation from the State. For example, a putative government that seizes power by undemocratic means may enjoy little or no recognition or legitimacy in the eyes of other governments, who nonetheless continue to recognise the sovereignty of the State as an entity. This was what happened in Haiti in 1994 when the United Nations authorised military action to oust an illegitimate government. Similarly, in 1997, the Economic Community of West African States (ECOWAS) authorised military action to restore democratic rule in Sierra-Leone, where the army had taken over power from an elected government.

[33] Kofele-Kale, "Political Economy" *supra* note 32, at 638.

[34] Roth puts the question as follows: "What are the irreducible duties of any ruling apparatus to its subjects, such that a failure to discharge these duties vitiates the legitimacy of the regime's assertion of authority?" **See** Roth, *supra* note 31, at 21.

[35] Questions of legitimacy have pre-occupied international law thinking for sometime now. Thomas Franck set the pace with the publication in 1990 of the *Power of Legitimacy among Nations*, and later *Fairness in International Law and Institutions* (1995). In both publications, Franck argued that legitimacy is a property of a rule or rule-making institution that exerts a pull towards voluntary compliance because the rule or institution was made in accordance with right process. He identified the elements of this process as determinacy, coherence, adherence and symbolic validation. Obiora Chinedu Okafor takes up the issue of state legitimacy, arguing that international law's approach to the question has been dominated by two perspectives, which he characterised as 'peer review' and 'homogenisation'. The former refers to the conferment of state legitimacy by the *ipse dixit* of other

authors in that I adopt a purposive perspective to the question of legitimacy. Where a government so neglects the needs and aspirations of the governed so as to defeat the objective for which governmental power ought to be exercised in the first place, that circumstance becomes relevant in any attempt to determine the question of governmental legitimacy. It is therefore conceivable that a 'politically legitimate' government that acquired power through transparent democratic processes, and that enjoys the recognition of its peers in the international community, may subsequently be deemed illegitimate due to a lapse in the exercise of governmental power, and a schism between the pursuit of private (governmental) interests and the public interest. The determination of governmental legitimacy is therefore not only external and process-oriented; it should also be internal, purposive and consequential. I shall employ this approach to governmental legitimacy in discussing the responsibilities of the Nigerian State in managing the country's natural resources. My objective is to demonstrate the disharmony between the financial interests of government officials (and business) on the one hand, and the public interest in socio-economic development and environmental protection on the other.

In contrast to the Weberian view of the State, is a second school of thought that has its roots in the Marxist tradition. According to this view, both the form of the capitalist State and of society, are determined by the relations of production of material goods.[36] Since these production relations are in turn dominated by certain powerful groups within society, the State becomes an instrument of class domination, rather than the arbiter of the common good.

Marxist thinkers have, however, diverged in their accounts of the relationship between the State, and societal groups within the State. Engels for example, ascribes an autonomous character to the State, standing, as it were, above group divisions

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states, while the latter reflects the predominance of the Eurocentric model of a nation-state, which fails to take into account the heterogeneity of the populations within states that are not European. For these reasons he argues that international law has contributed to the 'structural illegitimacy' of many African states, since international law's tests of state legitimacy (peer review and homogenisation) do not take into account the internal demographic/communal configuration of African states. This internal approach to the determination of state legitimacy he refers to as 'infra-review', in contradistinction to 'peer review', which is externally given. **See** Obiora Chinedu Okafor, "After Matyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa" (2000) 41 (2) Harv. I.L J., 503-528. Roth also alludes to the internal dimension of governmental legitimacy i.e. the extent to which the citizens of a country regard their government as legitimate, but his main inquiry was directed at the determinants of governmental legitimacy in international law. **See** Roth, *supra* note 31, especially chapters 1 and 2. **See** Chapter 4 *infra,* for a full discussion of governmental legitimacy and social development.

[36] Kofele-Kale, "Political Economy" *supra* note 32, at 635.

within its borders and serving as the means for their reconciliation. For Engels, the State:

> is a product of society at a particular stage of development; it is the admission that this society has involved itself in insoluble self-contradiction and is cleft into irreconcilable antagonisms which it is powerless to exorcise. But in order that these antagonisms, classes with conflicting economic interests, shall not consume themselves and society in a fruitless struggle, a power, apparently standing above society, has become necessary to moderate the conflict and keep it within the bounds of "order"; and this power, arisen out of society, but placing itself above it and increasingly alienating itself from it, is the State.[37]

Unlike Engels and Hegel, Marx viewed the State as largely non-autonomous. For Marx, instead of standing above sub-state groups, the capitalist state is itself involved in the competition between private interests in society. Thus the State is viewed as nothing more than "the executive of the modern state which is but a committee for managing the affairs of the whole bourgeoisie."[38]

These perspectives on the State are relevant to the present discussion for three main reasons. First, they have provided the starting-points for thinking about the role of the State in contemporary economic development. Second, they have shaped developing country attitudes towards the private sector in general and foreign investment in particular. Third, they have influenced the direction of domestic regulation of economic activity in many developing countries. Yet, in a post Cold War and globalizing world, the determination of the proper role of the State in economic development should be based upon consideration of factors other than ideological predisposition. The collapse of tariff barriers to trade and the greater mobility of capital and people across borders that are the results of over fifty years of progressive trade liberalization under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), have drawn the world closer than ever to a global marketplace. Additionally, the advances in telecommunications and information technology have shrunk territorial borders and induced global interconnectedness. Alongside this globalizing phenomenon is an increase in the array of actors that are

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[37] Friedrich Engels, *The Origin of the Family, Private Property and the State* (1942), at 155, in Kofele-Kale, "Political Economy" *supra* note 32, at 636. According to Kofele-Kale, Hegel envisaged a similar role for the State. Departing from the premise that the existence of the State is a rational idea, and that therefore the State was eternal and beyond 'the whole of society', Hegel saw the State as the embodiment and custodian of the collective good, as against the private interests of individuals and groups. However, the State bears responsibility for social order so as to facilitate the realisation of private interests. For a modern expression of the State as an idea, **see** P. Englebert, *State Legitimacy and Development in Africa* (Boulder & London: Lynne Rienner Publishers 2000), at 74: "The State is ... a conceptual category, a mental constraint. Its reach spreads from territorial and physical to ideological."

engaged in international affairs alongside states. While transnational corporations are the most prominent of these new actors, intergovernmental and non-governmental organizations, individuals, issue-oriented interest groups, as well as groups claiming self-determination have all, in different ways and to different degrees, participated in and influenced international affairs.[39]

The forces of globalization and the increased involvement of non-state actors in international affairs have led some to question the continued relevance of the State, and even to predict its demise.[40] Others have cautiously admitted a reduction in State influence in light of a globalizing world economy, and the larger and more active involvement of non-state actors at the international level. However, they maintain that there is really no alternative to the State, and therefore predict that the State will continue to be the primary instrument of governance for the foreseeable future.[41]

With respect to the role of the State in economic development in developing countries, there is broad acceptance that the invisible hand of Adam Smith's market mechanism is not capable of capturing all the costs of production and of efficiently allocating all resources.[42] This market failure underscores the continuing relevance of the State to provide not only the foundation of legal rules and norms necessary for the operation of market forces, but also to ensure that the full costs of production are borne by the producer and reflected in prices. Furthermore, it is the State's obligation

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[38] Kofele-Kale, "Political Economy" *supra* note 32, at 639.

[39] S.J. Toope, "Redefining Norms for the 21st Century", (1995) C.C.I.L Procs., at 197. Also Toope, "Emerging Patterns of Governance and International Law", in M. Byers, *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford Univ. Press 2000) 91-108. In both papers, Toope addresses *inter alia*, the role of non-state actors in the evolution of international law from the pre-legal (contextual) stage to binding normativity.

[40] S. Strange, "The Erosion of the State" Current History (Nov. 1997) 365; **also** A.M. Slaughter, "The Real New World Order" (1997) 76 (No. 2) Foreign Affairs, 183. **Contra** M. Reisman, "Designing and Managing the Future of the State" 8 Eur. J.I.L No. 3 (1997) 409, at 419: "the international system in the next century will find out that not only must it continue to live with the State, but that one of its systemic objectives will continue to be the improvement of the functions of the State in specific decision sectors."

[41] O.Schachter, "The Decline of the Nation-State and Implications for International Law" (1997) 36 Colum. J.Trans.L 7-23; also Schachter, "The Erosion of State Authority and its Implications for Equitable Development" in F. Weiss, E. Denters and P. de Waart, *International Economic Law with a Human Face* (The Hague: Kluwer Law International 1998) 31-44. In both articles, Schachter concluded that only the State has the authority structures necessary to protect all people within its territory on the basis of equality and justice, and to take account of the diversity of interests at the international level. For the specific issue of how the role of the State is affected by globalization, **see** P. Melanczuk, "Globalization and the Future Role of Sovereign States" in F. Weiss et al, 45-65. He too concludes that despite globalization, there is nothing in the present international order to replace states, and therefore that states are likely to remain "the main actors in international relations and in international law."

to ensure that the social goods that will not be provided or safeguarded by the market, are in place for the benefit of the poor and vulnerable in society.[43] In effect, the ideal role of the State in contemporary economic development is to act as both facilitator and regulator of the market, as well as the guardian of the general interest by providing public goods (health, education, social welfare) and protecting the environment. The satisfaction of both groups of responsibilities is necessary for the achievement of sustainable economic development.[44]

However, while the discharge of the above state responsibilities may be a necessary condition for sustainable development, it is not a sufficient condition. Like markets, States have often failed or been unable to act to safeguard and protect the public interest. In Nigeria for example, the State is both a regulator and a participant in the oil industry through the state-owned company Nigeria National Petroleum Corporation (NNPC), which holds a majority of shares in all the joint-ventures. In these circumstances, the State has often found itself in the unenviable position of having to enforce regulatory standards deemed to conflict with its interest in maximizing returns from oil exploration. In many cases, this conflict is resolved in favor of non-enforcement of the regulatory (often environmental and human rights) standards, to the detriment of the communities in which oil production takes place.[45] This policy failure arguably provides justification for a broader governance space that will permit the intervention of non-state actors to monitor, and where appropriate, seek the implementation of standards to safeguard matters of common concern to society. This trend involving greater participation of non-governmental and transgovernmental

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[42] J. Cordes, "Normative and Philosophical Perspectives on Sustainable Development" in J.M. Otto and J. Cordes (eds.), *Sustainable Development and the Future of Mineral Investment* (Paris: UNEP and MMAJ, 2000) 1, at 8-12.

[43] E. Kwakwa, "Regulating the International Economy: What Role for the State?" in M. Byers, *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford Univ. Press 2000), 227 at 241: "The State can, and should, play a crucial role in regulating the international economy. ...At the national level, States are expected to lay a firm rule-of-law foundation for markets to operate freely, and for property rights to be protected."

[44] World Bank, *World Development Report 1997: The State in a Changing World* (Washington DC: 1997) at 4, arguing that every government must discharge five fundamental tasks if sustainable development is to be achieved. These are: (i) Establishing a foundation of law (ii) Maintaining a non-discriminatory policy environment (iii) investing in basic social services and infrastructure (iv) protecting the vulnerable and (v) protecting the environment. **See also** P. Englebert, *State Legitimacy*, *supra* note 37, at 22-23, arguing that good governance is a key determinant of economic growth and development.

[45] See chapter 3 and 4 respectively, for a discussion of environmental and social implications of oil production in Nigeria.

actors in various issues of governance is already discernible at the international level.[46] This is particularly the case for international financial matters and international environmental co-operation.[47]

The above discussion leads to consideration of the competing theoretical perspectives on foreign direct investment and the activities of multinational corporations in developing countries. In his study of indigenization in Nigeria, Biersteker reviewed six theoretical perspectives on foreign investment.[48] While all the six perspectives could really be reduced to two, possibly three, broad categories (i.e. classical, dependency, and Marxist theories), I have decided to follow Biersteker's classification and to briefly describe each of the 'classical theories' because they each lay a slightly different emphasis on the role of foreign investment, and display varying understandings of development.[49] This discussion will show that none of the theories is broad enough to cover all three objectives of sustainable development.

Biersteker first discusses what he calls the *conservative neoclassical realists*, who argue that private foreign investment is essential to the economic development of developing countries because such investment provides much needed capital, skills, employment and technology, as well as an avenue for the mobilization of domestic resources.[50] For neoclassical realists, development is essentially equivalent to industrialization and rapid economic growth.[51] While the potential positive contribution of foreign investment to economic development cannot be gainsaid, neoclassical theory does not account for market failure and the role of law in ensuring

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[46] A.M Slaughter, "Governing the Global Economy through Government Networks" in M. Byers, (ed.,) *The Role of Law in International Politics: Essays in International relations and International Law* (Oxford: oxford Uni. Press 2000) 177-205: "... transgovernmentalism [is] a distinctive mode of global governance: horizontal rather than vertical, composed of national government officials rather than international bureaucrats, decentralized and informal rather than organized and rigid." In the environmental field, see P.M. Haas, "Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control", (1989) Vol. 43 (No.3) I. O. 377-403; and P.M. Haas, "Banning CFCs: Epistemic Community Efforts to Protect Stratospheric Ozone", (1992) Vol. 46 (No. 1) I. O. 187-224.

[47] M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London & New York: Routledge 1995) at 357. Articles 14 and 15 of the North American Agreement on Environmental Co-operation (NAAEC), provide procedures for NGOs to make a submission to the NAAEC Commission asserting that a NAFTA party is failing to effectively enforce its own environmental law. These provisions complement Article 1114 (2) of NAFTA, which provides that parties should not waive or lower their environmental standards so as to attract or retain investment in their territories.

[48] T.J. Biersteker, *Multinationals, the State and Control of the Nigerian Economy* (Princeton: Princeton Univ. Press 1987), 11-51.

[49] For a different classification, see M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Grotius Publications Cambridge Univ. Press 1994), who identifies the 'classical', 'dependency' and 'middle-path' theories of foreign investment.

[50] Biersteker, *supra* note 48 at 12-13.

[51] Ibid., at 13.

the internalization of investment externalities. For example, the theory does not provide scope for the internalization of environmental costs. Nor does neoliberal development theory cater for social development or distributional equity.

The *liberal internationalist* school is predominantly associated with western industrialized countries, particularly the United States.[52] While holding the view that foreign investment is positively related to socio-economic development, liberal internationalists are more guarded in their approach, and concede that such investment could also impose negative externalities on host societies. This, in their view, provides some justification for governmental intervention either to restrict investment in certain sectors of the economy, or to correct market failures.[53] Moreover, while adherents to liberal internationalist philosophy approach development from the vantagepoint of economic growth, there is scope within their theory for recognition of distributional concerns. Thus, according to Biersteker, "'growth with distribution' better summarizes their conception of development."[54] It is apparent that while liberal international thinking is an improvement on neoclassical realism in view of its sensitivity to distributional issues, a principal weakness of the liberal international perspective is that it does not account for the significance of 'nongrowth objectives' such as environmental protection.[55] In light of developments in international environmental knowledge and policy since the 1960s, and especially after the Stockholm, Rio, and Johannesburg conferences, environmental preservation is arguably of common concern to humankind.[56] As a result, a development theory that does not incorporate the need for environmental protection could only be of limited utility.

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[52] Ibid., at 18.

[53] For example in the United States the 1988 Exxon-Florio Amendment to the *Omnibus Trade and Competitiveness Act,* 50 U.S.C. app. § 2170(a) 1990, gave the Federal Government power to block any proposed investment that appears to threaten national security. In Canada, the erstwhile *Foreign Investment Review Act* laid down extensive screening and approval procedures for foreign investment to determine if the investment would be of 'significant benefit' to Canada, in terms of increasing employment and exports, technology transfer, and advancement of national industrial and economic policies. The upshot was a U.S. challenge of the Canadian measures before a GATT dispute settlement panel. **See** *Canada: Administration of the Foreign Investment Review Act (FIRA),* GATT BISD 30th Supp. 140 (1984). The *F.I.R.A* was repealed and replaced in 1985 by the *Investment Canada Act.* **See** M.J. Trebilcock and R. Howse, *The Regulation of International Trade, supra* note 47, 289-291.

[54] Biersteker, *supra* note 48 at 19.

[55] The label of environmental protection as a 'nongrowth objective' is borrowed from Englebert, in *State Legitimacy, supra* note 37, at 17.

[56] A. Kiss and D. Shelton, *International Environmental Law 2nd ed.,* (New York: Transnational Pubs. 1999) 22-25, 250-254. In the *Gabcikovo-Nagymaros case,* the ICJ approved the view of the International Law Commission that safeguarding the earth's ecological balance was an essential interest of all states. Recent international environment treaties in the areas of Biodiversity Protection, Climate Change and Desertification also support the common concern principle.

Structuralist perspectives posit that foreign investment could yield both positive and negative results for domestic economies of recipient countries.[57] The emphasis however, is on the negative side-effects of international investment, particularly its effects on local business, foreign exchange, government revenue through abusive transfer pricing, anti-competitive behavior, as well as the unwillingness of investors to transfer management skills and appropriate technology.[58] Moreover, structuralists hold a people-centered conception of development arguing that development must go beyond 'growth with distribution', and must entail the satisfaction of basic needs, as well as the reduction of poverty, unemployment, and social stratification.

As shown in Chapter one, this development perspective resonates in important respects with the concept of human development advocated by multilateral development organizations such as the UNDP and the World Bank.[59] However, structuralist theories of development are essentially anthropocentric in outlook. Their concern with the adverse economic effects of foreign investment and the emphasis on human needs, do not speak to the third element of a sustainable development paradigm - the protection of the natural environment.

On the other side of these three approaches, are two dependency schools (what Biersteker calls 'vulgar' and 'sophisticated' *dependentistas*) and a Marxist perspective on foreign investment.[60] The common thread that runs through these theories is their aversion to foreign capital, which is viewed as an instrument of exploitation and imperialism, intended to subjugate recipient countries to a state of peripheral development. Adherents to the dependency schools view multinational companies as agents of their home governments, and that through their investment activities, these corporations help to preserve the center-periphery status quo. The development of the peripheral states therefore comes to depend on the situation of the industrialized center - a pattern of 'dependent development'.[61]

While all these approaches provide useful insights into the historical attitude of many developing countries to foreign investment, and may have informed host government investment policies soon after independence in the 1960s, none of them

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[57] Biersteker, *supra* note 48 at 23.
[58] Ibid., at 24.
[59] See UNDP, *Human Development Report* 1994; World Bank, *World Development Report* 1997.
[60] For a detailed consideration of these perspectives, see Biersteker, *supra* note 48 at 27-44.
[61] Biersteker, *supra* note 48 at 33.

can singularly ground a theory of foreign investment today because the international economic landscape has changed significantly. With the collapse of communism in the former Soviet Union, command and control strategies of economic development have waned in favor of greater market openness and private sector participation. Cold war ideological underpinnings of development policy have also taken a back seat. Developing countries have also shifted from import substitution to export oriented development strategies largely influenced by the success of the newly industrialized countries in Southeast Asia. The greater openness in the international economy that has resulted from over fifty years of tariff reductions under GATT auspices and various regional and sub-regional trade groupings, advances in telecommunications and computer technology, and the attendant massive mobility of capital, goods and persons, have given impetus to the investment activities of multinational corporations.

While many developing countries now view investment capital as an important means for attaining economic development and have consequently enacted laws to open their economies to international investment, there is still a strong case for governmental oversight so as to harness the investments with the socio-economic and environmental interests of host societies. For these reasons, current state practice shows that investment lawmaking is a mix of regulation and openness, the objective being to create in tandem, an enabling environment for the realization of profit by investors and to safeguard the public interest of host societies.[62]

Since the 1980s, many developing countries have shed their hitherto hostile attitudes and enacted investment laws in order to facilitate greater foreign investment, while continuing to safeguard the public interest. The change in attitude was precipitated by several factors in the international political economy during the 1980s. First, the economic recession in the capital-exporting countries meant that there was a reduced quantum of funds for investment abroad or for official development assistance.[63] Second, the break-up of the former Soviet Union in 1989 and the opening-up of former communist countries in Eastern Europe meant that developing countries now had to compete with these countries for foreign investment.[64] Third, the heavy debt-burden of many developing countries made it difficult for them to raise

[62]M. Sornarajah, *The International Law on FDI, supra* note 49, at 8.
[63] Ibid., at 2.
[64] Ibid.

commercial bank loans.[65] These factors, together with the success of the newly industrializing countries of Hong Kong, Taiwan and Singapore, attributed in part to export-oriented foreign investment, led to the enactment of a flurry of African legislation to attract foreign investment.[66]

The principal objective of the new investment laws was to open up domestic economies to foreign investors. Legal provisions were therefore geared towards the provision of an 'enabling environment' for foreign investment. Legal rules and state practice reveal that in addition to fiscal incentives, the elements of such an environment include guarantees of non-discriminatory treatment, protection of proprietary interests and the sanctity of contracts, guarantees of impartial third-party dispute settlement and the elimination of performance requirements.[67] The issue of compensation for expropriation was more controversial. States were divided between adherents to the Hull formula of 'prompt, adequate and effective' compensation on the one hand, (mainly capital-exporting European countries and the United States)[68] and those on the other hand, who argued that this standard did not represent international law, and that the payment of 'appropriate' compensation was all that was required. This was the view of most developing countries.[69]

The effect of greater openness has been that domestic economies now have a variety of economic actors including both State and non-state participants, local as well as international. Legal regimes for foreign investment have also evolved

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[65] N. Kofele-Kale, "Investment Codes as Instruments of Economic Policy: A Cameroon Case Study", (1991) 25 Int'l Lawyer, No. 4, 821, at 822.

[66] N. Kofele-Kale, "Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary" (1990) 15 N.C. J. Int'l & Com. Reg at 361. **[hereienafter "Host-Nation Regulation"].** According to Kofele-Kale, a survey of African investment legislation since the 1960s reveals three distinct waves or generations. First, the 1960s and early 1970s which was an era of policy restrictiveness on the entry, activities and operations of foreign investors. Second, the late 1970s and early 1980s, when liberalisation of foreign investment regimes was the dominant trend. Third, after 1984, in response to the structural adjustment and stabilisation programs of the World Bank and IMF, many governments further eased restrictions on foreign investment by streamlining and simplifying screening procedures and easing bureaucratic delays.

[67] I.F.I. Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (Dordrecht: Martinus Nijhoff 1993). See also Sornarajah, *International Law on FDI, supra* note 49.

[68] The Hull Formula was named after the U.S. Secretary of State C. Hull who used it in his diplomatic exchange with the Mexican government in respect of the Mexican nationalisation of 1938. **But see** Asante, in "International Law and Foreign Investment: A Reappraisal" (1988) 37 ICLQ, 588 who argues that a realistic assessment of the evidence and sources of international law since 1945, cannot sustain the Hull formula as a valid principle of international law.

[69] S.K.B. Asante, "International Law and Investments", in M. Bedjaoui (ed.,), *International Law: Achievements and Prospects* (The Netherlands: UNESCO 1991) 667-690. **See also** S.K. Verma, "International Code of Conduct for Transnational Corporations", 20 I.J.I.L (1980) 20, at 35-36. Article 2 of the Charter of Economic Rights and Duties of States, provides for payment of 'appropriate' compensation.

accordingly. While there is still a degree of state intervention to regulate the negative side effects of international investment, as well as some sectoral restrictions on the basis of public policy, the principal characteristic of most investment legislation is openness to international capital. In the words of Sornarajah, current investment legislation is a mix of 'regulation and openness'.[70]

Together with domestic regulation, the increased activity of multinational firms has underlined the need for international legal norms to govern their operation. Efforts made within the United Nations to negotiate a *Code of Conduct for Transnational Corporations* failed, mainly due to disagreements between industrialized and developing countries.[71] Between 1995 and 1998, negotiations were held under the auspices of the Organization for Economic Co-operation and Development (OECD) for a *Multilateral Agreement on Investment* (MAI), which also failed to reach consensus.[72] A new lease on life has been given to soft regulation of multinational companies with U.N. Secretary-General Kofi Annan's announcement of the *Global Compact* in January 1999, and his invitation to MNCs to endorse and apply the principles in their corporate practices in the interest of sustainable development.[73]

The principal question that this thesis addresses is the extent to which governments in West Africa have been successful, through their investment legislation, in striking a balance between the private interests of corporations and government officials on the one hand, and the socio-economic and environmental interests of communities in which investments take place, on the other. In other words,

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[70] M. Sornarajah, *The International Law on FDI*, *supra* note 49, at 45. "The view which was once held that multinational corporations were a threat to the sovereignty of developing states may not arouse the same degree of concern any more. The developing states have built up confidence in dealing with these corporations. Multinational corporations, in turn, have left behind the role of being instruments of the foreign policy of their home states."

[71] Ibid., especially at 202-211. **See also** S.K.B. Asante, "International Law and Foreign Investment" *supra* note 68.

[72] B. Stern, "How to Regulate Globalization" in M. Byers (ed.), *The Role of Law in International Politics* (2000), at 248-249, noting that both developing and some developed countries opposed the MAI. The French Minister of Culture Jack Lang is quoted to have said during negotiations for the MAI (AMI in French) that "L'AMI, c'est L'ennemi". France advocated a 'cultural exception' to the MAI's liberalisation provisions, and objected to the Agreement on that basis.

[73] **See** www.unglobalcompact.org. The Global Compact is a set of nine human rights, labour and environmental principles, derived from the Universal Declaration of Human Rights, the ILO Fundamental Principles on Rights at Work and the Rio Principles on Environment and Development, respectively. According to the UN, the principles are inspirational in nature, intended to build the 'social and environmental pillars required to sustain the new global economy and make globalization work for all people'. Companies are called upon to 'act on' the principles in their own corporate domains.

to what extent can legal regimes for foreign investment contribute to the attainment of sustainable development in host societies?

In an attempt to answer this question, I will discuss the regulatory and contractual provisions that constitute the legal regime for investments in Nigeria's petroleum sector, and analyze how that regime affects prospects for sustainable development in the Niger Delta region of Nigeria.[74] The Niger Delta produces the bulk of Nigeria's petroleum.[75] This discussion will demonstrate that while Nigerian law has facilitated the realization of significant economic benefits by the Nigerian government and the multinational companies, the law has done little to advance the overall socio-economic plight of the majority of Nigerians, especially those in the oil-producing regions. In addition, inadequate implementation of environmental laws has resulted in severe ecological damage in the oil-producing regions, and devastated the livelihood of the populations that live there. While rich in mineral resources, the oil-producing communities of the Niger Delta have remained on the margins of abject poverty, lacking basic social amenities such as proper health care, education, shelter, sanitation and nutrition. Infrastructural facilities such as roads, hospitals, electricity-supply and running water are lacking. Per capita incomes in the oil producing areas are below the national average of $260.[76] In addition, due to improper production methods, antiquated technology, and inadequate implementation of legal rules, oil production has caused severe environmental damage to farmlands, fish and water sources, human habitats, biological diversity and the atmosphere. The conclusion is that the legal regime has not sufficiently integrated the triple values (economic, social, and environmental) necessary for sustainable development. I will make recommendations for amendment of the law so as to facilitate the realization of these objectives.

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[74] Section 14 of the Petroleum Act 1969, which is still the operative law, defines 'petroleum' to mean both oil and natural gas. The legal regime applies to the exploration and production of both these minerals. Although I have used the terms 'petroleum' and 'oil' interchangeably, the analysis in this thesis is limited to the exploration of oil. The commercial exploitation of natural gas in Nigeria began recently with the conclusion in 1995 of the Liquefied Natural Gas Project, a joint venture between the Nigerian Government, which holds 49% of the equity through the State-owned NNPC, Shell (24%), Elf (15%), and Agip (10%). The remaining 2% was offered to the IFC, which declined the offer in the wake of the execution of Ken Saro-Wiwa and other Ogoni activists in 1995. On the LNG venture, **See** C.E. Emole, "Nigeria's LNG Venture: Fiscal Incentives, Investment-Protection Schemes and ICSID Arbitration", (1996) 8 Afr. J.I.C.L 169-179.

[75] I. Okonta and O. Douglas, *Where Vultures Feast: Shell, Human Rights and Oil in the Niger Delta* (San Francisco: Sierra Club Books 2001) at 18, where they state that three-fourths of Nigeria's crude oil is produced in the Niger Delta region. Crude oil accounts for 95% of the country's foreign exchange earnings. It is estimated that reserves would increase to 33 billion barrels by end of this year.

In the previous chapter, I argued that the concept of sustainable development goes beyond the view of 'development as economic growth', and encompasses the fulfillment of the twin objectives of human and environmental security.[77] I relied upon the social aspects of the concept of human security as developed by the United Nations Development Program. While the UNDP defined human security in an expansive sense to include the economic, personal, environmental and political dimensions of security, I argued that human security requires the improvement of the standards of living of people through their access to basic needs for education, health care, clean water, sanitary facilities and a decent environment.[78] The second limb of sustainable development, the maintenance of environmental security, requires safeguarding the earth's ecological integrity both for the intrinsic value of the environment, and for the benefit of current and future generations.[79] My argument is that legal regimes for sustainable development should be constructed to facilitate the realization of economic, social and environmental objectives; what some have called the 'triple bottom line'.[80] As it will become clear later in the chapter, the principal shortcoming of investment legislation in developing countries such as Nigeria, is that they have failed to strike a sufficient balance between these three objectives. In most cases, economic considerations have weighed-in against social and environmental considerations.

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[76] For a compelling depiction of the relationship between oil production and the socio-economic and environmental situation in the Niger Delta, **see** I. Okonta and O. Douglas, *Where Vultures Feast, supra* note 75, at 18-20.

[77] *Supra,* Chapter 1.

[78] The United States Secretary of State at the 1945 San Francisco conference of the United Nations had this to say: "The battle of peace has to be fought on two fronts. The first is the security front where victory spells freedom from fear. The second is the economic and social front where victory means freedom from want. Only victory on both fronts can assure the world of an enduring peace .... No provisions that can be written into the Charter will enable the Security Council to make the world secure from war if men and women have no security in their homes and their jobs." See UNDP *Human Development Report 1994: New Dimensions in Human Development,* at 3.

[79] On environmental security, see J. Brunnée and S.J. Toope, "Environmental Security and Freshwater resources: A Case for International Ecosystem Law", (1994) 5 Y.B.I.E.L 41. Also, Brunnée and Toope, "Environmental Security and Freshwater Resources: Ecosystem regime Building" (1997) 91 A.J.I.L., 26. **See also** G. Handl, "Environmental Security and Global Change: The Challenge to International Law" (1990) 1 Y.B.I.E.L. 3. On intergenerational equity as a basis for sustainable development, **see** E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Pubs. 1989).

[80] The term 'triple bottom line' is attributed to John Elkington, Chairman of SustainAbility, a London and New York based strategic management consultancy, who first used it in his 1997 book *Cannibals with Forks.*

2. Social Organization and Political Context

The modern nation-state of Nigeria came into being in 1914 when the then British colonial Governor Sir Frederick Luggard brought the hitherto Northern and Southern protectorates under a single colonial administration.[81] However, the history of the Nigerian people goes back to over 2000 years.[82] Before the advent of the European traders in the 15th century, the territory of modern Nigeria fell under the sovereignty of several traditional Kingdoms. To the North were the great kingdoms of Kanem-Bornu and later the Fulani Empire established by the Islamic cleric and reformer, Usman dan Fodio in 1804. In the West were the Kingdoms of Ife and Benin, and the Oyo Empire. Finally, to the East were the city-states of the Niger Delta and large populations of Ibo people.[83]

The Portuguese were the first European traders to reach Nigeria when João Affonso d'Aveiro visited Benin in 1486.[84] The arrival of the Portuguese paved the way for other Europeans to explore the African hinterland in search of gold and slaves. This gave rise to the Trans-Atlantic slave trade, which lasted from about the middle of the 15th century to the 1860s. It is estimated that during this period, some 24 million people were transported from West Africa to the Americas.[85] In 1861, the British annexed Lagos in the South, and established a trading post. Between 1900 and 1906 British control was extended over most of present-day Northern Nigeria. Then in 1914, the Northern and Southern Protectorates were merged under a single administration marking the birth of modern Nigeria.

Located in the Atlantic Basin east of the Gulf of Guinea, Nigeria regained her independence from Britain in 1960, and became a republic within the Commonwealth of Nations in 1963.[86] At the time of independence, the country was governed as a federation comprised of three separate administrative units – the Eastern, Western and Northern regions dominated by the Ibo, the Yoruba, and the Hausa-Fulani ethnic groups respectively. In addition to these dominant ethnic groups is a multitude of smaller ethnic and linguistic groups totaling about 250 by some accounts.[87] Today,

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[81] A.A. Ikein, *The Impact of Oil on a Developing Country: The Case of Nigeria* (New York: Praeger 1990), at 60. **[hereinafter *Impact of Oil*].**
[82] M. Crowder, *The Story of Nigeria* (London: Faber and Faber Ltd., 1962) at 27.
[83] Ibid., at 21.
[84] Crowder, *supra* note 82, at 66.
[85] Ibid., at 72.
[86] T. Falola, *The History of Nigeria* (Westport, Connecticut: Greenwood Press (1999) at 10.
[87] F.A.O. Schwarz Jr., *Nigeria: The Tribes, the Nation, or the Race - The Politics of Independence* (Massachusetts: The M.I.T Press, 1965) at 10: "... the most significant general comment that can be

Nigeria's population is estimated to be over 120 million people, making the country the most populous on the African continent. Religious differences are equally pervasive; over half of the population is said to be Muslim, 35 per cent are Christians and the remaining 10-15 per cent are animist worshippers.[88]

As shown by their pre-colonial history, the people of Nigeria had very little in common before they were forcibly homogenized in 1914. The artificial nature of the colonial state, which was created without any regard to the prior history or geography of the people that were being subjugated to colonial rule, has been a sore nerve in the side of many Nigerians.[89] In addition, since independence, the absence of a sense of national unity has been at the forefront of the crisis of development facing the Nigerian State. The complexities of ethnic and religious diversity also explain much of the political instability in Nigeria, and underlie the significant economic disparities that characterize Nigerian society. Control of governmental power is contested along regional, tribal or religious lines, because such control breeds opportunities to further the cause of one's own constituency at the national level. Since independence in 1960, the country has experienced at least seven military administrations, compared to three democratically elected governments.[90] The frequent change of government has meant that socio-economic and development policy in Nigeria has remained in a state of permanent flux, as each government has sought to satisfy the competing demands of different regional and ethnic interest groups. Consequently, development planning has been directed towards meeting the parochial interests of these different constituencies rather than the national interest. Khan aptly describes the patrimonial nature of the Nigerian State:

> The lack of political authority and stability in Nigeria has largely been a consequence of its diverse ethnic and social make-up, as well as the nature of central government-state relations. ... All the different ethnic groups attempt to translate regional power into federal power in order to meet the revenue and resource needs of their particular states and constituents; and each federal government tends to plan its economic strategies and policies around ethnic and regional concerns in order to retain its own constituency. [91]

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made about precolonial history in Nigeria is that it is not Nigerian history but rather the history of different tribes, or occasionally, groupings of tribes."

[88] Sarah Ahmad Khan, *Nigeria: The Political Economy of Oil* (Oxford: Oxford Univ. Press 1994), at 6. **[hereinafter *Political Economy of Oil*].**

Ibid., at 7.

[89] O. Awolowo, *Path to Nigerian Freedom* (1947) at 47-48 wrote: "Nigeria is not a nation. It is a mere geographical expression.... The word "Nigerian" is merely a distinctive appellation to distinguish those who live within Nigeria from those who do not." Cited in F.A.O. Schwartz, *Nigeria, supra* at 3.

[90] J. G. Frynas, "Political Instability and Business: Focus on Shell in Nigeria" (1998) Third World Quarterly, Vol. 19, No. 3, 457 at 461.

[91] Khan, *Political Economy, supra* note 88, at 6.

Similarly, Forrest has concluded that "the struggle by private interests for state resources has helped to undermine the legitimacy of governments and erode the authority of the State."[92] For Osaghae, "...the State in Nigeria ... lacks autonomy in the sense that its apparatuses are not well developed, and not insulated from private capture. This means that the legal-rational and bureaucratic ethos of impersonality, impartiality and rationality has not been entrenched, making it possible for the State to be captured by hegemonic classes and groups as well as ambitious rulers."[93] The lack of autonomy of many Nigerian governments is particularly evidenced by the pattern of development planning and the distribution of revenues from oil. In many cases, it was clear that a few elites in government and business had customized government policy to satisfy special political or group interests at the cost of equitable national development and environmental protection.[94]

In contrast to the shifts in domestic development policy, political instability has not resulted in any major upheavals in Nigeria's investment policy, particularly as it relates to foreign oil companies. Apart from two indigenization laws passed in the 1970s to increase the participation of local entrepreneurs in the domestic economy by imposing sectoral restrictions on foreign investment, investment legislation has mainly been directed towards promoting and protecting investment, and creating an enabling environment to attract more foreign capital into the Nigerian economy.[95] Indeed, even at the height of the indigenization process, Nigerians emphasized that they were not

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[92] Tom Forrest, *Politics and Economic Development in Nigeria* (Boulder: Westview Press 1995), at 3.
[93] E.E. Osaghae, *Crippled Giant: Nigeria Since Independence* (Bloomington: Indiana Univ. Press, 1998) at 23.
[94] See *infra* Chapter 4, on "Oil Wealth and the Challenge of Social Development in Nigeria."
[95] For a comprehensive study of Nigeria's indigenisation experience, **see** T.J. Biersteker, *Multinationals, supra* note 48. **See also** F. C. Beveridge, "Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria" (1991) 40 I.C.L.Q. 302. Two restrictive indigenisation laws were passed in the 1970s. According to Beveridge, the Nigerian Enterprises Promotion Decrees of 1972 and 1977 respectively imposed restrictions in order to put small-scale localised activities, as well as medium-scale enterprises, into Nigerian control. However, following the recession in the world economy in the 1980s, and the fall in the price of oil with consequent shortages of foreign exchange in Nigeria, as well as a dearth of new foreign investment in the country, the government agreed to a package of economic reform measures proposed by the World Bank. These included relaxation of the indigenisation measures adopted in the 1970s. The 1989 Nigerian Enterprises Promotion Decree removed most of the sectoral restrictions and opened up all sectors of the Nigerian economy to foreign investment, with the exception of 40 activities. Even for these activities, foreign investment was possible with a capital infusion of N20 million. For a critique of the 1989 Decree, **see** T. I. Ogowewo, "The Shift to the Classical Theory of Foreign Investment: Opening Up the Nigerian Market" (1995) 44 I.C.L.Q 915, at 923. The Petroleum industry was not affected by any of these laws. It continued to be governed by a separate legal regime introduced under the Petroleum Decree No. 51 of 1969.

hostile to foreign investment. Rather, the objective of indigenization seemed to have been to boost infant industry, and to reduce external dominance of the economy.[96]

Liberalization and investment promotion was likewise the norm with respect to the petroleum sector. During the 1970s, the Nigerian government partially nationalized the petroleum sector in response to Organization of Petroleum Exporting Countries (OPEC) resolutions calling on member states to acquire greater control of this sector.[97] Apart from these measures, Nigeria has actively promoted and encouraged foreign investment in petroleum exploration and development. Regardless of the frequent political change, Nigeria's governments each sought to encourage oil exploration by multinational companies through a variety of fiscal incentives such as production cost allowances, favorable tax regimes, and low royalty rates. The reason seemed to have been that at the time oil was discovered in Nigeria, the country lacked the technological and human resources to effectively run the industry. Some have argued that this might well be the case till today.[98] This strategy has worked well for Nigeria. The favorable fiscal treatment, together with the superior quality of Nigerian crude oil[99] and the proximity of Nigeria to the markets of Western Europe and the United States, have all combined to keep the multinationals operating in Nigeria despite what is sometimes a difficult, even violent working environment.[100]

OPEC resolution XVI.90 adopted in June 1968, called on member states to acquire 'participation in and control over all aspects of oil operations' by taking a 51 per cent equity interest in foreign oil concessions. After joining OPEC in 1971, Nigeria acquired a participation interest in all the oil joint ventures. That year, the government took a 35 per cent stake. This was increased to 55 per cent in 1974 and, to 60 per cent in 1979.[101] However, in the 1980s and 1990s, the government began to face increasing

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[96] Beveridge, *supra*, note 95, at 308.

[97] Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch 1999), at 27. **See also** Khan, *supra*, note 87 at 18.

[98] Human Rights Watch, *The Price of Oil*, at 26-27.

[99] Nigerian crude oil is described as 'light' or 'sweet' with very low sulphur content, thereby requiring lesser refining costs than oil from the Gulf States, or Latin America.

[100] Khan, *supra*, note 88 at 13. Also Frynas, "Political Instability and Business", *supra* note 90, at 457-486. He posits that political instability is conducive to Shell's operations in Nigeria for several reasons: first, Shell occupies a dominant market position in the country, and profits from the company's Nigeria operations are higher than from other places; second, Shell acquired first mover advantages since the colonial period which it consolidated after independence by penetrating political power structures, thus hedging any risks that might arise from instability.

[101] Khan, *supra*, note 88 at 18. After the nationalisation of British Petroleum in 1979 over allegations that the company violated the economic embargo against South Africa, the Nigerian government's share in the Shell/BP joint-venture increased to 80 per cent. Some writers have argued that this

financial constraints resulting in inability to pay its share of production costs in the petroleum joint ventures. In addition, there was increasing realization that the financial clout and superior technology of multinational companies was essential to the continued survival of the oil industry. As a result, the government began divesting some of its shares in the joint ventures. According to Khan, "while the 1970s was a decade of nationalization, the 1980s saw a gradual realization that access to the marketing and investment funds of foreign oil companies would be of crucial importance to the continued growth of the oil sector."[102]

3. The Nigerian Economy and the Role of Oil

> An examination of the previous studies on the Nigerian oil industry shows that there has been too much emphasis on the economic significance of oil, to the extent that the human consequences, coupled with social costs to the host communities, are ignored, distorted, or simply forgotten. Apparently, resource development and economic progress are not synonymous with the overall social and economic development of the producing areas.[103]

The first discovery of oil in commercial quantities in Nigeria was made at Oloibiri, in the Niger Delta in 1956 and exports began in 1958 with 1.8 million barrels.[104] Despite this initial discovery, Nigeria remained a predominantly agrarian economy up to the time of independence in 1960. It was a major exporter of palm oil, groundnuts, cotton and cocoa. Agriculture accounted for 97 per cent of export revenues, 60 per cent of GDP, and the country was self-sufficient in food.[105] The agricultural sector was also the principal employer of domestic labor, absorbing more than 70 per cent of the labor force.[106] Similarly, mining of various minerals was a significant economic activity and foreign exchange earner; Nigeria exported iron, tin, columbite, limestone and coal.[107]

The rise of the petroleum industry was to change all this. The oil price increases of 1973-74 brought massive windfall revenues to the Nigerian government.[108] In 1970 export revenues from oil amounted to $724 million or 58 per cent of total export earnings. This increased to over $3 billion in 1973, and to $9

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nationalisation might have been politically motivated as it took place on the eve of the Commonwealth Summit in Lusaka, Zambia where Britain was poised to take a softer approach to sanctions against Rhodesia. See Beveridge, *supra* 95, at 320.

[102] Khan, *supra,* note 88, at 71.

[103] A.A. Ikein, *The Impact of Oil, supra* note 81 at xxi.

[104] Human Rights Watch, *The Price of Oil, supra,* note 97. Also Ikein at 4.

[105] Okonta and Douglas, *Where Vultures Feast, supra,* note 75, at 24.

[106] Ikein, at 71.

[107] Ibid.

[108] Khan, *supra* note 88, at 184.

billion in 1974, accounting for 84 and 92 per cent of export revenues respectively.[109] In 1992, the share of oil in export revenues reached 97 per cent or $11.6 billion.[110] At the end of 1998, the oil sector comprised more than 40 per cent of GDP, and accounted for 95 per cent of export revenue.[111]

This increase in oil revenues and the contribution of the oil sector to the Nigerian economy was secured at the expense of the non-oil sectors of the economy. Various Nigerian governments have been criticized for their poor economic management and financial indiscipline. Because of the rentier nature of oil revenues, they do not come with the same form of political pressures for accountability usually associated with revenue from personal income or property taxes.[112] As a result, financial discipline and accountability deteriorated and government expenditure surged, partly in response to claims from regional and private interest groups for a share of the windfall. Little thought was given to the need to reinvest the money abroad or in a stabilization fund in anticipation of future economic shocks, as is the practice in other oil states.[113] Nor was the oil wealth used to diversify the economy through investments in the non-oil sectors, such as agriculture. Instead, during the oil boom from 1973 to 1981, the Nigerian government embarked on massive public expenditure, mainly on showpiece infrastructure projects, huge increases in public sector salaries,[114] substantial transfers to the State governments without much requirement for accountability and cash donations. It was during this period that the government built the Kainji Dam, constructed its network of superhighways mainly in urban centers, established a steel plant, built the national airport in Lagos, and

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[109] Ibid.

[110] Ibid., **see** especially, Table 8.1 giving statistics of oil export revenues from 1970 -1992.

[111] Human Rights Watch, *The Price of Oil, supra,* note 97 at 25. [They relied on data from the IMF, in *Nigeria: Selected Issues and Statistical Appendix,* IMF Staff Country Report No. 98/78 (Washington DC 1998, pp 6 to 11.]

[112] Forrest, *supra* note 92 at 133.

[113] S.N. Onuosa, "Sustainable Development of Petroleum Resources: The Rumpus and Resolution", in Z. Gao, *Environmental Regulation of Oil and Gas* (London & The Hague: 1998), 433 at 445. He cites the example of Kuwait, which has operated a "Reserve Fund for Future Generations" since 1976. The objective is to set aside 10 per cent of the country's oil income to be utilized when oil resources deplete. When it was set up, it was provided that the Fund will not be interfered with for at least 25 years, and by 1998, it was estimated to have been worth US $100 billion.

[114] After the submission in 1974 of the Report of the Udoji Commission, which was set up to study reform of the public service, and to bring public sector salaries into line with those of the private sector, the Nigerian government increased salaries of senior civil servants by 90 per cent and those of lower ranks by up to 130 per cent. Moreover, these increases were backdated by nine months and paid in lump sum, contrary to the express recommendations of the Commission. **See** Forrest, *supra* note 92 at 143-144.

commenced work on a new federal capital in Abuja.[115] In 1977, the federal government cancelled loans due to it from the States totaling Naira 804 million.[116] Considering that most of this money was actually spent on patronage rather than on development in the respective states, it illustrates the lack of financial discipline and the total absence of accountability in the Nigerian government at the time. Ostensibly, this spate of public expenditure was viewed "as a way for the government to acquire legitimacy in the eyes of the public."[117] A similar pattern of governmental excesses prevailed in Zaire (now Democratic Republic of Congo), during the rule of Mobutu Sese-Seko.[118]

Externally, Nigeria lent Naira 225 million to the IMF oil facility, $80 million to the African Development Bank, and $52 million to the OPEC special fund.[119] In addition, grants were made to several West African countries that were members of the Economic Community of West African States (ECOWAS), and in 1976, a cash donation of Naira 13.5 million was made by the Obasanjo regime to the government of Angola.[120]

The neglect of the non-oil sectors of the economy that followed the increase in oil revenues has resulted in the virtual collapse of these sectors. Estimates of agricultural output for the years 1970 to 1982 reveal that yearly production of the country's export crops - cocoa, rubber, cotton and groundnuts, fell by 43, 29, 65, and 64 per cent respectively.[121] At independence in 1960, agricultural products accounted

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[115] Ikein, *supra* note 81 at 72.

[116] Forrest, *supra* note 92 at 144. On April 2, 2003 the inter-bank exchange rate for US $1 stood at Naira 133.41. See www.oanda.com/convert/classic (accessed April 2, 2003).

[117] Khan, *supra* note 88 at 185.

[118] P. Englebert, *State Legitimacy, supra* note 37, at 105-112. According to Englebert, [p110], Mobutu "literally purchased the support of regionally based elites by building networks of patronage and clientelism that allowed them to systematically plunder the State to the benefit of their region, their people, and themselves."

[119] Forrest, *supra* note 92, at 142

[120] Ibid.

[121] Khan, *supra* note 88 at 187. In fact, according to Khan, under the Third Development Plan from 1975-80, Nigeria spent a total of 21 per cent of capital expenditure on agriculture, mining and manufacturing, (what economists call the 'tradable sectors' of the economy), compared to 79 per cent on public utilities, education, health and other categories, including defence. While this may give the impression of major social investments by the government, the distribution of the investment projects were largely skewed in favour of urban areas. Ikein reminds us that "there was a concentration of development in the metropoles. Nigeria's urban centers could mimic the impressive skyline of industrialized cities in the West, but the country was still unable to provide basic amenities such as water, housing, roads, and power to its rural areas.... The imbalance in development has created two faces of oil wealth: growth in Western hegemonic centers in urban areas, and continued stagnation and underdevelopment in rural areas. The façade of a Western skyline in urban metropoles as a symbol of development should not be allowed to take precedence over much-needed rural development." Ikein, *The Impact of Oil, supra,* at 88-89.

for 97 per cent of export revenue and the country was self-sufficient in food.[122] The steady decline in the sector during the oil boom years meant that the contribution of agriculture fell from 60 per cent of GDP in 1960, to 21 per cent in 1977, and to less than 10 per cent in 1978.[123] Food production declined significantly between 1975 and 1983 as a result of governmental neglect and the paucity of investment in agriculture, forestry and fisheries. The effect was that Nigeria became a single-commodity-dependent economy (oil), thus increasing its vulnerability to the vagaries of external demand for oil, and fluctuations in market prices.[124]

The collapse of the non-oil sectors of the Nigerian economy as a result of the increase in revenues from oil has been described as a 'Dutch Disease'. This describes the adverse effects on Dutch manufacturing that resulted from discoveries of natural gas in the 1960s. It is now generally used to depict the process whereby new discoveries or favorable price changes in one sector of the economy (in Nigeria's case oil) causes decline in other sectors (agriculture in the case of Nigeria).[125] Khan concluded that "the rising oil revenues and declining GDP of the late 1980s suggest that the impact of the oil boom in the earlier decade was so detrimental to non-oil economic activities, that even increasing oil revenues after the low of 1986 were not sufficient to initiate or sustain a GDP recovery."[126] Forrest however disputes that 'Dutch disease' is a suitable term to describe the impact of oil on the Nigerian economy. According to him, "'Dutch Disease' cannot comprehend the loss of macroeconomic control, the increase in external indebtedness, the expansion of the public sector, and the existence of many unproductive state projects."[127]

Whatever the label given to the effect of oil wealth on the Nigerian economy, what is clear is that despite massive revenues from oil, the country remains one of the poorest in the world. While the government and oil companies may have grown wealthier, this wealth did not trickle down to the general population of Nigeria, particularly those in the oil producing areas of the Niger Delta. To quote from Khan again:

> The legacy of the oil boom years ... can be described from several different perspectives. Nigeria, in 1980, was to a large extent and primarily a nation of consumers. The productive element in the economy had been over-shadowed by the

[122] Okonta and Douglas, *Where Vultures Feast, supra* note 75 at 24.
[123] Ikein, *supra* note 81 at 19.
[124] Okonta and Douglas, *supra* note 75 at 28-29.
[125] Khan, *supra* note 88 at 186. See also Human Rights Watch, *The Price of Oil, supra* note 97, at 43.
[126] Khan, at 183.
[127] Forrest, *supra*, at 159.

> massive increase in imported goods, both capital and consumer, the availability of cheap energy, and the tremendous increase in public services, in particular education and public utilities. The high growing population, particularly urban, had acquired a taste for a high quality of life, and social well-being was emphasized at the expense of developing linkages between the oil sector and the rest of the economy. Industrial development was dependent on imports and therefore on the continued strength in the oil market. While lip service continued to be paid to the importance of agriculture, the country could no longer feed itself and was dependent on food imports. Capital investments were largely geared toward largely showpiece construction projects... [128]

Ikein reaches an even more profound conclusion. While recognizing that "oil has been instrumental to Nigeria's economic achievement since the 1970s," he points out that:

> mere economic aggregates by themselves are of little use for the masses since they are hardly relevant to their needs. In essence, the wealth did not get to the people. Distributive justice did not emerge to favor them. Apparently, economic growth as measured by GNP is not synonymous with social welfare. ... Nigeria was credited with an impressive growth rate in the 1970s, but was reduced to poverty status in the late 1980s. By 1989, it earned the status of one of the world's poorest nations by the World Bank, with a foreign debt of $30.5 million. ... The benefits of economic growth did not trickle down sufficiently to make the average citizen better off. The vast majority of Nigerians were losers rather than winners as a result of the country's economic growth.[129]

In its Human Development Report (2001), the UNDP ranked Nigeria 136th out of 162 countries in the world.[130] The country's per capita income is estimated at about US $300, literacy rate is put at 62 per cent for people over fifteen years of age, and GDP is estimated at US $30.9 billion.[131] This huge revenue has however not resulted in overall socio-economic development for its people, many of whom still lack basic social amenities such as clean water, primary health care, education, adequate sanitation and nutrition. 'Freedom from want', to borrow the UNDP's phrase, still remains an elusive dream for most Nigerians. Indeed Human Development Indicators for 2002 show that Nigeria's ranking dropped to 148th and over 70% of the population currently live below the poverty line of $1 per day.[132] Consequently, the Nigerian government still faces an acute human security challenge.

In addition to the human dimension, the severe environmental damage that has resulted from almost fifty years of oil exploration and production in the Niger Delta provides a compelling case for rethinking the law and policy governing oil exploration and the distribution of benefits arising from oil wealth. I will suggest that structural

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[128] Khan, *supra* note 88 at 188-189.
[129] Ikein, *supra* note 81 at 76 and 78.
[130] United Nations Development Programme, *Human Development Report: 2001.*
[131] The Corporate Council on Africa, *Doing Business with Africa 2000/1* (New Canaan: Business Books International, 2000), 223.

legal reform in line with the principles and objectives of sustainable development law could inject greater congruence between the economic interests of governments and business on the one hand, and the social and environmental imperatives of the larger Nigerian society, in particular, the oil producing communities on the other. The next section therefore examines the legal regime.

4. The Legal Regime for Investments in the Nigerian Petroleum Industry

The legal regime governing the petroleum industry in Nigeria is comprised of a mix of domestic legislation and state contracts signed between the government and international oil companies. The main body of domestic law is found in the *Petroleum Act* passed in 1969, together with the *Petroleum (Drilling and Production) Regulations* that were formulated the same year.[133] Resolutions of certain international organizations of which Nigeria is a member, have also influenced the domestic regulatory regime. The most important of these were certain resolutions of OPEC adopted in the late 1960s and early 1970s, intended to facilitate state control of the oil industry in OPEC member states.[134] What is even more interesting is the apparent nexus between the evolution of domestic law in Nigeria, OPEC resolutions and the debate that was taking place within the United Nations in the 1960s on the issue of permanent sovereignty over natural resources.[135] Despite their non-binding nature in a positivist sense, these United Nations resolutions have influenced the emergence, and defined the character of domestic investment legislation, especially with relation to the

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[132] United Nations Development Programme, *Human Development Indicators* (2002) available online at http://hdr.undp.org/reports/global/2002 accessed March 04, 2003.

[133] The Petroleum Act was initially promulgated by the Federal Military Government of General Yakubu Gowon, as Decree No. 51 of 27 November 1969. The regulations were made pursuant to the power of delegated legislation conferred on the Minister of Petroleum Resources by section 8 of the parent Act. It is noteworthy that due to the frequent change of government in Nigeria, the legal nomenclature has shifted from one reflecting law making by military governments to one by civilian administrations. Thus laws made by the military are referred to as "Decrees"; these decrees are usually converted to "Acts" when a civilian government comes to power. This was what happened in the case of the Petroleum Law. Similarly, cabinet members of military governments are referred to as "Commissioners" while in civilian administrations they are given the more familiar title of "Ministers". While I have to some extent used these terms interchangeably, I have endeavoured to stick to the terms "Act" and "Minister" whenever possible, and where the use of those terms will not be misleading, or lead to obscurity.

[134] **See** OPEC Resolution XVI.90 of 1968 on state participation, and Resolution XXI.120 of 1970 calling for a minimum tax rate of 51 per cent to be imposed on oil companies.

[135] Conducted within the context of calls for a New International Economic Order (NIEO), this debate led to the adoption of General Assembly Resolution 1803 (XVII), 1962 on permanent sovereignty over natural resources. Twelve years later, the General assembly also adopted a resolution on the Charter of the Economic Rights and Duties of States (G.A. Res. 3281 of 1974), and Res. 3201 (1974) on the establishment of a New International Economic Order.

exploitation of natural resources.[136] Writing on the same theme, Schrijver opines that "the principle of permanent sovereignty over natural resources has achieved a firm status in international law and is now a widely accepted and recognized principle of international law."[137]

This body of domestic legislation and state contracts governing investments in the Nigerian petroleum sector form the main focus of this chapter. In what follows, the regulatory regime is described and then critiqued from a sustainable development perspective. The thrust of the chapter is to demonstrate the lack of integration of social and environmental concerns in the current legal regime. For example, the Petroleum Act and regulations contain few poorly drafted and vague provisions on pollution prevention in the course of petroleum production.[138] The various contracts signed by the Government and MNCs address purely economic matters such as the parties' contributions to, and share of production, as well as the fiscal regime governing their relationship.[139] The Federal Environmental Protection Agency (FEPA) Act of 1988,

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[136] Sornarajah, *supra,* note 49, at 208 for the argument that the existence of a legal principle of permanent sovereignty is no longer in doubt since it has been incorporated into the constitutions and investment legislation of many developing countries. For the purposes of this thesis, it is noteworthy that both section 1 of the Petroleum Act (1969), and section 44 (3) of the 1999 Constitution of Nigeria, vest the entire ownership and control of all mineral resources in the country in the Government of Nigeria.

[137] N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge Univ. Press 1997), at 377.

[138] See for example section 7 (1) (g) of the Act which requires petroleum production operations to be in accordance with 'good oil field practice', a term which is not defined in the Act. Section 8 (1) (iii) empowers the Minister to make regulations *inter alia,* to prevent pollution of watercourses and the atmosphere. Regulation 36 of the Petroleum (Drilling and Production) Regulations requires multinational companies to keep all their equipment and appliances in good repair and condition and that production methods and practices must be in accordance with 'good oil field practice' a term which is again not defined by the regulations. In *Aminoil v. Kuwait* 21 ILM (1982) 976, the arbitral tribunal said the legal standard that should be applied to determine 'good oil field practice' is whether the practice followed is consistent "with the course that should have been followed by a skilled and circumspect operator." Regulation 36 also requires oil field operators to take measures to prevent the escape of waste into petroleum-bearing strata, the escape of petroleum into water bodies, and to prevent damage to trees, crops, buildings and other structures. It is noteworthy that the word 'environment' is not mentioned even once in these pieces of legislation. As will become clear below, inadequate implementation of these laws render even these limited pollution prevention provisions of little practical significance. **See** I.L. Worika, "Environmental Concepts and Terms in Petroleum Legislation and Contracts: A Preliminary Study" in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998) 393, at 398-401 for the various domestic law definitions of 'good oil field practice'. **See also** Chapter 3, *infra* for a discussion of oil production and environmental preservation in Nigeria.

[139] Oil production in Nigeria is being carried out through three main types of contracts: Joint Venture Contracts, Production Sharing Contracts, and Risk Service Contracts. For a discussion of these various types of contracts from an international law perspective, **see** S.K.B. Asante, "Restructuring Transnational Mineral Agreements" (1979) 73 A.J.I.L. 335; D. N. Smith & L.T. Wells Jr., "Mineral Agreements in Developing Countries: Structures and Substance" (1975) 69 A.J.I.L. 560; **and** Sornarajah, *supra,* note 49, especially at 114-118. For their specific application to the Nigerian context, **see** Y. Omorogbe, *The Oil and Gas Industry: Exploration and Production Contracts* (Lagos:

although providing a useful framework for environmental protection in the country, has been inadequately implemented due mainly to financial and manpower constraints, as well as corruption on the part of government bureaucrats and oil company officials. The resulting compliance deficit means that legal rules have hardly provided a deterrent to environmentally harmful oil production practices in Nigeria.[140] In addition, lack of governmental responsiveness to the needs of the people in oil producing areas, as well as inadequate adherence to the norms of corporate social responsibility have left the majority of people in the oil-producing communities in socio-economic circumstances much worse than those endured by the average Nigerian. This neglect of the socio-economic sector led to a spate of demands in the 1990s by several communities in the Niger Delta (the most prominent of which was the Ogoni ethnic group), for greater social investment from oil revenues, for environmental protection, and for the protection of fundamental human rights.[141]

(A) REGULATORY PROVISIONS

The direction of legal regulation of the petroleum industry in Nigeria has shifted on occasion, depending on who is in control of governmental power. During most of the colonial period, the legal regime largely operated to the advantage of international oil companies, with the colonial subjects realizing little economic benefit from the exploitation of their natural resources. Soon after amalgamating the Northern and Southern Protectorates in 1914, the colonial government passed the *Mineral Ordinance* which provided that licenses or leases for the exploration of oil could only be granted to British citizens or companies incorporated in Great Britain.[142] This effectively made the exploitation of Nigeria's petroleum resources a British monopoly.

