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Reshaping Natural Resources Management in a Globalized World : a Balancing Act

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Overview

1. INTRODUCTION

Will globalism bring shared prosperity, or make the desperate of the world even more desperate? Will we use science and technology to grow the economy and protect the environment, or put it to risk--put it all at risk in a world dominated by a struggle over natural resources?[1]

Natural resources' development scenarios involving indigenous peoples and other minority stakeholders, foreign investors (private and public), and considerable environmental and social impacts are increasingly frequent, particularly in South America and other developing regions. Balancing development's impacts and benefits and looking after a country's balance of payments while taking into account, among other things, minority rights, respect for cultural identities, the need for widespread poverty alleviation and environmental stewardship is proving an extremely delicate task and one that increasingly requires thoughtful consideration of extraneous limitations, both factual and legal.

Whilst a few decades ago the international law principle of permanent sovereignty over natural resources provided countries with a considerable measure of independence in the management of their natural resources, it may no longer be so. Current international and

[1] US President Clinton's address to the 54th Session of the United Nations General Assembly, September 21, 1999 cited in I. Simonovic, "State Sovereignty and Globalization: Are Some States More Equal?" (Summer 2000) 28 Ga. J. Int'l & Comp. L. 381.

transnational legal developments and practice are having a tremendous impact on the way a country deals with complex domestic issues of resource allocation, development and management.[2] Erosion of the principle is due to the enhanced exposure and to the proliferation of transnational networks[3] that results from an increasingly interconnected global community characterized, among other things, by an open global economy, the proliferation of international trade and investment, the mega growth of multi-national corporations, real-time communication technologies, deepening environmental and human rights' awareness, and a growing number of Non Governmental Organizations (NGOs) and civil society activism. International legal imperatives, practices and precepts, as well as principles developed in foreign municipal jurisdictions and by a new set of global actors, are making increasingly frequent inroads into the management of domestic affairs[4] and there is a heightened expectation both locally and globally that those precepts and practices will be followed in every country's natural resources' development and management decisions.

As the gap between the haves and the have-nots of the world continues to widen at an alarming rate,[5] this re-alignment of natural resources law and management practices to

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[2] This work generally refers to natural resources allocation, exploitation, decision-making and management operations under the general terms of "management" and/or "development."

[3] S. Picciotto defines transnational networks as "new forms of transnational politics, based on the growth of "principled issue networks" involving non-governmental organizations and others operating on the basis of shared ideals on global issues." S. Picciotto, "Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism" (1996-1997) 17 Nw. J. Int'l. L. & Bus. 1014 at 49. See also: J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge, U.K.: Cambridge University Press, 2000).

[4] I. Simonovic, *supra*, note 1.

[5] For some poignant examples see: D.A. Kysar, "Sustainable Development and Private Global Governance" (June 2005) 83 Tex. L. Rev. 2109. For an account of how the gap between rich and poor has spread more than 30 times over the last years in Argentina, see: Arg., La Nacion, "Hay menos gasto social que en los 90" 19 Feb. 2006, available at: <www.lanacion.com.ar/economia/nota.asp?nota_id=781952&origen=premium>.

respond to emerging global forces could be of significance to the future of humanity as a whole. The following chapters describe the forces currently driving that change and the successes and failures encountered in its wake; they also provide a glimpse of what could lie ahead and advance some ideas aimed at contributing to the achievement of equitable development and management of natural resources.

A. Natural Resources: What They Are and Why They Are Important

Before going on to discuss the legal and factual underpinnings of natural resources management, it is important to clarify what is meant by the reference to "natural resources" and why natural resources are key to community and individual development.

Several definitions of natural resources have been attempted in the legal as well as the non-legal fields. Regardless of whether the definition comes from the natural or the social sciences, central to the concept is the idea of value: utilitarian (anthropocentric) value or intrinsic value, but value nonetheless.

In international law, Schrijver chooses Cano's definition of physical natural goods, as opposed to those made by man, that are a constitutional element of the human environment, as the most complete.[6] Professor Weintraub offers a definition of natural resources that is particularly useful in that it ties it to human aspirations and needs that are specific to a community of individuals, making it easy to link natural resources with

[6] N. Schrijver, *Sovereignty over natural resources* (Cambridge, U.K.: Cambridge University Press, 1997) at 15.

the idea of development as understood by a variety of peoples. He refers to a natural resource as "*a portion of the Earth that contributes to the continued existence of a community. [Or] Earth-derived substances from which many aspects of a community's identity are distilled.*"[7] Accordingly, Prof. Weintraub characterizes a substance as natural resource "*based on the community's desire to tie its identity to reliance on that substance.*"[8] In turn, the concept of "environment" is dynamic and community specific. It designates the totality of natural resources that a community deems necessary for its continuity and development. As community needs and values change over time, so will the environment and its natural resource components.

Although some draw a distinction between natural resources and "natural wealth" arguing that natural wealth has a broader meaning comparable to that of environment, international instruments tend to refer to natural resources and natural wealth interchangeably.[9]

In sum, natural resources are valuable earth-derived physical substances, that grouped together make up the environment, and that are necessary for a community's development. But what exactly is development?

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[7] B.A. Weintraub, "Environmental Security, Environmental Management, and Environmental Justice" (Spring 1995) 12 Pace Envtl. L. Rev. 533, at 538.
[8] *Id* at 540.
[9] Schrijver distinguishes natural resources from natural wealth in that natural wealth is a more comprehensive term comprising all the components of nature from which natural resources can be extracted or which can serve as the basis for economic activities. Schrijver, *supra*, note 6 at 19.

B. Human Development and Well Being

"Development" is not a straightforward concept. In its most basic definition "develop" means to "unfold, bring or come from latent to visible or active."[10] *Per se*, the term development conjures the idea of change, but says nothing about the content or direction of that change. However, at least in the western mind and especially when thought of in the sense of "human development," forward seems the only possible direction that development can point at. Forward is equivalent to progress and growth; what is left behind is backward and inadequate. In this light, "*[d]evelopment is a set of practices and beliefs that are part of the Western political and cultural imagination, despite being presented as universal, natural and inevitable. (...) It presumes a universal and superior way of ordering society, and that all societies are to advance toward the same goal.*" [11]

Despite the reductionist approach that equates development with monetary wealth and with growth in *per capita* income or national economic indicators, development means different things to different peoples. Even the idea of change, so closely tied to the western notion of development, is misplaced. To a person in a big metropolis like San Francisco, USA, or the Argentine capital of Buenos Aires development may be equivalent to improved highways, increasing access to communication technologies and well stocked super-markets and stores that are relatively close by. To the rural and indigenous communities of southern Chile, it may mean stability and the ability to

[10] Oxford Dictionary, 4th. Edition (Oxford, U.K.: Oxford University Press, 1969).
[11] R.E. Gordon and J.H. Sylvester, "Deconstructing Development" (Winter 2004) 22 Wis. Int'l L.J. 1, at 4.

continue to lead pastoral or subsistence life-styles without fear from encroachment by competing uses of the land and resources that those livelihoods depend upon.

Human development is, "*above all else a question of human values and attitudes, goals self-defined by societies.*"[12] Just as societies and communities differ, so will the notion of development. The ultimate goal is individual and community (i.e. human) well being understood as the minimum acceptable level of spiritual and material satisfaction[13] that individuals and communities aspire to attain and that derives from their relationship with natural resources. Thus, development in this study refers to a process: the quest for human well being, whichever direction that quest might take.

So defined, development is still a controversial notion. It brings to the fore the tension between conflicting views of well being and the difficulties that are intrinsic to defining the "common good" or the "public interest." The larger and more diverse the community, the harder it will be to define what are tolerable costs and acceptable benefits to be borne and distributed amongst its members.[14] It comes as no surprise, therefore, that the right to development is amongst the most elusive of human rights.[15]

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[12] D. Goulet, "Changing Development Debates Under Globalization: The Evolving Nature of Development in the Light of Globalization" (Fall 2004) 6 J. L. & Soc. Challenges 1, at 2.
[13] Goulet refers to these as "needs of the first order" which are followed in ascending order by enhancement needs and luxury needs. Goulet, *id.*
[14] For a practical illustration of these tensions see case studies below.
[15] In fact, some authors, including Judge R. Higgins of the International Court of Justice, question its status as human right. R. Higgins, *Problems and Process: International Law and How We Use It* (New York: OUP, 1996). See also: J. Donnelly, "In Search of the Unicorn" in *Law and Development*, A. Carthy, ed. (NYU Press: New York, 1992).

C. Sovereignty, Natural Resources and Development in a Globalized World

When development is intrinsically tied to natural resources as in the definition above, the issue of access to, and management of, natural resources becomes central to its realization.

Traditionally, the notion of sovereignty drew a bright line parceling out the world into states with their own territory and exclusive access to the resources within. Indeed, access to, and management of, natural resources are central to the economic dimension of sovereignty manifest in the international law principle of *permanent sovereignty over natural resources*, proclaimed in 1962 under UN Resolution 1803.[16] The principle is an exclusionary one as it was devised as a tool to allow (mostly) newly formed states to cut off access to their valuable natural resources to outside interests. International law mediated between state actors and served to assert a state's rights to its natural resources *vis a vis* other states and their powerful constituents avid for natural resources, wherever located. At the time of its inception, internal allocation and management issues were not a primary concern as long as foreign detrimental access could be kept at bay.

The world that delivered Resolution 1803 was different from the world we know today. It was a world in expansion with states striving to shake off the North's political and economic domination of the pre-World War II era. The goal was redistribution of wealth and power amongst states. Monolithic, controlling states, self-determination[17] and the

[16] UN G.A. Res. 1803 (XVII) of 14 December of 1962: *Declaration on Permanent Sovereignty over Natural Resources.*

[17] Contrary to what may be generally thought, the right to self-determination does not equate to a right to independence. States have been very vocal in their defense of territorial integrity. Self-determination

idea of "one people, one state" were essential to the consolidation of the new world order.[18] Well being and development could only be conceived in terms of the state as a whole. It was not time to slice up the pie, but to make and consolidate it.

As events unfolded and the Cold War signaled to the Western powers the need to secure allies in the Third World, focus started to shift to the plight of the individual and to personal well being.[19] International Financial Institutions (IFIs), specifically the Bretton Woods Institutions or World Bank Group, added a social dimension to their mandate[20] and work began on indigenous and other minority issues. In 1986, the UN adopted the *Declaration on the Right to Development* whereby states recognize that "the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development."[21] Particularly regarding permanent sovereignty over natural resources, several UN Resolutions following Resolution 1803, including the 1969 *Declaration on Social Progress and Development*[22] and the 1974 *UN Charter of Economic Rights and*

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exists in two inter-related forms: 1) the right of peoples within a state as a whole to have equal access to and participation in the political, economic and cultural life of the state as expressed, for example in the *UN Covenant on Civil and Political Rights* and in the *UN Covenant on Economic, Social and Cultural Rights*; and, 2) the right of peoples to choose their own international status. R. Higgins, *supra*, note 15. See also: C.N. Okeke, "A Note on the Right of Secession as a Human Right" (1996) 3 Ann. Surv. Int'l & Comp. L. 27; and, A. Huff, "Indigenous Land Rights and the New Self-Determination" (Spring 2005) 16 Colo. J. Int'l Envtl. L. & Pol'y 295.

[18] Schrijver, *supra*, note 6.

[19] L. Henkin, "Sibley Lecture, March 1994, Human Rights and State "Sovereignty" (1995/1996) 25 Ga. J. Int'l & Comp. L. 31.

[20] B. Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions' (Spring 2000) 41 Harv. Int'l L.J. 529.

[21] G.A. Res. 41/128 of 4 December 1986. 1966 had already seen the emergence of two foundational human rights' instruments: the *UN Covenant on Civil and Political Rights* and the *UN Covenant on Economic, Social and Cultural Rights*. Similar developments also took place in the Americas.

[22] G.A. Res. 2542 (XXIV).

Duties of States,[23] though upholding the states' maximum discretion in the management of their natural resources, also represented a push to "put the exercise of permanent sovereignty over natural resources firmly in an economic and social-development context"[24] focusing on the centrality of human development as the duty that inevitably accompanies a state's right to resources.

Despite a proliferation of international declarations and the considerable time that has gone by, the impact of this shift of emphasis from state-centred development to individual well being is yet to be felt in many locations across the world. As will be illustrated with reference to South America in the case studies below, at least in some parts of the world, the individual well being that was supposed to derive from the states' exercise of permanent sovereignty over natural resources has failed to materialize. Inequalities continue to grow.

While developing countries and their rulers continue to struggle to deliver the well being that their populace is entitled to, the world continues to transform. New forces have emerged that require a fresh look at the law and practice of access to, and management of, natural resources. These new forces are generally referred to under the umbrella term of globalization. Globalization promises to take natural resources law and management in a whole new direction.

[23] G.A. Res. 3281 (XXIX). See especially art. 7.
[24] Schrijver, *supra*, note 6 at 88.

D. Globalization

As with the other concepts tackled in this section, no single, universal definition can be found for "globalization." Authors, however, coincide in characterizing globalization as a dynamic and complex phenomenon, involving a multitude of issues and processes and connecting societies and individuals at unprecedented levels.[25] Among its features are the proliferation of transnational networks, liberalized trade, increasing market integration, access to real-time communication and information technology, and an unprecedented growth of transnational corporations' wealth and power. According to the Office of the High Commissioner for Human Rights, a "*key characteristic of globalization is that the actors involved are not only states but non-state actors, particularly multinational or trans-national corporations.*"[26]

This globalized scenario has an inevitable impact on the law.[27] Despite some resistance to discarding the traditional classification of the law between public and private, national and international,[28] legal "cross-fertilization" is now increasingly common and a new, overarching global normative system seems to be taking shape. [29] This seems to be particularly true with regards to natural resources management.

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[25] D. Goulet, *supra*, note 12. See also: Officer of the High Commissioner for Human Rights, Globalization <www.ohchr.org/english/issues/globalization/>. Globalization entails an acknowledgement of the world as pluriform. On the subject of the world as pluriform see e.g.: S. Sucharitkul, "International Law and International Relations in a Pluriform World" Cleveringa Inaugural Lecture, Rijksuniversiteit Te Leiden, Leiden 24 November 1989.

[26] Officer of the High Commissioner for Human Rights, Globalization – Business and Human Rights, <www.ohchr.org/english/issues/globalization/business/index.htm>.

[27] See e.g. the discussion of the impact of globalization on sovereignty and on US policy and law in: H. Stacy, "Relational Sovereignty" (May 2003) 55 Stan. L. Rev. 2029.

[28] For an account of the negative effects of continued reliance on the traditional divide see: R. Dufresne, "The Opacity of Oil: Corporations, Internal Violence, and International Law" (Winter-Spring 2004) 36 N.Y.U.J. Int'l L. & Pol. 331.

[29] Prof. H.J. Berman uses "world law" to denote the combination of inter-state law with the common law of humanity and the common law of numerous existing world communities (communities of traders,

2. METHODOLOGY

After having set the conceptual basis for discussion above, the following chapters of the present study undertake a survey and analysis of some of the current international practices and normative developments that help shape natural resources management today. Specifically, the following chapters deal with the increased attention being given today to the link between natural resources and human rights and the activism displayed by some international human rights tribunals, the impact of environmental protection imperatives and recent developments in international economic law.

A review of policies and practices of the international institutions that play an important role in shaping resource management approaches and in lending visibility to minority, indigenous and environmental protection issues, such as the International Labour Organization, the World Bank Group, the World Trade Organization and the Inter-American System for the Protection of Human Rights, will be undertaken.

References to and sections on domestic law are based on the author's prior research on the subject and professional experience in South America. On that basis, the author provides an assessment of the effectiveness of domestic legal tools currently in use in South America to address natural resources management issues and the impact of outside

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financers, environmentalists, etc.). H.J. Berman, "The Role of International Law in the Twenty-First Century: WORLD LAW" (May 1995) 18 Fordham Int'l L.J. 1617. See also: E. Brown Weiss, "The Rise or the Fall of International Law?" (November 2000) 69 Fordham L. Rev. 345.

influences. The analysis and findings are centred on specific case studies in selected countries of South America.

The study attempts to answer the question of whether current institutions and practices as applied to and in developing countries are conducive to achieving a balanced and equitable natural resources development outcome "*for the improvement of the well- being of the entire population and of all individuals.*"[30] The concluding sections contain the author's final remarks about the status of natural resources law and some suggestions for improvement.

3. CONCLUSION

The information collected in the following chapters points at the existence of a global normative system that applies to natural resources management across the world. It also looks at the requirements of the global system through the lens of current law and policy as applied in some South American countries.

This study is not the first one to call the reader's attention to the fact that the classical divisions of the law into municipal and international, public and private, no longer reflects the type of normative interaction that is common in the world today.[31] Indeed,

[30] *Declaration on the Right to Development*, art. 2.3. UN, G. A. Res. 41/128 of 4 December 1986.
[31] In 1956 P. Jessup coined the term "transnational law" to designate an amalgam of principles of domestic and international law regulating actions or events that transcend national frontiers. Prof. S. Sucharitkul uses the term "community law" to designate a system that is international as well as domestic. S. Sucharitkul,

echoing prior academic work in that regard, one may say that a "*fluid model of multiple affiliations, multiple jurisdictional assertions, and multiple normative statements captures more accurately than the classical model of territoriality and sovereignty the way legal rules are being formed and applied in today's world.*"[32]

What this study attempts to do is to shine some light onto the manner in which the transformation of the law and normative relations under the phenomenon of globalization affects natural resources management regardless of where those resources are placed: inside or outside traditional state boundaries or somewhere in between. It points at the inadequacy of current institutions and norms to advance well being in the developing world and at developing states' relative powerlessness to correct and address the resulting situation.

The author finishes by contributing some ideas on legal tools that could be implemented to assist the developing world in its struggle to advance well being in the course of developing and managing its natural resources.

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supra, note 25, at 25. See also: P. Schiff Berman, "From International Law to Law and Globalization" (2005)43 Colum. J. Transnat'l L. 485.

[32] P. Schiff Berman, *id* at 537.

CHAPTER II

Natural Resources and the Evolution of Law

1. INTRODUCTION

It is obvious that states are no longer free to simply pursue whatever policy they wish within their borders. (...) We may well be witnessing the formation of a new "social contract," one that not only regulates relations between individuals and a state but also between individuals, states, and international organizations. [1]

This Chapter discusses some of the core concepts of international and economic law.[2] It traces their evolution and focuses on the development of the *right to permanent sovereignty over natural resources* and its meaning in a globalized world. It lays down the basis for analyzing the evolution of permanent sovereignty over natural resources and understanding the emerging legal landscape or, as in the quote above, the new "social contract" and its implications.

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[1] I. Simonovic, "State Sovereignty and Globalization: Are Some States More Equal?" (Summer 2000) 28 Ga. J. Int'l & Comp. L. 381, at 384 and 403.

[2] International economic law is hereby considered a subset of international public law concerning economic exchanges between the subjects of international law. Conf.: I. Sidl-Hohenveldern, International *Economic Law* (The Netherlands: Martinus Nijhoff Publishers, 1992). International development law concepts, relating to the rights and responsibilities of states in the development process, are also discussed within the broader framework of international law.

2. SOVEREIGNTY, SELF-DETERMINATION AND DEVELOPMENT

A. Sovereignty

Traditionally, the concept of sovereignty has provided the legal basis to a state's power to exclude others from the use and enjoyment of the natural resources situated within its territory. In principle, what took place within a state's boundaries, including the fate of its natural resources, was no one's business except the state's own.[3] What happened outside state lines was subject to such rules as the community of equally sovereign states agreed to through their express consent or as a result of their consistent practice.[4] Thus conceived, sovereignty has been fundamental to the development of the modern state as well as the cornerstone of international law. Sovereignty is also central to the link between natural resources management and international law as can be deduced from tracing its evolution and its connection with other important international law concepts like self-determination and the right to development. Today, as suggested in the opening quote, sovereignty, though still key, has shed some of its exclusionary traits and no longer shields states entirely against third party intervention.[5] This permeability is of particular importance in connection with natural resources management issues.

The following sections will trace the modern evolution of sovereignty *vis a vis* natural resources development and management.

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[3] Classic international law subjects domestic powers to the primacy of international law (pre-NIEO) principles.

[4] E.J. Cardenas, "The Notion of Sovereignty Confronts a New Era" in R. Pritchard, ed., *Economic Development, Foreign Investment and the Law* (London, U.K.: Kluwer Law International, 1996) Ch 1.

[5] H. Stacy, "Relational Sovereignty" (May 2003) 55 Stan. L. Rev. 2029. Stacy refers to sovereignty today as a "multi-directional contract." See also: E. Engle, "The Failure of the Nation State and the New International Economic Order: Multiple Converging Crises Present Opportunity to Elaborate a New Jus Gentium" available at <lexnet.bravepages.com/NIEO.htm>.

B. Sovereignty and Self-Determination

The right to self-determination can be found in the *International Covenant on Civil and Political Rights*[6] and the *International Covenant on Economic, Social and Cultural Rights*.[7] Common Article 1, Paragraph 1, of these Covenants provides that:

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*[8]

At its inception, the concept operated as the working principle behind the decolonization process that began after WWII. It applied between an emerging state and its colonial master. For a people to gain independent status as a state, some premises had to be present: a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capability to regain self-governance. Though controversial,[9] in contemporary international law self-determination is found to be operative beyond de-colonization to apply between a state and its own population. It is often referred to as "internal self-determination"[10] and implies the "existence of a plurality of relatively

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[6] Available at: <www.ohchr.org/english/law/index.htm>.
[7] Available at: <www.ohchr.org/english/law/index.htm>. Although self-determination is mentioned under article 55, there is no consensus on whether self-determination as a right is provided for in the UN Charter. R. Higgins, *Problems and Process. International Law and How to Use It* (Oxford, UK: Oxford University Press, 1996) Ch. 7.
[8] ICCPR and ICESCR, art 1, available at: <www.ohchr.org/english/law/index.htm>. It has also been defined by the International Court of Justice in the West-Saharan case as: "The need to pay regard to the freely expressed will of peoples."
[9] Eg.: C.N. Okeke, "A Note on the Right to Secession as a Human Right" 1996, 3 Ann. Surv. Int'l & Comp. L. 27.
[10] R. Higgins, *supra*, note 7.

autonomous sub-systems within the domain of a single state."[11] Territorial integrity is preserved.[12]

In all cases, the significance of the right to self-determination lies in the right-holders' entitlement to choose between political and economic systems through free and equal participation in the political process.[13] In the words of Australia's Aboriginal and Torres Strait Islander Social Justice Commissioner: *"Essential to the exercise of the right to self-determination is choice, participation and control."*[14]

Based on the Australian definition, it is easy to find a link between self-determination and the general theme of this study: natural resources management, insofar as choice and participation refers to lifestyle, and lifestyles, in our definition, are distilled from and identified with the natural resources a community controls.[15] Control over natural resources is therefore key to self-determination, both internal and external.

C. Permanent Sovereignty over Natural Resources

That the right to self-determination would raise significant issues of economic relations and struggles over natural resources, between and within nations, is self-evident.

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[11] Cardenas, *supra*, note 4, at 19.
[12] See also: *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970), reaffirming the right to self-determination in connection with territorial integrity and sovereign unity.
[13] A. Huff, "Indigenous Land Rights and the New Self-Determination" (Spring 2005) 16 Colo.J.Int'l Envtl. L.& Pol'y 295.
[14] Dr. B. Jonas and M. Donaldson, "Human Rights Based Approach to Mining in Aboriginal Lands" November 2003, p. 8; available at <www.minerals.csiro.au/sd/Certification/DonaldsonHumanRightsAndMiningNov03.pdf>.
[15] See Chapter I.

In international law, it was for the first time linked explicitly to sovereignty over natural resources when Chile proposed the inclusion of the *right to permanent sovereignty over natural resources* as inherent to the right to self-determination in the draft Covenants on human rights. Chile explained its proposal as "a practical way of giving moral support to a country's democratic struggle for the control of its own means of subsistence."[16] After its introduction in the international arena by Chile in 1952, and while states continued to discuss and negotiate the exact content of the Covenants, self-determination provided the basis for addressing the right to permanent sovereignty over natural resources in other United Nations' activities and fora. In 1954, the Commission on Human Rights recommended the creation of a special body to conduct a survey on the issue of permanent sovereignty "as a basic constituent of the right to self-determination."[17] The Commission on Permanent Sovereignty over Natural Resources was established in 1958 by Resolution 1314 (XIII). After lengthy debates, the Commission's findings led to the proclamation of the United Nations General Assembly *Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources* which explicitly recognizes "[*t*]*he right of peoples and nations to permanent sovereignty over their natural wealth and resources.*"[18]

Thus, the principle of permanent sovereignty over natural resources owes its existence to the struggles of newly independent and developing states in the post WWII era. At its core was the plight of those states to end economic dominance by powerful developed

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[16] UN. Doc. E/CN.4/S.R.260, 6 May 1952, p.6, cited in N. Schrijver, *Sovereignty over natural resources* (Cambridge, U.K.: Cambridge University Press, 1997) at 45; also available at: <dissertations.ub.rug.nl/FILES/faculties/jur/1995/n.j.schrijver/h2.pdf>.
[17] Resolution 1803 (XVII): *Permanent Sovereignty Over Natural Resources*, 14 Dec. 1962, Preamble.
[18] *Id*, art 1.

state interests. Although its genesis was very controversial, eventually, both the ICCPR and the ICESCR included a second paragraph under Article 1 that incorporates a watered-down version of the right to permanent sovereignty. As may be verified below, Paragraph 2 avoids any explicit reference to permanent sovereignty and takes a middle of the road approach, reaffirming adherence to international law principles and paying heed to developed countries' worries about the fate of their assets[19] and about access to vital natural resources outside their territorial boundaries. Art 1.2 reads:

> *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*[20]

Today, many international agreements include permanent sovereignty amongst their founding principles.[21]

Permanent sovereignty surfaced as an outwardly oriented concept touching primarily on North-South issues, most significantly: nationalization of foreign property, compensation, and standards of treatment of foreign investments. However, just as the right to self-determination evolved to apply internally, so has the (accompanying) right to permanent sovereignty over natural resources. As this study will show, current global developments

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[19] Developed countries insist on the application of classic international law concepts to compensation issues arising from nationalization.
[20] ICCPR and ICESCR, art. 1, available at: <www.ohchr.org/english/law/index.htm>.
[21] See e.g., *Stockholm Declaration on the Human Environment*, 1972, Pple. 21,available at: <www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>; *Rio Declaration on Environment and Development*, 1992, Pple. 2, available at: <www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

are prompting the gradual evolution of permanent sovereignty to include a state's duties to its own nationals and to the international community in connection with natural resources management.[22] At times, however, internal and external duties are hard to reconcile.

In connection with a state's internal duties and permanent sovereignty, much has been said and written about whether permanent sovereignty over natural resources is vested in a state or in its peoples. According to some, the latter alternative would justify secession whenever the representational gap between a peoples and their government is of such a nature and gravity that human rights are inevitably compromised in the process of developing natural resources. However, beyond just reasons and concerns about indigenous spoliation and government mismanagement,[23] the point may be moot in so far as, even in newly created states, peoples necessarily require an institutional framework and vested representatives to exercise any prerogatives, to ensure rights are respected and, in this case, that natural resources are managed in the best interest of all.[24]

What is necessary in all cases is to secure the *essential conditions of internal self-determination: the right of every people within a state to choose, participate and control.*

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[22] Referring to the evolution of human rights law and the concept of sovereignty, L. Henkin talks about a shift from state to human values. L. Henkin, "Human Rights and State Sovereignty" (1995/1996) 25 Ga. J. Int'l & Comp. L. 31. But see: R. Dufresne, "The Opacity of Oil: Internal Violence and International Law" (Winter-Spring 2004) 36 N.Y.U. J. Int'l L. & Pol. 331. "In international law, the gap between government and people is rarely given operative value" (at 357). Dufresne also argues that the international law principle of PSNR legitimizes contractual relationships between corrupt governmental elites and foreign companies

[23] See e.g.: R. Dufresne, *id.*

[24] N. Kofele-Kale frames the government's actions regarding natural resources management in terms of the public interest doctrine, with government officials acting as trustees. N. Kofele-Kale, "Patrimonicide: The International Economic Crime of Indigenous Spoliation" (Jan. 1995) 28 Vand. J. Trasnat'l L. 45.

To varying extents, these three conditions (the people's choice, participation and control) need always be present when it comes to advancing equitable and widespread well being through the development and management of natural resources. That is particularly true today when, breaking the traditional dichotomy of peoples v. state, new global players are starting to emerge. It may be too early to come to a definitive conclusion on whether these new players can help or hinder humanity's progress in its quest towards well being. One thing is sure, however, and that is that although the notion of sovereignty is changing to account for an increasingly interconnected world, [25] as long as the people need a vehicle for concerted action and as long as the current political paradigm is in effect, states and their governments continue to be relevant in achieving individual and global goals.[26]

D. Sovereignty and Development

If one agrees on a basic contemporary definition of sovereignty as "*the authority to decide, [and] the right to choose among alternative courses of action the one that appears most beneficial or least harmful*"[27] to the public interest, then a state's "*right and the duty to formulate appropriate development policies that aim at the constant improvement of the well-being of the entire population and of all individuals*"[28] is perhaps the most significant manifestation of sovereignty and the modern states' *raison*

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[25] Stacy offers the following definition of sovereignty: "the responsible governance of the complex interactions and relations of citizens under conditions of globalization." She terms this new notion of sovereignty "relational sovereignty." H. Stacy, *supra*, note 5, at 69.
[26] Simonovic, *supra*, note 1.
[27] J. Donnelly, "State Sovereignty and Human Rights" available at: <www.du.edu/~jdonnell/papers/hrsov%20v4a.htm>. Under traditional (relative) sovereignty doctrine, this right to choose would be subject only to the rules of international law.
[28] *Declaration on the Right to Development*, U.N. G.A. Res. 41/128 of 4 Dec. 1986, art. 2.3.

d'etre.[29] It is no wonder then that the United Nations declared a right to development as an inalienable human right,[30] even though its content remains somehow difficult to grasp and define.

Indeed, the task of setting development policies and, most of all, implementing them is of such magnitude and significance that states often pool their efforts in order to better their chances of success. Developed states have forged alliances to provide their member countries mutual assistance and support with policy-making and also to defend the common premises on which their policies are based (e.g.: freedom, democracy, etc.). Example of the first type of such alliance is the Organization of Economic Cooperation and Development (OECD).[31] The North Atlantic Treaty Organization (NATO)[32] would be an example of the second, defense-oriented kind of organization. When looking at the developing world, the attempt to establish a New International Economic Order (NIEO) represented a formidable, yet unsuccessful, common effort to harness international support to achieve equitable development.[33]

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[29] Simonovic, *supra*, note 1; Stacy, *supra*, note 5.
[30] *Declaration on the Right to Development*, art. 1, G.A. Res. 41/128 of 4 Dec. 1986, available at: <www.ohchr.org/english/law/rtd.htm>.
[31] For additional information see: <www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html>.
[32] For additional information see: <www.nato.int/>.
[33] Following the failure of NIEO to set commonly defined rules for development assistance, developing South American states continue to pay a high price for the development support of their developed counterparts, often through submission to the requirements of developed country-dominated International Financial Institutions. The developed countries' support may also materialize directly through development assistance loans. Loan conditions generally seek to secure advantages for developed country interests. See discussion below, Ch. III. See also, e.g.: A. Galano III, "International Monetary Fund Response to the Brazilian Debt Crisis: Whether the Effects of Conditionality have Undermined Brazil's National Sovereignty" (Spring 1994) 6 Pace Int'l L. Rev. 323; D.E. Moller, "Intervention, Coercion, or Justifiable Need? A Legal Analysis of Structural Adjustment Lending in Costa Rica" (Fall 1995) 2 Sw. J.L. & Trade Am. 483; D. Shelton, "Protecting Human Rights in a Globalized World" (Spring 2002) 25 B.C. Int'l & Comp. L. Rev. 273.

Nowadays, globalization has brought with it some changes to the business as usual approach to development policy making. First, by reducing the ability of states to control and tax large firms and capital, globalization has loosened the developed world's grip on transnational corporations generally, and as vehicles of foreign and domestic policy. By the same token, however, it has restricted developing countries' ability to implement policies that advance the economic and social rights that are at the core of the right to development.[34] Second, by opening the door to a multiplicity of international and local stakeholders, including international financial institutions (IFIs), non governmental organizations (NGOs) and members of the civil society, it exposes states to enhanced scrutiny and outside pressure, making it increasingly hard to ignore or suppress legitimate demands and grievances. Third, globalization speeds up change and exposes decision-makers to voluminous amounts of information, itself in constant flux. For example, the highly influential policies, requirements and methods of pressure groups and international organizations with an impact on domestic policy-making, including IFIs, are themselves under scrutiny and revision. Their relevance and appropriateness for development promotion is persistently challenged thereby contributing a destabilizing factor and leaving developing states in an increasingly vulnerable position. Finally, globalization provides momentum to normative harmonization and to the development and implementation of global standards through the operation of transnational networks and global courts.[35]

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[34] Donnelly, *supra*, note 27 ; D. Shelton, *id*; E. Engle, *supra*, note 5.
[35] H.V. Morais, "The Quest for International Standards: Global Governance Vs. Sovereignty" (May 2002) 50 U. Kan. L. Rev. 779; Cardenas, *supra*, note 4. Globalization could also be blamed for "race to the bottom" issues. However, the heightened visibility and forces at play in globalized issues will tend to counter this pull.

Summarizing, globalization forces states to re-examine the ways and means through which they implement the right to development. But what exactly can be said to be the content of the right to development, and, as a result, an "appropriate development policy"?

E. The Right to Development

In keeping with the idea that development may mean different things to different peoples developed in Chapter I, few areas of international law theory may be as full of contradiction and conflict as that which relates to the right to development. Because its nature and definition (and even its genesis) are so elusive, some authors deny its existence. Professor Jack Donnelly, in a thorough analysis of the genesis and content of the concept affirms that "*development is one of the primary objectives of all human rights, not a right in itself.*"[36] Though it may be good and desirable to *be* developed, he goes on to say, as right-holders we can only aspire to *pursue* development. Development, in this view, can be attained through the unobstructed exercise of social, economic and cultural rights which, in turn, are grounded on civil and political rights. Such is also the view of Justice Higgins of the International Court of Justice (ICJ).[37] This position seems to coincide with Chapter I's definition of development as a process directed at achieving well being.

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[36] J. Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" at 484 reprinted in *Law and Development*, A. Carthy, ed. (New York: New York University Press, 1992) 169. Though Donnelly's article was written before issuance of the *UN Declaration on the Right to Development*, the author does address it in draft format.

[37] Higgins calls it a "long term aspiration." CIEL, *Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society*, Internet publication, available at: <www.ciel.org/Publications/olp3iii.html>; see also: R. Higgins, *supra*, note 7, Ch. 6.

Notwithstanding the above, another ICJ judge, Judge Weeramantry has referred to the right to development as an inalienable human right. His definition, however, is somewhat circular. He defines it as the process of "improving the sum total of human happiness and welfare."[38] Judge Weeramantry is not alone in his position since that is more or less the view of those that ascribe to the "synthesis theory" which purports the right to development to be a synthesis of existing individual and collective human rights, distilled or added up. Another group of scholars has come up with what is called the "indispensability theory." Rather than arguing for the right to development as a result of other human rights, "indispensability theory" authors consider it as an enabling right, indispensable for the exercise of all other human rights and at a par with that of self-determination. Finally, the "generational theory" considers the right to development as a new "solidarity right" premised on an international duty to cooperate, with the flow of assistance moving from North to South to "compensate inequalities."[39]

Despite their lofty objective and doubtless good intentions, none of the theories mentioned succeeds in defining the content of the right as distinct from the aggregation of all other human rights. It may therefore be advisable to turn to the *UN Resolution on the Right to Development* for guidance. Article 1 of the Resolution reads:

> *1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*

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[38] ICJ, Separate Opinion of Vice-President, Judge Weeramantry, available at: <www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_weeraman.htm>.

[39] The classification is taken from R.Y. Rich, "The Right to Development as an Emerging Human Right" reprinted in *Law and Development*, A. Carthy, ed. (New York: New York University Press, 1992) 256.

> *2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.*[40]

Unfortunately, Article 1 does little beyond providing a list of ingredients of the right to development, amongst which sovereignty over natural resources is but one.[41] This leads one to conclude with Donnelly, that the right to development is mostly rhetorical; it is the end result of the Third World's numeric voting power in the UN countered by its limited factual power.[42] The sum of these ingredients, however, points to the notion of well being as the ultimate goal of the right to development. It is therefore useful to be reminded that, as discussed at the beginning of this study, well being can mean different things to different peoples. In other words, not unlike self-determination, development is about choice.[43] Development policy-making, one of the most significant manifestations of permanent sovereignty, can be described as "*the process of enlarging people's choices*"[44] aimed at achieving well being.

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[40] Available at: <ohchr.org/english/law/rtd.htm>.
[41] Note that Art. 1 refers to "full" –not permanent- sovereignty. The article's wording seems to imply that the right to development can be attained with less than permanent sovereignty.
[42] A good illustration of this are the developing world's failed efforts at bringing about a New International Economic Order, which in over thirty years has failed to materialize beyond an ambitious (and equally rhetorical) UN Resolution and Plan of Action. The *Charter of Economic Rights and Duties of States* suffered more or less the same fate.
[43] The right to development can be distinguished from, or subsumed in, the right to self-determination which in addition to the ability to choose also requires a measure of participation and control. Often times, the distinction is blurry.
[44] UNDP, Human Development Report 1990, "Concept and Measurement of Human Development" available at: <hdr.undp.org/reports/global/1990/en/> at 10.

