

## THE SANGAM OF FOREIGN INVESTMENT, MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS: AN INDIAN PERSPECTIVE FOR A DEVELOPING ASIA<sup>†</sup>

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The *sangam* (confluence) of foreign investment, multinational corporations (MNCs) and human rights raises new challenges for the developing countries in Asia. Though development is the underlying current behind this *sangam*, there is a fundamental tension in how the three streams intermingle. For example, the trend of investment-driven development often compels developing countries to allure foreign investment by MNCs, even if it brings negative effects on human rights realisation and development of the majority. A “race to the bottom” for securing foreign investment amongst developing countries further reduces their bargaining position vis-à-vis MNCs. Taking India as an example of developing countries of Asia, this article explores the individual and collective strategies that developing countries could employ to exercise a control over the *flow* and *direction* of foreign investment. It argues that developing countries should realise their place in an interdependent world, be guided by an approach of “diversified integration”, rely on human rights norms, and foster alliances with civil society organs in order to control the flow and direction of foreign investment.

### I. INTRODUCTION

This article proposes to uncover the rainbow created by the *sangam* (confluence) of foreign investment,<sup>1</sup> multinational corporations (‘MNCs’)<sup>2</sup> and human rights in

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<sup>1</sup> “Foreign investment” is taken to cover both foreign direct investment (‘FDI’) and portfolio investment. See Robert Pritchard, “The Contemporary Challenges of Economic Development” in Robert Pritchard, ed., *Economic Development, Foreign Investment and the Law* (London: Kluwer Law International, 1996) at 1, 3. But see, for the distinction between FDI and portfolio investment, M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994) at 4-6.

<sup>2</sup> Despite the difference in terminology of MNCs and transnational corporations (‘TNCs’), ‘MNCs’ has been used throughout this article to encompass both the entities. See generally David C. Korten, *When Corporations Rule the World* (West Hartford, Connecticut: Kumarian Press, 1995) at 125; Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell Publishers, 1995) at 12-15; Cynthia D. Wallace, *Legal Control of the Multinational Enterprise* (Hague: Martinus Nijhoff, 1982) at 10-12.

Asia.<sup>3</sup> Let me begin with a brief description of the “actual” *sangam* in India, and why I label the intersection of foreign investment, MNCs and human rights as a *sangam*, albeit a “global” one. *Sangam* is the name given to a place where three rivers—Ganga, Yamuna and Saraswati—meet at Allahabad.<sup>4</sup> Notably, whereas Ganga (*dhaval* or whitish in colour and a symbol of purity) and Yamuna (*syamal* or grayish in colour) are visible, Saraswati is a mythical or invisible river. How does this actual *sangam* and its three streams resonate with the three straits of the global *sangam*—foreign investment, MNCs and human rights—collectively as well as individually? I offer two explanations for this simile. First, the three streams of actual *sangam* could arguably be compared to the three variables of the global *sangam*. The human rights are like Ganga; the language of human rights has become so powerful that it is used to purify, justify or legitimise anything from putting trade restrictions to invading a country.<sup>5</sup> The foreign investment, on the other hand, could be compared to Yamuna in that the effects of foreign investment on host countries might be described more appropriately in terms of gray rather than being totally white or black. Lastly, it is fitting to see MNCs in terms of Saraswati, that is, invisible<sup>6</sup> but very real, important and powerful entities.<sup>7</sup>

Second, the intersection of foreign investment, MNCs and human rights share a common theme of development, though the patterns of such intersection might differ from region to region. “Development”, taken in its wider sense, is the underlying current behind this global *sangam* of foreign investment, MNCs and human rights. Foreign investment is about development, whether of the investors or of the place of investment or of both. Again, the rise in the number, area of operation and influence of

<sup>3</sup> Being conscious of vast literature on what human rights mean for Asia, I take human rights to mean all internationally recognised civil, political, social, economic, and cultural rights. Despite assuming an element of universality, I believe that culture plays an important role in contextualising, operationalising and realising human rights. See Robert McCorquodale & Richard Fairbrother, “Globalisation and Human Rights” (1999) 21 *Human Rights Quarterly* 735 at 741-2. See also Wright who demonstrates how local cultural differences might be used to promote human rights, and a failure to recognise such differences might in fact result in subverting human rights: Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (London: Routledge, 2001) at 88-93, 111, 213-4. Allahabad (also known as Prayag) is one of the most sacred Hindu pilgrimages in India.

<sup>4</sup> “Far from being a defence of the individual against the state, human rights has become a standard part of the justification for the external use of force by the state against other states and individuals.” David Kennedy, “The International Human Rights Movement: Part of the Problem?” (2002) 15 *Harvard Human Rights Journal* 99 at 119, and generally.

<sup>5</sup> MNCs are invisible not only because I consider corporations to be a legal fiction but also because they could disappear totally and then be reborn in newer forms. This is besides the fact that the principles of separate personality and limited liability allow corporate actors to operate (and also hide if needed) behind a veil. See Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002) at 6-14.

<sup>6</sup> A 2003 survey shows that there are now 72 MNCs in the list of 100 largest economic entities. Paul Sheehan, “A Rising Force in Capital and Culture” *Sydney Morning Herald* (3-4 January 2004) at 21. See also Murray Dobbin, *The Myth of the Good Corporate Citizen: Democracy under the Rule of Big Business* (Toronto: Stoddart, 1998) at 85-121; Noreena Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* (London: William Heinemann, 2001) at 6-8; Erin Elizabeth Macek, “Scratching the Corporate Back: Why Corporations have no Incentive to Define Human Rights” (2002) 11 *Minnesota Journal of Global Trade* 101 at 103-04; and Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, online: Global Policy Forum <<http://www.globalpolicy.org/soecon/tncs/top200.htm>>.

MNCs is directly linked to their never-ending desire for growth. Similarly, there is a close relationship between human rights and development in that they are considered complementary to each other.<sup>8</sup>

Despite the fact that all the three straits of the global *sangam* share a common theme of development, their interrelation creates a fundamental tension, which is not too difficult to notice.<sup>9</sup> The root of this tension lies in a battle for the primacy or supremacy of developmental interests of concerned participants. Let us have a look at the sample of how this tension plays out. From the perspective of the foreign investor(s), foreign investment (by MNCs or otherwise) is primarily about earning maximum returns and creating or capturing markets<sup>10</sup> including by eliminating and distorting competition, and could have both positive and negative impact on the realisation of human rights. But the host countries of foreign investment do have different objectives in mind when seeking foreign investment. MNCs, which are prime vehicles of globalisation<sup>11</sup> and foreign investment,<sup>12</sup> do have the potential to promote as well as abridge human rights, including through investment.<sup>13</sup> Human rights, on the other hand, are increasingly becoming such a powerful weapon that

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<sup>8</sup> See, for example, Amartya Sen, *Development as Freedom* (New York: Oxford University Press, 1999). Some of the issues related to human rights and development are also dealt with in a special issue of the Australian Journal of Human Rights: vol. 4:2 (1998). Compare Rajagopal who points out the tension between human rights and development: "How come human rights discourse comes to terms with the fact that *it is the process of bringing development that has caused serious human-rights violations among the deprived sections of Third World peoples?*" Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 202 [emphasis in original]. He further highlights the problems associated with "developmentalisation of human rights". *Ibid.* at 216-30.

