

*FOREIGN INVESTMENT, HUMAN RIGHTS AND THE ENVIRONMENT: A PERSPECTIVE FROM SOUTH ASIA ON THE ROLE OF PUBLIC INTERNATIONAL LAW FOR DEVELOPMENT* BY SHYAMI FERNANDO PUVIMANASINGHE (LEIDEN, BELGIUM: MARTINUS NIJHOFF PUBLISHERS, 2007) 284 PAGES. PRICE US\$173.00 (HARDCOVER) ISBN 9789004156869.

## I INTRODUCTION

The global economy has in recent years seen an unprecedented rate of growth and economic development set against a backdrop of increasing liberalisation of foreign direct investments ('FDIs') and immense deregulation. At the same time, in developing countries, where FDIs are usually channelled, there remains an alarming prevalence of poverty, environmental degradation, and human rights abuses linked to the FDI regime. According to Lowenfeld, while developing countries may not be entirely convinced of 'the advantages of [FDI], a healthy investment climate, or a stable legal order', FDI represents the only source of incremental capital in light of the shortcomings of public assistance.<sup>1</sup> The issues raised by the involvement of transnational corporations ('TNCs') in FDI, however, represent an intricate relationship of causes and effects in the pursuit of the competing goals of economic development and environmental protection. This relationship occurs in the context of what Higgins identifies as the 'key phenomena of our age: the widening and deepening of international law; the explosion of judicial bodies; the erosion of the national and the international; and the unavoidable complexities of [international law]'.<sup>2</sup>

*Foreign Investment, Human Rights and the Environment* by Shyami Fernando Puvimanasinghe describes the complexities of, and relationships between, FDI, human rights and the environment. It is set against the background of the conduct of development activities by TNCs and the adverse social and environmental effects they generate, vis-à-vis the advancement of development objectives. The FDI regime, including its operative TNCs, is dynamic and tends to change over time in line with the international economic order, a factor which makes it difficult to regulate TNCs in the international arena.<sup>3</sup> Even more complex is the issue of linking FDIs with the goals of sustainable development and regulating this relationship through international law and policy.<sup>4</sup>

Puvimanasinghe uses examples from South Asia, and specifically Sri Lanka, where conflicts abound between environmental, developmental and economic imperatives in TNCs' activities. She argues that, in light of the global nature of TNCs and the adverse effects of their activities, there is a need to assess the

<sup>1</sup> Andreas F Lowenfeld, 'Investment Agreements in International Law' (2004) 42 *Columbia Journal of Transnational Law* 123, 126.

<sup>2</sup> Rosalyn Higgins, 'Plenary Address: A Just World under International Law' (2006) 100 *American Society of International Law Proceedings* 388, 389.

<sup>3</sup> Shyami Fernando Puvimanasinghe, *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (2007) 8.

<sup>4</sup> Ibid.

appropriateness of relevant norms in public international law and to examine how these international norms can be adapted to non-state actors such as TNCs, whose structure and operation are complicated by cross-currents of sovereignty, globalisation, market-based reforms and sustainable development. She also explores the extent to which international norms and values can be stretched under principles of sustainable development in order to provide a balanced legal framework for the interrelationship between human rights, environment and FDI as a systematic dimension of international law. She considers that there must be pluralism in the way that legal systems address these issues, by allowing for broader interpretations, alternatives and complementarities to the global legal process.

## II INTERNATIONAL LAW AND INTERNATIONAL JUSTICE

The book makes a first attempt at mapping out a pluralistic legal framework for sustainable development and regulation of FDI in international law from five themes spread over eight chapters. These concern:

- the regulation of globalisation through conceptual notions of justice, equity and sustainable development;
- regulation of TNCs through public international law;
- the role of host states and home states of TNCs in regulation of FDI;
- specific aspects of regulation of TNCs through international human rights law, environmental law and economic law, and national and regional implementation arrangements; and
- the contributions of non-state actors — TNCs, NGOs and groups from civil society — to law and policy on sustainable development and regulation of FDI.