Malthouse Press Ltd., 1997); Omorogbe, "The Legal Framework for the Production of Petroleum in Nigeria" (1987) 5(4) J of Energy and Nat. Res. L., 273 **[hereinafter "Legal Framework"]**; Momodu Kassim-Momodu, "The Duration of Oil Mining Leases in Nigeria" (1988) 6 (2) J. of Energy and Nat. Res. L., 103 **[hereinafter "Oil Mining Leases"]**; **and** Myma Belo-Osagie "Petroleum Exploration and Production in Nigeria: An Article on the Legal Framework" in *The Petroleum Economist,* Special Supplement on International Petroleum Law (July 1992) **[hereinafter "Petroleum Exploration"]**.

[140] **See** in general J.A. Omotola (ed.), *Environmental Laws in Nigeria including Compensation* (Ibadan: Caxton Press (West Africa) Ltd, 1990). In particular, see essays in that volume by A. Ibidapo-Obe, "Criminal Liability for Damage Caused by Oil Pollution" at 231; and J. Finine Fekumo, "Civil Liability for Damage Caused by Oil Pollution", at 254.

[141] Okonta and Douglas, *Where Vultures Feast, supra* note 75.

[142] Section 6(1) (b) provides that: "No lease or licence shall be granted except to a British subject or to a British company registered in Great Britain or in a British colony, and having its principal place of business within His Majesty's dominions...." See Mineral Oils Ordinance 1914 in Barrows, *Basic Oil Laws and Concession Contracts: South and Central Africa,* Vol. II, at C-2; Sarah Ahmad Khan, *supra* note 88, at 16; Human Rights Watch, *The Price of Oil, supra* note 97, at 27; Ikein, *The Impact of Oil,*

In 1946, a new *Minerals Ordinance* vested the entire property in and control of all of Nigeria's mineral resources in the British crown.[143] This converted the *de facto* control of the colonial administration into legal sovereignty over Nigeria's oil resources. Prior to this, in the late 1930s, the colonial government granted sole concessionary rights to Shell d'Arcy Petroleum Development Company, a British multinational, to explore for oil throughout the territory of Nigeria.[144] This exclusive exploration right was held by Shell d'Arcy until 1955 when it relinquished part of the acreage allowing Mobil Oil to enter the Nigerian market for the first time that year.[145] Therefore, the legal regime governing the petroleum sector in Nigeria during the period of colonial rule preserved the dominance of the multinational oil companies over the oil resource.

The principal legal vehicle used for the exploitation of natural resources in developing countries during the colonial era was the 'concession agreement'.[146] The terms of these agreements reflected the power imbalance between the international oil companies and the traditional rulers with whom, in many cases, they negotiated.[147] In a typical concession agreement, a vast tract of land is transferred to the investor for a considerable period of time, ranging anywhere from 30 to 100 years depending on the country, and the natural resource that is subject to the concession.[148] In Nigeria, the initial concessions were granted for a period between 30 and 40 years.[149] In return, the concession holder paid a royalty based on the quantity of oil or other mineral resource produced.[150] Often, these royalties were patently inadequate, compared to the huge

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supra note 81, at 2. **But see** Y. Omorogbe, "Legal Framework", *supra* note 139 who erroneously I suggest, puts the date of this Ordinance at 1907.

[143] Minerals Ordinance 1946, section 3(1) in Barrows, *Basic Oil Laws*, Vol. II, at G-6.

[144] Again writers differ on the date of this monopoly. Omorogbe, "Legal Framework" *supra* note 139, at 274 says it was granted in 1938; Ahmad Khan, *supra* note 88, at 16 says it was in 1937. So does Human Rights Watch, at p27 of *The Price of Oil*. The important thing however, remains the grant of the right, not when it was granted.

[145] Human Rights Watch, *The Price of Oil*, *supra* note 97, at 27.

[146] Asante, "Restructuring Mineral Agreements", *supra* note 139, especially at 337-341. Also Sornarajah, *supra,* note 49 at 30-35.

[147] A. Angie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case" (1993) 34 (2) Harv. I.L.J 445, at 473: "More often than not, colonizers obtained concessions through direct coercion by "agreements" that were largely incomprehensible to the natives who were the ostensible signatories to them."

[148] For example, the Sierra-Leone Selection Trust had a diamond concession in Sierra-Leone for 99 years; the Ashanti Goldfields Corporation in Ghana had a term of 90 years; in Swaziland, a Havilock asbestos concession was for 100 years. See Asante, "Restructuring Mineral Agreements", *supra* note 139, at 338.

[149] Ibid.

[150] Sornarajah, *International Law on FDI, supra* note 49, at 30. **Also** Smith and Wells Jr., "Mineral Agreements", *supra* note 139, at 566.

profits made by the mineral companies.[151] Moreover, most concession agreements did not provide for revision to accommodate future changes in circumstances.[152]

It was this inequity in the traditional concession that led to the dispute in *Aminoil v. Kuwait.*[153] There, the concession agreement was entered into between the government of Kuwait, then a British protectorate and Aminoil, an American corporation. It was for the exploration of oil in a vast piece of land in Kuwait, to last for sixty years at a royalty rate of two shillings and six pence per barrel of oil produced. Subsequent changes in the oil industry, especially the oil price rise in the 1970s, led to claims by the Kuwaiti authorities for a re-negotiation of the terms of the concession. They argued that changes in market conditions had resulted in a fundamental change of circumstances rendering the old royalty rates inequitable in the light of the windfall profits that accrued to the oil company. Since this claim for greater contractual equity was not acceptable to Aminoil, the State took over the company's production.

To many commentators on the subject, the traditional concession was an instrument of economic exploitation by multinational companies and their home states.[154] It was therefore hardly surprising that after independence, many developing countries abandoned the concession pattern in favor of new contractual arrangements that were intended to introduce greater indigenous control, to reduce foreign dominance and exploitation, and to ensure that the benefits from their natural resources accrued to the country. For these countries, there was a strong case to depart from traditional concessions if the newly acquired political independence was to be transformed to economic independence. However, despite this shift in contractual forms, there are still questions as to whether many resource-rich developing countries have acquired the rhetorical 'economic independence'. Nigeria is an outstanding example. When oil was discovered in the country in 1956, there was no doubt that the

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[151] Asante, *supra* note 139, at 339: In many cases the companies paid a nominal rent of say, £150 for a whole concession, plus one or two bottles of rum. ... What purported to be a royalty ... was provision for the payment of a minute percentage, say 3 to 5 per cent of the declared profits of the companies."

[152] Ibid.

[153] (1982) 21 ILM 976. For commentary on Aminoil, see A. Redfern, "The Arbitration between the Government of Kuwait and Aminoil" (1984) 55 B.Y.I.L 65.

[154] Sornarajah, *International Law on FDI, supra* note 49, at 30: "The [concession] system was kept in place through an elaborate web of power exerted by the home state and a concerted dominance exerted within the international system itself by the dominant powers." **Also** Asante, "Restructuring Mineral Agreements" *supra* note 139 at 339: "... the traditional concession regime created an enclave status for the transnational corporation fortified by a regime of economic and legal arrangements so formidable

country lacked the human resources and technological depth necessary to exploit the resource on her own.[155] As a result, the country relied on multinational oil companies to explore and produce its oil in exchange for the payment of royalty and a tax on profits. In 1986, a senior official of the national petroleum company admitted that after thirty years of oil exploration in the country, Nigeria had not yet acquired the requisite technology and manpower to operate its oil industry, and was therefore still technically dependent on the West through multinational oil companies.[156] This raised questions about the extent of technology transfer by the multinationals.[157] Today, Nigeria's oil industry is still dominated by multinational oil companies that operate predominantly under joint venture arrangements with the State-owned NNPC, and a variety of product-sharing and risk-service contracts.[158] Although the NNPC holds a majority shareholding of 60 per cent in almost all the ventures, the oil companies, through their position as 'operator', exercise day-to-day managerial and technical control. This implies that Nigeria's position vis-à-vis the oil companies, largely remains that of a tax collector, and that the country has not acquired the requisite degree of technology transfer to enable it to fully internalize decision-making and the benefits from oil.

After independence in 1960, the Nigerian government began taking steps to reduce the dominance of its oil sector by foreign oil companies and to secure greater benefit for the country.[159] These steps were taken in the context of demands for greater

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and pervasive that it overtly challenged the sovereignty of the host government over its natural resources."

[155] Human Rights Watch, *The Price of Oil, supra* note 97, at 26.

[156] M.S. Olorunfemi, then General Manager, Economic Research and Corporate Planning at Nigeria National Petroleum Company (NNPC) wrote: "The country has not developed the capability to manage its petroleum resources by itself: all the crude oil is still produced by foreign operators. Even though some Nigerians who work in the industry occupy important management positions, the key management roles are performed largely by foreigners." See Olurunfemi, "Managing Nigeria's Petroleum Resources," 24 *OPEC Bulletin* (Dec/Jan 1986), at 25-26.

[157] Ikein, *The Impact of Oil, supra* note 81, at 16 noting that multinationals are often reluctant to transfer technology, and that developing countries therefore need to elaborate policies on technology transfer.

[158] There are currently six joint ventures with Shell, Chevron, Mobil, Agip, Elf and Texaco in each of which (except Shell), NNPC holds a 60% shareholding. NNPC holds 55% in the Shell venture, Shell holds 30 percent, Elf (10%), and Agip (5%). This venture accounts for 40% of Nigeria's total production. **See** Human Rights Watch, *The Price of Oil, supra* note 97 at 28-29.

[159] It is debatable whether Nigeria actually succeeded in attaining these objectives. While concessions were replaced by joint ventures as the principal vehicles for investment in the oil sector, government officials largely misspent the revenues that accrued from oil. Most Nigerians, therefore, did not experience true socio-economic development. Moreover, the lack of technological and human resource capacity in Nigeria meant that multinational oil companies (who were designated 'operators' under the joint ventures) exercised effective control and management in the oil industry. To many, this scenario placed the Nigerian state in the position of a passive tax collector, a position that is hardly consistent

economic nationalism on the part of many newly independent states, and for a re-ordering of the international economy so as to facilitate greater equity in the terms of international commodity trade. A significant precursor to greater state participation in the oil industry was Nigeria's attendance at the 1964 OPEC Conference as an official observer.[160] Prior to this, the United Nations General Assembly had adopted resolution 1803 (XVII) in 1962, which affirmed the permanent sovereignty of states over their natural resources. That resolution provided *inter alia,* that permanent sovereignty must be exercised for the well-being of the people of the State.[161] In 1968, OPEC adopted resolution XVI.90, which called upon member states to acquire greater control over the oil sector in their countries, and to expedite the relinquishment of exploration acreage by oil companies.[162]

As a non-member of OPEC at the time, Nigeria could not claim to have been implementing the above OPEC terms. However, the government took some important legislative steps that were consistent with OPEC and the United Nation's call for greater economic nationalism. First, the 1968 *Companies Act* required all companies operating in Nigeria to be locally incorporated.[163] Apparently, this was intended to facilitate better governmental oversight of oil company operations, by enabling greater access to their books of account.[164] From a legal perspective, the provision also had significant implications because the government could now exercise jurisdiction over the investors on the basis of their corporate citizenship.[165]

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with the exercise of permanent sovereignty. On the dichotomy between economic growth, as measured by GDP per capita, and overall socio-economic development in Nigeria, see Ikein, *Impact of Oil, supra* note 81, at 76. Khan also alludes to the 'disappointing' performance of the Nigerian economy despite the vast oil revenues, and concludes that the story of oil in Nigeria is one of 'missed opportunities, administrative disorganization, and resource mismanagement.' See Khan, *supra* note 88 at 2.

[160] Khan, *supra* note 88 at 16.

[161] General Assembly Res. 1803 (XVII) 1962, Permanent Sovereignty Over Natural Resources, paragraph 1: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of the well-being of the people of the State concerned." See N. Schrijver, *Sovereignty over Natural Resources, supra* note 137, at 80-81, 391 arguing that permanent sovereignty implies *inter alia,* a duty to utilize resources for national development and the benefit of the entire population.

[162] The Resolution, entitled "Declaratory Statement of Petroleum Policy in Member Countries", called for member countries to acquire 51 per cent ownership in all oil production ventures in their territories. Khan, *supra,* at 18.

[163] Human Rights Watch, *The Price of Oil, supra* note 97, at 27. This law was initially passed by a military government, and was therefore referred to as the Companies Decree. It was later incorporated into the laws of Nigeria as the *Companies and Allied Matters Act,* cap 59 Vol. III, Laws of the Federation of Nigeria (1990).

[164] Khan, *supra* note 88 at 18.

[165] On the question of nationality of corporations under international law, see the ICJ judgement in the *Barcelona Traction* case (Second Phase), ICJ reports (1970) where the court noted *inter alia,* at p42 that two criteria can be deduced from state practice and international instruments: "The traditional rule

Then in 1969, with the promulgation of the *Petroleum Decree*, the Nigerian government sought to revamp the legal regime governing the petroleum industry, and to assert its sovereignty over petroleum and other natural resources in the country. In pursuance of the latter objective, the decree repealed the 1914 Mineral Ordinance that had extended a monopoly to British subjects and companies.[166] Furthermore, in apparent reversal of the provision in the 1946 Mineral Ordinance that vested all of Nigeria's mineral resources in the British crown,[167] the post-independence petroleum law provided that "the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State."[168] This provision was intended to incorporate the principle of permanent sovereignty over natural resources into domestic law. It has now been enshrined into the country's constitution.[169] Section 2 of the Petroleum Act is a clear indigenization provision; it provides that only natural persons who are citizens of Nigeria, and companies incorporated in Nigeria could be granted rights to explore for oil in the country. This was another demonstration of the country's sovereignty from her former colonial master. Instead of Britain, investors now had to demonstrate a connection to the independent Nigerian state.

Having fully asserted its sovereignty over natural resources in the country, the Nigerian government was now ready to exercise the full incidents of sovereign ownership. The most important of these incidents is the unfettered right to dispose of the resource owned or to grant limited third-party rights over the resource. Since oil

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attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office."

[166] See Schedule 3 of the Petroleum Act 1969. See also note 142 and accompanying text.

[167] See *supra* note 143, and accompanying text.

[168] Section 1(1). Subsection 2 provides that 'lands' means all land in Nigeria, or under the territorial waters of Nigeria, or forming part of the continental shelf.

[169] Section 44(3) of the 1999 Constitution provides that "... the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly." See Constitution of the Federal Republic of Nigeria (1999) at http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm Historically, the provision goes back to the Second Republican Constitution of 1979 (section 40(3)); it was then incorporated in section 42(3) of the 1989 Constitution; and section 47(3) of the 1995 Constitution. I will only note *en passant* at this point that the issue of *ownership* of Nigeria's natural resources is a complex and controversial one. Some groups in the country that regard themselves as 'ethnic nationalities' have laid claims of ownership to natural resources found within their territory and called for more equitable distribution of the wealth accruing from these resources. Some have even called for greater political autonomy and a review of the political arrangement in the country. See for example the *Ogoni Bill of Rights* (1990); and the *Kaiama Declaration* (1998). These claims for self-determination and distributive justice have important implications for legitimacy of the Nigerian State, and are discussed in Chapter Four *infra*.

was to constitute the most significant source of revenue for Nigeria and therefore a crucial element for the country's economic development, the *Petroleum Act* empowered the government to grant limited rights of exploration and extraction. The Act provided for three species of rights or derivative interests that could be granted. First, the *oil exploration license* is a non-exclusive right that permits the licensee to search for petroleum in a particular area, by surface geological and geophysical methods including aerial surveys, and to drill to a maximum depth of 300 feet.[170] The license is valid for a period of one year, expiring on the 31st of December each year. While the licensee has an option to apply for renewal of the license, he is not entitled to an oil prospecting license or an oil-mining lease, which are both more extensive rights.[171]

The second derivative interest is referred to as an *oil-prospecting license.* It confers an exclusive right to search for, take and dispose of oil that is discovered as a result of the prospecting operations, subject to the payment of royalty and petroleum profits tax as well as any other obligations imposed by law.[172] The license is valid for a maximum period of five years at the end of which the acreage must either be relinquished to government where a 'commercial discovery' of oil is not made, or half of it converted into an oil-mining lease.[173]

The *oil mining lease* confers the same exclusive rights of exploration, transportation and disposal of oil as an oil prospecting license, and is usually only granted to holders of prospecting licenses who have discovered oil in commercial quantities, and satisfied all other legal requirements attached to the license.[174] The mining lease is also granted subject to the payment of royalty and petroleum profits

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[170] Section 2 (1) (a) and section 14 of the Act. 'Non-exclusivity' implies that the government is free to grant other licences or prospecting and mining rights over the same piece of the land. See schedule 1, paragraph 2 of the Petroleum Act (1969). **See also** Myma Belo-Osagie, "Petroleum Exploration" *supra* note 139.

[171] Schedule 1 paragraph 3 of the Petroleum Act (1969). Under Regulation 2 of the Petroleum (Drilling and Production) Regulations (1969), the land area subject to an oil exploration license shall not exceed 5000 square miles. **See also** Y. Omorogbe, "Legal Framework", *supra* note 139, at 274.

[172] Section 2 (1) (b), and schedule 1 paragraphs 5 and 7 of the Petroleum Act (1969).

[173] Under paragraph 2 of the regulations, an oil-prospecting license shall be for a maximum area of 1000 square miles, while an Oil Mining Lease shall relate to not more than 500 square miles. Production of oil in 'commercial quantity' is defined under paragraph 9 of schedule 1 of the Act as production of at least 10,000 barrels of oil per day from the licensed area. **See also** Human Rights Watch, *The Price of Oil*, *supra* note 97, at 18.

[174] Schedule 1, paragraph 8 of the Petroleum Act (1969). On oil mining leases as they operate in the Nigerian petroleum industry, see Momodu Kassim-Momodu, "Oil Mining Leases", *supra* note 139.

tax. It is granted for an initial term of twenty years and can be renewed for a further term.[175]

Licenses and leases confer extensive rights and powers over the land including powers of entry and exit, the power to cut down trees and undergrowth, to collect and use water, and to construct such infrastructure and facilities including roads, airfields, and buildings necessary for carrying out oil production, or for the benefit oil workers.[176] They are also subject to certain restrictions. Thus, a prospecting license or mining lease does not authorize access to sacred areas or the use of land reserved for public purposes.[177] The exercise of petroleum rights must not harm anything regarded as an object of veneration, and cannot confer rights to private land without the express permission of the Commissioner for Petroleum Resources, accompanied by the payment of fair and adequate compensation to persons in lawful occupation of the land.[178] While this regulation seems to require payment of compensation for loss of ownership rights to the land itself and, I submit, to any improvements that might have been made on the land, it is hard to reconcile with the provision in the parent Act which limits the payment of compensation to 'disturbance of surface or other rights'.[179]

These provisions must now be read in the light of section 1 of the *Land Use Act*, which vests all land in the country in the State.[180] According to Omotola, this provision divests citizens of their ownership of the land, leaving them with mere rights of occupancy.[181] In addition, the Act empowers the Governor to expropriate land for the purposes of an 'overriding public interest', which is defined to include the requirement of the land for mining purposes, oil pipelines, or any other purpose connected with such operations.[182] Compensation is payable for such acquisition in

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[175] Schedule 1, paragraphs 10 and 13.
[176] Regulation 15, Petroleum Drilling and Production Regulations, 1969.
[177] Regulation 17(1).
[178] Regulation 17(2). "Private land" is defined as 'land which is not State land or native land within the meaning of the Land and Native Rights Act.'
[179] Section 36 of the Petroleum Act.
[180] Land Use Act (1978) in *Laws of the Federation of Nigeria*, Vol. XI, Cap 202 (1990). The Act provides two sets of land administration regimes. All land in urban areas is under the control of the State government; all other (i.e. customary) land is placed under the control and management of the local government authority of the area in which the land is situated. The Act empowers the State Governor to grant 'statutory rights of occupancy' and the Local Government Authority to grant 'customary rights of occupancy'.
[181] J.A. Omotola, *Essays on the Land Use Act, 1978* (Lagos: Lagos Univ. Press 1984) at 16.
[182] Section 28.

accordance with the provisions for compensation stipulated in the Petroleum Act.[183] The latter Act, it will be recalled, only provides for compensation for interference with surface rights. On the other hand, the Oil Pipelines Act requires payment of compensation to landowners both for injury to land and to interests in land, as a result of laying oil pipelines.[184] Disputes as to the amount of compensation payable may be referred to court.[185]

It is submitted that all these provisions must now be read and interpreted in light of the property rights protections enshrined in Nigeria's democratic constitution. The Constitution not only affirms its own supremacy over all other laws in the country, but also provides that no right or interest in property may be acquired compulsorily, except under a law that provides for the payment of compensation and provides access to an impartial tribunal for the purpose of determining the amount of such compensation.[186]

Before 1999, land acquisition for the purposes of oil production was governed by the Land Use Act and the various petroleum laws. The practical effect of these laws was to confer a power of compulsory land acquisition on the government, without any due process mechanisms to ensure the protection of pre-existing customary rights. Moreover, the process of acquisition itself is largely skewed in favor of the oil companies. In the first instance, the relevant oil company identifies the land that it wishes to explore for oil.[187] It then notifies the owners/occupiers, and a date is agreed for assessment of the land. Based on this assessment, lump-sum compensation is paid according to rates determined by the government for surface rights such as crops, buildings, fishponds, and economic trees. As opposed to the regime under the Oil Pipelines Act, (which is limited to an action in tort for injury to property) the determination of compensation due under the Petroleum Act is made without any consultation with landowners, who have no other recourse, even where they are dissatisfied with the amount paid.[188] This provision is hardly in consonance

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[183] Section 29 (2) of the Land Use Act. The section actually provides for compensation in accordance with the Minerals Act, or the Mineral Oils Act, both of which were repealed and replaced by the Petroleum Act of 1969. Again, this provision is inconsistent with the Oil Pipelines Act (1956).

[184] Section 20 Oil Pipelines Act (1956).

[185] Ibid.

[186] Sections 1and 44(1) of the 1999 Constitution.

[187] On the process of land acquisition, see Human Rights Watch, *The Price of Oil, supra* note 97, at 78.

[188] Ibid. According to Human Rights Watch, "In practice, the decision as to the land that will be expropriated and the determination of such compensation as will be paid appears to be made by the oil industry itself. ... Because the government has complete control over land, it is easy for oil companies to ignore local concerns and to fail to ensure that local communities are fully consulted. Decisions

with the protection of property rights in the constitution. It is hoped that vigorous adherence to constitutional norms on the part of the government and oil companies will lead to better protection of property rights in Nigeria's oil producing areas.

B. TAKING CONTROL OVER NATURAL RESOURCES: THE EVOLUTION OF GOVERNMENT PARTICIPATION AND FISCAL INCENTIVES FOR OIL EXPLORATION

As mentioned above, the legal regime governing Nigeria's petroleum sector has evolved in response to changes in political power in the country. The shift from colonial rule to independence led to changes in the legal regime that were meant to underscore the control of indigenous Nigerians over the country's economic destiny. Having asserted the country's sovereignty over natural resources after independence, the challenge that faced the new rulers was to put in place governance structures that would ensure that resources were used for national socio-economic development. As already discussed, the Nigerian government sought to assert its sovereignty over the country's natural resources by enacting laws that vested the ownership and control of all natural resources in the State.[189] However, this was an insufficient reflection of the full spectrum of rights and responsibilities that the principle of permanent sovereignty now implies in international law. While there is no denying that permanent sovereignty implies the right of states to exercise control over their natural resources, this right must now be balanced with at least two principal responsibilities: the responsibility to use natural resources for the benefit of the people of the country, which is required by the UN resolution on permanent sovereignty over natural resources;[190] and governmental responsibility to avoid harm to the environment.[191]

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relating to use of land are completely taken out of the hands of those who have lived on and used it for centuries."

[189] See section 1 of the Petroleum Act and section 44 (3) of the 1999 Constitution.

[190] Resolution 1803 (XVII) *infra* note 161, paragraph 1.The question of the legal effect of resolutions of the United Nations General Assembly has been widely debated. Schachter argues that resolutions could be explanatory of rules of the UN Charter, See O. Schachter, *International Law in Theory and Practice* (The Hague: Martinus Nijhoff 1991) at 86-87. For Higgins, resolutions provide evidence of customary rules, See R.Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford: Oxford Univ. Press 1963, at 5. Dupuy on the other hand ascribes a prospective quality to UN resolutions by arguing that they provide a basis for the development of legal principles and rules that are not yet widely accepted in international law. **See** "Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft law" in R.J. Akkerman et .al, (eds.) *Declarations on Principles: A Quest for Universal Peace* (Leiden, 1977). The responsibilities of the government arguably derive from the maturity of permanent sovereignty as a principle of international law, rather on the basis of the UN resolution *per se.* **See** Schrijver, *Sovereignty over Natural Resources, supra* note 137 at 390.

The historical basis for permanent sovereignty as a ground for the exercise of control over natural resources can be traced back to the UN resolution on permanent sovereignty over natural resources, and its further elaboration in the UN Declaration on a New International Economic Order, as well as the Charter of Economic Rights and Duties of States. With respect to the social implications of permanent sovereignty, the United Nations Secretariat reported in 1970 that the General Assembly was not content with merely affirming permanent sovereignty as an abstract legal concept, but that the principle must be placed in its economic and social context.[192] This implied that permanent sovereignty was not only a basis for the exercise by states of rights of control and disposal of natural resources, "but also the capability to do so in such a way that the people of the State concerned might effectively benefit from them."[193]

Environmental concerns began to feature in the permanent sovereignty discourse ever since the Stockholm Declaration stipulated that states have a responsibility, as part of the exercise of their permanent sovereignty, to avoid transboundary environmental harm.[194] Subsequent developments at the United Nations resulted in the extension of this responsibility to the management of the domestic environment.[195] As a result, the exercise of permanent sovereignty as a legal principle must now be interpreted as implying an obligation to ensure that the exploitation of natural resources inures to the benefit of members of society, and that such exploitation proceeds in an environmentally sensitive and sustainable manner.

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[191] Schrijver, *Sovereignty, supra* note 137, especially at 390-392 where he outlines the rights and duties of states in international law under the principle of permanent sovereignty over natural resources. He points out that the following duties are, *inter alia*, implied by the principle of permanent sovereignty: (i) to ensure that the whole population (including indigenous peoples and future generations) benefit from the exploitation of resources and the resulting national development; (ii) The duty to have due care for the environment, which incorporates the customary obligation to prevent harm to areas beyond national jurisdiction, as well as the nascent responsibility to manage natural resources within the domestic sphere to ensure sustainable production and consumption. The second limb of this duty is, according to Schrijver, discernible from both UN resolutions and treaty law relating, *inter alia,* to protection of wildlife habitat, migratory birds, endangered species, biodiversity protection, deforestation, and pollution i.e. matters of common concern to both present and future generations. Although Schrijver has not mentioned it, one would today add climate change to this list of common concerns.

[192] Schrijver, *Sovereignty, supra* note 137, at 88.

[193] Ibid., at 89.

[194] Principle 21 of the Stockholm Declaration. The principle goes back to the arbitral decision in the *Trail Smelter Arbitration,* between the United States and Canada.

[195] General Assembly Resolution 35/7 called on member states to exercise their permanent sovereignty 'in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations." Similarly, the World Charter for Nature (GA res. 37/7), emphasised the importance of maintaining the stability and quality of nature and of conserving natural resources. See Schrijver, *Sovereignty, supra* note 137 at 128-129 for a full discussion of these developments.

This way, the permanent sovereignty norm seeks to bring all three pillars of sustainable development together. According to Schrijver,

> ...despite its complicated genesis the principle of permanent sovereignty over natural resources has achieved a firm status in international law and is now a widely accepted and recognized principle of international law....Permanent sovereignty over natural resources is a key principle of both international economic law and international environmental law. As such it can play an important role in the blending of these two fields of law with the aim of promoting sustainable development.[196]

As the above discussion shows, the Nigerian government did not leave any stone unturned to assert its full sovereignty and control over the country's natural resources. Legal provisions were put in place to enhance resource exploitation for the benefit of oil companies and the Nigerian government. However, contrary to the letter and spirit of the permanent sovereignty resolution, the wealth accruing from this resource exploitation has neither been utilized for national social development, nor has production proceeded in an environmentally sensitive manner. As discussed in the following two chapters, this is particularly true of the Niger Delta region.[197] It is for these reasons that I will argue that a sustainable development perspective should be utilized to reform the Nigerian legal regime for petroleum production. However, before discussing what the legal regime 'ought to be', I will first present a historical snapshot of the evolution of the law so as to place the sustainable development critique that follows this chapter in its proper context.

After joining OPEC in 1971, and in accordance with that organization's call for more state control of oil production, the government embarked upon gradual acquisition of ownership of oil production ventures.[198] In 1971 government acquired 35 per cent interest in Elf, and in 1973, a similar participation interest was acquired in Shell-BP, Mobil and Gulf Oil.[199] Government participation in all oil ventures was further increased to 55 per cent in 1974, and then to 60 per cent in 1979.[200]

Following the period of partial nationalization in the 1970s, the Nigerian government realized that in view of the substantial costs involved in oil exploration

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[196] Schrijver, *supra* 137 at 377 and 394.

[197] A. Sesan Ayodele, "The Conflict in Growth of the Nigerian Petroleum Industry and the Environmental Quality", (1985) 19 (5) Socio-Economic Planning Science, 295-301. **See also** A. Rowell, *Shell Shocked: The Environmental and Social Costs of Living with Shell in Nigeria* (Amsterdam: Greenpeace International 1994).

[198] The Second National Development Plan (1970-74) called for "... active participation in mining operations". See Omorogbe, "Legal Framework, *supra* note 139, at 275.

[199] Ibid., 276-277.

[200] Khan, *supra* note 88, at 18-19. Khan notes at p70, that the 60 per cent acquisitions did not affect the production sharing contract with Ashland, and the Tenneco-Mobil-Sunray venture.

and production, coupled with the financial crisis brought on by the fall in oil prices in the 1980s, it was not feasible to continue the pattern of government acquisition.[201] Like the Latin American oil states of Venezuela, Brazil, and Ecuador in the 1990s, Nigeria needed to access the financial and technological resources of international oil companies so as to keep its oil sector going.[202] Under these circumstances, the government had no choice but to reduce its share in the production ventures. In 1989, the 80 per cent equity interest it had acquired in the Shell-BP joint venture as a result of the nationalization of BP in 1979, was reduced to 60 percent.[203] It was reduced by a further 5 per cent in 1993 under a government policy announced that year, intended to divest government interests in oil production ventures to 50 percent.[204] Today, the State holds 60 per cent interest in each oil production venture in Nigeria except Shell, in which it holds 55 percent.[205]

Despite the vagaries in government participation and the political question of control, one constant feature of Nigeria's petroleum policy has been the objective to enhance the investment environment so as to attract foreign capital in exploration and production. While there was a limited effort to encourage domestic investment as well, the principal focus was on multinational companies. In particular, the government courted foreign investors to explore the difficult offshore area.[206] This was based on the assumption that foreign companies enjoyed ownership advantages relating to technology and human resources that needed to be tapped for successful operation of national oil industries.

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[201] Khan, *supra* note 88, at 84.

[202] A.B. Rosenfeld, D.L. Gordon, & M. Guerin-McManus, "Approaches to Minimizing the Environmental and Social Impacts of Oil Development in the Tropics" in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998) 279 at 283, noting that the need for foreign capital and the inability of Latin American countries to run their own oil fields, gave impetus to a wave of oil sector liberalisation measures during the 1990s.

[203] Human Rights Watch, *The Price of Oil, supra* note 97 at 28.

[204] Khan, *supra* note 88, at 71.

[205] Human Rights Watch, *The Price of Oil, supra* note 97 at 28-30, describing each production joint venture, the respective shareholdings of the government and oil companies, and their daily oil production.

[206] Khan, *supra* note 88, at 20. Between 1990 and 1992, up to 19 indigenous oil companies were granted exploration acreage totalling 33,000 km² mainly in the Niger Delta, and the Benin and Benue basins in the North of the country. In contrast, deep offshore acreage (i.e. between 200 and 3000 metres water depth), was allocated to international oil companies in recognition of their superior financial and technological capacity. In 1996, the Petroleum (Amendment) Decree permitted holders of oil mining leases, with the consent of the Head of State, to farm out marginal fields within the area covered by their lease. The law also empowered the Head of State to compulsorily farm out marginal fields that had not been exploited by their holders for ten or more years. See Human Rights Watch, *supra* note 97, at 30-31.

Nigeria's fiscal incentive regime has undergone three phases of change: the first phase (1959-70) was one during which the governments sought to encourage investments in exploration and production. During the second phase (1971-76), in response to the various resolutions of OPEC and the increase in petroleum prices, the fiscal regime was directed at reaping maximum rents for the State. Phase three commenced in 1977 with the promulgation of the Petroleum Profits Tax (Amendment) Decree.[207] This decree began a fresh process of granting fiscal incentives to facilitate greater investments in exploration and development by the oil companies.[208] The increase in fiscal incentives for oil exploration and production has remained a constant feature of the oil industry in Nigeria since then.

The fiscal regime goes back to 1959 at a time that government needed to make exploration of the difficult Niger Delta terrain attractive to oil companies.[209] That year, the Petroleum Profits Tax Ordinance laid down a 50-50 formula for the sharing of profits between the government and oil companies. The calculation was based on the company's *realized* prices, which are set exclusively by the companies without consultation with the government.[210] They are therefore generally deemed to favor the oil companies. Other criticisms have been leveled against the fiscal regime introduced by the 1959 Act. According to Schätzl, royalty rates were fixed at between 8 and 12.5 per cent based on the price of oil at the point of extraction. These royalties were included in (and as such, offset against) the government's share of profits. Thirdly, depreciation rates granted to oil companies "were higher than justified by economic principles."[211]

This fiscal generosity however, began to wane from the time Nigeria attended the 1964 OPEC conference. The Petroleum Profits Tax was amended in 1967 to allow the calculation of profits and taxes on the basis of *posted prices* and for royalty to be assessed as current operational expenditure, instead of being deducted from the

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[207] Decree No. 55 of 28th July 1977 in Barrows, *Basic Oil Laws and Concession Contracts: South and Central Africa,* Supplement No. LIV (54).

[208] In a press release issued two months before the decree, the Nigerian government reasoned that the incentives were necessary to 'improve the investment climate' and 'to encourage the oil companies to greater investment and more aggressive activities.' **See** Barrows, *Basic Oil Laws,* supplement LIV, at 131.

[209] L.H. Schätzl, *Petroleum in Nigeria* (Ibadan: Oxford Univ. Press 1969), at 94. The Niger Delta is characterised by thick forests and mangrove swamps, therefore making exploration difficult and expensive.

[210] D. Rimmer, "Elements of the Political Economy" in K. Panter-Brick (ed.), *Soldiers and Oil: The Political Transformation of Nigeria* (London: Frank Cass & Co Ltd 1978), 141 at 151. **Also** Khan, *supra* note 88 at 33-34.

government's share of profits.[212] According to Khan, between 1969 and 1975, through a series of legislative amendments and revisions adopted by the Nigerian government pursuant to OPEC resolutions, the petroleum profits tax increased from 50 per cent to 85 percent. Similarly, royalty rates increased from 12.5 per cent to 20 percent.[213]

The economic nationalism that led to the adoption of the OPEC resolutions and the enactment of more stringent fiscal legislation in Nigeria in the early 1970s, had started to decline by the end of the decade. Several factors account for the change in emphasis. First, it became clear that the difficult terrain in Nigeria and the small size of her oilfields require a sustained program of exploration, in order to maintain viable reserve levels.[214] Secondly, production costs in Nigeria were estimated to be higher than those in other oil-producing states such as Libya and the Persian Gulf.[215] Production cost allowances were therefore deemed necessary to offset these higher costs in order to maintain the profit margins of production companies and to keep the Nigerian market competitive.

It was in response to these concerns that the government amended the petroleum profits legislation in 1977 to the effect that Petroleum Profits Tax was reduced from 85 to 65 percent, royalties and investment tax credits were now adjusted to reflect difficulties in production terrain, and depreciation allowances were accelerated to allow amortization within five years.[216]

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[211] L.H. Schatzl, *Petroleum in Nigeria, supra* note 209 at 94.

[212] Ibid. at 98. The principal feature of the posted price structure, compared to realised prices, is that they were established by agreement between the oil company and the government. Khan, *supra* note 88, at 17.

[213] Khan, *supra* note 88, at 17 for a detailed discussion of these changes. The most important OPEC resolution was Res. XXI.120 adopted in December 1970. It called for member states to impose a minimum tax rate of 55 percent.

[214] Khan, *supra* note 88, at 79.

[215] Schatzl, *supra* note 209, at 31. See also Khan, *supra* note 88 at 85. Average production costs in 1964 were estimated at 15.2 cents per barrel for Libya, 10 cents for the Gulf states, and 30 cents for Nigeria.

[216] Petroleum Profits Tax (Amendment) Decree, No. 55 of 1977, section 1; and Nigerian Government Press Release of 18 May, 1977. Royalty was now payable as follows: 20% for onshore areas; 18.5% for offshore areas up to 100 meters water depth; and 16 ⅔% for offshore production beyond 100 meters. Similarly, investment tax credit was set at 5% for onshore production; 10% for offshore areas up to 100 meters in depth; 15% for offshore areas between 100 and 200 meters depth; and 20% for areas beyond 200 meters in depth. These incentives, popularly known as the 'Buhari Incentives' were formulated when Col. Muhamadu Buhari was petroleum minister, under Obasanjo's military government. Colonel Buhari himself later took over power in 1983 (as General Buhari) and ruled until 1985 when he was in turn overthrown by General Ibrahim Babangida.

This trend at improving the investment environment for oil companies through fiscal incentives continued through the 1980s and 1990s.[217] During this period, the Nigerian government concluded at least two Memoranda of Understanding with the oil companies. The first Memorandum of Understanding (MOU) concluded in 1986, increased production cost allowances to $2.00 per barrel even though estimates of actual production costs were often higher than that.[218] However, since the production cost allowance was meant to reduce the companies' tax exposure, the above allowance still operated as a substantial incentive considering that Nigerian production in the 1980s averaged some 1.3 million barrels of oil per day. The production cost allowance was further increased to $3.50 per barrel under the MOU concluded in 1991.[219]

In an attempt to shield investors from the vagaries of the international oil markets, the Nigerian government also introduced a system of guaranteed profit margins. This was done by giving up part of the government's tax entitlement. Thus, by increasing the amount of costs that the companies were allowed to claim as development expenditure, the government gave up the right to include these figures in calculating the tax liability of the beneficiary companies. Through this method, the government largely bore the risks of changes in the price of oil and increases in the cost of production in Nigeria. Under the 1986 MOU, profit margins were set at $2.00 per barrel as long as the price of oil per barrel was between $12.50 and $23.50.[220] This was increased to $2.50 under the 1991 MOU where capital investment in new fields exceeded $1.50 per barrel.[221] Where capital investment fell below this level, profit margins were set at $2.30 per barrel.[222]

It is clear from the above discussion that the Nigerian government, through a variety of legislative and contractual acts, has gone to great lengths to make investments in its oil sector attractive and profitable. This resulted in the realization of

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[217] In view of the dearth of secondary literature on the current fiscal regime in Nigeria, this section relies predominantly on the account in Khan, especially from pp79-86. Moreover, I do not intend to present a full account of the changes. My objective is to demonstrate, by a number of examples, the extent to which the Nigerian government has gone to make investments in the oil sector profitable for the oil companies. Full a full discussion, see Khan.

[218] Khan, *supra* note 88 at 80. In 1986, actual production costs were estimated anywhere between $3.50 per barrel of oil produced to $7.00 depending on the production terrain, the deep offshore obviously attracting higher costs.

[219] Ibid. at 86. This rate applied where capital investment in new fields exceeded $1.50 per barrel.

[220] Okonta and Douglas, *Where Vultures Feast, supra* note 75, at 51.

[221] Khan, *supra* note 88, at 84-85. **See also** Okonta and Douglas, at 51.

[222] Ibid.

monumental revenues for the government and the oil companies. Between the commencement of oil exports in 1958 and 1983, the Nigerian government was estimated to have earned $101 billion.[223] The International Monetary Fund estimates that the government earned a total of 65.6 billion dollars from oil between 1985 and 1992.[224] Shell Petroleum Development Company of Nigeria, the Nigerian subsidiary of Royal/Dutch Shell, is estimated to have earned between $530,000 and $670,000 a day from its Nigerian operations, assuming oil market prices remained constant at $15.00 per barrel between 1986 and 1995.[225] This translates to average earnings of some $200 million per year.[226]

Compared to its huge success on the profit front, the government has not been able to translate these economic returns into meaningful socio-economic development for the majority of the Nigerian people. In other words, the exercise of sovereignty over Nigeria's oil resource has, until now, not been 'to the benefit of the people', as required by UN resolution 1803 of 1962.[227] The 'paradox of plenty' that Terry Lynn Karl referred to in describing the socio-economic effects of oil in Venezuela, is an equally apt description of the two faces of Nigerian oil.[228] In addition to the poverty of the majority of her people, it is fair to state that Nigerian oil wealth was acquired at the expense of environmental quality, especially in the oil producing regions of the Niger Delta.[229] For these reasons, and as long as the socio-economic plight and environmental circumstances of the oil producing areas remain neglected, the internal legitimacy of Nigeria's governments will remain open to question. As will become apparent in the next two chapters, the principal weakness of the legal regime is its failure to integrate social and environmental concerns into the governance structure regulating the oil industry. Moreover, even the limited environmental protection provisions that do exist are often inadequately enforced or otherwise implemented.

In light of the above discussion, it can be concluded that legal regulation of the oil industry in Nigeria has laid emphasis on economic and profit motives at the

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[223] Okonta and Douglas, *Where Vultures Feast, supra* note 75, at 28, quoting figures attributed to the State-owned oil company, the Nigerian National Petroleum Company.
[224] Khan, *supra* note 88, Table 8.1 at 184 relying on IMF, *International Financial Statistics.* **See also** Okonta and Douglas, at 53.
[225] Okonta and Douglas, at 51.
[226] Ibid.
[227] See *infra* Chapter 4 on "Oil Wealth and Social Development in Nigeria."
[228] Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (Berkeley: Univ. of California Press, 1997).
[229] A. Sesan Ayodele, "The Conflict in the Growth of the Nigerian Petroleum Industry and the Environmental Quality", 19 Socio-Economic Planning Science, No. 5 (1985), 295-301.

expense of environmental balance and human well-being. Since economic, social and environmental objectives must be considered together in order to attain sustainable development, there is a strong case to revisit the legal regime if sustainable development is to be achieved. As Onuosa has argued, the principle of sustainable development has several important implications for petroleum development. These include the need for sustainable utilization of the resource in the interest of current and future generations, limiting the environmental effect of exploration and development, addressing pollution arising from the consumption of petroleum resources, and spreading the economic benefits of petroleum development over an inter-generational period.[230] While all these implications are relevant in the case of Nigeria, I focus in particular on the environmental effects of petroleum development and on the equitable utilization of petroleum wealth in Nigeria. The next chapter will explore the interconnections between oil production and environmental integrity in Nigeria, and chapter four will discuss the issue of social development in the oil producing regions of the Niger Delta.

[230] S.N. Onuosa, "Sustainable Development and Petroleum Resources", *supra* note 113, at 438.

Chapter 3: Oil Production and Environmental Preservation in the Niger Delta

1. Introduction

In the previous chapter, I discussed the legal regime governing the petroleum industry in Nigeria and demonstrated that it was principally oriented towards economic gain for oil companies and the Nigerian government. Environmental considerations and social well-being for the people of the Niger Delta were not integrated into the law, as required by the Rio Declaration on Environment and Development and Agenda 21.[1] The current chapter looks at the environmental dimension of oil production in Nigeria. Like the regulatory and contractual provisions in many other oil producing states, the *Petroleum Act* and the *Petroleum (Drilling and Production) Regulations* in Nigeria contain few environmental protection provisions.[2] Similarly, the *Federal Environmental Protection Agency (FEPA) Act* lacked sufficient substantive content to effectively regulate the oil industry to prevent environmental damage.[3] In addition, inadequate enforcement of these laws due to manpower, technological and financial constraints, as well as corruption on the part of government officials have left large incidents of environmentally-harmful production practices unpunished and operated as an incentive for continued environmental insensitivity on the part of oil companies. The environmental effects of oil production in Nigeria can be divided into three broad categories: (1) oil spillage and hydrocarbon pollution; (2) deforestation and loss of biological diversity; and (3) atmospheric pollution from gas flaring. I will briefly introduce each of these elements.

It is widely accepted that the process of oil production, refining, transportation and distribution carries a substantial risk of environmental damage.[4] This could be the

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[1] ACONF.151/26 (VOL.1) Report of the United Nations Conference on Environment and Development, Rio Declaration, Principle 4. And Chapter 8 of Agenda 21 on integrating Environment and Development in Decision-Making.

[2] Z. Gao, "Environmental Regulation of Oil and Gas in the Twentieth Century and Beyond: An Introduction and and Overview" in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998), 3, at 9. The author reports on a survey of national laws and concession systems that he conducted, which showed "there was little environmental provisions governing oil and gas activities in the first half of [the 20th] century." He also concluded that few international environmental law rules focused on the oil and gas sector due, perhaps, to the fact that the oil industry was not yet a major factor in economic development, and because environmental awareness was still low.

[3] Petroleum Act 1969, Cap. 350, Vol. XIX, Laws of the Federation of Nigeria (1990); Federal Environmental Protection Agency Act, Cap. 131, Vol. VIII, Laws of the Federation of Nigeria 1990.

[4] A. Dias, "The Oil and Gas Industry in the Tangled Web of Environmental Regulation: Spider or Fly?" in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998) 59, at 61.

result of spillage arising from accidents, human error, or equipment failure. In Nigeria, oil production has resulted in large amounts of oil spills and blowouts that have polluted equally large areas of the natural environment in the Niger Delta, as well as farmlands, fisheries and water sources belonging to the inhabitants of the region. While the oil companies have argued that most of these incidents result from deliberate interference with the oil production network by individuals wishing to make compensation claims, the preponderant research opinion suggests that most oil-related pollution is attributable to old and improperly maintained production equipment and non-compliance with environmental standards.

Secondly, oil exploration, especially the development of production infrastructure, has interfered with previously pristine areas of the Niger Delta with adverse consequences to many useful varieties of plants, wildlife species and habitat. This environmental problem is of local and international significance. At the local level, the people of the Niger Delta rely heavily on their natural environment both for daily sustenance and for economic well-being. Farming, hunting, fishing, and harvest of timber and non-timber forest products are an integral part of their day-to-day lives. At the international level, there is strong acceptance of the importance of protecting and preserving biodiversity because of benefits to present and future generations of humankind and for intrinsic value of biodiversity. This consensus led to the adoption of the Convention on Biological Diversity in 1992 which recognizes the multiple values of biodiversity (economic, ecological and intrinsic) and provides that the conservation of biological diversity is the common concern of humankind.[5] Nigeria is a party to the Biodiversity Convention.[6] The country therefore has a legal obligation to ensure that activities within its jurisdiction do not damage biodiversity resources which are of local, national, regional and global significance. This is a direct consequence of the customary law obligation enshrined in Principle 21 of the Stockholm Declaration which has been incorporated, without amendment, into Article 3 of the Biodiversity Convention. I will argue that by failing to adequately discharge its regulatory responsibility over oil companies, Nigeria is wanting in this legal obligation.

[5] United Nations Convention on Biological Diversity, 31 ILM (1992) 822, Preamble.
[6] Nigeria signed the Convention on June 13, 1992 during the Rio Conference. Its instrument of ratification was deposited on August 29, 1994. See www.biodiv.org/world/parties.asp

Thirdly, as a by-product of oil production, oil companies in Nigeria (as in other countries) produce large amounts of associated natural gas. What distinguishes Nigerian production is that the bulk of this gas, up to 95 per cent by some accounts, is burnt into the atmosphere (flared) with adverse impacts on human habitat, health, agriculture and the atmosphere in the oil producing regions and possibly on the global climate.[7] This situation arguably violates Nigeria's legal responsibility to prevent harm to its domestic environment and to the environment outside its national jurisdiction.[8] It also goes against the spirit of the climate change regime, which is geared towards reducing human-induced emissions of greenhouse gases into the atmosphere.[9]

The thrust of this chapter is to demonstrate that oil production in Nigeria has resulted in significant avoidable harm to the environment of the Niger Delta. In addition, because the people of this region rely so heavily on their environment for day-to-day sustenance, the environmental damage has had adverse consequences on their livelihoods. The primary reasons for this are the inadequacy of the legislative provisions governing the environment in the country and the lack of enforcement of the existing law. Inadequate legal rules, weak enforcement, and incidents of official corruption have encouraged the use of inappropriate production processes by oil companies with the consequence that they have failed to internalize the environmental costs of oil production. Similarly, the government and oil companies have largely neglected the interests and concerns of the local communities in whose territory oil production takes place. In effect, while the legal regime as presently structured and implemented, has proved congenial to the realization of short-term profits, it is largely unsuitable for the achievement of long-term sustainability because economic activity is proceeding at the expense of, and is undermining the environmental basis for future

[7]Shell Petroleum Development Corporation (SPDC), *Annual Report* (1998) at 10, online at www.shellnigeria.com/info/env_1998/envreport_t.htm. See *infra* note 206 and accompanying text for a full discussion of gas flaring and the climate change nexus.

[8] N. J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties,* (Cambridge: Cambridge Univ. Press, 1997) 390-92 where he argues that permanent sovereignty implies, among other things, the duty to care for the environment, including avoiding harm to areas beyond national jurisdiction, as well as the nascent responsibility to manage natural resources within the domestic sphere to ensure sustainable production and consumption. **See also** I.L.A. Committee on Legal Aspects of Sustainable Development, "Searching for the Contours of International Law in the Field of Sustainable Development" Final Conference Report, (New Delhi: April 2002), at p8 where they argue that: "During recent decades [the traditional principle of territorial sovereignty] has been supplemented by an obligation incumbent upon territorial States to protect not only the environment of areas beyond national jurisdiction, but also their own environment."

[9] United Nations Framework Convention on Climate Change, 31 ILM (1992) 849.

development. In making this argument, I am persuaded by the theory of ecological economics that the ecosystem contains the economy and therefore that in order to attain sustainable economic development, the environmental basis for future development must be preserved.[10]

Similarly, my analysis is consistent with the expansive sense of the concept of environmental security proposed by Brunnée and Toope to the effect that the maintenance or re-establishment of ecological balance would require that attention be paid to the short and long-term environmental consequences of current actions and omissions.[11] Under this conception of environmental security, the environment *per se* deserves exogenous consideration irrespective of the state-oriented territorial claims upon which international environmental protection has largely been based. In proposing an ecosystem approach to environmental protection, Brunnée and Toope argue that a territory-based approach to environmental protection is largely unsuitable for an environment that is interconnected and interdependent from both a spatial and temporal perspective.[12] They suggest that invocation of the principles of sustainable development, intergenerational equity and precaution, may be evidence that international environmental law is placing limits so as to keep actor conduct within the carrying capacity of the environment.[13] I will argue therefore that to the extent environmental security requires integration, or at least, consideration of environmental issues in decision-making relating to economic and legal development, it promises to play an important role in the transition to sustainable development.

With respect to the role of law in effecting this transition to sustainable development, I will suggest that Nigerian domestic law should be revised to incorporate certain sustainable development principles. I argue that the incorporation of these principles into Nigerian law could introduce greater balance between the

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[10] D.R. Downes, "Global Trade, Local Economies and the Biodiversity Convention", in W.J. Snape III (ed.), *Biodiversity and the Law* (Washington D.C.: Island Press 1996), 202 at 206.

[11] J. Brunnée and S.J. Toope, "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law" (1994) 5 Y.B.I.E.L., 41 at 46. The narrower sense of environmental security reflects the traditional conception of security, i.e. the potential for conflict from competition over scare environmental resources.

[12] Ibid., at 55.

[13] Ibid., at 66. It will be noticed here that my approach to sustainable development differs from that taken by Brunnée and Toope. Whereas for them, sustainable development is one of the principles that international society invokes/could invoke in the quest for environmental security, I hold the view that sustainable development is the overarching objective, towards the realisation of which we could invoke other principles such as the precautionary principle, and the concept of environmental security. However, we do share the conviction that current international, and much domestic law, is

economic interests of oil companies and the government on one hand, with environmental preservation in the interests of current and future generations of Nigerians on the other. Three key principles are relevant in this respect: first, the precautionary principle (or approach) could ensure that adequate regulatory and operational measures are put in place to prevent the discharge of harmful petroleum hydrocarbons into the environment, instead of dealing with the after-effects of oil pollution.[14] The precautionary approach is anticipatory and prudential in outlook. It provides a mechanism for *ex ante* rather than *ex post facto* deliberation over the probable consequences of action, as well as consideration of a range of options including, but not limited to regulatory intervention, in order to avoid harm to the environment or human health. To my mind, the exercise of precautionary thinking would be the basis for invoking other key principles such as environmental and social impact assessments before production projects and processes are embarked upon. In the words of Gao, "EIA is the most effective form of precautionary procedure which provides for detailed assessment of the expected direct and indirect environmental effects of proposed operations, possible mitigation measures, and programmes to manage, monitor, and evaluate the project impacts and effectiveness of mitigation."[15] That way, production decisions would be based on full information of all their potential effects. As well, the views and interests of all relevant stakeholders would be taken into account to ensure greater legitimacy.

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insufficiently oriented for the systematic consideration of environmental issues in economic development and legal decision-making.

[14] A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law Int'l., 2002), 3-4. He notes that some scholars and tribunals have sought to distinguish between the 'precautionary principle' and a 'precautionary approach' on the basis that the former creates binding obligations, while the latter imports a degree of flexibility for the persons to whom the normative provision is directed. He concludes after reviewing a number of legal provisions and the writings of several scholars that "the basis in state practice for a distinction between the basic characteristics or legal consequences of application of the "approach" as opposed to the "principle" is extremely narrow", and that "the distinction ...[lacks] a solid foundation in international law." In this thesis, as in many other works on the subject, the terms 'precautionary principle' and 'precautionary approach' are used interchangeably. Generally on the precautionary principle, **See** D. Bodansky, "Scientific Uncertainty and the Precautionary Principle", (1991) 33 *Env't* 4; J. Cameron and J. Abouchar, "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment", (1991) 14 B.C. Int'l & Comp.L.Rev. 1; E. Hey, "The Precautionary Concept in Environmental Policy and Law: Institutionalising Caution", (1992) 4 Geo. Int'l. Envt'l L. Rev. 303; L. Gundling, "The Status in International Law of the Principle of Precautionary Action", (1990) 5 Int'l J. Estuarine & Coastal L. 23.

[15] Gao, "Environmental Regulation of Oil and Gas", *supra* note 2, at 40. He also notes that EIA is now widely required in oil and gas operations where it performs a dual function. First, EIA brings the potential environmental effects of proposed petroleum projects to light; secondly, the procedure allows industry to evaluate and mitigate the likely environmental impact of the proposed project.

Secondly, the adoption of the polluter pays principle (PPP) would ensure that the full environmental and social costs of oil production are allocated to the oil companies instead of the poor inhabitants of the Niger Delta.[16] Once the PPP is incorporated into domestic law and rigorously adhered to, oil companies would have to bear responsibility for all pollution resulting from their production activities, including clean up and restoration of the environment as well as the payment of compensation to people whose material interests might be adversely affected.

Thirdly, the participation of the public, especially local communities and NGOs, in project design and siting, as well as their empowerment to monitor and seek compliance with environmental and social safety standards, is important for project legitimacy and sustainability. By engaging local communities and non-state actors, open and participatory decision-processes could engender perceptions of acceptance and legitimacy. In turn, process legitimacy tends to lead to outcomes that are fair, just and therefore sustainable.[17] Public participation in decision-making acquires particular importance in the regulation of international business in developing countries where business and government interests often come together against the societal good. This situation calls for a broader governance space that would permit civil society intervention to avoid or reverse government failure.[18]

As shown in chapter one, some of these principles emerged from the regional and international level (e.g. PPP); others (the precautionary principle) initially emerged from domestic legal systems; while others still are basic tenets of good governance. As principles, one of their inherent advantages is their adaptability to a variety of decision contexts. My suggestion is that by invoking these principles in legal discourse and deliberation geared towards law-making, legal interpretation and administrative decision-making, they could serve as useful instruments of legal evolution and development as Nigerian law governing the oil industry aspires towards sustainable development. At the same time, invoking the precautionary principle,

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[16] S.E. Gaines, "The Polluter-Pays Principle: From Economic Equity to Environmental Ethos", (1991) 26 Tex. Int'l. L. J. 463; P. Sands, *Principles of International Environmental Law* (1995) 213-217.

[17] T.M. Franck, *Fairness in International Law and Institutions* (1995); J. Brunnée and S.J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. of Trans'l L 19.

[18] C.R. Taylor, "The Right to Participation in Development Projects" in K. Ginther, E. Denters & P. de Waart, *Sustainable Development and Good Governance* (1995) 205; R.A. Wabunoha, "Popular Participation: a Precondition for Sustainable Development Planning" in Ginther at al (1995) 230; and R. Khan, "Sustainable Development, Human Rights and Good Governance – A Case Study of India's Narmada Dam" in Ginther et al (1995) at 420.

environmental impact assessments and the polluter-pays-principle could operate to reconcile the predominant economic motives underlying oil production with the public interest in pollution prevention and environmental preservation.

This chapter proceeds from the analytical perspective that the Nigerian State has primary legal responsibility to take the measures necessary to prevent harm to the domestic and international environment as a result of oil operations. This responsibility flows from both customary international law and various environmental treaties to which Nigeria is a party. However, since governmental action is in many cases either not forthcoming or inadequate, I argue that there is a strong case for a broader governance space that would allow civil society actors and other stakeholders to adopt measures (including public interest litigation), to safeguard the natural environment. This argument flows from the notion that environmental preservation and sustainable development are matters of common concern to humanity.

As will become apparent in the following pages, the focus on this chapter is on onshore oil production and the domestic and international rules that may be relevant to that activity. This is for two reasons: first, most of the environmental problems associated with the petroleum industry in Nigeria arise from onshore production. Secondly, the development of international law rules relating to oil and gas production has focused on offshore production, leaving the environmental effects of onshore production largely unaddressed.[19] I will therefore only make a passing reference to the international legal developments and instruments relating to offshore oil and gas production and the risk of marine pollution. Issues such as offshore abandonment of production platforms are not considered in detail in this thesis because they are not particularly salient problems in the context of the Nigerian oil industry. Yet, it is worth noting that the issue of offshore abandonment and decommissioning has been the subject of international legal discourse on at least three occasions between 1958 and 1982. The first United Nations Conference on the Law of the Sea (UNCLOS) considered the issue and the 1958 Geneva Convention on the Continental Shelf provided for the total removal of any installation which was abandoned or disused.[20] Secondly, the 1972 London Dumping Convention sought to address, but failed to resolve the issue of disposal of wastes in the marine

[19] Gao, "Environmental Regulation of Oil and Gas", *supra* note 2, at 29.
[20] Geneva Convention on the Continental Shelf (1958), Art. 5(5). Reproduced in 499 U.N.T.S., 311. **See also** A. Dias, "The Oil and Gas Industry", *supra* note 4, at 84.

environment. While the Convention attempted to prevent the deliberate disposal of wastes at sea, it initially included an exception relating to wastes arising from offshore processing of seabed minerals.[21] The uncertainty arising from the above provisions led to the adoption of a protocol in 1996, which clarified that the definition of dumping under the provisions of the Convention covered "any abandonment or toppling at site of platforms or other man-made structures at sea, for the purpose of deliberate disposal."[22] Thirdly, the 1982 UNCLOS now provides for the removal of all abandoned or disused installations or structures so as to ensure safety of navigation, taking into account relevant international standards.[23] The above provision is now considered to reflect customary international law on offshore abandonment.[24] UNCLOS also requires states to enact domestic law which is not less effective than international rules and standards, to deal with pollution of the marine environment from offshore activities and to cooperate with other states in efforts to protect that environment.[25] As a party to UNCLOS, Nigeria is bound by these obligations.[26]

2. Background: Social Setting and Environmental Features of the Niger Delta

The region referred to as the Niger Delta is a floodplain of 25,640 square kilometers located in the southeastern part of Nigeria. It is built up by the accumulation of sediments flowing from the Niger and Benue rivers.[27] It comprises the area currently covered by nine Nigerian States namely: Abia, Akwa Ibom, Edo, Bayelsa, Rivers, Delta, Imo, Ondo, and Cross River.[28] The Niger Delta is inhabited by a population of

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[21] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, (London: 29 December, 1972) 11 I.L.M. 1291 (1972). Art. II (1) (c) provides that the convention shall not apply to: "the disposal of wastes or other matter directly arising from, or related to the exploration, exploitation, and associated off-shore processing of sea-bed mineral resources...." **See also** K. Armstrong, "Managing Environmental Legal Risks in Oil and Gas Exploration and Production Activities" in Z. Gao, *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998) 359, at 630.

[22] International Maritime Organization (IMO), Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter 1972 and Resolutions Adopted by the Special Meetings, IMO/LC/SM 1/6 (14 November, 1996). **See** Gao, "Environmental Regulation of Oil and Gas", *supra* note 2, at 15.

[23] United Nations Convention on the Law of the Sea (UNCLOS), (December 10, 1982) 21 ILM 1261 (1982), Art. 60.3. **See also** Section XII UNCLOS for general obligations relating to the protection of the marine environment.