<sup>9</sup> For example, how many corporations (and also their stockholders) will be ready to invest not for return but for the promotion of human rights, say, in feeding malnourished children or distributing free medicines to AIDS patients?

<sup>10</sup> "The dominant motivation for most FDI decisions is to pursue a market for goods or service." Pritchard, *supra* note 1 at 5.

<sup>11</sup> "Globalisation is powerfully driven by international corporations." Joseph E. Stiglitz, *Globalisation and its Discontents* (New York: W. W. Norton & Co., 2002) at 10. Spar and Yoffie also suggest this: "[C]ross-border activities of multinational firms are an integral piece—perhaps *the* integral piece—of globalisation." Debora Spar & David Yoffie, "Multinational Enterprises and the Prospects for Justice" (1999) 52 *Journal of International Affairs* 557. In this article, "globalisation" signifies a phenomenon of liberalisation of economies through privatisation, shifting of power from state to private actors, and removal of national barriers with reference to market, capital, services, governance, etc.

<sup>12</sup> Sornarajah, *supra* note 1 at 1, 6, 22, 50-53. Tolentino also examines in detail the emergence and evolution of MNCs (from the perspective of outward FDI) in resource-abundant countries, resource-scare large countries and resource-scare small countries. Paz Estrella Tolentino, *Multinational Corporations: Emergence and Evolution* (London: Routledge, 2000). See also Halina Ward, "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options" (2001) 24 *Hastings International and Comparative Law Review* 451 at 452; Macek, *supra* note 7 at 103.

<sup>13</sup> See Stephen Bottomley, "Corporations and Human Rights" in Stephen Bottomley & David Kinley, eds., *Commercial Law and Human Rights* (Aldershot: Ashgate/Dartmouth, 2002) at 47-68. See also Stiglitz, *supra* note 11 at 67-73; William H. Meyer, "Human Rights and MNCs: Theory Versus Quantitative Analysis" (1996) 18 *Human Rights Quarterly* 368; William H. Meyer, "Activism and Research on TNCs" in Jędrzej G. Frynas & Scott Pegg, eds., *Transnational Corporations and Human Rights* (New York: Palgrave Macmillan, 2003) at 33-52. Compare Jackie Smith, Melissa Bolyard & Anna Ippolito, "Human Rights and the Global Economy: A Response to Meyer" (1999) 21 *Human Rights Quarterly* 207.

everyone wants to have them in one's armoury.<sup>14</sup> For example, MNCs not only invoke human rights as a shield against government regulation<sup>15</sup> but also see them as a business tool that could help in achieving higher profit and/or giving an edge over competitors.<sup>16</sup> On the contrary, human rights activists look towards human rights as salvation against the "profit only" onslaught of MNCs.

In the light of above brief mapping of a fundamental tension between foreign investment by MNCs and human rights, I intend to investigate two separate but inter-related issues. First, this article seeks to examine the negative effects of foreign investment by MNCs on human rights and development, especially in developing countries. Second, given that the flow of foreign investment is critical to development<sup>17</sup> (especially of developing countries),<sup>18</sup> I am interested in exploring the individual and/or collective strategies that developing countries could, if at all, employ to exercise a control over the *flow* and *direction* of such investment. It is necessary to ponder these questions because not only Asia—the home of several developing/under-developed countries—require foreign investment to realise human rights and accomplish developmental goals, but also because Asia "forms a critical part of the growth strategies" of MNCs.<sup>19</sup> Besides being one of the most rapidly liberalising host regions for foreign investment,<sup>20</sup> Asia offers one of the world's largest consumers' markets, one of the cheapest labour forces, and generally lax (or less stringent) legal regimes regarding issues such as labour, environment, health and safety, consumer protection, competition, and unfair trade practices.<sup>21</sup>

<sup>14</sup> "Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance." Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at ix. Rajagopal also refers to "the emergence of a new political culture of legitimacy in the form of human rights." Rajagopal, *supra* note 8 at 135. Compare Kennedy, *supra* note 5.

<sup>15</sup> See Michael K. Addo, "The Corporation as a Victim of Human rights Violations" in Michael K. Addo, ed., *Human Rights Standards and the Responsibility of Transnational Corporations* (Hague: Kluwer Law International, 1999) at 190 [*Human Rights Standards*]. See also *Autronic A.G. v. Switzerland* 12 (1990) E.H.R.R. 485.

<sup>16</sup> Simon Williams, "How Principles Benefit the Bottom Line: The Experience of the Co-operative Bank" in *Human Rights Standards, ibid.* at 63-8; John Harrison *et al.*, *Ethics for Australian Business* (Frenchs Forest: Prentice Hall - Sprint Print, 2001) at 1-9. See also 'CSR Facts and Figures', online: CSR Europe <[http://www.csreurope.org/aboutus/CSRfactsandfigures\\_page397.aspx](http://www.csreurope.org/aboutus/CSRfactsandfigures_page397.aspx)>.

<sup>17</sup> It can be said that the view one holds regarding the relation of foreign investment and development is determined largely by the theoretical position one takes. See Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Aldershot: Ashgate, 2002) at 9-30, 104-10; Sornarajah, *supra* note 1 at 38-50; Muchlinski, *supra* note 2 at 93-101. See also Theodore H. Moran, "Multinational Corporations and Developing Countries: An Analytical Overview" in Theodore H. Moran, ed., *Multinational Corporations: The Political Economy of Foreign Direct Investment* (Massachusetts: Lexington Books, 1985) at 3 [*Multinational Corporations*].

<sup>18</sup> "Developing states make up the great majority of the world's states, but they hold only a small fraction of international capital and must therefore depend on various external sources of capital for their development." Glen Kelley, "Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations" (2001) 39 *Columbia Journal of Transnational Law* 483 at 497.

<sup>19</sup> Linda Y. C. Lim, "Prospects for Foreign Investment in Asia", speech delivered at the 10<sup>th</sup> Annual Corporate Conference, Manila, 26 February 1999, online: Asia Society <<http://www.asiasociety.org/speeches/lim/html>>.