On the issue of globalisation, the key question is: how, and to what extent, can globalisation, with its fundamental influence on FDI regimes generally, and TNCs' operation specifically, be regulated through conceptual notions of justice, equity and sustainable development? To address this question, the author primarily uses the religious, cultural and ethical values of South Asia to establish the basis for pursuing development and environmental protection, and to show that both objectives have values connected with concepts of justice, equity and distribution as a way of living in that part of the world.<sup>5</sup> She then places some of these values within modern concepts of intragenerational and intergenerational equity principles in international instruments.<sup>6</sup>

Puvimanasinghe goes on to criticise international law for perpetuating economic imbalance and inequality among developed and developing countries. She uses these concepts to argue that law must redress the imbalance through the protection of the environment and other non-state-based interests that exist in public international law.<sup>7</sup>

From this conceptual framework, Puvimanasinghe asserts that the pursuit of justice will require international law to address the imbalance and inequity

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<sup>5</sup> Ibid 39.

<sup>6</sup> Ibid 40.

<sup>7</sup> Ibid 255.

between and within states through, *inter alia*, social cooperation, equitable social arrangements, fair distribution of world resources and/or social and economic advantages. Above all, the pursuit of justice should inform and influence theories of development — particularly public interest and human welfare — and changes in approaches to international law.<sup>8</sup>

But doubt has been expressed over whether justice can be a useful decision-making tool or a recognisable objective for international law. According to Higgins, while justice may require some kind of equality and procedural fairness, these are not of themselves justice.<sup>9</sup> Furthermore, when the notion of justice is decoupled from the legal process, it becomes extremely subjective.<sup>10</sup>

### III LAW AND SUSTAINABLE DEVELOPMENT

The author then uses the global concept of sustainable development to inform both values and practicalities. Sustainable development is value-oriented in relation to environmental protection and management of resources, and its human centeredness, but it also has a practical capacity to guide decision-making. The concept is also useful because of its ultimate capacity to balance and reconcile FDI conflicts and secure ‘mutuality of interests’.<sup>11</sup> As a legal issue, conflicts will emerge in the interrelationships among international public and private personalities, various strands of international law, conflict of laws in domestic legal systems, and conflicts in norms and values and their implementation.

Viewed both as a goal and a tool, sustainable development is represented as a relevant contemporary framework with great potential for influencing law and development. It is posited as having the capacity and the means of attaining justice and equity in the balancing of conflicting North–South interests, public interests and private purposes, enhancing responsibility and accountability of government and businesses and reinforcing mutual interests. The author perceives law as a ‘system which can assume a sense of direction from a related set of values’.<sup>12</sup> To this end, she proceeds to discuss sustainable development in several sections of this work, but at such a level of generality that its true meaning and the purpose of its application is sometimes blurred.

The concept of sustainable development could be applied in a more practical way, especially in this context of finding a legal framework for encouraging sustainable economic activities in developing countries. Whenever sustainable development is to be applied, it must be clear whether the concept is employed, on the one hand, to articulate an ‘international (regional or national) development policy, strategy or agenda on the one hand; or whether it is to inform or direct

<sup>8</sup> *Ibid* 240–1.

<sup>9</sup> *Ibid* 389.

<sup>10</sup> *Ibid* 388–9.

<sup>11</sup> FDI conflicts generally surface in contexts of North–South; TNCs–host-states; environment–economy; human rights–development and rights–responsibilities. Mutuality of interests will occur where one or more of these interests converge and serve as complements to the other: *ibid* 45.

<sup>12</sup> *Ibid* 51.

development *activities*'<sup>13</sup> (for example, investment projects) towards a sustainable path. There is a definite interrelationship between both goals.

However, in the context of a wider development agenda, the state of the environment becomes an indicator of economic growth and development, and is what best characterises the call on states to cooperate in 'further development of international law in the field of sustainable development'.<sup>14</sup> According to Sands, 'this branch of law is "still emerging", and cannot be identified as distinct principles and rules which are "independent and free-standing"'.<sup>15</sup> Sustainable development may have relevance only in the interpretation and development of varying fields of international law as opposed to direct regulation.<sup>16</sup> In a wider context, therefore, sustainability becomes an indicator of a country's level of development and is usually used in relation to other factors, such as poverty reduction, human rights, gender issues, democracy, population, education, trade, conflicts and so on.<sup>17</sup>

In regards to the pursuit of development *activities*, sustainable development is primarily a principle of international environmental law, with an identifiable set of elements that should inform and guide development activities towards a sustainable course in protection of the environment and other affected interests.<sup>18</sup>

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<sup>13</sup> Priscilla Schwartz, *Sustainable Development and Mining in Sierra Leone* (2006) 50.