[24] Dias, "Oil and Gas Industry", *supra* note 4, at 84.

[25] UNCLOS 1982, Article 208 (1) & (5).

[26] Nigeria ratified UNCLOS on 14 August, 1986. The Convention entered into force on 16 November 1994.

[27] World Bank, *Defining an Environmental Strategy for the Niger Delta* (Washington D.C., 1995).

[28] "NDDC Executes 700 Projects in Nine States", *This Day* (Lagos, March 29 2003) online at http://allafrica.com/stories/200303310032.html (accessed 2 April, 2003). **See also** Okonta and Douglas,

close to thirteen million people divided into some fourteen ethnic groups, the largest of which is the Ijaw and includes the Ogoni, who number about 500,000.[29] This population is growing at an annual average rate of 3% due to the influx of people from other parts of Nigeria lured by the prospects of better-paid jobs from the oil industry and by farmers from other areas attracted by the more fertile agricultural land of the Delta area. The expanding population has placed additional stress on the environment of the Niger Delta. There is a reduced amount of cultivable land in view of the influx of immigrant farmers. As well, the already limited social infrastructure in the oil producing areas is stretched even further.

The Niger Delta is composed of four ecological zones: coastal barrier islands, mangrove swamps, freshwater swamp forests and lowland rainforests.[30] The mangrove forests of Nigeria are the third largest in the World and the largest on the African continent; 60 per cent of these, or 6000 square kilometers are located in the Niger Delta.[31] The freshwater swamp forests cover an area of 11,700 square kilometers and are the most extensive in West and Central Africa.[32] Although the lowland rainforests are the smallest of the ecological zones, they have not been significantly affected by deforestation and provide habitat for large concentrations of biodiversity in the region.[33]

Heavy annual rainfall which is estimated to be around 175 inches, results in seasonal flooding of up to 80 per cent of the Niger Delta.[34] Before the natural systems of the Niger River were interfered with through the construction of dams, the Niger Delta was said to evince a natural capacity to balance seasonal flooding, erosion and sediment deposition. However, from 1968 when the first dam was constructed at

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Where Vultures Feast: Shell, Human Rights and Oil in the Niger Delta (San Francisco: Sierra Club Books, 2001) at 18. It seems that at the time of their writing, there were only three Niger Delta States.

[29] Ibid., at 5. **Also** World Bank, African Regional Office, "Nigeria - Delta Development Project" report No. PID 11440, (August 1, 2002).

[30] The environmental features described hereunder are derived from the 1995 World Bank study, *Defining an Environmental Strategy for the Niger Delta Vol. I* (1995), at vi. Most other descriptions of the Niger Delta ecosystem that I have come across are based on this study. See for example, Okonta & Douglas, *Where Vultures Feast* (San Francisco: Sierra Club Books, 2001); Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: 1999); and D. Moffat and O.Linden, "Perception and Reality: Assessing Priorities for Sustainable Development in the Niger River Delta" (Dec. 1995) 24 Ambio, No. 7-8, 527-538.

[31] Moffat and Linden, "Perception and Reality", *supra* note 30, at 527.

[32] Ibid.

[33] Ibid. Also World Bank, *Defining an Environmental Strategy, supra* note 27 at vi.

[34] Okonta and Douglas, *supra,* note 30, at 62.

Kainji, the natural equilibrium of the delta ecosystem has been adversely affected with consequent loss of up to 70 per cent of the sediment flowing from the river.[35]

In terms of natural resources, the Niger Delta produces at least 75 per cent of the country's petroleum.[36] The region is also endowed with extensive forests which provide food, fiber and economic resources to the people as well as habitat for wildlife. There are extensive tracts of fertile agricultural land for farming which is crucial to the daily survival and economic well-being of the people, even though this is coming under increasing pressure as a result of migration by farmers from other regions. The freshwater swamp and mangrove ecosystems of the Niger Delta provide significant sources of fish. Farming and fishing are the most important sources of livelihood for Niger Delta inhabitants. According to estimates by the World Bank, the artisanal fishing industry in the Niger Delta employs close to 400,000 people in the region.[37] In 1995 for example, the annual value of fish harvests was about Naira 5 billion, and to this day, fish contributes about 40 per cent of per capita animal protein intake for inhabitants.[38] The preservation of the freshwater swamp and mangrove ecosystems which are the main fish sources in the region, and the sustainable utilization of the fishery itself would therefore be crucial to the well-being of the local population.

With respect to biodiversity, the IUCN concluded in a 1992 study that the Niger Delta was one of the highest conservation priorities in West Africa and noted that the region was largely unprotected.[39] The region holds between 60-80% of all biodiversity in the country and provides habitat for many trans-hemispheric migratory bird species.[40] In addition to hunting and deforestation leading to loss of habitat, the activities of oil companies have also threatened the biodiversity of the region.

The Niger Delta region is of tremendous economic significance to Nigeria because the bulk of the country's petroleum resources are located in the region. The

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[35] Ibid., at 62.

[36] Moffat and Linden, "Perception and Reality", *supra* note 30 at 527. It has recently been estimated that Nigeria's oil reserves will increase to 33 billion barrels by the end of this year and would reach 40 billion barrels by the end of the decade. See "Oil Reserve Will Hit 33 Billion Barrels by End of Year, Says Lukman", *Vanguard* (Lagos, March 28 2003) online at http://allafrica.com/stories/200303280559.html (accessed April 2, 2003).

[37] World Bank, *Defining an Environmental Strategy, supra* note 27 at 20.

[38] Ibid., at 18-19. On April 2, 2003 the inter-bank exchange rate for US $1 stood at Naira 133.41. See www.oanda.com/convert/classic (accessed April 2, 2003).

[39] IUCN, Coastal and Marine Biodiversity Report for UNEP: Identification, Establishment, and Management of Specifically Protected Areas in the WACAF Region, (Gland: Switzerland 1992), at 95, 100, cited in World Bank, *Defining an Environmental Strategy, supra* at 38.

country boasts of some twenty billion barrels of crude oil reserves, which is expected to increase to over thirty billion barrels by end of this year.[41] At least 75 per cent these reserves are located within the Niger Delta region. Oil exports account for 95 per cent of foreign exchange earnings.[42] Despite these vast natural resources, the region remains one of the poorest and underdeveloped in the country. It is unthinkable that with such vast oil resources, the World Bank could report as late as 1995 that "although an important global producer of oil, the Niger Delta has almost no rural retail petroleum outlets."[43] Local businessmen in the region have to travel long distances to purchase bulk quantities of petroleum for sale to their people.

Income levels are below the national average and the number of children enrolled in school in the Niger Delta is between 30-40 per cent, compared to about 75 per cent for the rest of the country.[44] There is an acute shortage of basic facilities for health, electricity, clean water, sanitation and transportation facilities. For example, up to 80 per cent of illnesses in the region are water-related, a situation which is exacerbated by poor sanitation and inappropriate waste management practices, including waste generated from the oil industry. By one account, "although water is ubiquitous in the delta, potable water is difficult to find...."[45]

The situation in the Niger Delta represents one of the most acute paradoxes ever known to humankind. The pervasiveness of abject poverty and deprivation in the midst of abundant natural wealth is only explicable on the basis of total neglect of the population by autocratic military governments that have since independence, turned the national patrimony into individual enclaves of wealth. Also relevant are the activities of a complicit oil industry that has exploited the country's natural resources and devastated the people's environment. It is in the context of this scenario that one must approach the issue of legal reform. Arguably, legal reforms by themselves are unlikely to make a difference in the socio-economic plight of the majority of Nigerians unless the larger issue of governance is addressed. In drawing conclusions and making suggestions for legal reform in Nigeria, I also argue that these must be placed within the broader framework of responsible governance, supplemented by

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[40] World Bank, *Defining an Environmental Strategy, supra* note 27 at 38.
[41] "Oil Reserves" *supra* note 36 and accompanying text.
[42] Okonta and Douglas, *Where Vultures Feast, supra* note 30 at 18. Also Human Rights Watch, *The Price of Oil, supra* note 30 at 25.
[43] World Bank, *Developing an Environmental Strategy,* at 79.
[44] Ibid., at 2.
[45] Ibid., at 71.

structures and mechanisms that permit civil society intervention in the case of government failure.

3. Domestic Environmental Regulation of the Petroleum Industry

The domestic law regulating the oil sector in Nigeria is a mix of common law principles and statutory provisions. Upon attaining independence in 1960, Nigeria received part of the English common-law into her domestic legal system. This received law operates alongside the statutory provisions enacted by the country's legislature.[46]

With respect to the oil industry, one of the most important received common law principles is the doctrine of strict liability for nuisance resulting from the escape of dangerous material from one party's land and causing damage to the land of an adjacent owner. Laid down in the case of *Rylands v. Fletcher,* this rule of law was formulated by the House of Lords in the following terms:

> ... the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.[47]

The House of Lords held that two preconditions must be satisfied in order to ground liability under the rule. First, there must be the empirical fact of 'escape' of a substance from one piece of property to another. Secondly, the defendant's use of his land must be a 'non-natural user'. These elements were further clarified by subsequent decisions of the English courts. Starting with the second element, *obiter dicta* of Lord Molton sitting in the Privy Council is now regarded as the most authoritative elucidation of the requirement of 'non-natural user'. According to his Lordship, for there to be liability for non-natural user under the rule in *Rylands v. Fletcher*, "... [the use] must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."[48]

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[46] Interpretation Act, Cap 192, Vol. X, Laws of the Federation of Nigeria (1990). The received English law comprises the common law, the doctrines of equity and the statutes of general application in force in England on January 1, 1900, as well as English law made before October 1 1960 (the date Nigeria gained independence) and made applicable to Nigeria.

[47] *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, at 338-340.

[48] Per Lord Molton, in *Richards v. Lothian* (1913) A.C. 263 at 280 (Privy Council).

Subsequently, in *Read v. Lyons Company Ltd,* Viscount Simon elaborated that the requirement of 'escape' is satisfied where there is "escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control."[49]

The rule in *Rylands v. Fletcher* is 'strict' in the sense that proof of fault or negligence is unnecessary to ground liability for the damage. However, the rule is not always easy to apply in practice. Despite Lord Molton's definition, there is still no objective universal test of what amounts to non-natural user of land.[50] A court applying the rule will have to determine the matter based on a consideration of the peculiar facts of each case. Among the factors to consider would be the nature of the defendant's land use, its social usefulness, and whether he had any prior legal authorization to use the land in the way he did. These were the issues that faced the Nigerian courts in their efforts to apply *Rylands v. Fletcher* to oil pollution cases.

In *San Ikpede v. The Shell-BP Petroleum Development Company Nigeria Ltd,* the plaintiffs claimed for damages and compensation for fish and palm trees lost as a result of the discharge of crude oil from the defendant's oil pipelines. In determining whether *Rylands v. Fletcher* applied, the court reasoned that "to lay crude oil carrying pipes through swamp forest land is ... a non-natural user of the land."[51] However, the Court decided that the defendants were not liable under the rule because the Nigerian government lawfully authorized their action. The defense of statutory authority thus availed them.

It is apparent that the interpretation and application of the 'non-natural user' requirement is strongly affected by the context in which it is invoked. In the above case, the judge's reasoning seemed to have been influenced by the customary land-uses in the area where the pipelines were located. It is within that customary (mainly agricultural) context that one could categorize modern land-uses such as laying oil-pipelines as 'non-natural user'. The significance of the decision however must turn on the *obiter dicta* that, in effect, would have outlawed the method of oil production by laying pipelines above ground without government authorization. Notwithstanding the defense of lawful authority, the question still remains whether this method of

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[49] *Read v. Lyons Company Ltd* (1947) A. C 156, at 168.

[50] J. Finine Fekumo, "Civil Liability for Damages Caused by Oil Pollution" in J.A. Omotola (ed.,) *Environmental Laws in Nigeria including Compensation* (Lagos: Univ. of Lagos Press, 1990) 254, at 272.

production poses such a danger to life, property or the environment as to make it unreasonable for the government to continue to permit it. Arguably, lawmaking in this area should be directed at striking a balance between the economic interests of government and the oil companies on the one hand, and the public interest in health, safety and environmental preservation on the other. Unfortunately, the law in Nigeria is yet to strike this balance; crude oil continues to be carried in pipelines that are laid above ground in most parts of the Niger Delta. While Nigerian law does not require that oil pipelines be laid underground in the interests of health, safety and the environment, current industry practice seems to require that pipelines should not be laid above ground. Indeed, Shell's Nigerian subsidiary implicitly recognizes and accepts this position. The company has argued that its pipelines in the Niger Delta are laid above ground in view of the swampy nature of region, but promised to bury all pipelines by 1998. The company has failed to keep this promise.[52]

The Supreme Court of Nigeria also had an opportunity to decide on the application of *Rylands v. Fletcher* to an oil pollution case in the case of *Machine Umudje & Anor. V. Shell-BP Petroleum Development Company of Nigeria Ltd.*[53] The Court held that where oil-waste that was collected by the defendants and placed into a pit under their control, escapes and causes damage to the plaintiff's land, the defendants were liable for the resulting damage under the rule in *Rylands v. Fletcher.* The Court ruled that proof of negligence on the part of the defendants was unnecessary to ground liability and that there was no statutory authorization permitting the defendants to operate the oil-waste pit in the manner in which they did.[54]

However, there are serious limitations to the viability of private law approaches to the problem of oil pollution in Nigeria. First, illiteracy of the majority of the people who are affected by the activities of the oil companies renders it difficult for them to protect their property rights on an effective and consistent basis.

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[51] Per Ovie-Whiskey J, in *San Ikpede v. The Shell Petroleum Development Company of Nigeria Ltd* (1973) M.W.S.J 61 (Selected Judgements of the High Court of Mid-Western State).

[52] SPDC, *People and the Environment: Annual Report* (1996); and note 107 *infra,* and accompanying text.

[53] (1975) 9-11 S.C. 155.

[54] See dicta of Idigbe J.S.C., at pp172-173 of the report: "...liability on the part of an owner or the person in control of an oil-waste pit, ... exists under the rule in *Rylands v. Fletcher* although the 'escape' had not occurred as a result of negligence on his part... nor is there any evidence of justification, under any statutory provisions, for collection of the same by the appellants who cannot, therefore, avail themselves of any of the exceptions to the rule aforesaid..."

Secondly, even where they wish to invoke their private law remedies for nuisance or negligence, most people cannot afford the legal costs involved. Finally, there are the systemic difficulties with the legal system in Nigeria. Courts are understaffed, overworked, and lack sufficient facilities for the efficient discharge of their functions. Some have even alleged cases of corruption within the judicial system. This is how Human Rights Watch describes the state of the judicial system:

> The quality of judicial appointments has steadily deteriorated over the years, and the level of executive interference in court decisions has increased. Judges, magistrates and other court officers ... are very poorly paid. Court facilities are hopelessly overcrowded, badly equipped, and underfunded. ...There are no computers, photocopiers, or other modern equipment; and judges may even have to supply their own paper and pens to record their judgments in longhand. If litigants need a transcript of a judgment for the purposes of an appeal, they have to pay for the transcript themselves. There are long delays in bringing both criminal and civil cases to court. This financial crisis encourages the acceptance of bribes, in order to achieve the standard of living regarded as acceptable by someone with a legal qualification. Corruption is a pervasive feature of court cases, whether criminal or civil.[55]

These systemic problems have resulted in extra-ordinary delays in court cases and rendered the private law remedy for pollution prevention and environmental preservation largely theoretical.[56] They also provide compelling justifications for government intervention in the form of precautionary and preventative measures to safeguard the public interest.

As already noted, the government has made provision for environmental protection both in the context of petroleum legislation, and through specific environmental law statutes. The *Petroleum Act* and the *Petroleum (Drilling and Production) Regulations* both of which were enacted in 1969, as well as the *Federal Environmental Protection Agency (FEPA) Act* of 1988 operate alongside the received common-law principles discussed above to constitute the domestic legal regime governing environmental protection in Nigeria.[57]

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[55] Human Rights Watch, *The Price of Oil, supra* note 30 at 156.

[56] In the case of *SPDC v. Farah* [1995] 3NWLR (part 382) 148, the oil pollution incident occurred in 1970, proceedings for compensation were commenced at the High Court in 1989 and concluded in 1991. On appeal, the Court of Appeal delivered its judgement in 1995, twenty-five years after the incident. The oil company, being dissatisfied with the judgement, appealed to the Supreme Court of Nigeria. Similarly, in *Chief Joel Anare & Ors. V. SPDC,* (CS No. HCB/35/89), the Delta State High Court sitting at Ughelli, delivered judgement for the plaintiffs in 1997 in a claim for compensation for oil pollution that took place in 1982. Proceedings started in 1983, and therefore took 14 years to complete. As to add insult to injury, Shell announced that it would appeal the decision, meaning that the local community would have to wait even longer to know whether they would receive compensation or not. **See** Human Rights Watch, *The Price of Oil,* at 157-158.

[57] See *supra* note 3 for citations of these laws.

According to Gao, three main approaches to environmental regulation of oil and gas operations can be identified.[58] First, in the 'multi-statutory approach', environmental regulation of oil and gas production is contained in a number of statutes, some of which may only have indirect application to the oil industry. This approach is generally found in developed countries because these countries enjoy the administrative and resource capacity to implement the various rules and coordinate the work of a multiplicity of institutions. Examples include the United States, which has some twenty-five different statutes regulating the environmental effects of oil and gas production, including the 1990 Oil Pollution Act.[59] In contrast, the 'contractual approach' involves making references to environmental protection in petroleum exploration contracts signed between producing countries and oil multinationals. These references are usually quite imprecise and therefore largely ineffective. The contractual approach was mainly utilized by developing countries in the 1980s. Gao attributes the paucity of environmental provisions in these contracts to the historical reluctance of developing countries to allow environmental considerations to adversely affect their economic development efforts.[60] Thirdly, there is the 'integrated legislative approach' which was probably first introduced in China in 1982. In involves the promulgation of specific legislation to address the environmental aspects of oil exploration and production. It has become quite popular in Latin America since the 1990s. Argentina, Peru, and Ecuador have all enacted specific legislation to address environmental issues arising from oil production.[61]

As will become clear below, in Nigeria, the gamut of environmental regulations governing the petroleum sector are contained in a number of legislative instruments including the *Petroleum Act* and *Regulations*, and the *Federal Environment Protection Agency Act*. In addition, the common law principles referred

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[58] Gao, "Environmental Regulation of Oil and Gas", *supra* note 2, at 32.

[59] Ibid. The United Kingdom similarly operates a 'multi-statutory' model and distinguishes between onshore and offshore oil production. The former is predominantly regulated by the Town and Country Planning Act (TCPA) (1990) for England and Wales and the TCPA (1972) for Scotland. Under each of these, petroleum operations fall within the definition of 'development' requiring an environmental impact assessment under the Environmental Protection Act (1990). See Gao, pp33-35 for details of UK legislation.

[60] Ibid., at 36.

[61] Ibid., 37-38. He cites Argentina's Regulations and Procedures for the Protection of the Environment During the Development of the Exploration and Exploitation of Hydrocarbons (Nov. 11, 1992); Ecuador's Decree 2982 Regarding Environmental Regulations, (17 August, 1995); and Peru's Regulations for Environmental Protection in Mining and Metallurgical Activities (10 December, 1993) and Supreme Decree No. 046-93-EM, Regulations for Environmental Protection in Hydrocarbon Activities (10 November, 1993).

to above continue to be relevant to the operation of the oil industry. As discussed in the previous chapter, the production sharing and joint venture contracts between the oil companies and the government focus mainly on economic issues such as parties' shareholding and production quotas. However, some writers have interpreted the provision in Nigeria's 1995 Model Production Sharing Agreement requiring that insurance policies be based on 'good international petroleum industry practice', as a vague environmental protection requirement.[62] It is therefore not possible to classify Nigeria's environmental regulation of oil and gas under any of the rubrics laid down by Gao. It is at best a hybrid of the multi-statutory and contractual approaches. My recommendation would be that Nigeria should move towards the integrated legislative model, even though it would be desirable to extend that model to include provisions that integrate social development as well. That way, the law would cover the full range of sustainable development issues. However, before addressing what the law ought to be, I will first discuss the historical development of environmental law in Nigeria.

As it happened at the international level, the development of environmental law within Nigeria followed the increase of public awareness about the important life-support functions of the environment, as well as its interdependence and vulnerability. In addition, the occurrence of specific incidents of environmental pollution in the country underlined the need for a legal framework for the protection of the natural environment. Like the development of international environmental law, environmental lawmaking in Nigeria was initially reactive in outlook and sectoral in orientation. In the early 1980s, the military government of General Muhammadu Buhari launched a 'war against indiscipline' which included an environmental sanitation program.[63] This program led to the promulgation of at least four state-level environmental laws.[64] Except for the Sanitation Law in Oyo State, all the other State laws were limited to providing legal backing for their respective environmental sanitation programs. By prohibiting the discharge of industrial or commercial effluents or waste into rivers and other water bodies, the Oyo State law is arguably

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[62] Ibid., at 36.

[63] A. Ibidapo-Obe, "Criminal Liability for Damages caused by Oil Pollution" in Omotola (ed.,) *Environmental Laws in Nigeria* (1990), 231 at 248.

[64] O. Oyewo, "The Problem of Environmental Regulation in the Nigerian Federation" in Omotola (ed.,) *Environmental Laws in Nigeria* (1990), at 98. Environmental Sanitation Laws were passed in Lagos (1983), Rivers (1984), Kaduna (1984), and Oyo States (1986).

broad enough to cover operations of the oil industry.[65] However, Nigeria still lacked a comprehensive legal framework for environmental protection.

The impetus for a national environmental law came in 1988 when some Nigerians received payment for a shipment of toxic wastes from Italy that was dumped on a piece of private land in the village of Koko. The 'Koko incident' as it is now called, attracted considerable media attention within the country and abroad, and raised local awareness about the dangers of environmental pollution, especially from hazardous and toxic wastes.[66] It also led to the enactment of a law that criminalized the importation, transportation, or deposit of harmful waste in any part of Nigeria or its offshore waters.[67] The importance of the hazardous waste problem was underscored by the fact that the law excluded the application of diplomatic immunity to persons charged under the Decree, and provided for a sentence of life-in-prison upon conviction.[68] The toxic wastes imported were re-shipped back to Italy, but this took place before the decree was promulgated.[69] There is no evidence that anyone was charged for the Koko incident.

In addition to the Harmful Waste legislation, the government also enacted the *Federal Environmental Protection Agency (FEPA) Decree.*[70] The principal thrust of this law is to provide a permanent institutional structure for the protection and development of the environment in the country, and to advise the government on national environmental policies and priorities. The Act established the Federal Environmental Protection Agency (FEPA), which was empowered to establish national air and water pollution-prevention programs and programs for environmental restoration and enhancement.[71] The Agency also has power to formulate water and air quality standards, to prescribe limitations on effluent from industrial activity and to enforce the prohibition against discharge of hazardous substances into the air, land or

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[65] Section 8(1) (g). See A. Ibidapo-Obe, *supra* note 63, at 249.

[66] K.M. Mowoe, "Quality of Life and Environmental Pollution and Protection" in Omotola (ed.,) *Environmental Laws in Nigeria* (1990), 171, especially at 181-182.

[67] Harmful Waste (Special Criminal Provisions etc.) Decree No. 42 of 1988 *Laws of the Federation of Nigeria*, Cap. 165, Vol. IX (1990), Section 1. It is remarkable that the decree failed to define 'harmful waste.' **See also** Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa ("Bamako Convention"), 30 I.L.M. (1990) for a continental regime prohibiting the import of hazardous wastes into Africa.

[68] Sections 9 and 6 respectively.

[69] Mowoe, "Quality of Life", *supra* note 66, at 182.

[70] FEPA Decree No. 58 of 1988 cited *supra* note 3.

[71] Section 9.

territorial waters of the country.[72] FEPA is further empowered to conduct studies into the effect of ozone depleting substances and to control noise levels.[73]

Although the Act does not refer specifically to the oil industry, several of its provisions have implications for oil production and must be taken into account by the multinational companies engaged in oil production in Nigeria. As already indicated, section 20 prohibits the discharge of hazardous substances into any part of the environment in Nigeria or its territorial waters. This offence is punishable by a fine of N100,000 or a term of imprisonment not exceeding ten years for individual offenders, and N500,000 plus an additional sum of N1,000 per day for continuing offences by corporate entities.[74] To deter corporate directors and managers from hiding behind the corporate veil, the law provides for the personal criminal liability of persons who were "in charge of, or responsible to the corporate body for the conduct of [its] business."[75]

An important provision of the Act is its implicit incorporation of the polluter-pays-principle, which is an instrument through which the producer of a good or service is made to bear responsibility for the full costs of the production rather than passing them on to the public. By preventing polluters from free riding on the backs of the public, the polluter-pays-principle could help to align the private producer's interest with protection of the public good. This way, incorporating the PPP into legal regimes is one method through which those regimes could evolve towards sustainable development. Section 21 provides that the owner or operator of any vessel or production facility in Nigeria from which polluting substances emanate, shall be responsible for the full costs of removal of the hazardous substance and the payment of compensation to third parties whose material interests may be affected by the pollution.[76] The polluter is also required to take actions to mitigate the effect of the pollution by immediately notifying the government environmental authorities of the discharge, and commencing immediate clean up.[77]

Although the FEPA Act is important to the present discussion in view of the above provisions, from the perspective of a work on sustainable development, it is

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[72] Sections 15, 16, 17 and 20.
[73] Sections 18 and 19 respectively. The provision on ODS is clearly attributable to the conclusion of the Montreal Protocol on Substances that Deplete the Ozone Layer, in 1987.
[74] Section 20 (2) and (3).
[75] Section 20 (4).
[76] Section 21(1).
[77] Section 21 (2).

even more important for what it fails to provide. It is apparent that the law does not provide for the application of the precautionary principle, for the conduct of environmental impact assessments of development projects, or for public participation in decision-making. There is some evidence that the government promulgated an Environmental Impact Assessment (EIA) Decree in 1992.[78] Generally, the decree requires an EIA to be conducted where the nature, extent or scope of a development project is likely to significantly affect the environment.[79] More specifically, there is a mandatory EIA requirement with respect to the development of oil and gas fields, the construction of oil refineries, pipelines and oil processing and storage facilities.[80]

However, all the evidence suggests that the EIA requirement is observed more in breach than in compliance. For example, Okonta and Douglas wrote that throughout the period 1956 to 1977, Shell did not carry out a single EIA to evaluate the potential effects of oil exploration on the environment.[81] While Shell disputes this claim and argues that it conducts regular EIAs for all its projects, the company could not show evidence to substantiate their side of the story. The two EIA reports that the Company produced to a group of environmental consultants in 1994 were actually carried out after the projects had commenced, thereby failing to meet one of the key requirements of the EIA process - the *ex ante* assessment of impacts.[82]

In part, this compliance deficit is the result of inadequate enforcement capacity on the part of regulatory authorities. A 1997 study conducted to determine the environmental and social problems in the Niger Delta and to make proposals for sustainable development in the region concluded that "most state and local government institutions involved in environmental resource management lack funding, trained staff, technical expertise ... and other pre-requisites for

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[78] Decree No. 86, *Laws of the Federation of Nigeria,* 1992. **See also** Gao, "Environmental Regulation of Oil and Gas", *supra* note 2, at 41 noting that the oil and gas industry is included among the list of projects that require an EIA. I have not been able to lay hands upon the EIA legislation despite extensive internet and other research as well as personal contacts in Nigeria. The discussion on the EIA Decree is therefore exclusively based on secondary sources.

[79] Section 2(2).

[80] Human Rights Watch, *The Price of Oil* (1999), at 55-56.

[81] Okonta and & Douglas, *Where Vultures Feast,* (2001), at 69.

[82] Ibid., at 65. **Also** A. Rowell, *Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria* (Greenpeace International: 1994), at 11.

implementing comprehensive programs."[83] Tensions arising from jurisdictional overlap between environment and petroleum officials have also contributed to the lack of compliance with regulatory requirements. The 1997 report further concluded that in the exercise of their regulatory functions over the oil industry, "overlapping mandates and jurisdiction between FEPA and [Department of Petroleum Resources] DPR frequently contribute to counterproductive competition."[84]

To return to the FEPA law, it is also remarkable that it does not contain provisions on protection of biodiversity or on climate change. The fact that these issues represent the most challenging environmental problems facing the world today, shows that the Nigerian law is unsuitable for its time and needs to be revised. A comparison with the provisions of the environmental law of some neighboring West African countries illustrates the gaps in Nigerian law. In 1994, as part of the Rio implementation process, Gambia enacted the *National Environment Management Act (NEMA).*[85] In addition to setting up a National Environment Agency with responsibility for overall environmental management and standard setting, NEMA also provides for the conduct of environmental impacts assessments; for measures to protect biodiversity; for the protection of the ozone layer; for pollution prevention and application of the polluter-pays-principle; for the use of economic instruments such as tax measures; and for public access to environmental information.[86] The Gambia's NEMA seems to be a more progressive environmental legislation that the Nigerian law. Similarly, in Ghana, the *Environmental Protection Agency Act* established a national agency with responsibility for developing policy and regulations for the protection of all sectors of the environment, for the control of hazardous substances, and for prevention of pollution and the discharge of wastes into any part of the environment.[87] Specifically, the Act requires that an environmental impact assessment be conducted for all products that have, or are likely to have adverse impacts on the environment.[88]

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[83] Environmental Resources Managers Ltd., *Niger Delta Environmental Survey Final Report,* Phase I, Volume 1, p263. For details on the Niger Delta Environmental Survey, see *infra* note 278 and accompanying text.

[84] Ibid., **Also** Human Rights Watch, *The Price of Oil* (1999), at 56.

[85] *National Environment Management Act* (NEMA), No. 13 of 1994. The Act was passed by Parliament on 14 April 1994, and received the Presidential assent on 24 May 1994.

[86] See NEMA sections 22, 32, 37, 38, 29, and 48 respectively.

[87] *National Environmental Protection Agency Act*, No. 490. (1994), National *Gazette,* Accra, Ghana, 30th December, 1994.

[88] NEPA Act, Section 12.

Before the enactment of the FEPA statute, the only legal instruments in Nigeria that regulated the operations of the oil industry were the *Petroleum Act* and *Petroleum Regulations*, both of which were enacted in 1969. These laws contain a few provisions on pollution prevention and compensation for damage arising from pollution. However, the petroleum laws lack the holistic and integrated approach required by sustainable development analysis. For example, the Act empowers the government to suspend the rights of any oil company which was not conducting oil production in a manner consistent with the avoidance of danger to life or property, or in accordance with the standards of 'good oil field practice'.[89] Under the Regulations, oil companies are permitted to interfere with the environment by cutting down trees and undergrowth to the extent necessary for the construction of oil production infrastructure.[90] However, there is no requirement for EIA or for public consultation before these environmental interferences take place. Limited environmental protection provisions are built-in to avoid harm to certain types of trees and to objects of veneration.

As well, oil companies are required to pay compensation where private land rights are interfered with, where third-party economic interests are adversely affected by the construction of infrastructure, or where pollution results from discharge of crude oil. However, local inhabitants have complained that compensation levels are generally low, and that the process of assessing compensation favors the oil companies. This position was supported by the findings of a judicial inquiry into the killing of some eighty protesters at Shell's facilities at Umuechem in the Niger Delta. Ruling on the issue of compensation, the Inquiry concluded that oil companies were under a legal obligation to pay "adequate compensation" for lands acquired for oil operations and for crops and trees on such land, for damage to farms, pollution of water, rivers and streams. The tribunal noted that instead of "adequate compensation", "the compensations paid [by oil companies] for these deprivations are just pittance, meager pittance, on which the people cannot subsist for more than six months, and they become frustrated with life."[91] Although the tribunal did not define what it meant by "adequate compensation", *obiter dicta* from the Court of Appeal of

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[89] Petroleum Act, Section 7.
[90] Regulation 15.
[91] Rivers State Government, *Commission of Inquiry to the Causes and Circumstances of the Disturbance that Occurred at Umuechem in the Etche Local Government Area of Rivers State*, Port Harcourt, (1990) cited in Human Rights Watch, *The Price of Oil*, (1999), at 102-103.

Nigeria provides guidance on the issue. In *SPDC v. Farah,* the Court of Appeal said that compensation should "restore the person suffering the damnum as far as money can do to the position he was before the damnum or would have been but for the damnum."[92] There is no doubt that compensation levels in Nigeria have traditionally not met this standard.

In a very significant recent development, the House of Representatives in Nigeria has ordered Shell to pay compensation in the sum of $1.5 billion to the Ijaw ethnic group in Bayelsa State, Niger Delta.[93] The House was acting on a recommendation made by a four-man investigative panel headed by a former Chief Justice of Nigeria, Mohammed Bello. The panel found that Shell had operated in the regions inhabited by the Ijaw people for almost sixty years and that during this period, several oil spillages occurred. They noted that over the years, Shell had persistently refused to pay compensation based on what the panel called "unsubstantiated claims of sabotage."[94] They further found that oil spillage from Shell's facilities has affected aquatic and agricultural life among Ijaw communities leading to serious outbreaks of disease, including cancer, and up to 1400 deaths. For all these reasons, the Panel recommended the payment of the above sum in the following installments: US $500,000 to be paid immediately; $1 million dollars to be paid every year from the date of payment of the initial installment for a period of ten years.

Regulation 25 of the *Petroleum Regulations* requires oil companies to take "all practicable precautions including up-to-date equipment" to prevent oil pollution of several environmental media including inland waters, rivers, water courses, territorial waters or the high seas, and to avoid danger to marine life. Where pollution does occur, companies are required to promptly control and bring the pollution to an end. In my view, regulation 25 is the most progressive environmental provision contained in Nigeria's petroleum laws. The provision implicitly incorporates an anticipatory and preventive approach to environmental management. Bearing in mind the gaps in scientific understanding about the environment at the time the law was

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[92] *SPDC v. Farah* [1995] 3 NWLR (Part 382) p 148, at 192.
[93] "Reps Order Shell to Pay Ijaw $1.5billion Compensation", *The Vanguard,* Lagos, March 12, 2003 at http://allfrica.com/stories/200303120010.html (accessed March 15, 2003).
[94] Ibid.

enacted, it was in many respects an innovative provision.[95] However, its effectiveness remains open to question due to inadequate implementation.

At the time that these laws were enacted, knowledge about the environment was not as widespread and environmental protection had not acquired the prominence that it now enjoys. The linkage between international business and environmental protection was even less obvious. Emerging as they were, from colonial rule, developing countries such as Nigeria were pre-occupied with economic development. The creation of an enabling environment to facilitate capital investment by foreign companies in the natural resource sector was viewed as an important driver of economic development. The result was that while investor rights and interests were largely protected, there was little regulation of investment companies to safeguard the public good, for example, in environmental protection. These circumstances partially explain the paucity of environmental protection clauses in the petroleum laws. On the other hand, even where some provision is made as in the case of Nigeria, inadequate enforcement and implementation rendered the law largely ineffective.

Apart from regulation 25, the law in Nigeria remains largely reactive in outlook. The mechanisms for environmental protection are in the form of administrative and penal sanctions (fines, compensation, and restoration) usually imposed after damage has already taken place. To a large extent, these sanctions are insufficient to restore the environment to its former state, or to compensate the victims of pollution to their pre-existing positions.[96] The current law does not provide for some of the innovative instruments and processes that have come into existence since environmental protection became an issue of international significance in the early 1970s. For example, despite permitting oil companies to cut down trees and undergrowth and to construct roads, buildings and other infrastructure to facilitate oil production, there was no provision for EIA. Since environmental and social impacts are not assessed at all, naturally, there was no provision for invoking the 'no action alternative' whereby development projects are not proceeded with in view of probable adverse environmental and social consequences.[97]

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[95] Gao, "Environmental Regulation of Oil and Gas", *supra* note 2, at 12: "... national laws and traditional concession agreements concluded in the first half of [the 20th] century made little reference to environmental protection and control. This is ... because at the time these statutes and agreements were being developed, environmental consciousness and thinking was at its infancy."

[96] See *Commission of Inquiry into Umuechem Disturbances, supra* note 91.

[97] On the no-action alternative, see P. Sands, *Principles of International Environmental Law, supra* note 16, at 594.

Furthermore, the petroleum legislation makes no provision for the participation of the public in decision-making relevant to oil production, and how it could affect their environment and livelihood. This is particularly unfortunate because the people of the Niger Delta have for a long time lived off their environment and over the years, have treated the environment with respect.[98] They derive most of their livelihood from the natural environment, and turn to the environment for many religious and cultural purposes. Okonta and Douglas have brought to light the significance of environmental protection and preservation in the culture of Niger Delta communities. On the issue of the relationship between the Ogoni people and their environment, they wrote that:

> the land was considered as sacred, and to commit acts that polluted or desecrated it was viewed as an abomination and promptly visited with appropriate sanctions. The Ogoni saw themselves as custodians of the land and all that dwelled in it, including the rivers and streams, and went out of their way to protect and safeguard them all, knowing that their survival, indeed their very existence, depended on the well-being of their environment.[99]

The environment is equally revered in the culture of the Okoroba ethnic community in the Niger Delta. Viewing themselves as custodians of nature, the people of this community have developed customary laws to prevent damage to land, rivers, creeks and all creatures that live in them. To preserve this natural harmony, Okoroba customary law includes a variant of the preventive principle. According to Okonta and Douglas, first time visitors to the area are warned not to intentionally cause damage to the environment or to living things: "you are not allowed to touch any blade of grass or leaf of any kind or kill any animal here" is the customary injunction handed down to outsiders visiting the community.[100]

It is apparent that the concept of custodianship/stewardship as a defining characteristic of the relationship between man and nature, is an equally important principle of the culture of Niger Delta communities. Respect for this 'sacred trust', to borrow the words of Edith Brown-Weiss, demands that any outside interference with the environment of the Niger Delta must be based on the participation and consent of the local people. Unfortunately, as the discussion in the following pages will show,

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[98] A. Rowell, *Shell-Shocked supra* note 82, at 5. **See also** A. Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case" (1993) 34 (2) Harv. I.L.J., 445 at 483 for a description of the linkage between the people of Nauru and their environment, as well as the fragile nature of that environment.

[99] Okonta and Douglas, *Where Vultures Feast,* at 75.

[100] Ibid., at 81.

processes for public participation in decision making relevant to oil production hardly exist in Nigeria.

I argue that a reactive approach to environmental protection in Nigeria's oil-producing communities is insufficient in light of the nature of oil production, which carries a high risk of environmental damage. Instead, I will suggest that a precautionary approach to environmental regulation should be incorporated into the law. This would imply that the environmental and social impacts of development projects be studied before they are embarked upon. To be effective, these studies must retain the 'no action alternative' where proceeding with development projects would result in unreasonable environmental and social costs. Moreover, a precautionary approach would require that a variety of stakeholders should be involved in the process of decision-making with respect to the oil-industry, especially with regards to the manner in which oil operations could affect pre-existing rights and interests. Representatives of local communities and non-governmental groups concerned with environmental and social issues are some of the stakeholders that could contribute positively to the legitimacy and sustainability of development projects. I will further argue that it is the reactive orientation of Nigerian law, the lack of enforcement of even the limited provisions, as well as the corruption of government officials that explain the significant environmental pollution that has resulted from oil production. In sum, my argument is that the adoption of a precautionary and preventive approach to environmental protection, the conduct of environmental impact assessments, the invocation of the polluter-pays principle, and the institutionalization of public participation in decision-making would be crucial to avoid future oil pollution and contribute to sustainable development in Nigeria's oil producing communities.

In the pages that follow, I will discuss several environmental problems that have resulted from the oil industry. One of the major lessons to be learnt from the Nigerian experience is that the effectiveness of law does not depend exclusively upon enforcement by a higher authority, but additionally on the process of its creation and the persons or bodies empowered to seek compliance with it. It will be argued that it is undesirable for State authorities to enjoy exclusive competence in this respect. This is especially the case in a country like Nigeria where levels of official accountability are still rudimentary and where the interests of the government and the governed are not always easy to reconcile.

4. The Environmental Impact of Oil Production in the Niger Delta

Any student of Niger Delta affairs will agree that there is a whole range of environmental problems in the area, some of which, such as seasonal flooding, erosion and sedimentation are the result of natural ecology. However, in addition to these natural phenomena, there are other environmental problems that are either wholly attributable to, or are made worse through human agency. Oil exploration and production is the most prominent industrial activity in the Niger Delta, and has contributed immensely to the area's environmental problems. It is the environmental problems resulting from this activity that I am concerned with in this section.

In 1995, a World Bank study catalogued the full range of environmental problems in the delta including seasonal flooding, agricultural land degradation, deforestation, the spread of exotic species, inadequate handling and disposal of toxic and hazardous substances from industry, inefficient systems of municipal waste disposal, vehicular emissions, as well as air, water and land pollution from the activities of the oil industry.[101] In addressing the environmental problems linked to oil operations, my objective is to highlight why those problems have occurred and how they could be avoided in future through reliance on legal processes and mechanisms. The four sub-sections below are arranged as follows: (a) the linkage between oil spillage and hydrocarbon pollution; (b) oil production and deforestation; (c) oil production and loss of biological diversity; and (d) the problem of gas flaring and its effect on climate change and the local environment in the Niger Delta.

(A) OIL SPILLS AND HYDROCARBON POLLUTION

Shell operates a complex network of pipelines and flowlines[102] that are laid above ground on farmlands and near the homes of many Niger Delta communities.[103] This practice has rendered significant portions of agricultural land inaccessible and unsafe for farmers. As well, the proximity of pipelines to human dwellings spells danger to

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[101] World Bank, *Defining an Environmental,* (1995). **See also** Moffat and Linden, "Perception and Reality", *supra* note 30 at 527-538.

[102] Flowlines are smaller diameter pipes that carry crude oil from the wellhead to the flowstation.

[103] On Shell's pipeline network and the status of production equipment, see Human Rights Watch, *The Price of Oil* (1999) 61-62; A. Rowell, *Shell-Shocked, supra* note 82 at 10-1; and Okonta and Douglas, *Where Vultures Feast, supra* note 30 at 77-78.

local inhabitants. This danger is aggravated by the fact that most of the pipelines were installed in the 1960s and have outlived their operational lifespan of fifteen years.[104] In the Niger Delta, it is not uncommon to find pipelines that have been in operation for up to twenty-five years.[105] As the ensuing discussion shows, old age and lack of maintenance of production equipment are the principal factors responsible for incidents of environmental pollution from oil. At the same time, the fact that pipelines are laid out in the open has made it easier for criminals to vandalize oil production equipment.

To ward off criticism over this aspect of their production method, Shell argues that its pipelines in the Niger Delta are laid above ground because the swampy nature of the area portends a higher risk of pipeline rupture and oil leakage when pipelines are buried. Shell officials further argue that the company reviews the positioning of pipelines from time to time, so as to relocate them from expanding local communities.[106] In a move that effectively amounts to an admission that its production processes in Nigeria were not up to date, the company announced in 1996 that it would replace all its worn-out pipelines in the Niger Delta. They also promised that all pipelines laid above ground will be buried by 1998.[107] There is no evidence that this has been accomplished. On the contrary, Okonta and Douglas wrote that up to the time of their publication in 2001, "pipes continue to burst, ruining lives, fishing creeks, and farmlands in the Niger Delta."[108] This state of affairs is hardly consistent with the oil companies' legal obligation under the Petroleum Act and Regulations to conduct their operations in accordance with 'good oil field practice'; nor does it satisfy the requirement that oil exploration and production be conducted in a preventive manner, including the provision of up-to-date equipment.[109]

In the meantime, many incidents of oil spillage have taken place with adverse consequences on the environment and human health. Oil industry officials attribute most incidents of oil spillage to sabotage of production equipment by local youths. They allege that the youths' motive is either to provide a basis for compensation

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[104] Human Rights Watch, (1999), at 61.
[105] Ibid.
[106] Richard Tookey, Shell International (London: 1992), Letter to the London Rainforest Action Group, cited in A. Rowell, *Shell-Shocked* at 10-11.
[107] SPDC, *People and the Environment: Annual Report* (1996).
[108] Okonta and Douglas, *Where Vultures Feast,* at 72.
[109] See section 7(1) (g) of the Petroleum Act; and Regulation 25 of the Petroleum Drilling and Production Regulations.

claims or to steal crude oil for sale on the local market.[110] While there is some evidence of sabotage, most commentators on the situation in the Niger Delta agree that equipment failure is the predominant reason for oil spillage. For example, figures published by the Department of Petroleum Resources show that equipment failure and corrosion respectively account for 38 and 21 per cent of the 2,676 recorded incidents of oil spills in Nigeria between 1976 and 1990. Sabotage was only responsible for 18 per cent of oil spills.[111] In addition, Shell itself is quoted to have conceded that up to 75 per cent of spills from its operations in Nigeria were due to worn-out and corroded equipment; the company however maintained that with respect to Ogoniland, close to 70 per cent of spillage between 1985 and 1993 was due to sabotage.[112] It is however unlikely that local people would deliberately set upon their own farmlands and water bodies massive amounts of crude oil only for the hope of receiving meager amounts of monetary compensation from the oil companies. Not only are compensation sums virtually negligible, but Nigerian law expressly excludes the payment of compensation in cases where oil spillage is found to be the result of acts of sabotage.

Whether spillage was due to equipment failure or to sabotage, it is clear that Nigeria, and the Niger Delta in particular, has experienced more oil-related pollution than any other country or region in the world. According to Andrew Rowell of Greenpeace International, while the Shell Company has operations in over one hundred countries worldwide, by 1994, 40 per cent of oil spills in the company's facilities took place in Nigeria.[113] The Nigerian National Petroleum Company estimates that some 2300 cubic meters of petroleum are spilt in 300 separate incidents in Nigeria every year.[114] Due to underreporting of spill incidents by oil companies,

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[110] Okonta and Douglas, *Where Vultures Feast,* at 72. Also Human Rights Watch, *The Price of Oil, supra* note 30, at 61.

[111] Oyekan A.J., "The Nigerian Experience in Health, Safety and Environment Matters During Oil and Gas Exploration and Production Operations", Ministry of Petroleum, First Int'l Conference on Health, Safety and Environment in Oil and Gas Exploration and Production, (The Hague: 1991) Vol., 2 at 74; cited in A. Rowell, *Shell-Shocked,* at 12.

[112] Okonta and Douglas, *Where Vultures Feast*, at 78.

[113] A. Rowell, *Shell-Shocked,* at 12.

[114] World Bank, *Defining an Environmental Strategy,* at 49; **also** Moffat and Linden, "Perception and Reality", *supra* note 30 at 532. **See also** Human Rights Watch, *The Price of Oil* at 59, where they cite figures attributed to the Department of Petroleum Resources to the effect that between 1976 and 1996 a total of 4,835 incidents resulted in the spillage of at least 2,446,322 barrels of oil. Of this figure, 1,896,930 was spilled directly on the environment. Figures derived from the oil industry itself estimate that more than 1.07 million barrels of oil were spilled in Nigeria from 1960 to 1997.

some observers estimate that the total volume of oil spilt could be up to ten times higher than oil industry figures.[115]

While there is broad agreement on the fact of spillage, there is controversy over the environmental impact of hydrocarbon pollution. The World Bank, as well as Moffat and Linden, argue that the low sulphur content of Nigerian crude oil implies that upon discharge, it evaporates quickly into the atmosphere thereby causing less severe harm to the environment. They argue that evaporation loss could be as high as 50 per cent within 48 hours.[116] Moreover, to Moffat and Linden, and to the World Bank, "...oil pollution, in itself, is only of moderate priority when compared with the full spectrum of environmental problems in the Niger Delta."[117] For its part, Shell argues that following an oil spill and clean up, it is possible to completely rehabilitate the environment within a period of 12 to 18 months.[118]

These arguments are hardly convincing in the face of strong evidence of long-term adverse impacts of oil pollution on the environment and people of the Niger Delta. Human Rights Watch dismisses Moffat and Linden's position as based on 'incomplete data'.[119] In addition, there is evidence that an oil spill that took place in Ogoniland in 1970 was still affecting the growth of vegetation in areas located downstream from the spill site nineteen years after the incident.[120] This evidence negates the argument that oil spills in Nigeria have only short-term environmental effects. Furthermore, while the long-term effects of oil pollution on the natural environment may not be readily apparent, its impact on local populations is usually immediate and devastating. When oil leaks from the high-pressure pipelines that criss-cross the Niger Delta, its effects are spread across a wide area destroying agricultural land and crops, fish farms, economic trees and other valuable assets of the local population. While the loss incurred in these incidents may in monetary terms mean little to a multinational oil company, it could cost a poor Niger Delta family an entire year's food supply and source of income. With low levels of compensation, which in most cases take several months, if not years to be paid, these people are largely left to live their lives at the mercy of the oil companies, deprived of their traditional means

[115] Moffat and Linden, "Perception and Reality" *supra* 30 at 532.
[116] World Bank, *Defining an Environmental Strategy, supra* note 27 at 49; Moffat and Linden, "Perception and Reality", at 532.
[117] Ibid.
[118] Shell Petroleum Development Corporation, *People and the Environment Annual Report* (1996), at 14.
[119] Human Rights Watch, *The Price of Oil, supra* note 30, at 64.

of sustenance by a devastated natural environment. It will be recalled that after reaffirming the right of all peoples to freely dispose of their natural wealth and resources, the International Covenant on Civil and Political Rights provides in no uncertain terms that "[i]n no case may a people be deprived of its own means of subsistence."[121]

Oil pollution has not only deprived the people of the Niger Delta of their livelihood; their health has also been severely affected by insensitive production processes and methods. Due to the lack of pipe-borne water, most people in the region derive their domestic water supply directly from the streams and creeks. This water is used for drinking, cooking, bathing and other household purposes. The contamination of these water sources by crude oil has been devastating for the local people. In one incident of oil spillage in 1980, at least 180 people were said to have died from drinking contaminated water.[122] In 1997, an American NGO analyzed water samples from streams in two Ogoni villages. Samples from Luawii revealed 18 parts per million (ppm) of hydrocarbons, which is said to be 360 times the European Union standard of 0.05ppm. Samples from the village of Ukpeleide contained 34 ppm of hydrocarbons, 680 times the European standard.[123] Furthermore, there is evidence that one hundred people from a community affected by a Mobil oil spill fell sick and had to be hospitalized in 1998 as a result of drinking contaminated water.[124]

In the light of this evidence, I will argue that the relevant question is not whether oil spills have long or short-term effects on the environment and on people, but how to put in place regulatory and operational measures to prevent spillage in the first place. Needless to say, this responsibility falls upon the government and oil companies. Even assuming that the World Bank and oil industry officials were right about the existence of scientific uncertainty over the long-term effects of hydrocarbon pollution on the environment of the Niger Delta (an increasingly doubtful assertion in the face of the evidence), I will argue that at best, this provides a compelling case for invocation of the precautionary approach to environmental regulation. It is certainly no excuse to continue 'business-as-usual'.

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[120] Ibid.
[121] ICCPRs, G.A. res. 2200A (XXI) U.N. Doc. A/6316 (1966), 999 U.N.T.S., 171.
[122] Human Rights Watch, *The Price of Oil,* at 67. **See also** J. F. Fekumo, "Civil Liability for Damages Caused By Oil Pollution" in J.A. Omotola (ed.) *Environmental Laws in Nigeria including Compensation* (Lagos: Univ. of Lagos 1990), at 268.
[123] Okonta and Douglas, *Where Vultures Feast,* at 79; **and** Human Rights Watch, *The Price of Oil,* at 67.

Having argued that most of the oil spillage in the Niger Delta is in fact due to equipment failure, and that oil companies are in breach of their legal obligations under Nigerian law, I will now proceed to examine a few of the more significant oil spill incidents in the Niger Delta - the test of significance being the seriousness of environmental harm.

In 1970, there was a major blow-out at a well operated by Shell at Bori oil field in Kegbara Dere (K-Dere), Ogoniland.[125] Shell initially denied that it was responsible for this incident and blamed it on retreating Biafran troops, whom they accused of setting the well on fire as a shield against the Nigerian government forces. Subsequently, there was evidence to show that the spill actually occurred in 1970 after the civil war had ended, and therefore could not be blamed on secessionist troops. In 1983, the people of K-Dere brought a Naira10 million claim against Shell for compensation for damage occasioned to their land, crops, rivers, creeks and the diseases inflicted upon them. Without admitting responsibility, Shell agreed to pay Naira 300,000 'as a gesture of goodwill', clean up the spill and provide water supply to the community. However, this was not the end of the story. As already indicated, there is evidence that the long-term effects of this spill are still affecting the growth of vegetation in areas downstream from the spill site.[126] Other accounts have it that up to three acres of communal land remains polluted up to this day.[127] In 1990, despite previous attempts made by Shell to clean up the area, a study conducted by a local Nigerian University recommended that further clean up was necessary.[128] During the rainy season, crude oil still leaches from this site into the surrounding environment with adverse consequences on farmlands, water sources and human health. Delivering judgement in a case arising out of this incident, Justice Edozie of the Nigerian Court of Appeal summed-up the facts and environmental impacts of the incident as follows: "The blowout lasted for several weeks, during which time crude hydrocarbon, sulfur, and effluent toxic substances were violently emitted in dense fountains. The emissions formed a thick layer over the surface of the adjoining land, destroying farmlands, crops, and economic trees and natural vegetation of the impacted areas with the

[124] Human Rights Watch, *The Price of Oil* (1999) at 67.
[125] Okonta and Douglas, *Where Vultures Feast* (2001) at 76; **also** Human Rights Watch, *The Price of Oil* (1999) 64-65.
[126] See *supra* note 91 and accompanying text.
[127] Okonta and Douglas, *Where Vultures Feast,* (2001), 76.
[128] Human Rights Watch, *The Price of Oil* (1999) 65.

resultant desertification of the impacted area of 1,500 acres ... in K-Dere town."[129] Ken Saro-Wiwa, who was a regional commissioner in the area at the time the K-Dere incident took place, spoke of "the great damage that the blowout occasioned to the town of Kegbara Dere. Water sources were poisoned, the air was polluted, farmland devastated."[130]

Like onshore areas, Nigeria's offshore has also been subject to oil pollution. In 1980, a major offshore oil spill took place at a Texaco facility off the village of Sangana in the Niger Delta. It is estimated that between 230,000 and 400,000 gallons of crude oil escaped into the Atlantic Ocean and into rivers, creeks, lagoons, estuaries and other water bodies.[131] Drinking water for over 200,000 inhabitants was polluted, and up to 180 lives were lost as a result of the pollution.[132] Some 340 hectares of mangrove swamp were destroyed. Mangroves are an important ecosystem in the Niger Delta. They provide an important fishery for the local community, habitat for several species of biodiversity, and a natural barrier against disasters such as floods. The loss of any part of a mangrove ecosystem is significant not only for the economic and ecological services the ecosystem provides, but also because scientific evidence suggests that mangroves have a slow regeneration rate.[133] What is more, there is no evidence that either Texaco or any of its officials were made to pay compensation for damages arising from this incident. Similarly, there is no evidence of the manner and extent to which environmental clean up and restoration took place. This is further evidence of the enforcement gap in Nigerian law.

Many more incidents of oil spillage have taken place in Nigeria, but there is no point in recounting all of them. I would merely draw attention to some recent ones to show that environmental pollution by oil is a problem in Nigeria today, as it was thirty years ago. In March 1997 an oil spill took place at the village of Aleibiri, in Bayelsa State. It took Shell four months to clamp the pipeline from which the oil spilled, and the environmental clean up did not commence until five months after the incident. Significantly, even this clean up was conducted in a negligent manner by Shell's contractors, leading to the loss of ten hectares of forest by fire. The clean up method used, i.e., collecting contaminated matter into heaps and then burning them, is

[129] Cited in Okonta and Douglas, *Where Vultures Feast,* at 76-77.
[130] Ken Saro-Wiwa, *My Story,* in Okonta & Douglas at 76.
[131] Fekumo, "Civil Liability for Oil Pollution" *supra,* note 50, at 267-268. **Also** Human Rights Watch, *The Price of Oil,* at 59-60.
[132] See *supra* note 122 and accompanying text.

considered unsatisfactory by international standards.[134] This much is accepted by Shell itself when it stated to Human Rights Watch that: "Normal practice today in respect of oil-impacted debris is to remove it from site for controlled incineration."[135] The company attributed the fire at Aleibiri to poor supervision.

In January 1998, up to 40,000 barrels of oil spilled from a pipeline linking a Mobil platform with an onshore terminal in Akwa Ibom State. Some 500 barrels of oil was said to have been washed onto nearby land, with adverse effects on one million people in twenty communities.[136] Community members brought 14,000 separate compensation claims against Mobil totaling over U.S. $100 million. Up to three weeks after the incident, clean up operations had not commenced, even though Mobil had retained the services of a local contractor for that purpose. Similarly, at Shell's Jones Creek flow station, 20,000 barrels of crude oil spilled into the mangrove forest, devastating the ecosystem and all life forms therein. Shell attributed the cause of the spill to 'pipeline failure' and was compelled to shut down production at this site for at least six months.[137]

Oil spillage from outdated production equipment is not the only source of environmental pollution in the Niger Delta. The process of oil production involves pumping large quantities of water into oil wells to facilitate the extraction process. This mixture of water with oil is transported in pipelines from the oil wells to oil terminals located near the villages of Bonny and Forcados. Here, the oil is separated from the water and loaded on offshore oil tankers. The unwanted 'production water' which comes out in the form of heavy hazardous sludge, is discharged directly into the Niger Delta environment with little or no treatment.

There is some uncertainty about the environmental effect of this sludge. Evidence from Human Rights Watch suggests that production water 'generally contains low concentrations of oil', but that when discharged in large volumes, it may have long-term effects.[138] On the other hand, Okonta and Douglas argue that production/formation water comprises a combination of oil with other chemicals such as halon, and that the result is a 'potent mixture' that has contaminated the rivers,

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[133] World Bank, *Defining an Environmental Strategy, supra* note 27, at 35.
[134] Human Rights Watch, *The Price of Oil* (1999), at 62.
[135] Ibid., at 63.
[136] Ibid., at 60.
[137] Ibid., at 61.
[138] Ibid., at 63.

estuaries, and swamps of the Niger Delta throughout the years of oil production.[139] On the other hand, World Bank researchers and the oil industry have maintained that concentrations of oil in discharged water from terminals in the Niger Delta are consistent with regulatory standards prescribed by the government.[140] This is however not completely accurate. There are two sets of regulatory standards with respect to concentrations of oil in discharged water: the first, prescribed by the Department of Petroleum Resources sets a limit of 20 parts per million (ppm) of hydrocarbon content in respect of effluent discharged into nearshore waters, and 10ppm for discharges into inland waters. The second set of standards laid down by the Federal Environmental Protection Agency requires that effluent discharged into nearshore waters should not contain hydrocarbon concentrations exceeding 10ppm.[141] Contrary to claims of compliance by the oil companies, a 1986 study that examined production water discharged from terminals in the Niger Delta found hydrocarbon concentrations ranging from 11.2 to 53 milligrams per liter. Similarly, in 1993, Shell's own environmental impact study of production water from Oloma Creek revealed hydrocarbon concentrations of up to 62.7 milligrams per liter. Based on these figures, the World Bank concluded that treatment of production water from oil facilities in the Niger Delta is either poor or non-existent.[142]

The first thing to note here is the absolute necessity for the DPR and FEPA to harmonize their environmental standards. Regulatory inconsistency provides a fertile ground for rule evasion. Meanwhile, it is clear that oil companies are in violation of the environmental standards established in Nigeria. In addition to rule harmonization, the enforcement capacity of regulatory agencies must also be enhanced so that the above situation would not persist.

(B) PETROLEUM EXPLORATION AND DEFORESTATION

In the context of the discussion on the social setting and environmental features of the Niger Delta, I pointed out that the area contains most of Nigeria's mangrove and fresh-water swamp forests. It was also pointed out that despite their location within national borders, these ecosystems have regional and global significance because Nigeria's mangrove ecosystem is the third largest in the world and the largest in Africa. Its

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[139] Okonta and Douglas, *Where Vultures Feast,* (2001), at 87.
[140] World Bank, *Defining an Environmental Strategy,* at 48.
[141] Human Rights Watch, *The Price of Oil,* (1999) 64.
[142] World Bank, *Defining an Environmental Strategy, supra* note 27, at 49.

fresh-water swamp forests are the largest in West and Central Africa.[143] The mismatch between the territorial orientation of traditional international law and the interconnectedness of the global environment, the shared nature of many environmental resources, as well as the fact that species and habitats do not respect political boundaries, are some of the challenges that international environmental lawyers and policymakers have contended with over the years. The problem arises from the fact that international society has an interest in the protection and preservation of several environmental sectors, resources and species that are located within the limits of national jurisdiction and therefore subject to national sovereignty. Forests and wildlife are two examples of resources that are found mainly within domestic jurisdiction or across jurisdictional limits, but which have such important transborder environmental significance that the exercise of undiluted sovereignty over them is inappropriate. Traditional international law which is based on the territorial arrangements between states, is largely unsuitable for the protection of such interdependent environmental sectors and species.[144] For this reason, principles of international environmental law require that states cooperate both to address environmental issues that cut across, or have impacts beyond national territory, and in the development of international law rules for environmental protection and enhancement.[145]

With respect to forests, it is generally recognized that they perform important ecological and life support functions, ranging from providing habitat for many species of biological diversity, to serving as sinks to absorb human emissions of carbon dioxide and other greenhouse gases that cause climate change.[146] For these reasons, the protection and preservation of forests acquires global significance both in scope (the range of countries and people that benefit from their functions), and in time (the needs of current and future generations). It is the latter element, i.e. the desire to leave a natural legacy for future generations that has been characterized as the 'bequest'

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[143] See notes 30 and 31, *supra* and accompanying text.