3. CONCLUSION

Precious time and resources could be wasted trying to unravel the "true meaning" of the right to development as a precondition to state action. On the other hand, utilizing the powerful rhetorical value of the right to development to insist on compensation of inequalities as the cure for all the ills of the developing world, while doing nothing on the home front, is unlikely to deliver any well being and is a poor display of sovereign authority. In a shrinking world, sovereignty cannot be justified or permanent without state action to protect, manage, produce and conserve resources in the best interest and for the well being of the public.

With varying degrees of forcefulness, guidance on how to maximize the chances of success in the process towards development, will often come from outside sources, norms and practices. Furthermore, because natural resources and the global environment are inextricable related, some natural resources' management issues are of common or global concern and will elicit coordinated responses from the global community.[45] As shall be explained in the following chapters, although the nation-state continues to be in the first line of action regarding decision-making in natural resources management, it can no longer rely on its sovereign powers to do whatever it pleases with its natural resources. As discussed in the following chapters, a globalized world will demand that globally acceptable standards and practices be kept,[46] and that global interests are taken into account, sometimes at the expense of local peoples and their right to self-determination.

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[45] See Cardenas, *supra*, note 4.
[46] See gen.: D. Shelton, "Protecting Human Rights in a Globalized World" (Spring 2002) 25 B.C. Int'l & Comp. L. Rev. 273.

Global forces and actors may, at times, negatively interfere or try to redirect a country's development path in their own benefit. Other times, external stakeholder action will trigger local improvements. Thus, increasingly, sovereignty, and particularly permanent sovereignty over natural resources, carries limitations and duties.

The ascendancy of the international community and international law over the full and free enjoyment of a country's permanent sovereignty over its natural resources is of particular significance when what is at stake relates to economic and financial issues, human rights and the environment (including resource conservation), inevitably tied to resource development and management. The following chapters will explore some of these connections. They will look at emerging global principles and practices, the processes and institutions behind them, and their impact on the development of domestic natural resource management rules and policies.

CHAPTER III

Barbarians at the Gate: Natural Resources and Economic and Foreign Investment Law

1. INTRODUCTION

While permanent sovereignty over natural resources continues to be an important principle of international law, it cannot resist the forces that are shaping global events and relations today. Because the impact of natural resources' management policies and practices can be felt globally,[1] the international community keeps a particularly watchful eye. It does so through a variety of tools including loan conditionalities, provisions of multilateral and bilateral agreements, and oversight mechanisms included in conventions.[2] A sophisticated network of institutions and organizations supports their application. Civil society members and Non Governmental Organizations (NGOs) around the globe are also active watchdogs, often taking on enforcement activities where governments and other institutions are unable or unwilling to take action.[3]

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[1] The connection is economic as well as social and environmental. The *Stockholm Declaration on the Human Environment*, is often cited as the first international document to tie human well being and development to environmental and natural resources preservation on a global scale. Developing countries posed extensive resistance to the organization of the Stockholm Conference as they feared that the outcome of the meeting might pose a threat to their sovereign rights to natural resources. See: <www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503>.

[2] Other, non law-based tools including diplomacy and the use of force are also used. However, this study's focus is limited to the law and policy on natural resources management and related issues.

[3] T. Tietenberg, "Private Enforcement of Environmental Regulations in Latin America and the Caribbean. An Effective Instrument for Environmental Management?" (May 1996) Inter-American Development Bank Working Paper Series No. ENV-101, Washington, D.C.

2. ECONOMIC AND FOREIGN INVESTMENT LAW AND NATURAL RESOURCES MANAGEMENT

A. International Financial Institutions; Rules and Practices

Not unlike children tied to their parents for sustenance during their developing years, out of the entire extended family of international bodies and organizations, developing countries, including South American countries, are perhaps closest to the International Financial Institutions (IFIs). IFIs are lenders of last resort and tend to be regarded as necessary catalysts of development due to their ability to attract and channel much needed funds to developing countries,[4] otherwise unable to finance their growth.[5] This section will refer to the policies and practices of the International Bank for Reconstruction and Development, otherwise know as the World Bank (WB),[6] and the Inter-American Development Bank (IDB), a regional bank serving Latin America and the Caribbean set up under the auspices of the Organization of American States.[7] Both Banks

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[4] See R.P Delonis, "International Financial Standards and Codes: Mandatory Regulation Without Representation" (Winter-Spring 2004) 36 N.Y.U.J.Int'l L.& Pol. 563.

[5] Countries with a per capita gross national income of $865 or less benefit from access to the International Development Association's (IDA) interest-free loans and grants; WB directives and policies are applicable to IDA's activities. This study refers to the World Bank as comprising the operations of the IDA. See: <web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA>.

[6] Conceived at Bretton Woods, New Hampshire, USA, during World War II, the World Bank initially helped rebuild Europe after the war. In the early 1960s, however, it became obvious that while Europe had forged ahead, the Third World had stayed considerably behind. The World Bank's focus shifted from reconstruction to development, and from the First to the Third World. Today, its objective is reaching the Millennium Development Goals. Membership in its sister institution, the International Monetary Fund (IMF) is a precondition to membership in the WB. For additional information, including the Articles of Agreement see <www.worldbank.org>.

[7] Although the IDB was created to cater specifically to Latin American clients, and might be thought to have more ascendance over the formulation of law and policy in the region, the World Bank tends to be the main trend-setter in terms of development reform. IDB staff tends to view its own practices as more flexible and less idiosyncratic than those of the World Bank. That view is not necessarily shared by country officials implementing loan requirements, or supported in the documentation. See also: D. Bouille *et al*, World Resources Institute, "Argentina: Market-Driven Reform of the Power Sector," available at: <www.wri.org>. For the Bank's Articles of Agreement see <www.iadb.org>. Even though the influence of the International Monetary Fund is of the outmost importance, because of the considerably narrower focus

are dedicated to poverty alleviation and development[8] through promotion of trade and investment, and through the provision of financial assistance. As part of that process they also help borrowing countries create and maintain adequate investment environments.

Availability of IFI funding is of significance because loan terms are more beneficial than regular market terms, but also because they facilitate access to additional investments and funding that would be otherwise unavailable or too expensive to obtain. IFIs' intervention in any given country sends out a positive signal to third party lenders and investors regarding the (relative) safety of their investments.[9] The "price" for this assistance, however, goes beyond the financial consideration of a regular loan. To ensure that IFI-funded projects meet their development objectives and do not cause "unintended adverse effects"[10] on people and the environment, the banks make all of their lending operations subject to a set of bank-made rules and conditionalities. Thus, funding is tied to the countries' good behaviour in the observance of IFIs' recipes for stability and sustainable growth as illustrated in the cases discussed below. [11]

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of its mandate which concentrates on the technical/economic aspects of matters of balance of payment and exchange rate, it has not been included in this paper. However, its observations may be applicable to that institution.

[8] IFI's definition of development refers to economic indicators and, generally, does not coincide with the working definition of this study provided in Chapter I.

[9] See: <web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS>.

[10] *Id.*

[11] See R.P Delonis, *supra*, note 4 (explaining the developments that led to consideration of the IMF as LLR). Contra: G. Hernandez Uriz, "The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility?" (2002) 28 Brook. J. Int'l L. 77. Rather than as catalysts of investment flows, Hernandez justifies IFIs ascendance over developing countries on the basis of the magnitude of their expenditures and budgets *vis a vis* the budgets available to other development oriented UN bodies.

I. Conditionalities as Vehicles for Change

"[D]enial of assistance on the grounds of conditionality non compliance is perhaps the most potent sanction that any international organization can use against a state."[12]

Conditionality may be defined as the "attempt by donors to use aid as an incentive for [reform]."[13] Reform implies change, discarding what is for something that is expected to bring about an improvement on the *status quo*. Are these "attempts" of IFIs neutral in terms of the policies and tools that a particular country may choose to implement development reform? Traditionally, the answer has been "no," or as one author insightfully puts it "[t]he [World] Bank does not just lend money and produce ideas: it packages the ideas and the money together."[14] Indeed, all loan agreements and negotiations on development funding are made subject to close compliance with both IFIs standard policies and project-specific requirements.[15]

Accordingly, the concept of conditionality conjures recipes or instructions about the direction and content of macroeconomic reform. The package in use during the nineties and into the new millennium and that dominated the IFIs' agenda was infused with a set of liberal, market-centred policy principles known as the "Washington Consensus." Atop

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[12] Delonis, *supra*, note 4, at 612.
[13] C. Santiso, "Good Governance and Aid Effectiveness: The World Bank and Conditionality" (Fall 2001) 7 Geo. Pub. Pol'y Rev. 1, at 7.
[14] Gilbert *et al*, quoted in C. Santiso, *id* at 3.
[15] IFIs' loans can be roughly divided into two broad types: those that are dedicated to funding specific development projects (private or public), and those that focus on the general conditions and environment in which development takes place. Generally speaking, the latter type of loan, i.e. public sector or structural adjustment loan, is geared at enhancing a sector or sub-sector's performance or, generally, a country's macroeconomic performance and its government's administrative capacity.

of the Consensus list was privatization and deregulation of public services and state monopolies, most of which deal with natural resources.[16]

Under the Washington Consensus, belief in the market as a mirror of the public's preferences[17] was at its peak. State-owned natural resource-based industries and activities were privatized and deregulated, foreign investment was highly encouraged and trade was increasingly liberalized. The role of the state was deemed minimal and necessary only to correct some shortcomings of the market such as internalizing environmental costs. Even in those cases, economic instruments were the tool of choice.[18] What these policies failed to factor in was that under their dominance and operation marginal groups or non-market players, such as indigenous communities and the poor, have no say and no stake in the development process, resulting in an obvious imbalance. In practice, as shall

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[16] Washington Consensus principles were summarized by J. Williamson, a prominent World Bank economist, in the following list of ten principles of "sensible" policy for Latin America:

- Fiscal discipline
- A redirection of public expenditure priorities toward fields offering both high economic returns and the potential to improve income distribution such as infrastructure development.
- Tax reform.
- Interest rate liberalization.
- A competitive exchange rate.
- Trade liberalization.
- Liberalization of foreign direct investment inflows.
- Privatization.
- Deregulation to abolish barriers to entry and exit.
- Secure property rights.

These policies represent the "lowest common denominator" of the reforms that Washington-based institutions could agree were needed in Latin America as of 1989. J. Williamson (1), Institute for International Economics, "What Should the Bank Think About the Washington Consensus" July 1999, available at: <www.iie.com/publications/papers/williamson0799.htm>.

[17] See e.g.: L.K. Barrera-Hernández, "Impact of State and Economic Restructuring Process on Developing Countries Energy and Environment Strategies; Background Paper" presented at the Second Regional Workshop on Environmental Regulation for the Energy Sector, Trujillo, Peru, August 26-28, 1998.

[18] Well defined property rights in water were, (and still are), promoted as the best way to provide widespread access and ensure conservation. Demand side management was promoted as an ideal tool to achieve efficiency and thereby resource conservation. A study sponsored by the IDB, however, highlighted the challenges posed by the use of complex economic instruments for environmental protection in those countries with weak administrative frameworks.

be seen below, that omission would eventually lead to widespread public unrest. In South America it would also trigger an economic and political crisis, the results of which are in plain view today.[19]

In addition to the traditional macroeconomic conditionalities, the Banks rely on another set of rules of mandatory application in all loan operations. These rules, or "safeguard policies" –to follow the World Bank's nomenclature-, indicate where IFIs draw the line in terms of allowing a country's administrators freedom to choose what is best for its constituents in some sensitive project-related areas. The idea of safeguards as backstops, or "standards of last resort" for ensuring that IFI-funded projects contribute to a country's well-being is not a bad one. However, some concerns about the nature and manner of implementation of the safeguard policies may be raised.

II. WB Safeguard Policies and Other IFI Directives[20]

Over the years, the World Bank has developed and refined a set of directives and policies to guide borrowers and its own staff as to minimum common standards and expectations in key areas of the Bank's and the borrowers' activities. The resulting suite of guidelines and related documents deal with some of the most sensitive areas of the Bank's work, i.e. the social, cultural and environmental impacts of lending operations.

[19] Though current to this day, these principles were later revised by Williamson himself who, while insisting that most principles still represent good policy for Latin America, admitted that the manner of their application could use some fine tuning.

[20] Although the analysis is focused on the WB's policies, its conclusions are applicable to similar guidance documents issued by the IDB and other IFIs which, more often than not, follow the WB's lead, particularly with regards to social and environmental issues.

Those policies, which have been mirrored or adopted by other IFIs like the IDB, cover a wide range of issues of relevance to natural resources development including:

- Environmental Impact Assessment;
- Natural Habitats;
- Forests;
- Pest Management;
- Cultural Property;
- Involuntary Resettlement;
- Indigenous Peoples;
- Safety of Dams;
- Disputed Areas; and,
- International Waterways.

A review of those documents and their equivalents for other lending institutions reveals that rather than providing guidance, their provisions tend to be prescriptive and mandatory. While responding to global concerns about minimum standards in developing countries and also to a desire to hinder a race to the bottom by countries competing for foreign investment, they are an unquestionable intrusion on sovereign power.

The one-size-fits-all approach implicit in the imposition of IFIs' macroeconomic and safeguard rules through loan conditionalities does not meet the test of political legitimacy and social democracy. Rather than being a product of local rule-making processes and responding to the concerns of local parties and interests, the safeguards respond to the

priorities of IFIs' constituencies, including lobbies and powerful IFI Board members of developed countries which may or may not coincide with local needs and mores.[21] In addition, the imposition of externally formed rules may stifle regulatory innovation and stunt the development and consolidation of indigenous institutions and practices.[22] The rules' requirements may be disproportionately taxing on local agencies, generally lacking in economic and trained human resources.[23]

Notwithstanding the above, and although the source may be questionable[24] and the means of implementation flawed, IFI standards and safeguards tend to reflect an increasing global consensus around the tools that must be used and the limitations that states face as well as the duties they must fulfil in the process of developing their resources.

III. Impact of Loan Conditionalities on Policy and Regulatory Independence and on Permanent Sovereignty

One of the results of IFIs loan conditionalities is that policy-makers and regulators in South America face theoretical and temporal constraints for the development of sound

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[21] H.V. Morais, H.V. Morais, "The Quest for International Standards: Global Governance Vs. Sovereignty" (May 2002) 50 U. Kan. L. Rev. 779.
[22] Delonis, *supra*, note 4.
[23] See D. Kapur and R. Webb, noting that "convergence is towards the standards that already exist in advanced industrialized democracies. The result is an unequal distribution of the burden of regulatory adjustment: those with the least capacity have to travel the greatest distance." D. Kapur and R. Webb, UNCTAD/UN Center for International Development/Harvard University, G-24 Discussion Paper Series, Research papers for the Intergovernmental Group of Twenty-Four on International Monetary Affairs, No. 6, August 2000, "Governance-related Conditionalities of the International Financial Institutions" [on file with the author]. See generally, L.K. Barrera- Hernández, "Sustainable Energy Development in Latin America and Donor Driven Reform: What Will the World Bank Do" in *Regulating Energy and Natural Resources* (Oxford, U.K: Oxford University Press, 2006).
[24] Morais talks about the "unfortunate perception of a new form of Western 'imperialism'" H.V. Morais, *supra*, note 21, at 807.

natural resources' management frameworks in accordance with the states' duty to promote and facilitate general and individual well being.

So far, Washington Consensus principles and their preference for economic tools have dominated the theoretical approach to development policy and to regulatory choices despite obvious and negative impacts on marginal communities. On the other hand, the time between loan negotiations and approval, and the maturity of loan conditions is generally too short to set up and implement well tailored and properly structured natural resources' management frameworks of any kind, much less to respond to the detailed requirements of IFIs' safeguard rules. Loan cycles and the typically slower institutional and law and policy development cycle will not necessarily coincide. As a result, sweeping, half-baked changes based on the one-size-fits-all Consensus and safeguard policies such as opening up natural resource development to the (foreign) private sector and to market forces before setting up the framework for control and for distribution of benefits, and the practice of including specific (safeguard-derived) requirements in loan contracts that have no foothold in local laws and may therefore require recourse to an *ad hoc* supra-national enforcement framework, tend to be the norm. As shall be discussed below, that was the case of the water services' sector in Argentina and also of the Camisea Gas Project in Peru.

Changes to the countries' natural resources' management frameworks usually come in the wake of loan implementation and attempt to finish the job and "institutionalize" or officially incorporate to the administration of the sector concerned the tools already in

use as a result of loan conditionalities. This is not done without significant obstacles created by the myriad of acquired rights already in place, raised expectations, and the administrators' lack of understanding of some of the basic underpinnings of the requirements imposed through loan conditionalities.

B. Trade and Natural Resources Management

One of the central features of globalization is the breakdown of national barriers to international goods and services. Over the latter years, trade has grown to unprecedented levels.[25] Moreover, trade in natural resources has always been a weighty issue loaded with political connotations. Indeed, from the days in which the European colonial empires got boatloads of gold and other precious minerals and raw materials in exchange for glass beads - to date, the terms of trade and the fate of those countries rich in natural resources have been largely defined by the powerful.[26] To understand this is to understand that trade is not limited to the exchange of goods and services. Goods and services do not travel alone. Entire value-systems and issues of domestic policy accompany a can of tuna or a metric ton of gas when it crosses an international border. The values and issues that accompany traded goods and services often operate changes of in local mores, preferences and institutions, including law and policy. That is particularly true of the laws and standards for natural resources management. As a result, one can

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[25] WTO, Statistics Database, available at: <stat.wto.org/StatisticalProgram/WSDBViewData.aspx?Language=E>.

[26] "Paradox of plenty" theorists attempt to explain the low level of development of resource-rich Southern countries through reference to the break-down of internal mechanisms but tend to ignore the central role played by foreign and external forces. For a brief explanation of the paradox of plenty see: The Economist, "The Paradox of Plenty" (20 Dec. 2005), available at: <economist.com/displaystory.cfm?story_id=5323394>.

now see the values and standards of the dominant trading countries spreading and taking root throughout the globe.[27] The experience with GATT and the World Trade Organization provides ample examples of that.

I. General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO)

Born out of the ashes of WW II in conjunction with the Bretton Woods Institutions,[28] the General Agreement on Tariffs and Trade (GATT) setting the basis for the international trade system is grounded on the idea that the free flow of goods across national boundaries promotes increased productivity due to specialization and the law of comparative advantage. In turn, following the same economics only rationale, productivity growth is said to result in increased standards of living across trading partners. With that in mind, the GATT was launched in 1946 with the immediate purpose of negotiating tariff concessions among members. The final agreement, known as GATT 1947, entered into force in January 1948. Subsequent negotiations under GATT 1947 culminated in the Uruguay round of negotiations[29] which ushered in a new era in the evolution of the international trade system. As a result of the Uruguay Round, ministers of more than 120 countries signed a deal to create the World Trade Organization (WTO) in Marrakech, in 1994. In addition to setting up a body in charge of overseeing the

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[27] A. Judson Lodge, "Globalization: Panacea for the World or Conquistador of International Statehood?" (Spring 2005) 7 Or. Rev. Int'l L. 224.

[28] The Bretton Woods Conference, held in New Hampshire, USA, created the International Monetary Fund to oversee the world's monetary and exchange rate systems and the International Bank for Reconstruction and Development, generally known as the World Bank Group. The objective was economic stability and the restructuring and development of Western Europe.

[29] Multilateral trade negotiations, or "trade rounds", under the auspices of GATT offer a packaged approach to trade negotiations. The Uruguay Round was the predecessor to the latest Doha Round, currently suspended.

system, i.e. the WTO, the *Marrakech Agreement* incorporates a revised version of the 1947 agreement now known as GATT 1994 as well as agreements on various other trade issues such as trade in services and foreign investment.[30]

Under the WTO, the international trade system is said to have evolved from a system that was concerned solely with trade, to one that increasingly sees trade as a tool to advance widespread and sustainable development.[31] The Preamble to the *Marrakech Agreement* is put forth as evidence as well as source of this shift. The Preamble reads:

> *The Parties to this Agreement,*
>
> *Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development [...] Agree...*[32]

The Marrakech commitment was reaffirmed in the 2001 *Doha Ministerial Declaration*[33] which launched the Doha round of negotiations.

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[30] See: <www.wto.org>.

[31] The concept of "sustainable development" was a result of the developed world's awakening to environmental degradation and its consequences, first addressed at an international level by the *Stockholm Convention* and the resulting *Declaration* of 1972. Though recognizing the need for sustainable development, including adequate local environmental and labour standards, developing countries view its introduction in trade discussions as a suspicious attempt by developing countries to interfere in developing country affairs in favour of their own trading interests.

[32] Note that while the Marrakech document talks about "optimal use" of resources, the 1947 Preamble to GATT referred to "full use" of natural resources. Note also that development is measured in gains in productivity and growth.

[33] <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>. By the end of July 2006 the negotiations were deadlocked. WTO's Director-General called for and obtained their suspension.

Notwithstanding the claims made by free trade scholars and promoters,[34] whether or not multilateral free trade is compatible with global sustainable development is debatable to say the least.[35] Arguably, it may be even less so when development is defined broadly as the quest to advance well being (as opposed to growth in GDP) as is the case of this study.

II. Natural Resources and Environment under GATT and the WTO

While GATT's Uruguay Round and its predecessors focused on border measures and on lowering tariffs,[36] today's GATT negotiations under the Doha Round are all about how domestic rules intersect with trade rules and how both sets of rules impacts on each other.[37] As a result, though opinion may still be divided on the compatibility of ever increasing free trade with sustainability, there is no doubt about the impact of global free trade on regulatory authority and permanent sovereignty over natural resources.[38]

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[34] See e.g: Speech by P. Lamy, WTO Director-General, "Trade can be a friend, not a foe, of conservation" Geneva, 10-11 October 2005; OECD, Trade that Benefits the Environment and Development: Opening Markets for Environmental Goods and Services" (6 Dec 2005), available at: <www.oecd.org/LongAbstract/0,2546,en_2649_201185_35817888_1_1_1_1,00.html>; K. Matsuoka, "Tradable water in GATT/WTO law: Need for new legal frameworks?" Paper presented at Globalization and Water Resources Management: The Changing Value of Water, AWRA/IWLRI –University of Dundee International Specialty Conference, August 6-8, 2001.

[35] M. Halle (1), "Trading into the Future: Rounding the Corner to Sustainable Development" GTI Paper Series, Frontiers of a Great Transition #6, March 13, 2006.

[36] G.W. Mugwanya, "Global Free Trade Vis-à-vis Environmental Regulation and Sustainable Development: Reinvigorating Efforts Towards a More Integrated Approach" (1999) 14 J. Envtl. L. & Litig. 401.

[37] M. Halle (2), "Trade and Environment: Looking Beneath the Sands of Doha?" (2006) 2 JEEPL 107.

[38] For example, R. Nardone affirms that "the globalization of economic markets represents a fundamental challenge to the traditional allocation of regulatory power [over natural resources] because states' power to self-regulate is increasingly diminished." R. Nardone, "Like Oil and Water: The WTO and the World's Water Resources" 19 Conn. J. Int'l L. 183, at 206.

There are two ways in which trade rules, i.e. the GATT-WTO rules, impact on a country's sovereign right to manage its natural resources. In the first place, are the requirements that certain natural resources (*qua* products or services like water and petroleum) once entered, must remain in the global free trade market and continue to be traded as products or services.[39] Under this scenario, internal allocation becomes subject to international demand.[40] In the second place, are prohibitions on domestic resources' management rules that are considered incompatible with free trade as well as requirements that domestic rules conform to those of a counterpart trading country.

Typically, trade-related requirements and prohibitions on local regulations will be handed down from dominant trading partners either in the form of specific agreements negotiated on the basis of trade flows, or as a result of their trade practices.[41] Some of the banned measures (technical regulations and standards) are specified in the *Agreement on Technical Barriers to Trade* which aims at ensuring that domestic regulations and standards do not create unnecessary barriers to trade while allowing some room for trade-restrictive measures intended to achieve legitimate (public) objectives.[42] The final arbiter

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[39] A. Kwasniak, "Will Canada be forced to share its water supply?" (Winter 2006) 2:1 U at 49.
[40] This explains current shortages of natural gas in Argentina where a large portion of gas production is largely committed to supplying external markets.
[41] Mugwanya, *supra*, note 36.
[42] The *Agreement on Technical Barriers to Trade* (TBT), Annex 1, defines its scope broadly as covering:
1. *Technical regulation*
Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

2. *Standard*
Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

of the acceptability of a local trade-impacting, natural resources-related norm is the powerful WTO headquartered in Geneva, Switzerland.[43]

III. Natural Resources as Tradable Products and Services under GATT/WTO

With the exception of air, natural resources are not evenly distributed across countries and regions. Some, however, can be either, substituted by similar substances (oil for coal), spared (emeralds), or obtained through trade. Of the must-haves like air and fresh water,[44] the latter is already so scarce[45] that the possibility of having it enter the global trade market is daunting for some[46] and a lifesaver for others. Legal experts are therefore grappling with the question of whether or not, under current GATT-WTO rules, a water rich country can refuse to sell their water to others.[47] The same question could be

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Available at: <www.wto.org/english/docs_e/legal_e/17-tbt_e.htm>.

[43] While some of these requirements may be considered environment, natural resources, and human rights friendly, others may not. The net result of this regulatory push and pull, is demand-driven rule development and harmonization. Logically, the content of those rules will differ according to whether the buyer is, for example, the United States, Germany or, increasingly, China.

[44] According to some, timber may be equally indispensable due to the environmental services trees perform. See e.g.: Helen-Eagle Nowlin, "The Effects of the GATT/WTO in World Resource Allocation: A Case Study that Uses both Raw and Processed Timber Resources Conservation-Deforestation Explored" (2002) 16 Electronic Green Journal, available at: <egj.lib.uidaho.edu/egj16>.

[45] See BBC New Online, Report by A. Kirby, "Water scarcity: A looming crisis?" (19 October 2004), available at: <news.bbc.co.uk/1/hi/sci/tech/3747724.stm>. For more information see: World Wildlife Foundation, "Water Facts and Figures" (March 2003), available at: <assets.panda.org/downloads/worldwaterforumwaterfacts.pdf#search=%22water%20scarcity%20facts%22>.

[46] Center for International Environmental Law and World Wildlife Foundation International Discussion Paper, October 2003, available at: <www.ciel.org>.

[47] P.H. Gleick *et al*, "The New Economy of Water" (February 2002) Pacific Institute for Studies in Development, Environment and Security, available at: <www.pacinst.org/reports/new_economy_of_water/new_economy_of_water.pdf>.

asked of any other natural resource such as oil, also an increasingly scarce resource, so far successfully carved out of GATT-WTO's reach.[48]

Why would a country be under a legal duty to allow exports of water or any other natural resource? The answer may centre on what constitutes a tradable "product" under GATT-WTO and the rules that are triggered once that status attaches to a good.[49]

IV. Understanding GATT/WTO

The multilateral trade system under GATT-WTO is based on a few general principles that attempt to eliminate discrimination amongst trading partners while introducing transparency into the multilateral trading system. Those principles are: the most favoured nation (MFN) principle contained in GATT, Art. I, and the national treatment (NT) principle of GATT, Art. III. Under the MFN principle, any special concession that one country grants to another regarding particular goods has to be made extensible to all "like" goods of other trading partners. The NT principle requires that once imported goods enter a country's market they be given the same treatment as, or no worse treatment than, domestic goods. Under GATT, Article XI, the multilateral trading system also prohibits quantitative restrictions on imports and exports (quotas). As a result of the application of these principles, and particularly Art. XI, it is feared that once water or any other presently non GATT-traded (bulk) natural resource enters the trade stream as

[48] The application of GATT to oil may eventually result from the extension of GATS to energy services. Energy services are currently on the Doha Agenda for GATS. Gasoline, a refined oil product, has already been the subject of a WTO decision.

[49] R.J. Girouard, "Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes" (Winter 2003) 15 Geo. Int'l Envtl. L. Rev. 247.

a "product," any ban on exports will become illegal under current GATT-WTO law,[50] unless an exception can be validly invoked.[51]

The issue, however, is clouded with uncertainty. On one hand, GATT-WTO does not define "product." Though some turn to GATT's Harmonized Tariff Schedule to find an answer to what may be considered a product under the agreement, whether in connection with water or any other natural resource, there is considerable consensus on the idea that the enumeration contained therein does not define the meaning of "product' under GATT.[52] Rather, the Schedule is an organizational tool that merely list tradable goods, some of which could potentially enter the multilateral trade system as products. [53]

For the case that bulk[54] fresh water transfers or any tradable natural resource come to be considered products subject to GATT-WTO rules, countries may be able to retain some degree of control over exports if they can meet the criteria outlined under the agreement's exceptions.

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[50] In the Japan Semi-conductors case, 1988, the GATT panel made it clear that the prohibition of Art. XI applies broadly to all and any measures not listed as permissible in the article and instituted by a contracting party irrespective of the legal status of the measure. *Japan – Trade in Semi-Conductors*; Report of the Panel adopted 4 May, 1988, GATT, 104; available at:
<www.worldtradelaw.net/reports/gattpanels/japansemiconductor.pdf>; and,
<www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm>.

[51] Prof. A. D. Tarlock strongly opposes this view. In his opinion, GATT does not change the fact that a state has the sovereign right to decide to allow or disallow trade in natural resources at any time. He bases his view on the right to develop. A. D. Tarlock, "How Well Can International Water Allocation Regimes Adapt to Global Climate Change?" (Summer 2000) 15 & 9 Joint Issue, Land Use and Environmental Law & Transnational Law and Policy, 423.

[52] GATT's Harmonized Tariff Schedule lists various categories of water including sea water, aerated and flavoured water, and other natural or mineral waters. While there is no doubt in that bottled water is a product governed by GATT-WTO rules, such categorization cannot yet be made for bulk waters on the basis of the Tariff Schedule alone. See:
<www.wto.org/English/tratop_e/schedules_e/goods_schedules_e.htm>.

[53] R.J. Girouard, *supra*, note 49; P.H. Gleick *et al*, *supra*, note 47.

[54] Bottled and other non-bulk water products are already in the trade stream. Note that the definition of what may be considered "bulk" may change over time as scarcity increases.

The first exception is contained in the same article that *prima facie* imposes the ban on exports. Thus, despite the general prohibition, Article XI, II exempts:

> *(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party*[55]

Though the criteria defined under Art. XI, II may be easily met and demonstrated, the exception only provides for temporary control of exportable resources. Some measure of long-term control may be best obtainable under the applicable exceptions of Article XX.

The relevant sections of Art. XX read:

> *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:*
>
> *(...)*
>
> - *(b) necessary to protect human, animal or plant life or health;*
>
> *(...)*
>
> - *(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;*

Article XX, and the accompanying *Agreement on Technical Barriers to Trade* (TBT) are also the relevant provisions to focus on when analyzing GATT-WTO-driven rule creation and harmonization, i.e.: the "pull" and "push" of trading partners' requirements and objections to local rules discussed above. Indeed, while on the one hand Art. XX may

[55] GATT, Art. XI.

represent a lifeline to retain some measure of control over a given resource; on the other hand, it is also the vehicle through which other countries impose their own rules on their trading partners.

Although the GATT-WTO dispute settlement system does not operate on the basis of precedent, some guidance on the application of Article XX's exceptions can be drawn from past cases.[56] Below is a review of GATT-WTO case law.

V. GATT-WTO Dispute Settlement: Past, Present and Future

Despite some lack of consensus on its design, it was clear from the time of the signature of the original 1947 GATT agreement that a system for resolving trade-related disputes was a necessary component of a successful multilateral trading regime.[57] While the original GATT Panel had limited powers to settle controversies, the current WTO dispute settlement system can issue automatically binding decisions and has the "strongest enforcement procedures of any international tribunal."[58]

Upon a first reading, mirroring the evolution of the Agreement's objective, it may appear that the views and positions of the GATT-WTO dispute settlement bodies have shifted over time and are now more tolerant of domestic measures devised for human health, safety, environmental protection or conservation purposes.[59] It looks as if sovereignty has

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[56] Appellate Body Report on *Japan - Alcoholic Beverages II*. The Appellate Body in that case stated that adopted panel reports created "legitimate expectations" among members. For more information see: <www.wto.org/English/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm#fntext699>. At least one author affirms that a "de facto stare decisis effectively exists." M. Halle (2), *supra*, note 37 at 115.

[57] M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London, U.K: Routledge, 1995).

[58] R. Nardone, *supra*, note 38 at 203.

[59] In the *United States – Import Prohibition of Certain Shrimp and Shrimp Products* case, the Appellate Body expressly alluded to this shift. It stated: "As this preambular language [in the Marrakech Agreement]

regained some of its strength and developing countries may enjoy some flexibility when formulating and implementing rules to manage their natural resources without fear of running afoul of GATT-WTO rules. In practice, that is far from accurate. Accordingly, while the old GATT Panel in the first *Tuna - Dolphin* case outright rejected the application of environmental protection rules with an impact on trade as valid exceptions under Art. XX, "*[f]rom the start the [WTO Appellate Body] made it clear that it considered trade rules to be embedded in a broader framework of public policy made up of a web of interacting regimes.*"[60] Contributing to the new, apparent flexible approach, WTO bodies affirmed that the interacting regimes and rules had to be balanced against each other in good faith with the objective of achieving an equilibrium between the rights and obligations of trading countries and between free trade and other policy objectives such as natural resources management.[61] Underscoring this position, the Appellate Body in the *US – Shrimp* case held that:

> *conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific*

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reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*." AB-1998-4, available at: docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.DOC>.

M. Halle (2), *supra*, note at 115.

WTO Appellate Body Report in *US – Shrimp*, (WT/DS58/AB/R).

exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply. [62]

Thus, it appears that a country enjoys a good deal of flexibility to may make use of Art. XX to exempt a resource from compulsory trading or to pass natural resources' laws and regulations which may otherwise be considered illegitimate under GATT. The flip side of this approach is that, clearly, domestic natural resources management could be made subject to the application of trading partners' norms and policies. In case of disagreement between trading partners, it is up to the WTO to determine that those measures are necessary, legitimate and applicable to a given resource.

VI. Article XX's Scope and Standards

For the WTO to declare a measure compliant under Art. XX's exceptions, its requisites will have to be met. Despite lacking strict binding value, past GATT-WTO decisions help clarify the scope of the exceptions and the applicable standards of admissibility.

Article XX b) adopts a "necessity" standard. According to the WTO,

the term "necessary" refers, ..., to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to". [63]

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[62] WTO Appellate Body Report in *US – Shrimp*, (WT/DS58/AB/R). In the result, the disputed measure was rejected as GATT-WTO offensive.

[63] *Korea — Various Measures on Beef*, para. 161; (WT/DS161/AB/R, WT/DS169/AB/R). Although the case deals with Art. XX d), the interpretation may be extensible to XX b).

In addition,

> *determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.*[64]

While the precedents shed some light into what may be taken into account in deciding whether the necessity standard has been met, the threshold of acceptability of a potentially GATT-compliant exception will vary from case to case. Further uncertainty in this regard was introduced by the Appellate Body's decision on the *EC – Sardines* case of 2002. While in the 1996 *US – Gasoline* case the Appellate Body stated that it was not the necessity of the measure's policy goal that was at stake, but of the particular measure chosen to implement that goal,[65] it now seems to have reversed its position. Indeed, in interpreting the equivalent provision of the *Technical Barriers to Trade Agreement*,[66] the tribunal was unequivocal in affirming that "there must be an examination and a determination on the legitimacy of the objectives of the measure."[67] Thus, the standard may now require a double sided and widely restrictive test.[68]

Turning now to Art. XX g), the notion of "exhaustible" natural resource has also been a matter of controversy. Accordingly, the Appellate Body in the *US – Shrimp* case insisted

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[64] Id, para. 164.
[65] *US — Gasoline*, para. 16; (WT/DS2/AB/R).
[66] Art. 2.2.
[67] *EC — Sardines*, para. 286 (WT/DS231/AB/R) [emphasis added]. The same decision clarified that the enumeration of objectives in Art. 2 is not exhaustive.
[68] Note, however, that the TBT expands on the wording of GATT, Article XX, b) by stating that:

> *technical regulations shall not be more trade-restrictive than* ***necessary to fulfil a legitimate objective****, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.*

on a dynamic interpretation of the concept that could encompass resources which, though capable of natural reproduction, are susceptible of depletion. "Exhaustible" is not an equivalent of non-renewable or "non-living" under GATT-WTO.[69]

The term "relating to" used in the exception is not as demanding a standard as that of necessity of Art. XX b). It is taken to be equivalent to "primarily aimed at."[70]

Also under this exception, there is a requirement of "even-handedness" in that any trade restrictive measures need to be made "in conjunction with" restrictions on the domestic front. There is a remaining factor of uncertainty to the application of this exception, however. While, in the past, the exception has been invoked in connection to the conservation of a natural resource other than the one traded (air in connection to gasoline, turtles in connection to shrimp, etc.), the Appellate Body has never decided a case where the measure in dispute is directly aimed at the conservation of the traded natural resource as would be a total or limited prohibition on exports.

In addition to the requirements and standards reviewed above, for an exception under Art. XX b) or g) to be admissible, the measure at stake has to satisfy the requirements of the article's heading or *chapeau*,[71] i.e. it cannot be an arbitrary or unjustifiable discrimination amongst countries where similar conditions prevail or a disguised restriction on trade. Thus, a two-tiered analysis is required. Even if the conditions of the article's subsections

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[69] *US – Shrimp,* (WT/DS58/AB/R).
[70] *US — Gasoline,* (WT/DS2/AB/R). In the *US – Shrimp* case, the AB found that the means were "reasonably related to the ends" and, therefore, admissible. *US – Shrimp,* (WT/DS58/AB/R).
[71] *US — Gasoline,* p. 22, DSR 1996:I, p. 3 at 20; (WT/DS2/AB/R).

b) and g) are met, an exception will not be admissible under the *chapeau* if an equivalent measure less restrictive of trade could be taken to achieve the same result.[72] Discrimination amongst trading partners is also reason to strike down a measure.[73] The objective of the *chapeau* is to condition and limit the exceptions and prevent abuse by attempting to balance the countries' rights and obligations.