<sup>14</sup> *Rio Declaration on Environment and Development*, annex I to *Report of the United Nations Conference on Environment and Development — Volume 1: Resolutions Adopted by the Conference*, UN Doc A/CONF.151/26/Rev 1 (Vol I) (13 June 1992) principle 27 ('*Rio Declaration*').

<sup>15</sup> Schwartz, *Sustainable Development and Mining in Sierra Leone*, above n 13, 50, citing Philippe Sands, 'International Courts and the Application of the Concept of "Sustainable Development"' (1999) 3 *Max Planck Yearbook of United Nations Law* 389, 390.

<sup>16</sup> For instance, a wider development agenda may need to incorporate almost all the principles of the *Rio Declaration*, above n 14 (see especially principles 2, 3, 5–8, 18, 20, 21, 24, 25, 27); and also other principles known to international law, though particular emphasis will undoubtedly fall on international economic law, development law, human rights law and international relations and cooperation.

<sup>17</sup> See Priscilla Schwartz, 'The Legal Construct of Sustainable Development for Infrastructure Development Environment' in Sylvia Kierkegaard (ed), *Business and Law: Theory and Practice* (2008) 411.

<sup>18</sup> The *Stockholm Declaration* (*Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972*, UN Doc A/CONF.48/14/Rev.1 (1 January 1973) ch I (*Declaration of the United Nations Conference on the Human Environment*) ('*Stockholm Declaration*')), *Rio Declaration* (above n 14) and *Johannesburg Declaration* (*Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002*, UN Doc A/CONF.199/20 (1 January 2002) ch I, res I, annex (*Johannesburg Declaration on Sustainable Development*) ('*Johannesburg Declaration*')) and related implementation documents (*Report of the United Nations Conference on Environment and Development — Volume 1: Resolutions Adopted by the Conference*, UN Doc A/CONF.151/26/Rev 1 (Vol I) (13 June 1992) annex II (Agenda 21); *Johannesburg Plan* (*Report of the World Summit on Sustainable Development, 17<sup>th</sup> plen mtg, UN Doc A/CONF.199/20* (4 September 2002) res 2, annex II (*Plan of Implementation of the World Summit on Sustainable Development*) ('*Johannesburg Plan*'))) prescribed principles for legal and policy guidance regulating development activities for sustainable development. These include: the principle of environmental protection (*Stockholm Declaration*, principle 1; *Rio Declaration*, principle 1); the integration principle (*Rio Declaration*, principles 3, 4); the inter- and intragenerational principles (*Stockholm Declaration*, principles 1, 2; *Rio Declaration*, principles 3, 6); the principle of sustainable utilisation (*Stockholm Declaration*, principle 2; *Rio Declaration*, principle 8); the polluter-pays principle (*Stockholm Declaration*, principle 22; *Rio Declaration*, principles 13, 16); the precautionary principle (*Rio Declaration*, principle 15); principle of undertaking environmental impact assessment (*Rio Declaration*, principle 17); principle of participation (*Rio Declaration*, principle 10);

This view of sustainable development, as regulating environmentally and socially sound economic activities, is distinct from wider development strategies of countries:

It is these consequences, wrought by unsustainable patterns of production and resource exploitation that aligns economic development issues to the ‘principle of sustainable development’, and thus usher in it a broader dimension — the Development Framework.<sup>19</sup>

In spite of the above, the strengths of sustainable development as a concept are its value-oriented nature and its capacity to influence international law, and these are clearly illustrated by the author. It embodies imaginative solutions to environmental, developmental and human rights issues that plague FDI, which can then be used in reshaping international law. Puvimanasinghe suggests that if public international law is to accommodate and implement the goals of sustainable development in resolving conflicts or reinforcing mutual interests, it has to evolve to meet the constantly changing realities engendered by the structure of global society, the growing predominance of transnational business entities, and the increased intervention of non-state actors in domestic and international relations.<sup>20</sup> I am not convinced, however, of the need for such change given that sustainable development itself is a normative process of international law.