[144] J. Brunnée, "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law?" (1995) 18 Fordham Int'l L.J 1742.

[145] Principles 22 and 24 of the Stockholm Declaration; Principle 7 of the Rio Declaration. The international law duty to co-operate, arguably goes back to the ICJ judgement in the Corfu Channel Case, where Albania was held to have a duty to notify British war ships that it had mined some of its territorial waters. See Corfu Channel Case ICJ reps., (1949), 22.

[146] P. Sands, *Principles of International Environmental Law,* (1995) at 406.

value of environmental resources.[147] Bequest value is also consistent with aspects of Brown-Weiss' theory of intergenerational equity.[148]

In addition to these ecological values, forests also have significant economic values for the countries and people in whose territory they are located. For example, in Nigeria's Rivers State alone, the annual value of non-timber forest products has been estimated at over $100 million.[149] Yet, few people seem to recognize these values because they are not adequately reflected in market prices. Both government officials in charge of forest management and individual citizens perceive forest resources merely from the perspective of short-term economic interests, rather than long-term sustainability. Nick Ashton-Jones underscored this point in his study of the human ecosystems of the Niger Delta. He argued that "the bottom line for the villager is survival: if she cannot feed and support her family from the forest as it stands then it must go for farmland. The bottom line for the state government is to maximize income for the period that a particular regime is in office."[150] This emphasis on the short-term economic benefits of forests has proved inimical to their long-term conservation and undermined their ecological functions.

The dichotomy between the ecological and economic values of forests has animated efforts to construct an international legal regime for forest conservation. At the Rio conference, developed countries led by the United States, argued that the important life support functions performed by forests justified the adoption of a binding forest convention. On the other hand, developing countries under the leadership of forest-rich nations such as Malaysia, India and Brazil put forward their own demands including that any convention must cover all types of forest including boreal and temperate forests not just tropical forests; that a forest convention must address the issue of western industrial pollution, the role of external debt in accelerating deforestation in the developing countries, and set up a financial mechanism to compensate developing countries in lieu of forest revenue. These and other disagreements between industrialized and developing countries made it

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[147] D. Clark and D. Downes, *What Price Biodiversity?* (Washington: Centre for International Environmental Law (CIEL) 1995), at 5-6.

[148] E. Brown-Weiss, "Our Right and Obligations to Future Generations For the Environment" (1990) 84 A.J.I.L. 198, where she lays down three principles of intergenerational equity as follows: conservation of options, conservation of quality, and conservation of access.

[149] World Bank, *Defining an Environmental Strategy, supra,* note 27, at ix.

[150] N. Ashton-Jones, *The Human Ecosystems of the Niger Delta: An ERA Handbook* (Lagos: Environmental Rights Action, 1998), 115.

impossible to conclude a binding forest convention at Rio. Instead, states adopted the *Non-Binding Statement of Forest Principles.*[151]

Despite the word 'consensus' in its title, the *Non-Binding Forest Principles* actually evidence the absence of consensus on the management of forests, and on what should be the direction of international law in this respect.[152] For example, against the historical backdrop that developed countries have unsustainably exploited their own forest resources over the years, there is a strong perception among developing countries that international regulation of the remaining tropical forests would be an unjustifiable and inequitable interference with the use of their domestic resources. Consequently, despite recognizing the multiple ecological functions performed by forests, the *Forest Principles* provide that the management and conservation of forests is of concern to the governments of the countries to which they belong.[153] This is a clear rejection of the principle of common concern, which was advocated by industrialized countries as a basis for the regulation of forest management and utilization. Tension between developed and developing countries is also evident from the fact that the *Forest Principles* incorporate the customary law responsibility enshrined in principle 21 of the Stockholm Declaration, and at the same time, provide that states have the 'sovereign and inalienable right' to manage and exploit forest resources in accordance with their development needs, levels of socio-economic development, and on the basis of national policy. The constant oscillation between sovereignty and responsibility has been a defining characteristic of forest negotiations. The fact that both principles are included in the *Forest Principles* is evidence of the uneasy compromise that the *Principles* represent. There is little wonder therefore that states could not agree on a binding agreement, a failure that is additionally attributable to what many developing countries viewed as the morally inferior attempt to exercise controls on the exploitation of their resources, controls which industrialized countries did not have to deal with when they were at lower levels of economic development.

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[151] *Non-Binding Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests* 31 ILM, 881.

[152] D. Hunter, J. Salzman, and D. Zaelke, *International Environmental Law and Policy,* (New York: Foundation Press, 1998), at 1117, describe the outcome of the forest negotiations at UNCED as follows: "the story of international forest policy is really the story of national economic interests triumphing over international environmental issues, of State sovereignty triumphing over "common concern". It is in essence a case-study of the failure and limitations of international co-operation in the field of environmental protection".

[153] Forest Principles, Preambular paragraph (f).

Notwithstanding these difficulties, all is not lost in the attempt to develop international law in this area. First, it is arguable that despite the failure to agree on a binding instrument at Rio or since then, the discourse on forestry over the years has culminated in consensus that 'sustainable forest management' (SFM) should be the objective and direction of legal development in this area. This discourse can be traced back to the 1980s when the FAO together with UNDP, the World Bank and the World Resources Institute, adopted the Tropical Forestry Action Plan. The objective of the Plan was to provide international support for national efforts to arrest tropical deforestation, contribute forest resources to sustainable economic development and integrate forest conservation into areas of national development.[154] Similarly, in 1990 parties to the International Tropical Timber Agreement (ITTA) adopted the *Target 2000 Initiative* with the objective that by the year 2000, all tropical timber exports should be from sustainably managed forests.[155] The Agreement also encourages member states of the International Tropical Timber Organization to develop national policies aimed at sustainable utilization and conservation of tropical timber forests and their genetic resources.[156] In addition to the hortatory language used in the provision, it must be pointed out that the ITTA was essentially a trade facilitation agreement, albeit one that is informed by the consumptive use paradigm, i.e., use that would provide resources and incentives for conservation so as to guarantee future use potential.[157]

Under the *Forest Principles*, SFM is defined as forest management that meets the social, economic, ecological, cultural and spiritual needs of present and future generations.[158] According to Abramovitz, while SFM is still an evolving concept, it does require that forest management be approached from an ecosystem perspective for the benefit of present and future generations. The author also supports the thesis that SFM must address the triple values of social, economic and ecological needs, and must involve the participation of all stakeholders, especially the local communities in whose

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[154] Tropical Forestry Action Plan (1985). **See** www.mekonginfo.org for background to and text of this Action Plan. **See also** P. Sands, *Principles of International Environmental Law, supra* note 146, at 408.
[155] The ITTA was initially adopted in 1983, and revised in 1994. The revised Agreement can be found at 33 ILM, 1015 (1995).
[156] Ibid., article 1(l).
[157] For an elucidation of the consumptive use paradigm in the issue area of wildlife protection, **see** C. Freese (ed)., *Harvesting Wild Species: Implications for Biodiversity Conservation* (Baltimore: Johns Hopkins Univ. Press 1997), 1-39, explaining that the logic behind the consumptive use approach is that revenues generated by the commercial; consumptive use of wild species will provide economic incentives for sound management of the harvested population(s). The problem with consumptive use however, is the inherent risk of overexploitation especially in the face of so much uncertainty about sustainable harvest levels for most species.

territory most forests are located.[159] In addition to marking the culmination of consensus over SFM, the *Forest Principles* could influence the development of domestic rules on forest management. Indeed, this influence is already discernible from some domestic forestry laws enacted since the Rio Conference.[160] As well, the *Forest Principles* could serve as a substratum of international understanding upon which discourse on the conclusion of a future international convention could be built. In this way, the principles could contribute to the continuous development of international law in this area.

It must be added that there should be no illusions about the ease with which we might bridge the divide between industrialized and developing countries over forestry conservation. In order to overcome the various difficulties that have arisen between these countries over the perception of forests as subject to national sovereignty as opposed to common concern, over preservation as opposed to consumptive use, and over environment and development, it is imperative that a future convention must address the fact that industrialized countries have themselves managed their forest resources in an unsustainable manner, that forests provide an important economic resource for many developing countries, and that these resources could be crucial for poverty alleviation and the upliftment of standards of living for developing country people. As well, there is little doubt that developed countries continue to emit most of the greenhouse gases for which forests serve as sinks against global warming, and that higher consumption patterns in these countries are mainly responsible for the continued depletion of forest resources. For example, the UNDP has estimated that the 20 per cent of the world's population that live in industrialized countries consume 84 per cent of the world's paper.[161] The provision of a financial mechanism for compensation of developing countries would not only be an invocation of the equitable principle of differentiated responsibility, it would also be a fulfillment of industrialized countries' responsibility to take measures to prevent harm to the environment outside their national jurisdiction. To my mind, the ecological functions

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[158] Principle 2 (b), Non-Binding Statement of Forest Principles, *supra* note 151.

[159] J.N. Abramovitz, *State of the World,* (1998) 32-33, in Hunter et al, *International Environmental Law and Policy* at 1126.

[160] For example The Gambia's Forest Act (1998) provides that one of its objectives is the attainment of sustainable development. It provides for the sustainable utilization of forest resources, that forest management should be based on participatory principles, and lays down a framework for community forest management, as well as for sharing the benefits from forest management.

[161] United Nations Development Program (UNDP), *Human Development Report 1999: Globalization with a Human Face* (Oxford: Oxford Univ. Press 1999), at 4.

of forests alluded to earlier, justify the invocation of this principle in support of developing country claims for a compensatory financial mechanism under a future forestry regime. It is submitted that in order to contribute to sustainable development, a future convention on forestry must recognize these social and development concerns alongside the environmental concerns that industrialized countries have employed in support of arguments for a binding forest regime.

To return to the domestic situation in Nigeria, it is clear that like other developing countries, forest utilization in support of economic development has been the predominant objective of the law. The Nigerian law on forest conservation was enacted in 1937 and is largely outdated. It empowers the state governors, who have jurisdiction over forest reserves in their area, to grant logging permits to companies in exchange for stumpage fees and royalties. Like other aspects of environmental regulation in the country, most state level agencies lack adequate capacity to enforce compliance with these regulations, and over-exploitation of forest resources is a major problem.[162] In addition to commercial exploitation, competing land uses such as agricultural production and oil infrastructure development have also contributed to deforestation, particularly in the Niger Delta. Pressure on agricultural land and the consequent clearing of forest areas for agriculture, is in turn explicable on the basis of the increasing population of migrant farmers that have moved into the region.

With respect to the nexus between oil production and forest loss, it is apparent that several stages of the production process adversely affect forest cover and natural vegetation. Right from the start of the process, oil exploration is carried on through seismic surveys, which injure the environment.[163] A seismic survey involves detonating dynamite into the ground and recording the sound waves that are sent into the earth. These sound waves give an indication of the presence of oil or otherwise. However, the crucial issue is that before dynamiting, several meters of vegetation have to be cleared as seismic lines. As a result of this practice, oil companies have inflicted significant environmental damage. By one account, between commencement of oil operations in 1956 and 1993, Shell is estimated to have cut some 60,000 kilometers of

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[162] World Bank, *Defining an Environmental Protection Strategy,* at 31.

[163] A. B. Rosenfeld, D.L. Gordon, & M. Guerin-McManus, "Approaches to Minimizing the Environmental and Social Impacts of Oil Development in the Tropics", in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998) 279 at 289-290 outlining some environmental effects of seismic exploration such as noise pollution, soil erosion, water contamination, habitat loss, changes in hydrological cycles, and increased risk of flooding. **See also** Okonta and Douglas, *Where Vultures Feast,* at 68; Human Rights Watch, *The Price of Oil,* at 69.

vegetation for the purpose of their seismic lines. About half of this was said to have affected the mangrove ecosystem which has a slow regeneration rate.[164] The movement of large numbers of people for the purpose of conducting seismic surveys, has also affected the natural environment. Seismic crews are said to be as large as 1,200 men who have to be moved through thick vegetation with their equipment.[165]

The construction of roads and the dredging of canals to facilitate oil production, has been a double-edged sword for the people of the Niger Delta. While roads have eased transportation difficulties in the area, they have also permitted access by farmers, hunters and loggers to parts of the environment that were hitherto almost impossible to reach.[166] In addition, these infrastructure developments have sometimes directly affected the livelihood of local populations. For example, following the discovery of oil in the village of Okoroba in 1991, Shell constructed a canal through the village to enable the company to transport its petroleum drilling equipment to the production site. Despite the fact that the village was located between a freshwater swamp and a saltwater area, the canal construction was not preceded by an environmental or social impact study. Consequently, the freshwater swamp from which people derived their drinking water became contaminated, with adverse effects on water supply, food and cash crops for a population of about six thousand inhabitants.[167]

While Agenda 21 does not call for the development of an international convention on forests, it does require states to adopt effective measures to implement the provisions of the Non-binding Statement of Forest Principles.[168] In the specific case of Nigeria, there is little doubt that the 1937 law needs to be revised and instruments for sustainable forest management such as community participation and environmental impact assessment introduced.

(C) OIL PRODUCTION AND LOSS OF BIODIVERSITY

Forest preservation and the protection of biodiversity are interlinked and interdependent. Forests provide an important habitat for most terrestrial biodiversity.

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[164] N. Ashton-Jones, *Human Ecosystems of the Niger Delta, supra,* note 150, at 155 provides evidence that the re-growth of mangrove trees cut down to facilitate seismic surveys, may take some thirty years or more.
[165] World Bank, *Defining an Environmental Strategy,* at 52.
[166] Human Rights Watch, *The Price of Oil,* supra note 104, at 68.
[167] Okonta & Douglas, *Where Vultures Feast,* at 81.
[168] Agenda 21, Chapter 11.12.

At the same time, human society depends on biodiversity for a variety of products from food, to furniture, to medicine. Like forests, most terrestrial biodiversity is located within the limits of national jurisdiction and therefore subject to the principle of territorial sovereignty. However, unlike forests, many important species of biodiversity migrate across territorial boundaries from one season to the other. Similarly, important species of biodiversity can be found in the marine environment, outside national jurisdiction. Consequently, protective measures based exclusively on territoriality would be unsuitable to conserve migratory species of terrestrial biodiversity and straddling stocks of marine biodiversity. This provides a strong case for inter-state cooperation. The 1911 Pacific Fur Seal Treaty concluded between the United States, the United Kingdom, Russia and Japan, in part illustrates the significance of inter-state cooperation to the preservation and sustainable utilization of shared resources.[169] In addition, the fact that species, habitats and ecosystems do not always respect territorial boundaries underscores the need for an approach to conservation that is different from, or would complement state-centered approaches to environmental protection. I would suggest, following Brunnée and Toope that an ecosystem approach to environmental protection accords more with both the migratory nature of many important species of biodiversity, and the interdependence of species with their habitat.[170] As I will argue more fully below, biological diversity has intrinsic value and therefore deserves legal protection irrespective of its connection to state territory or state interests.

The World Charter for Nature though not binding, was the first international instrument to explicitly recognize the intrinsic value of nature and to call for protective measures irrespective of instrumental considerations.[171] This trend was followed through in international treaties. In particular, the 1992 Biodiversity Convention recognizes both the intrinsic and other values of biodiversity, and provides that protective measures should be undertaken on the basis that biodiversity conservation is of common concern to humankind.

The international movement for the protection of biodiversity has had a chequered history. Only in the 1980s did the holistic concept of 'biodiversity'

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[169] Convention for the Preservation and Protection of Fur Seals, (Washington) 7 July 1911; entered into force 15 December 1911; in B. Rüster and B. Simma, *International Protection of the Environment: Treaties and Related Documents (IPE)* Vol. VIII 3682: 29, 418.
[170] Brunnée and Toope, "Environmental Security and Freshwater Resources", (1994) *supra* note 11.
[171] World Charter for Nature, GA. Res. 37/7 (28 October 1982).

representing the variety of life on earth, emerge at the international level as the appropriate object of protection. Before then, international law was mainly directed at the protection of wildlife, and in particular, wildlife that could be commercially exploited. For example, the 1933 African Convention for the Preservation of Flora and Fauna in their Natural State, while calling for the preservation of forests as habitats for wild animals, actually laid more emphasis on the protection of animal species that were susceptible of economic utilization.[172] Similarly, by allocating harvest quotas to each party, the objective of the Pacific Fur Seal Treaty was to ensure that adequate populations of fur seal remained for future exploitation.[173]

Not surprisingly, many environmental activists and animal rights advocates object to this approach as overly anthropocentric. They argue that species and ecosystems possess intrinsic and existential values that make it necessary to protect them, regardless of their benefits to humankind. For these advocates, no exploitation of species should be permitted except where necessary for the most basic of human needs.

Arguments for full-protection have, however, not resonated well with States. The reality is that mankind depends on nature for a variety of products and services; therefore, for many states, non-exploitation is not an option. Instead, efforts have been directed at ensuring that levels of exploitation are sustainable over the long term. The rationale is that by allowing a certain measure of commercial offtake, people would have an incentive to protect both wildlife and natural habitat. It is argued that this approach would ensure that efforts are taken to maintain steady populations of wildlife so as to meet future demand.[174] However, the consumptive use argument assumes too much about our knowledge of species and ecosystems, and particularly, about what levels of exploitation are sustainable. The fact that so many species have in fact been overexploited, points to the risks inherent in this approach.

As in many other areas of international environmental law, the shift to 'biodiversity' as the object of protection was the result of efforts by individual environmentalists and marine biologists who argued that the focus on wildlife, and on

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[172] Convention Relative to the Preservation of Flora and Fauna in their Natural State (London: 8 November 1933, 172 LNTS 241). Following independence, this Convention was superseded by the African Convention on the Conservation of Nature and Natural Resources, (Algiers, 15 September 1968, 1001 UNTS 3).

[173] Pacific Fur Seal Treaty, *supra* note 169 and accompanying text.

[174] C. H. Freese, (ed.), *Harvesting Wild Species: Implications For Biodiversity Conservation* (1997) 1-36.

cute or charismatic megafauna such as whales, ignored the larger issue of the need to protect the overall richness of life on earth. They argued that biodiversity should be the appropriate focus of international conservation efforts. The IUCN played a particularly prominent role in this paradigm shift, arguing consistently that all life forms deserve protection on the basis of their intrinsic rather than anthropocentric values. This approach formed the basis for two non-binding conservation instruments introduced by the IUCN in the 1980s: the World Conservation Strategy (1980) not only gave currency to the term 'sustainable development', it also emphasized the preservation of genetic diversity as well as the sustainable use of species and ecosystems.[175] Similarly, the World Charter for Nature (WCN), which was introduced in the United Nations General Assembly in 1982 by the government of Zaire, was drafted by the IUCN. In comparison to the Stockholm Declaration, the WCN has been characterized as 'an avowedly ecological instrument'.[176] It provides *inter alia*, that "Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action."[177] The Charter goes on to provide for the protection of habitats, all life forms, unique areas, the maintenance of ecosystem integrity and ensuring optimum sustainable productivity of natural resources, without causing danger to other species or ecosystems.[178] It calls for nature protection to be integrated into development plans, and for environmental impact assessment of development projects.[179]

The IUCN also prepared a set of draft articles to be included in a future convention on biodiversity. The draft articles addressed actions necessary to protect all types of biodiversity at the species, genetic and ecosystem levels; it advocated *in-situ* conservation and called for the establishment of a funding mechanism to meet the incremental costs of conservation in developing countries. Although the IUCN draft was not the negotiating text for the Biodiversity Convention, it did help to make biodiversity conservation a live issue.[180] This situation might have provided the

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[175] P. Sands, *Principles of International Environmental Law*, *supra* note 16 at 44. The WCS was developed in collaboration with UNEP, WWF, UNESCO and FAO.
[176] Ibid., at 42.
[177] Preamble,World Charter for Nature GA Res. 37/7 (28 October 1982).
[178] Principles 2,3, and 4 of the Charter.
[179] Principles 7 and 11 (c) .
[180] F. Burhenne-Guilman and S. Casey-Lefkowitz, "The Convention on Biological Diversity: A Hard Won Global Achievement", 3 Y.B.I.E.L 43 (1992), at 44.

appropriate level of shared understanding necessary to make the ensuing convention negotiations a success.[181]

Meanwhile, the ad hoc Working Group set up by UNEP to investigate the desirability and possible form of a convention on biodiversity concluded in 1988 that there was already in existence a number of international conventions that addressed specific aspects of biodiversity, but that taken together, they were not sufficient for the integrated protection of biodiversity. The Working Group therefore suggested that a new treaty was needed that would build upon the extant legal framework.[182] The objective was to negotiate a convention that would complement, not supplant the existing law.

Negotiations for the Biodiversity Convention began in 1991 and were concluded in Nairobi in May 1992. The Convention was opened for signature at the Rio Conference. Under the Convention, biodiversity was defined as "the variability among living organisms from all sources ... and includes diversity within species, between species and of ecosystems."[183] The convention has three main objectives: the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits from biological resources, including biotechnology.[184]

For many reasons, the biodiversity convention represented advances in international conservation law. First, the Convention broke new ground by being the first treaty to recognize intrinsic quality as a reason for biodiversity protection. Secondly, unlike any other environmental treaty in the past, the convention provided that the conservation of biodiversity is of common concern to humankind. Thirdly, the biodiversity convention is the first international treaty to incorporate the principle of state responsibility for environmental protection, in the original form in which it was expressed in the Stockholm Declaration.[185]

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[181] C. Shine and P.T.B. Kohona, "The Convention on Biological Diversity: Bridging the Gap between Conservation and Development" (1992) 1(3) R.E.C.I.E.L, 307 at 310-311.
[182] F. Burhenne-Guilman and S. Case-Lefkowitz, *supra* note 180 at 44-45.
[183] Convention on Biological Diversity, 31 ILM (1992), 822 Article 2.
[184] Article 1.
[185] See the Preamble for the first two of these innovations, and Article 3 for the third. Principle 21 of the Stockholm Declaration provides that: "States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of natural jurisdiction." In comparison, principle 2 of the Rio Declaration adds the words 'and developmental' between 'environmental' and 'policies'. This was thought to dilute the original environmental focus of the provision.

Despite these advances, some have argued that not enough progress was made at Rio. For example, the designation of biodiversity as 'common concern' as opposed to common heritage, is viewed as a step backwards, but one which was necessitated by the historical exploitation of developing country biological resources by developed states and their multinational corporations, without equitably sharing the benefits of such exploitation. Historically, biological resources were regarded as a genetic heritage, freely accessible by and exchangeable between all of humankind for the purposes of food, agricultural development, as well as scientific and medical research.[186] The FAO Undertaking on Plant Genetic Resources, although a non-binding instrument, did provide that plant genetic resources are the common heritage of humankind.[187] However, as Ashish Kothari explains, for at least two centuries before the Biodiversity Convention was concluded, industrialized countries had taken advantage of the common heritage principle and harvested significant biological resources from developing countries, isolated their active ingredients, stored them in gene banks, and patented the ensuing biotechnologies, thereby excluding the original owners of the resources from any benefits.[188]

The controversy over the patent granted to Grace & Co., a United States corporation over a neem-tree extract derived from India, is too well known to re-state here.[189] Suffice it to say that neem has been know to, and used by communities in India for centuries for the treatment of psoriasis, as an anti-parasitic agent, and as a spermicide and insecticide. Indian farmers had long identified and used azadirachtin as a humanly benign, but powerful insecticide. Despite this knowledge, the United States Patent Office in 1992, approved a patent application from Grace & Co., on a stabilized azadirachtin solution on the ground that the stabilized solution had been transformed from its natural 'unpatentable' state, and therefore satisfied the requirements of United States law that the invention be useful, novel, and non-obvious when compared to prior art.[190] This was a clear rejection of the value of the traditional knowledge of the Indian people, and exemplifies one of the principal problems that developing countries have had with extant intellectual property regimes.

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[186]M.E. Footer, "Intellectual Property and Agrobiodiversity: Towards private Ownership of the Genetic Commons" (1999) 10 Y.B.I.E.L., 48.
[187] FAO Res. 8/83 (1983), Article 1.
[188] A. Kothari, "Beyond the Biodiversity Convention: A View From India" in V. Sánchez and C. Juma, *Biodiplomacy: Genetic Resources and International Relations* (Nairobi: ACTs Press 1994) 67, at 72.
[189] E. Marden, "The Neem Tree Patent: International Conflict over the Commodification of Life" (1999) 22 (2) Boston Col. Int'l & Comp. L. Rev., 279.

In the light of historical inequities such as the neem tree example, developing countries had no choice during the biodiversity convention negotiations than to insist on national sovereignty over biological resources, thus forestalling the open-access implications of a common heritage regime.[191] Indeed, to many observers, by providing that biological resources were subject to national sovereignty, international law in this issue-area shifted towards greater justice in the relations between industrialized and developing countries.[192] Downes further observes that "it is just and equitable for countries to own their genetic resources in the same way they own other natural resources such as oil or timber. Adding to the weight of this argument, there is strong evidence that individuals and communities in many societies have labored to conserve, modify, and improve genetic resources. In other words, many genetic resources are not just "found" in developing countries; they were made there, through human effort."[193] In effect, access to biological resources is now a matter of contract, based on the prior informed consent of the state within which they are located, upon mutually agreed terms and upon the fair and equitable sharing of benefits, including benefits arising from biotechnology.[194]

Having discussed the historical origin and substantive content of the international law on biodiversity protection, it is apposite to return to the situation in Nigeria and examine the significance of biodiversity there, the causes of biodiversity loss and the legal regime governing the protection of biodiversity. Throughout this discussion, I will focus on how the oil industry has affected biodiversity, and what could be done from a legal perspective to introduce greater congruence between the business objectives of oil investors and environmental balance for the people.

I have already indicated that the Niger Delta region comprises four ecological zones: coastal barrier islands, mangrove swamps, freshwater swamp forests and

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[190] Ibid.

[191] See articles 2, 4, and 15 of the CBD.

[192] D. Downes, "Global Trade, Local Economies and the Biodiversity Convention" *supra* note 10, at 203.

[193] Ibid., at 205.

[194] Articles 15 and 16 of the CBD. The Parties to the CBD have also negotiated and adopted *Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (2002). According to Hamdallah Zedan, the Executive Secretary of the Convention on Biological Diversity, the Guidelines have two main objectives: first, to assist Governments and other stakeholders in developing access and benefit sharing strategies, and in identifying the steps involved in the access and benefit sharing process; secondly, to help governments establish legislative, administrative or policy measures on access and benefit sharing and/or when negotiating access and benefit sharing contracts. **See** H. Zedan, "Introduction" *Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (2002), at iv.

lowland rainforests.[195] Among these, most biodiversity is found in the freshwater and barrier island ecozones.[196] The Niger Delta is said to be an area of endemism for Africa; of the 205 endemic species in Nigeria, 60-80 per cent can be found in the Niger Delta.[197] Many vertebrate and primate species that are either rare or even extinct in other parts of the country can be found in areas of the Niger Delta. In an earlier part of the chapter, I also alluded to the value of non-timber forest products for the local population.[198] For all these reasons, the need to protect biodiversity and the conduct of development activities with sensitivity to biodiversity issues is of vital importance to the local people, and at the level of international society.

In the light of the above, what are some of the factors responsible for loss of biodiversity in the Niger Delta? Apparently, there are both direct and indirect causes of biodiversity loss. Habitat destruction through logging and agricultural activities has been blamed for loss of substantial numbers of biodiversity. Similarly, hunting by local populations has diminished the numbers of many wildlife species. It is interesting that both logging practices and the consequent loss of habitat, as well as increased hunting, especially in previously inaccessible areas, are directly attributed to road and canal construction by oil companies. Here again, one witnesses the tension between oil infrastructure development, which is ostensibly advantageous to the needs of the local population, and environmental protection and preservation. The challenge is to reconcile this tension in the interests of sustainable development.

At an indirect level, the fact that most biodiversity is not ascribed a market value means that local populations do not have an incentive to invest in biodiversity protection measures.[199] This issue is linked to the problem of benefit sharing which needs to be resolved if biodiversity is to be protected at the local level. Because most important species are located within the territories of local/indigenous populations, adherence to the principle of subsidiarity demands that they be empowered at their level with the stewardship of biodiversity resources. As a corollary of this stewardship, mechanisms must be developed to ensure that some of the economic benefits accruing from the exploitation of biological resources trickle down to the local level. While the

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[195] See *supra* note 30 and accompanying text.
[196] World Bank, *Defining an Environmental Strategy, supra* note 27, at 38.
[197] Ibid.
[198] See *supra* note 149 and accompanying text.
[199] D. Clark and D. Downes, "What Price Biodiversity", *supra* note 147 at 5. As already noted, the Parties to the CBD adopted the *Bonn Guidelines* to serve as a framework for the development of domestic law and contracts on access to genetic resources and equitable sharing of benefits.

Convention on Biodiversity acknowledged this problem, it failed to resolve it, merely calling upon the parties to 'take all practicable measures' to promote access to the benefits of biotechnology on a fair and equitable basis.[200]

In terms of strategies to avoid or minimize future adverse effects on biodiversity of the operation of oil companies, I argue that consistent carrying out of environmental impact assessments before oil infrastructure development takes place is key to determining potential problems, and identifying mitigation measures. The interesting thing is that oil companies and governmental officials are aware of this process. Shell Oil Company, which operates the largest joint-venture in Nigeria, is reported to have said that it conducted seventeen different EIAs for a pipeline project in Scotland before commencement of work.[201] Considering the fact that few, if any EIAs are conducted by Shell's subsidiary in Nigeria, one can hardly resist concluding that the company applies different standards of operation, depending on where they are, the level of environmental awareness, and the rigor of regulatory enforcement. Andrew Rowell of Greenpeace International further supports the charge of double standards. In a 1994 publication, Rowell wrote:

> While oil company operations in developed regions are usually accompanied by environmental impact assessments, social and environmental policies – and not to mention a great deal of effort to appease the justified concerns of local communities – these practices are not exported to lesser developed regions where little or no media attention is paid and where accountability is unheard of.[202]

In Nigeria, all the indications are that oil companies realize they can get away with environmental cost savings because local people of the Niger Delta, though sometimes aware of their rights, face acute challenges enforcing them against the oil companies. In other cases, people are too poor to afford the legal services necessary to commence action. Furthermore, oil companies know that government officials will not insist on compliance with regulatory standards so long as the oil money continues to flow. This lack of accountability has resulted in significant environmental costs in the Niger Delta.

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[200] Article 19.

[201] Shell International, *Shell and the Environment,* (1992): "A painstakingly detailed Environmental Impact Assessment covered every meter of the route, and each hedge, wall, and fence was catalogued and ultimately replaced or rebuilt exactly as it had been before Shell arrived. Elaborate measures were taken to avoid lasting disfiguration, and the route was diverted in several places to accommodate environmental concerns." Cited in Okonta and Douglas, *Where Vultures Feast,* (2001) at 65.

[202] A. Rowell, Shell-Shocked, *supra* note 82, at 9.

To complement the EIA process, public participation in decision-making could ensure that the needs, concerns, and interests of local communities are taken into account when decisions are made. This would introduce legitimacy, which is a fundamental ingredient for project sustainability. The Rio Declaration not only provides that people are at the center of concerns for sustainable development, it also institutionalizes public participation as an essential process norm for the realization of sustainable development.[203] It has been argued that popular participation is "the principal means by which individuals and peoples collectively determine their needs and priorities, and ensure the protection and advancement of their rights and interests."[204] Experience with development projects show that both public consultation and popular acceptance are crucial to project success. In the case of the World Bank funded Sardar Sarovar dam project in India, the government failed to adequately consult stakeholders like farmers, city dwellers and local engineers who opposed the project on account of its potential environmental and social impacts. Ultimately, when those impacts began to materialize, the government was forced to cancel its loan agreement with the World Bank and the project failed as a result.[205]

In the case of Nigeria, public participation would require that the oil industry and government officials identify and consult with the full range of stakeholders that could be affected by, or are interested in environment and social development issues. In the Niger Delta, while there is no doubt that local farmers and fisher folk or their legitimately selected representatives must be involved in this consultative process, non-governmental organizations must also be involved. Such NGO participation is important because of large-scale illiteracy and poverty on the part of local people. There is little doubt that the lack of consultation with the local population in the Niger Delta contributed significantly to the perception of neglect that communities like the Ogoni felt about the oil industry and government officials. The consequence of years of neglect by both the government and oil communities is that the people of the Niger Delta have endured poverty, deprivation, human rights abuses and environmental

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[203] Rio Declaration Principle1; Principle 10 provides inter alia that: " Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. ... States shall facilitate and encourage public awareness and participation by making information widely available."

[204] "Global Consultation on the Right to Development",E/CN.4/1990/9 Rev. 1 (September 26, 1990) at 65-66.

[205] C.R. Taylor, "The Right of Participation in Development Projects" *supra* note 18, at 207. **See also** R. Khan, "Sustainable Development, Human Rights and Good Governance", *supra* note 18, noting that roughly 145,000 hectares of forest land would have been submerged by this project, and some 300,000 inhabitants displaced.

devastation. In addition to the effects on local people, this state of affairs has had negative consequences on the operations of oil companies themselves. For example, in the wake of the Ogoni crisis in 1993, Shell had to shut down production and withdraw from Ogoniland.

(D) BY-PRODUCTS OF PETROLEUM PRODUCTION: GAS FLARING AND THE CLIMATE CHANGE NEXUS

In the introduction to this chapter, I made reference to the fact that as a by-product of oil production, the oil industry in Nigeria produces substantial quantities of natural gas. By the oil industry's own account, up to 95 per cent of this associated gas is flared into the atmosphere, instead of being reinjected back into the earth for future use.[206] In 1999, SPDC estimated that as a by-product of the extraction of 706,000 barrels of oil per day in the Niger Delta, the company also produced 722 million standard cubic feet (scf) of associated gas each day. Of this, 703 million scf/d was flared into the atmosphere. Figures for 1998, 1997, and 1996 are generally in the same range.[207] These figures seem to illustrate the disturbing trend of an increase in gas flaring, considering that earlier independent research had put the percentage of gas flared at 88 per cent of total associated gas produced in the Niger Delta.[208] Even at these lower figures, Nigeria was considered to be the World's leader in natural gas flaring among all other oil producing countries. Estimates made by the World Bank in 1995, show that the oil industry in the United States flared only 0.6 per cent of natural gas, there was no gas flaring at all in the Netherlands (the home state of Royal Dutch Shell), Britain flared 4.3 per cent, and average gas flaring figures for all OPEC countries stood at 18 per cent.[209] Considering that the oil industry is dominated by a few multinational companies (the seven sisters), this evidence shows discriminatory operational standards on the part of oil companies. As I have maintained throughout this thesis, the lower standards (and greater environmental harm) in Nigeria is explicable on the basis of weak regulatory enforcement and a general lack of accountability on the part of government officials and the oil industry. In addition, one cannot rule out the moral hazard that oil companies would want to promote a positive

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[206] Shell Petroleum Development Corporation (SPDC), *Annual Report* (1998), p10. See www.shellnigeria.com/info/env_1998/envreport_t.htm

[207] SPDC, *Annual Report* (1999), p8, at www.shellnigeria.com/info/env_1999/envreport_t.htm

[208] Moffat and Linden, "Perception and Reality" *supra* note 32, at 533. **See also** World Bank, *Defining an Environmental Strategy, supra* note 27, at 58.

[209] World Bank, *Defining an Environmental Strategy, supra* note 27, at 59.

environmental image of their operations. This creates a strong likelihood that figures for gas flaring might have been understated by the oil industry.

But why is gas flaring such a problem? The answer lies in the fact that natural gas contains carbon dioxide and methane, two potent greenhouse gases with significant global warming potential. Since the late nineteenth century, when the Swedish chemist Arrhenius proposed the theory that emissions of carbon dioxide from the combustion of coal might have a global warming effect, there has been increasing understanding of the warming potential of greenhouse gases. To the extent that there was scientific uncertainty during negotiations for the Climate Change Convention, it related to the rate at which global warming might take place, and what the potential environmental and social effects of this warming might be.[210] Indeed, except for the views of a few global warming skeptics, even this limited scientific uncertainty was laid to rest by the time Working Group I of the Intergovernmental Panel on Climate Change (IPCC) submitted its second report in 1995.[211] The 1995 Report came to the fundamental conclusion that human agency was responsible for global climate change: "the balance of evidence suggests that there is a discernible human influence on the global climate."[212] This human influence, which was identified as the emission of greenhouse gases into the atmosphere, could result in increases in global temperature of up to 3.5 degrees Celsius (6.5 degrees Fahrenheit). According to the IPCC, while there are still uncertainties about the human and environmental effects of this rise in temperature, scientific estimates project sea-level rise of between 50 and 95cm, with devastating effects on many low-lying Island States and cities, some of which could be completely submerged. Other potential effects include increased incidence of disease and even death from heat waves and air pollution, as well as the spread of easily transmittable diseases such as dengue fever, yellow fever and malaria. This situation could have particularly grave consequences in developing countries. Variations in

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[210] S. Freeland, " The *Kyoto Protocol*: An Agreement Without a Future?" (2001) 24 Univ. N.S.W. L.J. No. 2, 532, at 534. See also C.M. Sinclair, "Global Warming or Not: The Global Climate is Changing and the United States Should Too" (2000) 28 GA. J. Int'l & Comp. L, 555, at 556-557.

[211] UNEP and WMO established the IPCC in 1988, to provide scientific guidance on the issue of climate change. The panel is divided into three Working Groups: Working Group I deals with the science of the climate system; Working Group II with impacts of climate change and policy response options; and Working Group III on the economic and social dimensions of climate change. The Panel had, in its first report (1990), predicted a rise in global temperatures of about 0.3 degrees Celsius per decade on a 'business-as-usual' scenario. See IPCC, *Climate Change: The IPCC Scientific Assessment* (1990).

[212] Report of the Intergovernmental Panel on Climate Change (IPCC) Working Group I, *The Science of Climate Change*, (1995) at 3-5.

regional agricultural productivity and its potential effects on global food security, loss of forests and biodiversity, as well as changes in global hydrological cycles are other potential impacts of global warming.[213]

In light of these threats, there is a compelling case to stem the continuous emission of greenhouse gases. In 1988, the United Nations General Assembly adopted resolution 43/53 which provided that climate change was a matter of common concern to be addressed in the interests of current and future generations. The following year, by resolution 44/207, the General Assembly called upon States to negotiate a convention and protocols, including binding commitments to reduce greenhouse gases.[214] Even at this early stage therefore, there appeared to be sufficient consensus at the international level that climate change posed such a significant threat as to warrant the commencement of international negotiations.

However, negotiations were difficult, not only because there were large gaps in knowledge about the possible effects of climate change on the environment and upon human populations, but also because important economic interests from both developed and developing countries were at stake. Most emissions of carbon dioxide emanate from the consumption of fossil fuels which remains an important driver of the economies of most states, both industrialized and developing. As a result, it was not surprising that many countries were initially opposed to strict timetables for the reduction of greenhouse gas emissions. For example, instead of binding reduction timetables, the United States advocated a 'no regrets' policy whereby actions would be taken that were beneficial for reasons other than climate change such as energy efficiency, or cost effectiveness.[215] Reductions of GHGs would be the incidental, as opposed to the primary objective of such policies. Similarly, the United States opposed binding targets and emission reduction timetables on the basis of the so-called 'comprehensiveness' argument. This argument had two aspects: first, that developing countries such as China, India and Brazil that were increasing their GHG emissions need to be subjected to similar reduction commitments as developed countries; secondly, that all GHGs, not just carbon dioxide, must be included in the emissions

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[213] IPCC, Summary to Policymakers, *The Regional Impacts of Climate Change: An Assessment of Vulnerability* (1997).

[214] See paragraph 1 of res 43/53 (1988) and paragraph 12 of res. 44/207 (1989) respectively.

[215] D. Bodansky, "Bonn Voyage: *Kyoto's Uncertain Revival*" (Fall 2001) The National Interest, 45 at 52 where he notes that the 'no-regrets' policy goes back to the first Bush and Clinton presidencies. **See also** L.B. Parker and J.E. Blodgett, CRS Report for Congress, "RL 30024: Global Climate Change: From 'No Regrets' to S. Res. 98" at http://www.cnie.org/NLE/CRreports/Climate/Clim-17.cfm#_1_9

reduction strategy.[216] Bodansky also notes that it was unfair to allow developing countries to participate fully in the negotiations for the Kyoto Protocol without assuming any obligations under the agreement.[217] He argues that this violates the basic norm of treaty law that treaties create mutual obligations for the parties. He suggests that an incremental approach involving the assumption of emission reduction commitments by a few like-minded States, might have provided incentives to other States including developing countries, to join the 'club' of emissions trading nations.

On the other hand, there is general agreement that most of the greenhouse effect is attributable to the economic activities of industrialized countries that had 'banked' substantial quantities of GHGs into the atmosphere since the industrial revolution.[218] Recent data shows that atmospheric concentrations of carbon dioxide increased by up to 30 per cent, compared to the period before industrialization.[219] Developing countries therefore argued that industrialized countries owed an ecological debt that rendered it inequitable to subject the two groups of countries to the same disciplines. They called for a regime of differentiated obligations.[220] Dutch Environment Minister and President of the Sixth Conference of the Parties to the Climate Change Convention Jan Pronk, has argued that the exemption of developing countries from binding emission reduction commitments and timetables under the Kyoto Protocol is an invocation of the principle of differentiated responsibilities.[221] According to the World Resources Institute, total global emissions of carbon dioxide up to 1992 amounted to 26 billion metric tons per year, of which 84 per cent (or 22 billion metric tons) was due to emissions from industrial activity. The United States was the world leader in CO2 emissions accounting for 22 per cent of total emissions,

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[216]Sinclair, "Global Warming" *supra note* 210, 576-577. Senate Resolution 98 adopted on July 25, 1997 prohibited the United States government from signing any agreement (The Kyoto Protocol), that limited industrialised countries' GHG emissions without providing for limitations by developing countries. It also prohibited the signature of any agreement 'that would result in serious harm to the economy of the United States'. Parker and Blodgett, *supra* note 215, argue that the Senate's position with respect to binding emission reductions can be summarised into the three Cs: cost, competitiveness, and comprehensiveness.

[217] Bodansky, "Bonn Voyage", *supra* note 215, at 50-51.

[218] K. Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1997) 16(2) Wisc. I.L.J., 353 at 387.

[219] Sinclair, "Global Warming", *supra* note 210, at 560.

[220] D. Goldberg, "As the World Burns: Negotiating the Framework Convention on Climate Change" (1993) 5 Geo.Int'l Envt'l L. Rev. 239. The notion of 'banking' reflects the understanding that GHGs stay in the atmosphere for long periods of time once they are emitted. The effects on climate change of emissions already made are therefore likely to continue to be felt for a long time to come.

[221] M. Wilder and P. Curnow, "The Clean Development Mechanism" (2001) 24 (2) Univ. N.S.W.L.J., at 578.

followed by China (11.9 per cent), Russia (9.4 per cent), and Japan (5 per cent).[222] On a per capita basis, the United States emitted 6503.8 million tons of CO2, representing 24.3 million tons per capita. As the second largest producer, China's per capita emissions stood at 4 million tons in 1997.[223]

But the climate change negotiations were more than a divide between industrialized and developing countries. Industrialized countries such as Germany and Japan saw the prospect of a strong convention as a means of gaining long-term competitive advantage in the area of technology development and innovation.[224] Countries and islands particularly vulnerable to the effects of climate change, (for example the effects of sea-level rise) advocated huge reductions in emissions of greenhouse gases. The Association of Small Island States (AOSIS) advocated that industrialized countries should reduce their GHG emissions by 20 per cent from their 1990 levels.[225] Oil producing countries on the other hand, and countries with large forests such as Brazil and India, were anxious about the possible impacts of the Climate Change Convention on their economies.

Despite these differences in interests and negotiating positions, states managed in the two years between 1990 and 1992, to negotiate a Framework Convention on Climate Change that was opened for signature at the Rio Conference. Negotiations began in earnest when the United Nations General Assembly passed a resolution establishing the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change.[226] The final text of the Convention, though unsatisfactory to many environmentalists and international scholars, was adopted on May 9, 1992 in New York.[227] Goldberg for example, argues that the final text of the convention "was a fait accompli. ...Ground-breaking approaches to dispute settlement, a financial mechanism, technology transfer, [etc.], were dropped in favor of

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[222] World Resources Institute, "Atmosphere and Climate" in *World Resources* (1996-97), 315-325. As at 20 March 2003, the Secretariat of the Framework Convention on Climate Change puts U.S. emissions at 36.1%, followed by the Russian Federation (17.4%), Japan (8.5%), Germany (7.4%) and United Kingdom (4.3%). Of these, the United States has withdrawn from, and the Russian Federation has not yet ratified the Protocol. See http://unfccc.int/resource/kpthermo_if.html accessed 7 April, 2003.

[223] S. Freeland, *"The Kyoto Protocol", supra* note 210, at 533.

[224] P. Sands, *Principles of International Environmental Law, supra*, note 16, at 273.

[225] Hunter et al, *International Environmental Law and Policy, supra* note 152, at 633. As will appear later, this was a highly ambitious proposal considering that up until 1997 when the Kyoto Protocol was negotiated, industrialized countries agreed to reduce their GHG emission by only 5 per cent between 2008-2012.

[226] UNGA res. 45/221 (1990).

[227] 31 ILM (1992), 849.

formulations that in some respects actually marked a retreat from previous international environmental agreements."[228] Sands describes Article 4 of the Convention (the commitments provision) as "the most opaque treaty language ever drafted" and concluded that it does not reflect a clear commitment for industrialized countries to stabilize their GHG emissions at 1990 levels by the year 2000.[229]

Notwithstanding the unsatisfactory language, the FCCC does recognize that climate change is a common concern of humankind, and sets out the objective of international society to stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[230] The element of anthropogenic interference is important because whereas scientific understanding has proved that the global climate is subject to some natural variability, the objective of the climate regime is to address the element of human agency in effecting climate change.[231] To achieve this objective, the Convention calls upon parties to be guided by, *inter alia*, the following principles: intergenerational equity, the principle of common but differentiated responsibilities, the precautionary principle, and the principle of sustainable development. In the latter context, it was emphasized that economic development by developing countries is essential for the adoption of measures to address climate change.[232] To give effect to the differentiated obligations of the parties, the Convention stipulates that developed countries shall provide new and additional financial resources and transfer technology needed to assist developing countries comply with their obligations under the convention.[233] Moreover, the convention provides that compliance by developing countries with their obligations under the climate change regime is conditional upon industrialized countries' fulfillment of commitments relating to financial and technological transfers.[234]

With respect to obligations, Article 4(1) requires all parties to develop, periodically update, publish and make available national inventories of GHG emissions and sinks, and to formulate national and regional mitigation plans. As well,

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[228] D. Goldberg, "As the World Burns" *supra,* note 220.
[229] Sands, *Principles of International Environmental Law, supra* note 16, at 277.
[230] Article 2.
[231] Article 1 (2) defines climate change as change attributable to human activity, in addition to natural variability. **See also** Kiss and Shelton, *International Environmental Law 2nd ed.,* (New York: Transnational Pubs. 2000), at 514; **and** Sinclair, "Global Warming", *supra* note 210, 559-560 citing research evidence to the effect that there is a one-in-forty chance that recent trends in climate change represent a natural variation.
[232] Article 3.
[233] Article 4(3) and (4).
[234] Article 4(7).

parties are required to promote the application of emission control processes and technologies, and promote the sustainable management of sinks and reservoirs of GHGs.[235] In line with the principle of common but differentiated responsibilities, and the recognition that industrialized countries are primarily responsible for climate change, the Convention provides that these countries should take the lead in adopting measures necessary to achieve the objective of the convention. Specifically, they are required to report within a period of six months after the convention enters into force, and periodically thereafter, measures taken by them to reduce emissions of GHGs with the aim of returning those emissions to their 1990 levels by the year 2000.[236]

It is apparent from the foregoing discussion that the convention does not provide specific emission reduction schedules for states. Moreover, in an interim report published in 1994, the IPCC pointed out that even if emissions of CO2 were stabilized at then current levels, atmospheric concentrations of the GHGs would continue to rise for at least two centuries.[237] This means that the commitment to reduce GHG emissions at 1990 levels by the year 2000 that was made by industrialized countries under the Framework Convention would be insufficient to meet the convention's objective of preventing human-induced climate change. The inadequacy of commitments made under article 4 (2) of the Convention was recognized at the first meeting of the Conference of the Parties to the Climate Change Convention held in Berlin (COP 1). This meeting therefore adopted a mandate for parties to commence negotiations for the adoption by developed countries of quantified limitation and reduction objectives within specified time frames.[238] It was on the basis of this mandate that the Kyoto Protocol was negotiated.

The key developments introduced at Kyoto were that developed countries committed to specified emission reduction timetables and agreed upon several cooperative mechanisms both among themselves, and between them and developing countries. The objectives of these cooperative mechanisms are to help developed countries achieve their reduction targets, and promote sustainable development in

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[235] Article 4(1).
[236] Article 4(2). **See also** G. Gupta, "Leadership in the Climate Regime: Inspiring the Commitment of Developing Countries in the Post-Kyoto Phase" (1998) 7(2) R.E.C.I.E.L., 180-190.
[237] Kiss and Shelton, *International Environmental Law, supra* note 231, at 516.
[238] Conclusion of Outstanding Issues and Adoption of Decisions (The Berlin Mandate) FCCC/CP/1995/L.14 (April 7, 1995).

developing countries.[239] Developing countries did not commit to any reduction timetables.

With respect to emission reductions, Article 3 of the Protocol requires developed countries to reduce their greenhouse emissions by at least 5 per cent below their 1990 levels between the years 2008 and 2012, after which new commitment periods would be negotiated.[240] Article 2 of the Protocol lists the methods that may be adopted by developed countries to meet their emission reduction commitments and contribute to sustainable development. These include the enhancement of energy efficiency, protection and enhancement of GHG sinks and reservoirs, promotion of sustainable agriculture, increased use of new and renewable forms of energy and of environmentally sound technologies, the reduction or phasing out of market imperfections and the use of economic instruments, as well as the reduction of methane through recovery and use in waste management.[241]

However, while the Kyoto Protocol marked an important milestone in international environmental law in that it was the first time that countries agreed to specific timetables for the reduction of greenhouse gases that cause global warming, both its potential contribution to ameliorating the climate change problem and its future existence, remain open to question. First, there is evidence to suggest that the reduction by industrialized countries of GHG emissions by 5 per cent below 1990 levels that was agreed at Kyoto, even if fully implemented, would not affect current concentrations of GHGs in the atmosphere, nor affect the predicted changes in global climate that would result from it.[242] Secondly, it is now beyond dispute that even these limited Kyoto commitments would not be met. In large measure, this is the result of United States opposition to the Kyoto Protocol. While the Clinton administration signed the Protocol, the Republican government of George W. Bush has since announced that it would not support the implementation of the Kyoto accord.[243] President Bush argued that the accord was 'flawed', 'costly' and 'unfair' because it

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[239] Article 3 and 12 of the Protocol.
[240] D. Golberg, *A Legal Analysis of the Kyoto Protocol* (Washington DC: CIEL 1995). The Kyoto Protocol covers the following GHGs: carbon dioxide, methane, nitrous oxide, hydrofloruocarbons (HFCs), perfloruocarbons (PFCs) and sulphur hexaflouride (SF6). It covers GHGs not controlled under the Montreal Protocol on Substances that Deplete the Ozone Layer.
[241] Sinclair, "Global Warming", *supra* note 210, at 566.
[242] J. Werksman, "Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime" (1998) Y.B.I.E.L. 48, at 49 citing Bolin, "The Kyoto Negotiations and Climate Change: A Scientific Perspective" 279 Science 330 (January 1998).
[243] Freeland, *"The Kyoto Protocol", supra* note 210, 538.

did not require emission reductions by developing countries such as China and India.[244] Instead of the precautionary approach upon which the whole climate regime was based, George Bush announced in June 2001 that the United States would adopt a 'science-based' approach to climate change.[245] As the world's largest emitter of GHGs responsible for 36 per cent of global emissions, it is unfortunate that the United States chooses the position of a 'global warming skeptic' and a regime laggard. Currently, all the evidence suggests that the Kyoto Protocol may not come into force without United States ratification and participation. This is because in order for the Protocol to enter into force, it must be ratified by at least 55 Parties to the Framework Convention. In addition to the number of parties, the Protocol must be ratified by a sufficient number of industrialized country parties so as to represent at least 55 per cent of the total CO2 emissions of these countries in 1990.[246] As at March 2003, the status of ratification of the Kyoto Protocol by Annex 1 parties reveals that only 43.9 per cent of global emissions would be reduced.[247] This falls far short of the threshold required for the Protocol to come into force. Most commentators agree that without United States participation, it will be virtually impossible to meet these requirements. For example, Robert Watson, the Chairman of the IPCC is quoted as saying that "if the US did not ratify the *Kyoto Protocol* then clearly the emissions will not be reduced by an average five per cent during the 2008-12 period, it will be significantly less than that."[248]

In addition to quantified emission limitation and reduction commitments adopted by the developed states, recognition of the interdependence of the global climate was brought to the fore through the cooperative mechanisms that were agreed upon under the Protocol. There were three such mechanisms: emissions trading, joint implementation, and the clean development mechanism.[249] Emissions trading and joint implementation are both actions intended to help developed states meet their reduction targets in a cooperative manner.

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[244] Ibid.
[245] Ibid., at 540.
[246] Article 25 (1) of the Kyoto Protocol. It will enter into force 90 days after the requisite number of ratifications have been secured.
[247] As at 20 March, 2003 there were 84 signatories, and 106 ratifications, acceptances, approvals or accessions to the Kyoto Protocol. The total number of Annex 1 countries that have ratified the Protocol at that date account for 43.9% of total emissions. **See** http://unfccc.int/resource/kpstats.pdf (accessed 7 April, 2003).
[248] R. Watson (April 2001), cited in Freeland, *"The Kyoto Protocol" supra,* note 210, at 542.
[249] Articles 16bis, 6, and 12 respectively. See also Werksman, "Compliance and the Kyoto Protocol", *supra,* note 242, at 49.

On the other hand, the Clean Development Mechanism (CDM) is a cooperative mechanism between developed and developing countries intended to address both the former's obligation to meet emission reduction obligations, and developing countries' emphasis on sustainable development.[250] Through the CDM, developed countries or companies from developed countries, could invest in projects in developing countries that reduce GHG emissions and credit the resulting "Certified Emissions Reductions" towards their emission reduction commitments under the Kyoto Protocol.[251] In order for a project to qualify under the CDM and receive certification, the following criteria must be satisfied: (1) it must be located in a developing country; (2) both countries (the sponsoring industrialized country and the recipient developing country) must voluntarily accept to participate in the project; (3) the project must result in the production of real, measurable and long-term benefits relating to the mitigation of climate change; and (4) the emission reduction from the project must be additional to any emission reductions that would occur in the absence of the CDM project.[252]

The CDM was constructed to facilitate the realization of the principal objective of the climate regime i.e. the reduction in emissions and, ultimately, the stabilization of atmospheric concentrations of GHGs. Its purpose is to provide a less costly way for industrialized countries to meet their emission reduction obligations. Secondly, in pursuance of the objective of sustainable development, and to allow scope for developing countries to contribute to the abatement of climate change, the CDM provides for developed countries to fund these projects in developing countries. It is structured so as to result in win-win outcomes between the developed countries (and

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[250] Article 12 provides that "The purpose of the [CDM] shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3." **See** L. Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime" (2000) R.E.C.I.E.L., Vol. 9 (2), 120 at 129-130. He also argues that the balance of commitments under the climate regime requires developing countries to address the adverse effects of climate change through adaptation measures based on their developmental needs. On the other hand, it requires industrial countries to address climate change through mitigation commitments based on their historical responsibility for creating climate change. For Rajamani, this balance of commitments reflects the invocation of the principle of common but differentiated responsibility in the climate regime.

[251] Article 12 (3) of the Kyoto Protocol. For a discussion of the CDM see, International Energy Association, "New Partnerships for Sustainable Development: Elaborating the Clean Development Mechanism under the Kyoto Protocol" at http://www.iea.org/ieakyoto/docs/cdmela.htm. For thoughts on the application of the CDM in Africa, see Y. Sokona, S. Humphreys, and J.P. Thomas, "The Clean Development Mechanism: What Prospects for Africa?" at http://www.edna.sn/energie/cdm2.htm ; and EDNA *Tiers Monde,* "From Joint Implementation to the Clean Development Mechanism: Should African Positions Change after the Kyoto Protocol?" at http://www.edna.sn/energie/cc/cdm.htm

[252] Article 12(5) of the Kyoto Protocol. **See also** M. Wilder and P. Curnow, "The Clean Development Mechanism", *supra* note 221, at 579; **and** Sinclair, "Global Warming", *supra,* note 210, at 571.

their companies) that fund the projects, and the host developing nations. Benefits to the parties include: (1) developed countries can claim the certified emissions towards their reduction obligations; (2) developing countries can acquire environmental technology and investment capital that otherwise might not have been available. Through this process, developing countries could hopefully leapfrog the environmentally destructive development paths that created the climate problem in the first place.[253] The CDM thus seeks to bring together the objectives of environmental preservation and economic development for developing countries. It is for this reason that the CDM promises to be one of the more important instruments for the attainment of sustainable development in the issue-area of climate change.

However, with respect to Africa, the potential success of the CDM must be analyzed within the context of the continent's overall contribution to GHG emissions. The available evidence suggests that in view of the low level of industrialization on the continent, emissions of GHGs from Africa are negligible compared to other parts of the world. Figures for 1992, the year that the Climate Change Convention was concluded, reveal that Africa accounted for only 3.2 per cent of total carbon dioxide emissions, and 7.7 per cent of methane emissions.[254] These figures further reveal that despite the interdependence of the global climate, and the conclusion of the IPCC that Africa is among the areas of the world most vulnerable to the effects of climate change, the continent's priorities obviously lie not so much in emission reduction, as in the adoption of development paths that avoid emissions in the first place. That way, the CDM would be contributing positively both to sustainable development in Africa, and avoiding climate change. As a result, the success of the CDM in Africa must be measured not by the quantum of GHG emissions reduced, but by the number of environmentally friendly and 'emission-avoiding' projects that the CDM brings to the continent. The idea is that the CDM would result in investments in development projects in Africa that are environmentally and technologically innovative so as to avoid emissions of GHGs. By adopting this development path, which is consistent with both the preventive and precautionary approaches, African countries would be avoiding the environmentally deleterious industrialization processes that characterized the development of the West, and thus contribute to global sustainable development. It

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[253] M. Wilder & P. Curnow, "The Clean Development Mechanism", *supra* note 221, at 582.

[254] The Clean Development Mechanism and Africa – Report from a Regional Workshop, Accra, Ghana 21-24 September, 1998 at www.uccee.org/CDM/accra/index.htm#proceedings

is hoped that industrialized countries that fund such projects would still be able to claim credits (in terms of avoided emissions) towards their emission reduction obligations under the Kyoto Protocol, and at the same time, contribute to sustainable development in developing countries. For example, Sokona and his associates have argued that the crucial criterion for Africa as far as the CDM is concerned is the necessity "to think in terms of **avoided future emissions** ... rather than emission reductions."[255]

It is clear from the above discussion that developing countries do not have specific emission reduction commitments under the FCCC and the Kyoto Protocol. I have suggested that in light of the low rate of emissions in most developing countries, particularly those in Africa, the emphasis of the CDM should be on development projects that avoid emissions. This has the advantage of simultaneously contributing to the reduction of carbon emissions, and contributing to sustainable economic development in developing countries. That leaves the question of what should happen to current GHG emitting projects in developing countries such as Nigeria. I would argue that despite the absence of a treaty obligation for developing countries to reduce GHG emissions within a specific timetable, the consensus over the negative impacts of climate change that resulted in adoption of the Convention and the Protocol, creates a legitimate expectation that even these countries should, within the context of their stages of development adopt development paths consistent with the objectives of the Climate regime. After all, it is a principle of customary international law that a signatory to an international treaty is under an obligation not to take measures that would defeat the object and purpose of the treaty.[256] In the alternative, this obligation could be based on the principle that climate change is a matter of common concern. Moreover, adherence to the concept of sustainable development requires that current development paths not undermine the basis for development in the future.

Consequently, even though Nigeria is not bound to reduce its GHG emissions within any specific period of time, I would argue that international society has a legitimate expectation that the country will adopt regulatory measures to avoid future GHG emissions. Such a prudential course of action would be consistent with the precautionary and preventive principles. A precautionary approach is further

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[255] Y. Sokona, S. Humphreys and J.P Thomas, "The CDM: What Prospects for Africa", *supra*, note 251, at 4. [Emphasis in original].

reinforced by the fact that gas flares in Nigeria have low combustion efficiency, meaning that most emissions are in the form of methane, which has a higher global warming potential than carbon dioxide.[257] By some accounts, at least 90 per cent of Nigerian natural gas is made up of methane, with carbon dioxide accounting for between 1.5 and 2 per cent.[258] This implies that on a business as usual scenario, Nigeria could be a significant contributor to global warming. In addition to the global warming potential, gas flaring also wastes a valuable resource. For example, some have argued that the 18 billion cubic meters of associated natural gas flared in Nigeria every year is equivalent to about 45 per cent of the energy requirements of France.[259] Abatement of gas flaring could capture significant economic resources, which could then be utilized to improve the living conditions of thousands of Nigerian citizens.