Although Art. XX may represent a well directed attempt to accommodate domestic discretion to pursue development, the results so far have been disappointing. The requirements of Article XX are, by no means, easy to meet. At the end of the day, while full control of resource exports might be impossible within GATT-WTO, on the other hand, very few resource management and conservation measures might pass Art.XX's test.[74] Those that do are more likely to extend developed country standards to the developing world rather than accommodate developing country needs.[75] In addition, critics continue to voice legitimate concerns regarding the procedural pitfalls of the system's dispute resolution mechanisms.

Most criticism of the GATT-WTO dispute resolution system centres on the secret nature of the proceedings and the lack of provisions for public information and third-party intervention as well as around the organization's permeability to powerful corporate

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[72] *EC — Asbestos,* para. 172, (WT/DS135/AB/R).
[73] *US — Shrimp,* para. 160, (WT/DS58/AB/R).
[74] By 2004 the GATT-WTO dispute resolution system had only admitted one out of 12 contested exceptions. M. Swenarchuck (1), "International Environmental and Sustainability Governance: Options Beyond Institutional Reform" (September 2004) Canadian Environmental Law Association, <www.cela.ca>. See generally: S. Gaines, "The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures" (Winter 2001) 22 U. Pa. J. Int'l Econ. L. 739.
[75] Where developing countries were parties to the disputes, they were always on the claimant's side, i.e. resisting a developed country protection or conservation measure.

interests.[76] When paired with the system's unparalleled enforcement powers, and the fact that trade negotiations are held behind closed doors by trade experts and little to none stakeholder consultation[77] its failings have led a number of scholars to decry it as a dangerous threat to sovereignty, particularly with regards to natural resources decision-making.[78] As will be illustrated below, the threat looms large for those countries in the weaker end of the bargaining table, where developing South American countries usually sit.[79]

VII. General Agreement on Trade in Services (GATS) and Natural Resources

If GATT 1994's application attracts some criticism, that criticism is even louder in relation to the *General Agreement on Trade in Services* (GATS) and the possibility that GATT-WTO dispute resolution mechanisms and precedents may be made extensible to natural resources through its application.[80] Although the GATS agreement is concerned with trade in services, its scope is such that it extends to certain foreign investments as well as to any form of measure that affects trade in services, including

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[76] M. Swenarchuck (2), "Civilizing Globalization: Trade and Environment, Thirteen Years On" (Mar. 2001) Canadian Environmental Law Association, <www.cela.ca>.
[77] Center for International Environmental Law and World Wildlife Foundation, "GATS, Water and the Environment," International Discussion Paper, October 2003, <www.ciel.org>. A. Judson Lodge talks about the "loss in democracy" that results from WTO's tribunals' decisions replacing countries' law making process. A. Judson Lodge, *supra*, note 27.
[78] R. Nardone, *supra*, note 38; Swenarchuck (1), *supra*, note 74. Contra: A. Afilalo and S. Foster, "The World Trade Organization's Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, and Environmental Health in the Balance" (Summer 2003) 15 Geo. Int'l Envtl. L. Rev. 663. According to these authors what is being rooted out is not sovereign power but protectionism.
[79] Center for International Environmental Law and World Wildlife Foundation, *supra*, note 77; T. Concannon and H. Griffiths, "Stealing Our Water. Implications of GATS for Global Water Resources" (Nov. 2001) Friends of the Earth, available at: <www.foe.co.uk>.
[80] GATS Art. XIV, partially mirrors the exceptions contained in its equivalent under GATT. Only section XX b) and the chapeau are reproduced.

measures concerning natural resources, from allocation to licensing and standard setting.[81]

Indeed, the much reviled privatization of services in the developing world[82] took place, at least in part, as a response to GATS' Art. XIX which requires the "progressive liberalization" of services in all countries including, among others, water distribution

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[81] Article I reads:

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;
(b) in the territory of one Member to the service consumer of any other Member;
(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:
(a) "measures by Members" means measures taken by:
(i) central, regional or local governments and authorities; and
(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;
In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;
(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;
(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

<Www.wto.org>. For some examples and discussion on the measures that could fall under GATS see: Center for International Environmental Law and World Wildlife Foundation, *supra*, note 77.

[82] The most prominent critic of privatization and its promoters is former WB Chief Economist J. Stiglitz who in his book *Globalization and its Discontents* and in his presentations questioned, among other things, the technocratic approach to development, the failure to account for local realities, the rapid pace of privatization imposed and the disregard of social and organizational capital building. Critics also contend that GATS and its thrust towards privatization are incompatible with human rights and environmental and natural resources conservation and protection. T. Concannon and H. Griffiths, *supra*, note 79. The authors of this report affirm that GATS does not allow room for application of the precautionary principle. See also: M. Cohn, "The World Trade Organization: Elevating Property Interests Above Human Rights 29 Ga. J. Int'l & Comp. L. 427; M. Barlow and T. Clarke, Polaris Institute, "Water Privatization: The World Bank's Latest Market Fantasy" (January 2004), <www.globalpolicy.org>; A.F. Câmara Neto and M. Vernengo, "Latin America in the Post-Washington Consensus Era" International Development Economics Associates (16 July 2004), available at: <www.networkideas.org/featart/jul2004/Latin_America.pdf>; "Protesta de piqueteros en Aguas Argentinas" La Nación Online, 3- 22-2005, available at: <www.lanacion.com.ar>; Arg. Indymedia, "Breve relato de la guerra del gas," available at: <www.argentina.indymedia.org>.

services and other natural resources-based services.[83] As shall be shown below, contrary to its proponents' claims, at least in South America, where the liberalization advanced by GATS has taken place the impact on the peoples' well being has been mostly negative.

Of particular concern for sovereignty under GATS are the ongoing negotiations to design rules (disciplines) for developing domestic measures as directed by Article VI.4.[84] Those rules could significantly constrain a country's ability to regulate to the point that one study suggests that as a result of their application governments may be required to submit their draft regulations to comments by their trading partners prior to their official adoption and implementation.[85] Already, GATS' Article XVI's list of prohibited measures for liberalized service sectors runs afoul of tried and true principles and tools of environmental and natural resources law including the regulator's ability to set discharge, emissions or other resource protection and management quotas and fees that could

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[83] GATS, available at: <www.wto.int/english/docs_e/legal_e/26-gats_01_e.htm>.Government provided services are technically exempt from GATS' application. Pressure is to liberalize and offer them for inclusion under GATS. Once commitments are made in this way, Art. XXI makes them virtually irreversible. For information on the World Bank's pro-privatization position see e.g.: WB, "New Designs for Water and Sanitation Transactions: Making Private Sector Participation Work for the Poor" and other papers posted on the World Bank's website: <rru.worldbank.org/PapersLinks/Privatizing-Water-Sanitation-Services/>.

[84] GATS, Art. VI. 4:

> *With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:*
>
> > *(a) based on objective and transparent criteria, such as competence and the ability to supply the service;*
> > *(b) not more burdensome than necessary to ensure the quality of the service;*
> > *(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.*

[85] Center for International Environmental Law and World Wildlife Foundation, *supra*, note 77.

indirectly limit the number of service suppliers, output or value.[86] Another tool of sound natural resources management that could be severely impaired under GATS is the Environmental and Social Impact Assessment (ESIA) tool. By banning the use of the economic needs test, Art. XVI a), b) and c)[87] does away with an important element of a balanced ESIA. The prohibition becomes even more critical in the case of a Strategic ESIA where being able to inquire whether a service will or will not be required in the future is central to the assessment's analysis and to its usefulness as a decision-making tool for natural resources planning and management. The provision condones inefficiency and even promotes waste for the sake of trade and the economic gain of investors contradicting mainstream thinking on the usefulness of ESIAs and Strategic ESIAs (SESIAs).[88] Indeed, to top things off, GATS' exceptions narrow the scope of GATT-WTO exceptions to cover only safety and the protection of human, animal or plant life or

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[86] Center for International Environmental Law and World Wildlife Foundation, *supra*, note 77. The application of Art. XVI prohibitions may also result in human rights infringements whenever a measure of the type mentioned above is struck down and the right to water, health or safety, to name a few, is compromised.

[87] GATS, Art XVI. 2:

> *In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:*
>
> *(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;*
>
> *(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;*
>
> *(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;*

[88] See World Bank Environment Strategy, July 2001, and related documents, available at: <web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/0,,contentMDK:20274476~pagePK:210058~piPK:210062~theSitePK:244381,00.html>.

health.[89] Conservation, a key factor for natural resources management, is not a viable objective under GATS.

Finally, it is worth noting that GATS' protection extends to cover foreign investments in liberalized services. This could result in severe limitations to permanent sovereignty. However, as explained below, the protection granted to foreign direct investment (FDI) and the resulting loss of sovereign power does not stop with GATS.

C. International Investment Treaties

Spurred by a host of investment promotion regimes set up by investment-hungry developing countries at the behest of IFIs, the latter years have seen an unprecedented proliferation of multilateral and, particularly, bilateral investment treaties[90] (generally: international investment treaties, IITs). While the –often implicit- objective sought by developing countries upon entering into international investment treaties (IITs) is development promotion[91] the results have been disappointing to say the least, even from the narrow point of view of *per capita* growth. On the contrary, as shall be discussed below, IITs may narrow the development-related law and policy options available to host countries in exchange for empty or half-kept promises. [92]

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[89] Art. XIV. Other exceptions cover public morals and order.
[90] By the end of 2005 the total exceeded 5,200. UNCTAD, IIA MONITOR No. 1, (2006), "Systemic Issues in International Investment Agreements" http://www.unctad.org/en/docs/webiteiia20062_en.pdf
[91] L. E. Peterson (1), International Institute for Sustainable Development, "Bilateral Investment Treaties and Development Policy-Making" (Nov. 2004), available at: <www.iisd.org>. The author highlights the impact of the omission of development among BITs' written goals for the agreements' interpretation.
[92] L. E. Peterson (1), International Institute for Sustainable Development, *id.* Reciprocal investor protection, the cornerstone of IITs, is a highly unrealistic objective and evidence of the relative power of the negotiating parties. According to Peterson's study, the dominant capital-exporting country manages to

Perhaps one of the most important issues concerning IITs and permanent sovereignty is the determination of what may constitute regulatory expropriation under them. In particular, when does a host government's issuance and implementation of rules and regulations designed to implement natural resources' management policy and that have an impact on existing foreign investments constitute a breach of the country's commitments under IITs and international investment law?

International investment law has long been grappling with the answer to these important questions. In fact, the popularity of IITs is based on the need to deal with issues of nationalization and compensation of foreign property, and the uncertainties they raise under customary international law.[93] Unfortunately, even with the IITs, no definitive answer can be given to the question of (il)legitimate exercise of regulatory power. Instead, IITs' provisions have been criticized for their "ambiguity and open-endedness."[94] Particularly troubling in this respect are the IITs' "fair and equitable treatment" and the

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protect existing investments while subsequent investments rarely materialize as a result of the agreements. When they do materialize, investors often use IITs to renege from their commitments. Another author reports that despite not being a party to any bilateral investment agreements, Brazil is ranked third in the ranking of investment destinations. C.G. Garcia, "All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration" (June 2004) 16 Fla. J. Int'l L. 301. See also: World Bank, "2003 Global Economic Prospects and the Developing Countries Report" (2002), <www.worldbank.org>.

[93] L.E. Peterson and K.R. Gray, "International Human Rights in Bilateral Investment Treaties and in Investment Arbitration" (April 2003), available at: <www.iisd.org>; G. Verhoosel, "Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a "Reasonable" Balance Between Stability and Change" (Summer 1998) 29 Law & Pol'y Int'l Bus. 451. Another risk-avoidance mechanism frequently used in international investment schemes is the "stabilization clause" that is typically inserted in contracts and that operates as a freeze of the legal and regulatory conditions existing at the time of the contracts' negotiations. For a critical analysis of the "stabilization clause" mechanism see: W.N. Duong, "Partnerships with Monarchs – Two Case Studies: Case One" 25 U. Pa. J. Int'l Econ. L. 1171. The author argues that such clauses are a derogation of permanent sovereignty.

[94] T. Walde and S. Dow, "Treaties and Regulatory Risk in Infrastructure Investment" cited in L.E. Peterson and K.R. Gray, *id* at 9.

"full protection and security" standards, which have already gained the reputation of being the "black holes of investment treaties."[95] This ambiguity explains the recent proliferation of investor-state litigation. A large number of the cases relate to natural resource-related investments and the states' power to regulate the sectors and resources involved.[96]

Moreover, the proliferation of IITs has served to weaken the "global regulatory system," by opening the door to unprecedented levels of forum and rule "shopping." Indeed, cases involving corporations with shareholders from different nationalities and several domiciles may be covered by more than one IIT, with their corresponding choice of law and dispute resolution provisions and with the ensuing potential for contradiction.[97] Available fora under these treaties may include the International Center for Settlement of Investment Disputes (ICSID), a tribunal working under the auspices of the World Bank that specializes in investment disputes; the International Court of Arbitration of the International Chamber of Commerce (ICC); *ad hoc* arbitration panels; and, domestic courts. IIT provisions may also designate the rules applicable to disputes such as those of the host state, the UNCITRAL, or of the tribunal of choice. On the other hand, the Most Favoured Nation clause commonly inserted in IITs is now being used to allow parties to a

[95] C.G. Garcia, *supra*, note 92 at 333.
[96] L.E. Peterson (2), "Research Note: Emerging Bilateral Investment Treaty Arbitration and Sustainable Development" (Aug. 2003), <www.iisd.org>. Peterson, who has written extensively on the issue of international investment agreements, calls the investors' standing to bring a state to an international arbitral tribunal "a quantum leap forward."
[97] The Lauder-Czech Republic UNCITRAL cases are often cited to illustrate this point. See: L. E. Peterson (1), *supra*, note 91; C.G. Garcia, *supra*, note 92. Any potential for contradiction amongst international tribunals adds up to the potential for contrary rulings in domestic courts. See generally: R. Doak Bishop *et al*, "Strategic Options Available When Catastrophe Strikes the Major International Energy Project" (2001), available at <www.kslaw.com/library/pdf/dimi2.pdf>; S.D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (March 2005) 73 Fordham L. Rev. 1521.

dispute to "shop" for the most favourable conditions available under the whole collection of investment treaties signed by a host nation. Such was, for example, the result of the position taken by the ICSID tribunal in a case involving Argentina as the host country, and a foreign conglomerate that held one of the largest water services' concession in the world.[98]

In addition to the host of tools now available to investors to challenge states in their exercise of permanent sovereignty, one should note the tendency to restrict the inclusion of performance requirements in IITs such as those provisions that mandate the use of specified technology or that require special qualifications of investors and personnel. This poses an additional hurdle to the full and free exercise of permanent sovereignty over natural resources under IITs. Evidence of this tendency may be found in the WTO *Agreement on Trade-Related Investment Measures* (TRIMs).[99]

Thus when it comes to international investment, in the struggle between protecting economic interests and empowering states to use natural resources in the best interest of their people's well-being, economic interests seem to have the lead. Yet, IITs cannot be renounced unilaterally. Thus, if IITs are to realize their development potential, a balancing compromise will need to be struck. As shall be discussed below, it is uncertain

[98] The cost of preparing for and participating in international arbitration proceedings could be prohibitive for certain developing countries.

[99] See: <www.wto.org/english/docs_e/legal_e/18-trims_e.htm>. See generally: K. Singh, "Multilateral Investment Agreement in the WTO. Issues and Illusions" (2003) available at: <www.wto.org/english/forums_e/ngo_e/multi_invest_agree_july03_e.pdf>. Some performance requirements may also run counter to GATT and GATS; e.g.: qualification requirements for service providers; limitations on foreign ownership of natural resources. The North American Free Trade Agreement, art. 1114, on the other hand, allows for measures "appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

whether ongoing arbitration arrangements and proceedings may be able to strike such a balance. Private arbitral tribunals may have little incentive to achieve the balance that country negotiators could not write into the agreements.

3. CASE STUDIES

A. The War on Utilities and Other Messy Stuff: IFIs, Privatization of Services, and Foreign Investment in South America

In 2005 picketers blocked the streets of Buenos Aires for days protesting against potential water services' price increases in front of the offices of the private concessionaire, Aguas Argentinas.[100] Also in Argentina, the officers and directors of foreign-owned public utilities in Argentina were reluctant to attend public hearings on the renegotiations of public service pricing for fear of physical aggression from the protesting public.[101] Similar issues turned Bolivia into a highly volatile environment and resulted in an electoral victory for leftist E. Morales who almost immediately proceeded to nationalize the country's hydrocarbon industry.[102]

In Peru, notwithstanding detailed environment and social impact-related requirements imposed by the IDB as conditions for funding the downstream section of the Camisea Gas Fields Development Project, a recent report issued by a joint commission of local

[100] La Nación Online, "Protesta de piqueteros en Aguas Argentinas" (3- 22-2005), available at: <www.lanacion.com.ar>.
[101] La Nación Online, "Las empresas temen ataques piqueteros" (18-5-2005), available at: <www.lanacion.com.ar>.
[102] See: Arg. Indymedia, "Breve relato de la guerra del gas," available at: <www.argentina.indymedia.org>.

and national authorities and representatives of civil society documents around US$ 20 million of unacknowledged and unmitigated negative social and environmental impacts.[103] In addition, there is growing discontent in the region of Cusco because consumers in Lima have access to the gas from Cusco's own Camisea fields, while the locals don't.

In Chile, farmers and indigenous peoples are worried over water availability, while fishermen up and down the coast may have to grapple with the impacts of decisions taken behind closed doors at the WTO headquarters in Geneva.

Natural resources development related accounts of widespread damage and social disruption in Colombia, Ecuador, and other resource-rich countries of South America constantly hit the news all over the world.[104]

Something is amiss. Following, is a close look at some factual and legal scenarios cases that illustrate international economic law and other forces at play in the natural resources area.

A. Peru's Camisea Project: IFIs Show Who is in Charge

Beginning in 1991, Peru embarked in aggressive Washington Consensus-style reforms directed at attracting investment to develop (among others) its energy resources.

[103] Perú, Comisión Técnica de Evaluación de Impactos Ambientales y Sociales en la Provincia de La Convención, "Evaluación y Valorización de Impactos Ambientales y Sociales del Proyecto Camisea en la Provincia de La Convención" (Nov. 2004) [on file with the autor].
[104] See e.g.: Maria Ramos, Amazon Watch, "Indigenous Protests Shut Down Hearings for Controversial Oil & Gas Project in Peruvian Amazon" (26-01-2005), available at: <www.amazonwatch.org>.

Development of the rich Camisea gas fields was one of the central components of the new development policy supported by the IFIs.

As part of its internal due diligence activities in relation to a private loan request for funding the transport component of the development of the Camisea fields, which in compliance with Peru's commitment to the International Monetary Fund[105] had been previously concessioned to a private consortium, the IDB drew up a detailed "Plan for Institutional Strengthening and Support for the Environmental and Social Management of the Camisea Project." The corresponding loan, signed on 27 February 2003, added five million dollars to Peru's debt portfolio in relation to the "Natural Gas and Gas Liquids Transport System Project" or "Camisea Project."[106]

Among the risks identified by the Bank was the fact that the project's construction was well under way and that the complex web of agencies with jurisdiction over the project could make Camisea's environmental and social management cumbersome and ineffective. Consequently, through its loan conditionalities implemented a virtual takeover of Peru's management of hydrocarbon resources. Among other things, the loan included funding for the set up of a special Technical Group for Inter-agency Coordination (GTCI) and of a special ombudsman office for Camisea (*Defensoría de Camisea*). As part of the loan's implementation, the IDB had direct oversight over both.

[105] See: Peru Letter of Intent and Memorandum on Economic and Financial Policies of the Government of Peru for the Period April 1, 1999 to March 31, 2002, available at: <www.imf.org>.
[106] IDB Public Sector Loan 1441/OC-PE, available at: <www.camisea-gtci.gob.pe>.

By June 2003, less than 4 months after the loan had been signed, but with approximately 60 per cent of the downstream component's construction complete (construction had started before funding), the IDB reported the following progress:

> *In relation to the [government's] enhanced institutional capacity, the results of the IDB Public Sector Loan and work in progress include as part of the Institutional Strengthening Component: (i) GTCI is fully operational; (ii) GTCI is coordinating the community monitoring program that is being implemented within the [indigenous] Nauha-Kugapakori reserved area by the NGOs Pro-Naturaleza and Rede (sic) Ambiental Peruana (RAP); (...) (vi) the [government] has selected the Catholic University as the Camisea ombudsman, and has implemented a number of workshops and seminars to disclose the information regarding the Camisea ombudsman.*[107]

On paper, the report suggests much progress but a look at the reality behind it may indicate otherwise.

Although in compliance with loan conditionalities, the fact that GTCI was fully operational is not necessarily a positive development. In practice, the requirement to set up the GTCI included in the loan agreement as a pre-condition for disbursement has proven ill conceived and disruptive for the efficient management of the Peruvian oil and gas sector. GTCI's declared objective was to strengthen the institutional framework for environmental and social impact management through coordination of supervision, monitoring, and enforcement activities. Before GTCI's creation, Peru's own OSINERG (*Organismo Supervisor de la Inversion en Energía*) was the only agency with a pre-dating legal mandate to ensure compliance with technical, social, and environmental laws and regulations relating to oil and gas development, as well as with the obligations derived from concessions, impact assessments, and management plans. However, the

[107] IDB Report, available at: <www.iadb.org>.

GTCI-CAMISEA Plan refers to GTCI's ability to 'demand immediate application of corrective measures'[108] a task that according to the law falls under the jurisdiction of OSINERG but which by virtue of the operation of the IDB's conditionalities came to be shared with GTCI and consequently with the IDB.[109] A set of parallel enforcement and compliance structures was thereby created and, instead of eliminating overlap and streamlining agency cooperation, the creation of GTCI -neither fully taking the lead nor letting another agency assume it- added a further element of confusion to hydrocarbon development management.[110]

Moreover, although some ambitious initiatives were undertaken under GTCI's leadership, the group missed some critical opportunities for enhancing governance within the energy sector. Far from promoting an environment of collaboration between agencies, the result of GTCI's set up has been an atmosphere of mistrust and competition amongst sectoral bodies and officers and the emergence of GTCI as an elite group -within the government's oil and gas managers- with the power to pull the plug on outside funding.[111] That result can be verified, for example, in relation to the activities undertaken by GTCI in connection with community relations and indigenous peoples' consultation. Again, due to the sensitivity of indigenous issues –particularly with the

[108] Plan GTCI-CAMISEA, s 4, available at: <www.camisea-gtci.gob.pe>.
[109] OSINERG, an autonomous regulatory agency, was set up as part of the country's efforts to create a stable and attractive investment environment for energy development. OSINERG's mission is to 'enforce, at the National level, compliance with legal and technical provisions relating to electricity and hydrocarbon sector activities, as well as compliance with legal and technical provisions regarding the conservation and protection of the environment in the development of the said activities'. Both contractual and regulatory obligations fall under OSINERG's compliance and enforcement powers. Peru, Law 26734/96, art. 2.
[110] The creation of a special ombudsman's office (*Defensoría de Camisea*) in addition to the existing one (*Defensoría del Pueblo*) is considered equally redundant and has led to friction between the two bodies.
[111] The statement is based on the author's personal experience.

IDB's constituents-, the Bank (through GTCI) virtually took over community relations.[112] Instead of working on perfecting the model in use by Peruvian authorities and on filling existing information and conceptual gaps, loan implementation activities started new community consultation programs under the leadership of GTCI. The Bank's demands and work in this area were seen as redundant and disruptive by.[113]

Today, notwithstanding the millions of dollars put into strengthening the institutional and regulatory framework of the hydrocarbon sector in Peru, governance issues and the related social and environmental problems, continue to be its Achilles heel. The country's poor environmental and social impact management record makes it a constant target of local and international activists. Peruvians in all corners of the country have taken issue with the fact that although Camisea's production has exceeded expectations, the people have experienced constant increases in the price of energy[114] and their needs continue to

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[112] By the time of the Institutional Strengthening Project's kick off, the Directorate of Hydrocarbons of Peru had an extensive track record of activities devoted to setting up and implementing a framework for indigenous and other communities' participation. See: L.K. Barrera-Hernández, *supra*, note 23.

[113] The new programs were undertaken despite the fact that the project was well under way and consultation meetings had already taken place. Although the Bank lays claim to successful results, accounts from the field yield increasing frustration on the part of the affected communities, which report lower than expected benefits and numerous instances of unattended claims. See: Peru, COMARU, "TGP provokes petroleum spill in the Urubamba Valley" (26-12-04), available at: <www.amazonwatch.org>; Peru, "Letter to IDB on Camisea Project Town Hall Meeting" (11-3-05), available at: <www.amazonwatch.org>. Interview with DGH officers.

[114] Average electricity prices went up in Peru in the years following the transformation of the market in 1992, the market then stabilized, but prices have been going up steadily since 2000. Camisea's Liquid Petroleum Gas (LPG) prices are at a par with imports. OXFORD ANALYTICA, "PERU: Camisea benefits felt gradually" (30 March 2005) [on file with the author]; available at: <www.worldenergy.org>.

be underserved.[115] As I write, citizens are getting ready to fight yet another private oil and gas company: Hunt Oil and its local subsidiary, Peru LNG SRL.[116]

Unfortunately, the mechanisms chosen by the IDB to manage the risks perceived were either inadequate or poorly applied and, rather than preventing mismanagement, contributed to exacerbate existing problems. Peru's experience illustrates the perils of undermining permanent sovereignty to the point where the balance between local and international interests is completely disregarded.

B. Argentina's Experience: Putting Profit over Well-Being in the Management of Privatized Services

In strict adherence to IFI-mandated Washington Consensus principles, in 1989 Argentina passed the *State Structural Adjustment Law* which, among other things, declared a state of emergency in relation to the public services' sector and every commercial enterprise in which the state had a stake. Under the law, public services and the state's commercial interests were made subject to immediate privatization.[117] In addition to the *Structural Adjustment Law*, Law 23.697, enacted immediately after, declared an "economic emergency," cancelling all industrial promotion regimes and state subsidies, (including service's costumers' subsidies), while lifting barriers to foreign

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[115] OXFORD ANALYTICA, *id.* Privatization of electricity generation has also stalled in the face of public opposition. In June 2002, for example, the government faced riots in Arequipa, Peru's second largest city, after the Toledo administration agreed to privatize two electric power plants (Egasa and Egesur) to Belgium's Tractebel. The government was forced to suspend the sale in order to restore the calm. See: <www.eia.doe.gov/emeu/cabs>.

[116] Peru, El Diario Internacional , J. de Castro, "Testaferros de Hunt Oil Compran Fallo del Tribunal Constitucional", available at <www.eldiariointernacional.com>.

[117] Arg., Ley de Reforma del Estado No. 23.696, available at: <infoleg.mecon.gov.ar/infolegInternet/anexos/0-4999/98/texact.htm>.

investment.[118] Privatization of water and gas services, electric utilities, and other important sectors was promptly undertaken far in advance of the set up of a regulatory and institutional framework to regulate and control the privatized activities.[119] In addition, no attention was paid to strengthening Argentina's feeble environmental and social impact management framework.[120]

The new regulatory framework, with its weak controls, resulted in questionable decisions and projects. A good example is the case of the Gasoducto Norandino, a gas transportation project in the north of Argentina that became socially and environmentally explosive and that was the subject of an extensive legal battle between the government, the private investor, and a local indigenous community whose well being was at stake.[121] Investment in new supply infrastructure also lagged behind leaving promises of increased

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[118] Arg., Ley de Emergencia Económica No. 23.697, available at: <infoleg.mecon.gov.ar/infolegInternet/anexos/0-4999/15/texact.htm>. Law 23.928 completed the investment promotion regime by pegging Argentina currency to the dollar. Arg., Ley de Convertibilidad No. 23.928, B.O.: 28/03/1991.

[119] J.E. Barbará, "Después de la crisis del Estado privatizador en Argentina, regulación y control: ¿a cargo de quién y hasta dónde?" VIII Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Panamá, 28-31 Oct. 2003 [on file with the autor]. In keeping with the dictates of the Washington Consensus, regulatory agencies were considered a necessary evil by the Argentine administration.

[120] World Bank Policy Research Working Paper 3342, V. Foster *et al*, "Towards a Social Policy for Argentina's Infrastructure Sectors: Evaluating the Past and Exploring the Future" (Oct. 2004), <www.worldbank.org>. Argentina's framework environmental management law was not enacted until 2002. Sectoral environmental and social impact management continues to be very weak.

[121] The Colla indigenous people and Greenpeace Argentina, filed suit against a private developer for the construction of a gas pipeline, i.e. the '*Gasoducto Norandino*'. The pipeline's route traversed a section of sensitive forests last home of the *yaguareté*, a species at the brink of extinction, and traditional lands of the Colla people. The project's approval was granted on the basis of an EIA that had been completed without consultation or participation of the Colla. The lower court found it "absolutely clear that due deliberation and discussion of the project had not taken place, as should have, through a public hearing." While the case was under appeal, construction was completed. After a period of intense rains, the pipeline broke causing fire damage to the area's ecosystem and spreading panic among the indigenous population. L.K. Barrera-Hernández, "The Legal Framework for Indigenous Peoples' and Other Public's Participation in Oil & Gas Development in Latin America. The Cases of Argentina, Colombia and Peru" in *Human Rights in Natural Resource Development* (D. Zillman, A. Lucas and R. Pring, eds, 2002) 589.

access unfulfilled.[122] Contrary to the IFIs' teachings the people did not experience gains in well-being. A World Bank review conducted in 1999 concluded that, in contrast with the Bank's predictions, the conditionalities imposed for public services' reform in Argentina aggravated the situation of the poor and contributed to deepen the gap between poor and rich, with the latter deriving the most benefits from the policies implemented as a result of donor demands.[123] Through over reliance on one-size-fits-all formulas,[124] the IFI-designed reform had failed to address the needs of a broad section of the Argentine public. The people reacted by staging massive protests, boycotting utilities and privately run natural resource businesses, and by launching court proceedings demanding injunctions and access to resources,[125] at times, prompting the government into action.[126] The disputes often landed in the docket of investment tribunals, where investors sought protection from an increasingly hostile host.[127] Argentina entered into an economic crisis which eventually resulted in the passage of the *Emergency Law* of 6 January 2002. Through the law, wholesale and retail tariffs of public service concessions were

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[122] Argentina, UNIREN, 'Informe de Grado de Cumplimiento de los Contratos de Distribución y Transporte de Gas Natural, available at <www.uniren.gov.ar>.

[123] Reported in D. Bouille *et al*, *supra*, note 7. The reform of the Argentine gas service sector was undertaken under the WB's Public Enterprise Reform and Adjustment Loan I approved in 1991. WB, OED Performance Audit Report No. 14809, "Argentina: Public Enterprise Adjustment Loan" 30-6-1995. Conf. Argentina, Defensor del Pueblo de la Nación, "Estudios del impacto de la estructura tarifaria de los servicios públicos en la economía de los usuarios contribuyentes" available at <www.defensor.gov.ar>.

[124] See WB, "Review of Bank Conditionality: Issues Note" (01-24-2005), available at: <www.worldbank.org>; WB, OD 8.60 Adjustment Lending Policy, replaced as of August 2004 by OP/BP 8.60 Development Policy Lending; "Reshaping Power Markets - Lessons from Argentina and Chile", WB, Viewpoint, available at <www.worldbank.org>. The evolution of the Bank's thinking on utilities' reform from its stance in the early 1990s towards the latter part of the decade can be traced in: WB, Sector Report, "Argentina – Reforming public utilities: issues, challenges and best practices" (June 1996), available at <www.worldbank.org>.

[125] E.g.: USUARIOS Y CONSUMIDORES EN DEFENSA DE SUS DERECHOS ASOCIACION CIVIL C/ AGUAS DEL GRAN BUENOS AIRES SA S/ACCION DE AMPARO EXPTE. 44.453, available at: <http://www.abogadosvoluntarios.net/contenido.asp?idcontenido=121&acceso=1>.

[126] For an account of the process that led to the termination of the water concession contract in the province of Tucuman, Argentina, eventually ending in ICSID arbitration (Vivendi Case I and II) see e.g.: J. Piaget, "Limits in Water Concession Contracts: The Case of Aguas del Aconquija (Argentina)" (April 2003), available at: <www.hec.unil.ch/iumi/iumi/>.

[127] See <www.worldbank.org/icsid>.

converted to pesos and frozen[128] and public utility contracts were made subject to renegotiation.[129] More companies launched complaints before the International Centre for Settlement of Investment Disputes (ICSID), an arbitral tribunal set up under the auspices of the World Bank to settle disputes between governments and private investors.[130] Argentina now faces billionaire claims which threaten to set the country further back in the road to development.

Similar scenarios can be found in Bolivia and other developing countries.

C. ICSID Arbitration

The catastrophic failure of IFI-dictated rules and policies in Argentina resulted in a dearth of foreign investment arbitration cases, particularly before the WB's ICSID. As a result of these and prior decisions, some jurisprudence is starting to accumulate which may provide a glimpse of how permanent sovereignty might fare under the current – private!- interpretation of international economic and foreign investment law.

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[128] Law 25.561 as amended (in force through 12-31-2006 – Law 26.077 of 1-1-2006), available at <www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71477/texact.htm>.

[129] The Kirchener administration concentrated renegotiation procedures under a single agency -UNIREN- with representatives of the affected sectors. The procedures for renegotiation contemplate public consultation and review of preliminary agreements between the private companies and UNIREN in public hearings; finalized agreements are subject to fast-track Congressional approval. The President has final approval power. Ley 25.790, 21-10-03; Decreto 311, 3-7-03; Res. Conjunta, Ministerio de Economía y Producción y Ministerio de Planificación Federal, Inversión Pública y Servicios 188/2003 y 44/2003, 6-8-2003; Decreto 1172, 3-12-03, available at: <www.uniren.gov.ar>. See <www.worldbank.org/icsid>. In the wake of the crisis, some measures to provide disgruntled utilities some breathing room were passed. Two legislative initiatives, one on social tariffs and one on a common regulatory regime for public utilities which increased the discretionary powers of the President were launched. Arg., Proyecto de Ley, Régimen Nacional de Servicios Públicos, available at <www.proconsumer.org.ar>. See also: Arg., Clarín, "Acuerdo entre el gobierno y el Congreso para sacar la ley" (16/3/04), available at <www.clarin.com.ar>; Arg., La Nación, "Nuevas criticas al proyecto de servicios públicos" 25-10-2004, available at: <www.lanacion.com.ar>. A spot market for gas was also regulated but to date, June 2005, it is not operational. Decreto 180/2004, Boletín Oficial 16-02-2004, No. 30340, available at: <www.infoleg.mecon.gov.ar>.

[130] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Washington Convention), available at: <www.worldbank.org/icsid>.

In the first place is the issue of jurisdiction. Unlike other *ad hoc* arbitral tribunals, the tribunal's founding document, the *Washington Convention*, article 25, imposes jurisdictional requirements for settlement of disputes under ICSID.[131] Despite that limitation, so far, ICSID arbitrators have taken an expansive view of ICSID's jurisdiction. They have done so by either considering treaty and contractual claims as separate and distinct, and asserting jurisdiction over the former,[132] or, by plainly assimilating contractual claims to treaty claims under ICSID's jurisdiction.[133] Another way in which ICSID tribunals have expanded their reach is by giving a wide interpretation to standing rules. On various occasions, ICSID arbitrators have stated that standing is not limited to the juridical person under which investments have been made, but that the definition of investor extends to shareholders regardless of the size of their share in the investment.[134] Moreover, ICSID jurisdiction can be extended by recourse to the Most Favoured Nation principle as in the case of Camuzzi v. Argentina. There, the more favourable rules available to the complainant under the MFN principle served, among other things, to overcome issues of temporal jurisdiction.[135] Thus, as a result of

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[131] The case must involve an "investment" dispute; one of the parties must be a contracting state; the state must give written consent to ICSID's jurisdiction; and, the private party must be a national of another contracting state. *Washington Convention*, available at: <www.worldbank.org/icsid>.

[132] E.g.: *Compañía de Aguas del Aconquija, S. A. v. Argentina* (Vivendi II), Decision on Annulment, ICSID No. ARB/97/3, 41 ILM 1135, 1154 (2002) (ad hoc comm. July 3, 2002). A recent review of the decisions concerning Argentina, places most cases under this category. P. Di Rosa, "The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues" (Fall 2004) 36 U. Miami Inter-Am. Law Rev. 41.

[133] *SGS Societe Generale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction, ICSID No. ARB/02/6 (Jan. 29, 2004). On "integrationist" v. "disintegrationist" approaches to jurisdiction, see: Y. Shany, "Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims" (October 2005) 99 Am. J. Int'l L. 835.

[134] *Siemens A.G. v. Argentina,* Decision on Jurisdiction, ICSID Case No. ARB/02/8; *Enron Corp. v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/ 01/3.

[135] *Camuzzi v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/03/2. In another case involving a water concession in Argentina, Spanish and British investors sought and obtained the protection of the

ICSID practice, developing states are dragged into private arbitration procedures at an increasing rate. The system appears to be eschewed to favour private interests.

Indeed, the application of the MFN principle to favour individual investors is a good example of the unbalanced evolution of international law under globalization where the prevailing drivers are economic interests. While the MFN principle was originally devised to operate between states as a manifestation of a globally sanctioned public policy that is deemed mutually beneficial (free trade), in this case, its effect is to favour private interests directly; the state is at the losing end of the bargain. The scenario is most unfair in the case of capital importing states, which will not have the opportunity to benefit from reciprocal treatment in the person of their (non-existent) national investors.[136] In those cases, the reciprocity built into the IITs is merely decorative diplomacy.[137] Adding insult to injury is the fact that, because arbitral tribunals are private fora, a country's fate is decided behind closed doors, on purely commercial terms, and with very little in terms of procedural safeguards.[138] International arbitration is not open to participation and scrutiny by third parties or the public.[139] Legitimate public concerns seem to have no place in the tight framework devised to protect investors.