As observed by Higgins, the law has an institutional and structural contribution to make to social and economic development; and through, *inter alia*, negotiating, bargaining, specialised voting rights and economic theory, it has contributed greatly to such concepts as distributive justice, intergenerational justice and fair access to markets. And while international law is not at the heart of these economic and social issues, it has provided the structures for both dialogue and internationalised decision-making in the context of, amongst other things, the concept of sustainable development.<sup>21</sup> In my view, sustainable development is the international legal phenomenon that seeks to regulate globalisation and its development. It sets a framework within which public and private law, actors, interests and institutions can all operate in fulfilment of economic, social and environmental goals, whether in regulation of development activities or in setting benchmarks for development strategies. It is a creature of international law with a corresponding effect on various aspects of domestic regulation.

#### IV TNCs AND PUBLIC INTERNATIONAL LAW

Chapter 3 engages in a discussion of TNCs and public international law. Here, the author describes the complexities surrounding regulation of TNCs in the domestic and international spheres, which stem from their formation, structure, activities and stakeholders. Such complexities render TNCs immune from the

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corporate accountability principle (*Rio Declaration*, principles 9, 16; *Johannesburg Declaration*); principle of cooperation (*Stockholm Declaration*, principles 24, 25; *Rio Declaration*, principles 7, 12, 14, 27 (see also *Agenda 21*, above this note [30.2], [30.10])).

<sup>19</sup> See Priscilla Schwartz, ‘Sustainable Development in International Law’ (2005) 5 *Non-State Actors and International Law* 127, 136.

<sup>20</sup> Puvimanasinghe, above n 3, 48–9.

<sup>21</sup> Higgins, above n 2, 389.

control of any single state and necessitate their regulation under public international law.<sup>22</sup> In order to carve a place within that order for such regulation, Puvimanasinghe examines the legal sources, institutions and practices of public international law and calls for reinterpretation of traditional notions such as ‘state practice’, ‘legal personality’, ‘jurisdiction’, ‘state responsibility’ and ‘domestic regulatory imperative’ to reflect changes in standards of TNC regulation for sustainable development.<sup>23</sup>

Puvimanasinghe then attempts to answer some difficult questions such as the extent to which it can be legally prudent and appropriate to accord or recognise ‘subject status’ or international legal personality to TNCs akin to that of their home or host states.<sup>24</sup> The argument is that if non-state actors engage in activities to the same or greater degree than states, then certain rights and duties, which applied previously only to states, must now be recognised with respect to non-state actors (with some caveats). TNCs must thus be recognised as subjects in the sense that they have a ‘functional personality’, while full international legal personality is reserved for states.<sup>25</sup>

On the issue of jurisdiction, the quest is to find ways in which international jurisdictional principles — territoriality, nationality, extraterritoriality and universality — can be applied to regulation of TNCs in a variety of respects. For example, given the fact that the activities of TNCs could entail harmful consequences which transcend borders, applying the ‘effects doctrine’ of the territorial principle<sup>26</sup> could lead to extension to higher standards for the promotion and protection of human rights and the environment.

Very interesting arguments are also made for stretching the principle of nationality beyond its legally plausible limits. Legally, a TNC’s nationality is defined by the state under the laws of which it is incorporated and in whose territory it has its registered office, although different issues may arise in the context of dispute settlement based on agreement (for example, in the World Trade Organization<sup>27</sup>) or bilateral investment treaties or International Centre for Settlement of Investment Disputes processes.<sup>28</sup> Under the rationale that TNCs holding a particular nationality could lead to greater accountability (especially for broader interests), Puvimanasinghe argues that a genuine link must be considered to exist between the TNC and the state whose nationality it possesses, even where the company is operated abroad and is controlled by foreign shareholders.<sup>29</sup> If the TNC has the nationality of its home country, it will more often than not have higher standards imposed on it and will not easily evade jurisdiction; and there may be greater efficacy of compliance and

<sup>22</sup> Puvimanasinghe, above n 3, 59–60.

<sup>23</sup> Ibid 93–4.

<sup>24</sup> Ibid 61–70.

<sup>25</sup> Ibid 69.

<sup>26</sup> June Ann McClure, ‘International Law: The Act of State Doctrine as a Limitation upon the Extraterritorial Application of United States Antitrust Laws’ (1972) 21 *Journal of Public Law* 151, 153.

<sup>27</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401.