(i) Local Effects of Gas Flaring

In addition to the potential global effect of interference with the climate system, gas flaring in the Niger Delta and the emissions of CO2 and methane, have affected human health and local ecosystems. Local communities in the Niger Delta have complained that gas flares are located too close to human habitations with adverse consequences to their buildings, crops, and to human health. Shell denies that flares are located close to villages; instead they argue that local settlements have grown around the flares, and that they usually relocate flares where this happens.[260] The local population not only deny Shell's claim that flares are relocated from community residences, they also speak of a host of other environmental and social effects of gas flares. Ken Saro-Wiwa for example, wrote about the effect of gas flares in the following terms:

> The most notorious action of [the oil] companies ... has been the flaring of gas, sometimes in the middle of villages, as in Dere ... or very close to human habitation as in the Yorla and Korokoro oilfields in Ogoni. This action has destroyed wildlife, and plant life, poisoned the atmosphere and therefore the inhabitants in the surrounding areas and made the residents half-deaf and prone to respiratory diseases. Whenever it rains in Ogoni, all we have is acid rain which further poisons water courses, streams, creeks and agricultural land.[261]

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[256] Vienna Convention on Law of Treaties, 8 ILM 679, Art. 18. The Convention was adopted on 23 May 1969, and entered into force 27 January 1980.
[257] Moffat and Linden, "Perception and Reality" *supra* note 32 at 533.
[258] N. Ashton-Jones, *Human Ecosystems of the Niger Delta, supra,* note 150, at 137. Both Moffat and Linden, and the World Bank estimate the ratio of methane to CO2 in Nigerian natural gas at 64 v. 1.
[259] Ibid., at 138.
[260] A. Rowell, "Shell-Shocked" *supra* note 82, at 10 citing a senior Shell official.
[261] Ken Saro-Wiwa, *Shell in Ogoni and the Niger Delta* (Emiroaf 1992) in A. Rowell, Shell-Shocked, at 10.

The most immediate and visible effect of acid rain is that it has a corrosive effect when it falls on the corrugated iron sheets that are predominantly used for roofing in the Niger Delta.[262] Others have questioned the allegation of acid rain, arguing that because of the low sulphur content of Nigerian crude oil, it does not contain adequate amounts of nitrogen oxide to either cause acid rain or have a corrosive effect.[263] While there may be debate about whether gas flaring causes acid rain, studies have shown increased temperatures in the areas where flares are located, as well as variances in the composition of species and vegetation.[264] Light pollution is also said to be a problem that has affected the life patterns of nocturnal animals. Consequently, they migrate from the Niger Delta to more friendly habitats, making hunting more difficult for the local population.[265] Moreover, as a low-lying area, the Niger Delta is one of the more vulnerable areas to the effects of sea-level rise. It is estimated that a one meter rise in sea level would severely disrupt the oil and gas industry in Nigeria, force up to 80 per cent of people in the Niger Delta to relocate, and destroy vast areas of agricultural land, forests and fisheries.[266]

Gas flaring from oil operations is therefore both a local environmental and social problem, and a potential global problem. The Nigerian government recognized this problem and enacted the *Petroleum (Drilling and Production) Regulations* that require oil companies to submit gas utilization plans within a period of five years from the commencement of oil production.[267] After major non-compliance on the part of oil companies, the government enacted the *Associated Gas Re-injection Act*, which provided that oil companies must provide gas utilization plans by 1980, or face fines.[268] This legislation was also rendered largely ineffective for two reasons: first, the government did not have any gas utilization projects in place; secondly, oil companies argued that the geology of oilfields in the Niger Delta made it uneconomical to reinject the gas.[269] For these reasons, and due to the power of the oil

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[262] Okonta and Douglas, *Where Vultures Feast, supra* note 28, at 73. **See also** Human Rights Watch, *The Price of Oil, supra* note 107, at 73-74.
[263] World Bank, *Defining an Environmental Strategy, supra* note 27, at 59.
[264] A.O. Isichei and W.W. Sanford, "The Effects of Waste Gas Flares on the Surrounding Vegetation in South-Eastern Nigeria," 13 Journal of Applied Ecology, 177-187.
[265] Human Rights Watch, *The Price of Oil, supra* at 74.
[266] N. Ashton-Jones, *Human Ecosystems of the Niger Delta, supra,* note 150, at 147.
[267] Regulation 42 Petroleum (Drilling and Production) Regulations, 1969.
[268] Associated Gas Re-injection Act, Cap. 26, *Laws of the Federation of Nigeria,* (1990). This Act came into force in 1979.
[269] Human Rights Watch, *The Price of Oil, supra* at 73.

industry lobby, the government backed down and enacted the *Associated Gas Reinjection (Continued Flaring of Gas) Regulations,* which allowed oil companies to continue flaring gas and imposed a fine for every cubic feet of gas flared.[270] Even after these fines were revised upwards in 1998, they still stood at about 11 United States cents for every 1000 cubic feet of gas flared into the atmosphere in Nigeria. It is not surprising therefore that oil companies find it more economical to pay these negligible fines, rather than adopt oil production processes and technology that would avoid gas flaring in the first place.

In most other countries, associated gas is re-injected back into the well or utilized for other purposes. For example, in the Kutubu Petroleum Development Project located in the Kikori River basin of Papua New Guinea, the operator Chevron Niugini invited the World Wildlife Fund to implement an integrated conservation and development project with the objective of minimizing the physical, social and economic impacts of the petroleum project on the local people and their environment.[271] Under the project, most of the associated gas is re-injected into the reservoir, while some is used for fuel.[272] So clearly, this project is operated without any gas flaring. There is no reason why Chevron and the other oil companies cannot operate along similar (sustainable development) lines in the Niger Delta.

Apart from the above laws, the Nigerian government and oil companies have also developed a Liquefied Natural Gas Project (LNG project) which is partly intended to solve the gas flaring problem. The LNG project is a US $3.8 million investment with the Nigerian National Petroleum Corporation (NNPC) holding 49 per cent of the shares; Shell (25.6%); Elf (15%), and Agip holds 10.4% of the shares.[273] The International Finance Corporation was going to take a 2 per cent shareholding, but declined to do so in the wake of the execution of Ken Saro-Wiwa and other Ogoni leaders in 1995. It is estimated that the LNG project would utilize up to 65 per cent of associated natural gas produced as a by-product of oil production by the year 2010.[274] While the government's policy is to stop all gas flaring by 2005, Shell, the largest oil

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[270] *Associated Gas Reinjection (Continued Flaring of Gas) Regulations* (1980). See Human Rights Watch, *The Price of Oil,* at 73.

[271] J.B. Price and A.P. Power, "Kikori River Basin Project to Sustain Environment Alongside Development" Society of Petroleum Engineers (SPE) Publication No. 28767, 1994, at 255.

[272] Ibid., at 256.

[273] NNPC, "Liquefied Natural Gas Project" at www.nigerianoil-gas.com/naturalgas. **See also** C.E. Emole, "Nigeria's LNG venture: Fiscal Incentives, Investment-Protection Schemes and ICSID Arbitration" (1996) 8 Afr. J.Int'l & Comp. L., 169.

[274] Human Rights Watch, *The Price of Oil, supra* at 33.

production company in the country, has only committed to stop routine flaring by 2008.[275] It appears that while there is significant rhetoric on the part of both the government and the oil industry to stop gas flaring, there is a lack of will on both sides, mainly because of what the oil companies consider to be the economic costs of adopting alternative operational technology. One can only hope that the LNG project would provide the economic incentive to stop gas flaring, and result in significant reductions in GHG emissions.

Meanwhile, some commentators have expressed concern about the environmental and social cost of the LNG project itself, and criticized the EIA conducted on the project as inadequate.[276] One review of the EIA on the LNG project concluded *inter alia*, that "the Environmental Statements fell well short of what would be required in any developed country and do not allow the reader to make an informed judgment about the relative environmental benefits and costs of the scheme. It is normal practice to consider alternatives in an environmental assessment, but this has not been done. Significant issues have been overlooked or deferred to a later date."[277]

(ii) The Niger Delta Environmental Survey (NDES)

Established in 1995 and funded by Shell, the NDES was a collaborative effort between the government, the oil industry, local communities and other stakeholders to study the socio-economic and human dimensions of environmental degradation in the Niger Delta. The survey was originally conceived by Shell "to catalogue the physical and biological diversity of the ... Niger Delta."[278] This information-gathering objective was rejected as too narrow by the NDES steering committee, particularly Professor Clauke Ake, the representative of the oil producing communities, and Struan Simpson of the Conservation Foundation in London. The mission statement upon which the Committee's work would eventually be based, provided that the aims of the survey would be to carry out a "comprehensive environmental survey of the

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[275] NNPC, *National Gas Policy* (1998) at www.nigerianoil-gas.com/naturalgas **See also** SPDC, *Annual Report* (1998), 10 at www.shellnigeria.com/info/env_1998/envreport_t.htm

[276] Okonta and Douglas, *Where Vultures Feast, supra* note 28, at 184-185.

[277] Dr. Phil Smith, *Review of the Environmental Statements Prepared for Nigeria LNG Ltd by SGS Environment Ltd* (London: Aquatic Environmental Consultants, 1995), in Human Rights Watch, *The Price of Oil* (1999), at 58.

[278] SPDC, Press Release, February 3, 1995 Lagos, cited in Human Rights Watch, *The Price of Oil,* at 88.

Niger Delta, establish the causes of ecological and socio-economic change over time and induce corrective action by encouraging relevant stakeholders to address specific environmental and related socio-economic problems identified in the course of the survey, to improve the quality of life of the people and achieve sustainable development in the region."[279] The proceedings of the committee were to be based on participatory principles involving all stakeholders, particularly communities in the Niger Delta. The NDES was expected: "to recommend reform of policies and practices which encourage social dislocation and environmental degradation; address poverty-induced causes of environmental degradation and social tension; improve public sensitivity and understanding of environmental issues and the application of this understanding; and strengthen the capacity of the people to identify and deal with environmental problems..."[280]

Unfortunately, despite these ambitious objectives, the work of the NDES was mired in controversy. Initially, there were questions about the Committee's independence from the oil industry, which funded it. Then, following the execution of Ken Saro-Wiwa in November 1995, Professor Claude Ake tendered his resignation from the committee, citing "the tragic enormity of recent happenings and the crisis of conscience arising from them", and concluding that the NDES was "diversionary and morally unacceptable."[281] The representative of the Conservation Foundation also resigned from the NDES in December 1997. These two resignations cast a shadow over the legitimacy of the NDES process since they represented some of the few independent voices on the committee. In addition, the work of the survey itself seemed to have ground to a halt after 1996. The first report submitted by a Dutch Environmental Consultancy was criticized by many environmentalists for failing to provide clear ideas on progress achieved, and future directions.[282] Disagreements between the Committee and the Consultants led to the consultants withdrawing from the project. A local Nigerian environmental consultancy that was subsequently retained, submitted a four-volume report in September 1997 that was deemed to represent the end of the first phase of the project. The second phase is apparently still

[279] NDES, "The Niger Delta Environmental Survey: Background and Mission," NDES Briefing Note 1, October 1995.
[280] NDES, "The Niger Delta Environmental Survey: Background and Mission" , cited in Human Rights Watch, *The Price of Oil,* at 89.
[281] Claude Ake, Letter of Resignation to Ganaliel Onosode, Chairman of the Steering Committee of NDES, November 15, 1995, cited in Okonta and Douglas, *Where Vultures Feast,* at 169. Professor Ake later died in 1996 in a suspicious plane crash.

in abeyance.[283] However, after the return to civilian rule in 1999, the government of President Obasanjo established the *Niger Delta Development Commission,* which has responsibility for identifying factors inhibiting the development of the Niger Delta, and to recommend policies for sustainable development in the region.[284]

To sum up, it is clear that Nigeria is under an international legal obligation arising from customary law and various environmental treaties, to take measures to avoid harm to both its domestic environment and areas beyond its national jurisdiction. This responsibility includes taking regulatory measures to ensure that the conduct of business operations and investment activities within her territory do not undermine the environmental basis for future development. I have argued that by failing to enact adequate legal provisions, or through inadequate implementation of existing laws with adverse effects on sectors of the environment that are of common concern to international society, Nigeria has failed to discharge this responsibility. In order to remedy this situation, I propose that Nigerian law needs to be revised with the object of incorporating the precautionary principle, the polluter-pays-principle, the EIA principle, and the principle of openness, public participation and access to information. Arguably, incorporation of these principles would inject legitimacy into processes of decision-making within governmental and oil industry circles, and help to bring the predominant economic objectives of government and business closer to the social and environmental challenges facing Nigerian society.

However, I also recognized that while these principles may play important roles in the evolution of the legal regime towards sustainable development, the Nigerian situation demands a broader approach than simply legal reform. The failure of legal implementation and the degree of official corruption in Nigeria suggest that legal norms have lost significant autonomy.[285] Legal rules cannot continue to exist simply as tools for government officials to demand corrupt payments in exchange for noncompliance with regulatory standards. A precondition of effective legal reform would therefore be the restoration of some of that lost autonomy through, *inter alia,*

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[282] Human Rights Watch, *The Price of Oil,* at 89.

[283] Okonta and Douglas, *Where Vultures Feast,* at 169-170.

[284] Niger Delta Development Commission (Establishment etc.) Act, No. 6, *Laws of the Federation of Nigeria,* (2000). **See** *infra* Chapter 4 for a more complete discussion of the NDDC.

[285] Transparency International, The Corruption Perceptions Index 2001 available at http://www.transparency.org/cpi/2001/cpi2001.html lists Nigeria as one of the most corrupt countries in the World. **See also** A.B.M Marong, "Toward a Normative Consensus Against Corruption: Legal Effects of the *Principles to Combat Corruption in Africa*" (2002) 30 (2) Denver J. Int'l L & Pol., 99 at 119-120.

mechanisms to ensure rigorous, consistent, and coherent application of law to all actors in Nigerian society. Part of this process might entail a broader governance space that allows civil society actors to monitor governmental and business conduct, and where necessary, seek regulatory compliance. More broadly, it will require the institutionalization of the rule of law, independent, effective, and efficient judicial and legal structures to govern the conduct of all actors, and democratic and accountable governance. In effect, any attempt to remedy the situation in Nigeria must go beyond structural legal reform; it must address the governance environment itself.

Chapter 4: Oil Wealth and the Challenge of Social Development in Nigeria

> *The real wealth of a nation is its people. And the purpose of development is to create an enabling environment for people to enjoy long, healthy and creative lives. This simple but powerful truth is often forgotten in the pursuit of material and financial wealth.* UN Human Development Report, 1990.

> *If I were pregnant and went into labor here, I would have to be taken by boat to a hospital, because there are no health facilities here.* Per Niger Delta Woman (Aug. 2002).

1. Introduction

This chapter provides the third pillar of my analysis of Nigeria's petroleum laws from a sustainable development perspective. In the previous chapters, I argued that as an analytical concept, sustainable development has three integral components: economic development, environmental protection, and social development. In chapter two, I reviewed the principal features of the legal regime governing investments in Nigeria's petroleum sector and argued that Nigerian law leans heavily in favor of the realization of corporate profit and governmental revenue. The petroleum law was principally directed at economic gain. This focus has two implications for sustainable development analysis. First, the law fails to provide for the internalization of environmental costs arising from oil production. This shortcoming has had devastating effects on the ecology of the oil producing areas, as discussed in chapter three. Secondly, Nigerian law fails to provide adequately for a fair distribution of the benefits of oil production. I argued in chapter two that oil wealth was utilized by Nigeria's governments to buy loyalty from various local constituencies, for political patronage, on massive and sometimes questionable governmental expenditure, or otherwise corruptly appropriated to the external bank accounts of government officials.[1] Most of this expenditure took place at the cost of investments in social infrastructure and on meeting the basic needs of the population. The

[1] Okonta and Douglas, *Where Vultures Feast: Shell, Human Rights and Oil in the Niger Delta* (San Francisco: Sierra-Club Books, 2001) 39, at 41[**hereinafter "Where Vultures Feast"**]. It has been reported that during his term of office as military ruler of Nigeria between 1993 and 1998, General Sanni Abacha stole and deposited into offshore accounts, some $10 billion from Nigeria's national coffers. Since Abacha's death in 1998, successor governments have attempted to recover some of this money. His immediate successor General Abubakar claimed to have recovered $1 billion from General Abacha's family, and a further $250 million from a former close aide. Similarly, General Ibrahim Babangida who ruled Nigeria from 1985-1993, is said to have failed to account for a windfall of up to $12 billion that accrued to Nigeria as a result of the oil price rise during the Gulf War from 1990-91.

situation is particularly acute in the oil producing regions of the Niger Delta. Since the 1950s, this region has produced billions of dollars worth of oil for Nigeria. However, most inhabitants of the Delta still lack access to a regular supply of clean drinking water, primary health care, adequate shelter, basic educational establishments, decent sanitary facilities and adequate nutrition. In other words, there is an acute social development challenge in the Niger Delta. It is this paradox of abject poverty in a sea of wealth that provides the subject matter of this chapter. I will argue that the law and policy governing the petroleum sector in Nigeria, as well as the utilization of oil revenue have both been insufficiently directed to the needs of people and the alleviation of poverty. This shortcoming provides further evidence of the insufficiency of the legal regime for sustainable economic development in Nigeria.

I will discuss the theme and implications of social development from two theoretical perspectives based on the responsibilities of the key players in Nigeria's petroleum sector – the government and the multinational oil companies. First, I will argue that among other things, good governance requires that governments be responsive to the development needs of the governed. Where they fail to do so, as in the case of Nigeria vis-à-vis the people of the Niger Delta, that factor ought to reflect in determinations of governmental legitimacy. This argument is grounded in social contract theory, and assumes that the exercise of governmental power is based on an implicit contract or understanding that governments have, *inter alia*, a responsibility to work for the development of the people of a country.[2] Classic social contract thought as developed by Locke, Hobbes and Rousseau, posits that individuals are born in a state of natural freedom, and only consent to join the *polis* or civil society in anticipation that by such union, they would enjoy greater protections for their life, liberty and property.[3] Thus, the natural liberties of members of society are subject only to those limitations that are

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[2] B.R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press 1999), at 65 **[hereinafter "Governmental Illegitimacy"]** noting *en passant,* that "Appeal is frequently made, ... to the terms of a supposed social contract, whether historical or abstract, that forms the basis of legitimate rule." **See also** A.I Ikein, *The Impact of Oil on a Developing Country: The Case of Nigeria* (New York: Praeger, 1990) at 179 **[hereinafter "The Impact of Oil"]**: " A good government is not one that protects the interest of only privileged or favored interest groups but one that seeks and protects the general welfare of its people."

[3] J. Keane, *Public Life and Late Capitalism: Toward a Socialist Theory of Democracy* (Cambridge: Cambridge Univ. Press, 1984), at 229-236 for a summary of the contractarian theses of Hobbes, Rousseau, Kant, Hume and Locke.

consequent upon their own consent to governance by a select few. Social contractarians therefore argue that the legitimacy of governmental power is, at least in part, conditioned by protecting the lives, freedom and property of citizens.[4]

I argue that the terms of the governance contract extend beyond protection of life, liberty and property, to an obligation to provide the circumstances necessary for the realization of basic human well-being. According to Roth, "... it seems undeniable that all societies and cultures charge the holders of state power with responsibility for the well-being of their subjects ... The very notion of governance is, at root, teleological."[5] Where a government neglects this duty, and the exercise of political authority becomes, instead, an avenue for the maximization of private gain at the cost of social and economic development for the generality of the population, that circumstance arguably undermines the substratum of the initial governance contract, thus de-legitimizing the hitherto mandate to rule. This extended view of social contract theory is implicitly supported by Locke himself, who once argued that "the linchpin of a government's legitimacy was its conduct, not its form."[6] Similarly, both Rousseau and Hobbes have argued that governments could lose their mandate to govern "when the holders of power behave so as to undermine the very purposes for which individuals consent to be governed in the first place."[7]

I shall call this approach 'internal governmental legitimacy'. It contrasts with the received learning on questions of governmental legitimacy at international law whereby at various times in the development of international rules, the determination of the question of legitimacy has been based on the principle of effective control, or the 'democratic entitlement' principle.[8]

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[4] Ibid., at 236: "... individuals were naturally and equally at liberty to 'order their Actions, and dispose of their Possessions, and Persons as they think fit'. Their political obligations could only be mutually negotiated and self-imposed. Insofar as the natural liberty of individuals ... was synonymous with their freedom from any *a priori* duties to earthly sovereigns, the 'Liberty of Man, in Society, is to be under no other Legislative Power, but that established, by consent, in the Commonwealth'", citing Locke, *Two Treatises of Government* (New York, 1963), bk. 2, sec 22.

[5] Roth, *Governmental Illegitimacy, supra* note 2 at 31-32.

[6] Ibid., at 27, citing J. Locke, "Second Treatise of Government" in *Two Treatises of Government* (London: J.M.Denet & Sons Ltd, 1982), 182-183.

[7] Ibid., at 31.

[8] Roth *supra* note 2 at 27-30, noting that effective or *de facto* control has now all but waned as a test of governmental legitimacy, and that it is gradually being replaced by an internal criterion, i.e. popular sovereignty. In other words, it is the will of the people within a state that is dispositive of the question of

While both popular sovereignty and democratic entitlement are internal tests of governmental legitimacy, they do not take into account the behavior of governments once they assume the reins of power. In other words, they are both process approaches and fail to explain what effect governmental conduct should have on determinations of the question of legitimacy. I will suggest that international law rules should include a normative internal criterion for the determination of questions of governmental legitimacy or illegitimacy. This thesis proposes one such approach - a teleological one - based on analysis of the degree of congruence between the terms of the implicit social contract referred to above, and the fact of governmental conduct vis-à-vis the well-being of the citizenry.

It is conceivable that many positivist scholars would object to such an approach as a violation of national sovereignty and the principle of non-interference with domestic affairs.[9] In response, I will argue that the traditional approach to state sovereignty has already been significantly eroded at international law. International law now recognizes that there are certain fundamental norms that need to be observed in the interests of international society as a whole, and that where they are violated, the compliance interest of international society takes precedence over the political sovereignty of particular nations. The principle of humanitarian intervention is one example of such departure from traditional sovereignty doctrine. According to Roth, humanitarian intervention is justified whenever governments violate the fundamental norms by which citizens' consent to governance. He argues that a certain 'overlapping consensus' exists as to what constitutes the 'natural duties' of governance.[10] This approach to governmental legitimacy

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governmental legitimacy. He notes that it is this shift that permits scope for de-legitimizing governments either through challenging the validity of processes by which governmental power was acquired in the first place, or by an argument that those delegated with government power have 'violated the terms of the delegation', or that 'changed circumstances have made the purposes of the delegation obsolete.' On the democratic entitlement argument, See T.M. Franck, "The Emerging Right to Democratic Governance", (1992) 86 A.J.I.L. 46; T.M. Franck, "Fairness to Persons: the Democratic Entitlement" in Franck, *Fairness in International Law and Institutions* (1995) 83-139; G.H. Fox, "The Right to Political Participation in International Law", (1992) 17 Yale J.I.L. 539

[9] Charter of the United Nations, Article 2(7).

[10] Roth, *Governmental Illegitimacy, supra* note 2 at 32: "If governance is universally conceived in normative terms, it is not unreasonable to assume that there is some overlapping consensus as to a normative *sine qua non* of governance, on which can be predicated an international law of humanitarian intervention that overrides state sovereignty." He places non-violation of *jus cogens* norms such as genocide and slavery on the list of natural duties owed by governments, and upon which humanitarian intervention could be based.

is also consistent with the UN Charter's objective of maintaining international peace and security, because failures of governance could, and have in the past, led to massive outflows of national populations across borders such as happened in Liberia, Sierra-Leone, Rwanda, Burundi, and the former Yugoslavia.[11]

The second theoretical perspective of the chapter is the doctrine of corporate social responsibility. Traditionally, there are two main schools of thought on corporate social responsibility. On the one hand, 'the shareholder model' posits that the primary objective of the corporate form and the sole duty of corporate management, is to exercise their functions to maximize returns for shareholders.[12] On the other hand, scholars adhering to the 'stakeholder model' argue that shareholder primacy is based on the individualist orientation of post-war American liberalism which is inconsistent with the widespread effects that corporate actions have had on a plurality of constituencies.[13] Grounded in communitarian ethics, stakeholder theory identifies the corporation as part of society, and argues that corporate actions have effects on many other groups, such as employees, suppliers, local communities and similarly situated stakeholders. As a result, it is argued that corporate management does have a responsibility to take the interests and concerns of these other stakeholders into account in their day-to-day decision-making.[14]

A third stream of scholarship situates the corporate social responsibility debate within the context of economic globalization. It is argued that multinational corporations operate in many underdeveloped countries such as Nigeria, which are characterized by

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[11] Since the September 2001 attacks on the United States, the fight against international terrorism has essentially been elevated to a common concern of the international community, and a crucial element for the maintenance of international peace and security. This interest of the international community has justified the authorization of the use of force to remove the Taliban regime in Afghanistan, and for Iraq to disarm itself of weapons of mass destruction. See UN Security Council Res. 1383 (2001) dated 6 December, 2001 on Afghanistan; and Security Council Res. 1441 (2002) dated 8November 2002, on Iraq.

[12] H. Hansmann and R. Kraakman, "The End of History for Corporate Law" (2001) 89 Georgetown L.J. 439-468; **See also** C.A. Williams, "Corporate Social Responsibility in an Era of Economic Globalization" (2002) 35 Univ. of Calif. Davis. L.R. 705-777; and F.H. Buckley, M. Gillen, and R. Yalden, *Corporations: Principles and Policies* (Toronto: Emond Montgomery, 1995) 543-562, for a discussion of various theories of corporate social responsibility.

[13] D.J. Morrissey, "Toward a New/Old Theory of Corporate Social Responsibility", (1989) 40 Syracuse L.Rev., 1005; **also** M.M. Blair and L.A. Stout, "A Team Production Theory of the Corporation" (1999) 85 Va. L. Rev. 247.

[14] D. J. Morrissey, "Toward a New/Old Theory", at 1033-1038. **See also** H. Ward, "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options", (2001) 24 Hastings Int'l & Comp. L. Rev., 451 "... corporate citizenship embodies a call to understand business as part of society, contributing directly to the welfare of society, rather than somehow separate from it."

weak systems of governance and official accountability, poverty and sensitive ecosystems. It is argued that these issues should be reflected in the corporate responsibility debate.[15]

I will argue that the question whether corporations have responsibilities over and beyond the maximization of shareholder gain is no longer controversial, or challenging. Even in the United States, where the shareholder primacy norm is said to be the predominant model of corporate governance and the preferred choice of corporate law scholars, many States have enacted so-called 'other constituency statutes'. These statutes allow corporate managers to take the interests of other stakeholders into account, alongside those of shareholders.[16] However, the principal shortcoming of much of this legislation is that the statutes merely provide an enabling power to corporate management. There is no *duty* to consider the interests of other constituencies.

Alongside this development at the domestic level, various efforts have been made at the international level to introduce greater social responsibility for global corporations. The United Nations *Code of Conduct on Transnational Corporations* was the first and most extensive effort in this regard, even though it was not adopted due to differences between industrialized and developing countries over the treatment of foreign investors.[17] In the 1970s and 80s, efforts were also made by the International Labor Organization, the World Health Organization, as well as the Organization for Economic Co-operation and Development (OECD) to align the profit motive of multinational corporations with various aspects of social and developmental policy. In 1999, the UN Secretary-General announced the formulation of the United Nations *Global Compact*, a set of nine universal human rights, labor and environmental principles.[18] He invited international business actors to endorse and apply the principles in their corporate practices as a way of

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[15] C.A. Williams, "Corporate Social Responsibility", *supra* note 12; **and** Ward, "Transnational Corporate Liability", *supra* note 14.

[16] D. Gordon Smith, "The Shareholder Primacy Norm" (1998) 23 J. Corp. L. 277; **also** Hansmann & Kraakman, "The End of History", *supra* note 12, arguing that not only is the shareholder primacy norm the predominant model in American corporate law, but also that corporate law in other Western industrialized states is likely to converge towards this model. In light of this 'covergence thesis', Williams, "Corporate Social Responsibility" supra, at 711, has labeled Hansmann and Kraakman as 'strong convergence optimists.'

[17] P.T. Muchlinski, *Multinational Enterprises and the Law* (Cambridge: Blackwell Publishers, 1995) at 593-594; **see also** M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge Univ. Press, 1994) at 194-211.

integrating the social and environmental pillars necessary to sustain the new global economy, and make globalization work for all people.[19]

The proliferation of non-binding instruments at the international level that emphasize the social and environmental dimensions of business activity, arguably reveals a broad aspiration on the part of governments and people that corporations should consider a wider spectrum of interests than contemplated by the shareholder model. Critics may argue that the failure to adopt a binding investment instrument at the international level, and the 'soft stature' of the instruments that exist, defeats the contention that corporations ought to consider wider constituency interests, at least as a matter of law. Admittedly, my argument falls short of the proposition that there is an extant legal obligation to consider other stakeholder interests. However, I do argue that the *travaux preparatoires* and content of the codes of conduct (both those adopted and those that were not) evidence the expectations of a broad section of the international community as to what proper corporate conduct should be. Against the background of failed efforts to adopt a binding investment instrument at the international level, domestic jurisdictions such as Nigeria could consider translating the non-binding international expectation into binding norms within their domestic legal systems. This is one of the normative values of soft international norms – they could inspire the development of binding norms at the domestic or international level.[20] It also supports the view that non-binding norms and instruments are not by reason of such non-bindingness alone, devoid of normative value. Legal normativity could be viewed along a continuum from soft to hard law, with norms along the continuum exercising various degrees of influence.[21]

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[18] www.unglobalcompact.org

[19] Ibid.

[20] There is vast and growing literature on soft law. A sample of the scholarship is as follows: P.M. Dupuy, (1998) "A Hard Look at Soft Law" ASIL Procs., 381; P.M. Dupuy, "Soft Law and the International Law of the Environment", (1991) 12 Mich. J. Int'l. L. 420; R.R. Baxter, "International Law in "Her Infinite Variety"", (1980) 29 I.C.L.Q. 549; P. Weil, "Towards Relative Normativity in International Law?" (1983) 77 A.J.I.L., 413; and C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", (1989) 38 I.C.L.Q., 850; J. Ellis, *Soft Law as Topos: The Role of Principles of Soft Law in the Development of International Environmental Law* (Montreal: DCL Thesis, McGill University 2001).

[21] J. Brunnée and S.J. Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building" (1997) 91 A.J.I.L 26, at 28-37 explaining regime building as proceeding from a non-binding or 'contextual' stage to binding legal normativity. **Also** Brunnée & Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Trans. L 19, at 46-47 where they posit that law is formed through 'continuing struggles of social practice' and as such that it 'cannot be understood as a fully realized system.'

The rest of the chapter is arranged as follows: part 2 discusses the concept of social development; part 3 outlines the state of social development within the oil producing communities in Nigeria; part 4 discusses the implications of this social situation for good governance and governmental legitimacy; part 5 discusses the doctrine of corporate social responsibility; and part 6 discusses corporate social responsibility under Nigerian law and offers concluding remarks.

2. The Concept of Social Development

Since the end of the Second World War, international economic policy has been dominated by neo-classical economic theory. This theory not only emphasized the role of markets in efficient resource allocation, but also advocated a minimal role for the state in regulating market transactions. The belief is that the free circulation of goods, capital, and other factors of production would create conditions of perfect competition under which resources would be put to their most efficient use, and the price of commodities would reflect their true market value. Under neo-classical theory, economic development was essentially perceived as equivalent to growth in gross domestic product, or in per capita income. Economic growth is in turn deemed to lead to increases in human welfare.[22]

This theory formed the basis of post-war economic policy and law in Western industrialized States and for most developing countries after attaining independence in the 1960s.[23] The conclusion of the *General Agreement on Tariffs and Trade* to reduce barriers to international trade in goods, and the establishment of the World Bank and the International Monetary Fund, provided the institutional mechanisms for pursuit of the

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[22] For accessible accounts of various theories of international trade from mercantilism, absolute and comparative advantages, to the new trade theory, See C.W.L. Hill, *International Business: Competing in the Global Marketplace* (Burr Ridge: Irwin, 1994) 114-145; M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London & New York: Routledge, 1995) 1-6; J.H. Jackson, *The World Trading System: Law and Politics of International Economic Relations* (Cambridge: MIT Press, 1999) 11-21.

[23] As discussed in chapter 2, soon after independence, many developing countries initially opposed neo-liberal market economics. Pursuant to their objectives of economic independence and self-reliant development, these countries adopted policies to enhance state control of the economy, protection of infant industry, and the promotion of import substitution, rather than export-oriented development strategies. These policies were obviously unsuccessful leading to a gradual opening-up of domestic markets and the encouragement of foreign investment. Yet, problems still remain with respect to the export-oriented strategies of developing countries, especially in light of protection of industrialized country markets through rules such as 'tariff escalation' whereby the amount of tariffs payable on imports, increases in accordance with the degree of processing of the imported goods. **See** Trebilcock and Howse, *Regulation of International Trade,* at 301; **and** Sornarajah, *International Law on FDI, supra* note 17, at 49.

neo-liberal economic order constructed after World War II.[24] To a large extent, these institutions focused on creating an enabling environment for the free exchange of goods and services, and the creation of wealth.[25]

While there is no denying that wealth creation through economic growth is an important factor in human well-being, it is not a sufficient condition. This is the principal shortcoming of neo-classical economic theory. It fails to recognize that economic growth as measured by increases in GDP or per capita income, is not an end in itself, but a means to the satisfaction of human needs. Hence, assuming that the human person is the central purpose and object of development, meaningful economic development must go beyond a quantum analysis of economic growth, to include non-growth variables such as income distribution and the appropriate utilization of national economic resources. As the UNDP puts it, "[e]conomic growth, an important input for human development, can translate into human development only if the expansion of private income is equitable and only if growth generates public provisioning that is invested in human development – in schools and health centres, not arms."[26]

The focus on social development in this chapter is intended to emphasize the centrality of human well-being as the objective of development. By so doing, I am persuaded by the work of scholars who argue that GDP figures are an incomplete measure of development for a variety of reasons. In an earlier part of the thesis, I referred to the work of several scholars who argue that economic growth that proceeds without the internalization of environmental costs could hardly result in sustainable development, because the environment provides the resources upon which all growth depends.[27] While environmental protection has often been justified on the basis of inter-generational equity, the focus on well-being of current human populations supports the claim that it

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[24] Trebilcock and Howse, *The Regulation of International Trade, supra* note 22, at 44-45. The GATT was initially intended to be a temporary arrangement between 23 trade nations in 1947 pending the adoption of the Havana Charter that would have brought the International Trade Organization into being. The Havana Charter was, however, not adopted largely as a result of opposition from the United States Congress where it was considered to infringe domestic sovereignty.

[25] Ibid. The IMF was charged with maintaining exchange rate stability; while the IBRD was initially meant to provide reconstruction capital to war-torn Europe. Due to the success of the Marshall Plan, the IBRD was later to change its focus to providing development capital to developing countries.

[26] UNDP, Human Development Report (1999), *Globalization with a Human Face,* at 43.

[27] H.E. Daly, *Steady-State Economics* 2nd ed., (Washington DC: Island Press, 1991); D. Pearce and E. Barbier, *Blueprint for a Sustainable Economy* (London: Earthscan Publications Ltd., 2000).

will be hard to attain justice between generations, if inequity pervades relations between members of the current generation.[28] Intra-generational equity reflects concerns not only over differences between industrialized and developing countries, but also the wide-gap between rich and poor within developing countries themselves. By focusing on the plight of people within the Niger Delta region of Nigeria, I hope to bring this important element of sustainable development to light.

The pursuit of intra-generational equity is consistent with the argument that meaningful development strategies must focus on benefit to human beings, and satisfaction of life's basic needs. Since the middle of the last century, the United Nations Development Programme (UNDP) has been at the forefront of the intellectual campaign for a people-centered approach to development. In 1994, the UNDP dedicated its *Human Development Report* to the theme of "New Dimensions of Human Security" and posited that 'sustainable human development' was the best guarantor of human security.[29] The Organization argued that:

> To address the growing challenge of human security, a new development paradigm is needed that puts people at the center of development, regards economic growth as a means and not an end, protects the life opportunities of future generations as well as the present generations and respects the natural systems on which all life depends.[30]

Sustainable human development as thus articulated by the UNDP resonates well with our concept of sustainable economic development - comprising the three elements of growth with equity, environmental preservation, and poverty eradication.[31] For the UNDP, the current pattern and direction of economic arrangements has resulted in the emergence of new threats to human security including insecure access to food, jobs,

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[28] E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transational Publishers, 1989); Brown Weiss, "Our Rights and Obligations to Future Generations for the Environment", (1990) 84 A.J.I.L.198. **Contra** L. Gundling, "Our Responsibility to Future Generations" (1990) 84 A.J.I.L. 207, who argues that the quest for inter-generational equity must be preceded by the realization of justice between members of the current generation.

[29] UNDP, Human Development Report 1994, *New Dimensions of Human Security* (Oxford: Oxford University Press, 1994).

[30] Ibid. at 4.

[31] Ibid., at 2: "Sustainable human development is development that not only generates economic growth but distributes its benefits equitably; that regenerates the environment rather than destroying it; that empowers people rather than marginalizing them. It is development that gives priority to the poor, enlarging their choices and opportunities and providing for their participation in decisions that affect their lives. It is development that is pro-people, pro-nature, pro-jobs and pro-women."

health care, personal income, as well as a devastated natural and cultural environment.[32] Thus, the fight against global poverty – freedom from want – is an important aspect of the human security and sustainable development agendas. As stipulated in the Rio Declaration, poverty eradication is an indispensable requirement for sustainable development.[33]

Other development scholars have elaborated upon this broader understanding of development and emphasized its human elements. According to Ikein:

> the criteria for just distribution and community social development should embrace a social welfare policy that can help promote development with increased equity. ... Social welfare objectives strive to enhance the well-being of people by raising their level of living, by ensuring social justice and a more equitable distribution of national wealth, and by enhancing the opportunity of the people to develop to their fullest in terms of health, education, and participation as contributing citizens. Thus an integrative approach to development maintains that any national development strategy must include a committed effort to satisfy the basic needs of the masses. Basic needs are defined to include food, shelter, clothing, and access to essential public services.[34]

Support for a human-centered approach to development can similarly be found in many international legal instruments, and the views of some international law scholars. For example, Virally once argued that 'development' is not only an economic problem, but a social problem *par excellence* that pervades the whole of international economic and social co-operation and that the United Nations ought to "establish the bases of a true international law of development."[35] Similarly, Okafor maintains that development goes beyond economic growth, to include "a modicum of equity in the distribution of such growth", and that economic aggregates such as per capita income are at best crude indices of the level of development in a given country.[36] For Gros Espiell, development implies "

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[32] Ibid. For the companion notion of 'environmental security', **See** J. Brunnée and S.J. Toope, "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law" (1994) 5 Y.B.I.E.L. 41; G. Handl, "Environmental Security and Global Change: the Challenge to International Law" (1990) 1 Y.B.I.E.L 3; A. Timoshenko, "Ecological Security: Global Change Paradigm" (1990) 1 Co. J. I. E. L & Pol. 127.

[33] Rio Declaration on Environment and Development (1992), Principle 5. See also Principle 3: "the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations."

[34] Ikein, *The Impact of Oil, supra* note 2, at 181.

[35] M. Virally, "Vers un droit international du développement," 11 *Annuaire Français Droit. Internationale. 3-12 (1965)* in F.V. Garcia-Amador, *The Emerging International Law of Development* (New York: Oceanea Publications, 1990) at 34.

[36] O.C. Okafor, "The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North *"Entente"*" (1995) 7 A.J.I.C.L., 865 at 869[**hereinafter "Right to Development"**]

... a necessary and balanced economic, social, cultural and political content, which includes, but at the same time surpasses, mere economic growth."[37]

The starting point for a discussion of international legal instruments must be the *Charter of the United Nations*. It provides that one of the functions of the U.N. is the promotion of "higher standards of living, full employment and conditions of economic and social progress and development", towards the achievement of which all Members have a duty to co-operate.[38] According to García-Amador, this provision imposes an obligation on the United Nations to promote developmental conditions and objectives.[39] In addition, I will argue that the provision implies both a domestic obligation on the part of governments in developing countries to work towards the realization of the development objective, as well as a concomitant expectation that developed countries would 'cooperate' with the former through the provision of financial and technological assistance.[40]

The *Universal Declaration of Human Rights* specifically addresses a broader conception of development in several of its provisions. In pertinent part, Article 22 provides that "[e]veryone, as a member of society, has the right to social security, and is entitled to realization ... of economic, social and cultural rights indispensable for his dignity and the free development of his personality."[41] Article 25 sets out the right to adequate standards of living, including food, clothing, housing and medical care; article 28 provides for the entitlement to a social and international order necessary for the full realization of the rights and freedoms set out in the Declaration; and article 29(1) states that "[e]veryone has duties to the Community in which alone the free and full

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[37] H. Gros Espiell, "The Right to Development as a Human Right" (1981) 16 Texas. Int'l .L.J. 189, at 191.
[38] Charter of the United Nations, Articles 55 and 56. See F.V. García-Amador, *The Emerging International Law of Development,* at 61.
[39] F.V. García-Amador, *The Emerging International Law of Development, supra* note 35, at 63.
[40] R. Sarkar, *Development Law and Finance* 2nd ed., (The Hague: Kluwer Law Int'l, 2002) 79 [**hereinafter *Development Law***].
[41] UNGA, Res 217 A (III), U.N. Doc. A/810, (December 10, 1948), Article 22. **Contra** J. Donelly, "The Right to Development: How Not to Link Human Rights and Development" in C.E. Welch, Jr., & R.I. Meltzer (eds.), *Human Rights and Development in Africa* (Albany: State Univ. of New York Press, 1984) 261, at 265 [**hereinafter "The Right to Development"**]. Donelly argues that this provision only sets out a right to social security, and that individual development is viewed as the object of economic and social rights, and not a right itself.

development of his personality is possible."[42] Irrespective of whether Article 28 provides the legal basis for a right to development, I will argue that the above provisions of the *Universal Declaration* demonstrate that the realization of the full gamut of human rights – civil, political, economic, social and cultural - is an integral part of the development process. It also shows that one can hardly speak of meaningful development with exclusive focus on its economic aspects.[43] The fact that the Universal Declaration is now regarded as customary international law,[44] adds saliency to the various rights, and by implication, to the broader conception of development referred to above. In the words of Sarkar, "... it is clear that in the UDHR *development* was meant to include more than simply the economics of development. The inclusion of the "development of the human personality" within the provisions of the UDHR gives the right to development a place under the rubric of human rights law. The terms of the UDHR clearly recognize that man does not live by bread alone."[45]

Other aspirational legal instruments likewise support a people-centered development paradigm. These instruments emphasize that human well-being is the main objective of development and place a duty on governments to adopt policies and measures necessary for the realization of that objective. For example, under the *United Nations Declaration on the Right to Development*, 'development' is defined as "... a comprehensive economic, social, cultural and political process, which aims at the *constant improvement of the well-being of the entire population* and of all individuals on the basis of their active, free and meaningful participation in development and in the fair

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[42] J. Donelly, "In Search of a Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) 15 Cal. W. I.L.J., 473 at 486-487, [**hereinafter "In Search of a Unicorn"**]. He argues that Article 28 of the UDHR could not provide the legal basis for a right to development, because that provision envisages an 'order', i.e., a structure of rules, principles, institutions and practices that are conducive to the realization of the rights enshrined in the Declaration. 'Development' on the other hand, is a process or result. He concludes that Article 28 could at best, provide an entitlement to remove those structures that are not consistent with the exercise of rights. However, in "The Right to Development", cited at note 41, at p266, Donnelly notes that while it was possible to plausibly extract a derivative human right to development from Article 28, this would be unwise because such a right could be claimed by many different subjects or groups, leading to "countless intense and refractory conflicts of rights."

[43] V.P. Nanda, "The Right to Development under International Law - Challenges Ahead", (1985) 15 Cal. W. Int'l. L. J., 431, at 432: "[the] unambiguous focus on the development of human beings is an implicit recognition that respect for human rights is a prerequisite to the development of the human person and that both material and non-material needs must be met for development to be meaningful."

[44] R. Sarkar, *Development Law, supra* note 40, at 269.

distribution of benefits resulting therefrom."[46] The Declaration goes on to place concerns for human well-being at the center of the development process and further provides that governments are primarily responsible for policy measures necessary for constant improvement and well-being of the entire population.[47]

More recently, the *United Nations Declaration on Social Development* adopted in Copenhagen in 1995, recognised a range of social problems including poverty, unemployment and social exclusion.[48] States further recognised that social development and human well-being are crucial elements of sustainable human development, and urged that transparent and accountable systems of governance were indispensable to that objective. They made specific commitments towards the achievement of social development including the following: (1) to create at the domestic level, an economic, political, social, cultural and legal environment to achieve social development. Such measures include creating an enabling environment for equitable access by all citizens to income, resources and social services, as well as the promotion and realization of all human rights including the right to education, food, shelter, employment, health and information. (2) To adopt measures to eradicate poverty as an ethical, social, political and economic imperative of humankind. This would require addressing the root causes of poverty and the basic needs of people. Such needs include the elimination of hunger and malnutrition, the provision of food security, education, employment and livelihood, primary health care, safe drinking water and sanitation, and adequate shelter. (3) Other commitments relate to the provision of full-employment; policies to promote and enhance social integration; respect for human dignity; the integration of social development goals into structural adjustment programs; as well as an increase in, and efficient utilization of resources for social development.

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[45] Ibid., at 263.

[46] UNGA Res. 41/128 (December 4, 1986), preamble. *[Emphasis added]*

[47] Ibid., Article 2. The Declaration has however been criticized as incoherent and loosely worded especially with respect to its designation of the subjects of the right to development. T.P. van Reenen has observed that: "The UN Declaration on the Right to Development loosely, incoherently and inconsistently refers to every human person as the central subject, the human person as the central subject, human beings, all human beings individually and collectively, all individuals, the entire population (of a state), groups, all peoples, states individually and collectively, and states in co-operation with one another as subjects of the right to development." See T.P. van Reenen, "The Right to Development in International and Municipal Law" (1995) 7 Afr. S.I.L. Proc. 364, at 370.

[48] United Nations, Report of the World Summit on Social Development, A/Conf.166/9 (19 April, 1995).

At the regional level, the *African Charter on Human and People's Rights* explicitly provides that all peoples have a right to economic, social and cultural development and places responsibility on African governments to ensure the exercise of the peoples' right to development.[49]

Some scholars have also argued that the right to development is recognised by the provisions of the development co-operation agreement concluded between the European Community and a group of African, Caribbean and Pacific (ACP) countries in Lomé.[50] The *Cotonou Agreement*,[51] which replaces Lomé IV, provides that the partnership between the two groups of countries is "centered on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development."[52] It also provides that co-operation shall be directed towards sustainable development centered on the human person, and entails respect for all human rights, including social rights.[53]

From the above discussion, it is possible to argue that international law now supports a broader understanding of development that goes beyond economic growth, and lays emphasis on human well-being. It is also clear that the primary responsibility for development rests with the government in each country. As I argue more fully below, this understanding of development responsibility departs from the New International

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[49] African Charter on Human and People's Rights (the Banjul Charter), OAU Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M 59 (1982). See Sarkar, *Development Law, supra* note 40 at 285, noting that the Banjul Charter sets forth the right to development as a *legal,* not a *human* right and thus eliminates the confusion created by the UNDRD which sought to place the right to development in the category of human rights. Okafor, "The Right to Development", *supra* note 36, at 869-872 adds that the right to development is now widely recognised as both an individual right and a right of peoples. He notes that as a right of peoples' within the African Charter on Human and Peoples' Rights, the right to development now enjoys the status of a norm of regional international law.

[50] Fourth ACP-EEC Convention of Lome, 15th December 1989, 29 ILM 783, Article 5. **See** Sarkar, *Development Law, supra* note 40 at 273; **and** Okafor, "The Right to Development" *supra* note 36, at 881-882. **But note** K. Arts, *Integrating Human Rights into Development Co-operation: The Case of the Lomé Convention* (The Hague: Kluwer Law International, 2000) at 197, where she argues that Article 5 only makes general references to human rights, and that the provision failed to formulate a concrete set of rights to be respected under any circumstances.

[51] *Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States and the European Community,* signed at Cotonou, Benin, 23 June 2000, available online at www.acpsec.org/gb/cotonou/accords.htm, accessed February 11, 2003.

[52] Ibid., Article 1.

[53] Article 9. See Sarkar, *Development Law, supra* note 40, on the opposition of the ACP group of states to linking human rights and development co-operation during negotiations of the Second Lomé Convention. The result was that no mention of human rights was made in Lomé II, even though the OAU later decided,

Economic Order (NIEO) claim that developing countries have a right to development, in the form of preferential treatment and access to financial and technological assistance from industrialized countries. In the sustainable development literature, differential treatment and technical and financial assistance for developing countries is now subsumed under the principle of common but differentiated responsibility. Indeed, to the extent that international law supports a right to development, it is only defensible as an entitlement of peoples within States for their governments to provide the circumstances and processes necessary for the realization of human well-being.

(A) THE NEW INTERNATIONAL ECONOMIC ORDER

Arguments for a broader understanding of development acquired greater prominence after the period of colonization in the 1960s when a new majority of developing countries joined the international community. One of the primary objectives of this new group of developing countries was to transform their newly acquired political independence into economic self-determination.[54] According to one leading commentator, developing country calls for the establishment of a NIEO were "a continuation of the process of decolonization in the economic sphere, the negation of domination and of neo-colonialism in international economic relations."[55]

However, these new states also realized that it would be difficult, if not impossible, to acquire economic independence under an international economic system that was constructed by, and geared towards meeting the needs of a few similarly situated industrialized countries. Under the NIEO strategy, these countries set out to revamp the international economic system so as to more equitably reflect the diversity in levels of development among members of the international community. To this end, developing countries raised several objections to the structure of international economic rules. First, they argued that the principles of equal and non-discriminatory treatment were no longer suitable to govern international economic relations in view of the greater heterogeneity of

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as a result of the human rights debate during Lomé II, to negotiate an African Human Rights instrument. This led to the adoption of the African Charter on Human and Peoples' Rights in 1981.

[54] E. Kwakwa, "Emerging International Development Law and Traditional International Law - Congruence or Cleavage?" (1987) 17 GA. J. Int'l & Comp. L 431 [**hereinafter "Development law"**].

the international community, now comprised of countries at vastly different stages of economic development.[56] These differences, it was argued, provide an equitable basis for the unequal treatment of developing countries in their economic relations with the developed world. Raul Prebisch, the first Head of UNCTAD, argued that "no matter how valid the principle of the most favored nation may be in trade relations among equals, it is not an acceptable and adequate concept for trade among countries with highly unequal economic power."[57] Secondly, developing countries argued that the tariff structure under GATT rules discriminated against their exports, which were mainly agricultural and unprocessed commodities. Thirdly, investment agreements with transnational corporations were negotiated under conditions of unequal bargaining power and therefore were largely inequitable. Fourth, it was argued that TNCs engaged in restrictive business practices and related-party transactions that adversely affected the revenue base of host countries. Finally, developing states maintained that TNCs were unwilling to transfer technology necessary for skills and industrial development in host countries.[58] All these provided justifications for developing country calls for a new order of international economic relations based on the principles of equity, sovereign equality, interdependence, common interest and co-operation among all States, permanent sovereignty over natural resources and the common heritage of mankind. These later formed the bedrock principles of the *Charter of Economic Rights and Duties of States*.[59]

However, the NIEO strategy itself, while seeking greater equity in inter-state economic relations, was wanting in important respects from the perspective of sustainable development. In an earlier part of the thesis, I argued that the NIEO instruments were adopted soon after the Stockholm Conference and that their failure to fully integrate

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[55] M. Bulajić, *Principles of International Development Law* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 3-4.
[56] K. Hossain (ed.,) *Legal Aspects of the New International Economic Order* (London: Frances Pinter Publishers, 1980), at 1.
[57] Cited in Kwakwa, "Development Law" *supra* note 54 at 439. Kwakwa also posits at 438, that "the principle of preferential treatment for developing countries is based on the idea that unequals should be treated unequally in order to obtain an equitable application of the principle of equality."
[58] M. Bulajic, "Legal Aspects of a New International Economic Order", in K. Hossain (ed.), *Legal Aspects of the New International Economic Order, supra* note 56 at 46-48.
[59] UNGA Res. 3281 (XXIX), *Official Records of the General Assembly: Twenty-Ninth Session,* Supplement No. 31 (A/9631). K. Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse", (1997) 16 (2) Wisc. I.L.J 353, at 366.

environmental concerns might have been a reflection of the divisive North-South environmental politics that took place at the Conference.[60] Similarly, NIEO is wanting from the perspective of a human-centered approach to development. First, NIEO claims of underdevelopment were squarely based on the economic growth model. To the extent that developing countries called for greater market access and the reordering of investment relations, their claims were based on the assumption that these changes would bring about increased economic growth and development. Secondly, the state-centric focus of NIEO resulted in the claim being put up as an entitlement of States, rather than of people within developing countries. This is not to say that the NIEO claim lacked moral authority, only that as articulated, it was insufficient from a sustainable development perspective. For example, the NIEO strategy gave little, if any, consideration to the issue of equitable income distribution at the domestic level.[61] Due to this shortcoming, it has been suggested that as a compromise to Western opposition to NIEO, developing country governments should accept some concessions, including a wider sharing within their countries of the economic benefits of the NIEO.[62]

(B) DISTINGUSIHING THE 'RIGHT TO DEVELOPMENT'

In addition to calls for preferential treatment in international economic relations, developing countries also argued that the objectives of the United Nations Charter, and the historical relations between industrialized and developing countries, especially the colonial experience, provide the basis not only for a *corpus juris* relating to international

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[60] Chapter 3 *supra.* **See also** Charter of Economic Rights and Duties of States, G.A. res. 3281 (XXIX) dated 12 December, 1974. The Preamble notes the desire of States to protect, preserve and enhance the environment. Article 30 elaborately restates the common responsibility of all States to protect the environment in the interests of current and future generations, but notes that environmental policies adopted in pursuance of the above responsibility should not adversely affect the development potential of developing countries. The provision also restates the prohibition against transboundary pollution, and calls on states to cooperate to develop norms of environmental protection.

[61] G. Abi-Saab, "The Legal Formulation of the Right to Development" in Hague Academy of International Law, *Report of a Workshop on 'The Right to Development at the International Level'*, 16-18 October, 1979 (The Hague: Sijthoff & Noordhoff, 1980), at 159 at 165-166 where he notes that the whole strategy adopted by countries during the First United Nations Development Decade from 1960-70, was based on measuring "development ... by the crude rod of the rate of growth of the GNP". He also notes that NIEO was criticized inter alia, for "ignoring the vital issue of a more equitable internal distribution of income...."

[62] Ibid., at 173. "... what we should be looking for ... is not so much a substitute for, as an internal complement to the NIEO."

development, but also of a right to development.[63] The argument was that the international duty to cooperate for the promotion of national and human welfare enshrined in the UN Charter, conferred a corresponding right on developing states to receive preferential treatment in their economic relations, and an entitlement to financial and technical assistance from industrialized countries.[64]

In 1979, a study conducted by the United Nations Secretary-General concluded *inter alia*, that "development is the condition of all social life and therefore an inherent requirement of every obligation", and identified various ethical and legal arguments in support of the right to development.[65] These include an international duty of solidarity, a moral duty of reparation for past colonial exploitation and its consequent effects on underdevelopment in developing states, moral and economic interdependence, and the necessity of development to the maintenance of world peace.[66] Donelly however disputes this ethical grounding of the right to development. In his view, while the ethical arguments underscore the righteousness of development from a moral standpoint, they do not give rise to a *right* in the sense of a specific entitlement to development.[67]

The Secretary General's report also concluded that "there is a very substantial body of principles based on the Charter of the United Nations and the International Bill

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[63] Garcia-Amador, *International Law of Development*, *supra,* note 35 at 35, citing the report of the Secretary-General of the United Nations on the Right to Development, which argued that "... a law relating to economic development [was] an emerging body of law, a part of, and a complement to, the objective stated in the Preamble to the United Nations Charter of promoting 'social progress and better standards of life in larger freedom' ... and in Article 1(3) of the Charter namely, 'to achieve international co-operation in solving international problems of an economic, social cultural or humanitarian character...' "

[64] Garcia-Amador, at 36. **See also** Héctor Gros Espiell, "The Right to Development", *supra* note 37, at 198-200. Some scholars have sought to distinguish between 'international development law' and the 'right to development'. For example, Edward Kwakwa argues that while the law of development refers to the law regulating the relations among sovereign but economically unequal states, i.e. a body of rules and principles formed within the international legal system with the aim of promoting development, the right to development 'has no precise legal foundation [and] evolved rapidly with a minimum of international scrutiny', albeit that it remains a branch of the law of development. He also notes that historically, while the law of development can be traced to the work of Professor Friedmann going back to 1962, the right to development only emerged ten years later from a lecture given at the International Human Rights Institute by the then President of the Supreme Court of Senegal, Keba Mbaye. **See** E. Kwakwa, "Development Law", *supra* note 54, at 432-433. I will suggest that the right to development is more appropriately categorized as an incident of the *corpus juris* of the law of development contained in the NIEO instruments.

[65] Report of the Secretary General, "The International Dimensions of the Right to Development as a Human Right in Relation to Other Human Rights Based on International Co-operation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and Fundamental Human Needs," UN Doc. E/CN.4/1334, 2 January 1979.

[66] J. Donelly, "The 'Right to Development'", *supra* note 41, at 261-278.

[67] Ibid., at 267-268

of Human Rights and reinforced by a range of conventions, declarations and resolutions which demonstrate the existence of a human right to development in international law."[68] Sarkar argues that international law does not support the existence of a right to development, whether as an entitlement of individuals or of States. For him, development is a common end or result towards which all States, developed as well as developing, have a duty to cooperate.[69]

Historically, the General Assembly specifically recognised the right to development for the first time in a resolution adopted in 1979.[70] Subsequently, after much debate and disagreement among developed and developing countries as to whether development qualifies as a right, the General Assembly adopted the *United Nations Declaration on the Right to Development* in 1986 by a roll-call.[71] The Declaration provided, *inter alia*, that "... the right to development is an inalienable human right and that *equality of opportunity for development is a prerogative both of nations and of individuals* who make up nations."[72]

As the voting pattern shows, many industrialized countries were not convinced that the state of international law supported the existence of a right to development as a human right. Disagreement seemed to center on States' respective theoretical conceptions of individual rights. Western legal traditions are largely influenced by John Locke's conception of individual rights as 'negative freedoms' conferred on the person *against* the state, which the State could only interfere with in very limited circumstances.[73] Typically, these freedoms take the form of guarantees of non-interference by the State with the

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[68] Report of the Secretary-General, at para. 78. The Report cites Articles 55 and 56 of the UN Charter, Articles 22, 26(2), 28, 29(1) of the UDHR; Article 1 of the CCPRs; and articles 1(1) and 2(1) of the CESCRs.

[69] R. Sarkar, *Development Law, supra* note 40, at 78-79.

[70] UNGA Res. 34/46 (November 23, 1979).

[71] UNGA Res. 41/128 (December 4, 1986). The UNDRD was adopted by 146 votes in favor and 1 vote (the United States) against. There were eight abstentions by Denmark, Finland, Federal Republic of Germany, Iceland, Israel, Japan, Sweden, and the United Kingdom.

[72] Ibid., Preamble. [Emphasis added].

[73] J. Donelly, "Human Rights and Western Liberalism", in A.A. An-Naim & Francis M. Deng, (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (Washington D.C.: The Brookings Institution, 1990) 31, at 33, 48 **[hereinafter "Human Rights and Liberalism"]**. He however concludes that the Lockean perspective does not demand a negative interpretation, and that Locke does give prominence to positive rights to political participation and private property: "The argument that liberalism does - let alone can – only recognize civil and political rights is, therefore, clearly without basis."

individual's person or property.[74] Consequently, the reference to a potential collective right of 'peoples' or 'nations' went against the very foundations of Western conceptions of rights. As Donelly argued, "[t]he very concept of human rights, ... rests on a view of the individual person as separate from, and endowed with inalienable rights held primarily in relation to society, and especially the state.... Collective rights... are not *human* rights as that term is ordinarily understood."[75]

The idea of negative liberalism also implied that Western governments were unwilling to accept an international human rights obligation to provide economic and social welfare to citizens.[76] This is despite the fact that many states do in fact assume important social welfare obligations. According to Sarkar, "...there is still a philosophical and legal reluctance to impose a legal duty on the state to provide these entitlements to its citizens as part of an international human rights regime."[77]

The reasons for Western opposition to the right to development as contained in the United Nations Declaration could therefore be summed up as follows: First, Western countries were averse to the idea of a collective human right to development, especially that its potential claimants might include 'peoples' and 'nations' in developing areas. This objection is grounded on the Lockean conception of human rights as individual rights.[78] Secondly, it appears that while many Western countries were willing to assume, and do

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[74] Sarkar, *Development Law, supra* note 40 at 263, 280. **See also** O.C. Okafor, "The Right to Development", *supra* note 36, at 870 alluding to the 'pre-eminent western idea of human rights which is driven by the pervasive individualism of advanced capitalist systems'.