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more favourable IIT negotiated between France and Argentina despite the existence of IITs between Argentina and their own countries. *Gas Natural SDG v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/03/10, available at: <www.worldbank.org/icsid>.

[136] C.I. Suarez Anzorena, R. Wisner, J.J. Coe, Jr., C.T. Salomon, K.S. Gans, "International Commercial Dispute Resolution" (Summer 2006) 40 Int'l Law. 251.

[137] A look at the docket of ICSID shows that the respondents in the cases before it are developing or transitioning economies.

[138] For example, witnesses' exposure to criminal liability is weak and evidence can be suppressed by the parties unwilling to cooperate.

[139] One reason for this is that IITs dispute resolution rules are usually transplanted from commercial arbitration tribunals' rules that deal with private matters.

Very few decisions on the merits have been rendered in the cases involving Argentina.[140] So far, the case law coming out of ICSID generally, has been marked by contradiction and inconsistency.[141] However, as illustrated in the two first cases involving Argentina to arrive at a decision on the merits, by nature, international arbitration interpret treaty provisions in the manner most conducive to the broad objective of foreign investment promotion and not of the countries' specific development objectives which may or may not have been served by the specific investment at stake.[142] Though it's been contended that the protection granted to investments under IITs should cede to *jus cogens* rules or rules intended to implement a state's human rights obligations, some of which are connected to natural resources management such as the right to water, life, and health,[143] this is yet to be recognized by an international investment tribunal.[144]

Thus,

> *[c]onfusion as to the boundaries of acceptable government regulation in this realm prevails at a worrying time, as there is clear evidence that investors have awakened to the existence of the full constellation of international investment treaties and are challenging host state laws in record numbers.*[145]

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[140] *CMS Gas Transmission Co. V. Argentina*, ICSID Case N. ARB/01/08; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, available at: <ita.law.uvic.ca>.
[141] C.I. Suarez Anzorena *et al*, *supra*, note 136; B.M. Cremades, "Investor Protection and Legal Security in International Arbitration" (May-July 2005) 60-JUL Disp. Resol. J. 82.
[142] In Azurix, the Tribunal states:
"For the Tribunal, the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim."
Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, para. 310, available at: <ita.law.uvic.ca>. See also: L. E. Peterson (1), *supra*, note 91.
[143] L.E. Peterson and K.R. Gray, *supra*, note 93 at 13.
[144] The argument, however, does not extend to cover rules relating to other (non-human rights/non-*ius cogens*) public policy purposes such as natural resource conservation and management.
[145] L.E. Peterson and K.R. Gray, *supra*, note 93 at 13.

The one certain conclusion that can be drawn from the operation of ICSID and similar tribunals is that in allowing standing in international arbitrations to private investors against states, while not imposing correlative stewardship obligations prompting them to take into account some measure of the public's interest in their decision-making, states have lost considerable ground in their power to ensure that management of natural resources proceeds in the best interest of the public.[146] A state's regulatory and contractual freedom may be effectively curtailed by existing IITs. In addition to losing ground to private interests, states remain subject to diplomatic pressure. Indeed, although one of the alleged objectives and main advantage of IITs was to de-politicize investment disputes, capital exporting states still find it their place to throw their weight around in defense of private interests operating in developing states. Such is currently the case, for example, of France *vis a vis* Argentina in connection with the Vivendi case.[147] This loss of power is aggravated by the lack of effective review mechanisms of arbitral awards.

Perhaps, opening arbitration proceedings to consideration of arguments based on human rights or environmental protection instead of restricting the analysis to commercial issues, as was unsuccessfully attempted by Argentina in the Azurix case,[148] might turn the tables on what so far has been a very unfavourable climate for state defendants in their struggle to manage natural resources in the best interest of their peoples. After all, if a private claimant's actions amount to demonstrable human rights infringements, it is a state's duty

[146] C.G. Garcia, *supra*, note 92; L.E. Peterson (2), *supra*, note 96.
[147] Arg., La Nación, "Francia planteó sus inquietudes a Kirchner" (9 Oct 2006), available at: <www.lanacion.com.ar/politica/nota.asp?nota_id=846935&origen=Premium>.
[148] *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, available at: <ita.law.uvic.ca>.

to stop them and it is highly unlikely that any tribunal, even a private arbitral tribunal, would find fault in it doing so.

D. One Scary Story: Chile's Private Water Model Would Make IFIs and the WTO Proud

Chile's 1980 *Constitution*, still in force, wholly embraces the neo-liberal market economics favoured by the international financial and investment community and reflected in the Washington Consensus principles. Among other things, the *Constitution* strengthens and expands property rights to include rights over water.[149] Accordingly, the *Water Code* of 1981 (the Code)[150] puts water rights in the same category as all other property rights that enable the owner to use, enjoy and dispose of the water at his or her will (derecho real).[151] It also classifies those rights into consumptive and non-consumptive depending on whether or not the rights' holder can consume all the water in the course of his/her activities. Non-consumptive rights' holders can use the water but must return it to its source.[152] The *Code* recognizes all rights acquired or granted under previous laws but not through traditional uses, which are subject to special proof requirements. New rights can be freely acquired from the Water Agency as long as they are physically and legally available. Under the law, any person desiring to acquire water rights may apply to the Water Agency for free adjudication of available rights. There are no restrictions as to who may own water or in what quantities. Water rights are completely separate from the right to land and can be freely sold, transferred or

[149] Art. 24, last paragraph.
[150] Decreto con Fuerza de Ley 1.122, Fija Texto de *Código de Aguas*. Chile, Diario Oficial de 29 de octubre de 1981.
[151] Id. Art. 6.
[152] Id. Arts. 12 through 15.

mortgaged. There is also no priority of use rules for allocation and no requirements imposing any duties to put those rights to work in any way.[153]

Rather than having a deliberate plan to ensure the provision of sufficient and safe water on an equitable basis to all the population, the Chilean strategy towards fulfilling that duty relies on the operation of the market with the government taking the back seat. Water availability is thus a result of the operation of the free market and not of the implementation of a national water strategy specifically geared at ensuring access to water to all the population as required by human rights law setting minimum standards of well being. However, it is common knowledge that the market tends to favour the highest bidder.

As if this scenario were not scary enough, if any private owner of water rights managed to export water in bulk, it would open the tap for endless water exports under GATT-WTO rules. As explained above, the exceptions may only be triggered when life or the resource itself is at risk. By then, any attempt at managing the resource and achieve well being may be futile. Chile, however, is constantly showered with praise by the IFIs and the international economic establishment for having embraced the free market development principles they promote. As shall be seen in another case study below, those left behind by the market are starting to raise their voices.

[153] Id. Libro I, Tit. III, De la adquisición del derecho; Libro II, Tit. I, De los procedimientos administrativos.

E. GATT-WTO Case-Law

Cases of regulatory pull, i.e. extraterritorial application of regulation or standards that align local norms with a foreign countries' policy objectives, are well documented in the WTO case law. A well know case is the *US Shrimp-Turtle* case that confronted the US with India, Malaysia, Pakistan and Thailand.[154] The case concerned a US ban on the importation of shrimp not caught with turtle excluder devises as required by US law. It illustrates the WTO's double-sided bias in the tug between unhindered trade and protection of natural resources. In the first place, despite declarations to the contrary, the organization's dispute settlement bodies are consistently reluctant to favour legitimate natural resources-related policy goals over free trade as evidenced in the original *Shrimp-Turtle* Panel's ruling and the Appellate Body's decision, both of which managed to strike down the resource-protective measure under different arguments. In the second place, the WTO's preference for negotiated solutions to resource protection and conservation as evidenced in this case puts developing countries at the mercy of their stronger developed trading partners.[155] Thus, while in the hands of the powerful trade becomes a leverage tool for managing natural resources beyond a country's borders, the WTO's reluctance to allow Art. XX exceptions it puts on a straightjacket on developing countries' attempts at managing their resources.

[154] Dispute DS58, available at: <www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>.
[155] For additional information see: <www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/c8s2_e.htm>.

4. CONCLUSION

The above seems to indicate that a fair number of natural resources management measures, including human rights, environment and conservation-related laws, regulations and administrative practices[156] could be considered illegal barriers to trade and subject to be struck down and to carrying penalties under international trade rules. A similar conclusion could be drawn with regards to foreign investment and the potential for infringement of IITs deriving in billionaire compensation and damages' payments. This is compounded by the fact that IFIs and trading countries may condition their dealings with developing countries on the adoption of a host of standards and measures for resource management that tend to be ill suited to the developing country context and fail to advance development.

The aggregate operation of international trade and investment rules determines that when it comes to managing their natural resources, developing countries find themselves between a rock and a hard place. While countries' hands are largely tied and permanent sovereignty continues to be eroded, the global system advanced to replace local decision-making raises significant doubts, particularly when it comes to the interests represented and advanced therein[157] as well as its overall coherence and relevance to developing countries. Indeed, reviews of the effectiveness of development assistance over the past

[156] GATS' definition of measures is wide, covering any government-backed practice whether it is based in law, regulations, policy or institutional culture. Measures taken to comply with a multilateral environmental agreement (MEA) could also be at stake.

[157] C. Dommen, "The WTO, international trade, and human rights" (2004), 3D, available at: <www.3dthree.org>; reproduced under another title in <www.surjournal.org/eng/index3.php>.

decades have demonstrated that reforms are more likely to be sustained and development-friendly when the reform program emerges from a country's own domestic political process and is suited to that country's specific circumstances.[158]

Whether the interests served are those of transnational corporations[159] or of dominant trading partners, at the end of the day the restrictions placed by international economic and investment law on a country's free management and disposition of its natural resources are extensive. In fact, one author goes as far as to declare that "countries have ceded their right to independently determine their countries' development priorities."[160] At the end of the day, the loss in permanent sovereignty does not result in any gains in well being. As the case studies show, sovereignty matters.

[158] WB, Review of World Bank Conditionality: Issues Note, Jan. 24, 2005, available at: <www.worldbank.org>.
[159] J. Oloka-Onyango and D. Udagama, "The Realization of Economic, Social and Cultural Rights: Globalization and Its Impacts on the Full Enjoyment of Human Rights" Sub-Commission on the Promotion and Protection of Human Rights, U.N. ESCOR, 52nd. Sess., U.N. Doc. E/CN.4/Sub.2/2000/13, par. 15, 66-67 (2000), cited in M. Cohn, *supra*, note 82 at 437.
[160] D. Shelton, "Protecting Human Rights in a Globalized World" (Spring 2002) 25 B.C. Int'l & Comp. L. Rev. 273 at 298.

CHAPTER IV

Natural Resources and Human Rights Law: Paving the Road with Good Intentions

1. INTRODUCTION

In addition to whatever doubts may be raised by the previous chapter regarding developing states' control over local resource management, the assertion that "*the extent to which the people in a resource rich region of a State (...) are entitled to benefit from resource exploitation in their region is in principle a matter of domestic politics*"[1] is also questionable under the light of international human rights law and of recent decisions and opinions of human rights bodies and tribunals. It is abundantly clear from looking at the 1948 *United Nations Declaration on Human Rights*[2] and subsequent instruments that, if human rights are to become fully effective, domestic natural resources management is of fundamental importance. Life, the one human right without which all of the others are a mere abstraction, cannot be sustained without natural resources. Take life-giving natural resources away, and the whole construct of human rights falls apart. It is inevitable then, that the law on human rights will have a significant impact on the way those resources are managed.

[1] N.Schrijver, *Sovereignty over natural resources, Balancing rights and duties* (Cambridge, U.K.: Cambridge University Press, 1997) at 9.
[2] Available at: <www.unhchr.ch/udhr/index.htm>.

2. HUMAN RIGHTS LAW AND NATURAL RESOURCES MANAGEMENT

A. Human Rights Law Basics

The first concerted international legal effort to provide minimum human rights guarantees across the globe was the 1948 *UN Declaration on Human Rights*.[3] Although the Declaration is not *per se* binding, it represented a momentous first step in the development of contemporary international human rights law. Following its proclamation, the international community continued to work together to develop a more comprehensive system covering civil, political, social, cultural, and economic rights. As a result, in 1966, the *International Covenant on Civil and Political Rights* (ICCPR)[4] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[5] were adopted.

Operating under the *Declaration* and the *Covenants*, which together make the *International Bill of Rights*, is a whole network of bodies and institutions charged with promoting, monitoring, implementing and developing human rights. Of particular note are the Human Rights Committee in charge of ICCPR implementation and the Economic, Social and Cultural Rights Committee implementing the ICESCR. These Committees are composed of independent experts who examine the reports that signatory nations submit under the treaties and issue observations and comments. In those reports Committee

[3] *Id.*
[4] General Assembly res. 2200A (XXI), U.N. Doc.A/6316 (1966); available at: <www.ohchr.org/english/law/ccpr.htm> and <www.unhchr.ch/html/menu3/b/a_cescr.htm>.
[5] *Id.*

experts summarize their concerns about the state of human rights in certain countries and give recommendations for the future. In both cases, to assist state parties in fulfilling their obligations, the Committees issue specific recommendations and interpretations (Comments) clarifying the scope and requirements of the rights included in the *Covenants*. As shall be illustrated in the Ralco case explained below, *Comment 15* of the Economic and Social Committee is a perfect example of the gravitation of the international human rights system over natural resources management.

While the Human Rights Committee can hear individual persons' complaints on human rights violations, the Economic, Social and Cultural Rights Committee does not have that ability.[6]

I. International Covenant on Economic, Social and Cultural Rights; General

a. *Comment 15 on the Right to Water*

Though fundamental for human survival, until recently, the right to water had only received scattered attention and was not explicitly defined and recognized under the main American and global human rights' instruments. That scenario has changed dramatically since the Economic, Social and Cultural Rights Committee issued *Comment 15 on the Right to Water* in November 2002.[7] In *Comment 15*, for the first time, the Committee defines concrete and measurable steps that governments must take to comply with their obligations under arts.11 and 12 of the ICESCR *Covenant* with regards to

[6] For additional information see the website of the Office of the United Nations High Commissioner on Human Rights, available at: <www.ohchr.org/english/bodies/treaty/index.htm>

[7] Committee on Economic, Social and Cultural Rights, Twenty-ninth Session, Geneva, 11-29 November, 2002, *The Right to Water, Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights*. UN Doc. E/C.12/2002/11 (26 November 2002).

water.[8] *Comment 15* is thus devoted to defining the human right to water as intrinsic to the right to an adequate standard of living and the right to the highest attainable standard of health of arts. 11 and 12.[9]

After a general affirmation of the right to water as an indispensable human right, *Comment 15* describes that right as containing freedoms and entitlements. While on the one hand, all persons are said to have the right to continuous access to existing and new quality supplies in minimum sufficient quantities, on the other, the *Comment* imposes three types of obligations on State parties, i.e. to *respect*, *protect* and *fulfill* the right to water. These obligations require, among other things, that the States refrain from interfering with the enjoyment of the right to water including interference with customary management arrangements (*respect*). They also translate into the need to prevent interference from third parties through adequate measures directed at safeguarding water quality and quantity and, generally, from any activities that would result in inequitable access (*protect*). In order to *fulfill* their obligations, States must take positive steps "to adopt the necessary measures directed towards the full realization of the right to water" (para. 26). In all cases, access to a "minimum essential amount of water, that is sufficient

[8] M. Leighton, "The Human Right to Water" paper presented at I Encuentro Iberoamericano de Doctores y Doctorandos en Derecho Ambiental. Reunión Científica: "El acceso al agua potable en el siglo XXI". Universidad Autónoma Metropolitana – Azcapotzalco, México. 22, 23, 24, y 25 de octubre de 2003 [on file with the author].

[9] *Comment 14* of the same Committee refers to the right to water as an "underlying determinant" of the right to health. Committee on Economic, Social and Cultural Rights, Twenty-second session, Geneva, 25 April-12 May, 2000, *The Right to the Highest Attainable Standard of Health*, UN Doc. E/C. 12/2000/4 (General Comments). Comment 4 on the right to housing also includes access to water as intrinsic to adequate housing. Committee on Economic, Social and Cultural Rights, Sixth Session, 1991, *The Right to Adequate Housing*. UN Doc. E/1992/23 (General Comments). For a precursor to *Comment 15* see S. McCaffrey, "A Human Right to Water: Domestic and International Implication" (Fall 1992) 5 Georgetown International Environmental Law Review, 1.

and safe for personal and domestic uses" (para. 37 a) must be ensured on a non-discriminatory basis.

Comment 15 takes particular note of indigenous and small-scale farming communities. According to its introductory remarks, the right to water in the case of indigenous and rural communities must be approached from the much more complex duty of ensuring that those peoples are not "deprived of [their] means of subsistence." Freedom from interference with traditional and customary access and management practices through, for example, encroachment and pollution (para. 16 c and d), is therefore a key area of concern. Thus, as far as indigenous peoples and subsistence farming communities are concerned, beyond continued efforts to expand water services and access to water (obligation to *fulfill*), compliance with the obligations to *respect* and *protect*, including refraining from taking any measures that may be considered retrogressive (para. 19) should become crucial components of a country's efforts to guarantee equality in the enjoyment of the right to water.[10]

Notwithstanding the developments referred to above, as mentioned, one should be reminded that no complaints' procedure is currently available for violations of the

[10] The *Draft UN Declaration on the Rights of Indigenous Peoples* highlights these duties by recognizing indigenous peoples' special relationship with water, their traditional rights to water and by requiring informed consent prior to the development, utilization or exploitation of water resources in traditional lands or of approving projects that may impact on traditional water resources. UN. Doc. E/CN. 4.SUB.2.RES.1994/45, Arts. 25, 27 and 30, available at: <www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument>. The *International Labour Convention 169, concerning Indigenous and Tribal Peoples in Independent Countries* of 1989, Art. 15, reaffirms the need to pay particular attention to safeguarding the rights of indigenous peoples "concerned to the natural resources pertaining to their lands." Available at: <www.unhchr.ch/html/menu3/b/62.htm>.

economic, social and cultural rights under the *Covenant*.[11] This, of course, includes the right to water defined as intrinsic to other economic, social and cultural rights such as the right to health and adequate standards of living.[12] However, the universality and indivisibility of first and second generation human rights and freedoms (civil and political on the one hand, and, economic, social and cultural rights on the other) have received widespread acceptance as fundamental to international human rights law.[13] As a result, in a practical application of the principle of indivisibility and to avoid the issues of justiciability that cloud the effective enforcement of social, economic and cultural rights, quite often, complaints pertaining to the right to water will be subsumed in claims relative to the right to life or other justiciable human rights.

Moreover, despite the lack of a formal complaints procedure under ICESCR, the Committee's oversight power includes the ability to designate special rapporteurs to investigate the situation of social, economic, and cultural rights in member countries as well as to respond to country reports and rapporteurs' findings. The Committee's observations are closely followed by the international community and add to the pressure

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[11] A protocol to establish a complaints procedure under ISECR has been proposed and is under study. At the core of the arguments against it is the justiciability of social, economic and cultural rights. See: Commission on Human Rights, Fifty-third Session, 18 Dec. 1996, *Draft Optional Protocol to the International Covenant on Social, Economic and Cultural Rights*, UN. Doc. E/CN. 4/1997/105; Commission on Human Rights, Fifty-eighth Session, 12 February 2002, Report of the Independent Expert, UN Doc. E/CN. 4/2002/57.

[12] See e.g. Human Rights Committee, Communication No 182/1984 (1987), *F.H. Zwaan-de Vries c. Pays-Bas*. CCPR/C/29/D/182/1984. See also: note 9 on Comments 4 and 14.

[13] That link is highlighted, for example, in the Preamble to the *Protocol of San Salvador* and the1993 *Vienna Declaration and Programme of Action* which clearly states that "[a]ll human rights are universal, indivisible and interdependent and interrelated." Art. 5, U.N. Doc .A/CONF. 157/23, 12 July 1993. This interrelation is particularly important when the right to water can be thus tied to a human right of the type that does not pose issues of justiciability, such as the right to life, and the right to equal protection under the law recognized, *inter alia*, in the *American Declaration*, the *American Convention* and the *International Covenant on Civil and Political Rights*.

faced by countries considered in violation, which often find it in their best interest to change their practices.

II. The Inter American System for Human Rights

The Inter American System for Human Rights functions under the umbrella of the Organization of American States (OAS) created in 1948. Peaceful coexistence through regional cooperation in dispute resolution, regional economic and social development and promotion of democratic values are the Organization's core functions, making the human rights system a fundamental component of the OAS. [14] In the years since its creation, the organization has expanded its membership to 35 countries and exerted increasing influence over its membership, particularly in the area of human rights.[15]

The Inter American Human Rights System is governed mainly by two documents: the *American Declaration on the Rights and Duties of Man* (1948),[16] one of its foundational

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[14] Art. 2 of the OAS Charter lists its objectives as follows:
a) To strengthen the peace and security of the continent;
b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention;
c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States;
d) To provide for common action on the part of those States in the event of aggression;
e) To seek the solution of political, juridical, and economic problems that may arise among them;
f) To promote, by cooperative action, their economic, social, and cultural development;
g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and
h) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.
OAS Charter, <www.oas.org>.

[15] Original membership was of 21 countries. Although Cuba is a member of the organization, its participation is on hold since the advent of the Castro administration.

[16] OEA, AG/RES. 1591 (XXVIII-O/98). OEA/Ser.L.V./II 82 doc.6 rev.1 at 17 (1992).

documents, and the *American Convention on Human Rights* (1969) which expands and updates the principles and rights contained in the *Declaration*.[17]

The OAS System provides recourse to people in the Americas who have suffered violations of their human rights and who have been unable to find justice in their own country. The pillars of the system are the Inter-American Commission on Human Rights, based in Washington, D.C., and the Inter-American Court of Human Rights, located in San José, Costa Rica. These institutions apply the regional law on human rights and are also influenced by the law and practice of other international bodies.

III. The Inter American Commission

In 1959, the Inter American Commission was created as a permanent body with the mandate to promote the observance and defense of human rights.[18] The 1970 amendment of the OAS Charter changed the Commission's status to that of an official organ of the OAS with authority over all member states under the OAS Charter and the *American Declaration*. It also has jurisdiction to apply the *American Convention* to process cases brought against those countries which ratified that instrument. In either case the Commission's powers are broad.

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[17] *American Convention on Human Rights*, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). In addition to the two basic human rights instruments mentioned, a relevant development of the 1969 *Convention* is the *Protocol in the Area of Social, Economic and Cultural Human Rights* of 1988 (*Protocol of San Salvador*); <www.oas.org/juridico/english/Treaties/a-52.html>.

[18] OAS Charter, art 106.

The Commission is empowered to receive, investigate and analyze individual allegations of human rights violations, conduct on-site visits, observe the general human rights situation in member states and publish reports with its findings, recommend the adoption of measures to improve the protection of human rights in specific states, and request states to adopt specific precautionary measures to avoid serious and irreparable harm to human rights in urgent cases. In urgent cases which involve danger to persons the Commission may also request that the Court order provisional measures, even where a case has not yet been submitted to the Court.

Standing requirements for petitioning the Commission are broad allowing any citizen of a member state to petition regardless of harm. However, no hypothetical or merely theoretical petitions will be entertained. [19] Petitions may proceed against the state and its agents or against any person where it can be *prima facie* demonstrated that the state failed to act to prevent a violation of human rights or failed to carry out proper follow-up after a violation, including the investigation and sanction of those responsible. The requirement of exhaustion of local remedies that is common to international tribunals also applies to the Commission's jurisdiction. Accordingly, petitioners must show that all means of remedying the situation domestically have been exhausted. Non-exhaustion of local remedies does not preclude recourse to the Commission when it can be shown that the petitioner tried to exhaust domestic remedies but failed because: 1) those remedies do not provide for adequate due process; 2) effective access to those remedies was denied, or; 3) there has been undue delay in the decision on those remedies. The Commission's

[19] I.K. Scott, "The Inter-American System of Human Rights: An Effective Means of Environmental Protection? 19 Va.Envtl.L.J. 197.

jurisprudence is clear in that it does not constitute an ordinary appeal jurisdiction from domestic procedures and that it will refuse review where a petition "*contains nothing but the allegation that the decision was wrong or unjust in itself.*" [20]

When the Commission receives a petition which meets, in principle, the requirements established in the rules on jurisdiction it can initiate proceedings. This decision to open a case does not prejudge the Commission's eventual decision on the admissibility or the merits of the case. The Commission may still declare the petition inadmissible and terminate the process without reaching the merits or may find that no violation has occurred. If the Commission decides that a case is inadmissible, it must issue an express decision to that effect, which is usually published. On the other hand, the Commission need not formally declare a case admissible before addressing the merits. In some cases the Commission will declare a petition admissible before reaching a decision on the merits. In others it may include its discussion on the admissibility of a petition with its final decision on the merits.

During the course of the process, parties are given plenty of opportunities to state and prove their cases. The Commission may also carry out its own investigations, conducting on-site visits, requesting specific information from the parties, etc. Its rules and procedures emphasize its powers to broker negotiated friendly solutions to the cases before it. At the conclusion of the process, the Commission prepares a report containing its conclusions and, where applicable, providing recommendations to the state concerned.

[20] See e.g.: *Marzioni v. Argentina.*

This report is not made public. The Commission allows the state party a set period of time to resolve the situation and to comply with its recommendations.

If upon the expiration of this period of time the problem subsists, the Commission can choose to prepare a second –similar- report. If the state persists in its disregard for the Commission's recommendations, a second report will be issued and made public.

Alternatively, if the country involved has accepted the jurisdiction of the Inter American Court, the Commission can decide to submit the case to the Court for a binding decision. "The decision as to whether a case should be submitted to the Court or published should be made on the basis of the best interests of human rights in the Commission's judgment."[21]

The fact-finding and advisory powers of the Commission are an important part of its functions. These may be exercised either as a result of a specific petition or as part of routine activities and result in Country Reports.[22]

IV. The Inter American Court

The Inter American Court on Human Rights is a creature of the *American Convention* adopted in 1969,[23] although it did not start holding session until over a

[21] OAS, <www.oas.org>.

[22] In April 1997, the Commission issued a Report on Ecuador. In its report, the Commission denounces the state's interference with the indigenous population's right to cultural and physical integrity. It states that government-sponsored activities, including hydrocarbon, forestry and agricultural production activities, encroach upon and interfere with those peoples use of traditional land and resources threatening their physical and cultural survival. It also finds that indigenous access to land and resources is severely limited by domestic laws and practices, regardless of constitutional and legal recognition of indigenous rights to those resources. As a result of its findings, the Commission recommends that the Ecuadorian state adopt the necessary measures to guarantee the right to life and physical integrity of jungle-dwelling groups, including legal protection of the lands they inhabit. The state is also required to take adequate protective measures to guarantee cultural survival in connection to resource development, including guaranteeing meaningful indigenous participation in development decision-making. The resolution of title claims and land demarcation issues is also urged.

decade later. The Court has both advisory and adjudicatory powers.[24] Only states and the Commission have a right to submit a case to the Court. However, according to the rules of the Court, once a case is admitted, the victims and their representatives may submit pleadings, motions and evidence autonomously.[25] The Court can take provisional measures at the Commission's or the victim's request as well as *de oficio*. If a breach is found, the Court can order a state to take specific measures to ensure the enjoyment of the right or freedom violated. It can also order remedies and compensation.[26] Its judgments are binding and final.

V. Decisions and Opinions of the Inter American Organs

From its creation to date, the Inter American System has gathered an extensive track record in the area of resource allocation and use. This might sound odd in light of the fact that the Inter American System does not include a right to natural resources as a human right. As will be shown below, however, it has managed to interpret individual rights and freedoms, including –but not limited to- the right to property, in such a way that domestic decisions on resource allocation and use can no longer disregard its mandates. Although a great deal of its work and decisions deal with indigenous peoples, the resulting analysis and principles may have widespread applicability as they relate to individual well being in connection with allocation of natural resources.

American Convention on Human Rights, "Pact of San Jose, Costa Rica", Arts. 52-69, available at: www.oas.org/juridico/english/Treaties/b-32.htm>.

Statute of the Inter American Court on Human Rights, OAS Res. 448 (IX-0/79), arts 1 and 2; available at www/oas.org>.

Inter American Court on Human Rights, Rules of Procedure, available at: <www.oas.org>.

American Convention on Human Rights, arts 62 and 63.

a. Decisions of the Commission

When considering the decisions of the Commission, it is important to be reminded of the fact that only a fraction of the Commission's decisions are made public. What is in plain view may only be the tip of the iceberg. For example, though several unofficial sources report proceedings in connection with the Aguinda case involving Texaco's oil production operations in Ecuador,[27] no official mention of the case can be found among the materials published by the Commission. However, given the consistency of the Commission's opinions, it may be safe to assume that all (undoubtedly numerous) other cases concerning human rights and natural resources are given similar treatment and decided with the same principles in mind. As is evident from the cases below, the Commission has no problem with asserting the prevalence of human rights over domestic laws and practice, even in cases where what is at stake is a state's sovereign and permanent right to develop and manage its natural resources.

i. Yanomami Case (Brazil)

A landmark case concerning resource use is the one dealing with a petition against the government of Brazil filed by de Yanomami indigenous group in 1980. The petition originated in the government-sponsored occupation and mineral and agricultural development of an area of the Amazon and the Territory of Roraima where official demarcation of the boundaries of Yanomami lands was pending. It was based on such disparate rights as the right to life, liberty and personal security, the right to equality before the law, the right to religious freedom and worship, the right to the preservation of

[27] See Chapter V.

health and well being, the right to education, the right to recognition of juridical personality and of civil rights, and the right to property.

After verifying that the Yanomami's territory had been invaded by mining and farming interests that brought destruction to the group, the Commission concluded that "*a liability of the Brazilian Government arises for having failed to take timely and effective measures to protect the human rights of the Yanomamis.*"[28] The government's actions awarding priority to, and even promoting, economically productive uses of the land were against international human rights law. In particular, the Commission found that in failing to demarcate indigenous lands and to prevent encroachment and invasion, the government was in violation of the right to life, liberty and personal security, the right to residence and movement, and the right to the preservation of health and to well being.

ii. Maya Case (Belize)

Another case directly concerning a state's disposition of natural resources, including land, is the one concerning the Maya indigenous communities of the Toledo District of Belize. The petitioners in that case complained that the logging and oil concessions granted by the state in over half a million acres of land traditionally used and occupied by the Maya, violated the communities' human rights to property and equality. In ruling for the petitioners, the Commission made a significant statement regarding the breadth of protection granted to property rights under the Inter American system in saying that "*the organs of the inter-American human rights system have recognized that*

[28] Inter American Commission on Human Rights, Resolution 12/85, Case 7615, Brazil, March 5, 1985, Recommendations #11.

the property rights protected by the system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law."[29] The Commission further states that "*development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected.*"[30]

Based upon these findings, the Commission took steps to halt the state's action in connection to the resources in question and to curb any future attempts to dispose of them against human rights law. It recommended that the state provide the Maya people with an effective remedy, including recognizing their communal property right to traditional lands, and to delimit, demarcate and title the territory in which this communal property right exists, in accordance with the customary land use practices of the Maya people. The Commission further recommended that the state abstain from any acts that might lead the agents of the state itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people until their territory is properly delimited, demarcated and titled.

iii. Western Shoshone Case (United States of America – US)

Also of importance in this context is the *Dann v. United States* case (also known as Western Shoshone Case) decided and published by the Inter-American Commission in

[29] Inter American Commission on Human Rights, REPORT N° 40/04, CASE 12.053, MERITS, MAYA INDIGENOUS COMMUNITIES OF THE TOLEDO DISTRICT, BELIZE, October 12, 2004, para 117.
[30] Id, para 150.

2002. At issue in this case was the right of the indigenous petitioners to access and use traditional (allegedly public) lands and resources for livestock grazing and gathering of subsistence foods. In denying access, the United States argued that indigenous title to the lands in question had been extinguished as a result of the occupation of the West by non-indigenous settlers (inverse condemnation).

Without getting into the details of the arguments given to uphold the government's title to the lands, the Commission determined that the procedure set up by the US to decide on indigenous land claims that resulted in the alleged extinction of the petitioners' rights was defective, lacking the requisites of fully informed and mutual consent that are fundamental to the protection of the human right to property. As a result, the Commission concluded that the United States had "*failed to ensure the Dann's right to property under conditions of equality (...) in connection with their claims to property rights in the Western Shoshone ancestral lands.*"[31]

Of particular importance in the resolution of this case is the fact that the Commission made clear its willingness to reach outside the main human rights instruments to interpret and define the content of the rights disputed in each case, including *inter alia* consideration of the *Draft Declaration on Indigenous Rights* as a valid source of law "*to the extent that* [in the present opinion of the tribunal] *the basic principles reflected in provisions of the draft Declaration (...) reflect general international legal principles.*"[32] This may open the door to increasing intervention of the System's organs in resource

[31] Para 172
[32] OAS, REPORT N° 75/02, CASE 11.140, MARY AND CARRIE DANN-UNITED STATES, December 27, 2002, available at: <www.cidh.org/annualrep/2002eng/USA.11140b.htm>.

allocation and management decisions particularly if the disputes before them revolve around issues of environmental law, inextricably connected to resource development and the protection of human life and health.[33]

b. Decisions of the Inter American Court

i. Awas Tingni Case (Nicaragua)

In 2001 the Inter American Court had the opportunity to pronounce itself in a case concerning a 1995 commercial logging concession in traditional indigenous lands. Since then, the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (the Awas Tingni Case) has become a landmark Court case in relation to the extension of a state's power over natural resources management.

The Awas Tingni case was filed by the Inter American Commission on behalf of a Nicaraguan indigenous community. The Commission requested the Court to decide, among others, whether the state violated the obligation to respect rights, the right to property and the right to judicial protection of the *American Convention.*

Prior to submitting the case to the Court, the Commission had found that:

> *The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.*[34]

[33] A petition was recently tabled before the Commission against the US on behalf of the Inuit of the Arctic. The petitioners argue that the US' acts and omissions on climate change represent a violation of that group's human rights, *inter alia*, the rights to life and to cultural integrity. Information on this submission is available at : <www.earthjustice.org/library/reports/summary_ICC_petition.pdf>.

[34] Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community

Among other things, the Commission recommended that Nicaragua should:

> *Suspend as soon as possible, all activity related to the logging concession within the Awas Tingni communal lands granted to SOLCARSA by the State, until the matter of the ownership of the land, which affects the indigenous communities, [is] resolved, or a specific agreement reached between the state and the Awas Tingni Community.*[35]

The Inter American Court agreed with the Commission's findings and ordered Nicaragua to take all measures to correct the country's violation of the Awas Tingni's human rights in connection with the community's property rights to its ancestral lands and natural resources

In addition to the fact that the decision's practical effect is to curtail the country's power to dispose of natural resources within its jurisdiction, a look at the transcript reveals that the System's organs are willing to take a deep look at the operating principles behind traditional expressions of sovereignty such as disposition of land and concessions to exploit natural resources.

In its allegations before the Court in connection to the right to property, the Commission takes a close look at the status of the lands and resources at stake and finds a violation in Nicaragua's assumption that "all lands not registered under formal title deed to be State lands."[36] Although the Court's decision does not directly address it, the argument is significant in that it challenges the extent of

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v. Nicaragua, Judgment of August 31, 2001, para 25.
[35] *Id.*
[36] *Id.*, para 140 (j).

state powers over those lands that may be considered *res nullius* ("unowned" things), thereby disputing the modern application of the Roman law-based principles used to justify a states' taking of lands and natural resources that are in operation since discovery and colonization. According to those principles, *res nullius* remain the common property of all mankind until they are put to some productive use at which time the person putting the thing to a "good" (productive) use can claim it for him/herself and obtain legal title. In other words, if lands and resources aren't used to generate economic value, the state can dispose of and exploit them as it sees fit. In doing so it can displace "lesser" (non-productive or subsistence) uses, such as the use to support subsistence lifestyles (hunting-gathering/subsistence farming), religious uses, esthetic uses, environmental uses, etc.

In questioning the continued undisturbed application of *res nullius* principles, the System is taking a very important step towards redefining the content of a state's sovereign powers over natural resources. It is forcing a re-examination of present rules and practice concerning a state's exercise of its permanent sovereignty over natural resources by questioning the traditional prevalence of economic uses/benefits over other beneficial uses, and, also importantly, by considering the impact of the exercise of sovereign powers on the individuals within a state and the extent to which they may benefit or suffer as a result.

ii. Yakye Axa Case (Paraguay)[37]

This recent case concerns a claim by an indigenous community to lands registered to and used by private parties. The claim in question covered operating faming establishments known as "estancias" (ranches) Loma Verde, Maroma and Ledesma sold by the government of Paraguay to British interests through a public tender process that took place in London in the early nineteenth century. Though, initially, the indigenous population stayed on the land as farm hands, deplorable living conditions and the promise of a better life drove the Yakye Axa to seek shelter with the Anglican missionaries charged with their "pacification." After experiencing equally taxing hardships, the indigenous group sought to recover its ancestral territory.

In 1993 the Yakye Axa initiated administrative procedures to recover the lands in question. The procedure eventually ended in a petition to the Inter American Commission. Finally, Paraguay's recalcitrance caused the Commission to submit the case before the Court.