<sup>20</sup> UNCTAD, *World Investment Report (2003)—FDI Policies for Development: National and International Perspectives* (New York: UN, 2003), Overview at 11 [*World Investment Report*].

<sup>21</sup> See Sornarajah, *supra* note 1 at 17-8.

But before we proceed further, few caveats about the scope of this endeavour. First, while I intend to examine the negative impacts of foreign investment on human rights and development, I am not suggesting that foreign investment has no positive effects. In fact, positive effects of foreign investment are underlying justifications for my second inquiry; the need to explore “controlling strategies” only arises because under the current global order foreign investment is essential but fraught with many avoidable adverse consequences. Second, though foreign investment could also flow from other sources other than MNCs,<sup>22</sup> presently I am concerned with foreign investment made by MNCs only. Third, my inquiry is limited to the perspective of developing countries of Asia (represented by India).<sup>23</sup> There is, however, a more profound reason for this limited treatment: in most of the cases it is the developing countries which face this difficult choice of creating an atmosphere conducive to foreign investment and also ensuring that such a scenario does not adversely affect the realisation of human rights and/or national developmental goals.<sup>24</sup> Fourth, I rely upon the case studies of Bhopal, Enron and Unocal to illustrate my arguments, in view of my greater familiarity with them. But again, this choice serves a purpose by demonstrating that human rights violations, as a result of investment/operation by MNCs, could occur in both democratic and non-democratic countries.

## II. FOREIGN INVESTMENT AND HUMAN RIGHTS/DEVELOPMENT: LOOKING AT THE OTHER SIDE OF THE COIN?

Foreign investment does have, and could have, a positive impact on the realisation of human rights as well as development.<sup>25</sup> Though I do not intend, or need, to deny that, presently I am interested in exploring the other side of the coin, namely, the negative impacts of foreign investment by MNCs on human rights and development.<sup>26</sup> In this process, this article raises some fundamental questions regarding the relationship of foreign investment by MNCs and human rights/development. For example, even if we assume—as some would argue—that foreign investment promotes human rights, what are those human rights (and of whom) that get promoted? Similarly, given

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<sup>22</sup> Foreign investment, for example, could also flow from developed countries and international financial institutions. See McCorquodale & Fairbrother, *supra* note 3 at 743.

<sup>23</sup> Two factors, among others, make India representative for my purpose. First, it ranked 28<sup>th</sup> in the world’s top 30 FDI recipients in 2002. Second, none of India’s MNCs figure in the list of top 25 non-financial TNCs from developing economies, ranked by foreign assets in 2001. *World Investment Report 2003*, *supra* note 20 at 4 and 6, respectively.

<sup>24</sup> See UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (New York: UN, 1999) Overview at 15: “The largest 10 home countries accounted for four-fifth of global FDI outflows.” [*World Investment Report 1999*]. Besides, about 90 per cent of the top 100 MNCs, which are prime source of foreign investment, are from the European Union, Japan and the U.S.; *ibid.* at 2.

<sup>25</sup> Lance Compa, “Exceptions and Conditions: The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection” (1998) 31 *Cornell International Law Journal* 683 at 684 and *supra* notes 13 and 17.

<sup>26</sup> See, for example, World Rainforest Movement, “Burma: Human Rights Abuses Linked to Foreign Investment in “Development””, online: World Rainforest Movement <<http://www.wrm.org.uy/bulletin/39/Burma.html>>. See also generally Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable, 2004); and Glasbeek, *supra* note 6.

that foreign investment leads to economic development, how is such “development” conceptualised? More importantly, whose development are we referring to, and at what cost?

### A. Negative Effects on Human Rights

Foreign investment by MNCs adversely affects human rights realisation in several ways. Some of these are worthy of a brief treatment here. First, in view of the fact that the majority of foreign investment in developing countries is in the manufacturing sector and not in developing infrastructure or providing basic services,<sup>27</sup> such investment hardly contributes towards the promotion of basic human rights, *e.g.*, the right to food, water, shelter, education, or health.<sup>28</sup> The result is that people in villages may have access to Pepsi and Coke but not to safe drinking water. Moreover, it is probable, on the contrary, that the condition of basic human rights might worsen if governments in developing countries start withdrawing the resources allocated to providing these services without ensuring that foreign investment fills the vacuum created by them.<sup>29</sup> This is not to ignore the fact that the entry or level of foreign investment by MNCs in basic services remains a contentious issue,<sup>30</sup> general public in developing countries do not trust *foreign* corporations more than their *local* politicians or corporations.

Second, the way in which foreign investment affects tribal and cultural rights is another area of serious concern. There are reasons to believe that the policies of general or accumulative development<sup>31</sup> (might) impinge upon the vital rights of the disadvantaged sections of society,<sup>32</sup> including tribal people.<sup>33</sup> Displacement of tribal populations and lack of adequate rehabilitation due to construction of large

<sup>27</sup> See *World Investment Report 1999*, *supra* note 24, figure I.13.

<sup>28</sup> “There is little or no investment in primary health care, safe drinking water, and basic education.” McCorquodale & Fairbrother, *supra* note 3 at 743.

<sup>29</sup> For example, in India the percentage of gross domestic product (‘GDP’) allocated for health has dropped from 1.4 per cent in 1991-92 to 0.9 per cent in 2001-02. Siddharth Narrain, “Health, for a Price”, *Frontline*, Vol. 21, Issue 5, (28 February-12 March 2004), online: <http://www.frontlineonnet.com/fl2105/stories/20040312008112900.htm>. What is, however, encouraging is that the government has recently imposed a two per cent “education cess” on all taxes in order to generate resources for funding education.

<sup>30</sup> Notably, the Human Resources Development Minister of India, in a recent interview, has indicated that the foreign investment in “elementary education” will be welcome, under a policy yet to be formulated. “Foreign Investment Welcome in Elementary Education: Arjun Singh” *The Hindu* (25 June 2004), online: <http://www.thehindu.com/2004/06/25/stories/2004062502701200.htm>.

<sup>31</sup> “If you are to suffer, you should suffer in the interest of the country.” Jawaharlal Nehru, speaking to villagers who were to be displaced by the Hirakund Dam (1948), as quoted by Arundhati Roy, “The Greater Common Good”, *Frontline*, Vol. 16, Issue 11 (May 22-June 04 1999), online: <http://www.frontlineonnet.com/fl1611/16110040.htm>.

<sup>32</sup> In the context of public resistance to the construction of Narmada dam, Rajagopal writes: “Narmada [became] a symbolic struggle that raised basic questions about India’s political and economic structure and the place of most vulnerable persons within them.” Rajagopal, *supra* note at 124 [emphasis added].