[75] J. Donelly, "In Search of a Unicorn", *supra* note 42, at 497-498.

[76] J. Donelly, "Human Rights and Liberalism", *supra* note 73, at 48 however notes that a radical interpretation of the liberal conception of rights could support positive rights. He notes that Locke himself recognised the positive right to private property, and further that "the fundamental natural law of the preservation of *all* mankind clearly allows the recognition of additional economic and social rights."

[77] Sarkar, *Development Law, supra* note 40 at 280.

[78] Ibid., at 281. **See also** Donelly, "The 'Right to Development', *supra* note 41 at 265-266 arguing both against the existence of a right to development, and that even for those who assume the existence of such a right, its conferment on a multiplicity of subjects such as individuals, groups, peoples, and states could only lead to "countless intense and refractory conflicts of rights." It is noteworthy in this respect that the preamble to the UNDRD provides, inter alia, that "... the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations." In contrast, the *African Charter on Human and Peoples Rights* (the Banjul Charter), provides in Article 22 that: "(1) All peoples shall have the right to their economic, social, and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind and (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development." Thus under the Banjul Charter, the right to development is clearly conferred as a right of people, with a corresponding duty on the state to ensure its protection.

assume responsibilities to provide social welfare to their citizens, they were unwilling to accept this as an international human rights obligation. Thirdly, the West argued that while solidarity and international co-operation might provide ethical reasons for the provision of international development assistance, this fell short of a right to, or an entitlement of developing countries to receive such assistance. It has been suggested that these divisions, evidenced in the *travaux preparatoires* of the *Declaration on the Right to Development*, also explain the adoption of the two international human rights covenants as separate instruments, so as to allow States to ratify one or the other.[79]

Due to space limitations, this paper will not provide a comprehensive survey of the debate on, or seek to determine the legal status of the right to development. In particular, I am less concerned with the question whether developing countries have a right to receive development assistance from developed countries. However, I do believe that the rules of international trade have from 1947 to the end of the Uruguay Round and adoption of the WTO Agreements in 1994, continued to operate largely in favor of exports from developed countries.[80] This provides a case for revisiting the rules of international trade to facilitate, among other things, greater market access for developing country exports.[81] I do not however believe that of itself, such global economic inequity

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[79] V.P. Nanda, "The Right to Development", *supra* note 43, at 435-436 gives evidence of the disagreements between experts from the United States and Russia on the Working Group on the Right to Development. The former viewed the right to development as an individual right supported by Article 28 of the UDHR, and placed emphasis on civil and political rights. The latter argued that the right is a collective right, and emphasized economic, social and cultural rights. **See also** Sarkar, *Development Law, supra* note 40 at 264-265, who uses the disagreements over the right to development to provide insight into the separate adoption of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. He argues that: "The two International Covenants reflected the ideological rift between the laissez faire economies of the West, and socialist economies of the former Soviet bloc." The United States has still not ratified the International Covenant on Economic, Social and Cultural Rights. Some have argued that in view of US ratification of the Universal Declaration of Human Rights, which includes some economic, social, and cultural rights, and is now considered customary international law, non-ratification of the ICESCR is merely academic. **See** P. Alston, "US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 A.J.I.L 365.

[80] Trebilcock and Howse, *The Regulation of International Trade, supra,* note 24 at 301, speaking of NIEO assert: "... the rules of the game of international trade and finance were so heavily skewed to the disadvantage of the LDCs that a radically new strategy was necessary, based upon a fundamental redistribution of wealth and opportunities between North and South."

[81] WTO Ministerial Declaration adopted at Doha, Qatar (20 November, 2001) WT/MIN/(01)/Dec/1. Paragraph 2 recalls that international trade can promote economic development and poverty eradication in all countries, so that all people would benefit from the gains arising from international trade. The Declaration therefore seeks to place the needs and interests of developing countries at the heart of WTO work. To this end, Ministers undertook to work towards greater market access, balanced rules, and technical assistance and capacity building for developing countries.

provides the basis for a collective right to development for developing countries. After all, as the situation in Nigeria illustrates, some four to five decades of political independence and resource exploitation have afforded many developing States significant opportunity to make a dent in their underdevelopment. Therefore, while there is a strong moral case for such assistance in view of past exploitation and current margins of economic inequality, I will suggest that the principal responsibility for development remains with the governments of developing countries themselves. This view is shared by Okafor, who, in a commentary on the South's claim for a NIEO and the right to development, argued that "the South must ... revise their demands to reflect the fact that they are not totally free from blame for their problem of underdevelopment. The portrayal of the failure of the South to develop as *entirely* a result of loaded dice is not credible...."[82]

Instead of viewing the right to development as an entitlement of developing countries, my main focus is on the well-being of the human person as the central subject of development. To that end, I will explore the relations between the governments of developing countries and their citizenry, and attempt to answer the question whether assuming a basic governmental obligation to provide the circumstances necessary for the realization of human well-being, developing country governments have actually met that obligation. To the extent that a right to development is relevant to this analysis, it is viewed as an entitlement of people *within* countries against their governments, an entitlement grounded on the central purpose of governance. In my submission, one of the key elements of this governance purpose is the provision of circumstances or processes to enable citizens to improve their material well-being. As I alluded to earlier, the extent to which governments satisfy this basic obligation should be a relevant consideration in determinations of questions of governmental legitimacy.

Oscar Schachter has alluded to this internal dimension of the right to development. For Schachter, the claim to development assistance was 'by and large' accepted by Western countries both through the endorsement of legal instruments supporting the claim, as well as the development assistance practices of such countries. He however adds "[d]onors cannot ignore the glaring internal inequities in wealth and

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[82] O.C. Okafor, "The Right to Development", *supra* note 36 at 879.

income distribution and the not uncommon consequence that external aid often benefits only a small elite in the developing country."[83] He concludes that the needs of the poor countries, "must be perceived in terms of the large mass of disadvantaged individuals and communities, and that these needs involve social and cultural factors ... which are not easily changed by external aid."[84] Similarly, Okafor has argued that at the internal level, the right to development imposes a duty to improve the quality of life of all peoples, both through economic growth and, " ... a modicum of equity in the distribution of such growth."[85]

This analysis therefore shifts the debate on the right to development from an entitlement of developing States against the industrialized world, to emphasis on the needs of people and communities within developing countries. From that perspective, and to the extent that a right to development is relevant to this thesis, it applies internally and its subjects are the people, not governments.[86] This approach to the right to development also shifts the discourse on the intra-generational component of sustainable development from differences between industrialized and developing countries, to margins of poverty among people in developing countries.

Arguably, a right to development could be implied from an implicit social contract between governments and the governed. While Locke's social contract theory posits that free men join in political union because they expect their lives, liberty, and property to be better protected, one could also argue that citizens' consent to the exercise of political authority is based on the further expectation that governments would provide minimum circumstances consistent with meeting the basic needs of the governed. From that perspective, where governments fail to provide the circumstances necessary for the realization of human well-being, that failure potentially undermines the basis upon which citizens' consent was given.

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[83] O. Schachter, "The Evolving International Law of Development" 15 Colum. J.Trans'l L., (1976) 1, at 11.
[84] Ibid.
[85] Okafor, "The Right to Development", *supra* note 36 at 869.
[86] Ibid., at 870: "The Right to Development is said to possess both internal and international dimensions. In its internal dimension, the state is said to owe its citizens and it's differing peoples or sub-units a duty to promote their development. In its international dimension, the developed world ... is said to owe a duty to promote development in the developing world...." It is noteworthy that most discussions of the right to development emphasize its international aspect. This partly explains its unpopularity among Western countries.

From the above discussion, it can be safely concluded that development includes, but is much broader than economic growth as represented by increases in GDP. It includes both an environmental aspect and a social aspect. The latter focuses on equitable income distribution and meeting the basic needs of people. I will utilize this broader conception of development as a framework for discussing the state of social development in the oil producing regions of Nigeria. My objective is to show that government policy in Nigeria has leaned in favor of macro-economic growth and paid inadequate attention to distributive justice and satisfaction of the basic needs of the population. The legal regime has, in large measure, followed the pattern of government policy in this respect. In particular, the petroleum law has been directed at the maximization of government revenue and corporate profit. Consequently, distributional issues and concerns for human development have been neglected or inadequately addressed. Alongside the responsibilities of government, I will also argue that it is incumbent on the oil multinational companies, in pursuance of their corporate social responsibilities, to do more to ameliorate the development needs facing the communities in which they operate.

3. The State of Social Development in the Niger Delta

In a recent study on poverty in Nigeria, two IMF economists concluded that the country is endowed with all the necessary resources - land, oil, other natural resources - and that if revenues from these resources were properly utilized, the majority of the population would not have been living in poverty.[87] The authors report that while the country earned almost US $200 billion from oil for the years 1970 to 1990, this wealth was inequitably distributed. Government expenditure was largely concentrated on the "urban, modern sector to the detriment of the traditional, rural sector...", with the consequence that at least two-thirds of the national population now live below the poverty line.[88]

The pattern of unequal development between the urban and rural areas of Nigeria that Thomas and Canagarajah describe is particularly accentuated in the case of the Niger

[87] S. Thomas and S. Canagarajah, "Poverty in a Wealthy Economy: The Case of Nigeria" IMF Working Paper (WP/02/114), 2002, p4 at www.imf.org. **See also** World Bank, Africa Regional Office, "Nigeria – Delta Development Project" Report No. PID11440 (August 1, 2002) at www.worldbank.org. They put the poverty figure at 58% of the population.

Delta region. I have already made reference to the fact that average per capita income in the region, estimated at about US $260, is below the national average. Of the 13 million people living in the Niger Delta, up to 70 per cent inhabit rural communities.[89] The daily lives of the bulk of this population is characterized by lack of access to basic needs such as primary education, health services, safe drinking water, shelter, food and employment opportunities.[90] According to Okonta and Douglas, "...in spite of its considerable natural resources, the [Niger Delta] is one of the poorest and most underdeveloped parts of [Nigeria]. Seventy percent of the inhabitants still live a rural, subsistent [*sic*] existence characterized by a total absence of such basic facilities as electricity, pipe-borne water, hospitals, proper housing and motorable roads. They are weighed down by debilitating poverty, malnutrition, and disease."[91] Ikein underscores the point with evidence that in 1990, after some three decades of independence during which the government earned several billion dollars in oil revenue, only 6 percent of the rural population had access to pipe-borne water, while 96 percent were without electricity. A dual healthcare delivery system prevailed, whereby the urban population had access to modern hospitals and Western medicine, and the bulk of the rural population relied on traditional herbalists.[92] Within the Niger Delta region, a different type of dual healthcare operated. According to Human Rights Watch, oil workers had access to modern medical facilities in Lagos or Port Harcourt, but the local inhabitants relied on traditional remedies.[93]

Paradoxically, this region provides the mainstay of the Nigerian economy. Compared to the poverty of her people, the Niger Delta region holds the largest endowment of natural resources in Nigeria. It produces most of the country's oil and gas resources, which account for 80% of total government revenue and 95% of foreign

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[88] Ibid.
[89] World Bank, African Regional Office, "Nigeria - Delta Development Project" Report No. PID11440, dated August 1, 2002, p1 at www.worldbank.org.
[90] Ibid.
[91] Okonta and Douglas, *Where Vultures Feast, supra* note 1, at 19.
[92] A. Ikein, *The Impact of Oil, supra* note 2, at 81.
[93] Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 2000) at 101 [***hereinafter The Price of Oil***].

exchange earnings.[94] According to Okonta and Douglas, the bulk of Nigeria's crude oil reserves (projected to reach 33 billion barrels by the end of this year) are located in the Niger Delta. This is in addition to other natural resources such as fertile agricultural land, forests, rivers, creeks, and abundant fish resources. Not surprisingly, the authors concluded that the Niger Delta is the "goose that lays Nigeria's golden egg."[95]

This state of essential social deprivation was deeply resented by the people of the Niger Delta, and gave rise to various social movements within the region. These movements advocated for a more equitable distribution of the income derived from natural resources and for social and community development. Women, men, youth and elders all participated in various ways to demand greater social justice from Nigeria's rulers and the oil companies. Historically, these protests date back to the times of colonial conquest and domination, but it was only in the 1990s that they attained national and international prominence, largely due to the activities of the Movement for the Survival of the Ogoni People (MOSOP), under the leadership of Ken Saro-Wiwa. In 1990, the MOSOP leadership drafted a *Bill of Rights* containing the demands of the Ogoni people directed at the Nigerian government and the oil companies.[96] Following MOSOP's lead, various Niger Delta ethnic groups demonstrated against the activities of multinational oil companies, and demanded a more equitable utilization of oil revenues, as well as greater autonomy in the determination of their own affairs. These demands were contained in several instruments adopted by communities in the Niger Delta during the 1990s.[97] The oil producing communities resented the fact that while they languished in poverty and social deprivation, oil revenues were being siphoned off by the oil companies and the government to the benefit of other regions and people both within and outside of Nigeria.

This resentment was manifested in well-organized campaigns against the government and oil companies dating back to colonial times. Turner has catalogued the

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[94] World Bank, "Integrated Safeguards Data Sheet (Initial), Nigeria-Delta Development Project" (dated November 21, 2002) p6, at www.wordlbank.org. **See also** A. Rowell, "Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria" (1994) at 6.

[95] Okonta and Douglas, *Where Vultures Feast*, *supra* note 1 at 19.

[96] *Ogoni Bill of Rights*, adopted 26 August 1990, at Bori, Rivers State.

[97] In October 1992, the Movement for the Survival of the Izon (Ijaw) Ethnic Nationality in the Niger Delta (MOSIEND) adopted the *Izon People's Charter;* in November 1992, the Movement for the Reparation to Ogbia (MORETO) adopted the *Charter of Demands of the Ogbia People*; and in December 1998, the *Kaiama Declaration* was adopted by a Group of Ijaw youths.

struggles of Nigerian women in the oil producing areas of the Niger Delta against male domination, social inequality and government and oil company exploitation.[98] The emergence of the indigenous women's movement - what Turner calls "indigenous feminism",[99] - goes back to the period 1928-30 when the women of Aba, a village in Eastern Nigeria, protested to the colonial government out of fears that the head count then being conducted by the authorities, was a prelude to the imposition of a tax on women. During the same period, women also successfully protested against the imposition on their communities of a system of warrant chiefs by the colonial government, which they argued, offended their traditional systems of leadership selection and decision-making.[100]

Similarly, between the 1930s and 1950s, women from Egba, a Western Nigerian village, secured the abdication of the ruler of Egbaland, on the ground that he collaborated with the colonial government to exploit the people of his own community.[101]

These early expressions of indigenous feminism have been replicated in more recent times, only that they are now directed at the Nigerian government and the oil multinationals. For Turner, the protests represented a stand against "oil-based industrialization [that] superimposed on this local political economy a new regime which dispossessed women of access to farm land."[102] In 1984 and again in 1986, women's movements in different parts of the Niger Delta protested against the inequitable exploitation of their natural resources (especially oil). They demanded more social investment and poverty alleviation measures. The 1984 protest took place in the oil village of Ogharefe and was directed at the Nigerian subsidiary of the American oil giant, Pan Ocean. After years of oil exploration, land grabbing, and pollution, the women mobilized and presented several demands to the oil company, including the payment of compensation for the lands taken for oil production, the drilling of a water well and the provision of electricity.[103] Several thousand women occupied the premises of the

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[98]T.E. Turner, "Women's Uprisings against the Nigerian Oil Industry in the 1980s" at http://www.uoguelph.ca/~terisatu/Counterplanning/c9.htm 1-34.
[99] Ibid., at 2.
[100] Ibid., at 8.
[101] Ibid.
[102] Ibid., at 1.
[103] Ibid., at 14.

company and interrupted oil production. When the company's management attempted to enter the premises to negotiate with the women, the latter resorted to 'the curse of collective nudity', in the words of Turner, to "drive the point home that what they needed was compliance with their demands and not new negotiations."[104] The fact that the women threw off their clothes as the company management approached the premises, both symbolized the seriousness of their cause and their commitment to social justice. It also proved effective, because the company did not only pay compensation for the lands taken and for oil pollution, they also installed water and electricity for the villagers.

A similar protest of close to 10,000 women was held in Ekpan in 1986 against the Nigerian National Petroleum Company (NNPC). Again, the demands were for employment opportunities, for compensation for land taken for oil production, water and electricity supply, and scholarships for their children.[105] After two meetings with the women and the community, the company promised to afford more employment opportunities to the local population, to service the only water borehole in the village and to reactivate the only electricity generator that was located in the village hospital.[106]

These early protests symbolized the frustration of the people over the inequitable exploitation of their natural resources, the decimation of their land and environment, and the nonchalance of the government and oil companies over their social and economic well-being. Powerful as they were, the early women's protests were only precursors to more organized and systematic campaigns by various communities in the Niger Delta during the 1990s. Each of these communities demanded more equitable distribution of oil wealth, environmental protection, and compensation for damaged or expropriated land, investments in social and economic infrastructure, and above all, for greater autonomy in the determination of matters that affect their lives and resources.[107]

Under the leadership of Ken Saro-Wiwa, MOSOP was at the forefront of these protests. In August 1990, the MOSOP leadership negotiated and adopted the *Ogoni Bill*

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[104] Turner, at 15. According to the author: "disrobing by women in public is considered a serious curse on those to whom the women expose themselves. The curse is related to mothering, agricultural productivity and fertility in general."
[105] Turner, 19-21.
[106] Ibid.
[107] For details of these claims, See Human Rights Watch/Africa, "The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria" (New York: Human Rights Watch, 1995), at 33 [**hereinafter "The Ogoni Crisis"**]; Human Rights Watch, *The Price of Oil, supra* note 93, at 129-130.

of Rights, which was a charter of grievances and demands of the Ogoni people against the Nigerian government and the oil companies.[108] The Bill emphasized that Ogoniland had historically existed as a separate and autonomous ethnic nationality that was forcibly annexed by the colonialists and merged into the Nigerian federation upon independence.[109] It recalled that from 1956, over 30 billion dollars worth of oil had been extracted from the region. The Ogonis argued that the bulk of this money was used for the development of other regions of Nigeria, while the Ogoni people lacked the basic needs of society such as running water, electricity, job opportunities and social and other development projects.[110] The Bill of Rights also noted that oil production had resulted in severe land and food shortages for the population, and devastated the local environment. Finally, the Ogonis deplored the fact "that one of the richest areas of Nigeria should wallow in abject poverty and destitution."[111]

For all these reasons, they demanded a politically autonomous Ogoniland within the Nigerian state, including the right to control and use of a fair proportion of Ogoni resources for Ogoni economic development; adequate and direct representation in all Nigerian national institutions; the full development of Ogoni culture; and the right to protect the Ogoni environment and ecology from further degradation.[112]

The Nigerian government largely handled the Ogoni issue as a potential secession from the rest of Nigeria. The brutal repression of the Ogoni people was therefore deemed necessary to maintain the territorial integrity of the country.[113] However, it is clear that at no time did the Ogoni people or MOSOP profess a desire to secede from Nigeria. Both

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[108] Ogoni Bill of Rights, adopted on August 26, 1990 at Bori, Rivers State. The Bill of Rights was signed by representatives of all five Ogoni clans namely: Babbe, Gokana, Ken-Khana, Nyo-Khana, and Tai.

[109] Ogoni Bill of Rights, Paragraphs 1-5. On the question of structural legitimacy of the Nigeria State as it relates to Ogoniland, **see** O.C. Okwu-Okafor, "Self-Determination and the Struggle for Ethno-Cultural Autonomy in Nigeria: The Zangon-Kataf and Ogoni Problems", (1994) 6 Afr. SICL Procs., 88 **[hereinafter "Self Determination"]**; more generally on the question structural legitimacy of Africa States vis-à-vis their relations with sub-state groups, **see** O.C. Okafor, "After Matyrdom: International Law, Sub-State Groups and the Construction of Legitimate Statehood in Africa" (2000) 41 Harv. J. I. L., 503 **[hereinafter "Legitimate Statehood"]**.

[110] Paragraphs 7-11.

[111] Paragraphs 15-18.

[112] Bill of Rights, paragraphs (a) - (g).

[113] Okafor, "Legitimate Statehood", *supra* note 109, referring to the violent suppression of claims for self-determination as 'homogenization' and arguing that by lending precedence to the preservation of territorial integrity, international law has contributed to the violent homogenization of sub-state groups in Africa. **See also** Okafor, "Self-Determination", *supra* note 109, for an application of this argument to the Ogoni conflict in Nigeria; and *infra* note 140 and accompanying text.

the *Bill of Rights* and the public statements of the Ogoni leadership show that while they demanded some local autonomy, they perceived the future of the Ogoni people to lie in a federal Nigeria. The Bill specifically reaffirms the wish of the Ogoni people to "remain part of the Federal Republic of Nigeria..."[114]

Following upon the Ogoni example, other ethnic groups adopted similar instruments directed at the Nigerian government and the oil companies. Each demanded greater political autonomy, a more equitable utilization of oil resources, as well as environmental protection and compensation.[115]

The Ogoni *Bill of Rights* was presented to the Nigerian government under then President Ibrahim Babangida, and subsequently, to all the oil companies operating in Ogoniland. In their presentation to the oil companies in December 1992, the Ogonis demanded the payment of 30 million dollars in oil royalties within thirty days, or a stop to oil production in Ogoniland.[116]

Except for the creation of the *Oil Mineral Producing Areas Development Commission* (OMPADEC) in 1992, the Babangida government largely ignored the demands of the Ogoni people.[117] The ensuing cycle of protests against the operation of oil companies led to a massive military response from the Nigerian government, which vowed to maintain an enabling environment for the pursuit of economic activities. In several incidents between 1990 and 1998, peaceful protests by members of the oil producing communities were violently suppressed by the Nigerian security forces, especially the army, police, and the *Rivers State Internal Security Task Force* - a special

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[114] Ogoni Bill of Rights, para. 20.

[115] For example, in October 1992, the Movement for the Survival of the Izon (Ijaw) Ethnic Nationality in the Niger Delta (MOSIEND) adopted the *Izon People's Charter*; in November 1992, the Movement for the Reparation to Ogbia (MORETO) adopted the *Charter of Demands of the Ogbia People*; and in December 1998, the *Kaiama Declaration* was adopted by a group of Ijaw youths. The latter claimed that all land and natural resources (including oil), located within Ijaw territory belonged to the Ijaw community, and called for the withdrawal of the military from their areas. While the Declaration agreed to preserve the territorial integrity of the Nigerian federation, it did call for a new federal order based on 'ethnic nationalities' and resource control at the local level.

[116] Human Rights Watch, "The Ogoni Crisis", *supra* note 107, at 10.

[117] Oil Mineral Producing Areas Development Commission Decree No. 23 of 1992. OMPADEC was envisaged as a development agency for the oil producing regions and had responsibility for monitoring environmental problems associated with oil production. Its initial budget of $95 million for 1993, was largely misappropriated. The Commission was subsequently wound up in acrimony. See Okonta and Douglas, *Where Vultures Feast,* at 32-35, and *infra* note 157 and accompanying text for a fuller discussion of OMPADEC and other efforts by Nigerian governments to acquire legitimacy in the oil producing areas through the establishment of development agencies.

paramilitary unit created by General Abacha in 1993 as a response to the activities of MOSOP in Ogoniland. Soldiers killed several thousand people, many more were injured, and valuable property destroyed, including several villages that were burnt down.[118]

However, nothing could have been worse than the trial and execution of Ken Saro-Wiwa and eight other leading MOSOP figures by a special tribunal, allegedly for the murder of four other Ogoni chiefs. While the military government claimed that Saro-Wiwa and his co-accused masterminded the said murders, all the evidence that has emerged since the trial, as well as the views of many independent commentators suggest that there was nothing to link the accused persons with the murders.[119] It seemed to be a classic case of politically trumped-up charges specifically targeted at the MOSOP leadership. The law and procedure governing the special tribunal have been challenged for contravening the Nigerian Constitution, as well as international and regional human rights norms.[120] Specifically, the composition of a three-member special tribunal (including an active member of the armed forces) to try an offence that was squarely within the jurisdiction of the regular courts, was a clear violation of the due process requirements under Nigerian law. During the trial, the accused persons were often denied access to counsel, and in the few cases in which access was granted, interviews were conducted under the watchful eyes of the Nigerian military. Since the trial, several prosecution witnesses have come forward and admitted receiving various inducements from the government and the oil companies, especially Shell Petroleum Development

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[118] Human Rights Watch, "The Ogoni Crisis", *supra* note 107. **See also** S. Pegg, "Human Rights in Nigeria's Niger Delta", (2001-2002) 4 (1) Indiana Int'l H.R.L. Bulletin, 5. He estimates that between two and three thousand Ogoni people were killed from 1993 to 1995. He also reports that between December 1998 and November 1999, some 2,600 Ijaws were killed as a result of clashes with Nigerian security forces.

[119] Human Rights Watch, "The Ogoni Crisis", *supra* note 107; M. Birnbaum Q.C., *Fundamental Rights Denied: Report of the Trial of Ken Saro-Wiwa and Others* (London: Article 19, June 1995); and M. Birnbaum, *A Travesty of Law and Justice: An Analysis of the Judgement in the Case of Ken Saro-Wiwa and Others* (London: Article 19, December 1995).

[120] In January 1995, defense lawyers for Saro-Wiwa and others commenced proceedings in the Federal High Court challenging the composition of the Special Tribunal and the absence of an appeal to a higher court. The Federal High Court dismissed the action on the basis of its own lack of jurisdiction to hear the application. The defense team ultimately withdrew their representation of Saro-Wiwa and others on the grounds that "... daily occurrences at the tribunal [show] that their appearance will only serve the purpose of glorifying the tribunal which is set up for a pre-determined purpose. These continued appearance[s] at the tribunal will serve no other purpose [than] to mislead the Nigerian public and the international community into believing that the tribunal was set up to pursue justice. That is not the case." **See** Human Rights Watch, "The Ogoni Crisis", *supra* note 107 at 26, and 32.

Company, to make incriminating statements against Saro-Wiwa and the other Ogoni leaders.[121] Moreover, the military decree that established the special tribunal excluded appeals to a higher court.[122] The inevitable conclusion is that the Nigerian government under General Abacha left no stone unturned, including resort to judicial murder, to appease the oil companies. The British jurist, Michael Birnbaum, who observed the trial on behalf of the Human Rights NGO, Article 19, summed up his views of the trial as follows:

> The judgement of the Tribunal is not merely wrong, illogical and perverse. It is downright dishonest. The tribunal consistently advanced arguments which no experienced lawyer could possibly believe to be logical or just. I believe that the Tribunal first decided on its verdicts and then sought for arguments to justify them. No barrel was too deep to be scraped. [123]

Having discussed the concept of social development and outlined the state of social development in the Niger Delta region, I will proceed to a legal analysis of these issues. As stated previously, I will discuss the issues within the theoretical frameworks of governmental legitimacy, and corporate social responsibility.

4. Governmental Legitimacy

In his attempt to provide a theoretical explanation for why 'powerful states obey powerless rules', Thomas Franck posited that in the absence of a coercive authority on the international plane, rule obedience by the generality of states must be explicable on some other ground than the threat of Austinian sanction. In doing this, Franck was inspired by various non-coercive explanations for rule obedience within domestic legal systems.[124] In answer to the question posed above, Franck suggests that the compliance-

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[121] Human Rights Watch, "The Ogoni Crisis" *supra* note 107, at 29-30. **See also** Wiwa & Ors. v. Royal Dutch Petroleum & Ors. 96 Civ.8386., (dec'd.Feb. 22, 2002) United States District Court for the Southern District of New York. This was a claim for the violation of the human rights of the Ogoni people brought against two parent companies of SPDC under the United States Alien Tort Claims Act. **See** *infra* note 241 and accompanying text for a fuller discussion of this decision.

[122] The Trials were conducted under the Civil Disturbances (Special Tribunal) Decree of 1987, as amended by the Special Tribunal (Offence Relating to Civil Disturbances) Edict 1994.

[123] M. Birnbaum Q.C., *A Travesty of Law and Justice: An Analysis of the Judgement in the Case of Ken Saro-Wiwa and Others* (London: Article 19, December 1995), at 2.

[124] T.M. Franck, "Why a Quest for Legitimacy?" (1988) 21 U.C. Davis Law Rev. 535, at 540-541; T.M. Franck, "Legitimacy in the International System" (1999) 82 A.J.I.L 705, at 708-709. At 710, Franck writes: "... despite its residual Austinian propensities, national jurisprudence has quite a bit to say to the international system precisely because there is empirical evidence that, in both systems, nonceorcive factors play an important part in conducing to rule/law-compliant behavior." Such 'noncoercive' explanations are offered by Dworkin, who argues that citizens obedience to rules is a function of the rule's 'fairness, justice and integrity'; Habermas' theory of 'discursive validation' places a premium on reasoned communication

pull of rules at the international level is explicable on the basis of their perceived 'legitimacy'.[125] Legitimacy is the property of a rule or rule-making institution that pulls towards compliance, because the rules are made in accordance with 'right process'. The elements of right process are determinacy, symbolic validation, coherence and adherence.[126]

It is apparent from the above that Franck's theory of legitimacy is almost entirely process oriented. Both law's existence and the willingness of nations to abide by legal norms are determined by the manner through which law comes into existence, including its consonance with a higher order norm, the extent of its textual clarity, and the consistency of its application. This theory of legitimacy, while elegant and innovative at first sight, reveals some weaknesses upon closer examination. For example, it is clear that as initially propounded, Franck's theory of rule legitimacy did not account for the substantive outcome of a rule's application. Tesón has argued that Franck's positivist inclinations led the latter to propose a state-centric theory of international lawmaking under which "principles of justice do not or should not play a role in determining the legitimacy of international rules and principles."[127] He argues that morality, respect for

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based on consent, openness, and participation; and Max Weber's process approach explains obedience as a factor of the citizen's conviction that the rule was made in accordance with a 'superior framework of reference, rules about how rules are made...."

[125] T.M. Frank, *The Power of Legitimacy Among Nations* (1990).

[126] Frank, (1990); T.M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford Univ. Press, 1995), 30-46. 'Determinacy' refers to the textual clarity of a rule of law. 'Symbolic validation' reflects those cues, which show that a rule emanates from proper authority and therefore pulls towards compliance. 'Coherence' reflects the horizontal aspect of legitimacy. Rules are coherent when they are applied in a like manner in similar cases, and relate in a 'principled manner' to other rules of the same system. 'Adherence', the vertical aspect of legitimacy, refers to the rule's consistency with a higher order rule which sets out how primary rules of obligation are to be made, applied and interpreted. The requirement of adherence is an application of Hart's concept of a 'rule of recognition', by which the validity of all other rules of the legal system are tested. Hart however denies that a rule of recognition exists at the international level. Franck on the other hand, maintains that despite the lack of a written constitution or a rule of parliamentary supremacy at the international level, there is an international rule of recognition which is 'autochthonous' and 'demonstrable only circumstantially', based on the fact of membership of the international community. In other words, for Franck, compliance with international legal obligation, be it a treaty or customary law, is not explicable on the basis that states have consented to such rules, but rather because membership of the international community is anchored on a ground rule that legal rules ought to be complied with. According to Franck: "There are other parts of the ultimate rule that can be deduced from the practice of states in adhering to it *as an incident of statehood* rather than as a consequence of their specific consent." Franck, "Legitimacy in the International System", *supra* note 124 at 757.

[127] F. R. Tesón, "The Power of Legitimacy Among Nations", Book Review of *The Power of Legitimacy Among Nations* by T.M. Franck, (1992) 37 McGill L.J. 666.

human rights and fair representation of members of the state, are better grounds for supporting a theory of international legitimacy than mere procedural regularity.[128]

In support of Tesón, it is quite conceivable that a rule may meet all the criteria for process legitimacy, but in its practical application, produce results that are manifestly inequitable, unfair, or unjust.[129] For example, following the colonial period, developing countries argued as part of claims for a New International Economic Order that the bedrock principles of the international economic system (i.e. non-discrimination and reciprocity) unfairly operated against them. This was a challenge both to the processes by which those rules came into existence, and the effect of their application on developing country economies. It was in part a challenge to the law's substantive outcome.

In a subsequent publication, Franck sought to address the consequentialist critique of his work.[130] After arguing that international law had entered a post-ontological era (i.e. it was a mature legal system wherein all the main rules and processes were in place), Franck posited that the relevant theoretical question to which legal scholars should address their minds is not whether international law is law, but whether this body of law is 'fair'.[131] Fairness in international law, according to Franck, is an attribute of two qualities of rules: first, rules must be legitimate in the sense discussed earlier, i.e. made in accordance with right process. This is Franck's notion of legitimacy as 'procedural fairness'. Secondly, fairness discourse must partake of the consequential effects of law, its distributive justice.[132] Thus, Franck meets the consequentialist challenge head-on by shifting his analysis from a singular focus on law's process legitimacy, to an additional dimension relating to the particular outcome of law's application. The two notions of legitimacy and distributive justice also represent the dialogue between stability and change in Franckian fairness discourse.

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[128] Ibid., at 667-668.

[129] L. Fuller, *The Morality of Law* (1969) would object to this argument. For Fuller, fairness of substantive outcomes is closely related, almost conditioned by the processes through which law comes into existence. As such, he posits that a law that meets the tests of internal morality (process fairness), could hardly produce unfair outcomes. Law's ends and its means, it has been said, stand in a situation of 'pervasive interaction'. See Brunnée and Toope, "International Law and Constructivism", *supra* note 21 at 43-64, discussing 'interactional legal theory' based on insights from Lon Fuller.

[130] T.M. Franck, *Fairness in International Law and Institutions* (1995).

[131] Ibid., at 6.

[132] Ibid., at 8-9: "Legitimacy and distributive justice are two aspects of the concept of fairness. While one has a primarily procedural ... the other [has] a primarily moral, perspective..."

Except for a passing reference to social contract theory as the basis of governmental power at the domestic level, Franck's theory does not address the issue of governmental legitimacy *per se*.[133] However, this is not a critique of his theory, for his express purpose was to set out a theory of *rule*, not *governmental* legitimacy. Influenced by his work, other 'legitimacy scholars' have addressed issues relating to both state and governmental legitimacy.[134]

In a political and historical analysis of state creation in Africa, Okafor argues that international law has contributed to the structural illegitimacy of contemporary states in Africa. He posits that European colonialism contributed to the erasure of pre-existing independent States in Africa, and replaced them with geo-political units that paid no regard to the hitherto territorial, linguistic, and ethnic arrangements which were characterized by significant degrees of political autonomy.[135] Upon attaining independence, the governing African elite inherited these arbitrary colonial borders, and committed themselves to maintaining the territorial integrity of the new countries.[136]

International law contributed to this structural illegitimacy because the international law rules for determining legitimate statehood, which the author labels 'peer review' and 'homogenization',[137] failed to take into account the previous independence of the various nations and their ethnic and linguistic heterogeneity. Peer review describes the process by which legitimate statehood is conferred on putative states through the rhetorical determination (*ipse dixit*) of pre-existing states.[138] This externally-given

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[133] Franck, "Quest for Legitimacy", *supra* note 124 at 537: "...in search for a teleology of organized authority, political and social philosophers from Aristotle to Dworkin, have advanced sophisticated concepts of *polis,* the civil society or community, in which the citizen's affiliation, as a matter of status, engenders reciprocal rights and duties which in turn endow governance with what amounts to an architectural construct of socially pooled power." He also referred to the works of Hobbes, Locke, Rawls and Ricoeur and posited them as "the international observer's options for conceptual borrowing...."

[134] O.C. Okafor, "Legitimate Statehood in Africa", *supra* note 109, discussing state legitimacy; O.C. Okwu-Okafor, "Self-Determination", *supra* note 107; and B.R. Roth, *Governmental Illegitimacy, supra* note 2, discussing, as the title states, international law rules relating to governmental illegitimacy.

[135] Such independent states included the Sokoto Caliphate, the Oyo Empire, the Ashanti Empire, Benin, Dahomey, Buganda, Bunyoro-Kitara, and Kanem-Bornu. The independence of some of these states was signified by the fact that they entered commercial and diplomatic relations with the European powers. See Okafor (2000).

[136] Okafor, "Legitimate Statehood in Africa", *supra* note 109 at 512, citing the Organization for African Unity Resolution of Border Disputes, 1964, reprinted in I. Bronwlie (ed.), *Basic Documents on African Affairs* (1971), 360.

[137] Okafor, "Legitimate Statehood In Africa", *supra* note 109, at 514. He also referred to the other elements such as the principle of 'effectiveness', 'glorification of empire', and 'domestication.'

[138] Okafor, "Legitimate Statehood in Africa" *supra* note 109 at 515.

standard of state legitimization pays no regard to whether the state as constructed, is acceptable to sub-groups within the state, or indeed, how such groups are in fact treated by the state. The process of determining whether the constructed state is acceptable to sub-groups within the state, is what Okafor refers to as 'infra-review', which he offers as a prescriptive normative criterion for reviewing international law's approach to state legitimacy.

Alongside the peer review mechanism, Okafor also argues that while the Eurocentric conception of the nation-state (i.e. a relatively homogenous population living within a defined territory) now prevails all over the world, it is an inappropriate model for African states which consist of largely heterogeneous ethnic and linguistic communities.[139] These existed as independent nations before the time of contact. Through application of the principles of *uti possidetis* and the maintenance of territorial integrity, international law has enabled African states to coercively homogenize these pre-existing 'fragmented' populations into single nation-states. He argues that the relative immaturity of norms relating to minority protection, and the proscription of secession, similarly encourage such coercive homogenization. He therefore suggests that the homogenization norm needs to be replaced by the notion of 'multinational statehood', which will not only respect the rights of sub-state groups, but also encourage African states "to seek more peaceful means of securing their post-colonial borders and population composition."[140]

At face value, Okafor's proposals appear to advocate the undesirable outcome of the break-up of many African states, and the emergence of multiple ethnic and linguistic entities with little capacity to govern, but lots of potential for inter-ethnic conflict. The fact that he did not wish to make any such suggestion is however apparent from an earlier publication.[141] Such national and ethnic fragmentation would certainly not be conducive to the maintenance of regional or international peace and security, nor to socio-economic development in Africa, particularly in an age of increasing global integration. However, the significance of his study remains beyond doubt, especially his recognition that the

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[139] Ibid., at 512-513.

[140] Ibid., at 527. **See** Okafor, "Self-determination", *supra* note 109 for an application of the structural illegitimacy argument to the situation of the Ogoni people in Nigeria.

[141] O.C. Okwu-Okafor, "Self-determination", *supra* note 109 at 95: "Ideally, the elimination of inter-group domination can only be achieved by ensuring that only one homogenous group inhabits any given State but

indicia of legitimate statehood under international law should not remain externally-driven (by the *ipse dixit* of other states), but must include an internal criterion (i.e. the participation of populations in the process of legitimization and their acceptance of the process outcome).

Yet, it is not surprising that as a Franckian disciple, Okafor's work remains strongly process oriented. His argument seems to imply, in the main, that a shift from peer review to infra-review as the process of determining state legitimacy would suffice to take care of the resentment of sub-state groups. He only makes passing reference to the 'treatment' of such groups by the state i.e., the coercive repression by African governments of claims of self-determination by sub-state groups. Okafor's internal legitimacy criterion is therefore limited to determining state legitimacy from a structural perspective. Like Franck, his work neither addresses the question of governmental legitimacy in a systematic manner, nor the theoretical significance that lapses in governmental conduct ought to have on determinations of the question of legitimacy.

Unlike Franck, and Okafor, Roth's express purpose was to address as a matter of normative theory, "the criteria" by which "the international community, in fact, assess[es] the legitimacy of domestic ruling authorities."[142] He notes that historically, international law's approach to governmental legitimacy was based on the principle of effective control or *de facto* rule, and that this was in part based on the Charter principle of non-interference in domestic affairs, which is itself an incident of the principle of sovereign equality.[143] Roth further argues that the significance of the effective control test and the concomitant principle of non-interference in domestic affairs, has now significantly

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the reality of international society is that most countries are nations-states and it may amount to undesirable atomization to insist on the disintegration of all these States ...."

[142] Roth, *Governmental Illegitimacy, supra* note 2, at 19. He sets this out as an 'external/descriptive' question. He also alludes to the 'external/prescriptive' question (the criteria by which the international community determines that a certain government 'ought to' be accepted as legitimate); the 'internal/descriptive' question (the subject population's assessment of the regime's legitimacy); and the 'internal/prescriptive' question (the subject population's conception of what 'ought to' count as legitimate governance). The approach in this thesis is also internal/prescriptive, but it assumes that the subject population's conception of legitimate governance is that which fulfils the terms of the hypothetical governance mandate or social contract.

[143] Ibid. at 2: "According to the traditional interpretation of the sovereign equality framework, once a state is recognised as a member of the international community, any question of the legitimacy of the apparatus that effectively governs that state constitutes undue intervention in internal affairs. Under most circumstances, a government that maintains the "habitual obedience" of the bulk of the populace is

waned. In part, this is a result of the application of the principle of humanitarian intervention, based on breach of the 'natural duties' of governance including respect for fundamental human rights, the latter being a constituent element of the social contract between the government and the people.[144] In this manner, humanitarian intervention operates as a symbol of collective non-recognition and de-legitimization of *de facto* regimes. Roth describes this process tellingly:

> Irrespective of its origins and its level of popular support, a state's government may by its sub-standard internal behavior be thought to forfeit the ordinary protections that international law accords under the principle of sovereign equality. This is the concept of humanitarian intervention ... more usefully understood as grounded in a consensus among widely divergent worldviews on certain natural duties owed to subjects by all those who purport to engage in governance. ... [Later, at 32] If governance is universally conceived in normative terms, it is not unreasonable to assume that there is some overlapping consensus as to a normative *sine qua non* of governance, on which can be predicated an international law of humanitarian intervention that overrides state sovereignty. While there may be no useful consensus as to the body of internationally-recognised human rights as a whole ... there are some atrocities, such as genocide or slavery, that go to the core of shared humanitarian values, and are recognised as violating peremptory norms of international law... It is on this ground that the advocates of humanitarian intervention must make their case...[145]

Based on these developments, in particular, on the fact that the original conceptualization of state sovereignty was no longer being strictly adhered to, Roth suggests that true sovereignty lies in the population, and therefore that popular sovereignty is the ultimate source of governmental legitimacy.[146] It is for this reason that both humanitarian intervention (in failed states) and collective non-recognition of usurper governments are justified as methods to preserve the sovereign will of the people. This is so even in states where a juridical constitution provides the legal norms and processes by which governments are to be selected, because those norms and processes enjoy habitual obedience only because they are presumed to be expressions of the popular will.[147] While

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automatically acknowledged to possess the legal capacity to assert rights, incur obligations and authorize acts on behalf of the state."

[144] It must however be noted that recent humanitarian interventions have also been based on the collapse of law and order and the consequent threats to international peace and security that result from civil strife and the displacement of civilian populations.

[145] Roth, *Governmental Illegitimacy, supra* note 2 at 30, 32.

[146] Roth, at 38 citing the Universal Declaration of Human Rights, Article 21(3): "The will of the people shall be the basis of the authority of government..."

[147] Roth, at 51: "On no account, ...can rule by laws ... be seen as a sufficient condition of legitimacy. ...A legal order is not mere procedure; it embodies a substantive vision of the proper ends and methods of governance. That vision must be shown to have been ratified, however, indirectly, by the source of sovereign authority, which in our day is to say, by "the will of the people"."

the juridical constitution does provide a touchstone of legitimacy when legitimacy questions arise at the internal level, it proves inadequate when the extant constitutional and governmental order is usurped and replaced either by disgruntled elements within the country, or through outside intervention. In such situations, external evaluations of the legitimacy of the new regime would be determined by the circumstance that its acquisition of power violated the sovereign will of the people. For Roth, this is the rule of governmental illegitimacy or collective non-recognition that operates under international law.[148] The norm of popular sovereignty arguably provided the basis for actions of the United Nations Security Council in Haiti, when it authorized the use of force in 1994 to remove a usurper government and replace it by the democratically elected government that was then in exile.[149] Similarly, in 1997, the Economic Community of West African States (ECOWAS) in an action endorsed by the United Nations Security Council and the Organization of African Unity, authorized military intervention to depose the military junta that had seized power from Sierra-Leone's elected civilian government under President Ahmed Tejan Kabba.[150]

From the above discussion, it is clear that not only does Roth address the question of governmental legitimacy, he also does so (as does this thesis), from an internal perspective. Yet, ultimately, his approach also emphasizes *processes* of government legitimization. While he alludes to violations of natural duties of governance as a ground for governmental illegitimacy, this was anchored on the overall theme that such violations also flout the sovereign will of the people - a process test *par excellence.*

As I mentioned earlier, my approach to governmental legitimacy is also internal/prescriptive. I argue that the extent to which governments fulfil or fail to fulfil the terms of the implicit governance contract, including the pursuit of social development or general well-being, ought to be a factor in determining questions of governmental legitimacy. In an earlier part of the chapter, I described the state of social development and poverty in Nigeria's oil producing communities, and contrasted this with the extra-ordinary natural resource wealth of the region. Similarly, I adverted to the fact that

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[148] Roth at 55: "... where sovereignty is thought to inhere in the people, legitimacy typically would continue to be reserved to the individual leader or institutional structure that is thought to articulate the will of the political community, even should *de facto* authorities effect a usurpation."
[149] Security Council Resolution 940 (1994). **Also** Roth, *Governmental Illegitimacy, supra* at 29.

substantial amounts of revenue were used for the development of other parts of the country, while the Niger Delta remained largely neglected. The underdevelopment of the Niger Delta is further attributable to large-scale avarice and corruption on the part of governing elite who were largely insensitive and unresponsive to the needs of the people. This cleavage between the needs of the people of the Niger Delta, and the priorities of various governments in Nigeria, is arguably inconsistent with the terms of the underlying contract by which the populace consented to the exercise of governmental power.

That populations expect certain benefits from their government, and that this expectation is an essential term of the governance contract, is apparent from the fact that from historical times to the present, governments have often claimed benevolent purposes in their quest for internal legitimacy.[151] As I mentioned in an earlier chapter, during the oil boom of the 1970s, Nigerian governments embarked upon massive public expenditure as a way of acquiring legitimacy in the eyes of the people.[152] As the next section shows, various Nigerian governments have sought both to legitimize their political authority, as well as the continued production of oil by establishing government institutions with responsibility for socio-economic development in the oil producing areas. Governments also promulgated legal provisions to introduce some distributive justice in the allocation of oil revenues. These legitimacy efforts largely proved ineffective due to official corruption. In some cases, the federal government itself only paid lip service to the development objective, as where institutions are set up, but are not allocated the resources necessary to implement their mandate.

(A) THE SEARCH FOR GOVERNMENTAL LEGITIMACY IN THE NIGER DELTA

Efforts by Nigeria's rulers to acquire legitimacy in the eyes of Niger Delta populations and to induce a perception that the region was benefiting from the extraction of its natural resources, date back to the colonial period with the establishment of the *Niger Delta*

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[150] "O.A.U. Speaking in One Voice", *The Weekly Review,* June 6 1997, 29.

[151] Franck, "Legitimacy in the International System", *supra* note 124 at 731 referring to the construction and maintenance of temples and other public buildings and the distribution of foodstuffs by ancient Aztec rulers, as well the construction of pyramids by the Pharaohs of Egypt, as early instances of "legitimization through the symbolism of public works...." **See also** Roth, *Governmental Illegitimacy, supra,* note 2 at 32 arguing that this quest for internal legitimacy has made it necessary for even non-liberal governments to endorse human rights instruments which in reality they have no intention of implementing.

Development Board (NDDB) in 1950.[153] Funded with an allocation of 15% of revenue from the Federal government, the Board was responsible for the co-ordination of socio-economic development in the region. While the NDDB was set up before the discovery of the first oil well at Oloibiri in 1956, the Niger Delta was still a significant source of government revenue, which at the time accrued mainly from palm oil trade.[154]

There is no evidence of the extent to which the Board actually fulfilled its mandate, or indeed, on how long it existed for. It is distinctly possible that after independence, the new rulers simply never resuscitated the NDDB. Consequently, thirty-six years elapsed between the establishment of the NDDB, and the setting up of the *Oil Mineral Producing Areas Development Commission* (OMPADEC) in 1992. During this period, Nigeria's governments professed adherence to a 'balanced development' strategy that sought to eliminate inter-regional disparities and improve living conditions in the poorer areas of the country. The strategy was said to be expressly anchored on social justice and egalitarian principles.[155] However, after independence, Nigeria encountered a flurry of military interventions in politics.[156] In most cases, this meant increased centralization of authority and a lack of governmental accountability. As a result, the balanced development strategy was inadequately implemented as each group of military rulers concerned themselves with the quest for personal wealth, rather than the development of the country. The poor areas of the country, including the Niger Delta region, remained neglected by one government after the other, and a state of underdevelopment and poverty persisted in these areas.

The establishment of OMPADEC in 1992 was therefore generally viewed as a positive development. OMPADEC resulted from the increasingly assertive demands of

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[152] **See** Chapter 2; **and** S.A. Khan, *Nigeria: The Political Economy of Oil* (Oxford: Oxford Univ. Press 1994), at 6.

[153] World Bank – Africa Regional Office, "Nigeria-Delta Development Project" Report No. PID11440 (August 1, 2002) 1, at www.worldbank.org

[154] For an account of the trade in palm oil and slaves between indigenous communities in Nigeria and British merchants, See Okonta and Douglas, *Where Vultures Feast, supra* note 1 at 5-14.

[155] Ikein, *The Impact of Oil, supra,* note 2 at 103.

[156] From 1966 to 1998, Nigeria experienced a total of eight military interventions compared to two democratically-elected governments. In other words, for the 38 years between independence in 1960 and 1998, Nigeria was under military dictatorship for 28 years. A third civilian government elected in 1999, brought former military ruler General Olusegun Obasanjo to power. He faces elections this year, and his main rival is another former military ruler General Muhamadu Buhari, who ruled Nigeria between 1983-85.

Niger Delta populations, in particular the Ogoni people, for greater distributive justice in the allocation of oil revenues, for social and economic investment, and for environmental protection and compensation.[157] Its broad mandate was to address the difficulties and sufferings of inhabitants of the oil producing areas. More particularly, it was charged with monitoring and managing ecological problems associated with oil production. OMPADEC was to be funded by an allocation of 3 per cent of government revenue derived from oil production.

This ostensibly well intentioned initiative, however failed to live up to expectations. The primary reason for failure was that officials charged with the implementation of development projects viewed the Commission as an opportunity for personal enrichment. While the Decree placed OMPADEC under the direct supervision of the Presidency, it soon became clear that there was inadequate oversight of the Commission's projects and finances.[158] The bulk of money allocated to the Commission, (several million dollars each year) ended up being 'paid out' to non-existent contractors and many projects were commenced but never completed.[159] The first Chairman of the Commission, Albert Horsfall, was sacked in 1996 over allegations of corruption. His successor, Eric Opia, who had previously headed a Commission to investigate the financial activities of Horsfall, was himself relieved of his responsibilities in 1998 for 'gross financial misappropriation' estimated at around US $200 million.[160] There is no evidence that apart from their dismissals, these officials were held responsible in any other way, be it civil or criminal. In 1995, a World Bank study concluded that while OMPADEC had made some progress in the implementation of infrastructure projects, it faced severe constraints that needed to be addressed for the Commission to fulfil its mandate.[161] These constraints include (1) a lack of emphasis on, and non-implementation of the Commission's mandate for environmentally sustainable development; (2) an

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See *The Daily Observer* (Banjul), 22 January, 2003 "Nigeria's Generalissimo Hijack", available online at http://allafrica.com/stories/200301220302.html (accessed February 3, 2003).

[157] Oil Mineral Producing Areas Development Commission Decree No. 23 of 1992.

[158] Okonta and Douglas, *Where Vultures Feast, supra* note 1, at 33.

[159] Human Rights Watch, *The Price of Oil, supra,* note 93 at 46-49. In 1993 for example, OMPADEC was allocated US $95million for its operations, and in 1996 $22.68 million.

[160] Okonta and Douglas, *Where Vultures Feast, supra,* at 35.

[161] World Bank, *Defining an Environmental Strategy for the Niger Delta,* Vol. 1 (Washington DC: The World Bank, 1995), at 82.

absence of long-term planning; (3) lack of provision for project maintenance or servicing; (4) lack of sufficient policies and expertise to adequately assess projects; and (5) a deficit in cross-sectoral and stakeholder participation in the Commission's work. For these reasons, and a lack of financial discipline, the OMPADEC initiative has largely remained an unfulfilled dream.[162]

It was during OMPADEC's existence that the government also established the *Petroleum Special Trust Fund* (PSTF) which was funded through allocations derived from a percentage of the sale price of petroleum at Nigeria's retail outlets.[163] According to the government of General Abubakar, the objective of the PSTF was to identify "key projects in all parts of the federation so as to bring about equitable development in all ... communities."[164] The government also promised that the bulk of the Fund's resources would be applied to road construction, education and water supply projects.

Like previous initiatives, there is little evidence to show the extent to which these laudable objectives were realized in fact. On the contrary, some commentators have suggested that before handing over power to the current civilian government in 1999, General Abubakar and his top officials awarded to themselves lucrative oil exploration and oil lifting contracts worth several billion dollars.[165] In addition, Abubakar and his henchmen all but emptied the national treasury through dubious foreign currency payments to external financial institutions. As the military prepared to hand over power to civilian rulers between December 1998 and March 1999, it is estimated that some $2.7 billion disappeared as a result of these dubious transactions. Most of it is suspected to have ended up in the private bank accounts of the outgoing President and his senior military brass.[166]

Soon after the return to civilian rule in 1999, the government of President Obasanjo established the *Niger Delta Development Commission* by an Act of the

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[162] Human Rights Watch, *The Price of Oil, supra,* at 46.
[163] Petroleum (Special) Trust Fund Decree, No. 25 of 1994. Based on these allocations, the Fund received $ 277 million in 1995, $511 million in 1996, and $433 million in 1997. See IMF, *Nigeria: Selected Issues and Statistical Appendix,* p54 cited in Human Rights Watch, *The Price of Oil,* at 46.
[164] Human Rights Watch, *The Price of Oil,* at 46.
[165] "Nigeria: Muddy Waters," *Africa Confidential,* April 12, 1999 Vol. 40 No. 7 (Cited in Okonta & Douglas, at 40).
[166] "Nigeria: The $2.7 Billion Hole in the Bank," *Africa Confidential,* April 16, 1999 Vol. 40 No. 8 at 58. (Cited in in Okonta & Douglas at 40).

National Assembly.[167] The Commission is intended to be a comprehensive response to the dire socio-economic and environmental challenges facing the Niger Delta. It is to be funded with 15% of the annual federal allocation to the Niger Delta, as well as 3% of the revenue of the oil and gas companies and the Nigerian National Petroleum Company (NNPC).[168] The Commission had two main areas of responsibility: first, to "identify factors inhibiting the development of the Niger Delta area and assist the member states in the formulation and implementation of policies to ensure sound and efficient management of the resources of the Niger Delta States."[169] It would then formulate policies and plans for the implementation of socio-economic development in the area, particularly in infrastructure, including roads, health, education, industrialization, housing, water supply, electricity, and telecommunications. Second, the Commission is responsible for tackling ecological and environmental problems that arise from oil and gas exploration, including working with the oil and gas companies to prevent and control pollution from oil operations.[170] These two areas of responsibility constitute the Commission's mandate to bring about sustainable development in the Niger Delta.

This new institution appears more promising. The Act of Parliament provides mechanisms for financial and project accountability to other branches of the Nigerian government and the local population of the Niger Delta, as well as provisions for public consultation and participation, including NGO input. It seems that the founding fathers of the NDDC have learnt their lessons from OMPADEC, and are determined to improve the socio-economic and environmental situation in the oil-rich Niger Delta. In a recent statement to the press, the Chairman of the NDDC Presidential Monitoring Team said the Commission is committed to completing and commissioning up to seven hundred development projects spread across all nine States in the Niger Delta.[171] He disclosed that the projects include water, electricity, roads, schools and health centers. While this is welcome news for the people of the Niger Delta, the information comes in the midst of a presidential election campaign and Niger Delta populations would be hoping that it is not

[167] Niger-Delta Development Commission (Establishment etc.) Act, No. 6, *Laws of the Federation of Nigeria,* 2000.
[168] NDDC Act, section 14.
[169] Ibid., section 7(f).
[170] Ibid., section 7(h).

another one of the many unfulfilled promises from Nigerian politicians. Overall, it is probably early days to assess the impact of the Commission. Its project proposal for capacity building and institutional strengthening was submitted to the World Bank for funding in August 2002, and is not expected to receive Bank approval before July 2003.[172]

Alongside the special development projects referred to above, revenue sharing debates have been a constant feature of Nigerian politics from the time of independence.[173] In part, these debates reflect the ethnic complexity of the country, and the desire of each group or region for autonomy and a share of the national wealth. As a result of these ethnic and regional claims, the configuration of the Nigerian federation has changed from three regions at independence in 1960, to thirty-six States today.[174] Beginning in 1967 when President Gowon broke up the three regions into twelve States, various Nigerian governments have viewed state creation as a means of appeasing the fears of minority groups of domination by the larger ethnic groups, and thus increasing minority support for the federal government. At the same time, the smaller groups viewed regional autonomy as a way of securing their participation in the life of the federation, and of benefiting directly from the allocation of revenue.[175]

The revenue sharing debates revolve around the application of two contending principles – 'derivation' versus 'population/need'. Under the former, each region was allocated revenue based on its contribution to central revenues. The latter principle, otherwise referred to as the principle of 'even progress', empowered the central government to make larger allocations of revenue to the poorer areas of the country so as to secure balanced development.[176] In 1947, a Royal Commission was set up by the

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[171] "NDDC Executes 700 Projects in Nine States", *This Day (Lagos)* 29 March, 2003 at http://allafrica.com/stories/200303310032.html

[172] World Bank, "Nigeria-Delta Development Project report No. PID11440 (August 1, 2002), 1.

[173] T.O. Elias, *Nigeria: The Development of its Laws and Constitution* (London: Stevens & Sons, 1967), especially Chapter 13, on "The Allocation of Revenue and Public Finance." **See also** S. Egite Oyovbaire, "The Politics of Revenue Allocation" in K. Panter-Brick (ed.), *Soldiers and Oil: The Political Transformation of Nigeria* (London: Frank Cass Publishers, 1978) 224.

[174] The Nigerian Federation comprises three tiers of government. The Federal Government at the Centre, Thirty-Six State Governments, and 774 Local Government Administrations. The population is estimated at about 120 million people. **See** http://www.nigeria.gov.ng/aboutnigeria.factfile.htm, accessed February 8, 2003.

[175] Human Rights Watch, *The Price of Oil, supra* note 93 at 41-42.

[176] Elias, "The Allocation of Revenue", *supra* note 173 at 248.

colonial government to advise it on the application of the two principles. In its report, the Phillipson Commission recommended the adoption of the derivation principle, which held sway until 1953.[177]

Under normal circumstances, one would think that as a representative of the totality of the population, the government ought to be in a position to make proper determinations as to which parts of the country were less developed and the extent of resources necessary for that purpose. What was more, such determinations could be made in consultation with local level representatives. These circumstances would tend to favor the application of the population/need principle of revenue allocation. However, in a country such as Nigeria, where an atmosphere of deep-seated distrust prevails between the government and the majority of the population, and where the latter constantly view the former as corrupt and exploitative, it is understandable that the States from which the bulk of Nigeria's revenue is derived, wanted clearer rules and more autonomy over revenue allocation.

Yet, over the years, clear allocative rules by themselves have proved inadequate to address the regional concerns over revenue allocation and development. Often, local people have blamed State-level politicians of misappropriating large portions of development revenue with the effect that ultimately, the money never gets to the people, its intended beneficiaries. It is this cycle of corruption, and an atmosphere of patronage and strategic behavior that clouded the revenue allocation debates in Nigeria. Consequently, the revenue sharing formulae have shifted on many occasions depending on whether Nigeria had a civil or military government, and the strength of personalities occupying political office. While the derivation principle held sway at independence in 1960 under a three-region federal structure, this changed in 1967-68 when the Gowon regime divided the country into twelve states. Under Gowon's revenue allocation formula, States contributed 15% of revenue to the federal government, 35% was paid to a

[177] The Commission was under the Chairmanship of Sir Sidney Phillipson. Subsequently, the Hicks-Phillipson Commission, which reported in 1951, recommended a *melange* of four principles of revenue allocation. According to Elias, these were the principles of 'independent value', 'derivation', 'needs', and 'national interest.'