<sup>28</sup> See Donald McRae, ‘Trade, Investment, and the Environment: Closed Boxes? Summary of Remarks’ (2006) 100 *American Society of International Law Proceedings* 34, 34–5.

<sup>29</sup> Puvimanasinghe, above n 3, 72.

implementation. Thus Puvimanasinghe advocates the extension of domestic legislation, chiefly on the basis of nationality, as an appropriate measure to regulate TNCs, possessing high potential for just and equitable solutions to environmental and civil rights protection.<sup>30</sup>

Puvimanasinghe's arguments could be resisted by those calling for 'denationalisation' of TNCs in favour of 'supranational citizenship', potentially by treaty.<sup>31</sup> The International Institute for Sustainable Development's *Model Agreement*<sup>32</sup> is a useful example. It has the clear objective of promoting 'foreign investment that supports sustainable development',<sup>33</sup> and features provisions that allow a party to take non-discriminatory regulatory measures that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment.<sup>34</sup> But treaty structures (whether designed as contractual arrangements or public regulatory regimes) can create biases and pose a challenge to addressing the tension between investment and the environment.<sup>35</sup> According to Yang, the:

challenge is not a problem of law [but one] of how the politics of trade, development and the environment affect the structure of international agreements. As a result, change does not require fundamental legal change but rather change in the politics [of] and discourse on these issues.<sup>36</sup>

Puvimanasinghe further advocates for an expansion of the concept of state responsibility, from the perspective of justice, equity and sustainable development, to make a home state responsible for the wrongful conduct of its TNCs. The argument is, however, apologetic to the obstacles that such a measure may pose to economic development, and the ultimate utility of increasing the share of responsibility of states in a global era where the rights of states are declining.<sup>37</sup> It is worth mentioning that appropriate international measures of responsibility are being implemented, and are now widely recognised as the basis of emerging general principles on environmental liability, including responsibility for pollution. These include institutional practices of implementing international liability and compensation schemes for victims of pollution under a system of operator non-fault liability including the apportionment of responsibility between states, industry and private parties, maintaining financial security and guarantees to cover compensation claims, establishing

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<sup>30</sup> Ibid 75–6.

<sup>31</sup> George W Ball, 'Cosmocorp: The Importance of Being Stateless' (1967) 2 *Columbia Journal of World Business* 25, 28–9.

<sup>32</sup> Howard Mann et al, International Institute for Sustainable Development, *IISD Model Agreement on Investment for Sustainable Development* (2005) <[http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf)> at 23 September 2008 ('Model Agreement').

<sup>33</sup> Ibid 2.

<sup>34</sup> Ibid 12 (arts 20, 21).

<sup>35</sup> Tseming Yang, 'The Challenge of Treaty Structure: The Case of NAFTA and the Environment' (2006) 100 *American Society of International Law Proceedings* 32, 32.

<sup>36</sup> Ibid 34.

<sup>37</sup> Puvimanasinghe, above n 3, 76.

industry-wide funds at the national level and allocating additional financial resources.<sup>38</sup>

The sum of the author's argument with regard to the application of public international law concepts and norms to TNCs is that progressive development of this branch of law would have to take account of the ongoing formation of law, international public policy and community values (including the evolving body of law and policy relating to corporate social responsibility ('CSR')) to condition classical norms of state and international responsibility. This would enhance the need for coherence and efficiency in public international law, on the one hand, and aid attainment of the goals of justice, equity and sustainable development on the other. This conclusion is realistic. As emphasised by Higgins, international law is 'a normative system, harnessed to the achievement of common values ... that speak to us all'<sup>39</sup> and which should be able to contribute to solving today's problems. 'Law as a process encourages interpretation and choice that is more compatible with the values we seek to promote and objectives we seek to achieve',<sup>40</sup> and 'the possibility of including the actions [of a] variety of authorised decision-makers within the fabric of international law'.<sup>41</sup>

## V HUMAN RIGHTS

In Chapters 4 and 6, Puvimanasinghe examines strands of the international legal order from the perspectives of environmental law, economic law, human rights law and national and regional arrangements for implementation. She uses the discourses both to illustrate the reality of international inequality, power, and politics and to highlight the common values represented in policy principles, standards, procedural requirements and institutional arrangements that speak to protection of the natural, human and social environment. Sustainable development, law, principles and practice are at the heart of the formulation and definition of the common values implicit or explicit in the respective areas of law.