<sup>33</sup> See Suprio Dasgupta, “Tribal Rights in Free Market Economy” in Parmanand Singh, ed., *Legal Dimensions of Market Economy* (New Delhi: Faculty of Law, University of Delhi, 1997) at 113 [*Legal Dimensions of Market Economy*]; McCorquodale & Fairbrother, *supra* note 3 at 762.

dams,<sup>34</sup> resulting in severance of their ties with their past, history and culture<sup>35</sup> is a very good example of this.<sup>36</sup> The Narmada dam project in India has illustrated this point clearly.<sup>37</sup> Besides, the facts that corporations—offshoots of foreign investment as well—are not bound by affirmative action provisions of the Indian Constitution<sup>38</sup> and that they tend to exploit the disadvantaged position of women,<sup>39</sup> are also matters of deep constitutional anxiety.<sup>40</sup>

Third, though transfer of technology and know-how is an important and alluring facet of foreign investment, it is a contentious issue<sup>41</sup> and could also prove counter productive for the technology importing developing countries. The transfer of old, outdated, dangerous, untested, inappropriate or capital intensive technology to developing countries directly comes in conflict with various human rights.<sup>42</sup> The Bhopal gas disaster demonstrates how the use of an old and inferior technology in

<sup>34</sup> Roy points out that “[a] huge percentage of the displaced are tribal people (57.6 per cent in the case of the Sardar Sarovar Dam).” Roy, *supra* note 31. See also Upendra Baxi, “What Happens Next is up to You: Human Rights at Risk in Dams and Development” (2001) 16 *American University International Law Review* 1507 at 1509-10; Erin K. MacDonald, “Playing by the Rules: The World Bank’s Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects” (2001) 31 *Environmental Law* 1011 at 1030-9; and Thomas R. Berger, “The World Bank’s Independent Review of India’s Sardar Sarovar Projects” (1993) 9 *American University Journal of International Law and Policy* 33 at 35, 41.

<sup>35</sup> “Indigenous populations and tribal peoples whose interests policy makers do not take into consideration endure particularly egregious suffering. Dams often destroy not only their lands but also their sacred sites, and may even threaten the survival of certain indigenous groups.” Sarah C. Aird, “China’s Three Gorges: The Impact of Dam Construction on Emerging Human Rights” (2001) 8 *Human Rights Brief* 24 at 25.

<sup>36</sup> Not to forget several other human rights implications that arise due to displacement, *e.g.*, housing, livelihood, employment. In view of huge human rights cost of large dams, Baxi wants us “to consider a call for an international moratorium on the construction of large dams until there is an installation of participatory policy-making processes.” Baxi, *supra* note 34 at 527.

<sup>37</sup> “Narmada had become a symbol of a highly destructive development model and the ‘test case’ of the [World] Bank’s willingness and capacity to address the environmental and social impacts of its projects.” Lori Udall, “The International Narmada Campaign: A Case Study of Sustained Advocacy” in William F Fisher, ed., *Toward Sustainable Development? Struggling over India’s Narmada River* (New York: M. E. Sharpe, 1995) at 202, as cited by Rajagopal, *supra* note 14 at 124 and generally 122-6. See also Roy, *supra* note 31; and the Indian Supreme Court’s judgment on the issue: *Narmada Bachao Andolan v. Union of India* (2000) 10 S.C.C. 664.

<sup>38</sup> Only “state”, as defined in article 12 of the Constitution and interpreted by judiciary, is bound by the affirmative action provisions, *e.g.*, articles 15(4) and 16(4)/(4A)/(4B), and it does not cover corporations unconnected with the state. See Mahendra P. Singh, ed., *Shukla’s Constitution of India*, 10<sup>th</sup> ed. (Lucknow: Eastern Book Co., 2001) at 21-6; and generally Surya Deva, “Concept of ‘State’ in the Era of Liberalisation and Withering State—An Analysis” in Dr. D. S. Prakasa Rao, ed., *Constitutional Jurisprudence and Environmental Justice: A Festschrift Volume in the Honour of Professor A Lakshminath* (Visakhapatnam: Pratyusha Publishing Ltd., 2002) at 175.

<sup>39</sup> The disadvantages to women prevail in diverse areas, including hiring and firing, wages, promotion, maternity benefits, and sexual advertising.

<sup>40</sup> The issue of reservation of jobs in the private sector is a matter of current debate at national level in India. In this context, the Prime Minister Mr. Manmohan Singh recently observed: “Nobody can prevent an idea, whose time has come...those opposing the move will not be able to do so once a national policy is put in place.” Kalpana Sharma, “Manmohan for Voluntary Quota in Industry” *The Hindu* (6 October 2004), online: <http://www.hindu.com/2004/10/07/stories/2004100709300100.htm>.

<sup>41</sup> Muchlinski examines the conflicting interests of technology-exporting (mostly developed) and technology-importing (mostly developing) countries. Muchlinski, *supra* note 2 at 427-44.

<sup>42</sup> See Seid, *supra* note 17 at 12-4; McCorquodale & Faibrother, *supra* note 3 at 744-5; Sornarajah, *supra* note 1 at 39-40; Robert J. Fowler, “International Environmental Standards For Transnational Corporations” (1995) 25 *Environmental Law* 1 at 8-10. See, on emerging human rights concerns of

a hazardous activity<sup>43</sup> could violate human rights of several thousand people of a developing country.<sup>44</sup> One should also not forget that on many occasions it is the people of developing countries—who are easy targets due to poverty, lesser awareness and lax or no legal regime governing experimentation on humans—that bear the burnt of untested and potentially dangerous technologies.<sup>45</sup>

Technology could, however, influence the realisation of human rights on another level. Though technology has the potential to shape the nature of human rights,<sup>46</sup> it is possible that only certain sections of society get the benefit of the “technology-added dimension” of human rights because technologies generally have an inbuilt *dissemination bias*.<sup>47</sup> The uneven spread of internet—also known as the “digital divide”—is a good example of this trend. As the access to internet is limited to certain people, those who were disadvantaged are further disadvantaged; only “haves” could exploit technologies to their advantage and not the “haves not”.<sup>48</sup> For example, farmers—who have limited or no access to traditional means (newspapers/radio/TV) to get information, say, about weather or prices of their crops—are hardly benefited from the internet revolution. And it is really doubtful if any MNC would come forward to fill in this gap!

Fourth, foreign investment by MNCs has the potential to drive out local and small industries of developing countries,<sup>49</sup> resulting in dislocation and displacement of people for livelihood. Most of the times, even such dislocation or displacement does not ensure an alternative means of livelihood because there is no compatibility

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new technologies, Dinah Shelton, “Challenges to the Future of Civil and Political Rights” (1998) 55 Washington and Lee Law Review 669 at 674-81.