"Distributable Pool Account" and 50% was retained on the basis of the derivation principle.[178]

Currently, the revenue allocation formula is provided for under the 1999 Constitution.[179] It provides that the National Assembly shall take several principles into account in determining the revenue allocation formula including population, equality of states, internal revenue generation, landmass, terrain and population density.[180] It is further provided that the principle of derivation shall be reflected in the allocation formula as representing not less that 13 percent of revenue earned from natural resources.[181] Commenting on section 163 (2) of the 1995 Draft Constitution, which is *ipsissimis verbis* with section 162(2) of the 1999 Constitution, Human Rights Watch observed that the inclusion of all these principles in the provision reflects a lack of consensus on the revenue allocation formula during the constitutional debate.[182]

To sum this section up, I will argue that regardless of the revenue allocation formula that is laid down by Nigerian law, or the number of development institutions set up, the people's expectations and aspirations for social development are unlikely to be fulfilled unless more transparent and accountable governance standards are introduced and adhered to. Nigeria's abundant natural wealth and resources contrast sharply with the poverty of her people and the country's continued ranking under the United Nations *Human Development Indicators* as one of the poorest in the world.[183] I will suggest that

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[178] Human Rights Watch, *The Price of Oil,* at 42. In 1970, this was revised to the effect that the Federal Government now earned 5% of revenue, 50% was paid to the DPA, and 45% was held on derivation basis. In 1971, the government introduced a distinction between onshore and offshore revenue, and retained 100% of the latter. In 1975, the allocation of onshore revenue to states on the basis of derivation was further reduced to 20%. The derivation principle was altogether abolished in 1979. The new civilian government that came to power that year conducted wide-ranging consultations on revenue sharing, and in 1982, a new formula was adopted giving the federal government 55%, the States 30.5%, local governments 10%, and a special allocation of 4.5% was made to the oil producing communities. This sum was to be spent for three purposes: 1% was intended for ecological problems, 2% was said to represent a derivation payment, and the remaining 1.5% was to be utilized for development of the oil producing communities. This situation remained in force until 1992, with the establishment of OMPADEC when the development allocation to oil producing areas was increased to 3%.

[179] Constitution of the Federal Republic of Nigeria (1999) available online at http://www.Nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm (accessed February 3, 2003).

[180] Ibid., at section 162(2).

[181] Ibid.

[182] Human Rights Watch, *The Price of Oil,* at 48.

[183] United Nations Development Program, *Human Development Indicators* (2002). Nigeria is ranked 148 on the Human Development Index. Average life expectancy stands at 51.7 years, and 70.2% of the population lives below the poverty line of $1 per day. If the poverty baseline were raised to $2 a day,

the failure of Nigeria to realize its development potential is mainly attributable to a governance deficit. I have maintained that governments in Nigeria have thwarted the governmental purpose from pursuit of the general well-being, to a quest for personal wealth. I have also argued that this cleavage between the interests of government on the one hand, and those of the public on the other, should be a relevant consideration in determinations of governmental legitimacy, akin to the manner in which a government's failure to uphold and protect the 'natural duties of governance' has led to collective non-recognition and de-legitimization of governments in international law. It is my submission that governmental responsibility for human well-being is an essential term of the social contract between governments and subjects.

However, the state of social underdevelopment in the Niger Delta requires analysis going beyond the responsibilities of the government. The multinational oil companies operating in Nigeria have been powerful and influential actors that either directly or indirectly, have affected the lives of thousands of Nigerian citizens. In the previous chapter, I discussed the role and responsibilities of the multinational oil companies in environmental damage in the oil producing regions of Nigeria. In the next section, I will look at the question of corporate responsibility for social development in Nigeria's oil producing areas. I will argue that while Nigerian law does not provide for corporate responsibility for social development, the *travaux preparatoires* and content of several international *Codes of Conduct* and *Non-Binding Principles*, the views of many publicists, as well as the rhetoric of many business corporations including those working in Nigeria, show that there is an emerging societal expectation that business should do more as a moral or ethical responsibility, to contribute to human well-being in the places that they operate.

90.8% of the population would fall below that line. This compares very poorly with figures for other oil-rich states. For example Venezuela is ranked 69 in the world; life expectancy at birth stands at 72.9 years; adult literacy 92.6%; and 23% of the population lives below the poverty line of $1 a day. Kuwait is ranked 45; life expectancy 76.2 years; adult literacy 82%; and 0% of the population live below the poverty line. Saudi Arabia is ranked 71; life expectancy is 71.6 years; adult literacy 76.3% and there are no statistics of people living below the poverty line. In Indonesia which has a population of 231,328,092 (i.e. twice that of Nigeria), only 7.7% of the population live on income levels below $1a day.

5. Corporate Social Responsibility

In an article that sparked off controversial debates on corporate responsibility, Milton Friedman argued against broader social responsibilities for business. He maintained that corporations are artificial constructs created for specific purposes and that the responsibility of corporate management is to act within the confines of their mandate, i.e., to maximize profits for their shareholders within the limits of law and ethical custom.[184] For Friedman, while it was conceivable to speak of social responsibilities for natural persons, the same assertion could not be made with respect to the legal fiction that was the corporation. He drew a distinction between the responsibility of business corporations (limited to wealth maximization) and that of governments (which included social objectives), and argued that any attempt to impose the latter type of obligation on private corporations would amount to an illegal wealth transfer.

Friedman's article laid the groundwork for a lively scholarly debate on the responsibilities of business corporations.[185] As previously mentioned, there are two main schools of thought on corporate social responsibility. The predominant position in American legal scholarship supports the view that the corporate purpose is the maximization of shareholder wealth, and that management responsibility should be directed to that end.[186] On the other hand, some scholars argue that both the historical purpose of the corporate form, and the diversity of constituencies that are affected by corporate actions make it undesirable that corporate responsibility be limited to stockholder wealth maximization. It is argued that at a minimum, corporate managers should take the interests of other constituencies into account in their management decisions.[187] Respectively, these two perspectives have now earned the label 'shareholder' and 'stakeholder' views on corporate social responsibility.

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[184] M. Friedman, "The Social Responsibility of Business is to Increase its Profits" in T. Donaldson and P.H. Werhane (eds.), *Ethical Issues in Business: A Philosophical Approach* (Englewood Cliffs, New Jersey: Prentice-Hall 1979) 191.

[185] The debate on corporate social responsibility is most advanced in American corporate law scholarship. The analysis here therefore draws heavily from that literature.

[186] Hansmann & Kraakman, "The End of History of Corporate Law", *supra* note 12.

[187] D.J. Morrissey, "Corporate Social Responsibility", *supra* note 13; L.E. Mitchell, "The Human Corporation: Some Thoughts on Hume, Smith, and Buffett" (1997) 19 Cardozo L. Rev. 341; L.E. Mitchell, "Private Law, Public Interest?: The ALI *Principles of Corporate Governance*", (1993) 61 (4) Geo. W. L. Rev., 871.

In 1932, Professors Merrick Dodd and Adolf Berle debated the issue of corporate responsibility in a pair of articles published in the Harvard Law Review.[188] Berle suggested that unless coherent suggestions were made on how to handle the problems that would arise from a regime of management responsibility to multiple constituencies, it was better to retain the status quo under which corporate managers owe their fiduciary duties only to the shareholders.[189] Dodd on the other hand argued that corporate managers owe their duties to the corporate institution *per se*, and not to the stockholders. For Dodd, the modern corporation was a quasi-public entity which, in the conception of a majority of the population, has both social and profit objectives. Consequently, as trustees of an institution, management ought to exercise their power with consideration to the interests of multiple constituencies such as employees, customers, stockholders and the general public.[190]

Berle later took a broader view of management responsibility, holding that corporate management should be a 'purely neutral technocracy', under which stockholder ownership should not prevent management from carrying out a community program including job security and fair compensation to workers, reasonable service to the public, and stabilization of business.[191] He also conceded Dodd's claim that management ought to be free to pursue broader constituency interests, a change he referred to as a "20th Century Capitalist Revolution", and that management power should somehow be held responsible to a "public consensus".[192]

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[188] E. Merrick Dodd, Jr. "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145; A.A. Berle Jr., "For Whom Corporate Managers *are* Trustees: A Note" (1932) 45 Harv. L.Rev 1365.

[189] Berle, at 1367: "Now, I submit that you can not abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."

[190] Dodd at 1161: "That the duty of managers is to employ the funds of the corporate institution which they manage solely for the purposes of their institution is indisputable.... Nevertheless, the [institution] once it becomes a going concern, takes its place in a business world with certain ethical standards which appear to be developing in the direction of increased social responsibility. If we think of it as an institution which differs in the nature of things from the individuals who compose it, we may then readily conceive of it as a person, which, like other persons engaged in business, is affected not only by the laws which regulate business but by the attitude of public and business opinion as to the social obligations of business. ... Those through whom [the institution] acts may therefore employ its funds in a manner appropriate to a person practicing a profession and imbued with a sense of social responsibility without thereby being guilty of a breach of trust."

[191] Katz, "Responsibility and the Modern Corporation" 3 J.L. & Econ. (1960) 75 citing A.A. Berle and G. C. Means, *The Modern Corporation and Private Property* (1932) at 532; Berle, *The 20th Century Capitalist Revolution* (1954).

[192] Ibid.

Since this debate, legal scholarship on corporate social responsibility has oscillated between the 'shareholder' and 'stakeholder' models. The shareholder view of management responsibility emerged from the nineteenth century introduction of the principle of limited liability, and the legal fiction that the corporation existed in law as an entity separate from the members that formed it.[193] In addition to maximizing the net present value of the corporation, the shareholder model also posits that the only constraint on such wealth maximization is that it must be carried out in accordance with law, without deception or collusion.[194] To the extent that social responsibilities are recognised under this model, they are deemed to be satisfied when corporations excel in their economic activities leading to economic growth, job creation, the provision of goods and services to the market, and the promotion of social well-being through payment of taxes.[195] The shareholder view also argues that the interests of other stakeholders such as contractors, employees, consumers and the environment are best protected through private contracts and government regulation, not corporate law.[196]

A more radical version of the shareholder model views the corporation as a nexus of contracts between shareholders and various persons and groups that deal with the corporation, and that the primary objective to maximize shareholder gain is an implicit term of the contract between shareholders and managers. In contrast to the mainstream shareholder model, the nexus of contracts view suggests that the pursuit of wealth maximization would even free corporate management from moral or social responsibility to comply with legal rules, where non-compliance would be economically advantageous to shareholders.[197] Needless to say, this position is as untenable as it is irresponsible. Like ordinary citizens, corporations are bound to obey the legal rules that exist in their areas of

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[193] B. Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights", (2002) 20 Berkeley J. Int'l L., 45 at 54.

[194] H. Hansmann and R. Kraakman, "The End of History of Corporate Law", *supra* note 12; Williams, "Corporate Social Responsibility", *supra* note 12, at 712-713. According to Williams, the shareholder model represents the predominant academic view in the United States on corporate social responsibility.

[195] William Safire, "The New Socialism" N.Y. Times, Feb. 26, 1996 at p. A13 defended this position as follows: "What are the primary "social" responsibilities of a corporation? To serve its owners by returning a profit and its community by paying taxes; to earn the allegiance of customers by delivering value, and to provide a secure future for employees who help it succeed in the marketplace."

[196] Williams, "Corporate Social responsibility", *supra* note 12 at 713.

[197] F.H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* (1991); Easterbrook & Fischel, "The Corporate Governance Movement" 35 Vad. L. Rev. 1259; and Easterbrook and Fischel,

operation. It is inconceivable that this obligation could be trumped by a presumed contractual obligation to maximize shareholder profits. As John Dewey pointed out, "the corporation is ... a right-and-duty-bearing unit", and its rights and duties are those ascribed to it by the law.[198] According to UNCTAD, compliance with legal rules forms part of the normative compact under which corporations are granted the right to do business within specific societies. Such compliance therefore falls outside the purview of corporate social responsibility, for social responsibility incorporates standards of behavior that, while reflective of the collective expectations of members of society, are not required as a matter of law.[199]

In 1919, the Michigan Supreme Court was faced squarely with the question of corporate social responsibility.[200] The issue in that case was whether a controlling shareholder and manager of the company, was under an obligation to distribute special dividends to shareholders instead of investing the extra income implementing an expansion plan that would have enabled the company to reduce the selling price of its cars, and create more jobs for the public. The plaintiffs were minority shareholders who objected to these plans on the ground that the management's first responsibility was to the shareholders, and that this involved taking measures to increase, not decrease the value of their shares. The Court agreed that the legal obligation of the company's management was to work to maximize profit for the shareholders and that this obligation overrides the altruistic motives of management. Justice Ostrander presented the reasons for the court's decision in the following words:

> There should be no confusion ... of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[201]

"Antitrust Suits by Targets of Tender Offers" 80 Mich L. Rev. 1155. Williams, *supra* at 715 refers to this view as the "irresponsible position."

[198] John Dewey, "The Historic Background of Corporate Legal Personality" 35 Yale L.J. (1926) 655, at 656 cited in Beth Stephens, "The Amorality of Profit", *supra* note 193, at 61.

[199] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report (1999): Foreign Direct Investment and the Challenge of Development* (Geneva: United Nations, 1999) at 346-347.

[200] *Dodge v. Ford Motor Company*, 170 N.W. 668 (**Michigan Sup. Ct.** 1919).

The shareholder primacy norm was also applied in the English case of *Parke v. Daily News Ltd.*[202] There, the management of a company attempted to distribute the entire purchase price of a newspaper business that was then being wound-up, to the company's employees in the form of benefits and voluntary severance pay. The Court held that this was an illegal application of company funds to the detriment of dissenting shareholders. In its judgement, the court reasoned that:

> Stripped of all its side issues, the essence of the matter is this, that the directors of the defendant company are proposing that a very large part of its funds should be given to its former employees in order to benefit those employees rather than the company, and that is an application of the company's funds which the law, as I understand it, will not allow.[203]

Despite these decisions upholding the shareholder model, instances of judicial endorsement of wider constituency interests could be found on both sides of the Atlantic. In 1883, the Chancery Division of the English Court of Appeal reasoned that philanthropic action by corporate management could be upheld on the basis of enlightened self-interest.[204] In other words, such action was permissible if it ultimately redounded to the benefit of the company. Similarly, a New Jersey Court once upheld a gift of $1500.00 to Princeton University over the objections of a minority shareholder. The Court opined that the success of modern corporate life depended upon the existence of a sound economic as well as social environment. Consequently, a gift such as the one in the present case could be sustained in fulfillment of the social responsibilities of corporate citizens within the communities in which they operate.[205]

As opposed to the shareholder view, scholars who adhere to the stakeholder view of the corporation invoke a variety of historical, interest-based, and ethical arguments to defend the position that corporate management should consider a broader spectrum of interests than the maximization of shareholder gain. First, it is argued that historically, corporate charters were granted in Britain and the United States as a privilege from the Crown or State legislatures to facilitate the discharge of certain public services such as

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[201] Ibid.
[202] [1962] Ch. 927.
[203] Per Plowman J., at 963.
[204] *Hutton v. West Cork Railway Company* (1883) 23 Ch.D. 654, at 673.
[205] *A.P. Manufacturing Co. v. Barlow,* 98 A. 2d 581 (**New Jersey,** 1953)

railways, bridges and canals, turnpikes and public utilities.[206] These early charters envisioned the corporation as a quasi public service institution. This historical circumstance, they argue, is consistent with the stakeholder view of management responsibility. Secondly, it is argued that in their current form, corporate activities affect a number of constituencies including employees, consumers, suppliers, the general public, and the natural environment. Therefore, in discharging their responsibilities, corporate management should take the interests of these other stakeholders into account.[207] A third variant of the stakeholder view maintains that the true nature of the modern business corporation takes the form of team production, requiring input from a variety of constituents including employees engaged at various levels of management and non-management responsibility, as well the communities in which corporations operate. As the success of the corporate enterprise depends on the input of these various constituents, it is unfair that management power be directed solely to the realization of shareholder gain.[208] Indeed, even Adolf Berle, that prolific defender of shareholder primacy, once argued that the separation of ownership from management that is now characteristic of many large corporations, and the consequent passivity of many stockholders, makes it undesirable that management responsibility be exercised solely to the benefit of shareholders. For Berle, "true ownership involves not only risk but active participation in management [and therefore] a passive investor who abdicates management responsibility has no justifiable claim to the full fruits of the enterprise."[209] Fourth, other scholars argue that corporate social responsibility could be based on a communitarian view of the corporation. In essence, this argument seeks to disregard the separate legal existence of the corporation and to identify the corporation's social responsibilities with those of the natural persons that form it.[210] Since the welfare of these

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[206] D.J. Morrisey, "Corporate Social Responsibility", *supra* note 13 at 1008, citing A. Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (1982), at 6 to the effect that: "It was assumed, as it still is in nonprofit corporations, that the incorporated body earned its charter by serving the public good."

[207] L.E. Mitchell, *Progressive Corporate Law* (1995); L.E. Mitchell, "Private Law, Public Interest?: The ALI *Principles of Corporate Governance*" (1993) 61 Geo. W. L. Rev., No. 4, 871.

[208] M. Blair and L. Stout, "A Team Production Theory of the Corporation", *supra* note 13, at 247.

[209] Katz, "Responsibility and the Modern Corporation" 3 J.L. & Econ., 75 (1960) paraphrasing Berle.

[210] H. Ward, "Transnational Corporate Accountability", *supra* note 14; Morrisey, "Corporate Social Responsibility", *supra* note 13 at 1006: "... at root, the corporation is a human, and therefore moral organization. Its status as a leading player in society gives it a calling beyond just economic utility."

persons are intricately linked with the general good of society, it follows that corporate well-being must, in some way, be connected with the general good. At heart then, the communitarian view of corporate social responsibility emanates from the Aristotelian view of the individual as part of society, and that happiness and self-understanding lie in group existence.[211]

The principal weakness of the shareholder view of corporate social responsibility is that its adherents confined their analysis within the limits of corporate law. Their objective was to answer the question whether it was appropriate for corporate law to provide for the protection of non-shareholder interests. From this perspective, the predominant consensus holds that interests outside those of the shareholders are best protected through private contracts or public regulatory law. Yet, even in the United States, this position has now been severely weakened.

Since the 1980s, many States have enacted 'other constituency' statutes which permit corporate management to take the interests of other stakeholders such as employees, consumers and the general public into account.[212] For example, in the State of Illinois the corporate law statute provides that directors and officers of the corporation, in considering the best interests of the corporation, "may...consider the effects of any action upon employees, suppliers, and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors."[213] This enabling power to consider non-shareholder interests is said to be a common feature of many State-level corporate law statutes.[214] In a study on corporate governance in the United States, the American Law Institute sought to strike a balance between the shareholder and stakeholder views of management responsibility. In the *Draft Principles of Corporate Governance* released in 1992, the Institute recommended that "a business corporation should have as its objective the conduct of business activities

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[211] Morrisey, "Corporate Social Responsibility", at 1005-1006. **See also** J. Spoerl, "The Social Responsibility of Business" (1997) 42 Am. J. Juris. 277, arguing that management responsibility should be exercised to promote 'authentic human flourishing'. Human flourishing is "...the state of being well off, in good condition, in 'good shape' as a human being." Synonyms include happiness, eudaimonia, perfection, well-being, or felicity.

[212] F.H. Buckley et al, *Corporations: Principles and Policies*, *supra* note 12, 558-561. **Also** Williams, "Corporate Social Responsibility", *supra* note 12, at 716.

[213] Illinois Ann. Sat. ch. 32, para. 8.85.

[214] Buckley et al, *Corporations, supra* note 12 at 559.

with a view to enhancing corporate profit and shareholder gain...."[215] The principles however permit management to take such ethical considerations into account as they regard appropriate to the responsible conduct of business, and to devote a reasonable amount of the corporation's resources "to public welfare, humanitarian, educational, and philanthropic purposes."[216]

Predictably, this attempted half-way house solution to the corporate social responsibility dilemma has been criticized for adding to the philosophical confusion between the private and public nature of the corporation, and for further muddling the issue to which constituency management owe their responsibilities. Mitchell has argued that "[t]he reason for the philosophical ambiguity of the *Principles* - and therefore their limited utility - is the failure of the ALI to address and resolve the great unanswered question in corporate law: What is the nature and purpose of the corporation?"[217] Other scholars have argued that the provision allowing consideration of ethical and public purposes was not intended to protect the interests of non-shareholder constituencies, but rather to provide a defense to corporate management in suits for breach of fiduciary duties arising from management action in blocking hostile take-overs.[218]

(A) CORPORATE SOCIAL RESPONSIBILITY AND GLOBALIZATION

A more profound objection to the corporate social responsibility debate is that it has not taken into account changes resulting from the internationalization of corporate activity, and the globalization of the world economy. First, the debate has been conducted within the theoretical assumption that corporations are legal entities created under domestic law and subject only to national legal strictures. On the other hand, since the 19th century, corporations have expanded their business activities across many national jurisdictions and legal systems. This global corporate expansionism was given further impetus since 1947 when the formation of GATT led to a significant reduction of tariff barriers to the movement of goods. In 2002, UNCTAD estimated that there were about 65,000

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[215] American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (Proposed Final Draft 1992), para. 2:01. **See also** L.E. Mitchell, "Private Law, Public Interest?: The ALI *Principles of Corporate Governance*" (1993) 61(4) Geo. W. L. Rev., 871.
[216] Ibid. at para 2. 01 (b) and (c).
[217] Mitchell, "Private Law, Public Interest", *supra* at 875.
[218] Buckley et al, *supra,* at 559.

multinational companies in the world, with some 850,000 foreign affiliates accounting for total sales of $19 trillion.[219] Most transnational business activity is therefore vertically integrated through a network of parent and subsidiary companies which exist as separate legal entities within their countries of incorporation, but in fact operate under centralized management and decision-making structures.[220] Thus, while production and management decision-making have both become transnational and integrated, legal regulation has largely remained domestic in outlook. This is one of the anachronisms of modern corporate law and corporate liability rules viewed in the light of international production and the globalization of markets. It has enabled parent companies to escape responsibility for the actions of their subsidiaries operating in different parts of the world on the basis that the subsidiary was a separate entity in law.[221] In that respect, it has been noted that historically, the concept of limited liability was intended to protect the individual members of a corporation, but that it was inappropriately extended to shield the separate units of a corporate enterprise.[222] As Blumberg has argued, this state of affairs ignores the economic reality that international corporations operate as integrated 'economic enterprises', and therefore legal rules should reflect this economic reality.[223]

In addition, the integrated production structure of MNCs has enabled them to take advantage of variances in domestic regulatory regimes, in many cases relocating production to avoid environmental, labor, human rights and fiscal regulation. In developing countries in particular, many governments have reacted to this situation by deregulating their economies with the aim of creating a hospitable environment for foreign investment. As a result, regulatory standards in these countries have slipped towards the bottom. In addition to weak domestic regulation, some scholars have also suggested that the power of multinational enterprises explain the international

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[219] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2002: Transnational Corporations Export Competitiveness* (Geneva: United Nations, 2002), at xv.

[220] P. Muchlinski, *Multinational Enterprises and the Law*, *supra* note 17, at 12.

[221] **See** *infra* note 234 ff, for a discussion of the case-law.

[222] P.I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993), 3-7: "[the extension of limited liability to components of a corporate group] overlooked the fact that the parent corporation and its subsidiaries were collectively conducting a common enterprise, that the business had been fragmented among the component companies of the group, and that limited liability - a doctrine designed to protect investors in an enterprise, not the enterprise itself- would be extended to protect each fragment of the business from liability for the obligations of all the other fragments."

community's failure to adopt a binding regulatory instrument for international direct investment.[224] In other cases, multinational enterprises operate in countries with weak systems of governance and low levels of official accountability. In such situations, it is argued that these companies could use their enormous economic and political influence to encourage officials to adopt policies for better human rights, social development, and environmental protection.[225] For example, after the conviction of Ken Saro-Wiwa in Nigeria, there were many calls both locally and internationally, for Shell to make representations to the government to prevent the execution of the convicted persons. While Shell initially took the position that it had no mandate to interfere with the legal processes of Nigeria, evidence later came to light that Brian Anderson, the Head of Shell Nigeria had, in a secret meeting with Saro-Wiwa's brother, offered to secure his release in exchange for Saro-Wiwa giving up the Ogoni campaign.[226] Secondly, a day before Saro Wiwa and the eight other Ogonis were hanged, C.A.J. Herkströter, President of Royal Dutch Shell sent a 'personal letter' to General Abacha pleading that the death sentences be commuted on humanitarian grounds. This obviously came too little, too late, as the "Ogoni nine" were executed on November 10, 1995.[227]

Rather than using their economic clout to encourage host government responsiveness to social and environmental concerns, multinational enterprises have in many cases been accused of collusion with repressive governments and of complicity in human rights and environmental violations. This is particularly true of companies in the extractive industry. The disgraced American company Enron, has been accused of working with security forces in India in violent repression of local opposition to an energy project.[228] Accusations of complicity in human rights violations have also been leveled against British Petroleum for their operations in Columbia, and against Unocal Corporation for their dealings with the military regime in Myanmar, formally known as Burma.[229] Similarly, Shell Oil Company was implicated in the Nigerian military's brutal

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[223] Ibid.
[224] Beth Stephens, "The Amorality of Profit", *supra* 193 at 81.
[225] H. Ward, "Transnational Corporate Accountability", *supra* note 14 at 453.
[226] Okonta and Douglas, *Where Vultures Feast, supra* note 1, at 184.
[227] Human Rights Watch, *The Price of Oil, supra* note 93, at 171-172.
[228] Beth Stephens, "The Amorality of Profit", *supra* note 193 at 51-52.
[229] Ibid.

suppression of anti-oil protests by inhabitants of the Niger Delta region during the 1990s.[230]

In light of these concerns, multinational enterprises continue to pose a regulatory challenge to international law. The question remains how to meet this challenge so that MNEs could become more socially responsible in their areas of operation. Three distinct approaches come to mind: first, some writers have proposed that in the absence of a global regulatory regime, multinationals operating in developing countries or other areas having lower environmental and social regulation should be held to the standards prevailing in the home state of the parent company. In other words, 'home state jurisdiction' is intended to allow actions to be brought in the home country of the parent company for conduct by its subsidiary operating in a developing country, where the conduct amounts to a violation of human rights and environmental standards prevalent in the parent's home state.[231] In the absence of international mechanisms for the enforcement of human rights and environmental norms against corporations, home state jurisdiction could be a useful tool to prevent a race to the bottom in regulatory standards. It might also be useful to avoid the difficulties arising from host government complicity in many of the violations for which corporations are accused, as well as the fact that at least in some jurisdictions, judicial systems cannot be fully relied upon. Such concerns could arise from the possibility of political interference in judicial processes, to a lack of financial and legal resources rendering the possibility of securing redress quite remote.

Yet, home state jurisdiction could be subject to many practical and legal difficulties. In the *Texaco* case for example, the government of Ecuador, before it was overthrown in 2000, issued a diplomatic protest to the United States that proceeding with the action in that country would infringe upon Ecuador's sovereignty.[232] In addition, due to the separate legal existence of parent and subsidiary companies, the exercise of home state jurisdiction would entail departing from the entity theory of corporate law. This would require evidence that the acts of the subsidiary are imputable to the parent either because it controls the actions of the subsidiary, or because the parent and subsidiary

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[230] Human Rights Watch, *The Price of Oil* (1999).
[231] P.S.P. Subedi, "Foreign Investment and Sustainable Development" in F. Weiss, E. Denters, and P. de Waart, *International Economic Law with a Human Face* (The Hague: Kluwer Law, 1998), at 426.
[232] Ward, "Transnational Corporate Accountability", *supra* note 14 at 459.

firms are engaged in a common economic enterprise. Either way, home state jurisdiction is laden with implications for traditional corporate law theory. For Blumberg, the enterprise theory provides a sufficient reason for the imposition of liability on multinational corporations.[233]

The second approach to social responsibility for multinational corporations is foreign direct liability, or universal jurisdiction. Under this approach, it is argued that while international law addresses itself primarily to the actions of States, private actors could also be held responsible within domestic legal systems for violating international norms that are 'universal, obligatory, and definable'.[234] The *Forti* standard was an application of the *Alien Tort Claims Act* (ATCA) of the United States, which permits federal courts to try a "civil action by an alien for a tort ...committed in violation of the law of nations or by a treaty of the United States."[235] So far, the case law under ATCA supports universal jurisdiction for violations of *jus cogens* norms such as genocide, war crimes, crimes against humanity, slavery, forced labor, and for disappearances and summary execution. In *Filártiga v. Pena-Irala,* a Second Circuit Court in the United States reversed the District Court and held both that ATCA covered violations of international law, and that torture by a state of its own citizen amounted to such a violation.[236]

However, United States Courts have been less willing to accept jurisdiction or impose liability where the ATCA claim involves environmental violations. While none of the actions has so far been decided on their merits, the preliminary rulings delivered are illustrative of the judicial attitude. For example, in the *Union Carbide* case, claims

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[233] P.I. Blumberg, *The Multinational Challenge to Corporation Law, supra* note 222, at 177-181.

[234] *Forti v. Suarez-Mason*, 672 F. Supp. 1531, at 1539-40 (N.D. Cal. 1987). **See** B. Stephens, "The Amorality of Profit", *supra* at 86 noting that the above standard was first articulated in the *Forti* case.

[235] Alien Tort Claims Act, 28 U.S.C. § 1350 (1994). The Statute was originally passed in 1789 as part of the Judiciary Act. Until the 1980s, the scope of ATCA litigation was limited. However, in 1995 in *Kadic v. Karadzic,* 70 F. 3d 232, at 243 (2d Cir. 1995) it was established that ATCA actions could be brought not only against foreign officials, but also against private individuals for narrowly-defined violations of international law such as genocide or war crimes.

[236] *Filártiga v. Pena-Irala,* 630 F.2d 876 (2d Cir.1980). **See also** *Doe I v. Unocal Corporation,* 963 F. Supp. 880 (C.D. Cal. 1997) which held that an ATCA action could be brought against a corporation for slavery and forced labor even though in the present case the defendant company was not held liable on the ground that there was insufficient evidence to show that it participated in, or co-operated with the government in the alleged violations. This conclusion is hard to support in light of the court's finding that the defendants knew that the military authorities were using forced labor to implement works on the

brought on behalf of victims of the chemical explosion at a Union Carbide factory in India were dismissed by United States Courts on the basis of *forum non conveniens.*[237] Furthermore, beginning in 1993, a series of class action suits were commenced in New York State against Texaco Corporation on behalf of indigenous populations in Ecuador and Peru.[238] Plaintiffs claimed that the company openly dumped the toxic by-products of oil production on their lands, instead of reinjecting them into the oil well, which was the standard industry practice. Plaintiffs argued that this resulted in pollution of rivers, landfills, roads and forests, and caused personal injuries and illness (including cancer) among local populations. The defendant company raised several preliminary objections including that the plaintiffs failed to join a necessary and indispensable party (i.e. the government of Ecuador); that proceeding with the actions in the United States would be inconsistent with international comity; and finally, on the basis of *forum non conveniens.*

After many appeals and cross-appeals, as well as a series of other events including a change of government in Ecuador, which in turn led to a change of parties in the litigation,[239] the United States District Court for the Southern District of New York expressed its willingness to grant the motion for dismissal on the basis of *forum non conveniens.* The Court reasoned that all the land and people allegedly affected by the company's actions as well as the bulk of the evidence, were located outside the United States. In January 2000, the Court ordered that the Government of Ecuador and the parties be given an opportunity to make submissions on whether the courts of Ecuador and Peru "might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being refiled in one or both

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production site, and benefited financially from the project. In *Beanal v. Freeport-McMoran, Inc.,* 969 F. Supp. 362 (E.D. La. (1997), it was held that a corporation could be held liable for genocide under ATCA.

[237] *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F. Supp. 842 (S.D.N.Y. 1986). The claims were later brought in the Indian Courts, where a lump-sum settlement was reached. **See** *infra* note 243 and accompanying text.

[238] Aguinda v. Texaco Inc., No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. April 11, 1994); Ashanga v. Texaco Inc., No. 93 Civ. 9266, 2000 WL 1221143 (S.D.N.Y. Jan 31, 2000).

[239] On January 21, 2000 there was a change of government in Ecuador. The new government was sympathetic to the claims brought in New York and voluntarily submitted to the jurisdiction of the New York courts as a co-plaintiff. The new government argued that its action was necessary to "protect the interests of the indigenous citizens of the Ecuadorian Amazon who were seriously affected by the environmental contamination attributed to the defendant company." **See** *Jota v. Texaco, Inc.,* 157F. 3d 153, 155 (2d Cir. 1998) cited in C.A. Williams, "Corporate Social Responsibility" *supra* at 754.

of those forums."[240] This decision was taken despite the fact that the head offices of Texaco were located in the United States, and irrespective of the plaintiffs contention that decisions reached at corporate headquarters in Connecticut, were implemented in both countries and directly resulted in the alleged violations.

The case of *Wiwa v. Royal Dutch Petroleum,*[241] also raised issues of foreign direct liability under ATCA. The plaintiffs were American residents of Nigerian origin. They brought the case against two Shell holding companies - Royal Dutch Shell of the Netherlands, and Shell Transport and Trading Company of the United Kingdom. Plaintiffs claimed that through their local subsidiary in Nigeria, the two holding companies violated the human rights of Ken Saro-Wiwa and other Ogoni leaders and citizens by enlisting the Nigerian army and other security forces to violently clamp-down on anti-oil protests in Ogoniland during the 1990s. The plaintiffs accused the companies of complicity in the arrest, detention, torture of the Ogoni leaders and citizens, and ultimately, of the trial and execution of Ken Saro-Wiwa and eight other Ogoni activists by a special military tribunal. The fact that claims in the *Wiwa case* were limited to human rights abuses shows that litigants recognize a lack of judicial willingness to entertain environmental claims under ATCA.

Even without the environmental claims, the defendants still sought to have the action dismissed for failure to state a claim, for the court's lack of jurisdiction, and on the basis of *forum non conveniens.* Both the District and Second Circuit Courts in New York held the fact that both defendants maintained investor-relations offices in New York, was sufficient ground for the exercise of jurisdiction. The Second Circuit then reversed the District Court on the issue of forum. It held that while the United Kingdom provided a suitable alternative forum, the plaintiffs' choice of forum ought to be given sufficient consideration and due deference. It further reasoned that the United States had an interest in providing a forum to litigate international human rights issues, and that United States resident plaintiffs would be unduly burdened by litigating the action in another jurisdiction. For all these reasons, the Court held that the balance of convenience favored proceedings in the United States. Upon remand back to the District Court, the defendants

[240] Aguinda v. Texaco Inc., No. 93 Civ. 7527 (SDNY Jan. 31, 2000).
[241] 226 F. 3d88 (2d Cir. 2000).

renewed their motion to dismiss for failure to state a claim, arguing that in order to find the defendant companies liable for the actions of the Nigerian subsidiary, plaintiffs must show that the latter was the alter ego of the former. Defendants also argued that plaintiff's allegations concerned the actions of the Nigerian military and police forces and that these were covered by the 'act of state' doctrine, therefore barring jurisdiction. The District Court has again dismissed both of these motions and the case now seems set to proceed on its merits.[242]

The *Texaco* ruling raises serious doubts about the potential of foreign direct liability for environmental abuses by multinational corporations. While United States Courts were willing to exercise universal jurisdiction with respect to gross violations of human rights, this does not seem to be the case when it comes to the environmental conduct of MNEs.[243] Apparently, the U.S. Courts are content to leave these matters to the jurisdiction of the courts where the multinationals operate.

However, in the absence of an international tribunal dedicated to resolving disputes arising from the environmental conduct of private actors, and as more and more evidence comes to light of the negative environmental conduct of MNEs, as well as the increasing interdependence of the global environment, domestic courts must show greater willingness to depart from traditional legal doctrines such as the domestic nature of corporate entities and the jurisdictional limitations arising from strict adherence to state sovereignty. Moreover, while some environmental issues are clearly limited to national jurisdiction, there are many types of environmental violations that have transnational or even global effects. At a minimum, it is suggested that where the environmental conduct of multinational corporations affect sectors of the environment that are of common concern to humankind, there would be a strong case for the exercise of universal jurisdiction along the same lines as United States courts have assumed jurisdiction under

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[242] *Wiwa v. Royal Dutch,* 96 Civ. 8386 (KMW) February 22, 2002, (U.S. Dist. Crt. SDNY).

[243] *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F. Supp. 842 (S.D.N.Y. 1986). This action arose out of claims brought against Union Carbide for an explosion at its gas plant in Bhopal India, which resulted in the death of 2,500 people and injury to over 200,000 people. The action in the United States Courts was dismissed on the basis of *forum non conveniens.* It was later recommenced in India. Interim orders for payment by Union Carbide were made by the District Court and the High Court respectively, and subsequently, a final settlement of $470 million dollars was awarded to the Government of India, as representative of all the victims of the disaster against Union Carbide. See (1989) 1 SCC 674; (1989) 2

ATCA for gross violations of human rights. In both cases, the issues at stake touch upon fundamental interests of international society. It is also conceivable that such environmental violations would satisfy the 'universal, obligatory, and definable' standard under ATCA.

In the face of this misfit between domestic regulation of corporate activity and the integrated international production of corporate groups, Blumberg suggests that liability rules should shift toward the notion of a 'corporate enterprise' as opposed to the corporate entity theory. This shift would require recognition that in reality, control, decision-making and economic benefit are centralized at the corporate headquarters of multinational enterprises and consequently, that liability rules should reflect this situation.

The shift to enterprise liability would be consistent with the emerging global consensus that multinational corporations should be concerned with broader interests than the maximization of shareholder gain. In particular, since the 1970s, developing countries have argued that there is a case for some form of international regulation so as to bring corporate conduct in line with the social and economic development policies of host states.[244] Efforts by developing countries to transpose these provisions into the *United Nations Code of Conduct on TNCs* were largely opposed by the industrialized countries. The latter emphasized non-discrimination and the treatment of TNCs in accordance with international minimum standards, which they argued, reflected customary international law.[245] Developing countries on the other hand, questioned the customary status of the said standards and argued that they were based on the practice of industrialized countries at a time that most developing countries had not attained political independence, and therefore could not have consented to the alleged rules.[246] Despite these differences in

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SCC 540. **See also** C.M. Abraham and S. Abraham, "The Bhopal Case and the Development of Environmental Law in India" (1991) 40 I.C.L.Q., 334.

[244] UNGA Res. 3281 (XXIX) 1974, Charter of Economic Rights and Duties of States, 14 ILM 251 (1975). This resolution affirms the permanent sovereignty of all States over their natural wealth and resources. It also recalls the right of all States to freely admit TNCs into their territory, and to regulate their activities. CERDS further confers a right to expropriate foreign property and to pay 'appropriate compensation' to be determined by the domestic courts of the nationalising state.

[245] Muchlinksi, *Multinational Enterprises and the Law, supra*, note 17 at 595. These standards are national treatment, most favored-nation treatment, and fair and equitable treatment, including the payment of 'prompt, adequate and effective' compensation in cases of expropriation.

[246] Ibid., at 594-595

negotiating position, the Draft Code includes provisions relating both to the treatment of TNCs, as well as norms of good conduct for business corporations. These include respect for human rights, socio-cultural objectives and values of host states, abstention from corrupt practices, non-interference in internal politics, transfer of technology and environmental protection.[247] These provisions show that a significant part of the international community clearly wanted to introduce a better balance between the protection and promotion of investment, and broader social responsibilities for corporations.

While negotiations for a Code of Conduct on TNCs have been suspended since 1992, the United Nations continues to take the position that more needs to be done from a normative perspective, to bring international business activity closer to the objective of sustainable development. In 1999, the Secretary-General announced the United Nations *Global Compact* as a voluntary corporate citizenship initiative with two main objectives.[248] First, it was intended that the nine principles of the *Global Compact* would become a part of business strategy; second, that the Principles would facilitate co-operation among key stakeholders and promote partnerships in support of United Nations goals.

The nine Principles are derived from the *Universal Declaration of Human Rights*, the ILO's *Declaration on Fundamental Principles and Rights at Work,* and the Rio *Declaration on Environment and Development.* Broadly, they relate to respect for human rights, labor, and environmental standards.[249] The United Nations argued that by applying these principles in international business decisions, multinational firms would integrate the environmental and social pillars of sustainable development with the predominant

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[247] United Nations Code of Conduct on Transnational Corporations, *Official Records of the Economic and Social Council,*1983, Supplement No. 7 (E/1983/17/Rev.1), Annex II, in UNCTAD, *International Investment Instruments: A Compendium,* Vol. I (UN New York: 1996), at 161. For a discussion of the code and various other soft-law instruments **See** D. F. Vagts, "Multinational Corporations and International Guidelines" (1981) 18 C. M. L. Rev., 463-474; S. K. Verma, "International Code of Conduct for Transnational Corporations", (1980) 20 Ind. J.Int'l L 20; S.K.B. Asante, "The Concept of a Good Corporate Citizen in International Business" (1989) ICSID Rev. 1.

[248] http://www.unglobalcompact.org (accessed January 28, 2003).

[249] Principles 1-2 relate to support and respect for international human rights and non-complicity in human rights abuses; Principles 3-6 provide for freedom of association and recognition of rights to collective bargaining, elimination of forced, compulsory, and child labor, as well as elimination of discrimination at the work place; Principles 7-9 call on international business enterprises to support the precautionary

economic focus of globalization. In this way, the *Global Compact* could contribute to making globalization work for the benefit all people, not just for businesses and governments.

Similarly, the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* requires that MNEs conduct their operations in harmony with the development priorities and social objectives of the countries where they do business, and promote employment, training, skills transfer and safe and healthy working environments.[250]

At the regional level, the OECD *Guidelines on Multinational Enterprises*[251] were initially developed in 1976 as a counterpoise to the 'corporate control movement' then being spearheaded by developing countries under the NIEO campaign. However, they have now been revised to take into account difficulties arising from the activities of multinational enterprises.[252] For example, under the investment promotion provisions, the *Guidelines* provide for national treatment and the adoption of international minimum standards for the treatment of multinational investors.[253] On the other hand, the *Guidelines* require Members of the OECD to "give their full support to efforts undertaken in co-operation with non-member countries, and in particular with developing countries, with a view to improving the welfare and living standards of all people both by encouraging the positive contributions which multinational enterprises can make and by minimizing and resolving the problems which may arise in connection with their activities."[254]

Furthermore, in 1991, the *Guidelines* were revised to include a chapter on environmental protection which calls on MNEs to integrate environmental protection measures in their operations, and to avoid creating environmentally-related health problems. Useful instruments that could be utilized to this end include environmental and

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approach to decision-making, promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technology.

[250] International Labor Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977) in UNCTAD, *International Investment Instruments: A Compendium, supra* at 89.

[251] OECD, *Declaration on International Investment and Multinational Enterprises* (1976) revised in 1979, 84, and 1991, in UNCTAD, *International Investment Instruments, supra* at 183 **[hereinafter "OECD Guidelines"].**

[252] P. Muchlinski, *Multinational Enterprises and the Law, supra* note 17 at 578-579.

[253] OECD Declaration, Para. II.1; and Annex II, para. 7 respectively.

health impact assessments, information sharing, and precautionary measures necessary to minimize environmental and health risks. According to Muchlinski, the provisions on public welfare and environmental protection in the *Guidelines*, suggest that OECD Member States recognize a moral duty to ensure that the activities of their MNEs do not contribute to the detriment of public interests of host societies. He further notes that the provisions mark a departure from the OECD's earlier emphasis on investment protection.[255]

Individual efforts have also been made to enhance corporate social responsibility. The *Sullivan Principles* were initially introduced by Rev. Leon Sullivan to dissuade companies from doing business with the apartheid government of South Africa.[256] They have now been revised with the objective of having companies work towards the objectives of human rights, social justice and economic opportunity. The Principles call upon companies to respect human rights, promote employment in conditions that are fair and in environments that are secure and healthy, protect human health, the environment and sustainable development, and work with governments and communities to improve human quality of life.[257]

These normative developments provide reasons for a good argument to be made that there is an emerging consensus at the international level that corporations should be 'good citizens' of the countries in which they operate. The idea of good corporate citizenship reflects the claim that because corporations enjoy certain 'rights' under domestic and international legal regimes in the form of standards of treatment, their responsibilities should, like those of ordinary citizens, go beyond the minimum requirements laid down by law.[258] This is a clear departure from the shareholder view of corporate responsibility, which still holds sway within many domestic legal regimes.

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[254] *OECD Guidelines, supra,* at Annex I, para. 3.
[255] Muchlinksi, *Multinational Enterprises and the Law, supra* note 17 at 579. A new resolution has been introduced in the European Parliament, authorizing the adoption of a Code of Conduct for European Companies operating in developing countries. It is intended that the Code will address the human rights, social and environmental conduct of such companies. **See** *Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct,* European Parliament, Res. A4-0508/98 (adopted 15 January, 1999).
[256] http://globalsullivanprinciples.org (accessed January 27, 2003).
[257] Ibid.
[258] UNCTAD, *World Investment Report 1999, supra,* at 352.

Fortunately, multinational enterprises operate in developing countries, many of which are faced with socio-economic, legal and governance environments different from those prevalent in industrialized States. It is therefore not unreasonable to expect different standards of social and environmental conduct on the part of these companies. I will suggest that the claims for broader social responsibility for multinational corporations must be understood against the background that developing host states have different socio-economic development needs and challenges which are dictated in large part by conditions of poverty and underdevelopment. Similarly, regulatory and judicial systems are constrained in many of these countries, and systems of governance and public accountability are either weak or ineffective. These factors compare poorly with the economic might of many multinational corporations, and arguably provide compelling justifications for a normative shift towards enhanced corporate social responsibility. While the power of the multinational has ensured that investment regulation remains in the nature of soft law norms at both the international and regional levels, there is no reason to suppose that the non-binding consensus contained in these soft law instruments could not be transformed into binding legal rules within domestic law.

Having examined the corporate social responsibility debate, and argued that there is an emerging international consensus moving away from the shareholder primacy norm, I would now briefly consider the legal position in Nigeria.

(B) CORPORATE SOCIAL RESPONSIBILITY UNDER NIGERIAN LAW

The first thing to note is that as a former British colony, Nigeria has borrowed many legal principles from her erstwhile colonial master.[259] This is specifically true of the country's corporate law.[260] Currently, the *Companies and Allied Matters Act* provides for

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[259] Interpretation Act, Cap 192, *Laws of the Federation of Nigeria,* (1990) section 32 (1) provides that: "Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria."

[260] J. Ola Orojo, *Nigerian Company Law and Practice,* (London: Sweet & Maxwell, 1976) 1-11, giving a history of company law in Nigeria and tracing it to developments in British company law. The Supreme Court Ordinance of 1876 made applicable to Nigeria the common law, doctrines of equity and statutes of general application in England on July 24, 1874. This reception date was later changed to 1st January 1900 by the Supreme Court Proclamations for the Southern (1900) and Northern (1902) Protectorates respectively, and remains so to this day. The first indigenous company statute was the Companies Ordinance of 1912. Its objects included 'to provide for the formation of limited companies' in the colony

management responsibility based on the shareholder primacy norm.[261] However, the Act also permits management to take the interests of employees into account in their management decision-making.[262] Thus the Nigerian law recognizes a limited stakeholder model, even though the clear tenor of the law is that primary management responsibility is the realization of corporate profit.

Yet, the above provisions of the Companies Act are less inclusive than the maximal social responsibility standards required by the stakeholder model. As already discussed, under that model, management responsibility should include considering the interests of not just shareholders and employees, but also suppliers, creditors, consumers, local communities, and the beneficiaries of a clean environment.

Aside from the law, there is a broad expectation on the part of the Nigerian public that corporations, especially those in the petroleum sector, ought to do more as good corporate citizens. The claims made by various local communities that live in the Niger Delta region for social investment and environmental protection and referred to earlier in this chapter, are testimony to this expectation. In addition, while the government has not imposed social responsibilities as a matter of law, government officials have expressed the view that oil companies ought to give something back to the communities in which they do business as a demonstration of their good corporate citizenship. For example, in 1997, oil Minister Dan Etete argued that oil companies should be "socially responsible citizens" and that company profits "should be reinvested in these communities to alleviate the negative impacts of their operations."[263] It is possible to conclude from the above, following Donaldson and Dunfee, that part of the implicit contract that binds oil multinationals with the larger Nigerian society is the general expectation that these

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and protectorate of Nigeria. Orojo writes that before 1912, all the companies that traded in Nigeria came from Britain, and 'carried' their limited liability under British law to their operations in Nigeria.

[261] Companies and Allied Matters Act, Cap 59, Vol. III, *Laws of the Federation of Nigeria,* (1990). Section 279 (1) provides that: "A Director of a company stands in a fiduciary directors' relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf." Subsection 3 provides that directors shall at all times act in the 'best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed..." Under subsection 5 directors must exercise their powers for the specified purposes, and are prohibited from exercising power for 'a collateral purpose.'

[262] Ibid., section 279(4): "The matters to which the director of a company may have regard in the performance of his functions include the interest of the company's employees in general, as well the interests of its members."

[263] Human Rights Watch, *The Price of Oil, supra* at 102.

companies would go beyond their legal (shareholder) responsibilities to assume broader standards of conduct consistent with the welfare of the communities in which they operate.[264]

Furthermore, oil companies themselves have recognised that they owe broader social responsibilities in view of the serious development challenges facing the communities in which they do business. For example, in the mid-1990s, the Shell Group of Companies introduced changes in their management and operational philosophy with the objective of introducing greater social responsibility. The immediate catalysts for reform were two incidents that happened in 1995. The first related to international condemnation directed at the company's attempt to dump the *Brent Spar* storage facility into the North Atlantic; the second concerned Shell's alleged complicity in the trial and execution of Ken Saro-Wiwa and eight other Ogoni leaders.[265] One of the outcomes of Shell's internal review was the adoption of Shell's *Statement of General Business Principles,* intended to integrate sustainable development concerns into Shell's business activity.[266] The *Principles* provide that Shell Companies recognize responsibility to five main constituencies: shareholders, customers, employees, those with whom they do business, and society.[267] With respect to their societal responsibility, Shell companies pledge:

> to conduct business as responsible corporate members of society, to observe the laws of the countries in which they operate, to express support for fundamental human rights in line with the legitimate role of business and to give proper regard to health, safety and environment consistent with their commitment to contribute to sustainable development.[268]

In terms of application, Shell argues that each unit of the corporate enterprise is required to endorse the *Principles* and to recognize the various areas of responsibility as inseparable. As a way of ensuring the consistent application of corporate policy, Shell

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[264] T. Donaldson and T.W. Dunfee, "Toward a Unified Conception of Business Ethics" (1994) 19 Academy of Man. Rev. No.2, 252-284.

[265] T. Donaldson & T. W. Dunfee, *Ties That Bind: A Social Contracts Approach to Business Ethics* (Boston: Harvard Business School Press, 1999), at 1-3. Environmental groups, human rights activists, and the clergy all criticized Shell's actions as a violation of ethical and legal norms.

[266] Royal/Dutch Shell, *Profits and Principles - Does There Have to be a Choice* (London: Shell International Ltd., 1998), at 2 referring to these experiences as "a very salutary lesson."

[267] Royal/Dutch Shell Group, *Statement of General Business Principles* (London: Shell International Ltd., 1997), Principle 2. According to Shell, the Principles have been in existence since 1976, but their revision and systematic implementation only commenced after the two incidents in 1995 galvanized public reaction to, and scrutiny of Shell's operations.

requires that each year, Heads of Shell subsidiaries sign a 'Business Principles Letter' confirming their understanding of the spirit of the *Principles,* and that they were being implemented.[269]

In pursuance of its social responsibilities in Nigeria, Shell maintains that in 1997, the company spent $32 million on community assistance and development projects in that country, including hospitals and schools.[270] It is further argued that the company's "choice of development projects is essentially based on the needs of the people and in agreement with their communities."[271] While local activists and community members do not deny that some of these projects were commenced, they argue that most projects do not reflect the priorities of the people, nor are decisions taken on a consultative basis. According to Human Rights Watch, "... much of the money supposedly spent in fact goes missing, leaving substandard facilities of little use to the communities, such as hospitals without water or electricity."[272]

I have focused on Shell's claims of social responsibility and community assistance because it is the industry giant and has been present in Nigeria longer than all the other companies. However, the smaller players claim to adhere to similar policies of social responsibility, and to have spent substantial sums of money on community development in their areas of operation.[273]

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[268] Ibid., at Principle 2(e).

[269] Royal/Dutch Shell, *Profits and Principles, supra* at 7. Heads of Shell Companies are also required to submit annually, a 'Letter of Representation' affirming that business was being conducted with integrity, and a 'Health, Safety and Environment Letter' to assure that management procedures, systems, and audits in the HSE area were in place, sufficiently understood, and implemented.

[270] Ibid., at 16. This is a high figure considering that at p14, the company puts its global social investment and charitable giving for that year at a total of US $78.9 million.

[271] Shell International Ltd., *Letter to Human Rights Watch,* (February 13, 1998) in Human Rights Watch, *The Price of Oil, supra* at 103.

[272] Human Rights Watch, *The Price of Oil, supra* note 93 at 104. At p105 they wrote: " Wholly inappropriate development projects abound, such as an SPDC fish processing plant in Iko ... far from any potential markets, without electricity to provide cold storage, and without any suitably qualified local people to run the plant. ... [N]earby is a hospital, also built by SPDC, which has no running water and no toilet... Virtually every community in the delta has a non-functioning water or electricity scheme or other project sponsored by one or other of the oil companies or by OMPADEC and since abandoned. Alternatively, a large and expensive project such as a jetty is provided, not because it is a community priority, but because a large contract provides opportunities for equally large rake-offs."

[273] Human Rights Watch, *The Price of Oil,* at 97-106 for corporate responsibility policies and community assistance by Chevron, Mobil, Elf and Agip. For example, Mobil claims that for the years 1994-1997, it spent US $8million per annum on community development; Chevron claims to have spent US $28million between the years 1990-1997; Elf posits that it runs an annual budget of U.S $4.5 to $5 million on development projects; and Agip puts their development spending at U.S. $2.5million per year.

Unfortunately, despite this apparent large expenditure, the Niger Delta region still remains poor and marginalized, compared to the rest of country. Two possible conclusions could be drawn from this scenario: either the companies have not spent the monies actually claimed to have been disbursed for community development, or as most commentators seem to suggest, the money was corruptly misappropriated to the benefit of a few officials.[274] The latter has serious implications for our reform proposals. Primarily, it implies that reforming Nigerian corporate or investment law to *mandate* corporate responsibility by multinational oil companies would at best, be a chimera. All the indications are that such a law would be honored more in breach than in compliance, either because Nigerian officials are unable or, more likely, would be unwilling to enforce legal standards that would seal windows of opportunity for illicit financial gain.

Consequently, I will suggest that the Nigerian government could either retain the current status quo whereby corporate social responsibility remains voluntary and largely determined by the values and business ethics of individual corporations, or introduce mechanisms of social contribution in contracts between the government and oil companies. Here, it could take the form of setting aside a predetermined percentage of corporate profits for investments in social and community development in the oil producing areas. The latter option is attractive because it shifts corporate responsibility requirements from the area of government regulation to a contractual obligation of the oil companies. In addition, it gives the latter an opportunity to specifically consent to be good corporate citizens at the time of entering the domestic market.

In light of the analysis in this chapter, I wish to suggest that the challenge of social development in Nigeria does transcend the question of legal reform. To be meaningful, legal reforms in Nigeria must be anchored upon a governance regime that ensures that government decision-making processes are transparent and officials are held responsible and accountable for their conduct. As I have maintained throughout this thesis, Nigeria's economic woes, the environmental challenges and the social deprivation endured by the majority of her people are a direct result of serious deficits in governance. Due to this deficit, most of the country's oil revenue has been misappropriated, officials have turned a blind eye and in some cases actively colluded with international business

[274] Ibid., at 105.

corporations in environmental and human rights violations, and a significant majority of the country's population live below the poverty line. It is unlikely that legal reforms would be effective if the broader governance questions are not addressed.

In 1989, the World Bank concluded that "underlying the litany of Africa's development problems is a crisis of governance."[275] This is a very apt description of the situation in Nigeria. Twenty-eight years of military dictatorship has resulted in a centralization of power and decision-making processes, and insulated governmental conduct from public and judicial scrutiny. Consequently, official corruption, lack of accountability for public officers and a general cleavage between the interests of government officials and the needs of the people, have resulted in waste of public resources and eroded the very foundations of the rule of law in Nigeria. While a democratically elected government has been in place since 1999, Nigeria still has a long way to go on the road to good and responsible governance. In particular, it is imperative that a strong rule of law foundation be established if the country is to make a transition to sustainable development.

According to A.V. Dicey, the rule of law entails three main elements: (1) supremacy of the law and the absence of arbitrary discretion; (2) equality before the law; (3) constitutional law as part of the ordinary law of the land.[276] While Dicey laid the intellectual foundation for the rule of law, his three point formulation has never been thought to adequately reflect the operations of the British constitution. For example, while his first element generally denotes the idea of legal limits on the power of the executive arm of government and underscores that all official action must have a foundation in law, it can hardly be argued that administrative discretion is inconsistent with the rule of law. Indeed, in many cases, the vagaries of governmental decision-making demand that officials enjoy some latitude in their possible courses of action. The challenge for the rule of law is how to introduce safeguards to ensure that official discretion is exercised responsibly, not capriciously.[277] Secondly, the contemporary

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[275] World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington DC: 1989), at 60.
[276] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Part II) 1958, in F.N. Botchway, "Good Governance: The Old, the New, the Principle, and the Elements (2001) 13 Florida J.Int'l L., 159 at 196.
[277] E.C.S. Wade, A.W. Bradley, & K.D. King, *Constitutional and Administrative Law* (London: Longman, 1993) at 101.

notion of equality before the law not only requires that all subjects enjoy equal treatment before the law and have equal access to the ordinary courts, it also prohibits legally-sanctioned discrimination between citizens based on color, race, religion, political affiliation, gender, sexual orientation etc. However, when he wrote, Dicey limited the notion of equality to the equal subjection of all people (officials and ordinary citizens) to the jurisdiction of the ordinary courts. For him, equality before the law implied the absence of a separate system of administrative law to govern the conduct of public officials. For this reason, he disapproved of the French system of *droit administratif* as favoring public officials. Despite Dicey's initial misgivings about it, a system of administrative law dealing with the official acts of public authorities and officers, is today viewed in many common-law countries as an important public interest safeguard and a check on the abuse of power.[278] Thirdly, Dicey's view of the constitution as part of the ordinary law of the land is meant to demonstrate his belief that the rights of the citizen - in particular freedom of the person, of speech, and of association - emanate from and are better protected by the ordinary courts rather than through a constitutional document. Here again, Dicey has been criticized for failing to reconcile this view of the rule of law with parliamentary supremacy in Britain. At least in theory, Parliament can take away any of the common law rights.[279]

For all the above reasons, it has been concluded that: "Dicey's view of the rule of law is ... based on an analysis of the British constitution which today is in many respects outmoded."[280] The authors further suggest that the contemporary notion of the rule of law implies three main things. First, it implies the maintenance of law and order in an atmosphere of political liberty. Second, the rule of law requires that government be conducted according to law. This means that there must be a legal foundation for every official action; ordinary citizens must have access to the ordinary courts to redress grievances, especially those arising from government conduct; and the ability of the ordinary courts to apply the law to all societal actors including government officials. Third, the rule of law as a political doctrine means that the law must operate within the

[278] O. Hood Phillips, P. Jackson, & P. Leopold, *Constitutional and Administrative Law* (London: Sweet and Maxwell, 2001) 34-35.
[279] Ibid., at 35.
[280] Wade, Bradley, and Ewing, *Constitutional Law, supra* note 277, at 102.

context of the historical experience and values of the legal system, as well as the social and political context within which governance takes place.[281]

In his discussion of the rule of law, Raz goes back to the Aristotelian concept of 'government by law, and not by men', and posits that "... in political and legal theory, [the rule of law] has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it."[282] He adds however that the rule of law goes beyond a law and order interpretation, requiring both obedience to law, and the capacity of legal rules to guide human behavior.[283] Raz then lays out eight requirements of the rule of law, including (1) open, clear, and prospective rules; (2) stability and predictability; (3) subjecting particular legal rules to the general legal order; (4) independence of the judiciary; (5) observance of the principles of natural justice; (6) the power of judicial review; (7) access to justice rendered by the ordinary courts of the land; and (8) a principled approach to law enforcement.[284]

These historical roots have informed contemporary attitudes towards the rule of law. Since the 1990s, it has been argued that rule of law reforms in developing countries and transition economies involve three broad measures: structural legal reform through law revision or the enactment of new laws, the creation of a viable civil society to democratize decision making and increase legitimacy, and effective and predictable judicial systems.[285]

To argue that a rule of law foundation is necessary for Nigeria to make progress towards sustainable development is to invoke the instrumentalist function of law. In other words, that law could contribute to the realization of social objectives. However, to perform this function, law must also be autonomous. As Weber argued, legal rationality implies among other things that legal rules must be capable of independent invocation,

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[281] Ibid., at 103-106.
[282] J. Raz, "The Rule of Law and its Virtue" (1977) 93 Law Q. Rev. 195, at 196.
[283] Ibid, at 197-198.
[284] Ibid., at 198-202. Raz acknowledges his partial reliance on Fuller's tests of internal morality, but says he abandoned some of Fuller's tests "... due to a difference in views on conflicts between the laws of one system". Fuller laid down eight tests for the existence of law or legal systems as follows: generality of rules, promulgation, limiting cases of retroactivity, clarity, avoidance of contradiction, not asking the impossible, constancy over time, and congruence of official action with underlying rules. See L. Fuller, *The Morality of Law* (1969).
[285] R. Sarkar, *Development Law and International Finance* (The Hague: Kluwer Law International, 2002), at 37-38.

and consistent and coherent application by and against all societal actors. These same qualities are required by the rule of law. Where legal processes and mechanisms are captured by special interests within society, and legal norms are applied on a selective basis, law loses its autonomy and becomes incapable of fulfilling its instrumental function.[286] This is what happened in Nigeria. Consequently, the legal reform measures suggested in this thesis will be of little value if judicial systems and civil society participation are not developed to facilitate the coherent and consistent application of legal rules to all actors including the government, public officials, corporations and ordinary citizens. As I have tried to demonstrate throughout the thesis, in many cases, the problem in Nigeria was not so much an absence of legal rules, as the failure of rule implementation on a coherent and consistent basis. The consequent lack of governmental and corporate accountability has encouraged corruption and waste, and undermined the development of the country. In order for law to contribute to sustainable development in Nigeria, legal rules must therefore first regain some of that lost autonomy.