The challenges and dilemma of reconciling human rights, the environment and economic development to attain sustainable development, especially in the context of TNCs' investment activities, are viewed through the lens of the South Asian region. This region experiences both the boom of economic development ushered in by globalisation and adverse impacts on the environment and human rights.<sup>42</sup> The latter is compounded by regional realities including overpopulation, poverty, laxity in regulation and implementation, lack of good governance and use of unsafe industrial technology.<sup>43</sup> These complex relations create problems in apportioning responsibility for human rights and environmental abuses.

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<sup>38</sup> International Law Commission, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, principles 3, 4, 5, 7, as contained in *Report of the International Law Commission Fifty-Eighth Session*, UN GAOR, 61<sup>st</sup> sess, Supp No 10, UN Doc A/61/10 (1 October 2006).

<sup>39</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 1–2.

<sup>40</sup> *Ibid* 10.

<sup>41</sup> Schwartz, *Sustainable Development and Mining in Sierra Leone*, above n 13, 56.

<sup>42</sup> Puvimanasinghe, above n 3, 1–3, 177–8.

<sup>43</sup> *Ibid* 117.

In these circumstances, the author asserts that international human rights law can be instrumental in promoting basic human rights and freedoms.<sup>44</sup> Even though, from a holistic approach, human rights issues are still confined to the realms of reports and recommendations, she argues that they could still provide fertile ground for the progressive development of international, regional and domestic law, and encourage interventions of home state, host state and non-state actors.<sup>45</sup> In the area of development law, despite political shifts on the character of the ‘the right to development’, the link between development and broader social issues is maintained by industrialised countries and international institutions, positively through assistance, and negatively through ‘conditionalities’ placed on respect for international standards on human rights and environment. However, according to the author’s reasoning, the path toward strengthening the accountability of states and TNCs may be fairer than the conditionality approach.

In respect of investment, Puvimanasinghe criticises the lack of an effective international legal regime including a binding and comprehensive international instrument or a strong institutional framework for foreign investment regulation. Where international treaties exist to regulate TNCs, huge reliance is placed on cooperation of home states and host states for their ratification and legislation. Her concerns are buttressed by Alvarez, who identifies three potential risks to the FDI regime; namely, a vertical democratic deficit (within democratic societies), renewed horizontal (North–South) tensions and internal incoherence or inconsistency.<sup>46</sup> Although they may have more general effects (as on customary international law), investment treaties are more similar to ‘tit for tat deals’ than they are legislative.<sup>47</sup> Even the WTO regime, which represents a formidable legal structure both at the institutional and adjudicatory level, and is progressively implementing developmental and environmental values through its rules and principles, is a failure with regard to its investment regime.<sup>48</sup> This state of affairs desires invocation and garnering of legal resources at the international, regional and national levels for FDI regulation.

Sustainable development is recommended by the author as a key tool in this regard. Puvimanasinghe demonstrates how sustainable development is addressed at the institutional level through regional efforts under the South Asian Association for Regional Cooperation (and its environmental wing, the South Asian Co-operative Environmental Programme) and the Asian Development Bank.<sup>49</sup> On the economic front, the *Agreement on South Asian Free Trade Area*,<sup>50</sup> the *Agreement on South Asian Association for Regional Cooperation*

<sup>44</sup> Ibid.

<sup>45</sup> Ibid 128–37.

<sup>46</sup> José E Alvarez, ‘The Emergence of Foreign Direct Investment’ (2005) 99 *American Society of International Law Proceedings* 94, 96.

<sup>47</sup> Ibid 97.

<sup>48</sup> World Wildlife Foundation, *No Investment Agreement within the WTO: Re-directing Investment to Promote Sustainable Development* (WWF International Discussion Paper, 2001).

<sup>49</sup> Puvimanasinghe, above n 3, 214.

<sup>50</sup> Signed and entered into force 6 January 2004, available from <<http://www.saarc-sec.org>> at 23 September 2008.

*Preferential Trade Agreement*,<sup>51</sup> the Asia-Pacific Economic Cooperation and the Association of South-East Asian Nations are some of the important instruments and institutions discussed.<sup>52</sup> The book gives a more detailed jurisprudential overview of increasing use and reliance on public interest litigation.<sup>53</sup> Developments in public interest litigation and sustainable development jurisprudence, as have evolved in South Asia, serve the purpose of uniting the objectives of environmental protection and human rights, and also of bridging the gap between values and norms.