After reviewing the case, the Court found Paraguay in violation, among others, of the right to property. It ordered Paraguay to identify and transfer to the Yakye Axa the lands claimed. In case of conflict between private and indigenous title the Court provides the country with criteria to evaluate the admissibility of potential limitations to the claimants' right to property *vis a vis* the private title-holders. According to the Court, admissible limitations must: 1) be declared by law, 2) be necessary, 3) be proportionate, and 4) be

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[37] Corte Inter-Americana de Derechos Humanos, Caso Comunidad Indígena Yakye Axa vs. Paraguay, Sentencia de 17 de junio de 2005; available at: <www.oas.org>.

directed at achieving a legitimate common (as opposed to individual) objective in a democratic society. The issue of "need" should be determined in relation to whether the proposed limitations are directed at the satisfaction of a pressing objective of public interest. Significantly, the Court specifically rejects "usefulness" as an objective that *per se* can justify any restrictions to the right to property. In addition, the Court highlights the value of land for the preservation of indigenous cultures and their human rights as a factor to be taken into account in deciding on the resource's allocation.[38]

Once again in this case, in reclaiming their abandoned ancestral lands, the Yakye Axa petition brought about an examination of the deeply rooted Roman-law principles upholding a state's decisions in the exercise of its sovereign rights over land and resources. At the core of the legal dispute was the status of the indigenous group's original title *vis a vis* the existing title of the private land-holders. Throughout the local claim procedures initiated in 1993 and in the proceedings before the organs of the Inter American System, though recognizing the Yakye Axa's right to the land, Paraguayan authorities consistently referred to the private title-holders' "rational," i.e. productive, use of the lands as the main obstacle barring their transfer to the claimants. They based their argument on the fact that Paraguayan law adjudicates preemptive status to the title of the "productive owner."[39] As was explained above, the Court, however, rejected utilitarian arguments as sufficient justification for rightful limitation of the human right to property under article 21 of the *American Convention*.

[38] Id, para 144 through 156.
[39] Id. Para 54 (g) and 122 (f).

3. INDIGENOUS RIGHTS AND THE INTERNATIONAL LABOUR ORGANIZATION CONVENTION 169

A discussion on natural resources management cannot be complete without direct reference to the rights of indigenous peoples. Natural resources are central to the cultural and material survival of indigenous communities; they are intrinsically tied to their distinctiveness and to the protection that the recognition of that distinctiveness entails.[40] In the developing world, natural resources' development is increasingly taking place in, or very close to traditional indigenous areas. While resulting in much needed revenues and the potential for enhanced well being for some sectors of the population, for the most part, the peoples in the areas where the resources are located tend to bear a disproportionate share of the negative impacts of resource development through reduced access to resources and direct exposure to pollution and environmental degradation. That is when international law and institutions step in.

Though, individually, states may drag their feet with regards to recognizing and implementing indigenous peoples' rights in connection to natural resources, international law has developed at a much faster pace. Indigenous rights are specifically dealt with in Principle 22 of the *Rio Declaration*[41] which promotes indigenous peoples' participation in sustainable development and in the *Framework Convention on Biological Diversity*

[40] D. Kinley and J. Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (Summer 2004) 44 Va. J. Int'l L. 931.
[41] UN Conference on Environment and Development, 1992, <www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

[42]which calls countries' attention to the importance of preserving traditional cultures and their role in biodiversity conservation.[43] Though its adoption is pending, "*traditional collective systems for control and use of land, territory and resources, including bodies of water and coastal areas*" [44] are specifically recognized and protected as fundamental to indigenous survival and well-being in the *American Declaration on the Rights of Indigenous Peoples* sponsored by the Organization of American States.[45]

Most important in this context is the *International Labour Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169).[46] Though ILO 169 may lack worldwide significance as a source of international law due to a low number of ratifications, the Convention is of great relevance in Latin America, where it has been ratified by 13 countries, eight of which are located in South America.[47] Because it is backed by such a highly respectable and experienced organization as the International Labour Organization, with long standing control and enforcement procedures, ILO 169 has received a lot of attention from indigenous groups and lawmakers in South America.

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[42] See: <www.biodiv.org/convention/articles.asp>.
[43] For additional information see: M. Berraondo López, *Los derechos medio-ambientales de los pueblos indígenas* (Quito, Ecuador: Abya-Yala Editing, April 2000).
[44] OAS, *supra*, note 2, Preamble, para. 5. Art. XIII refers generally to the right to "conserve, restore and protect their environment and the productive capacity of their lands, territories and resources."
[45] Organization of American States (OAS), Inter-American Commission on Human Rights, 1333rd. session, 95th. regular session, 26 February 1997. Negotiations on the 1997 proposal are ongoing. However, the United States has clearly stated that it will not support a declaration that undermines sovereign prerogatives. For an account of the negotiations and their outcome see: www.dialoguebetweennations.com.
[46] ILO 169, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. Entry into force: 5 September 1991, available at: <www.ilo.org>.
[47] As of September of 2006 the list includes Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Venezuela.

Infused by the principles of respect and participation,[48] ILO's *Convention 169* identifies indigenous and tribal peoples as a clearly distinct stakeholder group with a "*right to decide their own priorities for the process of development as it affects their lives, (...) and the lands they occupy or otherwise use, and to exercise control to the extent possible, over their own economic, social and cultural development. ... (and to) participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.*[49] Accordingly, ILO 169 recognizes indigenous peoples the following:

- The right to recognition of ownership and possession of traditional lands;
- the right to be free from encroachment and intrusion in their traditional lands;
- the right to participate in the use, management, protection and conservation of natural resources;
- the right to be consulted before natural resources on their lands are explored or exploited;
- the right to studies on the effects of exploration and exploitation on their lands;
- the right to benefit in the profits made from any exploitation and use of natural resources from their lands; and,
- the right to be compensated by the government for any damages caused by natural resources exploitation on their lands.[50]

[48] Introducción, OIT, Convenio No. 169 sobre pueblos indígenas y tribales en países independientes, 1989, Departamento de Normas, Oficina Regional de la OIT para América Latina y el Caribe, 9a. Edición actualizada, junio de 1997. For a complete guide to ILO 169 see: "Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169" available at: <www.ilo.org/public/English/employment/strat/poldev/papers/1998/169guide/169guide.htm#C4>.
[49] ILO 169, art. 7.
[50] *Id.*

Ratification of an ILO Convention involves a commitment by the member States to render its provisions effective within their national legal system, and to provide information to relevant ILO supervisory bodies. ILO members must address requests for information resulting from complaint procedures initiated before the Organization and must present periodic reports on the status of legislation and practice in relation to the matters dealt with in ILO Conventions and Recommendations regardless of ratification. Disputes falling under ratified ILO Conventions may eventually find their way into the docket of the International Court of Justice.[51]

The Convention is already having a tremendous impact on domestic natural resources management in South America. As illustrated below, the periodic report and observations process is a very powerful tool to achieve compliance with ILO rules and to guide domestic rule making and implementation. As a result, the ILO is an important driver of law and policy for natural resources management and has intervened in numerous cases as discussed below.

[51] Periodic country reports are subject to a technical review by an advisory body known as the Experts' Commission which may choose to communicate directly with the governments (generally regarding issues of a technical or secondary nature) or publish its comments as "observations" in a formal report to be submitted for discussion at the Conference Committee on the Application of Standards (CCAS) in preparation for the annual meeting of the International Labour Conference. The Commission's Report provides the basis for tripartite discussions at the CCAS. The conclusions of that discussion are presented at the ILO Conference in plenary session. Although no formal sanctions may proceed from the procedures outlined above, the organization's political and moral leverage exerts considerable pressure and has a significant impact on a country's international reputation and credibility. ILO Constitution, Art. 19, ss.5(e), 6(d) and 7. For examples of enforcement procedures initiated against Colombia see: <ilolex.ilo.ch:1567/public/english/50normes/infleg/iloeng/newcountryframeE.htm>.

4. UNIVERSAL JURISDICTION AND EXTRATERRITORIAL REGULATION

Stretching the reach of domestic norms and adjudicators to rein in corporate activities beyond a country's borders may be another way in which the international community has an impact on natural resources management. There are two ways in which this could be attempted. On the one hand, is the practice of allowing cases with little or no connection with a given state to be heard in that state's courts through the application of the principle of universal jurisdiction.[52] On the other hand, is the possibility of extending the application of municipal law and policy outside the confines of the domestic territory. Examples of the latter practice have already been discussed in connection with trade and the GATT-WTO agreements and will not be re-visited here.[53] This section will concentrate on universal jurisdiction under the United States' (US) *Alien Tort Claims Act* and its impact on natural resources management outside the US.

A. Universal Jurisdiction under the US Alien Tort Claims Act

One of the positive outcomes of globalization is the possibility of accessing and sharing information across the globe in real time. As a result, the work of activist groups is facilitated and enhanced. Their message can promptly reach all the corners of the world; they can tap into a wide and rich pool of human resources and forge alliances with

[52] Universal jurisdiction allows states to exercise jurisdiction over persons in their territory suspected of crimes against humanity, no matter where such crimes took place. According to Oppenheim it represents "the recognition of the supremacy of the law of humanity over the law of the sovereign state when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind". Cited in Amnesty International, "Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation" available at: <web.amnesty.org/library/index/engior530082001?OpenDocument>.

[53] See discussion on GATT/WTO law and jurisprudence in Ch. III.

other groups as may be required by their cause. These alliances allow often marginal groups or causes to overcome practical and legal hurdles at home and abroad. A major hurdle and one that is sadly common in developing countries is the inefficiency and ineffectiveness of the courts. Therefore, access to alternative fora under the principle of universal jurisdiction is actively sought. Perhaps for economic or other reasons, including lack of sufficient knowledge and understanding of alien regimes as well as stringent standing requirements, few cases end up finding their way into foreign courts. However, of those that do, a vast majority has to do with natural resources' exploitation.

US federal courts have been particularly receptive to foreign victims' claims for violations of the law of nations[54] which are admitted under two statutes: the *Alien Tort Claims Act* (ATCA)[55] and the *Torture Victim Protection Act*. Of the two, ATCA is consistently used in human rights cases arising out of natural resources' exploitation projects in the developing world. The criteria for admissibility, however, are strict and only allegations concerning violations of the law of nations, i.e. well established, universally recognized norms of international law, are heard.

US case law has limited the interpretation of the content of the law of nations to a very narrow list of violations that meet the "specific, universal and obligatory" standard of ATCA. The violations that may be covered include genocide, war crimes, extrajudicial

[54] T. Collingsworth, "Separating Fact from Fiction in the Debate over Application of The Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations" (Spring 2003) 37 U. of San Francisco Law Review 563.
[55] 28 U.S.C. § 1350 (1994).

killing, slavery, torture, unlawful detention and crimes against humanity.[56] In fact, the courts are often criticized for not allowing environmental torts to be litigated in the US under ATCA.[57] Notwithstanding this limitation, human rights-based allegations have proved a good enough basis for accessing the US courts, including in those cases where environmental harm is part and parcel to the substance of the victims' claims.[58] Furthermore, ATCA allows suits to be brought against states as well as private persons. The latter, however, can only be held liable for *jus cogens* violations.[59]

The list of natural resources-related cases litigated in the US under ATCA is long and includes several *causes célèbres*, such as *Aguinda v. Texaco* in Ecuador, alleging large scale destruction and contamination of indigenous peoples' rain forest habitat leading to human rights violations and decimation of indigenous groups; *Wiwa v. Royal Dutch Petroleum Company* in Nigeria, involving the summary execution of an activist leader, Ken Saro Wiwa, for his activities protesting the company's and the government's human rights and environmental violations; *Bano v. Union Carbide* arising from the Bophal incident, India, where the release of a toxic chemical from a factory lead to the death of as much as 20,000 people;[60] and, the case filed against Unocal Corp. for using forced labour in the construction of a pipeline in Burma (Myanmar).[61]

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[56] The courts have approached the law of nations from an evolutionary stand-point. This signals the possibility of the expansion of this list in the future.
[57] See court's decision on dismissal: *Flores v. So. Peru Copper Corp.*, 2002 WL 1587224 at 9-10 (S.D. N.Y. 2002).
[58] N.L. Bridgeman, "Human Rights Litigation under the ATCA as Proxy for Environmental Claims" (2003) 6 Yale Hum. Rts. & Dev. L.J. 1.
[59] *Kadic v. Karadzic*, 70 F. 3d 232, 238 (2d Cir. 1995).
[60] For further information on the Bhopal incident see: <www.bhopal.org/whathappened.html> and <web.amnesty.org/pages/ec-bhopal-eng>.
[61] The Unocal case ended in a settlement in December 2004. For further information see: <www.laborrights.org/projects/corporate/unocal/index.html>.

The cases are a sticky diplomatic issue for US international relations and can easily end up in a dismissal on comity, *forum non convenient* and even political question grounds. However, regardless of their final outcome, the cases are a powerful driver of change in the developing world. Already, ATCA claims have proved instrumental in bringing about changes in how municipal laws and practices deal with natural resources decision-making and management. For example, since the Aguinda case was filed in 1993, the government of Ecuador has gone from siding with the defendant company for dismissal of the case in the US, to acknowledging the legitimacy of the proceedings in the US and promising to assist in the implementation of its outcome.[62] Legal and regulatory changes were also introduced in an attempt to instill accountability on companies and government officials in the management and exploitation of hydrocarbon resources.[63]

Whether due to the lawsuits *per se*, or to the negative attention they bring on countries' and governments' practices in connection with natural resources management, the impact is the same. Once again, though short of handing out specific rules to be implemented by developing states, in the end the manner in which states exercise permanent sovereignty follows outside prompts.

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[62] It should be noted that some recent reports denounce the government's (particularly the military) resumption of hostilities against the plaintiffs. For a summary of the case and main legal documents filed, including a letter from Ecuador's Attorney General in support of the plaintiff's suit in the US, see: <www.texacorainforest.com/case/index.htm>. See also Amnesty's International account in: <www.amnestyusa.org/business/sharepower/chevron.html>.

[63] The case is currently before Ecuadorian courts. Despite advances in Ecuadorian laws and regulations, the administration of justice, including the enforcement and judicial branch of Ecuador's system, continues to be very weak. Several reports of procedural irregularities and extrajudicial misconduct, including numerous threats and beatings of members and friends of the plaintiffs' party, have been reported. For additional information see the website of the Amazon Defense Coalition available at: <www.texacotoxico.com/eng/index.php?option=com_content&task=view&id=52&Itemid=53&PHPSESSID=d115678c90f07c048b5338fff40569d7>.

5. CASE STUDIES

A. Chile's Ralco Project

In 1989 the Chilean government approved an ambitious hydro-electric development plan for the upper Bio Bio River area on traditional indigenous Mapuche lands: the Pangue-Ralco Project. The Pangue-Ralco Project consisted of the construction and operation of a series of dams to be built along the Bio Bio River as well as of the additional support infrastructure for electricity generation. The project was to be undertaken by a newly privatized company, ENDESA, with funding from the International Financial Corporation (IFC), a subsidiary of the World Bank Group. Once completed, the project would supply 570 MW of electricity to mostly urban areas and would represent over 10% of the country's supply.

Thus, the local Mapuche, [64] who for centuries had lived in the upper Bio Bio practically undisturbed, became involved in a struggle to protect their land and water resources that lasted over 12 years until the signature of parallel agreements between the government and the Mapuche,[65] and between ENDESA and the last Mapuche families whose lands were affected by the dams' construction, put an end to the dispute.[66]

[64] The case involves the Mapuche-Pehuenche band.
[65] The agreement was presented to the Inter-American Commission of Human Rights as a negotiated solution to a complaint presented by the affected Mapuche families in December 2002. It was approved by the Commission on 11 March 2004. Its terms will be discussed below. OEA, Informe #30/04, Petición 4617/02, Solución Amistosa, M.J. Huenteao y Otras, Chile, 11 de marzo de 2004.
[66] "Tierra Pehuenche ahora es de Endesa" Chile, Diario El Sur, 19 Feb. 2004.

I. The Conflict

Once the plans for the Pangue-Ralco Project became known, with the support of non-governmental organizations, environmentalists and the government agency in charge of indigenous affairs, (CONADI-National Corporation for Indigenous Development),[67] Mapuche representatives raised concerns about the environmental and social impacts of building the proposed series of dams on the Bio Bio. They argued that since the first dam, Pangue, was designed to work in conjunction with a large upstream reservoir-dam (Ralco), the government ought to consider the cumulative environmental and social effects of building the two dams before giving approval to Pangue. Among the concerns cited were the project's impacts on the Bio Bio River, its ecosystem and on the communities dependent on it. It was argued that the natural flow of the river would be disturbed and that the quality of the water would be altered and would no longer be suitable for existing human and traditional uses. The project also required the displacement of the Mapuche families of the area, whose lands were to be flooded.[68]

Pangue resulted in a highly visible court battle between the Mapuche, environmentalists and other water rights' holders on one side, and ENDESA on the other. At issue was the

[67] CONADI was conceived under the auspices of the Nueva Imperial Agreement. Its subsequent creation by Law 19.253 of 1993 (the Indigenous Law) was welcomed by Chile's indigenous peoples who found that it's composition, including 8 elected indigenous representatives, was an important step towards the recognition of their rights. After a series of measures taken by the Chilean government, including replacement of several members and directors, the Commission's reputation suffered significantly and its independence from the administration is seriously questioned.

[68] L. Nesti, "The Mapuche-Pehuenche and the Ralco Dam on the Bio Bio River: The Difficult Protection of Indigenous Peoples' Right to (Their) Land" available at: <www.unisi.it/ricerca/centri/cisai/nesti.htm>. In addition to the impacts mentioned above, the Pangue dam would retain most of the natural nutrients that the river discharged in the Arauco Gulf, one of Chile's prime fishing grounds. See gen.: M. Baquedano, Instituto de Ecología Política, *La Batalla de Ralco* (LOM Ediciones Ltda., Santiago de Chile, Chile: 2004).

right of ENDESA to alter the Bio Bio River's flow in a manner that could potentially injure other water rights' holders. Strengthening the case against the dam's construction was the argument advanced by down-stream farmers who saw the potential reduced and uneven water flows as a threat for agriculture and their livelihoods. However, breaking ranks with its traditional protection of consumptive rights' holders[69] and reversing the Appellate Court's decision, Chile's Supreme Court decided in favour of ENDESA clearing the way for the dam's construction and dismissing the plaintiffs' claims as exaggerated and premature.[70]

Continued opposition to the project could not stop construction of the first of the dams planned, the Pangue dam, including building of access roads and relocation of families. Once Pangue had been completed, ENDESA forged ahead with its plans to build the Ralco dam 27 kilometers up-stream from Pangue. The expected social and environmental impacts of Ralco were far greater than Pangue's, including the displacement of 91 families. Mapuche opposition grew and, amidst much turmoil which included scandalous allegations of foul play on the part of the World Bank and the International Financial Corporation,[71] the families refused to be relocated.

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[69] For an explanation of the different categories of water rights see footnote 91 and accompanying text.
[70] Cited in C.J. Bauer, "Slippery Property Rights: Multiple Water Uses and the Neoliberal Model in Chile" (Winter 1998) 38 Nat. Resources J., 109. Case law in Latin America is not always commercially published and available as in North America. With some exceptions the author had to rely on secondary sources.
[71] The World Bank and the IFC were repeatedly denounced by members of the civil society for approving the project without a full EIA as required by World Bank policy, and for alleged abuses resulting from the project's implementation. On November 1995 the Grupo de Acción por el Bio Bio presented a claim before the Bank's Investigation Panel requesting a formal investigation. Although the petition was denied by the Panel, the Bank's President, J. Wolfensohn, ordered a special investigation headed by Dr. Jay Hair, an anthropologist. A similar, parallel, investigation was commissioned to another anthropologist, Dr. Theodore Downing, by the IFC concerning the Pehuen Foundation, an agency set up as a result of the IFC loan to provide local development support and offset the project's socioeconomic impacts. Both reports arrived at similar and highly critical conclusions, condemning the World Bank and the IFC for not following internal policy and documenting abuses resulting from the project's implementation. Although

After years of bitter legal disputes over the right of the government of Chile to allow the development of a hydroelectricity project in traditional indigenous lands involving significant environmental impacts on water and related resources as well as the displacement of the local inhabitants, in December 2002 a few indigenous women whose lands and families were the last remaining obstacle for the completion of the Ralco dam filed a complaint before the Inter American Commission. The complaint was based on the right to life, the right to humane treatment, the right to a fair trial, the right to freedom of conscience and religion, the rights of the family, the right to property and the right to judicial protection of the *American Convention on Human Rights*. At the time of the petition Ralco was 70% complete. The petitioners requested the Commission to issue precautionary measures to avoid the serious and irreparable harm that would ensue from the continuation of Ralco, particularly as a result of the imminent flooding of the reservoir. The precautionary measures were granted and the Commission requested Chilean authorities to abstain from undertaking any actions and to stay any proceedings that could result in the eviction of the petitioners from their traditional lands until the petition had been reviewed and the agencies of Inter American System had had a chance to issue their decisions.[72] The Commission never got to consider the merits of the case.[73] The complaint eventually resulted in an Amicable Agreement between Chile and the

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the results were initially withheld from the public and particularly the directly impacted Mapuche, increasing public pressure resulted in the release of the information and a public *mea culpa* on the part of the World Bank. American Anthropological Association, Committee for Human Rights, "The Pehuenche, the World Bank Group and ENDESA S.A" available at: <new.aaanet.org/committees/cfhr>; C. Opaso, "The Bio-Bio Project: A Lesson Not fully Learned by the World Bank" available at: <www.dams.org/kbase/submissions>.

[72] OEA, Comisión de Derechos Humanos, Informe No. 30/04, Petición 4617/02, Solución Amistosa, M.J. Huenteao Beroiza y Otras, Chile, 11 de marzo de 2004.

[73] Note that the Commission would have had to interpret the meaning and scope of Chile's reservation regarding the right to property.

petitioners that the Commission approved on 11 March 2004. Though loosely phrased, the Commission-brokered Agreement, including a series of conditions binding the government of Chile in future natural resources-related decisions with an impact on indigenous communities, marked a first step in curtailing the state's sovereign management and disposition powers over natural resources. [74]

Unfortunately, a progress report presented by the Mapuche to the ICHR on October 2004 severely criticizes the government of Chile for its unilateral approach and lack of cooperation regarding the Amicable Agreement's implementation. According to the October 2004 report, despite the promises made by the government of Chile, no attempts have been made to establish any channels of communication, exchange and consensus building with the Mapuche. The government is accused of foot-dragging in several fronts, including the constitutional recognition of indigenous peoples, ratification of ILO 169, and the satisfactory resolution of legal proceedings against indigenous leaders for their activities in connection to Ralco, such as the prosecution of Mr. V. Ancalaf under special "anti-terrorist" laws. [75]

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[74] For details of the Agreement of 16 September 2003, see: <www.mapuexpress.net/publicaciones/memorandum-ralko2.htm>. The government of Chile and the petitioners signed a simultaneous agreement where the government undertook several supplemental commitments aimed at securing the lands for ENDESA, available at: <www.mapuexpress.net/publicaciones/memorandum-ralko.htm>.

[75] At the time of the October 2004 report, Mr. Ancalaf had been found guilty of participating in the destruction of pieces of ENDESA's equipment and was facing the prospect of spending 5 years and 1 day in prison. Contrary to the Mapuche's expectations and underscoring the accusations made in the October report, his sentence was confirmed by Chile's Supreme Court on November 22, 2004; see: <www.nodo50.org/azkintuwe/noviembre29_1.htm>. The application of special anti-terrorist and national security laws to indigenous activists was an issue of special concern to the UN Special Rapporteur, Prof. Stavenhagen. Though predating it for almost a year, Prof. Stavenhagen's report echoes most of the general concerns voiced in the progress report. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile, UN, E/CN.4/2004/80/Add.3, ss. 31-40, Nov 17, 2003. For further information on the application of special laws to indigenous activists see the report

While the legal battles were taking place in Chile and before the Inter American System the issue was under the lens of the UN Commission on Human Rights Special Rapporteur on indigenous peoples who criticized the country for its handling of the Pangue-Ralco case.[76] Chile also received negative reviews from the UN Committee on Economic, Social and Cultural Rights for its treatment of indigenous peoples. On November 26, 2004, just days after the Supreme Court's pronouncement in the Ancalaf case reaffirmed the indigenous leader's prison sentence for his activities in connection with Ralco, and after reviewing Chile's first report on the status of economic, social and cultural rights under ICESCR, the Committee expressed regret over the existence of unsettled claims in connection with indigenous lands and resources and generally urged the country to address indigenous issues.[77]

Though Chile managed to complete the project, it was not without significant costs in time, resources and reputation. The bright light of the international human rights community continues to shine over Chile and its handling of its natural resources. It is doubtful that future projects of similar characteristics will be allowed to proceed unchallenged. Sovereignty may be permanent, but not at the expense of human rights.

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prepared by Human Rights Watch and the Observatorio de Derechos de los Pueblos Indígenas, "Undue Process" available at: <www.hrw.org/**reports/2004/chile**1004/4.htm>. Indigenous groups are also accusing the government of trying to undermine indigenous rights over traditional lands through an attempt to amend art. 17 of the Indigenous Law, regarding the indivisibility of small tracts of land. "Chile: Consejera Nacional de CONADI se opone a la subdivisión de la tierra,"available at: <www.quechuanetwork.org/news_template.cfm?lang=q&news_id=1996>

[76] See: <www.unhchr.ch/indigenous/rapporteur.htm>.

[77] It should be noted that the Committee is the body in charge of implementation of *Comment 15 on the Right to Water*. UN, CESCR, E/C.12/1/Add.105, Nov. 26, 2004. The CESCR also expressed concern regarding the lack of constitutional recognition of indigenous peoples and lack of ratification of ILO 169.

B. Colombia's U'wa Peoples

The case that pitted the U'wa indigenous community against a foreign petroleum consortium and the government of Colombia, has received the close attention of the International Labour Organization and the international community in general.

The conflict with the U'wa peoples started in 1992 when a consortium of foreign oil companies made up by Occidental and Shell bought petroleum exploration rights to a section of the Colombian territory traditionally occupied by the indigenous U'wa community. Despite the U'wa's opposition to the project, after implementing a much criticized consultation program, the consortium petitioned and obtained the approval of the environmental license to conduct seismic operations in the area. The U'wa continued to oppose the project and threatened to commit mass suicide in protest for the invasion of their lands. Two separate actions were initiated by the Public Defendant on behalf of the U'wa demanding the cancellation of the environmental license for lack of compliance with the country's domestic laws and particularly international obligations under ILO 169. While the Superior Court considered that the licence had been issued in violation of indigenous rights, the State Council confirmed the validity of the licence under dispute arguing that the consultation had proceeded according to existing law, i.e. Decree 1397, and was therefore sufficient. [78] In revising the decision of the Superior Court, the

[78] The State Council rejected the Defendant's motion on the basis that the duty to consult with the indigenous communities did not imply an absolute power to veto projects, but that it sought to arrive at agreements with, or obtain the consent of, those communities.
M. A. Santiago Reyes, Ecopetrol, "El Caso Samoré y la Comunidad U'wa" [on file with the author]. See also: <http://www.minambiente.gov.co/uwa/>. According to ONIC, Colombia's National Organization of Indigenous Peoples, the special relationship of the indigenous peoples with their land warrants consultation whenever a project may impact on those lands. Consultation in its view, goes beyond providing information

Supreme Court agreed with the State Council and ruled in favour of Occidental. In the final domestic round of litigation, the Constitutional Court determined that consultation had been insufficient to protect the U'wa's fundamental rights and decided in favour of granting a temporary suspension of the licence pending proper consultation.[79]

The conflict with the U'wa people played itself beyond the country's borders. Dissatisfied with the results obtained at home, in 1997, the U'wa filed a petition before the Inter American Commission on Human Rights. Around the same time, a Colombian petition for assistance to the OAS resulted in the set up of a special commission made up of OAS and Harvard University professionals. The OAS/Harvard Commission was entrusted with investigating and mediating the conflict. The OAS/Harvard Commission issued a report that called for: 1) an immediate and unconditional declaration from the oil companies committing to suspend plans for oil exploration and exploitation in the area; 2) advances in the process of titling U'wa lands; 3) moderation of public rhetoric from all parties; 4) recognition and respect for the U'wa system of authority and leadership; and, 5) other measures to promote understanding. Soon thereafter, the Inter American Commission issued a recommendation advising the parties to seek a friendly solution to the dispute.

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nd agreeing on how its people will participate as the Government pretends. In ONIC's view, it must onsist in an authorization from the part of the community and an agreement arrived at from the basis that e project will not harm the community. Colombia, ONIC, "Sobre el Petróleo" presentation at the public aring held between the U'wa Peoples and the Ministry of the Interior, Ministry of the Environment and inistry of Mines and Energy, Tamaría (Cubará), Boyacá, May 29 of 1997 [on file with the author].
See: <www.moles.org/uwa/crisis/news.html>.

Despite some efforts towards achieving a friendly solution, no progress could be achieved. In September 1999, the Ministry of the Environment issued another licence for exploratory drilling in the area known as Gibraltar 1. The licence was not issued in consultation with the U'wa under the pretext that the area in question was not part of the lands officially recognized as U'wa territory.[80] Further court proceedings and protests ensued.[81] The government of Colombia decided to militarize the area and a series of repressive actions were taken. The U'wa and their supporters renewed their efforts before domestic courts and petitioned the Inter American Commission for precautionary measures to put a halt to the hostilities against the U'wa.[82]

Eventually the international oil consortium dissolved and ended up withdrawing from the area. However, the Colombian government, through the state-owned oil company Ecopetrol, continued to act upon its determination to produce the oil that might be locked under U'wa territory. As a result, in 2001 Colombia was denounced before the International Labour Organization for failing to properly regulate and implement its duties under *Convention 169*. Upon investigation, the Organization concluded that the process of consultation, as provided for in Colombian law was not consistent with ILO 169 and requested the government to amend the legislation concerned, and that it improve the consultation procedures to come into conformity with the Convention's requirements. It also asked the government to provide information on a wide range of issues related to consultations with indigenous peoples when planning and carrying out

[80] See: <www.moles.org/uwa/crisis/chron99-00.html>.
[81] See: <www.minambiente.gov.co/uwa/>; <www.ecopetrol.com.co/>; and, M. A. Santiago Reyes, Ecopetrol, "El Caso Samoré y la Comunidad U'wa", *supra*, note 78.
[82] The case is # 11.754. No further information has been released by the Inter American Commission.

development projects that affect their land rights, particularly regarding mineral exploitation. A further request for information made in 2003 included information on the criteria applied in practice for the granting of concessions for extraction and exploration in indigenous areas, and reiterates its previous request for information regarding the manner in which indigenous peoples participate in the benefits of the exploitation. The ILO also insisted that the government of Colombia "*adopt all the necessary measures to guarantee that the U'wa people benefit from all the rights afforded by the Convention.*"[83] Unable to shake off international attention and scrutiny, the government of Colombia responded by asking the ILO's technical assistance to facilitate consultations with the U'wa peoples. In the meantime the resource is not being developed.

Beyond showcasing a government's powerlessness when human rights issues are combined with an active and driven stakeholder group and international attention, the case of the U'wa is also demonstrative of the significant impact of another aspect of globalization: communication technologies. Through the use of modern communication technologies and the media, the U'wa were able to reach and maintain an important support network amongst global non-governmental organizations and activists.[84] Their combined efforts have ensured the continued and worldwide visibility of the U'wa's plight, have enhanced government accountability in oil and gas decision making and had a decisive impact on the private oil companies' decision to withdraw from the project.

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[83] ILO, CEACR 2003, 74th. Session, Observations, <webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>

[84] In 1997 The U'wa Defense Project, a coalition of NGO's, is formed in the US. The coalition is made up by the Action Resource Center, Amazon Watch, Center for Justice and International Law, Colombian Human Rights Commission (DC), Earthjustice Legal Defense Fund, Earth Trust Foundation, Project Underground, Rainforest Action Network, and Sol Communications.

C. Ecuador: Aguinda v. Texaco/Chevron

Of all cases concerning natural resources and human rights, Ecuador's *Aguinda v. Texaco/Chevron* and accompanying cases have earned the distinction of being a showcase of the human rights community's zeal in pursuing human rights violations in connection with natural resources exploitation.

Since 1993, Aguinda plaintiffs and those of its companion cases in Peru and Ecuador have insistently requested the assistance of local and US courts as well as of international human rights organizations including the Inter American System on Human Rights,[85] the UN Commission on Human Rights,[86] and the International Commission of Jurists.[87] The plight of the South American plaintiffs has also garnered the support and assistance of prominent international non governmental organizations (NGOs) and *ad hoc* activist groups around the globe. Amnesty International, Amazon Watch, the Sierra Club, CorpWatch and EarthRights International, to name a few, are part of their support network.

In the US, Aguinda and related cases were eventually dismissed in deference to the local courts (*forum non convenient*). Though this outcome could be hailed as a victory for permanent sovereignty, the case continues to attract international attention and intervention. Indeed, legal battles around oil exploitation, including but not limited to

[85] See: <www.amazonwatch.org/amazon/EC/view_news.php?id=1198>.
[86] See: <chevrontoxico.com/article.php?id=300>.
[87] See: <www.icj.org/news.php3?id_article=3942&lang=en>.

Aguinda, continue to take place on Ecuadorian soil where the many failings of the justice system and the resurgence of governmental hostility against the Aguinda plaintiffs and their supporters have opened the door to intervention by the Inter American Commission and the Inter American Court on Human Rights. Local government leaders are increasingly under international pressure to apply internationally sanctioned rules and practices as well as to rectify the situation uncovered in Aguinda. Illustrative of this was the reaction of the Ecuadorian Minister of Energy and Mines to a recent decision on precautionary measures by the Inter American Commission. The decision was met with defiance by the Minister who was prompted to exclaim that "the OAS does not give orders [in Ecuador]."[88]

Despite the government's posturing, the ripple effects of Aguinda and sister suits can already be felt across the country and South America. Community groups inside and outside Ecuador,[89] backed by a strong international support network, have been empowered to stand up to the government and request participation in natural resources decision-making and management. Recently, two additional oil concessions in Ecuador were suspended as a result of local opposition,[90] and local communities have found a powerful ally in responsible investment funds, which are increasing the pressure on companies to clean up their act.[91] The repercussions of their activities might prompt state decision makers into injecting transparency and accountability to their performance in

[88] See: EarthRights International, "Achuar Nation Wins Landmark Agreement to Stop Toxic Contamination of their Lands" (24 October 2006), available at: <www.earthrights.org/campaignfeature/achuarwin.html>.
[89] EarthRights International, *id*; Amazon Watch, Ecuador Report (14 August 2006), available at: <www.amazonwatch.org/amazon/EC/view_news.php?id=1198>.
[90] See: EarthRights International, *id.*
[91] See e.g.: <www.bostoncommonasset.com/news/burlington-amazon.html>.

natural resources management in order to project an image that is attractive to investors and assuages companies' worries about increased shareholder activism. Local and global stakeholders stand fast to guide governments in this aspect of their exercise of permanent sovereignty, to monitor their performance and to press for changes where necessary.

6. CONCLUSION

Perhaps the most remarkable transformation of the principle of sovereignty over natural resources that can be noted through the analysis of the law and work of the human rights bodies and tribunals dealt with in this chapter is that the principle's application is now beginning to stretch beyond the protection of collective rights as represented by the state. While the rights to self-determination and development provided the original basis for the collective claim to sovereignty over natural resources during decolonization and independence, individual human rights as interpreted by international and regional human rights bodies can be seen to operate a distribution of the attributes (risks and benefits) of sovereignty over natural resources among the individuals populating the states.

Past decisions on resource use and allocation, including the distribution of risk and benefit, were the exclusive domain of government bureaucrats. That can seldom be said to be the case today. Largely as a result of international developments, stakeholder participation is increasingly a feature of resource decision-making processes. In the Americas, absent participation and any other requisites to ensure that the well being derived from resource use is widespread and that the full enjoyment of human rights is

guaranteed, human rights bodies, particularly the organs of the Inter American System and the ILO, are not shy about interfering with a state's sovereign rights over resources. In addition, US courts may be leading a trend, -soon to be followed by other countries-,[92] in their increasing willingness to intervene in natural resource-related cases when human rights are at stake. Thus, the application of human rights' law to natural resources' issues seems to be taking the next most logical step in the area of international natural resources law: from equality amongst states to equality amongst individuals within states, in the enjoyment of the benefits derived from the use and possession of natural resources.[93]

Notwithstanding some substantial progress towards ensuring equitable management of natural resources for the benefit and well being of all prompted by human rights law, a disturbing fact remains. In the great majority of the cases to date, the strength of the individual claims, petitions, findings and resolutions lies in the protection owed to indigenous peoples as a group. Indeed, of late, indigenous peoples and their cause command such attention and have such a presence in the international arena that their claims cannot be easily ignored.[94] However laudable the attention and protection afforded to this group might be, indigenous peoples do not necessarily represent all of a country's peoples, not even all the poor and marginalized peoples. One cannot help but to wonder whether the human rights' community would be equally bold about interfering with states' permanent sovereignty over natural resources when indigenous peoples' issues are not at stake.

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[92] Though in a different kind of cases, Spanish and Belgian courts are two, very active, examples.
[93] An equitable distribution of benefits assumes an equally equitable distribution of risks.
[94] For and excellent account of the historical treatment of indigenous rights to land and resources see: A. Huff, "Indigenous Land Rights and the New Self-Determination" (2005) 16 Colo. J. Int'l Envtl. L.& Pol'y 295.

Also alarming is the transnational corporations' perseverance in defending and perpetuating reprehensible corporate practices in the developing world. It becomes more worrisome in light of the fact that the states' responses to human rights' tribunals' recommendations and decisions are often slow or practically non-existent.[95]

[95] An example is a recent US initiative to sell public lands, including Western Shoshone lands. See press release from U.S. Representative Nick Rahall, 5 Nov. 2005, <http://www.house.gov/apps/list/press/ii00_democrats/budgetmininglaw.html>. On the progress made by Nicaragua a year after the Court's decision, see J.P. Vuotto, "Awas Tingni v. Nicaragua: International Precedent for Indigenous Land Rights?" 22 B.U. Int'l L.J. 219; regarding Chile and Ralco see: CASO P-4617-02 – MERCEDES JULIA HUENTEAO Y OTRAS V. CHILE, INFORME SOBRE ESTADO DEL ACUERDO DE SOLUCION AMISTOSA, 14 de octubre de 2004, available at <www.derechosindigenas.cl/Observatorio/documentos/ralko_271004.htm>; and L.K. Barrera-Hernández, "Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water" (Spring 2005) XI Golden Gate Annual Survey of International & Comparative Law.