<sup>43</sup> See Jamie Cassels, “Outlaws: Multinational Corporations and Catastrophic Law” (2000/2001) 31 Cumberland Law Review 311 at 317; Sornarajah, *supra* note 1 at 47.

<sup>44</sup> See Cassels, *ibid.* at 316-7. See also Lapierre & Moro who draw a powerful socio-economic sketch of the use of inferior/unproven technology—from the Bhopal gas plant (UCC/UCIL) to recent genetically modified crops (Monsanto). Dominique Lapierre & Javier Moro, *It Was Five Past Midnight in Bhopal* (New Delhi: Full Circle Publishing, 2001).

<sup>45</sup> Drug trials provide a very good example of this. See Joe Ford & George Tomossy, “Clinical Trials in Developing Countries: The Plaintiff’s Challenge” 2004 (1) Law, Social Justice and Global Development Journal, online: <<http://elj.warwick.ac.uk/global/issue/2004-1/fordtomossy.html>>; R. Krishnakumar, “Ethics on Trial”, *Frontline*, Vol. 18, Issue 16 (4-17 August 2001), online: <http://www.flonnet.com/fl1816/18161230.htm>>; “Fast Growing Business: Unethical Clinical Trials in India”, online: Alliance for Human Research Protection <<http://www.ahrp.org/infomail/04/07/27.html>>.

<sup>46</sup> Balkin, for example, explains how the right to freedom of speech changes in the digital age. Jack M. Balkin, “How Rights Change: Freedom of Speech in the Digital Age” (2004) 26 Sydney Law Review 5.

<sup>47</sup> By “dissemination bias” I mean that the use of technology is dependant on certain key inputs—*e.g.*, electricity or telephone lines—which are not as easily available everywhere. The result is that the benefits of technology might be concentrated amongst some people. Arguably, the dissemination bias could also be result of other non-technological factors such as lack of political will. For example, The World Health Report 2003 demonstrates how technology could help in curing diseases in one part of the world but not in the other. World Health Organisation, *The World Health Report 2003: Shaping the Future* (Geneva: WHO, 2003).

<sup>48</sup> The Indian government though is aware of this gap and is proposing to take remedial action. The government has accepted the report of the “Working Group on Information Technology (IT) for Masses” and has launched the National IT Mission to oversee the implementation of this report: online: Government of India, Department of Information Technology <<http://www.mit.gov.in/E-rural/index.asp>> <<http://www.mit.gov.in/E-rural/nitm.asp>>.

<sup>49</sup> This phenomenon is known as “crowding out”. *World Investment Report 1999*, *supra* note 24 at 37-8. See also *World Investment Report 2003*, *supra* note 20 at 104-5.



between the training and experience these dislocated possess and the jobs which are on offer in market. Lack of any adequate social security schemes in developing countries makes the position of these venerable sections of society worse.

Fifth, foreign investment could also have a negative bearing on labour rights. Even those countries—like India—that protect labour rights through constitutional provisions and other laws<sup>50</sup> tend to apply different rules regarding the protection of such rights in special export zones.<sup>51</sup> Besides, even outside such special zones, there are real possibilities that civil and political rights could be curtailed, especially when their exercise appears to interfere with expected returns on foreign investment.<sup>52</sup>

Sixth, the business policies adopted by MNCs to get quick return over their investment<sup>53</sup> pose a threat for human rights generally. MNCs engage in provocative (and also obscene) advertising in order to mould consumers' choices, even to the detriment of their health and safety;<sup>54</sup> promote consumerism to create market;<sup>55</sup> change peoples' social-cultural habits;<sup>56</sup> show scant respect to environment;<sup>57</sup> and remain non-committal to the philosophy of sustainable development. All these essentially result in slow but often irreversible adverse consequences for the realisation of human rights.

Besides some of the specific situations mentioned above, foreign investment in developing countries influences the realisation of human rights on a general policy level as well. Given the fact many developing countries compete for their share of foreign investment, this often leads to a "race to the bottom" regarding human rights, including environmental and labour standards;<sup>58</sup> developing countries are often left

<sup>50</sup> *Constitution of India 1950*, articles 23 and 24. See also the *Workmen's Compensation Act 1923*; the *Trade Unions Act 1926*; the *Payment of Wages Act 1936*; the *Industrial Disputes Act 1947*; the *Minimum Wages Act 1948*; the *Maternity Benefit Act 1961*; the *Child Labour (Prohibition and Regulation) Act 1986*.

<sup>51</sup> See Usha Ramanathan, "Business and Human Rights—The India Paper", I.E.L.R.C. Working Paper 2001-02, online: International Environmental Law Research Centre <<http://www.ielrc.org/content/w0102.pdf>>. See also Seid, *supra* note 17 at 126-7.

<sup>52</sup> See, for example, the impact of the activities of Enron in India and Unocal in Myanmar. See *infra* note 90.

<sup>53</sup> "In a globalised economy, the patience of investors to obtain returns on their investment is considerably reduced." McCorquodale & Fairbrother, *supra* note 3 at 745.

<sup>54</sup> Balmurli Natrajan, "Legitimizing Globalisation: Culture and its Uses" (2002) 12 *Transnational Law and Contemporary Problems* 127 at 127-30; Ashish Kothari, "Environment and the New Economic Policies: 1991-96" in *Legal Dimensions of Market Economy*, *supra* note 33 at 57, 63. See also Glasbeek, *supra* note 6 at 94-103.

<sup>55</sup> See McCorquodale & Fairbrother, *supra* note 3 at 735.

<sup>56</sup> In retrospect, one may ask why plastic bags were promoted in the past as an alternative to paper or cloth bags. Similarly, doubts could be raised about the appropriateness of promoting the culture of "night shopping", "shopping malls", "sending greeting cards on ever-increasing days", and "weekends" in developing societies. See, on how MNCs influence social and cultural traits of people, Krishna Kumar, ed., *Transnational Enterprises: Their Impact on Third World Societies and Culture* (Boulder, Colorado: Westview Press, 1980).

<sup>57</sup> See, for example, the environmental damage caused by Shell in Nigeria. Joshua P. Eaton, "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment" (1997) 15 *Boston University International Law Journal* 261 at 264-71. See also Fowler, *supra* note 42 at 8-18; Martin A. Geer, "Foreigners in their Own Land: Cultural Land and Transnational Corporations—Emergent International Rights and Wrongs" (1998) 38 *Virginia Journal of International Law* 331.