However, other sustainable regulatory measures outside public interest litigation are worth considering. According to Duong, in some legal systems, ‘the doctrine of social responsibility has helped write public interest concerns ... into the role of profit-making corporations’.<sup>54</sup> ‘Enforced self-regulation’ or ‘management based regulation’ is a regulatory model now initiated by national jurisdictions where companies are incorporated and headquartered, so as to compel ‘the regulated entities to improve or disclose their internal management to achieve public goals’.<sup>55</sup> Two further legal techniques for regulating companies specifically and industries generally are ‘negotiated rule-making’ and ‘regulation by litigation’.<sup>56</sup> In the former, main interest groups move from the public regulatory process to negotiations, through an agency-directed process that places emphasis on the creation of trust funds for adversarial relations.<sup>57</sup> Morriss, Yandle and Dorchak note that ‘in regulation-by-litigation, agencies use enforcement actions against regulated entities [and interest groups] ... to create new substantive obligations for the regulated’.<sup>58</sup>

Puvimanasinghe is inspired by the magnitude of the body of values represented by these three dimensions of international law — economic, environmental and human rights — and calls for these values to be incorporated into the methodology of the sources of public international law.

## VI NON-STATE ACTORS

Chapter 7 addresses the role of non-state actors (NGOs, civil society and TNCs) in promoting sustainable development law and policy. NGO intervention is viewed in light of attempts at regulation, sensitisation and publicity. Civil society’s role in self-regulation includes collaboration with TNCs in public–private partnerships and multi-stakeholder initiatives that include certification bodies, sectoral labelling schemes, factory monitoring, reporting guidelines and codes of conduct. The values of TNCs’ practice of CSR or

<sup>51</sup> Signed and entered into force 11 April 1993, available from <<http://www.saarc-sec.org>> at 23 September 2008.

<sup>52</sup> Puvimanasinghe, above n 3, 214.

<sup>53</sup> Ibid 180–208.

<sup>54</sup> Wendy N Duong, ‘Partnerships with Monarchs — Two Case Studies: Case One — Partnerships with Monarchs in the Search for Oil: Unveiling and Re-examining the Patterns of Third World Economic Development in the Petroleum Sector’ (2004) 25 *University of Pennsylvania Journal of International Economic Law* 1171, 1191.

<sup>55</sup> Ibid 1192.

<sup>56</sup> Andrew P Morriss, Bruce Yandle and Andrew Dorchak, ‘Choosing How to Regulate’ (2005) 29 *Harvard Environmental Law Review* 179, 180–1.

<sup>57</sup> Ibid 180.

<sup>58</sup> Ibid 181.

attempts at self-regulation are addressed extensively in this work. But it is important that a distinction is made between ‘public welfare’ codes and ‘private transactional’ codes. While the former are attractive means for promoting self-regulation and socially responsible TNC (or multinational corporation) conduct, private transactional codes (such as the International Chamber of Commerce’s *Incoterms 2000*<sup>59</sup>), are useful for promoting cross-border transactions and to protect the security of those transactions. According to Murphy, they ‘raise fewer concerns than do public welfare codes since [multinational corporations] have a sufficient economic interest in maintaining, refining and self-policing’ these codes.<sup>60</sup>

Picciotto’s suggestion could be useful in making self-regulation and voluntary codes effective or showing how the body of global public values and policy they entail could be made to penetrate legal systems. He sees no rigid separation between soft and hard law or ‘totally voluntary codes’ and ‘strictly binding law’.<sup>61</sup> He maintains that codes ‘entail a degree of formalization of normative expectations and practices’ which, even if they are not laws, may have an indirect legal effect on the application of both national and international law.<sup>62</sup> He suggests that ‘they should be more firmly anchored within a broader regulatory framework that establishes obligations as well as rights for business’<sup>63</sup> and that this framework ‘could be based on new approaches to combining binding hard law with non-binding soft law standards through a framework convention’.<sup>64</sup>

Unease with voluntary codes of conduct has led to calls for transforming them into binding laws at both the international and national levels, including urging international and national courts to use the codes as an expression of the rule of law.<sup>65</sup> But Murphy has expressed doubt over the emphasis on binding law succeeding in the near term, even at a treaty level.<sup>66</sup> In his view, codes were adopted

<sup>59</sup> International Chamber of Commerce, *Incoterms: ICC Official Rules for the Interpretation of Trade Terms* (2000) (‘*Incoterms 2000*’).