[286] L. Cao, "Law and Economic Development: A New Beginning?", Book Review of *Law and Development*, by A. Carty (ed.), (1997) 32 Texas. Int'l. L.J. 545, at 552.

Conclusion

One of the main objectives of this thesis has been to study the normative significance of the concept of sustainable development, and what the role of law might be in its realization in developing countries. To that end, I conducted an in-depth study of the legal regime governing petroleum exploration and development in Nigeria.

The first part of the thesis sketched a short history of sustainable development as a legal norm, and explored the discourse over its international legal status. I argued that as an international law construct, sustainable development emerged from a discursive process that involved both state and non-state actors from the late 1960s to 1992. From this discourse, the essence of sustainable development appears to be the integration of economic development, environmental protection, and social development as non-hierarchical objectives of international society in the interest of current and future generations. The focus on these triple values marked an important turning point in international policy discourse on environment and development. First, it marked a departure from the bland emphasis of developed countries that economic growth leading to modernization was the appropriate policy direction for progress in international society. Sustainable development recognized that economic growth was having undesirable impacts on the environment and natural resources and that the challenge facing current generations was how to impose limits on growth today, so as not to undermine the basis for future growth. Second, sustainable development also gave legitimacy to the needs of people in developing countries for poverty alleviation and access to basic needs. Developing countries argued that in order to attain sustainable development, environmental commitments must not operate to forestall their economic development and poverty alleviation efforts. At both the Stockholm and Rio Conferences, and in almost every international environmental agreement negotiated since then, an equitable basis for reconciling these positions was the adoption of the principle of common but differentiated responsibilities.[1] It can now be safely argued that this principle forms part of the normative compact between industrial and developing countries with respect to sustainable development.

[1] J. Brunnée, "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental law?" (1995) 18 Fordham Int'l L.J.1742, arguing that the principle of common but differentiated responsibilities encapsulates the strategies employed in global environmental protection treaties to balance environment and development interests.

Therefore, at a conceptual level sustainable development challenges the predominant view that seeks to equate development with economic growth. Part of the legal significance of the concept lies in the fact that both in its genesis and its content, sustainable development challenges traditional international law. The argument that sustainable development emerged from a discursive process implicating both state and non-state actors, invokes a diffuse and inclusive process of normative development which is hardly supportable by the state-centric paradigm that underpins positivist understandings of international law. In addition, to argue that the normative value of sustainable development and the principles that give it form and content is not dependent upon their status as binding legal norms, is to admit that legal normativity is a fluid concept, and that even norms in the process of evolution could have a variety of normative uses. These normative values include serving as guides to discourse and decision-making, and as instruments of moral suasion for appropriate conduct by States and individuals. Emerging norms could also serve as precursors to the development of binding legal rules. Sustainable development also challenges traditional environmental law in two ways. First, by emphasizing the interdependence of the natural environment and calling for an ecosystem approach to environmental protection rather than protection based on the territorial interests of States. Secondly, by advocating for shifts in human conduct based on respect for the intrinsic value of nature, in addition to its utility to the human species.

Having noted these important dynamics of the concept of sustainable development, I referred to the fact that sustainable development has been endorsed in a large number of legal instruments at the international and regional levels. Ideas underlying sustainability could also be found in many domestic laws and state practice, as well as the decisions of judicial bodies. However, I argued that despite this wide endorsement, there is insufficient *opinio juris* for sustainable development to qualify as a rule of customary international law. Instead, I argued that the interdependence of the global environment together with the moral imperative to alleviate poverty among populations in developing countries, supports a strong case that there is a legitimate international expectation that States, organizations, and individuals would conduct their affairs in accordance with sustainable development principles. In other words, that at all times, sustainable development requires the

integrated consideration of environmental, social and economic implications of decisions.

To this end, I also suggested that to operationalize the concept will require the incorporation of the precautionary principle, the principle of environmental and social impact assessments, and public participation in decision making at all levels. Viewed as a legitimate expectation, the usefulness of sustainable development is not dependent on its status as a rule of law, be it customary or otherwise. Its function is to guide decision making in a variety of contexts including international and domestic law making, as well as judicial and administrative decision.

Having discussed the normative significance of sustainable development, I proceeded to consider the legal regime governing petroleum production in Nigeria. However, the ideas underlying this thesis and the concept of sustainable development have resonance going beyond Nigeria. Indeed, it is my hope that the framework for decision-making suggested here could be a useful precedent for research on similarly situated developing countries, as well as for investment regimes at the sub-regional and multilateral levels. It is therefore in place to briefly refer to these broader implications before returning to the specific policy implications for Nigeria.

Implications for West Africa

Nigeria is a Member of the Economic Community of West African States (ECOWAS), a sub-regional integration grouping comprising sixteen countries in West Africa. The Treaty establishing the Community was concluded in Lagos in 1975, and revised in 1993.[2] The revised Treaty seeks to improve upon the negative integration measures (i.e. the reduction of tariff barriers to trade) by introducing two key provisions. First, ECOWAS member states made an undertaking to integrate environmental protection in their development strategies at both the national and sub-regional levels.[3] Coming after the Rio Conference in 1992, this provision is directly attributable to Principle 4 of the Rio Declaration on Environment and Development. Secondly, they agreed to harmonize their national investment laws leading to the adoption of a single Community Investment Code.[4]

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[2] Treaty of the Economic Community of West African States (ECOWAS), 14 I.L.M. 1200 (1975). The revised treaty is reproduced in African Legal Materials (1996) 8 Afr. J.I.C.L., 189.
[3] Article 29 of the Revised Treaty.
[4] Ibid., Article 3.

In the latter context, this thesis has important sub-regional implications. In formulating the new Investment Code, ECOWAS member states must go beyond investment promotion and protection to an integrated law that includes environmental and social concerns. For example, the new Code must provide mechanisms and processes through which the environmental and social costs of investment projects would be adequately studied and understood before projects are embarked upon. As well, they must ensure that the costs of environmental damage are borne by the investors. Furthermore, investment projects must carry the least possible disruption to the life patterns of local communities and their social and agricultural systems, and compensation must be paid where adverse effects ensue. In other words, investment lawmaking for West Africa must seek to balance the predominant economic motif of the current law with environmental preservation and social development as co-equal objectives of sustainable development. Such an integrated approach is not inconsistent with investment liberalization measures such as removal of sectoral restrictions, performance requirements, and investment protection measures including guarantees against expropriation and third-party dispute settlement. What is important is that in addition to these measures, an integrated investment code must also include good conduct norms such as the precautionary principle, the principle of environmental and social impact assessments, and the polluter-pays principle. Learning from the experience in other integration groupings such as NAFTA, the ECOWAS investment code would also need to provide for mechanisms of civil society involvement in defense or furtherance of public interests.[5]

Obviously, there are many advantages to be derived from a harmonized investment regime for the whole sub-region. The adoption of a single investment code would reduce the uncertainties arising from investors having to deal with multiple legal systems. As well, it could bring an end to the costly incentive competition between the countries, as the new code harmonizes investment incentives for the whole sub-region. Moreover, it will hopefully arrest the slippage in regulatory standards, especially human rights and environmental standards that has resulted from competition to attract foreign investment. However, the advantages of a regional

[5] For example Articles 14 and 15 of the North American Agreement on Environmental Co-operation (NAAEC) provide that NGOs can make a submission before the NAAEC Commission asserting that a NAFTA party is failing to effectively enforce its environmental law. These provisions complement Article 1114(2) of NAFTA, which prohibits parties from waiving or lowering their environmental standards so as to attract or retain investment in their territories.

investment code could all be undermined if the investment regime is constructed solely to facilitate the realization of short-term corporate profit and government revenue at the expense of environmental balance and social well-being for current and future generations.

Implications for Multilateral Investment Regimes

Currently, there is no multilateral treaty governing foreign direct investment. Attempts made within the OECD to negotiate a Multilateral Agreement on Investment (MAI) between 1995 and 1998 failed to bear fruit. Despite this failure, important process and substantive lessons can be learnt from the MAI negotiations. One of the key objections raised by NGOs in particular, was the opaque manner in which the MAI negotiations proceeded without adequate consultation with key stakeholders. In addition, NGOs resented the fact that developing countries did not have a direct input into the negotiations, despite the fact that the Agreement was intended to be open to accession by such countries.[6]

On the substantive issues, one of the principal objectives of the MAI was to provide a framework of multilateral investment rules with high standards of investment liberalization and protection, and effective dispute settlement mechanisms. From the start therefore, the MAI was meant to reinvigorate the OECD's traditional emphasis on investment promotion and protection. However, even here, OECD countries might have assumed too much about the commonality of objectives between them. For example, some of the issues that remained unresolved until the time the negotiations were called off related to exceptions to the national treatment and MFN standards, and whether, and if so, how sub-national authorities would be subject to the obligations of the MAI. From a sustainable development perspective, the failure of the MAI is also attributable to disagreements over whether to include a general cultural exception to the liberalization obligations, and the nature and extent of labor and environmental protection clauses. Indeed, even the reference to sustainable development, environmental protection, and core labor standards was a subsequent add-on attributable to the activities of NGOs. It was no surprise therefore that up to

[6] UNCTAD, *World Investment Report 1999: Foreign Direct Investment and Development* (Geneva: United Nations, 1999), at 136.

the time the negotiations were called off, States could not agree upon these provisions.[7]

With respect to the environment and labor, some delegations had proposed that the MAI should include NAFTA-like clauses prohibiting the lowering of labor and environmental standards in order to attract investment. However, other delegations opposed a binding provision to this effect and preferred a hortatory clause. Indeed even proposals for a preambular reference to the principle of sustainable development as contained in the Marrakesh Agreement of the WTO, and binding language prohibiting the lowering of labor and environmental standards could not be agreed upon.

In the light of the failure of the MAI, the most likely forum for negotiating international investment rules in the future, is the WTO. At the conclusion of the Fourth Ministerial Conference of the WTO held in Doha, Qatar, trade ministers underscored the need for a "multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment...." It was also agreed that a decision would be adopted by explicit consensus at the Fifth Ministerial Conference setting out the modalities for negotiations on such an investment framework.[8] The Declaration recognized the needs of developing and least developed countries for technical assistance and capacity building in the investment area and provided that any future investment agreement must seek to balance the interests of home and host states. It must also take into account the development policies and objectives of host governments as well as their right to regulate investment in the public interest.[9]

From a sustainable development perspective, any future investment regime negotiated under WTO auspices must go beyond investment liberalization and the promotion and protection of investments, to include public interest provisions relating to the environment, labor, and the myriad of social concerns such as protection of cultural industries, indigenous livelihoods, and equitable access to the benefits of investment projects.

It is encouraging that the Doha Declaration includes a provision mandating the WTO Committee on Trade and Development, and the Committee on Trade and the

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[7] S.H. Seid, *Global Regulation of Foreign Direct Investment* (Burlington: Ashgate Publishing Ltd., 2002) at 80.
[8] WTO Doha Ministerial Declaration, WT/MIN (01)/DEC/W/1 (14 November 2001), paragraph 20.

Environment, to identify and debate issues falling within their respective mandates so that the objective of sustainable development could be appropriately reflected in the new round of trade negotiations.[10] Moreover, I will argue that any future investment agreement negotiated within the WTO, must be interpreted and applied in light of the preamble to the Marrakesh Agreement which provides that sustainable development is one of the objectives of the international trade regime.

However, a chorus of voices can already be heard in opposition to the idea of negotiating investment rules under the WTO. Like they did during negotiations for the MAI, and the WTO Ministerial Meeting held in Seattle in 2000, NGOs are at the forefront of the campaign to prevent the commencement of investment negotiations under WTO auspices. At a meeting held in Geneva in March 2003, over forty NGOs adopted a statement calling on WTO members to explicitly reject the launch of negotiations on investment when the WTO Ministerial Conference convenes in Cancun, Mexico in September this year.[11] The NGOs also called on WTO members to reject the NAFTA/MAI approach to investment liberalization, which was criticized for failing to address poverty reduction, sustainable development and corporate accountability and liability, and for overly focusing on investor protection.

Other reasons given for opposing investment negotiations at the WTO include the argument that the WTO is the wrong forum because the core principles of the trade regime such as 'national treatment' and 'most favored nation treatment', restrict the policy space within which governments could effectively regulate foreign investment in the interests of their national development, for the protection of vulnerable social groups, and in the interests of health and environmental protection.[12] In addition, it is argued that the WTO suffers from a democratic deficit because developing countries have not been able to participate on an equal and effective basis in WTO deliberations, and civil society has been largely excluded. Finally, NGOs argue that sustainable development must be the central goal of any future investment agreement and that this is unlikely to be the case if negotiations are held under WTO auspices.

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[9] Ibid., paragraphs 21 and 22.
[10] Ibid., paragraph 51.
[11] "No Investment Negotiations at WTO", Declaration of Non Governmental Groups and Civil Society Movements, online at http://www.ciel.org/publications/Invest_common_Mar03.pdf (accessed 14 April, 2003).
[12] "Statement on Investment for the April WTO Investment Meeting" online at http://ciel.org/Publications/Invest_Statement_Mar03.pdf (accessed April 15, 2003).

As I have already argued, sustainable development must underlie both the process of negotiating a future multilateral investment treaty, as well as its substantive contents. Mechanisms to ensure effective developing country participation as well as processes for consultations with civil society and other stakeholders, would be indispensable to the legitimacy of any future agreement. In addition, one can hardly overstate the significance of integrating the social and environmental pillars of sustainable development into the extant emphasis on investment protection and promotion. Without this *melange* of process and substantive norms, it is unlikely that negotiations for an international investment agreement will succeed.

Implications for Nigeria

The discussion of Nigerian law in this thesis was anchored upon the analytical framework of sustainable development established in chapter one which is to the effect that sustainable development requires the integrated consideration of environmental, social and economic concerns at all levels of decision-making. In chapters two and three, I argued that Nigerian law makes extensive provision for the promotion and protection of corporate investment and profit as well as governmental revenue, but falls short in its protections of the environment and social well-being. Neither the petroleum law nor the environmental protection legislation, makes provision for the integrated consideration of the environmental, social and economic effects of oil production. The result is that wealth creation for the government and multinational corporations is proceeding at the cost of unwarranted environmental devastation, as well as persistent poverty and deprivation among a majority of the population.

To revamp this situation, I propose two approaches to structural legal reform, so that Nigerian law could be more conducive to the realization of sustainable development. The first approach is law revision to introduce the precautionary principle, environmental impact assessment, public participation in decision-making, and in view of the large-scale environmental pollution that has resulted from oil operations, the polluter pays principle. Those suggestions were targeted specifically at the operations of the oil industry. The second approach is for Nigeria to opt for a new integrated investment law geared towards balancing investment promotion and protection with environmental protection and social development. This is the approach now in vogue in many mineral-producing developing countries, particularly

those in Latin America. An integrated investment law is neither inconsistent with investment promotion and protection, nor with the existence of investment incentives. However, the objective of the integrated approach would be to complement the investment liberalization measures with safeguards for environmental balance and social well-being. Consequently, a new investment law for Nigeria could include investment promotion and protection measures, as well as the good conduct norms already discussed - the precautionary principle, environmental impact assessment requirements, the polluter-pays principle, and processes of public participation in decision-making.

One of my objectives in chapter four was to argue that the Nigerian situation goes beyond difficulties arising from inadequate legal regulation and implementation. I argued that since independence in 1960, most Nigerian governments have failed to meet the terms of the social contract with their citizens. I argued that the social compact that binds governments and citizens extends beyond the protection of life, liberty and property to include governmental responsibility for human well-being. Governments in Nigeria have converted the purposes of political authority from pursuit of the general welfare to a quest for personal enrichment and self-aggrandizement. The ensuing governance deficit has important implications for governmental legitimacy. One way out of this conundrum would be to strengthen adherence to the rule of law, enhance anti-corruption initiatives, and develop the capacity of legal and judicial institutions to hold government officials fully accountable for their conduct.

On corporate responsibility, I argued that while there is no legal obligation on multinational companies either under international or domestic law to be good corporate citizens, there is a significant international expectation, partly arising out of the peculiar circumstances in which multinationals operate in developing countries, for such companies to consider a broader spectrum of interests than the maximization of shareholder profit. These circumstances include the weak systems of governance and official accountability in many developing states, ineffective legal structures and judicial systems, as well as the significant margins of poverty. Viewed in light of the economic power of multinational corporations, these circumstances underscore a strong moral claim for corporate social responsibility. With respect to Nigeria, I argued that while the *Companies and Allied Matters Act* is based on the shareholder primacy norm, the environmental and social challenges facing the Niger Delta region

provide a compelling case for an argument that oil companies working in that region should do more towards the well-being of the communities in which they operate.

Indeed, even as I put the final touches on this thesis, the situation in Nigeria in general, and in the oil producing areas in particular, remains desperately volatile. The country faces National Assembly and Presidential elections on April 12 and 19 respectively. The Ijaw and Itsikere ethnic groups in the Niger Delta have been fighting a tribal war that arose out of disagreements over the delineation of electoral boundaries. Several hundred people have been killed, many villages have been razed to the ground, youths have threatened to derail the whole electoral process, and to destroy all the oil production installations in their area. All the major oil companies have suspended oil production for several weeks leading to loss exports of some 800,000 barrels of oil per day. While dissatisfaction with the electoral process might be the immediate catalyst for the current violence, the real reasons for public anger and disaffection in the oil producing areas must be the years of neglect by a ruling class and a complicit business elite who have come together to exploit the people's natural wealth and resources, decimate their environment, and subject them to lives of poverty and social misery. To a large extent therefore, the crisis in Nigeria as in many other African countries, is a crisis of governance. There could hardly be a better way to conclude this thesis than to recall the words of the British historian Basil Davidson:

> And so the historian, emerging from the study of past centuries when Africa generally knew no such misery and crisis but, generally, a slow expansion of wealth and self-development, meets questions not to be avoided. What explains this degradation from the hopes and freedoms of newly regained independence? How has this come about? Where did the liberators go astray? ... No doubt, human blunders and corruption can supply some easy answers, and have their abrasive part in the story. Yet ... they can seldom reveal the root of the matter. Africa's crisis of society derives from many upsets and conflicts, but the root of the problem is different from these: ... [t]he more one ponders this matter the more clearly is it seen to arise from the social and political institutions within which decolonized Africans have lived and tried to survive. Primarily, this is a crisis of institutions.[13]

Unless that 'crisis of (governmental) institutions' is addressed and resolved, Nigeria, (indeed, Sub-Saharan Africa's) quest for sustainable economic development would remain a distant dream. If that suggestion and the ideas in this thesis were to contribute even modestly to the discourse on, and search for solutions to the African crisis, I would be gratified.

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[13] B. Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (New York: Times Books, 1992) 9-10.

Bibliography

Primary Sources: Nigerian Legislation

Associated Gas Re-injection Act, Cap. 26, Vol. 1, *Laws of the Federation of Nigeria* (1990).

Civil Disturbances (Special Tribunal) Decree (1987).

Companies and Allied Matters Act, Cap. 59 Vol. III, *Laws of the Federation of Nigeria* (1990).

Constitution of the Federal Republic of Nigeria (1999).

Federal Environmental Protection Agency Act, Cap. 131, Vol. III, *Laws of the Federation of Nigeria* (1990).

Harmful Waste (Special Criminal Provisions etc.) Decree 1988, Cap. 165, Vol. IX, *Laws of the Federation of Nigeria* (1990).

Interpretation Act, Cap. 192, Vol. X, *Laws of the Federation of Nigeria* (1990).

Land Use Act (1978) Cap. 202 Vol. XI, *Laws of the Federation of Nigeria* (1990).

Mineral Oils Ordinance (1914) in Barrows, *Basic Oil Laws and Concession Contracts: South and Central Africa,* Vol. II, at C-2.

Minerals Ordinance (1956) in Barrows, *Basic Oil Laws and Concession Contracts: South and Central Africa,* Vol. II, at G-6.

Niger Delta Development Commission (Establishment etc.,) Act, No. 6, *Laws of the Federation of Nigeria,* 2000.

Oil Mineral Producing Areas Development Commission Decree, No. 23 (1992).

Oil Pipelines Act, Cap.338, Vol. XIX, *Laws of the Federation of Nigeria* (1990).

Petroleum Act, Cap. 350, Vol. XIX, *Laws of the Federation of Nigeria* (1990).

Petroleum Drilling and Production Regulations, Cap 350, Vol. XIX, *Laws of the Federation of Nigeria* (1990).

Petroleum Profits Tax Act, Cap. 354, Vol. XX, *Laws of the Federation of Nigeria* (1990).

Special Tribunal (Offences relating to Civil Disturbances) Edict (1994).

Regional and Multilateral Instruments

African Charter on Human and People's Rights (Banjul) (1981).

Agreement Establishing the World Trade Organisation (1994).

Agreement on the Application of Sanitary and Phytosanitary Measures (1994).

Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), 1992.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus), (1999).

Convention on Biological Diversity (1992).

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo), 1991.

Convention on the Ban of Import into Africa and the Control of Transboundary Movement of Hazardous Wastes Within Africa, (Bamako), 1991.

Convention on the Protection of the Ozone Layer (Vienna), 1985.

Fourth Convention between the African, Caribbean, and Pacific Countries and the European Economic Community, (Lomé), (1989).

Fourth Ministerial Declaration of the World Trade Organisation, Doha (2001).

Framework Convention on Climate Change (1992).

International Labour Office, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977).

Johannesburg Declaration on Sustainable Development (2002)

Kyoto Protocol on Climate Change (1997).

Ministerial Declaration on Sustainable Development in the ECE Region (Bergen Declaration), 1990.

Non-Binding Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (1992).

North American Agreement on Environmental Co-operation (1994).

North American Free Trade Agreement (1994).

OECD, Declaration on International Investment and Multinational Enterprises (1991).

Partnership Agreement between the Members of the African, Caribbean, and Pacific Group of States and the European Community, (Cotonou) (2000).

Plan of Implementation of the World Summit on Sustainable Development (2002).

Protocol on Substances that Deplete the Ozone Layer, (Montreal), 1987.

Revised Treaty of the Economic Community of West African States (1993).

Rio Declaration on Environment and Development (1992).

Stockholm Declaration on the Human Environment (1972).

Treaty of the Economic Community of West African States (1975).

United Nations Code of Conduct on Multinational Enterprises (Draft)(1983).

United Nations Declaration on Social Development (Copenhagen) (1995).

United Nations Declaration on the Establishment of a New International Economic Order, Res. 3201 (S-VI) 1974.

United Nations Declaration on the Right to Development (1986).

United Nations General Assembly Resolution 1803 (XVII): Permanent Sovereignty over Natural Resources, 1962.

United Nations General Assembly Resolution 1831(XVII): Economic Development and the Conservation of Nature, 1962.

United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States, 1974.

United Nations Global Compact for Sustainable Development (1999).

United Nations Resolution 1831 (XVII) 1962, "Economic Development and the Conservation of Nature."

United Nations Resolution 37/7 (28, October 1982), World Charter for Nature.

Universal Declaration of Human Rights (1948).

Vienna Convention on the Law of Treaties (1969).

Case-Law

Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) I.C.J. reps., (1997).

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case (New Zealand v. France), ICJ reps., 1995.

Legality of the Threat or Use of Nuclear Weapons ICJ reps., (1996), 226.

Asylum Case ICJ reps., (1950), 265.

North Sea Continental Shelf Cases ICJ reps., (1969), 3.

EC Measures Concerning Meat and Meat Products (Hormones) (Canada and United States v. European Community) AB-1997-4, WTO Doc. WT/DS26/AB/R and WT/DS48/AB/R

United States - Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R (1999).

114957 Canada Ltée (Spraytech Société d'arrosage) v. Hudson (Town) 2001 Supreme Court of Canada 40.

Minors Oposa v. Secretary of the Department of Environment and Natural Resources 33 ILM 173 (1994).

Trail Smelter Arbitration 3 R.I.A.A. 1907 (1941).

Pacific Fur Seals Arbitration (Great Britain v. United States) 1 Moore's Int'l Arbitral Awards, 755 (1893).

Rylands v. Fletcher (1868) L.R. 3 H.L. 330.

Richards v. Lothian (1913) A.C., 263.

Read v. Lyons Company Ltd. (1947) A.C., 156.

San Ikpede v. The Shell Petroleum Development Company of Nigeria Ltd., (1973) M.W.S.J., 161 (Selected Judgments of the High Court of Mid-Western State).

SPDC v. Farah [1995] 3 N.W.L.R., 148.

Secondary Sources: Books

An-Naim, A.A., & Deng, F.M. (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (Washington DC: The Brookings Institution, 1990).

Ashton-Jones, N., *The Human Ecosystems of the Niger Delta: An ERA Handbook* (Lagos: Env'tal Rights Action, 1998).

Bedjaoui, M., *International Law: Achievements and Prospects* (The Netherlands: UNESCO 1991).

Biersteker, T.J., *Multinationals, the State and Control of the Nigerian Economy* (Princeton: Princeton Univ. Press, 1987).

Birnie, P., & Boyle, A., *International Law and the Environment* 2nd ed., (Oxford: Oxford Univ. Press 2002).

Blumberg, P.I., *The Multinational Challenge to Corporation Law: the Search for a New Corporate Personality* (Oxford: Oxford Univ. Press,1993).

Boyle, A.E., & Freestone, D., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford Univ. Press, 1999).

Brownlie, I., *Principles of Public International Law* 4th ed., (Oxford: Clarendon Press, 1990).

Brown-Weiss, E., *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publishers, 1989).

Buckley, F.H., Gillen, M., & Yalden, R., *Corporations: Principles and Policies* (Toronto: Emond Montgomery, 1995).

Bulajić, M., *Principles of International Development Law* (Dordrecht: Martinus Nijhoff Publsihers, 1993).

Byers, M.(ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford Univ. Press, 2000).

Byers, M., *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge Univ. Press, 1999).

Carty, A. (ed.), *Law and Development* (New York: NYU Press, 1992).

Corporate Council on Africa, *Doing Business with Africa 2000/1* (New Canaan: Business Books International, 2000).

Crowder, M., *The Story of Nigeria* (London: Faber and Faber Ltd., 1962).

Daly, H.E., *Steady-State Economics* (Washington DC: Island Press, 1977).

Daly, H.E., *Steady-State Economics* 2nd ed., (Washington DC: Island Press, 1991).

Donaldson T., & Dunfee, T.W., *Ties that Bind: A Social Contracts Approach to Business Ethics* (Boston: Harvard Univ. Press, 1999).

Donaldson, T., & Werhane, P.H. (eds.), *Ethical Issues in Business: A Philosophical Approach* (Englewood Cliffs, New Jersey: Prentice-Hall, 1979).

Dworkin, R., *Taking Rights Seriously* (Cambridge: Cambridge Univ. Press, 1999).

Elias, T.O., *Nigeria: The Development of its Laws and Constitution* (London: Stevens & Sons, 1967).

Englebert, P., *State Legitimacy and Development in Africa* (Boulder & London: Lynne Rienner Publishers, 2000).

Falola, T., *The History of Nigeria* (Westport, Connecticut: Greenwood Press, 1999).

Finnemore, M., *National Interests in International Society* (Ithaca: Cornell Univ. Press, 1996).

Forrest, T., *Politics and Economic Development in Nigeria* (Westview Press, 1995).

Franck, T.M., *Fairness in International Law and Institutions* (Oxford: Oxford Univ. Press, 1995).

Franck, T.M., *The Power of Legitimacy Among Nations* (New York: Oxford Univ. Press, 1990).

Freese, C. (ed.), *Harvesting Wild Species: Implications for Biodiversity Conservation* (Baltimore: Johns Hopkins Univ. Press, 1997).

Freestone, D., & Hey, E. (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague: Kluwer Law International, 1996).

Fuller, L.L., *The Morality of Law* (1969).

Gao, Z. (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998).

García-Amador, *The Emerging International Law of Development* (New York: Oceana Publications, 1990).

Ginther, K., Denters, E., & de Waart P., *Sustainable Development and Good Governance* (Dordrecht: Kluwer Academic Publishers, 1995).

Higgins, R., *The Development of International Law through the Political Organs of the United Nations* (Oxford: Oxford Univ. Press, 1963).

Hill, C.W.L., *International Business: Competing in the Global Marketplace* (Burr Ridge: Irwin, 1994).

Holmberg, J. (ed.), *Making Development Sustainable: Redefining Institutions, Policy and Economics* (Washington DC: Island Press, 1992).

Hood Phillips, O., Jackson, P., & Leopold, P., *Constitutional and Administrative Law* (London: Sweet and Maxwell, 2001).

Human Rights Watch, *The Price of Oil: Corporate responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 1999).

Hunter, D., Salzman, J., & Zaelke, D., *International Environmental Law and Policy* (New York: Foundation Press, 1998).

Hussain, K. (ed.), *Legal Aspects of the New International Economic Order* (London: Frances Pinter (Publishers) Ltd., 1980).

Ikein, A.A., *The Impact of Oil on a Developing Country: The Case of Nigeria* (New York: Praeger, 1990).

IUCN, UNEP, WWF., *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland: IUCN, 1980).

Jackson, J.H., *The World Trading System: Law and Politics of International Economic Relations* (Cambridge: MIT Press, 1999).

Keane, J., *Public Life and Capitalism: Towards a Socialist theory of Democracy* (Cambridge: Cambridge Univ. Press, 1984).

Keck, M.E., & Sikkink, K., *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell Univ. Press, 1996).

Khan, S.A., *Nigeria: The Political Economy of Oil* (Oxford: Oxford Univ. Press, 1994).

Kiss, A., & Shelton, D., *International Environmental Law* 2nd ed., (New York: Transnational Publishers, 2000).

Kratochwil, F., *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge Univ. Press, 1989).

Lang, W., (ed.), *Sustainable Development and International Law* (The Hague: Martinus Nijhoff, 1995).

Muchlinski, P.T., *Multinational Enterprises and the Law* (Cambridge: Blackwell Publishers, 1995).

Munro, D.A., & Holdgate, M.W., *Caring for the Earth: A Strategy for Sustainable Living* (Gland: Switzerland, IUCN 1991).

Munro, R.D., & Lammers, J.G., *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London: Martinus Nijhoff 1986).

Okonta, I & Douglas, O., *Where Vultures Feast: Shell, Human Rights and Oil in the Niger Delta* (San Francisco: Sierra-Club Books, 2001).

Ola Orojo, J., *Nigerian Company Law and Practice* (London: Sweet and Maxwell, 1976).

Omorogbe, Y., *The Oil and Gas Industry: Exploration and Production Contracts* (Lagos: Malthouse Press ltd., 1997).

Omotola, J.A. (ed.), *Environmental Laws in Nigeria including Compensation* (Lagos: Univ. of Lagos Press, 1990).

Omotola, J.A., *Essays on the Land Use Act 1978* (Lagos: Lagos Univ. Press, 1984).

Osaghae, E.E., *Crippled Giant: Nigeria Since Independence* (Bloomington: Indiana Univ. Press, 1998).

Otto, J.M., & Cordes, J. (eds.), *Sustainable Development and the Future of Mineral Investment* (Paris: UNEP & MMAJ, 2000).

Page, T., *Conservation and Economic Efficiency: An Approach to Materials Policy* (Baltimore: Johns Hopkins Univ. Press, 1977).

Panter-Brick, K. (ed.), *Soldiers and Oil: The Political Transformation of Nigeria* (London: Frank Cass & Co. Ltd., 1978).

Pearce, D., & Barbier, E., *Blueprint for a Sustainable Economy* (London: Earthscan Publishers, 2000).

Rawls, J., *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1999).

Rawls, T., *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1971).

Revesz, R.L., Sands, P., & Stewart, R.B., *Environmental Law, the Economy and Sustainable Development* (Cambridge: Cambridge Univ. Press, 2000).

Roth, B.R., *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press, 1999).

Sánchez, V., & Juma, C., *Biodiplomacy: Genetic Resources and International Relations* (Nairobi: ACTs Press, 1994).

Sands, P., *Principles of International Environmental Law* (Manchester: Manchester Univ. Press, 1995).

Sarkar, R., *Development Law and International Finance* 2nd ed., (The Hague: Kluwer Law International, 2002).

Schachter, O., *International Law in Theory and Practice* (The Hague: Martinus Nijhoff, 1991).

Schätzl, *Petroleum in Nigeria* (Ibadan: Oxford Univ. Press, 1969).

Schrijver, N., *Sovereignty over Natural Resources: Balancing Rights and Duties* Cambridge: Cambridge Univ. Press, 1997).

Schwarz Jr., F.A.O., *Nigeria: The Tribes, the Nation, or the Race - The Politics of Independence* (Massachusetts: MIT Press, 1965).

Seid, S.H., *Global Regulation of Foreign Direct Investment* (Burlington: Ashgate Publishing Ltd., 2002).

Shihata, I.F.I., *Legal Treatment of Foreign Investment: The World Bank Guidelines* (Dordrecht: Martinus Nijhoff, 1993).

Snape III, W.J. (ed.), *Biodiversity and the Law* (Washington DC: Island Press, 1996).

Sornarajah, M., *The International Law on Foreign Investment* (Cambridge: Grotius Publications Cambridge Univ. Press, 1994).

Trebilcock, M., & Howse, R., *The Regulation of International Trade* (London & New York: Routledge, 1995).

Trouwborst, A., *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law International, 2002).

UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (Geneva, United Nations, 1999).

UNDP, *Human Development Indicators* 2002.

UNDP, *Human Development Indicators*, 2001.

UNDP, *Human Development Report 1994: New Dimensions of Human Development* (Oxford: Oxford Univ. Press, 1994).

UNDP, *Human Development Report 1999: Globalization with a Human Face* (Oxford: Oxford Univ. Press, 1999).

UNDP, *Human Development Report* 2001.

United Nations, *Report on the World Social Situation* (2001).

United Nations., *Development and Environment: Report and Working Papers of a Panel of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment* (Paris: United Nations, 1972).

Wade, E.C.S., Bradley, A.W., & King, K.D., *Constitutional and Administrative Law* (London: Longman, 1993).

Weiss, F., Denters, E., & de Waart, P., *International Economic Law with a Human Face* (The Hague: Kluwer Law International, 1998).

Welch Jr., C. E., & Meltzer, R. I. (eds.), *Human Rights and Development in Africa* (Albany: State Univ. of New York Press, 1984).

Wolfke, K., *Custom in Present International Law* (The Hague: Nijhoff Publishers, 1993).

World Bank, *Defining an Environmental Protection Strategy for the Niger Delta Vols. I & II* (Washington DC: World Bank, 1995).

World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington DC: 1989).

World Bank, *World Development Report 1997: The State in a Changing World* (Washington DC: World Bank, 1997).

World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford Univ. Press, 1987).

Secondary Sources: Journal Articles and Essays

Abi-Saab, G., "The Legal Formulation of the Right to Development" in Hague Academy of Int'l L., (1980), 159.

Adede, A.O., "Utilisation of Shared Natural Resources: Towards a Code of Conduct" (1975) 5 E.P.L. 66.

Akehurst, M., "Custom as a Source of International Law" (1974-75) 47 B.Y.I.L. 32.

Anand, R.P., "Development and Environment: The Case of the Developing Countries" (1980) 20 Ind. J.I.L. 1.

Anghie, A., "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case", (1993) 34(2) Harv. I.L.J., 445.

Abraham, C.M., & Abraham, S., "The Bhopal Case and the Development of Environmental Law in India" (1991) 40 I.C.L.Q., 334.

Armstrong, K., "Managing Environmental Legal Risks in Oil and Gas Exploration and Production Activities" in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998) 359.

Asante, S.K.B., "International Law and Foreign Investment: A Reappraisal (1988) 37 ICLQ, 588.

Asante, S.K.B., "International Law and Investments" in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), 667.

Asante, S.K.B., "Restructuring Transnational Mineral Agreements" (1979) 73 A.J.I.L., 335.

Asante, S.K.B., "The Concept of a Good Corporate Citizen in International Business" (1989) ICSID Rev. 1

Atapattu, S., "Sustainable Development, Myth or Reality? A Survey of Sustainable Development under International and Sri-Lankan Law" (2001) 4 Georgetown Int'l Envt'l L. Rev., 265.

Baird Callicott, J., & Mumford, K., "Ecological Sustainability as a Conservation Concept", (1997) 11 No. 2., *Conservation Biology,* 32.

Barbier, E., "The Concept of Sustainable Economic Development" (1987) 14 *Env'tal Conservation,* 101.

Baxter, R.R., "International Law in "Her Infinite Variety"" (1980) 29 I.C.L.Q., 549.

Belo-Osagie, M., "Petroleum Exploration and Production in Nigeria: An Article on the Legal Framework" (1992) *Petroleum Economist,* Spec. Ed.

Berle, A.A., "For Whom Corporate Managers *are* Trustees: A Note" (1932) 45 Harv. L. Rev., 1365.

Blair, M.M., & Stout, L.A., "A Team Production Theory of the Corporation" (1999) Va. L. Rev., 247.

Bodansky, "Scientific Uncertainty and the Precautionary Principle" (1991) 33 *Env't.*,4.

Bodansky, D., "The United Nations Convention on Climate Change: A Commentary" (1993) 18 Yale J.I.L. 451.

Bodansky, D., "Bonn Voyage: *Kyoto's Uncertain Revival*" (Fall 2001) *The National Interest*, 45.

Botchway, F.N., "Good Governance: the Old, the New, the Principle, and the Elements" (2001) 13 Florida J. Int'l L. 159.

Brown-Weiss, E., "Our Rights and Obligations to Future Generations for the Environment" (1990) 84 A.J.I.L. 198.

Brunnée, J., "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law" (1995) 18 Fordham Int'l L.J., 1742.

Brunnée, J., & Toope, S.J., "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law" (1994) 5 Y.B.I.E.L., 41.

Brunnée, J., & Toope, S.J., "Environmental Security and Freshwater Resources: Ecosystem Regime Building" (1997) 91 A.J.I.L. 26.

Brunnée, J., & Toope, S.J., "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Trans'l L. 19.

Burhenne-Guilman, F., & Casey-Lefkowitz, S., "The Convention on Biological Diversity: A Hard Won Global Achievement" (1992) 3 Y.B.I.E.L., 43.

Cameron, J., & Abouchar, J., "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment (1991) 14 B.C. Int'l & Comp. L. Rev., No. 1, 1.

Cao, L., "Law and Development: A New Beginning?" Book review of *Law and Development, by A. Carty (ed.),* (1997) 32 Texas Int'l L.J., 545.

Chinkin, C.M., "The Challenge of Soft Law: Development and Change in International Law," (1989) 38 I.C.L.Q., 850.

Chowdhury, S.R., "Common but Differentiated Responsibility in International Environmental Law: from Stockholm (1972) to Rio (1992)" in K. Ginther, E. Denters, and P. de Waart (eds.), *Sustainable Development and Good Governance* (1995).

Cordes, J., "Normative and Philosophical Perspectives on Sustainable Development" in J.M. Otto, & J. Cordes, *Sustainable Development and the Future of Mineral Development* (2000), 1.

D'Amato, A., "Do We Owe a Duty to Future Generations to Preserve the Global Environment?" (1990) A.J.I.L. 190.

De Aruajo Castro, J.A., "Environment and Development: The Case of the Developing Countries" (1972) I.O. 401.

Dernbach, J.B., "Sustainable Development: Now More than Ever" (2002) 32 Envt'l L.Rep., 10003.

Dias, A., "The Oil and Gas Industry in the Tangled Web of Environmental Regulation: Spider of Fly?" in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998) 59.

Dodd Jr., M., "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev., 1145.

Donaldson, T., & Dunfee, T.W., "Toward a Unified Conception of Business Ethics" (1994) 19 (2) Academy of Mangt. Rev., 252.

Donelly, J., "Human Rights and Western Liberalism" in A.A. An-Naim & Francis M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (1990), 31.

Donelly, J., "In Search of a Unicorn: the Jurisprudence and Politics of the Right to Development" (1985) Cal.W.I.L.J., 473.

Donelly, J., "The Right to Development: How Not to Link Human Rights and Development" in C.E. Weclch Jr., & R.I. Meltzer (eds.), *Human Rights and Development in Africa* (1984), 261.

Doud, A.L., "International Environmental Developments: Perceptions of Developing and Developed Countries" (1972) 12 Nat. Res. J. 520.

Downes, D., "Global Trade, Local Economies and the Biodiversity Convention" in W.J. Snape III (ed.), *Biodiversity and the Law* (1996), 202.

Dupuy, P.M., "A Hard Look at Soft Law" (1988) A.S.I.L. Procs., 381.

Dupuy, P.M., "Soft Law and the International Law of the Environment" (1991) 12 Mich. J. Int'l L., 420.

EDNA *Tiers Monde,* "From Joint Implementation to the Clean Development Mechanism: Should African Positions Change after the Kyoto Protocol?" at http: www.edna.sn/energie/cc/cdm.htm

Finine Fekumo, J., "Civil Liability for Damages Caused by Oil Pollution", in J.A. Omotola (ed.), *Environmental Laws in Nigeria including Compensation* (Lagos: Univ. Of Lagos Press, 1990) 254.

Footer, M.E., "Intellectual Property and Agrobiodiversity: Towards Private Ownership of Genetic Commons" (1999) 10 Y.B.I.E.L., 48.

Fox, G.H., "The Right to Political Participation in International Law" (1992) 17 Yale. J.I.L., 539.

Franck, T.M., "Legitimacy in the International System" (1988) 82 A.J.I.L., 705.

Franck, T.M., "The Emerging Right to Democratic Governance" (1992) 86 A.J.I.L., 46.

Franck, T.M., "The New Development: Can American Law and Legal Institutions Help Developing Countries?" in A. Carty, (ed.), *Law and Development* (New York: New York Univ. Press, 1992), 3.

Franck, T.M., "Why a Quest for Legitimacy?" (1988) 21 U.C. Davis Law Rev., 535.

Freeland, S., "The Kyoto Protocol: An Agreement Without a Future?" (2001) 24 Univ. N.S.W.L.J. No.2, 532.

Freeland, S., "The *Kyoto Protocol:* An Agreement Without a Future?" (2001) 24 (2) Univ. N.S.W.L.J., 532.

Freestone, D., & Hey, E., "Origins and Development of the Precautionary Principle" in D. Freestone & E. Hey, (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (1996).

French, D., "Developing States and International Environmental Law: The Importance of Differentiated Obligations" (2000) 49 I.C.L.Q. 34.

Friedman, M., "The Social Responsibility of Business is to Increase its Profits" in T. Danaldson & P.H. Werhane (eds.), *Ethical Issues in Business: A Philosophical Approach* (Englewood Cliffs, New Jersey: Prentice-hall 1979), 191.

Frynas, J.G., "Political Instability and Business: Focus on Shell in Nigeria" (1998) 19 (3) Third World Quarterly, 457.

Gaines, S.E., "The Polluter-Pays Principle: From Economic Equity to Environmental Ethos" (1991) 26 Tex. Int'l L. J., 463.

Goldberg, D., "As the World Burns: Negotiating the Framework Convention on Climate Change" (1993) 5 Geo. Int'l Env'tal L. Rev. 239.

Goodland, R., & Ledec, G., "Neoclassical Economic and Principles of Sustainable Development" (1987) 38 *Ecological Modelling,* 19.

Gopal, M.G., "Law and Development: Toward a Pluralist Vision", (1996) A.S.I.L. Procs., 231.

Greenberg, D.F., "Law and Development in Light of Dependency Theory" in A. Carty (ed.), *Law and Development* (New York: New York Univ. Press, 1992), 129.

Gros Espiell, H., "The Right to Development as a Human Right" (1981) 16 Texas Int'l L.J. 189.

Gundling, L., "Our Responsibility to Future Generations" (1990) A.J.I.L., 207.

Gundling, L., "The Status in International Law of the Principle of Precautionary Action" (1990) 5 Int'l J. Estaurine & Coastal L., 23.

Gupta, J., "Leadership in the Climate Regime: Inspiring the Commitment of Developing Countries in the Post-Kyoto Phase" (1998) 7(2) R.E.C.I.E.L., 180.

Haas, P.M., "Banning CFCs: Epistemic Community Efforts to Protect the Stratospheric Ozone" (1992) 46 I.O. No.1, 187.

Haas, P.M., "Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control" (1989) 43 I.O. No. 3, 377.

Handl, G., "Environmental Security and Global Change: The Challenge to International Law" (1990) 1 Y.B.I.E.L., 3.

Hansmann, H., & Kraakman, R., "The End of History for Corporate Law" (2001) 89 Georgetown L.J., 439.

Hey, E., "The Precautionary Concept in Environmental Policy and Law: Institutionalising Caution" (1992) 4 geo. Int'l. Env'tl L. Rev., 303.

Ibidapo-Obe, A., "Criminal Liability for Damages Caused by Oil Pollution" in J.A. Omotola (ed.), *Environmental Laws in Nigeria including Compensation* (Lagos: Univ. Of Lagos Press, 1990), 231.

Int'l Energy Ass., "New Partnerships for Sustainable Development: Elaborating the Clean development Mechanism under the Kyoto Protocol" at http://www.iea.org/ieakyoto/docs/cdmela.htm

Isichei, A.O., & Sanford, W.W., "The Effects of waste Gas Flares on the Surrounding Vegetation in South-Eastern Nigeria" 13, *Journal of Applied Ecology*, 177.

Kassim-Momodou, M., "The Duration of Oil Mining Leases in Nigeria" (1988) 6 (2) J. Energy & Nat. Res. L., 103.

Khan, R., "Sustainable Development, Human Rights, and Good Governance - A Case Study of India's Narmada Dam" in K. Ginther, E. Denters, & P. de Waart., *Sustainable Development and Good Governance* (Dordrecht: Kluwer Academic Publishers, 1995), 420.

Kofele-Kale, N., "Host Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary (1990) 15 NCJ Int'l & Com. Reg., 361.

Kofele-Kale, N., "Investment Codes as Instruments of Economic Policy: A Cameroon Case Study" (1991) 25 (4) Int'l Lawyer, 821.

Kofele-Kale, N., "The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations in Developing Countries" (1992) 23 L & P of Int'l Bus.,619.

Kothari, A., "Beyond the Biodiversity Convention: A View from India" in V. Sánchez & C. Juma, *Biodiplomacy: Genetic Resources and International Relations* (1994), 67.

Kwakwa, E., "Emerging International Development Law and Traditional International Law - Congruence or Cleavage" (1987) 17 Ga. J. Int'l & Comp. L, 431.

Kwakwa, E., "Regulating the International Economy: What Role for the State?" in M. Byers, (ed.), *The Role of Law in International Politics* (Oxford: Oxford Univ. Press, 2000) 227.

Lowe, V., "Sustainable Development and Unsustainable Arguments" in A. Boyle, and D. Freestone, *International Law ad Sustainable Development: Past Achievements and Future Challenges* (1999), 31.

Lowe, V., "The Politics of Law-making: Are the Method and Character of Norm Generation Changing?" in M. Byers, (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 207.

Luff, D., "An Overview of International Law of Sustainable Development and a Confrontation between WTO Rules and Sustainable Development" (1996) 1 *Revue Belge de droit Int'l* 90.

Marceau, G., "A Call for Coherence in International Law - Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement" (1999) 33 (5) J.W.T., 87.

Marden, E., "The Neem Tree Patent: International Conflict over the Commodification of Life" (1999) 22 (2) Boston Col. Int'l & Comp. L. Rev., 279.

Marong, A., & Gehring M, "Sustainability Challenges of Paragraph 51 of the Doha Ministerial Declaration" 6 *Bridges,* No.1 (Jan. 2002), 17.

Marong, A.B.M., "Toward a Normative Consensus Against Corruption: Legal Effects of the *Principles to Combat Corruption in Africa*" (2002) 30 (2) Denver J.I.L & Pol., 99.

May, J.R., "Of Development, Davinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States" (1983) 3 Widener Law Symposium Journal, 197.

McCloskey, M., "The Emperor Has No Clothes: The Conundrum of Sustainable Development" (1998-99) 9 Duke Envt'l L & Pol. 153.

McDougal, M.S., Lasswell, H., & Reisman, W.M., "The World Constitutive Process of International Decision" (1966-67) 19 J. Legal Edu. 253.

McIntyre, O., & Mosedale, T., "The Precautionary Principle as a Norm of Customary International Law" (1997) 9 J.E.L 221.

Melanchuk, P., "Globalisation and the Future Role of Sovereign States" in F. Weiss, E. Denters and P. de Waart, *International Economic Law with a Human Face* (1998), 45.

Meyers, G.D., & Muller, S.C., "The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy" (1996) 4 Buff. Envt'l L.J., 1.

Mickelson, K., "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1997) 16(2) Wisc. I.L.J., 353.

Mitchell, L.E., "Private Law, Public Interest?: The ALI *Principles of Corporate Governance*" (1993) 61 (4) Geo. W.L.rev., 871.

Mitchell, L.E., "The Human Corporation: Some Thoughts on Hume, Smith, and Buffet" (1997) 19 Cardozo L. Rev. 341.

Moffat, D., and Linden, O., "Perception and Reality: Assessing Priorities for Sustainable Development in the Niger River Delta" (1995) 24 (7-8) *Ambio (A Journal of the Human Environment).*

Morrisey, D.J., "Toward a New/Old Theory of Corporate Social Responsibility" (1989) 40 Syracuse L. Rev., 1005.

Mowoe, K.M., "Quality of Life and Environmental Pollution and Protection" in J.A. Omotola (ed.), *Environmental Laws in Nigeria including Compensation* (Lagos: Univ. Of Lagos Press, 1990), 171.

Nanda, V.P., "The Right to Development under International Law - Challenges Ahead" (1985) 15 Cal.W.I.L.J., 431.

Norgaard, R.B., "Sustainable Development: A Co-Evolutionary View" (1988) *Futures,* 606.

Ntambirweki, J., "The Developing Countries in the Evolution of an International Environmental Law" (1991) 14 hastings Int'l & Comp. L. Rev. 905.

Okafor, O.C., "After Matyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa" (2000) 41 (2) Harv. J.I.L., 503.

Okafor, O.C., "Self-Determination and the Struggle for Ethno-Cultural Autonomy in Nigeria: The Zangon-Kataf and Ogoni Problems" (1994) 6 Afr.S.I.L.Procs., 88.

Okafor, O.C., "The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North *"Entente"* " (1995) 7 A.J.I.C.L., 865.

Omorogbe, Y., "The Legal Framework for the Production of Petroleum in Nigeria" (1987) 5 (4) J. Energy & Nat. Res. L., 273.

Onuosa, S.N., "Sustainable Development of Petroleum Resources: The Rumpus and Resolution", in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (1998), 433.

Oyewo, O., "The Problem of Environmental Regulation in the Nigerian Federation" in J.A. Omotola (ed.), *Environmental Laws in Nigeria including Compensation* (Lagos: Univ. Of Lagos Press, 1990), 98.

Pallemaerts, M., "International Environmental Law from Stockholm to Rio: Back to the Future?" (1992) 1 R.E.C.I.E.L. 254.

Parker, L.B., & Blodgerr, J.E.,"RL 30024: Global Climate Change: From 'No Regrets' to S. res. 98" at http://www.cnie.org/NLG/Erreports/Climate/Clim-17.cfm#_1_9

Pearce, D., "Economics, Equity and Sustainable Development" (1988) *Futures,* 598.

Pearce, D., "Foundations of Ecological Economics" (1987) 38 *Ecological Modelling,* 9.

Pegg, S., "Human Rights in Nigeria's Niger Delta" (2001-2002) 4 (1) Ind. Int'l H.R. Bulletin, 5.

Porras, I.M., "The Rio Declaration: A New Basis for International Cooperation" (1992) 1 R.E.C.I.E.L. 245.

Rajamani, L., "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Change Regime" (2000) 9 (2) R.E.C.I.E.L., 120.

Raz, J., "The Rule of Law and its Virtue" (1977) 93 Law. Q. Rev., 195.

Redcliffe, M., "Sustainable Development and the Market: A Framework for Analysis" (1988) *Futures,* 635.

Redfern, A., "The Arbitration between the Government of Kuwait and Aminoil" (1984) 55 B.Y.I.L., 65.

Reisman, W.M., "Designing and Managing the Future of the State" (1997) 8 (3) Eur. J.I.L., 409.

Reisman, W.M., "International Lawmaking: A Process of Communication" (1981) A.S.I.L. Procs., 101.

Reisman, W.M., "The View from the New Haven School of International Law" (1992) A.S.I.L. Procs., 118.

Rimmer, D., "Elements of the Political Economy" in K. Panter-Brick (ed.), *Soldiers and Oil: The Political Transformation of Nigeria* (1978), 141.

Rosenfeld, A.B., Gordon, D.L., & Guerin-McManus, M., "Approaches to Minimizing the Environmental and Social Impacts of Oil Development in the Tropics", in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998), 279.

Ruhl, J.B., "Sustainable Development: A Five-Dimensional Algorithm for Environmental Law" (1999) 18 Stan. Envt'l L.J., 31.

Sands, P., "Environmental Protection in the Twenty-First Century: Sustainable Development and International Law" in R.L. Revesz, P. Sands, & R.B. Stewart, (eds.), *Environmental Law, The Economy and Sustainable Development* (Cambridge: Cambridge Univ. Press, 2000), 369.

Sands, P., "International Law in the Field of Sustainable Development: Emerging Legal Principles" in W. Lang (ed.), *Sustainable Development and International Law* (The Hague: Martinus Nijhoff, 1995).

Sands, P., & Alexander, D., "Assessing the Impact" (1991) 141 New L.J. 1487.

Schachter, O., "The Decline of the Nation-State and Implications for International Law" 36 Colum. J. Trans'l L., 7.

Schachter, O., "The Erosion of State Authority and its Implications for Equitable Development" in F. Weiss, E. Denters and P. de Waart, *International Economic Law with a Human Face* (1998), 31.

Schachter, O., "The Evolving International Law of Development" (1976) 15 Colum. J. Trans'l L., 1.

Sesan Ayodele, A., "The Conflict in Growth of the Nigerian Petroleum Industry and the Environmental Quality", (1985) 19 (5) *Socio-Econ. Planning Science*, 295.

Shine, C., & Kohona, P.T.B., "The Convention on Biological Diversity: Bridging the Gap between Conservation and Development: (1992) 3(1) R.E.C.I.E.L., 307.

Sinclair, C. M., "Global Warming or Not: The Global Climate is Changing and the United States Should Too" 28 Ga. J. Int'l & Comp. L., 555.

Slaughter, A.M, "The Real New World Order" (1997) 76 (2) Foreign Affairs, 183.

Slaughter, A.M., "Governing the Global Economy through Government Networks" in M. Byers, (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000).

Smith, D.N., & Wells Jr., L.T., "Mineral Agreements in Developing Countries: Structures and Substance" (1975) 69 A.J.I.L., 560.

Smith, S.L., "Ecologically Sustainable Development: Integrating Economics, Ecology and Law" (1995) 31 Willamette L.Rev., 261.

Sohn, L.B., "The Stockholm Conference on Environment and Development" (1973) 14 Harv. Int'l L.J., 423.

Sokona, Y., Humphreys, S., & Thomas, J.P., "The Clean Development Mechanism: What Prospects for Africa?" at http://www.edna.sn/energie/cdm2.htm

Stephens, B., "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 Berkeley J. Int'l L. (2002), 45.

Stern, B., "How to Regulate Globalization" in M. Byers, (ed.), *The Role of Law in International Politics* (2000) 247

Strange, S., "The Erosion of the State" (1997) Current History, 365.

Subedi, P.S.P., "Foreign Investment and Sustainable Development" in F. Weiss, E. Denters, & P. de Waart, *International Economic Law with a Human Face* (1998), 426.

Taylor, C.R., "The Right to Participation in Development Projects" in K. Ginther, E. Denters, & P. de Waart., *Sustainable Development and Good Governance* (Dordrecht: Kluwer Academic Publishers, 1995), at 207.

Téson, F.R., "The Power of Legitimacy Among Nations", Book Review of *The Power of Legitimacy Among Nations* by T.M. Franck, (1992) 37 McGill L.J., 666.

Timoshenko, A., "Ecological Security: Global Change Paradigm" (1990) 1 Co. J. I.E.L. & Pol. 127.

Toope, S.J., "Confronting Indeterminacy: Challenges to International Legal Theory" (1990) 19 C.C.I.L. Procs., 209.

Toope, S.J., "Emerging Patterns of Governance and International Law" in M. Byers., (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 91.

Toope, S.J., "Redefining Norms for the 21st Century" (1995) C.C.I.L. Procs., 191.

Trubek, D.M., "Law and Development: Then and Now" (1996) A.S.I.L. Procs., 223.

Trubek, D.M., "Toward a Social Theory of Law: An Essay on the Study of Law and Development" in A. Carty (ed.), *Law and Development* (New York: New York Univ. Press, 1992), 39.

Turner, T.E., "Women's Uprisings against the Nigerian Oil Industry in the 1980s" at http://www.uoguelph.ca/~terisatu/Counterplanning/c9.htm

van Reenan, T.P., "The Right to Development in International and Municipal Law" (1995) 7 Afr. S.I.L. Proc., 364.

Verma, S.K., "International Code of Conduct for Transnational Corporations" (1980) 20 Ind.J.I.L., 20.

Verma, S.K., "Multinational Corporations and International Guidelines" (1981) 18 C.M.L. Rev. 463.

Von Moltke, K., "The Relationship between Policy, Science, technology, Economics and Law in the Implementation of the Precautionary Principle" in D. Freestone & E. Hey, (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (1996).

Wabunoha, R.A., "Popular Participation: a Precondition for Sustainable Development Planning" in K. Ginther, E. Denters, & P. de Waart., *Sustainable Development and Good Governance* (Dordrecht: Kluwer Academic Publishers, 1995), at 230.

Ward, H., "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options" (2001) 24 Hastings int'l & Comp. L. Rev., 451.

Weil, P., "Towards relative Normativity in International Law?" (1983) 77 A.J.I.L., 413.

Werksman, J., "Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime" (1998) Y.B.I.E.L., 48.

Wilder, M., & Curnow, P., "The Clean Development Mechanism" (2001) 24(2) Univ. N.S.W.L.J., 578.

Williams, C.A., "Corporate Social Responsibility in an Era of Economic Globalization" (2002) 35 Univ. of Calif. Davis L.Rev., 705.

Worika, I. L., "Environmental Concepts and Terms in Petroleum Legislation and Contracts: A Preliminary Study" in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London & The Hague: Kluwer Law International, 1998) 393.

Young, D., "The Application of Environmental Impact Statements to United States Participation in Multinational Development Projects" (1992) 8 Am. Univ. J. Int'l L & Pol. 309.

Other Sources

United Nations, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development* (Geneva: September, 1995).

IISD, *Earth Negotiations Bulletin* Vol. 22 No. 51 (6 September, 2002).

F.I.E.L.D., *Report of a Consultation on Sustainable Development: The Challenge of International Law,* R.E.C.I.E.L., (1993).

UNDP, *Governance for Sustainable Development* (1997) online at www.undp.org

Shell Petroleum Development Corporation, *Annual Report* (1996).

Shell Petroleum Development Corporation, *Annual Report* (1998).

Shell Petroleum Development Corporation, *Annual Report* (1999).

Shell International, *Shell and the Environment* (1992).

A. Rowell, *Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria* (Greenpeace International, 1994).

Nigerian National Petroleum Corporation, "Liquefied Natural Gas Project", at www.nigerianoil-gas.com/naturalgas

Nigerian National Petroleum Corporation, "National Gas Policy", at www.nigerianoil-gas.com/naturalgas

S. Thomas & S. Canagarajah, "Poverty in a Wealthy Economy: The Case of Nigeria" IMF Working Paper (WP/02/114) 2002.

World Bank, "Nigeria - Delta Development Project" report No. PID11440 (August 1, 2002) at www.worldbank.org

World Bank, "Integrated Safeguards Data Sheet (Initial), Nigeria-Delta Development Project" (November 21, 2002) at www.worldbank.org

M. Birnbaum, *Fundamental Rights Denied: report of the Trial of Ken Saro-Wiwa and Others* (London: Article 19, 1995).

M.Birnbaum, *A Travesty of Law and Justice: An Analysis of the Judgement in the Case of Ken Saro-Wiwa and Others* (London: Article 19, 1995).

Center for International Environmental Law (CIEL) et al., "Statement on Investment fortheAprilWTOInvestmentMeeting"onlineathttp://www.ciel.org/Publications/Invest_Statement_Mar03.pdf

CIEL et al, "No Investment Negotiations at the WTO" online at http://www.ciel.org/Publications/Invest_Common_Mar03.pdf