CHAPTER V

Natural Resources and International Environmental Law: Another Brick in the Wall

1. INTRODUCTION

In recent years, the legal community has seen the rapid proliferation of international environmental law. Indeed, some sources estimate in over four hundred the number of international environmental agreements, half of which have been introduced over the last 25 years.[1] From the early days of bilateral, single resource protection agreements, environmental treaties have evolved to become complex webs of objectives and commitments covering entire ecosystems and regions, or, increasingly, the entire world. Though treaties signify a country's willingness to bow to international law and authorities, the sheer number of commitments and obligations that they embody land domestic resource administrators in an intricate labyrinth of legal requirements and conditions that added up can significantly curtail their freedom of action. In addition, negotiations for some international environmental agreements may have unexpected impacts over natural resources management in the developing world, an impact that is only now starting to become evident.

[1] Canada, *British Columbia Guide to Watershed Law and Planning*, available at: <www.bcwatersheds.org/issues/water/bcgwlp/s3.shtml>; Environmental Treaties and Resource Indicators (ENTRI) Database, available at: <sedac.ciesin.columbia.edu/entri/treatyTexts.jsp>.

Adding to the voluntary written commitments embodied in treaties, international custom and principles have also evolved to incorporate the main environmental law tenets.[2] To top things off, environmental law has evolved from being reactive to proactive, thus forcing a shift in decision-makers' and administrators' attention from post-decision management of environmental issues to preventing and mitigating impacts at the planning stages of resource development and management.

Unlike local environmental norms, where the duty to abide by environmental rules is owed to the local people, the duty to respect international environmental law in domestic decisions on resource management is owed to the international community. Non-compliance has international repercussions. While in the dawn of the environmental movement low levels of environmental awareness coupled with relatively slow communications determined that in most cases repercussions were negligible, nowadays, they can be significant. Global warming is a case in point, with the remaining recalcitrant countries increasingly the subject of pressure and criticism. In South America, an example of this shift in attitudes is provided by the current conflict between Argentina and Uruguay over the establishment of two paper mills on the Uruguayan margin of a shared watercourse. For decades, the shores on both sides have seen the establishment of industrial and other undertakings with no major repercussions on either side of the river. However, today the new paper mill projects are being fiercely opposed by the Argentine public and authorities on environmental grounds. The otherwise cordial relations between

[2] Art. 38 of Statute of the International Court of Justice enumerates primary international law sources as being: treaties, custom and principles of international law; <www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_II>.

both countries are at an all time low, and the case is a matter of discussion at the headquarters of the World Bank and the Peace Palace in The Hague.

The following sections survey the extent to which natural resource management decisions are increasingly constrained by current international environmental law. The analysis will focus on three core substantive principles of international environmental law: 1) intergenerational equity; 2) good neighbourliness; and, 3) fair and equitable utilization of shared resources.[3] It will show that although some of these principles may be embodied in environmental and resource-related agreements voluntarily entered into by states, their existence and operative-ness is independent from them and is unaffected by seemingly conflicting principles of international environmental law. Whether treaty, custom or principle-based, their impact on a country's natural resources management practices and rules is increasing, particularly in the developing world. Finally, through the specific example of the Climate Change agreements, this section will illustrate the extent to which even voluntary undertakings may have far reaching, though scarcely discussed, sovereignty-eroding effects.

[3] Only the more established principles are dealt with. Others, like the precautionary principle or sustainable development, may have similar sovereignty-abrogating effects.

2. INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES

A. Intergenerational Equity

Intergenerational equity is a principle that can be easily and directly linked to natural resources management. It refers to the ability of future generations to enjoy and benefit from the earth's natural endowments in the same or as similar as possible a manner as present ones. Corollary of this ability is the present generations' duty to protect and conserve the environment and resources.

Several international environmental agreements refer to this principle. As early as 1972, The *Stockholm Declaration*, Principle 1, affirmed that: "*Man ... bears a solemn responsibility to protect and improve the environment for present and future generations*." Most importantly, Principle 2 states:

> *The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.*[4]

Intergenerational equity is also the cornerstone of sustainable development as defined by the Brundtland Commission in its historical report.[5] Furthermore, the *Rio Declaration on Environment and Development* subjects the right to development to the developmental

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[4] UN, *Declaration of the United Nation Conference on the Human Environment*, available at: <www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>.

[5] Sustainable development was defined by the Commission as: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." World Commission on Environment and Development, *Our Common Future (*Oxford, UK: Oxford University Press, 1987) at 43. The concept has been criticized as vague or pro-development, and is the subject of much debate. Contra: G. Mayeda, "Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law" (Winter 2004) 15 Colo. J. Int'l Envtl. L. & Pol'y 29.

and environmental needs of not just present but of future generations.[6] In addition, beyond the soft law treaties referred to, intergenerational equity formulations can be found in many other environmental agreements. Examples are the 1979 *London Ocean Dumping Convention*,[7] the 1973 *Convention on International Trade in Endangered Species*,[8] and the 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage*.[9]

In 1996, the dissenting opinion of Judge Weeramantry of the International Court of Justice in the *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons*, reaffirmed the status of the principle as a source of international law by stating that:

> *[T]he rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.*

And also that:

> *[T]his Court would fail in its trust if it did not take serious note of the ways in which the distant future is protected by present law. The ideals of the United Nations Charter do not limit themselves to the present, for they look forward to the promotion of social progress and better standards of life, and they fix their vision, not only on the present, but on "succeeding generations".*[10]

Principle 3 ; <www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>.
Available at: <www.londonconvention.org>.
Available at: <www.cites.org>.
Available at: <whc.unesco.org/pg.cfm>.
ICJ, Advisory Opinion of 8 July 1996, <www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm>. See also rder of 22 September 1995 (NZ v. France); <www.icj-cij.org/icjwww/icases/inzfr/inzfrframe.htm>.

The concept of intergenerational equity formulated and developed in international fora, and currently part of the catalogue of principles that serve as sources of international environmental law, has a direct impact on domestic decision-making. One could ask, however, how this principle translates into legal imperatives when it is not spelled out in the specific norms and commitments of an international agreement. Perhaps no other scholar has devoted as much attention to the subject as Professor Edith Brown Weiss. Her teachings might be of assistance in finding an answer.

Professor Weiss argues that "we are part of the natural system and that we hold the global environment in common with past, present and future generations of the human species. We have both rights to use it for our own benefit and obligations to care for it for our generation and future generations."[11] According to her writings, three types of obligations may be derived from the principle:

1. diversity conservation;
2. environmental quality conservation and enhancement; and,
3. equitable access to natural resources.[12]

One difficulty that arises in the implementation of those duties is that of the legal representation of future generations. Who can legitimately speak for or bring a claim in name of unborn generations? While Judge Weeramantry in the *Advisory Opinion* found

[11] E. Brown Weiss, "The Rise or the Fall of International Law?" (Nov. 2000) 69 Fordham L. Rev. 345, at 369.

[12] Some contend that the same requirements apply to environmental protection for present generations; the distinction is considered moot. D.B. Gatmaytan, "The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory" (2003) 15 Geo. Int'l Envtl. L. Rev. 457; P.A. Barresi, "Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena" (Winter 1997) 11 Tul. Envt'l L.J. 59.

no impediment in placing that burden squarely on the states, the issue could become more contentious at the municipal level. This difficulty was overcome in the case of *A. Oposa et al v. F. Factoran* decided by the Philippines' Supreme Court in 1993.

The Oposa case was brought to the courts by a group of children and their parents who, in the name of their own generation and those to come, sued the state's administration demanding cancellation of existing logging licenses and an indefinite moratorium of logging activities in the Philippine rain forest. In granting them standing to sue in a class action the Philippine Supreme Court affirmed that:

> *This case ... has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." ...Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.*[13]

In recognizing the right to a sound environment as sufficient grounds to bring action, the Supreme Court based the petitioners' standing on a duty to preserve that right for future generations.[14] The decision has been celebrated outside the Philippines as a significant

[13] Philippines, Supreme Court, G.R. No. 101083 July 30, 1993, available at: <www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html>.
[14] The case is grounded on a substantive right to the environment. The right is far from being universally recognized.

advance in the development of environmental law,[15] and is already being used to gain access to the courts in other jurisdictions.[16]

Although the direct impact of the intergenerational equity principle on current municipal practices may be limited, the day may not be far off when a country is taken to an international court for failing to take into account future generations in its management of a natural resource. Unlike other principles that order neighbour relations or the use of shared (sovereignty) resources, intergenerational equity-based complaints could be legitimately launched from anywhere around the world. How long will it be before the issue finds its way into some international adjudicatory forum? In fact, the tiny island-state of Tuvalu has already threatened to take action before the ICJ against the United States and other polluter countries for failing to ratify the *Kyoto Protocol*.[17] The weak environmental record of most South American countries makes them easy targets for this kind of action. The fact that they host the largest share of the remaining global biodiversity resources is also a magnet for intergenerational equity based concerns and challenges.[18] Deforestation in the Amazon, for example, is a constant target of international campaigning and petitions.[19] It comes as no surprise then that Brazil, for

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[15] See e.g.: M.S.Z. Manguiat and V.P.B. Yu III, "Maximizing the Value of Oposa v. Factoran" (2003) 15 Geo. Int'l Envtl. L. Rev. 487; UNDP, Human Development Report 2000 Background Paper, A. Dias, "Human Rights, Environment and Development: With Special Emphasis on Corporate Accountability" available at: <hdr.undp.org/docs/publications/background_papers/Dias2000.html>. Some authors contend that recourse to intergenerational equity as a means to access environmental protection is unnecessary and cumbersome in so far as the same result can be achieved by purporting to protect the environment for present generations. See e.g.: D.B. Gatmaytan, *supra*, note 12; P.A. Barresi, *supra*, note 12.

[16] E.g.: *Farooque v. Bangladesh* cited in M.S.Z. Manguiat and V.P.B. Yu III, *supra*, note 15 at 494.

[17] R.E. Jacobs, "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States the International Court of Justice" (January 2005) 14 Pac. Rim. L. & Pol'y J. 103.

[18] United Nations Environment Programme, Global Environmental Outlook 2000, www.unep.org/geo2000/english/0087.htm>.

[19] E.g.: Greenpeace, "Soya traders agree to a moratorium on Amazon deforestation following customer pressure" (July 25, 2006), available at: <http://www.greenpeace.org/international/press/releases/soya-

example, has already moved to review its policies and efforts to enhance the protection of its share of the Amazonian forest.[20]

B. Good Neighbourliness

The good neighbour principle, or the obligation not to cause transboundary harm, made its environmental debut[21] in a case concerning pollution damages caused in the US by a smelter located in Canada. The case, know as the *Trail Smelter* case,[22] was awarded by a special treaty-made arbitral tribunal. The tribunal found that according to international law,

> *no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*[23]

The rule, later incorporated to the *Stockholm Declaration* under Principle 21 and into other international agreements,[24] is nowadays accepted as customary international law.[25]

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traders-agree-to-a-morato>. See also: D. Howden, "BRAZIL: Eating the Amazon: The fight to curb corporate destruction" (July 17, 2006), available at: <www.corpwatch.org/article.php?id=13908>. As in Tuvalu's case, deforestation in the Amazon basin could be brought to the ICJ's attention by an island or low lying state that finds that it adds to and accelerates the effects of global warming thereby escalating threats to its existence.

[20] Mongobay.com, "Brazil Takes Action to Slow Amazon Rainforest Loss" <rainforests.mongabay.com/amazon/external_nov04.html>.

[21] E.L. Hughes *et al*, *Environmental Law and Policy*, 3rd. ed., (Toronto, Canada: Emond Montgomery Publications Ltd., 2003). The same principle in a non-environmental context was applied in the ICJ's decision in the *Corfu Channel Case*, (UK v. Albania), 1949 I.C.J. 4, 22 (Apr. 9).

[22] *United States v. Canada*, Arbitral Tribunal, Montreal 16 April 1938 and 11 March 1941; *United Nations Reports of International Arbitral Awards* 3 (1947) 1905.

[23] *Id* at 1965.

[24] E.g.: 1982 *UN Convention on the Law of the Sea*; 1997 *UN Watercourse Convention*; UN GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50, art. 30.

[25] The United States courts, for example, have referred to its incorporation in the *Rio Declaration on Environment and Development* as evidence of state practice in *Aguinda v Texaco.* (1996) US Dist. LEXIS 16884 (SDNY 12 November 1996). The US had previously renounced the doctrine supporting absolute territorial sovereignty over natural resources originating solely within one state known as the Harmon Doctrine. L. Waldron Davis, "Reversing the Flow: International Law and Chinese Hydropower Development on the Headwaters of the Mekong River" (Summer 2006) 19 N.Y. Int'l L. Rev. 1.

It recognizes a state's sovereign right to exploit its natural resources while subjecting it to *"the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."*[26]

Although the corollary rules on state liability for transboundary harm are highly context-dependant and remain unsettled,[27] states are nevertheless obliged under customary international law to take steps to ensure that natural resources' activities within their territories do not cause unacceptable harm to its neighbours.[28] Applying due diligence to assess and avoid transboundary harm will always be a requirement limiting a state's options in the management of its natural resources. Failure to take specific assessment, avoidance or mitigation measures and to regulate accordingly would be a breach of a country's international environmental law obligations. In some cases, the costs of litigating potential breaches could be such that the benefits of a resource undertaking that does not abide by the good neighbour principle could be entirely wiped out.[29]

One author argues that the principle was already inherently a part of the principle of permanent sovereignty. See: F.X. Perrez, "The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage" (Winter 1996) 26 Envt'l L. 1187.

[26] *Declaration of the United Nations Conference on the Human Environment* (Stockholm Declaration), Principle 21. Note that Principle 21 dropped the "serious consequence" standard of the *Trail Smelter* case. <www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>.

[27] See discussion on international liability for injurious consequences arising out of acts not prohibited under international law in the website of the International Law Commission, available at: <untreaty.un.org/ilc/summaries/9.htm>. See also: A.E. Boyle, "Globalising Environmental Liability: The Interplay of National and International Law" (2005) 17 J. Envtl. L. 3.

[28] One author suggests that the *Trail Smelter* precedent implies an obligation to negotiate and arbitrate disputes. M.T. Delcomyn, "Arctic National Wildlife Refuge Oil: Canadian and Gwich'in Indian Legal Responses to 1002 Area Development" (Summer 2004) 24 N. Ill. U.L. Rev. 789.

[29] See e.g.: M.T. Delcomyn, *id*, referring to the litigation that may follow a US decision to open up a wildlife sanctuary in Alaska to oil development and concluding that the litigation costs may spoil the economics of the decision. If such is the case with US and Canada regarding oil exploitation, a similar situation in SA could be potentially ruinous. Already, the dispute between Argentina and Uruguay referred to above has ramped up a significant bill and prejudiced the economies of both countries.

C. Reasonable and Equitable Use of Shared Resources

Shared resources are those straddling more than one country,[30] like a body of water along the boundary lines of two countries or a mineral deposit that stretches on either side of those lines. They are different from the global commons in that countries can and do have legitimate sovereignty claims over them. On the contrary, the global commons are the "common heritage of mankind" or *res communis*, i.e. no sovereign rights to the resources are recognized by the community of states which shares the resources in common.[31] While some resources, like biodiversity, have been labeled a "common interest of mankind," that designation does not interfere with sovereign rights over the resources it applies to. On the contrary, the coining of the phrase reflects developing countries' zeal in retaining their sovereign rights over local resources, which, like biodiversity, have such value and potential that the whole world has a stake in their preservation and use, and would like to see them catalogued as "global commons."[32]

Art 3 of the 1974 *Charter of Economic Rights and Duties of States*[33] imposes on countries a duty to cooperate and consult regarding the use of shared natural resources to avoid damages to the legitimate interests of their counterparts. The inclusion of this duty in the *Charter*, following a motion by Argentina, was not welcome by some developing countries, most prominently Brazil. According to that country, the provision could only apply to shared sovereignty resources, such as boundary rivers, but not to the part of a

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[30] Straddling fish stocks move from coastal waters to the high seas and are shared by several fishing nations.
[31] Some examples of global commons are: deep sea beds, the atmosphere and outer space.
[32] J. Schwartz, 'Whose Woods These Are I Think I Know': How Kyoto May Change Who Controls Biodiversity" (2006) 14 N.Y.U. Envt'l L.J. 421.
[33] GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50.

shared resource that is entirely within a state's territory where application of the good neighbourliness principle (duty to avoid transboundary harm), wherever relevant, was seen to suffice. The contrary, according to that country, would render permanent sovereignty devoid of any content. [34] Despite opposition, the principle is now an established rule of customary international law that requires countries to ensure that their use of a shared resource is both reasonable and equitable.[35] It's application, however, is highly context-dependant and has led to the subscription of a myriad of multilateral agreements of specific application to the numerous existing shared resources.[36] Fish stocks and bodies of water,[37] typical examples of shared resources, are the subject of the vast majority of multilateral agreements.[38] In fact, it was a water-related agreement: the 1966 International Law Association's *Helsinki Rules on the Uses of the Waters of International Rivers* that codified the principle for the first time.[39] The *Helsinki Rules* provided a set of criteria to determine compliance with the principle in relation to

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[34] M. Bulajić, *Principles of International Development Law*, 2nd. Edition, (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1993).

[35] E. Hughes *et al*, *supra*, note 21. Contra: S. Upadhye, "The International Watercourse: An Exploitable Recourse for a Developing Nation Under International Law ?" (Spring 2000) 8 Cardozo J. Int'l & Comp. L. 61.

[36] A.T. Wolf, "Criteria for equitable allocations: The heart of international water conflict" (February 1999) v. 23:1, Natural Resources Forum, 3.

[37] The world's 263 international river basins cover almost half of the surface of the earth. Some 145 countries are classified as riparian to these transboundary basins, and about 45% of the world's population lives in internationally shared river basins. Over 50% of the available surface water is located in transboundary basins. Program, World Water Week, Aug. 20-26, 2006, <www.worldwaterweek.org/>.

[38] Report of the 52nd. Conference (August 1966). Similar principles are contained in the *1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses* (not in force); (1997) vol. 36 International Legal Materials 703. The International Law Commission is currently working on rules for shared underground resources that are not covered by the *UN Convention on the Law of the Non-navigational Uses of International Watercourses*. Following a recommendation by the Special Rapporteur, the ILC concentrated its efforts on groundwater (aquifers) while voicing its firm reluctance to deal with the regulation of oil and gas, "whose problems were of a different nature and which were usually addressed through diplomatic and legal processes." Report of the ILC Shared Resources Workgroup Chairman, E. Candioti, to the Fifty-eighth General Assembly, Press Release, GA/L/3242, 03/11/2003, <www.un.org/news/Press/docs/2003/gal3243.doc.htm>. For additional information on the ILC's work on shared resources see: <www.un.org/law/ilc/>. The ILA has also issued the *Seoul Rules on International Groundwaters*, <www.internationalwaterlaw.org/IntlDocs/Seoul_Rules.htm>. Most agreements are specific to certain countries and resources.

[39] Available at: <www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm>.

navigable watercourses. Nowadays, current advances in knowledge and environmental awareness have determined that much larger "baskets" of resources such as watersheds and entire ecosystems are increasingly the focus of this legal principle and its codification.

Equity and reasonableness in the management of shared natural resources are hard to define in abstract.[40] At a minimum, the principle embodies a state's right to fair development of shared resources and a duty to consult and to negotiate in good faith.[41] These obligations were highlighted by the arbitral tribunal deciding the 1956 *Lac Lanoux case* between Spain and France. [42] The case, often cited as the landmark decision on equitable and reasonable access, dealt with France's intention to divert the waters of a

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[40] Both the *Helsinki Rules* and the 1997 *UN Convention* provide some guidance. The *UN Convention*, art. 6.1 lists factors that are relevant to equitable and reasonable utilization as including:
(*a*) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
(*b*) The social and economic needs of the watercourse States concerned;
(*c*) The population dependent on the watercourse in each watercourse State;
(*d*) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
(*e*) Existing and potential uses of the watercourse;
(*f*) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
(g) The availability of alternatives, of comparable value, to a particular planned or existing use.
<untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf>.

[41] For example, Art. 63 of the *United Nations Convention on the Law of the Sea* (UNCLOS), dealing with shared stocks of living resources states:

> *1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.*
>
> *2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.*

<www.un.org/depts/los/convention_agreements/texts/unclos/part5.htm>.

[42] UNEP, Compendium of Judicial Decisions on Matters Pertaining to the Environment. International Decisions, Vol. I, December 1998.

watercourse shared with in Spain. The waters would be used for hydroelectricity generation and later returned to their course which flows into Spain. The works were to take place entirely in French territory. The dispute was decided in the context of the 1866 *Treaty of Bayonne* between France and Spain. Striking a balance between the rights of both states, the tribunal's award rejected France's claim of absolute sovereignty while negating Spain's right to veto reasonable upstream development in France. It found that "the upstream State has a right of initiative ... provided it takes into account in a reasonable manner the interest of the downstream State."[43]

According to some scholars, particularly those that specialize in water resources, the practical application of this principle of international law traditionally favours pre-existing, (mostly commercial), uses.[44] However, equity and reasonableness may be evolving to include a less utilitarian, development-oriented approach to management of shared resources. This shift is reflected in the ICJ's decision in the *Gabcikovo-Nagymaros Project* case.[45]

The *Gabcikovo-Nagymaros* case resulted from the implementation of an investment treaty between Slovakia and Hungary to develop a shared section of the Danube for hydroelectricity and other purposes. While Slovakia dutifully complied with its commitments, Hungary stalled and eventually renounced the treaty on the basis of its potential to cause negative environmental and economic impacts. Subsequently, Slovakia

[43] Cited in A.T. Wolf, *supra*, note 36.
[44] A.D. Tarlock, "Safeguarding International River Ecosystems in Times of Scarcity" (Spring 2000) 3 U. Denv. Water L. Rev. 231; A.T. Wolf, *supra*, note 36.
[45] ICJ, <www.icj-cij.org/icjwww/idocket/ihs/ihsframe.htm>.

implemented an alternative development plan, unilaterally assuming control of the resource. According to A. D. Tarlock, a well reputed scholar in the area, in confirming the validity of the investment treaty and insisting on a negotiated outcome, the ICJ's decision:

> *firmly establishes that international rivers are shared resources subject to the principle of equitable apportionment and that all riparian states have equal rights to enjoy both the commodity and non-commodity ecological benefits of the river, hydrologically connected groundwater, and the riparian corridors. ... the opinion integrates the merging norms of international environmental protection and the law of international watercourses into the law of treaties and water management, clearly establishing that the doctrine of equitable apportionment is the grundnorm* [sic] *of international water law.*[46]

Though referring specifically to water resources, the case affirms that equity and reasonableness in the use of shared resources now requires striking a balance amongst the environmental, social and economic factors implicated in resource management decisions. Indeed, while the sole motivation behind early shared resource agreements was to maximize and optimize consumptive uses,[47] -for which conservation was a necessary premise-, increasingly, modern treaty making and interpretation includes a preoccupation for ecosystem integrity and sustainability. This shift, however, is neither complete nor fast as exemplified by the 1997 *UN Convention on the Law of the Non-navigational Uses*

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[46] A.D. Tarlock, *supra*, note 44, at 245. Judge Weeramantry's separate opinion is also significant. In it, he highlights the importance of balancing developmental and environmental considerations and embraces the notion of sustainable development as a principle with "normative value" in international law. ICJ, Separate Opinion of Vice-President Weeramantry, <www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm>. In 1998 Slovakia requested an additional Judgment mandating Hungary to implement the Court's decision.

[47] E. g.: UNCLOS, Art. 62:

> *The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.*

Art. 61 imposes on coastal states a duty to take conservation measures to maintain "maximum sustainable yield." <www.un.org/depts/los/convention_agreements/texts/unclos/part5.htm>.

of International Watercourses which continues to subordinate ecosystem sustainability to optimum use. Eventually, the principle of equitable and reasonable use could fully evolve into that of equitable and reasonable management to better accommodate the adaptability requirements of ecosystem protection and (sustainable) development.[48] In the end, the duty to consult and negotiate attached to reasonable and equitable use may make joint management, as proposed by the ICJ in the Slovakia-Hungary dispute, an increasingly common feature of shared resources regimes and a requirement of international environmental law.[49]

D. A Note on Procedural Principles

As may be concluded from the discussion above, the operation of all three international law principles: intergenerational equity, good neighbourliness and equitable and reasonable use, rests on the effective implementation of indispensable procedural mechanisms. Access to information, participation and justice are part and parcel to the implementation of the substantive principles reviewed. The adoption by states of tools that implement those principles is a fundamental step towards achieving full compliance with the requirements of international environmental law.

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[48] A.D. Tarlock, *supra*, note 44.

[49] Numerous joint management regimes are currently operative under multilateral treaties. One example is the Joint Norwegian-Russian Fisheries Commission to manage fish stocks in the Barents Sea. For more information on the Commission see: <www.fni.no/projects/norwegian_russian_fisheries_commission.html>. In the case of shared water systems, it would be interesting to find out if seasonal water transfers across borders may trigger the application of GATT rules under WTO resulting in an obligation to open bulk water trade generally.

3. INTERNATIONAL ENVIRONMENTAL LAW IN CONTEXT. CLIMATE CHANGE: OFF THE HOOK OR GRAPPLING FOR AIR?

A. The Principle of Common but Differentiated Responsibilities as Sovereignty's Shield

Despite the entrenchment of the legal principles of intergenerational equity, good neighbourliness and equitable and reasonable use in international law, the emergence of some novel principles such as "common but differentiated responsibilities" and, possibly, "sustainable development" emphasizing, among others, the idea of growth as necessary to combat poverty-derived environmental deterioration, may cast some doubt as to their applicability to developing nations. The issue can be easily illustrated with reference to the international legal framework to combat climate change.

Among the instruments adopted for signature at the 1992 *Rio Conference on Environment and Development* was the text of the *United Nations Framework Convention on Climate Change* (UNFCCC – the Convention).[50] The Convention, an agreement to curb emissions of the greenhouse gases (GHGs) responsible for climate change, entered into force in 1994. Shortly afterwards, the *Kyoto Protocol* (the Protocol), designed to reinforce the commitments made in the Convention through the inclusion of measurable emission abatement targets, was adopted in 1997 in Kyoto, Japan.[51]

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[50] (1992) I.L.M. 849; <http://unfccc.int/2860.php>.

[51] Un. Doc. FCCC/CP/1997/L.7/Add.I; <unfccc.int/essential_background/kyoto_protocol/background/items/1351.php>. Opened for signature in 1998; in force since February 2005.

Under the Convention, developed (Annex I) countries, committed to cutting their emissions of greenhouse gases to the levels of 1990 by the year 2000. Developing countries (Annex II Parties), including all of South America, were not bound by that target. Rather, they were expected to achieve the Convention's goals through a series of house-keeping activities including the preparation of GHG inventories and national mitigation plans. The commitments of the Convention were hardened in the *Kyoto Protocol*, where developing countries adopted legally binding reduction targets to be achieved by the years 2008-2012. Collectively, those commitments amount to an average reduction of six greenhouse gases by 5.2 per cent. No quantitative reductions were included for developing countries in Kyoto.

Climate change is one of the most talked about and hotly debated environmental issues of the day. Its complexity, implications and scale is such that it is easier to blame it on the neighbours than to take steps to address it. In fact, developing countries have prompted the codification of this "blame thy neighbour" approach into environmental international law as the principle of "common but differentiated responsibilities." And blame they can. Indeed, to continue with the example of greenhouse gases, there is no dearth of data and studies to demonstrate that while the unwanted pollution originates mostly in the more developed areas of the world, -which also carry a commeasurable share of historical responsibility for the current state of the global environment and climate-, their consequences can be felt (more or less) equally throughout the globe. Similar arguments can be made about other shared environmental goods such as the ozone layer, etc. As a result, while the North enjoys the benefits of development, and even though developing

countries may eventually catch up in terms of their contribution to atmospheric pollution, today, as in the past, the burden of development's effects is on the poor and undeveloped. The commitments undertaken in the *UN Framework Convention on Climate Change* and the subsequent *Kyoto Protocol* are premised on exactly that idea.[52]

It could be argued that this principle of common but differentiated responsibilities provides developing countries of the world, including South American countries, with an escape mechanism to exempt them from following international environmental law principles owed to the international community as the ones discussed in the beginning of this chapter. The argument appears to be true at least in relation to climate change, where common but differentiated responsibilities have been specifically codified in the international agreements.[53] But the issue is not that simple. Let's examine Tuvalu's threat to the US and others in a different context.[54] Can Venezuela, a developing non-Annex I country but South America's top greenhouse gas emitter, remain indifferent to the fate of low-lying Uruguay under the principle of common but differentiated responsibilities?[55] What about neighbouring Guyana?[56]

Air and climatic conditions are a shared resource. While it is true that greenhouse gas abatement measures, such as forest protection from clear-cutting and setting stringent air

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[52] Stone questions why "should the fight against poverty extend to making poverty a defense against laws against pollution?" C.D. Stone, "Common but Differentiated Responsibilities in International Law" (April 2004) 98 Am. J. Int'l L. 276 at 293.

[53] Interpretations of the notion of "sustainable development" that emphasize the developmental angle seem to underscore this conclusion.

[54] See footnote 17 above and related text.

[55] D. Erosa, "Uruguay y el cambio climático," <www.uruguayambiental.com/articulos/ErosaUruguayCambioClimatico.html>.

[56] Guyana is a low-lying state with 90% of its population living on the coastal strip. See Guyana's National Communication to the Climate Change Secretariat, available at : <www.unfccc.int>.

quality and emission standards, may not be immediately required of South American states under the climate change agreements, the same may not be true under the principles of international environmental law reviewed above. Under those principles, Venezuela is at least partly responsible for the dire consequences of climate change on every other member of the international community of states, including Uruguay and Guyana. Allowing a country like Venezuela to take no action while blaming climate change exclusively on the bigger polluters turns this vital issue into a meaningless game of charades.[57] The principle of common but differentiated responsibilities cannot and does not trample the other fundamental contributions of environmental law to the protection of the global environment.[58] Though perhaps fragile and often criticized,[59] the climate change instruments strike a balance among the need to curb overall emissions, historical responsibilities and sustainable growth. This is done through an agreement on a shared objective and through setting differentiated commitments as well as through provisions on financial and technology transfer. While the differentiated commitments allow countries to adjust the abatement objective to their own pace and circumstances, the latter (transfer) mechanisms attempt to level the playing field of historical responsibilities through a North/South transfer of knowledge and wealth. It is hoped and expected that while the most resourceful countries move to curb their emissions immediately, the new resources available to the rest will facilitate that development be

[57] When pressured to ratify Kyoto, Venezuela responded by requesting compensation for future forgone natural resources development. India and China took a similar approach in the negotiations concerning the depletion of the ozone layer. C.D. Stone, *supra*, note 52.

[58] A.C. Dowling, "'Un-Locke-ing' a 'Just Right' Environmental Regime: Overcoming the Three Bears of International Environmentalism – Sovereignty, Locke and Compensation" (Spring 2002) Wm. & Mary Envtl. Law and Pol'y Rev. 891.

[59] While some criticize the agreements for failing to account for and mitigate future growth of emissions in developing countries, particularly China, India and Brazil, others find the technology transfer and funding provisions ineffective and a poor means of redress for the disproportionate pollution burden carried by the developed world. Additionally, developed country contributions are found to be chronically in arrears.

achieved in a less environmentally destructive manner. At the end of the day, the fundamental message comes out loud and clear: good neighbours should change their harmful ways to avoid future harm and respond for the harm caused to others in the past, and all must ensure that present and future use of air is done in a reasonable and equitable manner for the benefit of present and future generation. As signaled by Tuvalu's threat, rather than starting from a clean slate, the climate change agreements reaffirm and enshrine pre-existing principles of international law. The apportionment of responsibilities and obligations contained therein help define specific expectations and outcomes but does not do away with customary and other international law principles which continue to apply beyond and despite the written agreements. Accordingly, developing state parties are fully accountable to the climate change bodies in charge of verifying compliance with UNFCC-Kyoto commitments and to the entire international community for any breach of general international environmental law. Should Venezuela fail to live up to its specific duties under the agreement, Uruguay, –and even developed country parties to the UNFCCC-, will be able to request whatever sanctions may be applicable under the Convention. Its neighbour, Guyana, may be in a better position to ask for direct reparation under customary international law provided there is demonstrable damage and causation is clear. Also under customary law, renegade states remain accountable to the community of nations for their contribution to the climate change problem. Natural resources should be managed accordingly.

Notwithstanding the above, *per se*, the developing nations' commitments under the UNFCCC and the *Kyoto Protocol* may not be enough to significantly impinge on those

states' sovereign rights over natural resources. Sovereignty, however, is very much at stake in the operation of the clean development mechanism (CDM).

B. CDM and Sovereignty

To assist Annex I countries in achieving their abatement goals, the UNFCCC encouraged collaboration among parties to find flexible, cost effective measures to cut overall emissions. That led to the inclusion in the *Kyoto Protocol* of three "flexibility" mechanisms: emissions trading (art. 17), joint implementation (art. 6) and the clean development mechanism or CDM (art. 12). Of the three mechanisms, the CDM is particularly relevant to developing countries and the management of their natural resources.[60]

Under article 12 of the *Kyoto Protocol*, setting the basis for the CDM, developed countries are allowed to demonstrate compliance with their Kyoto targets through funding the implementation of GHG abatement projects in developing countries. Through the successful implementation of a CDM project, the sponsoring developed country (itself or through private investors) can accrue Certified Emission Reduction credits (CERs) which it can apply towards demonstrating compliance with its obligations under the Protocol. The credits are deducted from the actual emissions of the sponsoring party during the commitment period.[61] The rationale behind the mechanism is that it is easier and a more efficient use of resources (cheaper) to invest in greenhouse gas abatement in

[60] The other two mechanisms cannot apply to developing countries.
[61] Decision 17/CP.7, Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol; <unfccc.int/resource/docs/cop7/13a02.pdf#page=20>.

the developing world than it is in the developed countries.[62] Also, as potential hosts of CDM projects, developing countries of South America that are parties to the Convention and the Protocol are faced with a considerable opportunity to attract new foreign investments. As discussed below, these investments are subject to strict international rules that will run the fate of all CDM projects well beyond their completion date, locking in the projects' natural resource base while subjecting it to the authority of an international body.

For the CERs of any particular developing country to be an attractive investment, their integrity as veritable abatement credits needs to be irrefutable.[63] For that reason, the UNFCCC-Kyoto authorities have developed a sophisticated third-party certification procedure and oversight mechanism dedicated to guaranteeing their worth. The procedure, overseen by the CDM Executive Board, consists of several steps: validation, registration, verification, certification and monitoring. For an eligible project to be registered with the CDM Board, an independent third party or "Operational Entity," must validate its compliance with the requirements of the CDM as defined by the Meeting of the Parties in the *Marrakech Accords*.[64]

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[62] At the time that Kyoto was being negotiated, the reduction cost of a ton of CO2 in the developed world was estimated to be in the US$50-100 range, while it was calculated at about US$ 30 in developing countries. Latin American Energy Organization (OLADE), *Energy and Environmental Law in Latin America*, (Quito, Ecuador: OLADE, 2000). The flexibility mechanisms have been criticized for allowing developed countries to reap the "low hanging fruit" while leaving host countries to pick up the higher cost of second generation abatement measures in the future.

[63] Environmental Defense Position Paper, "Clean Development Mechanism Rules of Procedure: Standards for the Executive Board and Operational Entities" (January 11, 2002), available at: <www.environmentaldefense.org/documents/606_CDM_ethics.PDF>.

[64] Decision 17/CP7, <cdm.unfccc.int/Reference/COPMOP/decisions_17_CP.7.pdf>.

According to the rules laid down in Marrakech, once a project is registered, including acceptance by the host country and approval of the baseline and monitoring methodologies, the project may proceed. Throughout the project's life an Operational Entity is in charge of verifying, through periodic review and monitoring, the effective reductions in anthropogenic emissions that have occurred as a result of the CDM project activity. Certification is the written assurance by the designated Operational Entity that, during a specified time period, a project activity achieved the reductions in emissions as verified. Issuance of the certified emission reduction credits, or CERs, follows the submission in good order of a certification report.[65] Projects may be undertaken for a fixed crediting period of ten years or for up to three periods of seven years (renewable crediting period).[66] Sink projects (afforestation and reforestation) have a longer duration of 30 years (fixed) or 20 years, renewable twice (up to 60 years).[67]

A result of the implementation of CDM rules is that once a project is approved by the national CDM authority the host country's ability to control the project or the resources it utilizes is significantly curtailed. On one hand, the resources involved will be locked in for the duration of the project, sometimes up to 60 years (renewable period sink projects), regardless of any changes in the country's circumstances or needs. For example, if a sink project stands in the way of any other land use project, including exploitation of valuable sub-surface resources that may require forest clearing, the new land use would have to be

[65] Decision 17/CP7, <cdm.unfccc.int/Reference/COPMOP/decisions_17_CP.7.pdf>.
[66] Decision 3/CMP.1, para 49, <cdm.unfccc.int/Reference/COPMOP/08a01.pdf#page=6>. See also: CDM Glossary, <cdm.unfccc.int/EB/Meetings/007/eb7ra04.pdf>.
[67] Decision 5/CMP.1, para 23, <cdm.unfccc.int/Reference/COPMOP/08a01.pdf#page=6>.

put on hold through the duration of the project's certification period, and even beyond.[68] Similarly, the water demanded by a hydroelectricity project will not be readily available for other uses. Arguably, locking-in resources is a common feature of all long term development projects. In those cases expropriation, cancellation or non-renewal of permits and the like always remain a state's prerogative in the public interest. It is doubtful, however, that a state may be willing to make use of such controversial prerogatives after agreeing to host a CDM project. The repercussions of such a measure would stretch far beyond any impact on the project's owner exposing the frailty of the system in place and shaking the foundations of global efforts to combat climate change.