<sup>60</sup> Sean D Murphy, ‘Taking Multinational Corporate Codes of Conduct to the Next Level’ (2005) 43 *Columbia Journal of Transnational Law* 389, 393–4.

<sup>61</sup> Sol Picciotto, ‘Rights, Responsibilities and Regulation of International Business’ (2004) 42 *Columbia Journal of Transnational Law* 131, 146.

<sup>62</sup> Ibid 145–6. For example, codes may be enforceable through private law, such as by constituting part of commercial agreements or legal enforcement by private parties based on state regulatory law, or standards can be given legally binding status at international level as in the WTO’s requirement that its members adopt international standards in implementing its *SPS* and *TBT Agreements* or integrating CSR measures within the global rules-based framework: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*) 1867 UNTS 493 (‘*SPS Agreement*’); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Technical Barriers to Trade*) 1868 UNTS 120 (‘*TBT Agreement*’).

<sup>63</sup> Picciotto, above n 61, 133.

<sup>64</sup> Ibid.

<sup>65</sup> Murphy above n 60, 422–3, citing Emeka A Duruigbo, *Multinational Corporations and International Law: Accountability and Compliance in the Petroleum Industry* (1999) 156; Ralph G Steinhardt, ‘Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*’ in Philip Alston (ed), *Non-State Actors and Human Rights* (2005) 177.

<sup>66</sup> Murphy, above n 60, 423.

because of the political obstacles and legal complications in regulating non-state entities who operate across borders, and because of a desire to preserve some level of flexibility in the regulation of such actors as well as to promote true ‘internalization’ of values.<sup>67</sup>

All of these factors will make direct regulation problematic.<sup>68</sup>

## VII CONCLUSION

*Foreign Investment, Human Rights and the Environment* is rich in content, broad in scope and altogether oriented towards transformation. Through in-depth and balanced analyses of a broad spectrum of international public law, policy and practice, including methods of implementation at the regional, domestic and industry level, the author has overcome a formidable challenge: to explore how public international law can adequately serve as a medium for the advancement of economic development, while simultaneously protecting and promoting human rights and conserving the environment in the context of FDI. The book reveals a wealth of international public values from manifestations of ideals and morals, ethics and policy, and soft and hard law. Together these fall between law and non-law, with the majority of values being predominantly soft law. *Foreign Investment, Human Rights and the Environment* advocates recognition and implementation of this body of values, through pluralism and diversity of laws and processes, bound together by broader approaches to interpretation of public international law, with a degree of innovation and imagination.

The volume gives us great food for thought on the approach suggested. But Higgins simply raises this contemplation to another level. In her view, international law has never been about the automatic and mechanical application of a single ‘rule’ governing a general situation. The problem is rather about choosing between options among an ‘ever thickening and deepening corpus of law’.<sup>69</sup> The decision-maker has several norms from which to choose in any given situation, including the appropriate governing law. The important questions, therefore, are:

Does context, and the promotion of values, suggest which of various applicable norms should be selected for application? Often, of course, several desirable values — human dignity, security of the person, the environment, intergenerational considerations — can be jostling for our attention. But how far can ‘context’ go in providing the answers? Is there a point at which reliance on ‘context’ can change the illegal into the normative? ... [W]hen does ‘creativity’ in the face of adverse circumstances cross the line into the unpermitted? ... If strict construction won’t give the answer, and the attainment of values (or the assessment of motives) must be part of the analysis but still will not provide the whole answer, how do we know when we have passed from the ‘unforeseen, but legal’ to ‘illegal’? Is it the quantum, or quality, of the opposition? ... Is it the existence or otherwise of a specific contravening norm[?] ... Or is ‘legitimation’ really the answer to our conundrums?<sup>70</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Higgins, above n 2, 394.

<sup>70</sup> Ibid.

Nevertheless, Puvimanasinghe has made an immense contribution to the debate on when, where, how and/or why to apply international law to address environment, human rights and investment issues.

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