<sup>58</sup> Seid, *supra* note 17 at 120; Macek, *supra* note 7 at 104; Clare Duffield, "Multinational Corporations and Workers' Rights" in Stuart Rees & Shelley Wright, eds., *Human Rights and Corporate*

with no choice but to either lower their human rights standards or not enforce them.<sup>59</sup> As a “race to the bottom” is in the interest of MNCs,<sup>60</sup> it will not be unreasonable to assume that they, armed with a lollypop of foreign investment, often initiate such race by pressing the panic button during negotiations for investment deals.

### B. Negative Effects on Development

Though it is widely argued and believed that foreign investment leads to economic development, this should not be accepted as a universal truth in all cases. McCorquodale and Fairbrother offer three reasons which question the above assumption: “the type of investment, the basis of investment decisions, and the type of economic growth.”<sup>61</sup> Furthermore, we should ask more fundamental questions about development: what do we mean by development; about whose development are we talking; and what should be the acceptable cost of such development?<sup>62</sup> Below is a brief attempt to grapple with these questions.

#### 1. What do we mean by development?

At a time when “development” is identified with industrialisation, westernisation and economic growth,<sup>63</sup> it seems that the true meaning of development is lost.<sup>64</sup> Development ought to be associated with humans,<sup>65</sup> and not merely with the possession

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*Responsibility—A Dialogue* (Sydney: Pluto Press, 2000) 191 at 194; Mahmood Monshipouri, Claude E. Welch, Jr. & Evan T. Kennedy, “Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities” (2003) 25 *Human Rights Quarterly* 965 at 973; Fowler, *supra* note 42 at 16-8. See, for when such races occur and do not occur, Spar & Yoffie, *supra* note 11. Compare Kevin Banks, “Globalisation and Labour Standards: A Second Look at the Evidence” (2004) 29 *Queen’s Law Journal* 533, who do not find a uniform race to the bottom.

<sup>59</sup> “Economic globalisation may undermine national and international human rights protections as states make an effort to remain competitive and to entice investment. The ‘race to the bottom’ is a threat, as countries are pressured to relax their standards for the treatment of workers, denying collective bargaining, minimum wages, and, in some cases, the right to be free from forced labor.” Shelton, *supra* note 42 at 684. Compa demonstrates how even “not lowering standards” provision in the Multilateral Agreement on Investment and other provisions in the OECD Guidelines may not be able to protect labour rights. Compa, *supra* note 25 at 688-91.

<sup>60</sup> “Multinational corporations have the option of deliberately taking advantage of lower environmental or social standards or weak systems of governance in developing countries.” Ward, *supra* note 12 at 452-3.

<sup>61</sup> McCorquodale & Fairbrother, *supra* note 3 at 743.

<sup>62</sup> Incidentally, Rajagopal also frames these questions in somewhat similar terms, though in the context of opposing views of developing and developed countries: “[D]evelopment of what, of whom, and at whose expense?” Rajagopal, *supra* note 8 at 220.

<sup>63</sup> Hilary Charlesworth, “The Public/Private Distinction and the Right to Development in International Law” (1992) 12 *Australian Yearbook of International Law* 190 at 196-7, as quoted by McCorquodale & Fairbrother, *supra* note 3 at 750.

<sup>64</sup> For example, Sen argues: “Development can be seen ... as a process of expanding the real freedoms that people enjoy. Focusing on human freedoms contrasts with the narrower views of development, such as identifying development with the growth of gross national product, or with the rise in person incomes, or with industrialisation, or with technological advance, or with social moderanisation.” Sen, *supra* note 8 at 3.

<sup>65</sup> Sub-Commission on the Promotion and Protection of Human Rights, 54th Session, Agenda Item 4, *Report of the High Commissioner on Liberalisation of Trade in Services and Human Rights*, E/CN.4/Sub.2/2003/9 (25 June 2002) at para. 8.

of material goods<sup>66</sup> or accumulated growth.<sup>67</sup> For example, the ranking of India on the Human Development Index (HDI)—which takes into account factors other than economic prosperity—is on the decline despite the big claims of economic development made in the last few years:<sup>68</sup> India's ranking slipped to 127<sup>th</sup> in 2003 from 124<sup>th</sup> in 2002 and 115<sup>th</sup> in 2001.<sup>69</sup> It also seems that liberalisation of the Indian economy since the early 1990s and consequent flow of foreign investment into India had no significant impact on the value of HDI.<sup>70</sup>

Besides, two more factors should be central to the idea of development: sustainability and equitability. Development has to be such which could be sustained for the time to come.<sup>71</sup> Present generations could hardly make a rightful self-proclamation of development when such development comes at the cost of causing unreasonable consumption or irreparable loss of natural resources, which the past had left for the present to be preserved for the future.<sup>72</sup> Similarly, it has to be ensured that the opportunities for development are not limited to certain sections of society only (or certain countries if we talk about the world society).<sup>73</sup> Such exclusions will not only be unjust but will also invite historical analogies of colonial exploitation.

If we apply the above developmental parameters, it is doubtful if foreign investment is achieving development in this sense. There is ample evidence to suggest that the agenda currently promoted by the *sources* of foreign investment is resulting in

<sup>66</sup> Pritchard, for example, seems to suggest this when he argues that the policy of an open competitive market economy is going to advance the living standards of people. Pritchard, *supra* note 1 at 1-2. *Contra* Rajagopal who argues that designations such as “development”, “developed”, “advanced” and “backward” are influenced by the Western model of development which is based on the level of mass consumption. Rajagopal, *supra* note 8 at 91.

<sup>67</sup> An aggregate growth does not truly and necessarily reflect an improvement/development in the lives of all the people. Stiglitz, *supra* note 11 at 79; David Kinley, “Human Rights, Globalisation and the Rule of Law: Friends, Foes or Family?” (2002-03) 7 U.C.L.A. Journal of International Law and Foreign Affairs 239 at 255. See also generally James Petras & Henry Veltmeyer, *Globalisation Unmasked: Imperialism in the 21<sup>st</sup> Century* (Halifax, Nova Scotia: Fernwood Publishing, 2001) at 122-27. But see Brian Griffiths, “The Challenge of Global Capitalism: A Christian Perspective” in Dunning, ed., *infra* note 76, 159 at 169-70.

<sup>68</sup> The recent Human Development Report 2004, however, indicates that there is no further decline in India's ranking in 2004 as compared to 2003. UNDP, *Human Development Report 2004* (New York: UNDP, 2004) at 141.

<sup>69</sup> See the various Human Development Reports, online: Human Development Reports <<http://hdr.undp.org/reports/default.cfm>>. Ward also notes that “in a number of poor but oil-rich developing countries, UNDP Human Development Index ranking have fallen as oil revenues have increased.” Ward, *supra* note 12 at 453.