Taken from a different angle, CDM rules require the host country to confirm that a proposed project contributes to sustainable development in that country. Host country CDM project acceptance and approval is by the national CDM authority which functions as an investment promotion agency. A country is not required to produce any evidence to prove that a project fits the country's long-term sustainable development plan, or that it even has such a plan. As a result, for example, the sum of individually approved CDM projects in a country may end up defining the development matrix of that country with little intervention, planning or control by the natural resources, environmental and other relevant local (non-CDM) authorities.[69] Whether the end result is sustainable or not, may be owed more to luck than to deliberate and concerted state action. Thus, South American

[68] Harvesting is allowed if re-planting is to follow (no change in land-use). Even if legally possible, once the new forest is in place, public activism may hinder or impede changes in land use. Decision 17/CP.7, Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol; <unfccc.int/resource/docs/cop7/13a02.pdf#page=20>.

[69] Ironically, developing countries' unfettered ability to certify the sustainability of a project rests on sovereignty arguments.

countries' traditional lack of long term planning paired with foreign investor and developed country pressure could result in a development matrix that may not reflect the best interests of those countries in the long term. Even in those cases like Argentina, for example, where the lack of official policy guidance on eligible CDM projects is said to be deliberate, sovereignty is in jeopardy.[70] Whether Argentina's position is the result of careful consideration or is a cover up for the country's deficient development planning ability and thirst for investment, the end result is a handover of development decisions to foreign investors and international CDM authorities.[71]

The above is aggravated by the fact that a country's national CDM authority does not have the last word on the acceptability of a project. That function is reserved to the international CDM Executive Board. The Executive Board will accept or reject a project based on its own interpretation of the CDM rules, rules which have been often criticized as ambiguous and open to significantly different readings.[72] A system of project-by-project approval by an international authority, driven by international interests and

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[70] According to Argentine officials, the evolving nature of sustainable development requires flexibility. For that reason, they argue, the quality rather than the type of project is what determines eligibility. L. Barrera-Hernández, "Argentina, Climate Change and the Clean Development Mechanism" (March 2006) 3 International Energy Law and Taxation Review 77.

[71] Even in countries with a more solid policy making and long-term planning tradition, like Brazil and Chile, project choice may be more determined by the need to attract investment than any other factor. Among energy projects, for example, a preference for hydroelectricity projects is already evident, followed closely by biogas. However, some authors warn about the potential stress on food supplies and agricultural lands derived from a significant increase in demand for energy crops which, in turn, may require more conversion of wetlands and forest land into arable land. Beyond being counter-productive in terms of poverty alleviation, GHG abatement and environmental protection in general, the loss of wetlands and forest cover that may result from unplanned energy development could have a detrimental impact on hydroelectricity production through the disruption of natural water flow regimes. UNFCCC, CDM, <cdm.unfccc.int/Projects>; Jim Cook and Jan Beyea, National Audubon Society, "An Analysis of the Environmental Impacts of Energy Crops in the USA: Methodologies, Conclusions and Recommendations" available at: <www.panix.com/~jimcook/data/ec-workshop.html>; <www.futurepundit.com/archives/cat_energy_biomass.html>.

[72] J. Schwartz, *supra*, note 32.

developed country investors, that rests on the weak environmental protection and natural resources development planning capacity of developing country authorities and their pressing need for investment and technology, does not bode well for permanent sovereignty. Also, throughout the duration of its life under the CDM (certification period), a project is subject to CDM rules and is ultimately under the control of the UNFCCC-CDM authorities through the verification and certification procedures. Although the Operational Entity is intended to act as an independent third party, it is chosen by the project developer, -generally a developed country or a developed country investor-, and responds to the CDM Board, not the host country.[73]

Finally, by transferring the burden of abatement from the developed to the developing world, CDM projects in effect curtail the developing nations' freedom to use air for their own advancement or, in other words, reduce their ability to pollute for the sake of development. In the future, developing countries will find themselves literally grappling for air.[74] Because the most cost-effective abatement measures have already been implemented through CDM projects, sustainable development will become significantly more expensive and increasingly beyond the developing world's (independent) reach, perpetuating the cycle of North/South domination.[75]

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[73] J. Schwartz, *id.*

[74] E. Richman, "Emissions Trading and the Development Critique: Exposing the Threat to Developing Countries" (Fall 2003) 36 N.Y.U.J. Int'l Law and Pol'y 113. Contra: Stone, arguing that the ability to comply with targets through financing projects in the developing world is a more efficient approach to global warming, while equity and welfare goals should be pursued independently. C.D. Stone, *supra*, note 52.

[75] New technology transfers will likely be necessary at a point where they will no longer be free.

4. CASE STUDY

A. Paper Wars: Argentina v. Uruguay

Argentina and Uruguay are separated by the second largest water basin in South America which in the section that borders both countries comprises the Uruguay and Plata rivers. Over the last few years, Uruguay's decision to authorize construction and operation of two pulp mills on the margins of the Uruguay River sparked an international conflict that disturbed the once placid relations between Argentina and Uruguay. The conflict has been sharply brought to the public's attention by local activists who protested Uruguay's initiative by blocking important international routes connecting the two countries.[76] Commercial transportation and tourism was significantly impacted and the conflict quickly escalated, with governments on each margin hurling accusations and threats at each other. Though Uruguay and the private investors, the Finnish Botnia Corporation and Spain's ENCE, swore by their environmental impact assessments and environmentally sound technology, local residents and environmental organizations argued that the water quality and the general environment would be severely impacted by the planned industrial development posing a threat to health and life in the area. In turn, the government of Argentina denounced Uruguay for failing to abide by the terms of a 1975 bilateral treaty concerning shared management of the Uruguay River.[77]

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[76] Argentine protesters have the support of several local communities and environmental activists in Uruguay.

[77] T. Drago, "ARGENTINA-URUGUAY: Pulp Mill Conflict Takes on International Dimension" Interpress News Service Agency, <ipsnews.net/news.asp?idnews=32277>. See also the Preliminary Proceedings before the ICJ, <www.icj-cij.org/icjwww/idocket/iau/iauframe.htm>.

The 1975 *Uruguay River Statute* (the Statute), Articles 7-12, impose a duty on any country planning to undertake any works that might impact on navigation, the river's flow or water quality, to communicate its plans to a joint administrative commission: "CARU."[78] The Commission is charged with assessing if the proposed project could have a determinable (from the original in Spanish "sensible") impact on the other country. In that case, or if the Commission does not reach a determination within the time specified in the Statute, further notification to the potentially impacted country is required. Any objections and issues that cannot be dealt with through CARU, or by direct negotiation between the countries, can be put before the International Court of Justice for a decision.[79] The other set of applicable rules, Uruguay's regulations on environmental impact assessment and approval, provide administrators only scant general guidelines and make no reference to transboundary issues.[80]

There is no evidence on record of notification and of any opportunity to comment on the proposal provided to Argentina or CARU before approval.[81] The steps prescribed by the international Statute were only undertaken after Uruguay had approved the private undertakings and its plans had hit the radar of public opinion. By that time, the issue had become politicized and there was very little room for good faith negotiations as

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[78] See: <caru.org.uy/publicaciones/publicacionesPDFs/The-River-Uruguay-executive-commission-Uruguay-Paysandu.pdf>.

[79] Arg., Ley 21413, Estatuto del Rio Uruguay, available at: <www.freplata.org/documentos/archivos/Documentos_Freplata/inventario/Inventario%20Freplata/AR_seccion%20II.2/A.II.2.L.5.pdf>.

[80] According to one commentator, the general nature of the regulations allowed administrators to defer authorization to the operations phase rather than construction. G. Honty, "Papeleras: la dificultad de manejar la incertidumbre" <www.uruguayambiental.com/articulos/HontyPapelerasManejarIncertidumbre.html>.

[81] The process is documented in the website of Uruguay's Environmental Authority, <www.dinama.gub.uy>.

prescribed by the equitable and reasonable use principle of international law. The involvement of the International Financial Corporation (IFC), the World Bank's private lending arm, with a rather questionable environmental track record, and the finding by the institution's Ombudsman that the IFC had failed to apply due diligence in connection with the environmental and social impacts of the project,[82] did not help. Predictably, the negotiations prompted by the public outcry and the ensuing international sparring contest failed. The case is now before the ICJ.[83]

The case was brought to the ICJ by Argentina in May of 2006. In the first place, the country asked for provisional measures ordering Uruguay to: 1) suspend the construction's authorizations and halt building work pending a final decision by the Court; 2) to co-operate with Argentina to protect and preserve the aquatic environment of the river; 3) to refrain from taking any further unilateral action with respect to the construction of the paper mills; and, 4) to refrain from any other action which might aggravate the dispute or render its settlement more difficult.

The ICJ did not find sufficient evidence to justify an injunction on the authorization or the actual construction of the mills. It also relied upon Uruguay's promise to abide by the Statute and to cooperate to deny the rest of the measures requested. In doing so, the Court

[82] Report on the Activities of the IFC/MIGA Compliance Advisor/Ombudsman (CAO), June 2005 – May 2006, available at: <www.cao-ombudsman.org/html-english/documents/CODEReportontheActivitiesoftheCAO2005-2006_9May06-FINAL.pdf>. See also: Fundación Centro de Derechos Humanos y Ambiente, "Caso Papeleras a La Haya: Se Profundiza la Crisis," available at: <www.cedha.org.ar/es/comunicados_de_prensa/go.php?id=69>.

[83] Proceedings instituted by Argentina (*Argentina v. Uruguay*), May 4, 2006, <www.icj-cij.org/icjwww/idocket/iau/iauframe.htm>. Other petitioners presented the case before the Organization of American States and the OECD. See: J.D. Taillant, "Using human rights tribunal to force Bank compliance: Uruguayan paper mill," available at: <www.brettonwoodsproject.org/article.shtml?cmd[126]=x-126-507742>.

reaffirmed "*the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development, and ... the need to safeguard the continued conservation of the river environment and of the rights of economic development of the riparian States.*"[84] The Court further urged the parties to fulfil their obligations under international law and highlighted the importance and usefulness of the "progressive" management regime set up under the 1975 Statute for achieving that balance, requiring the parties to implement in good faith the consultation and co-operation procedures provided for therein.

> *The Court makes it clear, however, that, in proceeding with the authorization and construction of the mills, Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make. It points out that their construction at the current site cannot be deemed to create a fait accompli because, as the Court has had occasion to emphasize, "if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded a priori of a judicial finding that such works must not be continued or must be modified or dismantled".*[85]

Although what the ICJ decides about the substance of this case is yet to be seen, given the case's history of failed attempts at reconciling Uruguay's and Argentina's positions, it would make little sense for the Court to send back the decision for further consideration by the joint management body or for negotiation between the two countries. Failing any last minute solution, the power to decide on the management of the Uruguay River in this case is placed squarely on the ICJ. Ultimately, the Court will have to decide if Uruguay's proposal qualifies as equitable and reasonable use of the Uruguay River. While at it, it will have to weigh in intergenerational equity issues as well as the country's obligation to

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[84] *Pulp Mills on the River Uruguay*, (*Argentina v. Uruguay*), Request for the indication of provisional measures, Summary of the Order of 13 July 2006, <www.icj-cij.org/icjwww/idocket/iau/iauframe.htm>.
[85] Id.

abstain from causing harm to its neighbour. The principle of common but differentiated responsibilities will have little to do with the dispute.

Further stressing the fact that the final decision on the management of the Uruguay River is no longer in the hands of either state, most attention is now placed on the World Bank's decision on funding, now tied to the findings of the institution's new impact assessment and to Uruguay's receptiveness to the changes and requirements proposed therein.[86] Also contributing to the countries' powerlessness is the unprecedented level of activism surrounding the case that has galvanized communities and NGOs on both sides of the border against the mills.[87] In fact, giving in to public pressure, one of the private investors, ENCE, has already announced its decision to change the placement of the mill to another location.[88] Thus, the case's impact may stretch beyond the resource in question, spilling over to the country's land use planning and management.

5. CONCLUSION

Though treaty making implies a voluntary renunciation of sovereign power in exchange for some good derived from common compliance, at times, its consequences

[86] Arg., La Nación, "Levantaron el corte en Gualeguaychú" Oct. 16, 2006, <www.lanacion.com.ar/849768>; Halifax Initiative, "Bank funding on hold as pulp mills spark conflict between Argentina and Uruguay," available at: <www.halifaxinitiative.org/index.php/Issue_Update/768>; CorpWatch, "Uruguay: New Report May Show Way Ahead in Paper Mill Dispute," available at: <www.corpwatch.org/article.php?id=13485>.
[87] CorpWatch, "Uruguay: Pulp Factions: Environmentalists v. Big Paper," available at: <www.corpwatch.org/article.php?id=13111>.
[88] Reuters Foundation, AlertNet, "Spanish firm says to move Uruguay paper factory" (21 Sept. 2006), available at: <www.alertnet.org/thenews/newsdesk/N21396510.htm>.

can stretch far beyond what state negotiators intended. On the other hand, the reach of international environmental law stretches beyond treaty law to customs and principles with strong implications for municipal natural resource management. In addition, like in the case of the CDM mechanism, developing countries' weak environmental and general planning capabilities combined with their chronic need of investment often open the door to strong global players which can take over important resource management functions. Whether the result of deliberate state action or not, current international environmental law is an increasingly important source of limitations to permanent sovereignty over natural resources.[89] In addition, the level of environmental awareness under the current conditions of globalization is such that any limitations placed by the law are reinforced in practice by local and global activism.

[89] Unfortunately, it is also one where the historical domination of the South by the North still plays out. This conclusion would support the argument that environmental protection is elitist. According to this argument, the elite already got what it wants at the environment's expense and forces protection on what is left at the expense of the less advantaged.

CHAPTER VI

Conclusion: A Balancing Act

1. INTRODUCTION

"Our post-war institutions were built for an inter-national world, but we now live in a global world."

Kofi Annan, UN Secretary General[1]

Throughout the case studies reviewed in the previous chapters we have seen international norms and practices come in direct contact with local realities. Although the cases differ substantially, they all illustrate the leverage of international forces over domestic resource management to the point where one can conclude that permanent sovereignty over natural resources is dramatically affected.

The chapters also provided good evidence of the difficulties encountered by local authorities when faced with international requirements and expectations in areas like trade, foreign investment, human rights and environmental protection. They also shine some light on the contradictions that surface when attempting to decipher and implement the mandate of the international community. International law and institutions send out a mixed message. Their discourse is often conflictive. While human rights and environmental law and practice strive to impose a balance amongst economic, social and

[1] Quoted in J.H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept" (October 2003) 97 Am. J. Int'l L. 782 at 787.

environmental factors, trade and investment law and practice, throw that message out the window of the International Centre for Settlement of Investment Disputes under the watchful eye of the WTO. Indeed, on the one hand, some institutions and their rules are unequivocal in saying that development cannot proceed at a pace and in a manner that trumps human rights and environmental balance. On the other hand, those institutions concerned with trade and foreign investment see in economic development a cure to all global ills regardless of some "temporary" imbalances. The faster development takes place, the sooner that human rights, including environmental balance, will be realized.[2]

Globalization's mixed message is exacerbated in the makings and work of international tribunals, with WTO and ICSID at the top of the list of most powerful global adjudicators, while the ICJ, the Inter American System's bodies and the rest remain at a considerable, powerless distance.[3] Individual states and their constituents are caught somewhere in between.

2. STATES AT THE CROSSROADS

South American resource managers are supplied with a good arsenal of local policy, law and regulatory tools to respond to the increasing demands of the globalized scenario upon which they are required to perform. However, frequently molded by

[2] D.A. Kysar, "Sustainable Development and Private Global Governance" (June 2005) 83 Tex. L. Rev. 2109.
[3] D. Barnhizer, "Waking from Sustainability's 'Impossible Dream': The Decisionmaking Realities of Business and Government" (Summer 2006) 18 Geo. Int'l Envtl. L. Rev. 595.

international players and hailed as the last cry in normative development, these guidelines, norms and practices have failed to conform and adapt to local realities or simply and typically have not produced the desired results in terms of delivering well being.

A survey of the laws and regulations of South American countries reveals that all have adopted some form of environmental and social impact assessment tool for managing natural resources development. Quantity, quality and technical pollution standards are also common, as are economic mechanisms to deal with impacts of varied sorts. Stakeholder participation and access to information laws and regulations are a more recent addition to the legal landscape of South American resources' management; some countries are even experimenting with benefit distribution legislation.[4] Though with varying degrees of (in)effectiveness, in all cases the combined operation of these tools is quite far from delivering the widespread well being that could be expected in resource-rich countries.[5]

Most authors point at weak enforcement as the source of this failure.[6] Though it is true that enforcement is wanting, it is doubtful that it can be made entirely responsible for the

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[4] As part of a previous research project, the author conducted a full survey and comparative analysis of environmental and natural resources statutes of 26 Latin American and Caribbean countries. Research results may be found in: L. Barrera-Hernández and A. Lucas, eds., *Energy and Environmental Law in Latin America and the Caribbean: Legislative Inventory and Analysis* (Quito, Ecuador: OLADE, June 2000).

[5] World Bank, "World Development Report 2006: Equity and Development" (Sept. 2006), available at: <econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/EXTWDR2006/0,,contentMDK:20586898~pagePK:64167689~piPK:64167673~theSitePK:477642,00.html>.

[6] L.K. Barrera-Hernández and A.R. Lucas, *Environmental Policy and Legislation for the Energy Sector in Latin America & The Caribbean: Tool Kit* (Quito: OLADE, June 2000); M. Paquin and C. Sbert, Unisfera International Centre, "Towards Effective Environmental Compliance and Enforcement in Latin America and the Caribbean" (November 2004), available at: <www.unisfera.org/IMG/pdf/New_approaches_to_environmental_protection_vfinale3_ajout_.pdf>.

failure of local natural resources' development management to produce its share of well being. Those that point at governance issues as a whole,[7] may be closer to providing an answer. But the governance issues that stand in the way of achieving widespread well being are not circumscribed to local matters. Rather, the fact that states are no longer the single rule-makers and drivers of domestic resource management and that the law has failed to keep up with this reality has a lot to do with it.

After the irruption of transnational corporations (TNCs)[8] as powerful global players with the ability to direct government decision-making, the classical divisions of the law into municipal and international, public and private, no longer reflect the type of interaction that is common in the world today.[9] States' failure to deliver well being in connection with natural resources' management is as much a function of local governance issues and their supporting law and policy framework, as it is of international ones. Both local and international governance mechanisms and practices need to be revised, adapted and enhanced to respond to the challenges of globalization.

What this study attempted to do was to shine some light onto the manner in which the transformation of the law and legal practice under the phenomenon of globalization

[7] Governance is defined as the traditions, institutions, and processes that determine how citizens are given a voice and how decisions are made on issues of public concern. See e.g.: R. Dufresne, "The Opacity of Oil: Oil Corporations, Internal Violence, and International Law" 36 N.Y.U.J.Int'l L. & Pol. 331.

[8] TNCs are hereby defined quite broadly as a business enterprise where one unit has the ability to impact the operations and movement of another unit located abroad, whatever the legal form, and whether units are taken collectively or individually.

[9] In 1956 P. Jessup coined the term "transnational law" to designate an amalgam of principles of domestic and international law regulating actions or events that transcend national frontiers. Prof. S. Sucharitkul uses the term "community law" to designate a system that is international as well as domestic. S. Sucharitkul, "International Law and International Relations in a Pluriform World" Cleveringa Inaugural Lecture, Rijksuniversiteit Te Leiden, Leiden 24 November 1989, at 25. See also: P. Schiff Berman, "From International Law to Law and Globalization" (2005)43 Colum. J. Transnat'l L. 485; and, M.K. Addo, "Human Rights Perspectives of Corporate Groups" 37 Conn. L. Rev. 667.

affects natural resources' management regardless of where those resources are placed: inside or outside traditional state boundaries or somewhere in between. The case studies have demonstrated how developing states are often torn between their legal duties to their constituents, their lenders, trade partners, investors and the international community. At the end of the day, the states' inability to respond to these conflicting duties send them into recurring crisis pushing them further away from any gains in well being.[10]

A. Private Property Protection as Dominant Paradigm

Under the current, Western style world order the rule of law privileges property rights to the detriment of the peoples' well being.[11] It is a logical consequence of a governance system whose traditions, institutions and processes are rooted in the protection of private property. This is sharply brought into view by the phenomenon of globalization: those with the most economic power have the last word in deciding what the law is and how it is implemented.

Though international bodies and tribunals eventually pick up the flag of human rights and environmental protection, they face tough competition in the form of international trade and investment adjudicators with real and substantive enforcement power. On the other hand, while TNCs are able to sue and stake millionaire claims against states, they cannot be held accountable on the same terms and conditions for their participation or contribution to human rights violations, environmental deterioration and related abuses.[12]

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[10] M. McFarland Sanchez-Moreno and T. Higgins, "No Recourse: Transnational Corporations and the Protection of Economic, Social and Cultural Rights in Bolivia" 27 Fordham Int'l L.J. 1663.
[11] D. Barnhizer, *supra*, note 3.
[12] M. McFarland Sanchez-Moreno and T. Higgins, *supra*, note 10.

Much in the same way, rich-country dominated IFIs dictate the contents of law and policy reform in developing countries but do not own up to their failures even though they continue to demand regular loan payments and interest. At the end of the day, "*pure power prevails*;"[13] resource-rich developing states and their populations lose.

Humanity has managed to supplant the law of the jungle with the law of supply and demand. It is high time that powerful economic stakeholders start taking up the responsibilities that come with the benefits of calling the shots in developing countries. Law and legal scholars can make a significant contribution.

Below, the author advances some ideas on legal tools that may serve to tip the balance of what is today a much eschewed playing field, and help to achieve a more equitable outcome in the development and management of natural resources.

3. OLD AND NEW TOOLS

When devising or recasting legal tools to counter the loss of sovereign power over natural resources and a state's inability to advance the well being of its general populace, one should ask: 1) where the lost power is now located, and, 2) how best to address the resulting imbalance. Regarding the first question, despite the important surge in public activism, now, as ever, it is quite clear that power is where the money is. The difference introduced by globalization is that home states are no longer in full control of TNCs.

[13] J.H. Jackson, *supra*, note 1, at 801.

"The notion of citizenship for a corporation is fluid,"[14] allowing it to accumulate power while escaping accountability. Corporate power is now unfettered power. Corporate transnational entities, with the assistance of their home states and IFI backers, have been instrumental in shaping the current legal scenario.

In what concerns the second question posed, i.e. how best to address the resulting imbalance, it would be old school to propose that power should devolve back to the state and its organs. However, for a variety of reasons that range from local corruption to international extortion, developing states, particularly South American states, have demonstrated their inability to cope with the challenges posed by globalization in fulfilling their mandate of procuring widespread well being within their borders.

Could one turn to the international arena for help? Unfortunately, the solution does not seem to reside there. As illustrated by the case studies of the previous chapters, international institutions working in the human rights and environmental protection field are no match for their corporate-dominated counterparts in the trade and investment area, far better equipped legally and factually to force and enforce their will. The result is the prioritization of economic interests and gains over a balanced approach that is truly development oriented as understood in this study.

In attempting to implement a more balanced playing field, perhaps one should turn towards those that have the power in the first place and to those that want change the

[14] T. O'Neill, "Water and Freedom: The Privatization of Water and its Implications for Democracy and Human Rights in the Developing World" (Spring 2006) 17 Colo. J. Int'l Envtl. L. & Pol'y 357 at 376.

most: TNCs and the public. Some national and global approaches to shifting the balance of power are advanced below. The task, however, is not easy and exposes global leadership's powerlessness to rein in corporate greed as evidenced by over a decade of paying lip-service to "corporate social responsibility" as explained below.

A. Decentred Regulation: Codes of Conduct and International Voluntary Standards for Non-State Actors

It is a broadly shared view among corporate social responsibility advocates and business leaders that given the power of transnational corporations *vis a vis* developing (and also developed) countries and their administrations,[15] businesses should fill in the gap left by governments through the consistent application of best practices and standards to minimize and mitigate the negative impacts of their activities while enhancing corporate accountability.[16] Supporters of this view also argue that even in those developing countries that have achieved a certain level of administrative sophistication and enforcement capability, governments will be inclined to favour investors, their home countries, and their IFI backers as a means to attract more business and to stay in the IFIs' good books.[17] Governments may also have a vested interest in lowering costs to

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[15] In a paper written in 2002 D. Shelton reported that "the assets of the three wealthiest individuals in the world is more than the combined gross national product of all least developed countries, while the annual sales of one transnational corporation exceeds the combined gross domestic product of Chile, Costa Rica, and Ecuador. D. Shelton, "Protecting Human Rights in a Globalized World" (Spring 2002) 25 B.C. Int'l & Comp. L. Rev. 273 at 279. Similar data can be found on the website of the International Finance Corporation, <www.ifc.org>.

[16] D. Kinley and J. Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (Summer 2004) 44 Va. J. Int'l L. 931; M. McFarland Sanchez-Moreno and T. Higgins, *supra*, note 10; D. Shelton, *id.*

[17] D. Shelton, *supra*, note 15; R. Dufresne, *supra*, note 7. The same reasons are given to shift responsibility over achieving minimum standards to IFIs and to justify IFI safeguard policies.

businesses as a means of maximizing revenues from taxes or from their own participation in economic activities. Also, it is argued, businesses know best how and where they can improve their performance while remaining competitive and contributing to a "healthy economy." Indeed, any industry-based efforts in the direction of filling the regulatory and enforcement gap created by cash-strapped, powerless, unwilling, or incapable administrators, and particularly those efforts that focus on the social and environmental impacts of industrial activities, could have a significant beneficial impact on general well being. The resulting attempts at achieving corporate restraint through business' cooperation have come to be known as decentred regulation and include voluntary measures and self regulation.[18] Unfortunately, as will be seen below, experience shows that TNCs are hardly moved by moral or ethical arguments.

Reacting to industry's arguments and prompted by a desire to transform TNCs worldwide into law abiding global citizens, once again, the international community responded by offering a menu of codes of conduct and voluntary sets of rules to guide businesses in the pursuit of their exploits. Some industries and sectors have also come up with their own decentred schemes for natural resources production and management,[19] contributing their own two cents to the growing number of voluntary norms and codes. Among them, those schemes that are meant to work across the globe may stand a better chance of success than local ones. Because corporations are wary about being undercut by their

[18] See: B. Barton, "The Theoretical Context of Regulation" in B. Barton *et al*, eds., *Regulating Energy and Natural Resources* (Oxford, U.K.: Oxford University Press, 2006) 11.

[19] The Canadian Chemicals Producers Association, was among the first business associations to adopt voluntary guidelines. For further information, see, CCPA, Responsible Care Program, available at: <www.ccpa.ca/ResponsibleCare/>. The Canadian Association of Petroleum Producers followed suit. See: <www.capp.ca/default.asp?V_DOC_ID=5>.

competitors, they are more likely to spend money in compliance if the chances that the competition will take similar steps are considerable.[20] However, even in those cases, the results have generally been disappointing.

One of the first international initiatives of this kind resulted in the 1997-2000 *Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises*.[21] The OECD *Guidelines* are a set of voluntary, non-binding rules to guide corporations in defining their own codes of practice and procedures with regards to a variety of issues. They are quite general in nature and aim to strengthen relationships between governments, TNCs and the societies in which they operate. The foreword to the 2000 revised version condenses the often cited arguments in favour of global standards. It is also quite remarkable in that it strongly implies that global standards should be modeled around those that have the approval of the 33 OECD nations, i.e.: capital-exporting countries' *government-backed* standards. The foreword reads:

> *The revised Guidelines will be an important instrument for shaping globalisation. They provide a government-backed standard of good corporate conduct that will help to level the playing field between competitors in the international market place. They will also be a standard that corporations themselves can use to demonstrate that they are indeed important agents of positive change throughout the developing as well as the developed world.*[22]

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[20] The internationalization doctrine calls for the universal incorporation into local laws of all established industry norms and practices that could be considered part of international economic law.
[21] Available at: <www.oecd.org/dataoecd/56/36/1922428.pdf>.
[22] The whole document is strikingly revealing of this neo-colonial attitude. Argentina, Brazil and Chile have already expressed their adherence; <www.oecd.org/dataoecd/56/36/1922428.pdf>.

As far as their specific impact on natural resources management is concerned, the *Guidelines* stipulate rules for proper environmental management, including adoption of the precautionary principle, and stress efficiency in the use of natural resources. They also encourage respect for human rights, information disclosure and sustainable development. However, the *Guidelines* may be too general to have any significant impact on a TNCs' performance and general well being. That is also the case of the much criticized *Global Compact* sponsored by the United Nations.

The *Global Compact*, launched by the UN in 2000, is a call to businesses to embrace a set of ten principles regarding human rights, labour, environment and anti-corruption. The principles are general statements of value and provide no guidance as to implementation. Their adoption is voluntary and no enforcement mechanism is provided. Businesses that adhere to the *Compact* have a right to use the *Compact's* logo identifying them as participants. The ability to display the UN's "seal of approval" and the fact that the compact's principles are so undeniably basic that blatant non-compliance would constitute an aberration, have led many to say that the *Compact* represents a sell-off of the UN to business.[23]

A stronger step in the same direction was the adoption by the UN Commission on Human Rights of *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* in August of 2003.[24] Despite their general nature,

[23] For a collection of essays that illustrates this view, see: Public Policy Forum, available at: <www.globalpolicy.org/reform/indxbiz.htm>; and, CorpWatch, available at: <www.corpwatch.org>.
[24] E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

and the fact that they are not yet binding,[25] it is important to highlight that the *Norms* subject TNCs to the direct application of international law. However, the *Norms* are criticized by some that see in their enunciation a relaxation of what are already international duties binding on TNCs.[26] Notwithstanding their flaws, the *Norms* represent a significant step towards recognizing that the states are not the only medium for internalizing important legal mandates reflecting basic ethical principles. Further reinforcing their value is the fact that despite their draft status and controversial nature, the UN has already taken action towards defining international standards and best practices under the *Norms*.[27]

Finally, recurring to international standards issued by an authoritative and independent standard-setting body is also a popular decentred alternative to the point that some such standards have been incorporated, by reference, into domestic regulations.[28] Whether standardized rules have an impact on natural resources management and the resulting well being or not, depends on the set of rules and how they are implemented by TNCs. The more detailed the rules, the higher the probability of having any real impact.

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[25] The Commission, in its decision 2004/116 of 20 April 2004, expressed the view that while the Norms contained "useful elements and ideas" for its consideration, as a draft the proposal had no legal standing.
[26] B. Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 Berkeley J. Int'l L. 45.
[27] E/CN.4/2005/L.87, 15 April 2005. The *Norms* could interfere and curtail a state's range of action in managing its natural resources anytime those actions conflict with the relevant international law as applied by TNCs. Conf.: Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights. E/CN.4/2005/91, 15 February 2005.
[28] In that way, states are farming out tasks that they are under a legal duty to perform.

Although there are a myriad of standardized rules,[29] perhaps the most widely used ones are those sanctioned by the International Organization for Standardization (ISO).

ISO is a worldwide non-governmental association of standards' institutes, currently comprising 157 members, on the basis of one institute per country.[30] Membership is voluntary and each institute/country has one vote in the process of developing a standard.[31] Unless adopted by law or by contract, as all other voluntary codes, ISO standards are not legally enforceable. Their effectiveness depends on the good will of TNCs.[32]

In sum, though the jury may still be out on the effectiveness of self-regulation, results so far have not been very dramatic.[33] Several reasons have been given for their lack of effectiveness. For some, "[c]odes of conduct produced by the muscle of the market are often subject to distortions."[34] Vagueness and lack of objective standards are often cited to support the argument that decentred regulation, particularly self-regulation, is nothing more than an empty promise devised to enhance a company's public image with no

[29] Standards can be developed by local or international bodies. This section is concerned with the latter. Other examples of international standards' organizations are the International Commission on Illumination (CIE), the International Electrotechnical Commission (IEC), and the International Telecommunication Union (ITU). For links to those institutions, see the World Standard Services Network website at: <www.wssn.net/WSSN/>.

[30] The institutions that represent each country are not required to be part of the country's administration.

[31] For more information see: <www.iso.org>.

[32] Though regulatory delegation is common administrative practice, it is worth noting that in the case of ISO, and most other cases of international standardization bodies, delegation is to an international private entity outside the confines and reach of the state. Whether applied as a result of regulatory delegation or voluntary practice, a single vote, which may or may not come from a state-run standardization body, links the standards to the sovereign and its resources. ISO has adopted an Action Plan for developing countries to enhance developing country participation in, and benefits from, the standard development process. For further information see ISO's website, available at <www.iso.org/iso/en/aboutiso>.

[33] See generally: B. Barton *et al*, eds., *Regulating Energy and Natural Resources* (Oxford, U.K.: Oxford University Press, 2006).

[34] D. Kinley and J. Tadaki, *supra*, note 16.

intention to follow through. For those that see decentred regulation as a true tool to guide corporate practices, its main weakness lies in the lack of transparency, enforcement and adjudication mechanisms. Its strength would rest on the long term potential to influence corporate and state behaviour to the point that repeated practice turns soft law into hard law.[35] In the short term, decentred regulation may work where it is embedded in a system that triggers enforcement and sanctions whenever the primary system fails.[36] Usually, that system is the legal apparatus of the state. A logical consequence of this is that the end result is subject to the same challenges and problems that common regulatory compliance is faced with. Even in the case of the UN *Norms*, corporate offenders cannot be brought to an international court. A bolder approach is required for any real change to come about.

B. Confronting the Ugly Truth

> *"Business has become, in this last half century, the most powerful institution on the planet. The dominant institution in any society needs to take responsibility for the whole."*[37]

For decades, legal and economic scholars have engaged in an endless discussion concerning the role of corporations in society.[38] While one side argues for profit

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[35] D. Kinley and J. Tadaki, *id.* For S.R. Ratner self regulation represents a first step towards international corporate responsibility. S.R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (December 2001) 111 Yale L.J. 443.

[36] D.V.J. Bell, "The Role of Government in Advancing Corporate Sustainability" (27 March 2002), available at: <www.g7.utoronto.ca/scholar/2002/bell11062002.pdf>.

[37] D. Goulet, "Changing Development Debates Under Globalization: The Evolving Nature of Development in the Light of Globalization" (Fall 2004) 6 J.L. & Soc. Challenges 1 at 17.

maximization, the other sees in corporations a legitimate vehicle for implementing public welfare policy. The first position, championed by the Chicago School of Economics, can only conceive of welfare as the result of the individual's freedom to choose translated into his/her market power. The more profit the corporation generates, the more that goes in the individual's pocket and the freer he/she is. Wealth trickles down from the corporation to the individual through the operation of the free market. Their view –now labeled neo-liberal- is reflected in the principles of the Washington Consensus and, generally, in present day, Western-style domestic and international law and practice.

Though it may be true that in a perfect world a corporation's goals should be that of maximizing wealth rather than redistributing it,[39] that is not the world in which we live. Corporations are run by individuals with their virtues and flaws. Their success is measured by a single metric: their contribution to the bottom line, i.e. the corporate profit-making mission. Perhaps when the connection between a corporation, its representatives and managers, and its activities was more or less in plain view, the Chicago way of achieving widespread welfare could have been attainable. That is not the case in our high-tech, globalized world where companies can quickly and imperceptibly implement changes that can keep them flying under the radar of any legal system devised to keep them in check and to guarantee their contribution to the economy. We are faced

[38] W.T. Allen, "Our Schizophrenic Conception of the Business Corporation" (November 1992) 14 Cardozo L. Rev. 261; A.A. Dhir, "Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability" (Summer 2006) 43 Am. Bus. L.J. 365.

[39] Arguably, beyond exceeding their profit-driven mandate, corporate officers are no better allocators of welfare spending than the shareholders whose money they would be spending. If not through shareholder spending, a corporation's contribution to welfare under this view is said to be limited to tax payments with the government deciding on allocation.

with "*multinationality that transforms into statelessness.*"[40] Neo-liberal economics fails to account for this disconnection and to factor in the unleashing of personal greed and destruction that is fuelled by unaccountability.[41]

Current lack of corporate accountability is as real and mind-boggling as it is devastating. Recent experience has shown that individual ambition when shielded from plain view by numerous layers of legalities can shed even the most basic shreds of propriety and make monsters of would-be law abiding people.[42] How else can one explain, Union Carbide's refusal to disclose information even after the Bophal tragedy killed thousands of people,[43] or the decisions (–on record in the case's transcript-) of Unocal's officers and directors to ignore the use of forced labour and other illegal practices connected to the company's activities in Myanmar?[44] Neo-liberal economic theory fails to take into account human nature. For the most part, the law has followed suit.

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[40] B. Stephens, *supra*, note 26 at 59.

[41] In the 1933 words of Justice L. Brandeis of the US Supreme Court: "Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution-an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to assert that this "master institution of civilized life" is committing it to the rule of a plutocracy." Cited in: Third World Traveler, R. Benson, "Challenging Corporate Rule Petition to Revoke Unocal's Charter as a Guide to Citizen Action" (1999) <www.thirdworldtraveler.com/Controlling_Corporations/ChallengeCorpRule_UNOCAL.html>.

[42] Kenneth Lay, the person at the centre of the Enron scandal was but one example.

[43] Reported in: D. Weissbrodt, "Business and Human Rights" (Fall 2005) 74 U. Cin L. Rev. 55.