<sup>70</sup> The value was as follows: 0.416 (1975); 0.443 (1980); 0.481 (1985); 0.519 (1990); 0.553 (1995); and 0.590 (2001). UNDP, *Human Development Report 2003* (New York: Oxford University Press, 2003) at 243.

<sup>71</sup> This is so because “infinite growth with a finite pool of resources is impossible”. Richard Welford *et al.*, *Hijacking Environmentalism: Corporate Responses to Sustainable Development* (London: Earthscan Publications Ltd., 1997) at x. [*Hijacking Environmentalism*]. See also Rajagopal who refers to the “limits to growth” theory advanced by the Club of Rome in 1972. Rajagopal, *supra* note 8 at 113.

<sup>72</sup> Rajagopal highlights a critical contradiction “between the logic of economic growth, which is based on infinite economic exploitation of both labour and resources, and the logic of environment, which is premised on inherent limits to growth.” Rajagopal, *supra* note 8 at 116. He, however, also cautions that the “language of sustainability” has made little progress to resolve this contradiction; *ibid.*

<sup>73</sup> Agamben highlights this politics of exclusion and inclusion in terms of the “*People*” (a whole, integral body politic) and the “*people*” (a subset consisting of needy and excluded). Giorgio Agamben, “What is a *People*?” in Giorgio Agamben (translated by Vincenzo Binetti & Cesare Casarino), *Means without Ends: Notes on Politics* (Minneapolis: University of Minnesota Press, 2000) at 29-36.

lopsided, inequitable and unsustainable development.<sup>74</sup> In sum, neither developed countries nor the MNCs based therein are doing enough for the development of the whole “one community”.<sup>75</sup>

## 2. Whose development are we talking about, and at what cost?

Whose development do we refer to when we talk about foreign investment-driven development? Is it the development of everyone, of the privileged few, or of the most disadvantaged? It is important, in my view, that the developmental benefits of foreign investment *reach first to those who need it most*. In fact, foreign investment fails in achieving its objective of bringing development if it creates or strengthens existing inequalities of wealth and opportunities.<sup>76</sup>

The recent government-run “India Shining” blitz<sup>77</sup> illustrates this very clearly. India is definitely shining: the economy is booming; the foreign exchange reserves are at an all time high; inflation is in control; poverty has declined; the information technology (IT) sector is leading the way. But this show campaign hides and mystifies what is not shining and who are not shining—the voiceless poor populace living in villages, slums and remote tribal areas: “Most of the India Shining claims are true. As long as we are talking about 10 per cent of the population ... The fastest growing sector in India Shining is not IT or software, textiles or automobiles. It is inequality.”<sup>78</sup> The message is, therefore, clear: *when it is declared that foreign investment brings development, the reference seems to be to the development of not all but only of those who (and whose development) matter*. Consequently, the development indicators do not even take cognizance of suicides by farmers under debt trap,<sup>79</sup> or death of

<sup>74</sup> Rubin, for example, suggests that “[o]ne source of [public interest] concerns is that a corporation may be perceived as not conferring benefits or costs equally on all regions of even a single country.” Seymour J. Rubin, “Transnational Corporations and International Codes of Conduct: A Study of the Relationship between International Legal Cooperation and Economic Development” (1995) 10 *American University Journal of International Law and Policy* 1275 at 1279.

<sup>75</sup> See generally Peter Singer, *One World: The Ethics of Globalisation* (Melbourne: Text Publishing Co., 2002) at 165-213. See also the recent report of the ILO which urges: “Obtaining a fair globalisation is a collective responsibility of many actors .... Those with the greatest power to make things better also have the greatest responsibility at every level ...” World Commission on the Social Dimension of Globalisation, I.L.O., *A Fair Globalisation: Creating Opportunities for All* (Geneva: ILO, 2004) at 1 [*A Fair Globalisation*].

<sup>76</sup> Whether globalisation, which is the driving force behind foreign investment, increases or decreases poverty as well as economic disparity is a hotly debated and contested issue. See Petras & Veltmeyer, *supra* note 67 at 20-2; Stiglitz, *supra* note 11 at 4-10, 24-5, 86; Hertz, *supra* note 7, 8, 41-51; John H. Dunning, “The Moral Imperatives of Global Capitalism: An Overview” in John H. Dunning, ed., *The Moral Challenges of Global Capitalism* (Oxford: Oxford University Press, 2003) 11 at 18; Dinah Shelton, “Protecting Human Rights in a Globalised World” (2002) 25 *Boston College International and Comparative Law Review* 273 at 278-9.

<sup>77</sup> Just before the 2004 general election for the 14th Lok Sabha, the outgoing BJP-led National Democratic Alliance government spent millions of rupees in projecting India’s shining economy through all possible means of communication.

<sup>78</sup> P. Sainath, “The Feel Good Factory”, *Frontline*, Vol. 21, Issue 5 (28 February-12 March 2004), online: <http://www.frontlineonnet.com/fl2105/stories/20040312007800400.htm>. See also the other reports related to the cover story, “Is India Shining?”, *Frontline*, Vol. 21, Issue 5 (28 February-12 March 2004), online: <http://www.frontlineonnet.com/fl2105/fl210500.htm>.

<sup>79</sup> S. Nagesh Kumar, “Suicides by Andhra Pradesh Farmers Continue” *The Hindu* (10 June 2004), online: <http://www.hindu.com/2004/06/10/stories/2004061002121200.htm>. See also W. Chandrakanth, “Farmers Reeling under Free Market Forces” *The Hindu* (11 June 2004), online: <http://www.hindu.com/2004/06/11/stories/2004061102101200.htm>.

thousands of malnourished tribal children,<sup>80</sup> because these people are not considered part of the development process.<sup>81</sup>

Concerns also arise not only about the unreasonable cost of development but also regarding the bearers of such cost inherent in foreign investment by MNCs. Care should be taken that the *future* of future generations is not mortgaged for achieving avoidable development of today.<sup>82</sup> Similarly, the cost of development should be spread out equitably as opposed to be borne out by selective few disadvantaged.<sup>83</sup> After all, why is it taken for granted that it is the tribals, farmers, small handicraftsmen and similar ignored voices who must bear the cost for “overall” societal development, as if they are lesser human than those who dress in designer clothes, dine in costly cutlery, live in palace-like “cottages” and roam in fancy cars.

In view of the above brief analysis, it is reasonable to argue that even if the claims of foreign investment-driven development are true, they present a distorted picture. Not only the meaning of true development is overshadowed, but also forgotten are the people excluded from the race for development<sup>84</sup> and the cost of such development. Development based on a model which designs developmental goals as per the needs of already well off, or excludes some from the focus of development, or places the cost of development on those shoulders that cannot bear it, is not only unfair but also amount to unjust enrichment. Arguably, we need to deconstruct such a model of development.