[44] *Doe I v. Unocal Corp.*, 395 F.3d 932, 161 Oil & Gas Rep. 599, RICO Bus.Disp.Guide 10,336, 02 Cal. Daily Op. Serv. 9585, 2002 Daily Journal D.A.R. 10,794, 9th Cir.(Cal.), Sep 18, 2002 (NO. 00-56603, 00-57195, 00-57197, 00-56628).

On the other hand, even though modern TNCs can often have a devastating impact on individuals and their communities, one cannot ignore the driving force behind TNCs, i.e. consumers. Consumers demand, and businesses deliver; the businesses that can deliver at the best prices are the ones that reap the most profits and the ones that can claim success. Ultimately, consumers in the developed world end up virtually dictating the development policies of the developing countries while lenders and investors implement it. Competition between developing countries ensures low prices and equally low standards. To be effective and coherent, any attempts at curtailing the negative consequences of unbridled corporate power should address consumer power as well.

C. Global Approaches

What better way to combat corporate impunity than to open the legal playing field? The current system of compartmentalized law upholds the fiction of states as the only entities capable of causing good or evil on a large scale and falls short of bringing about well being and peaceful coexistence. At the same time, "*[d]ecisions and actions of corporations have social consequences largely indistinguishable from those created by public regulators, but ... corporate decisionmaking [is] largely insulated from public participation, engagement, or scrutiny.*"[45]

Two approaches can be advanced to deal with these issues. First would be opening all courts to all actors. All legal barriers should be lifted to allow TNCs, which can already

[45] D. Danielsen, "How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance" (Summer 2005) 46 Harv. Int'l L.J. 411.

contract with states and sue them in international fora, to be brought before supranational or "global" tribunals to respond for their criminal or tortiuous acts.[46] Moreover, corporate employees should not be able to shield themselves behind the corporation in cases of human rights, environmental or any kind of abuse just because their activities were not abhorrent enough to trigger the jurisdiction of the International Criminal Court.

Second, the law should ensure maximum accountability and transparency in all aspects of natural resource development and management. Access to and disclosure of information rights and duties should reach all players whose activities can impact the public interest in resource development, including IFIs.[47] Broad public participation should also be the rule.

The issues, however, are as controversial as they are bogged down in theory.

I. Legal Personality of TNCs – Standing to Sue and Be Sued for Criminal and Tortiuos Acts

All that has been written about TNCs and their legal personas cannot hide the fact that they are a creature of the law and as such can, and should, be tampered with to reflect new and changing circumstances. After all, "*the debate about the inherent nature of the*

[46] By the same token, affected individuals should not be barred from bringing suit against TNCs before a global adjudicator. Truly universal jurisdiction could also be an option in such a manner as to allow injured individuals to choose between bringing suit in any domestic court or before a global court.
[47] D. Danielsen, *supra*, note 45.

corporation is essentially no different than a debate about what rights and obligations society will choose to impose upon it."[48]

If TNCs claim the power to regulate their own activities, a traditional state function, why should they not respond for all of their actions before international tribunals the way that states do? However, while states are being vacated of their powers and attributes, responsibility is not equally transferred or shared. Given that their power often surpasses that of states, particularly developing states, TNCs should be governed by similar duties.[49] This is consequent with the idea that the state no longer represents the greatest danger to the individual, a position that the contemporary state now shares with TNCs and other institutional actors.

From a substantive point of view, no person, legal or fictitious, is above the law. [50] Moreover, fictitious personality is not meant to grant immunity for criminal or civil wrongdoings under international law.[51] If anything, international law teaches that not even the all powerful state, itself a creature of the law, is exempt. Just as states are, TNCs and all fictitious persons are substantially bound by the basic rights and duties owed to all persons in and outside their home states whether they can be brought before a tribunal or

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[48] B. Stephenson, *supra*, note 26 at 61.
[49] C. Baez *et al*, "Multinational Enterprises and Human Rights" (1999-2000) 8 U. Miami Int'l & Comp. L. Rev. 183; S.R. Ratner, *supra*, note 49.
[50] The Preamble to the *Universal Declaration of Human Rights* refers to: "every individual and every organ of society" as bound by the duties and rights spelled therein. General Assembly resolution 217 A (III) of 10 December 1948, available at: <www.un.org/Overview/rights.html>. Similar assertions can be found in the *International Covenant on Civil and Political Rights*, art. 5, and the *International Covenant on Economic, Social and Cultural Rights*, art. 5; G.A. Res. 2200A (XXI) of 16 Dec. 1966; available at: <www.unhchr.ch/html/menu3/>.
[51] J.J. Paust provides a summary of municipal cases and jurisdictions that have upheld international law obligations of TNCs and other organizations. J.J. Paust, "Sanctions Against Non-State Actors for Violations of International Law" (Spring 2002) 8 ILSA J. Int'l & comp. L. 417.

not. This is so regardless of their lack of express consent to be bound. Arguing that TNCs and other fictitious persons are not bound by international norms due to their lack of direct consent is equivalent to saying that individuals in a state are not bound by the mandates of domestic laws because they did not participate directly in their formulation. Besides, corporations are not opposed to being bound by international norms safeguarding their property rights such as those in IITs and other international agreements like the *Washington Convention* creating ICSID. On the contrary, they've been quite eager to assert their rights under any international instrument or source as long as it is found to be advantageous to their profit seeking motives.[52] The problem is clearly procedural and may only become one of substantial law wherever substantial universal rights and duties are not clearly defined.[53]

Standing and jurisdiction rules should be revised to allow all types of claims against TNCs to be made before the tribunal(s) with the best chances of becoming an effective deterrent of abuse. Limiting standing rules in international law to allow a right of action only against states is a fiction that is not in keeping with current times. Already, individuals can both sue and be sued before international tribunals for human rights violations.[54] Also, if corporations can (and do) bring suits and complaints before international tribunals to protect the rights that matter to them, namely: property rights,

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[52] Some authors see in environmental agreements such as the Basel Convention, and the agreements on civil liability for oil and radioactive pollution, a system of direct foreign liability that by-passes the state by channeling international liability directly to TNCs. However, regulation and enforcement remains a responsibility of the state. H. Ward, "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options" (Spring 2001) 24 Hastings Int'l & Comp. L. Rev. 451; B. Stephens, *supra*, note 26; A.E. Boyle, "Globalising Environmental Liability: The Interplay of National and International Law" (2005) 17 J. Envtl. L. 3.

[53] C. Baez *et al*, *supra*, note 49.

[54] B. Stephens, *supra*, note 26. See also: *Rome Statute of the International Criminal Court*, available at: <www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf>.

why can't they be placed at the receiving end when non-property rights are at stake? Why is property more deserving of protection than any other human right like life, health and freedom? Just as property, the rights to life, health, water, shelter, freedom and a score others include *erga omnes* negative obligations as well as positive duties. Why then, if there is a general duty not to interfere with life for example, does protecting life become relevant in this context only when dealing with states or individual persons, and, in the latter case, only if it can be called genocide or given a similarly heinous label? How about the perpetrators and the other rights? After all, a violation is a violation, is a violation.[55]

The uneven treatment of perpetrators and rights cannot be blamed on the indeterminacy of non-property rights. There is nothing indeterminate in the taking of life and health through contamination (Bhopal; Aguinda), freedom through forced labour (Unocal), shelter and food through forced displacement (Awas Tingni; Pangue-Ralco), and so on. Incredibly, ordinary wrongdoers go to jail or face stiff penalties –and justly so- for the same or milder violations that Chief Executive Officers (CEOs) get bonuses. The law needs to step in to correct the unbalance by removing all obstacles and granting standing to allow individuals and persons to bring suits against TNCs and other organizations for human rights and related violations before global tribunals. Once the playing field has been leveled so, the problem becomes one of finding the best suitable forum.

[55] Stephens finds a precedent for corporate liability in international law in the work of the Nuremberg Tribunal and the subsequent activities of the US Military Tribunal. B. Stephens, *id.*

In all cases where individual persons cannot be brought before a global tribunal, civil liability of individuals acting for a corporation that is found liable by a global tribunal should be automatic and directly actionable before the courts of the country where the individual is domiciled or holds assets.

II. Global Litigation: Weighing the Options

Local courts, particularly in developing countries, are no match for TNCs or IFIs. The power and political influence wielded by them could directly or indirectly paralyze even the most honest adjudicators.[56]

Though expanding the scope of universal jurisdiction to allow all human rights and related abuses to be litigated in domestic courts regardless of where the abuse takes place and regardless of the nature of the human rights violations,[57] could be a good way to curb illegal TNC behaviour, it may not be feasible or practical. While the technical difficulties inherent in determining when a TNCs' presence in a country is enough to trigger universal jurisdiction could be overcome by asserting jurisdiction regardless of physical connection, Belgium's unsuccessful experience with universal jurisdiction, opening Belgian courts to all victims of violations of the law of nations worldwide, demonstrated the dangers of trying to cast too wide a net.[58] On the other hand, even if the local connection with the state that asserts jurisdiction is well established, in the end, the piece

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[56] D. Kinley and J. Tadaki, *supra*, note 16.

[57] Presently only a limited list of crimes catalogued under the customary law of nations qualify, generally, for application of the principle of universal jurisdiction.

[58] D. Kinley and J. Tadaki, *id*; Social Science Research Council, L. Walleyn, "The Shabra & Shatila Massacre and the Belgian Universal Jurisdiction" available at: <www.ssrc.org/programs/gsc/publications>; Human Rights Watch, "Universal Jurisdiction in Europe: The State of the Art: VI. Belgium" available at: <hrw.org/reports/2006/ij0606/6.htm>.

of the TNCs that can best respond to the outcome of the suit upon sentencing may be beyond the court's reach. In any event, universal jurisdiction is vulnerable to political pressure and may eventually have to cede to arguments of political comity.[59] Along the same lines, some attempts by states to enact legislation holding domestic corporations to human rights standards in their overseas operations have already died on the drafting table.[60] The global community needs to step in to provide adequate supranational fora equipped with enough powers to rein in unacceptable behaviour.

Existing international courts have limited capabilities. Assuming that the International Court of Justice could hear cases against TNCs, their officers and employees and other organizations, its enforcement powers are limited. The Inter American System's organs face similar limitations. The International Criminal Court (ICC), on the other hand, is already in a position to prosecute the officers and employees of offending TNCs and other organizations, but on a limited number of crimes that can hardly be interpreted to encompass the kind of behaviour that TNCs most routinely engage in. Thus, even if the ICC's personal jurisdiction could be interpreted to apply to corporations as some authors suggest,[61] very little could be accomplished *vis a vis* TNCs unless its statute were amended to cover all human rights and related violations. The history of the ICC's creation lends little hope to any attempts to broaden its material jurisdiction for the time being.[62]

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[59] H. Ward, *supra*, note 52.
[60] The U.K., Australia, the U.S. and the Netherlands are some examples. D. Kinley and J. Tadaki, *supra*, note 16; H. Ward, *id.*
[61] D. Weissbrodt, *supra*, note 43. Similarly, Stephens argues that corporations are equivalent to individual persons under international law since the time of the Nuremberg Tribunals. B. Stephens, *supra*, note 26.
[62] J.D. van der Vyver, "Personal and Territorial Jurisdiction of the International Criminal Court" (Spring 2000) 14 Emory Int'l L. Rev. 1.

The WTO could offer an interesting avenue for action considering that, after all, what TNCs obtain through their unlawful and unethical behaviour is an unfair trade advantage that could qualify as illegal under international trade rules. Standing rules, however, would need to be expanded to allow direct action against TNCs by countries as well as individuals.

It is a proven fact that the social, cultural and environmental impacts of natural resources development cannot be divorced from the economic activities that they entail. Only the law and legal institutions maintain that fiction by having separate tribunals deal with the different aspects of the same activities. Although the WTOs' disposition towards becoming an arbiter of human rights and related abuses is –at best- dubious, the WTO is the best choice among existing international tribunals to take on TNCs. On top of broadening standing provisions, however, additional changes would need to be made in order to ensure transparency and accountability.[63]

Private arbitral tribunals like ICSID, on the other hand, should not be barred from hearing and considering arguments based on human rights and other violations, particularly if their availability is the result of state treaty-making as in the case of ICSID.

[63] Even if this were accomplished, unfortunately, oil –one of the natural resources with the worst records of TNC abuse-, does not trade under WTO rules. Such a radical change as the one proposed could make it even more difficult for it to ever be traded under the WTO regime. However, it is probably better to start with an established tribunal that has already been looking at the issues at stake and with real global power than to try to begin building a new.

III. Some Practical Considerations on the Approaches Proposed

Opening the floodgates of broad international responsibility for TNCs and other organizations and their officers could have negative repercussions on developing and other economies if the new procedural tools are used as a means to harass or hurt powerful economic interests. Therefore, any procedural vehicles devised to make TNCs and others accountable should be crafted in such a way as to minimize the risk of frivolous claims. Some ideas could include:

- notification of the intention to initiate an action to the TNCs' home country and/or the defendant or organization under investigation;
- requirement that a negotiated resolution be attempted; and,
- the victim's state may reserve the right to be represented in, or replace the private petitioner or plaintiff in the action.

The fundamental weakness of any proposal to subject TNCs to the authority of global tribunals for all human rights and related violations, including the creation of an individual right of action, is that such a system needs to be brought about with the help of states. Developed states, and even developing ones, tend to shy away from punishing corporations which they see as funding their own welfare and futures. As a result, the answer may come from the bottom up, i.e. empowering the public to mobilize to punish TNCs and other delinquent organizations directly. Flexing its consumer power is one way of doing that. There may be others as suggested below.

IV. Special Considerations on IFIs

Political and procedural issues make it harder to put IFIs on trial in the same way and venues as TNCs. However, there is much room for improvement on the *status quo*.

IFIs, on the one hand, could be part of the solution. They could contribute to well being and to curbing TNC power by embracing their social mandate fully. That would mean setting strict governance standards at the country level and enhancing monitoring duties within the IFIs. To do so, they need not micro-manage individual projects away from elected government officials. Requesting minimum accountability and transparency standards as pre-condition to lending, such as requiring that broad disclosure and access to information, and access to participation and to justice provisions be in place, would be a start.

Most importantly, for IFIs, embracing their social mandate would imply taking an active role in deterring bad corporate behaviour. One way to do this would be to black-list TNCs that have engaged in human rights, environmental or related abuses. The TNCs so listed, including subsidiaries and affiliates, would be ineligible to work in IFI funded projects or to receive direct funding from their private-arm institutions. A procedure and criteria for listing and de-listing TNCs would have to be set. To further solidify these procedures, IFIs themselves would need to be subject to strict accountability standards.

Rather than the toothless in-house monitoring systems currently in place, IFIs should be subject to an independent oversight body dedicated to overseeing their performance on human rights and related abuses, i.e. an IFI Ombudsman. Currently, for example, the World Bank's Inspection Panel and the Inter-American Development Bank's Independent Investigation Mechanism are internal review mechanisms with limited power to issue recommendations.[64] There are also no procedures to investigate and take disciplinary action against employees who fail to enforce IFI standards in the projects under their responsibility or control. Contrary to this, the proposed IFI Ombudsman would have broad powers to investigate violations *per se* or at the request of the public and to demand corrective action, as well as to evaluate the IFIs' overall performance and make recommendations for improvement on a periodic basis.[65] To ensure that its demands and recommendations don't fall on deaf ears, the Ombudsman would have the power to leverage fines from IFIs, as well as to suspend employee privileges and recommend further disciplinary action. The fines collected from IFIs could help fund the Ombudsman's activities. In addition to the independent Ombudsman, ensuring IFIs' accountability will require that they be subject to broad disclosure and access to information requirements. Of course, the Ombudsman would be subject to the same transparency requirements.

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[64] See: WB, The Inspection Panel, available at: <web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html>; and, IDB, About the IADB, Independent Investigation Mechanism, available at: <www.iadb.org/aboutus/iii/independent_invest/independent_invest.cfm?language=English>.

[65] These powers could be modeled around those of the Commissioner of the Environment and Sustainable Development of Canada's federal government. For information see: Canada, Office of the Auditor General, Commissioner of the Environment and Sustainable Development, available at: <www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/menu8_e.html>.

D. Involving the Public – Domestic Approaches

One way in which the public could make a difference is in suing for revocation of the corporate charter of rogue TNCs. Clearly, corporations cannot deviate from their stated objective in their activities; the commission of illegal acts can hardly be considered incidental to the pursuit of a TNCs' objective. As an instrument of society created by law and administrative authority, those TNCs that contravene the law should be dissolved. This has already been done in the US in the case of Ohio's Standard Oil Co. and others.[66] It was also recently attempted in connection to one of the cases mentioned in this study[67] in a petition to California's Attorney General (AG) to revoke the charter of Unocal Co. for the abuses committed in Burma (Myanmar). Although the petition was unsuccessful, no explanation was given for the AG's refusal, leading one to believe that the legal basis on which it was grounded remain valid and applicable.[68] Avenues for petitioning corporate charter revocation should be available to individuals anywhere and anytime that a corporation acts outside the law, violating the social contract upon which all corporations are erected. Standing to request revocation should be broad and open to any person with an interest in upholding the rule of law.

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[66] Third World Traveler, L.R. Grossman and F.T. Adams, "Taking Care of Business. Citizenship and the Charter of Incorporation" (1993) <www.thirdworldtraveler.com/Corporations/TakingCareBusiness.html>. As recently as 2005, the US FTC shut down three consumer debt companies. For more examples, see: <www.corporatepolicy.org/issues/crime.htm> and <www.multinationalmonitor.org/mm2002/02oct-nov/oct-nov02corp1.html>.

[67] See Ch. IV, Universal Jurisdiction.

[68] R. Mokhiber, CorpWatch, "The Death Penalty for Corporations Comes of Age" (1 Nov. 1998) <www.corpwatch.org/article.php?id=1810>. In fact, the AG invited the petitioners to request permission to sue for revocation directly. The petitioners turned the invitation down due to lack of resources and went on to campaign for a law requiring automatic charter revocation upon the perpetration of 3 major offences. For a copy of the bill introduced to the California Legislature in 2003 see: <www.leginfo.ca.gov/pub/03-04//bill/sen/sb_0301-0350/sb_335_bill_20030602_amended_sen.html>.

Another way in which any person can influence TNCs is through his/her purchase power. This could be done directly through individual decisions to boycott certain products[69] or indirectly through the purchase and sale of shares in corporations.[70] Socially responsible investment can have a powerful impact on corporations, to the point that numerous funds have been instituted to take advantage of that power. Once constituted, not only do they buy and sell shares, but they also intervene in TNCs decision-making by exercising their share-holder voting rights and bringing about change from within the TNCs.[71]

Enhancing public and stakeholder rights is key to bringing about changes in TNCs' behaviour and to making progress on achieving general well being.

I. Enhanced Public Rights

> *If the media are unable to report on abusive behaviour, there will be no public relations consequence of corporate acts. If government leaders share in the inflated profits generated by abusive behaviour, they will have no incentive to enforce even the most basic norms.*[72]

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[69] Perhaps the best example of this kind of action was the boycott of Nike products as a protest against the company's human rights record in Asia.
[70] This approach is particularly effective in those cases of companies that do not market their products under easily recognizable brands.
[71] See e.g.: Social Investment Forum, "2003 Report on Socially Responsible Investing Trends in the United States" (Dec. 2003), available at:
<www.socialinvest.org/areas/research/trends/sri_trends_report_2003.pdf>.
[72] B. Stephens, *supra*, note 26 at 63.

The quote from B. Stephens, above, is a strong reminder of the power of public action. For that action to be possible and effective, however, some minimum conditions need to be met. Those conditions include:

- Wide disclosure and access to information;
- Opportunities for participation; and,
- Access to justice.

Though the enabler is *per force* the state through regulation, as mentioned above, states can be prodded to issue and perfect the necessary legal and regulatory rules by the IFIs, which can also add some technical assistance to their leverage power.

a. Disclosure and Access to Information

i. Information Disclosure

In order to maximize the effectiveness of public and stakeholder participation in natural resources management, the availability of relevant quality information is key. There are three types of information that are essential to any participation activities: base line, interpretative and performance information.

Baseline information is typically provided by the government and includes background data concerning the resource and its environment. It typically includes data on the location, type and value of the resource, land use, relevant socio-economic information and similar comparative data. This type of information is essential to assessing the viability and convenience of an undertaking and for sound natural resources'

development policy and strategy formulation. It is therefore natural that the initial investment in collecting baseline information be borne by the state.[73]

Generally, and particularly for participation purposes, the public must be able to understand, compare and assess the meaning of the available data in terms of impacts and benefits. In other words, interpretative information is required. There is a wealth of interpretative and educational material and information constantly being produced and volunteered by highly qualified institutions and Non-Governmental Organizations (NGOs) that is relatively easy to access. Cash-strapped governments could harness the power of NGOs in reaching out and educating the public. The media is also a valuable resource to disseminate interpretative and background data.

Performance information relates to product and process inputs and outputs and includes data on actual environmental, social, economic and cultural impacts, both positive and negative. Although it is available to administrators through their inspection and investigation powers, it is most immediately, easily and cheaply available to the producer. Collecting performance information requires a consistent monitoring effort which the regulated individual is forced to undertake in order to ensure it is in compliance. From an economic perspective, and taking into account that both administrators and industries need to collect performance data to verify compliance with regulatory and contractual obligations, the fact that obtaining it may be less costly for

[73] Some of this information is routinely collected as a requirement of important international law instruments of widespread ratification in SA such as the Biodiversity Convention and the Framework Convention on Climate Change. Both Conventions contain a requirement to file periodical "National Communications."

industry due to its immediateness and familiarity with the regulated activities may suffice to determine that industry should bear the bulk of the burden of collecting the information while the government plays a more limited role, collecting, organizing and storing it. It is cost effective and efficient.[74] However, even if regular self-compliance checks are made and the information is readily available, the producer may not be motivated to disclose it. Self-reporting may be induced either through regulation or by offering special incentives.[75]

In comparative law, regulatory self-reporting of infringements is generally limited to accidents and spills or to cases of risk of imminent and significant harm to people or the natural environment. Issues concerning the right to avoid self incrimination and the protection generally due to privileged information have often been raised against compulsory reporting of violations.[76] However, self-reporting of data concerning ordinary business activities and circumstances proves to be a significant source of background information for public participation activities. Disclosure requirements in

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[74] T. Tietenberg, "Private Enforcement of Environmental Regulations in Latin America and the Caribbean. An Effective Instrument for Environmental Management?" (May 1996) Inter-American Development Bank Working Paper Series No. ENV-101, Washington, D.C. With regards to environmental and related information, environmental law principles, particularly the polluter pays principle, would support this conclusion insofar as the cost of data collecting and reporting can be considered to be necessarily associated with the polluting, profit-generating activities.

[75] Tietenberg, *id.*

[76] Audit privilege was at the centre of a long-standing dispute between the federal and the states' environmental authorities in the USA. There, as a result of a growing trend towards enacting environmental audit privilege legislation which seriously curtails the public's access to companies' information, federal authorities decided to boost self-reporting of violations by issuing a policy statement in January 22, 1996, which promised leniency to those companies which reported violations; <www.garynull.com/Documents/erf/right_to_know_nothing.htm>; <http://www.enviroweb.org/gnp/corporat.htm>; <http://www.enviroweb.org/gnp/fulldisclosurefeb.htm>. For a complete review of confidentiality issues see: L. Barrera-Hernández, *Information for Sustainability* (1996), Master of Laws Thesis submitted to The University of Calgary, Faculty of Law [on file with The University of Calgary and the author]. See also: Anchorage Daily News, March 24, 1989 <http://www.adn.com/evos/stories/EV62.html>; McCutchen, Issue Brief, available at: <www.mccutchen.com/erg/title.htm>.

community right-to-know legislation[77] are valuable tools even if the information disclosed as a result is, for the most part, based on estimates and does not directly reveal violations.[78] The information obtained may serve as a "pointer" sounding the alarm on potential problem "hot spots."

ii. Access to Information

While collecting information is of the outmost importance for effective management, transparency and accountability will only be achieved if the information disclosed and collected is readily available to the public. Providing direct public access to information empowers the public and promotes compliance through enhanced visibility of the activities of TNCs and the authorities. It also assists in planning for development through opening decision-making to public scrutiny and input.

Ideally, the principle governing access to information in general should be that, with a few clearly defined exceptions, access to all government-held information, including third party information, should be directly and unconditionally available to the public. In addition, the public's participation in natural resources management requires access to all that information which may reasonably be deemed necessary to assess the soundness and

[77]Since 1986, when the U.S.A. passed the *Emergency Planning and Community Right to Know Act* (EPCRA), 42 U.S.C. §11001, right-to-know legislation has proliferated and expanded throughout the developed world seeking to empower workers, consumers and the community at large by giving them the ability to access information on environmental issues relevant to them. For detailed information on EPCRA see: Chemicals in Your Community: A Guide to the Emergency Planning and Community Right-to-Know Act, EPA document EPA 550-K-93-003, <http://www.epa.gov/epahome/citizen.htm>.

[78] Right-to-know legislation has encountered some opposition from the private sector. Industry stakeholders are generally concerned about reporting burden and business confidentiality issues. See: USA, Business Roundtable Position Paper, available at: <www.brtable.org/document.cfm/47>; Canada, Willms and Shier Environmental Law Newsletter (Winter 1998), available at: <www.willmsshier.com/newsltrs/9801.htm#feds_2>.

convenience of a proposal, a decision or action that is subject to participation and public scrutiny. Accordingly, the available information should not be limited to the information in the hands of a specific decision-maker but may require accessing files of other authorities or agencies. It could also imply access to third party documents, including those held by TNCs, which may or may not be on file with the government. In the latter case, procedures and conditions for requesting and accessing third party information should be regulated. For example, the information to be accessed may include: a developer's financial information as may be necessary for reviewing the soundness of environmental investment and community development plans and other onerous commitments included in a proposal; information on process and product design to determine probable impacts on consumers and communities; information on inputs and outputs; etc.

Access to information may be available as a substantive right or provided for on a case by case basis (procedural right). The right is most useful if it is defined broadly to encompass all those with a simple, unqualified interest in the information. In all cases, it must be guaranteed through adequate regulation. Constitutional rights or statutory rights to access information are important but may lend very little assistance if they are not translated into regulations and into everyday rules of practice.[79] Regulated access may take place under various statutes which should be considered and organized carefully in order to provide wide access while taking care not to unduly burden the administration

[79]The groups seeking access are generally the ones with fewer means to bring legal action for failure to provide access. Thus, the right to access information and participate, though recognized, may have very limited application.

and to prevent duplication of efforts (and the consequent waste of resources) or an unnecessary atomization of the information, particularly in federal countries.[80]

b. Tackling Public Participation

The term "public participation" when referred to development activities and decisions relates to the opportunities and rights given to individuals or groups to have an impact in the development process, to ensure that their needs and concerns are appropriately taken into account, that benefits are distributed on an equitable basis, and that no single group or individual bears a disproportionate share of the negative impacts of development. The public's participation in development decisions and activities is increasingly being recognized as of vital importance for achieving development and well being at the local, regional and international level. Responsible, informed and effective participation contributes to fair, transparent and accountable management and development.

Participation should be differentiated from information disclosure and access, where people are notified of what has already been decided or done. The actual degree of public involvement in participation may vary from consultation, where the public's input is sought but there is no obligation to take into account its input, to active involvement of

[80]The advantage of an expanded rights package that includes access-to-information provisions is reduced discretion regarding disclosure, and fewer exemptions to transparency. See: <www2.ec.gc.ca/cepa/ip10/e10_03.html>.

the public at early stages of a project and throughout its implementation to ensure accomplishment of project goals.[81]

Most South American countries legislate public participation in relation to project approval processes in connection with environmental and social impacts. However, there is no theoretical impediment for extending participation to other decision making processes or tools, even if participation is not a recognized substantive right but is included as a specific procedural opportunity. Participation can also be informal, through non-established channels. Examples of informal participation are boycotting a certain product or a project as in the case of the Argentine peoples' protests against Uruguay's pulp mills.

Providing for the public's participation through formal channels will generally add to a decision's sustainability through contributing to its transparency and also because it may anticipate and prevent conflict by putting TNCs face to face with the public in advance of development activities. It also serves to enhance the quality of decision-making through the introduction of relevant new variables or information and by building consensus.[82] Public participation can help to ensure a fair distribution of impacts and benefits.[83]

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[81]Overseas Development Institute, Briefing Paper, "Mainstreaming Public Participation in Economic Infrastructure Projects" 1998 (3) July, <http://www.oneworld.org/odi/briefing/3_98.html>.
[82]Canada, *It's about our Health! Towards Pollution Prevention*, Report of the House of Commons Standing Committee on Environment and Sustainable Development, June 1995; see also: N. Schwartz *et al*, "Consulta comunitaria, desarrollo sostenible y el Banco Interamericano de Desarrollo, Un marco conceptual" (Washington, D.C.: Inter American Development Bank, 03/99) at 14. The study states that consultation generally enhances economic return indexes.
[83]N. Schwartz, *id.*

The public's input may be put to use throughout the wide range of natural resources-related decision-making opportunities through different mechanisms. Thus, while natural resources development policy makers can canvass public opinion through opening the process to written comments from the public, individual project approval requires more in depth involvement by the public that can be called upon to help decide on acceptable uses of natural resources in their area.[84] In addition, public participation in development projects does not have to be limited to the approval process, and can be extended to participation in the development of protection and management plans, as well as in their implementation. Other opportunities for public participation include commenting on proposed statutes, regulations, guidelines, codes of practice, permits, agreements, etc.

By creating the conditions for effective, timely and meaningful participation, regulatory requirements can procure that the public gets a fair and reasonable opportunity to influence decision-making by making it accountable and context relevant, and that well being is ultimately achieved. The following may help clarify what those requirements should be:

- Whether participation is a substantive or procedural right, the rules on standing should be clear. Accountability and substantive fairness considerations may advise taking a broad approach towards legal standing for participation in resource-related matters.
- Depending on the kind of decision to be made (i.e. on permits, regulations, etc.)

[84]See E. Hughes *et al*, eds, *Environmental Law and Policy*, Preliminary Edition (Toronto: Emond Montgomery Publications Ltd., 1992).

participation should be sought before a decision is taken and as early as possible in the process, before any mayor commitments are made and/or resources spent;

- The right to participate must be upheld by a parallel right to access information; i.e. provisions on standing to access information should at least mirror legitimating rules for participation.[85]
- The accessible information must be complete, timely and readily available.[86]
- Effective notice provisions must be in place. Provisions on notice should be flexible enough to allow for best efforts in ensuring that notice of the opportunity to participate reaches its target audience. Means and language of communications have to be considered, especially when the target audience is located in remote or rural areas and may include distinct sectors of the population such as indigenous and tribal peoples.
- Funding for intervenors to level the playing field may also be necessary.

Regulatory provisions on participation, whether in project approval or development planning, need to be clearly inserted in the decision-making or management process in order to be incorporated to and reflected in the outcome. This is not to say that the public's input will be the one single binding and decisive factor to be taken into account in the outcome. Given that the appropriate formalities to ensure transparency and fairness are kept, including the provision of a reasoned written decision that is publicly accessible, it does guarantee, however, that the public's input will be taken into account in the outcome.

[85] A typical example where the rules on access limit the possibility of participating can be found in those kinds of rules that limit the right to request information to specific types or categories of data.
[86] See section on access to information above.

c. Social Licence to Operate and Impact Benefit Agreements

Although, the general theory and practice on public participation in resource development treats the public's input regarding the viability of a specific development project as non-binding, recent experience in SA points in a different direction.

In similar cases in Tambogrande and Quilish, Peru,[87] and another in Esquel, Argentina,[88] the public's opposition to gold mining projects determined that the resource remained undeveloped. On all occasions, the private developer was driven away by the local community which, unconvinced that they would accrue any benefits and fearing the negative toll that the resulting environmental degradation and pollution would take on their health and livelihood, took practical and legal action to impede development.[89] As a result, the term "social license to operate," or "social licence" was coined to refer to the need to obtain host communities' favour to enter and operate in a certain area. Although the "requirement" has yet to be explicitly incorporated to the regulatory landscape of SA, it is already part of the IFIs' jargon. It will be interesting to trace its evolution as a tool to assist the public, particularly potentially affected communities, in contributing to natural resources development. There is a danger, however, in allowing one section of the

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[87] For information on Tambogrande see, e.g.: Oxfam America, "A Proposed Mine in Tambogrande, Peru: An Alternative Look" (September 2001), available at: <www.oxfamamerica.org/newsandpublications/publications/research_reports/art615.html>, and "Tambogrande Wins Prestigious Human Rights Award", available at: <www.oxfamamerica.org/newsandpublications/news_updates/archive2002/art3929.html>. On Quilish see: Oxfam America, "Tangled Strands in Fight Over Peru Gold Mine" (25 October 2005), available at: <www.oxfamamerica.org/newsandpublications/news_updates/news_update.2005-11-03.6933209585>. See also: Oxfam America, "Peru Searches for Solutions to Mining Conflicts" (31 August 2005), available at: <www.oxfamamerica.org/newsandpublications/news_updates/news_update.2005-08-31.3642638674>.

[88] For information on Esquel, see: <www.nodirtygold.org/esquel_argentina.cfm>.

[89] In Tambogrande and Esquel, protesters set up referendum procedures in the communities. In both cases voters overwhelmingly rejected the development.

general public to gain disproportionate weight in deciding the course of natural resources' development in a given country and stifle sectoral or economic development. In order to overcome that danger and ensure that natural resource development can be beneficial to affected communities as well as the general public, law makers and administrators in Canada, for example, are increasingly resorting to Impact-Benefit Agreements (IBAs).[90]

In their simplest form, IBAs are agreements between a resource developer and the community affected by the project. The agreements seek certainty and stability in community-developer relations through the negotiation of mutual benefits and the establishment of formal channels of communication.[91] While the developer seeks undisturbed access to the resource and the development area, the community seeks to minimize negative impacts and maximize benefits. The agreements typically include provisions on: community education, training and employment opportunities; workplace conditions; economic development and business opportunities; social, cultural and community support; environmental management and monitoring; and, financial arrangements on revenue sharing. IBAs' usefulness is maximized when their negotiation is inserted as a step or precondition in the permitting process and their fulfilment is eventually incorporated as a condition in the licence or contract between the government and the developer, becoming legally binding and enforceable.[92] In that case, if the TNC

[90] Focus, "Negotiations with Aboriginal Groups: the Canadian experience" (March 2002) <www.aar.com.au/pubs/pdf/nat/fontmar02.pdf>. For a list of existing IBAs in Canada, see: <www.impactandbenefit.com/News.html>; see also: Canada, Indian and Northern Affairs Canada, Thirteenth Annual Report, Mechanisms for Aboriginal Community Benefits, < http://www.ainc-inac.gc.ca/ps/nap/abo/abo13/7abo13_e.html>.

[91] T. Isaac and A. Knox, McCarthy Tetrault, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2004), available at: <www.mccarthy.ca/pubs/Resource_development.pdf>.

[92] The government would review and approve the IBA thusly incorporated. A. Lucas, "Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?" in

in question fails to hold its side of the bargain, the licence can be suspended or terminated. In addition, subjecting the agreement to the government's approval can ensure that a balance is maintained between the interests of the immediate stakeholders and the public at large. Though IBAs are commonly used for projects in indigenous areas, their application could be made extensible to other communities similarly located in development areas, whether they belong to an indigenous group or not.[93] Some conditions regarding the target community(ies), their rights and representatives, however, will have to be met and not all natural resource development projects may warrant the negotiation of an IBA.[94]

d. Access to Justice

Another avenue through which the public may contribute to ensure that natural resource development contributes to well being, is through its involvement in compliance and enforcement activities (private compliance and enforcement action). Private action may enhance deterrence by filling those gaps left by public compliance and enforcement efforts. It also lends transparency to the workings of the administration through oversight.

Even in countries with effective and efficient compliance and enforcement administrations, some misdeeds will go undetected. It is those gaps that private activity

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Human Rights in Natural Resource Development, D. Zillman et al, eds., (Oxford, U.K.: Oxford University Press, 2002) 305. In the Canadian Territory of Nunavut, they are required by law.

[93] S. Matiation, "Impact and Benefits Agreements Between Mining Companies and Aboriginal Communities in Canada: A Model for Natural Resource Developments Affecting Indigenous Groups in Latin America?" (Fall 2002) 7 Great Plains Nat. Resources J. 204.

[94] For more information see: Public Policy Forum, "Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreement" (March 2006), available at: <www.ppforum.ca/common/assets/publications/en/report_impact_benefits-english.pdf>.

is called in to fill. Of course, it is most important where government corruption or TNC extortion are present.

In addition to the traditional menu of rights of action available to the public, including – preferably- citizen suits, this study leads one to conclude that it is of the outmost importance to allow members of the public to go outside their local jurisdictions to sue TNCs directly for human rights and associated violations. Exhaustion of local remedies may be a requisite before accessing global courts. However, given the limitations and obstacles that individual plaintiffs and states face when confronted with TNCs, this study advocates for direct access to global courts by individuals and anyone with an interest in enforcing the law.

4. EPILOGUE

As I was finishing this dissertation, Milton Friedman, the father of the Chicago School of Economics,[95] died quietly in a US hospital. Author of "The Social Responsibility of Business is to Increase its Profits," economist Milton Friedman argued that "there is one and only one social responsibility of business--to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception and fraud." Corporate social responsibility, he wrote, would be a "'fundamentally subversive

[95] For more information on M. Friedman see: <www.econlib.org/library/Enc/bios/Friedman.html>.

doctrine' in a free society"[96] Over two decades later, profit-maximizing TNCs of the "free world" are unabashedly resorting to forced labour and other abhorrent behaviours in the developing world. We should either redefine "free society" or "corporation." What will it be?

[96] Milton Friedman, The Social Responsibility of Business is to Increase its Profits, N.Y. TIMES MAG., Sep. 13, 1970, reprinted in: <www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

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