### C. *What Lessons Could We Learn from Bhopal, Enron and Unocal?*

As mentioned before, it might be helpful to refer to three case studies—two of which relate to India and the third to Myanmar—that illustrate the chemistry of *sangam* explored in this article. I begin with Bhopal, probably the most catastrophic industrial tragedy, first. The establishment, operation of chemical plant at Bhopal was a typical response of an MNC, Union Carbide Corporation (UCC), to Indian government’s

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<sup>80</sup> S. Balakrishnan, “9,000 Kids Starve to Death in Shining India” *The Times of India* (5 July 2004), online: <http://timesofindia.indiatimes.com/articleshow/766306.cms>.

<sup>81</sup> “In the process of carrying out projects they claim advance development goals, policy makers regularly ignore the needs of the most marginalized in society—minorities, indigenous and tribal peoples, peasants, and women—often worsening their situations. Development in this context betters the situation for a select few, while worsening the situation for many others.” Aird, *supra* note 35 at 25.

<sup>82</sup> Welford argues that the “dominant corporate culture which believes that natural resources are there for taking and that environmental and social problems will be resolved through growth, scientific advancement, technology transfer..., free trade and the odd charitable hand-out” must be changed. Richard Welford, “Introduction: What are we Doing to the World?” in Welford *et al.*, *Hijacking Environmentalism*, *supra* note 71, 3 at 7.

<sup>83</sup> See generally McCorquodale & Fairbrother, *supra* note 3 at 743-4. Rajagopal characterizes it as “violence of development”. Rajagopal, *supra* note 8 at 202.

<sup>84</sup> A recent report highlights the pervasive unemployment, especially among the youth and the educated, in South Asian countries despite an integrated development agenda being pursued at the international level. It blames South Asian governments, multilateral organisations and the governments of developed countries for this situation. Mahbub Ul Haq Human Development Centre, *Human Development in South Asia 2003: The Employment Challenge* (Karachi: Oxford University Press, 2004). Interestingly, this is despite the fact that a World Bank study has found a notable poverty reduction in South Asia: “Notable Poverty Reduction” *The Hindu* (31 July 2004), online: <http://www.thehindu.com/2004/07/31/stories/2004073113211200.htm>.

desire “to modernise and become self-sufficient in food production”.<sup>85</sup> UCC, which owned and operated the plant through its Indian subsidiary, Union Carbide India Ltd., applied inferior technology, sidelined safety measures in order to save on running cost and exploited the absence (or lax enforcement) of laws dealing with health, safety and environment. The result, on the night of 2-3 December 1984, of all this was what is called the “industrial Hiroshima”, killing several thousands and exposing lakhs of people to a deadly cocktail of poisonous gases. After a long ordeal in the courts, both in the U.S. and in India, victims could get monetary compensation, but not justice.<sup>86</sup> Several proceedings are still pending in different Indian and U.S. courts in quest of justice.<sup>87</sup> Though it is not possible to even mention the saga of victims’ miseries, both on account of the gas tragedy and the legal battle that ensued, it will be pertinent to note what is most relevant for the present purpose. With a view not to send a wrong signal to prospective foreign investors, the government of India not only did not press vigorously for the extradition of Warren Anderson, the ex-CEO of UCC,<sup>88</sup> but also applied to an Indian court, which was hearing a criminal case against him, to dilute the charge from “culpable homicide not amounting to murder” to “death by rash or negligent act”, the latter being a less serious offence.<sup>89</sup>

Enron is another relatively recent example of human rights abuses caused by foreign investment. Dabhol Power Project (commonly known as Enron Project), initiated in the middle of 1992 by Enron Corporation, was the first major litmus test of the Indian government policy to allow foreign investment in power and electricity sector. But the project remained in controversy from the very inception due to various reasons such as corruption, lack of transparency and competitive bidding, and the high cost of electricity. When people protested against the project, the state government machinery muzzled such protests including through arbitrary arrests, beating, and harassment of protest movement leaders. What was, however, critical was that Enron

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<sup>85</sup> Cassels, *supra* note 43 at 316.

<sup>86</sup> In accordance with a settlement agreement, reached with government of India and approved by the Indian Supreme Court, the UCC agreed to pay US\$470 million to the government “for the *benefit of all victims of the Bhopal gas disaster ... and not as fines, penalties, or punitive damage.*” *Union Carbide Corp. v. Union of India* A.I.R. 1990 S.C. 273 at 275 [emphasis added]. It is important to note that recently the Indian Supreme Court directed the government to distribute *pro rata* the remaining amount of Rs. 1503 crore amongst the victims. It is estimated that every victim or his/her kith and kin will be getting about Rs. 26,000—after almost two decades of the tragedy. J. Venkatesan, “Court Orders Relief to Bhopal Gas Victims” (20 July 2004), online: The Hindu <<http://www.hindu.com/2004/07/20/stories/2004072008760100.htm>>.

<sup>87</sup> A criminal case is pending against the UCC/UCIL and its employees, including Warren Anderson, the Chief Executive Officer of UCC, in a district court of Bhopal. Similarly, the proceedings under the *Alien Tort Claims Act* 28 U.S.C. § 1350 (2004) are continuing in the U.S. courts. See *Sajida Bano v. Union Carbide Corporation* 99 Civ. 11329 (JFK), 2000 U.S. Dist. LEXIS 12326; *Sajida Bano v. Union Carbide Corporation* 273 F.3d 120, 2001 U.S. App. LEXIS 24488 (2d Cir. N.Y. 2001); *Sajida Bano v. Union Carbide Corporation* 99 Civ. 11329 (JFK), 2003 U.S. Dist. LEXIS 4097; *Sajida Bano v. Union Carbide Corporation* 361 F.3d 696, 2004 U.S. App. LEXIS 5003 (2d Cir. N.Y. 2004).

<sup>88</sup> See the opinion of the Attorney General on the extradition of Anderson at online: Union Carbide Corporation <<http://www.bhopal.com/opinion.htm>>. The US government has rejected the Indian government’s plea for the extradition of Anderson, “U.S. rejects request for Anderson’s extradition”, *The Hindu* (21 July 2004), online: The Hindu <<http://www.hindu.com/2004/07/21/stories/2004072111711100.htm>>.

<sup>89</sup> The court has, however, rejected this request, online: CorpWatch <<http://www.corpwatch.org/article.php?id=3729>>.

Corporation provided resources to aid and fund these state operations.<sup>90</sup> Enron is, thus, an example of how even a democratic state could take the side of a foreign investor MNC against its own people, whose human rights it is obliged to protect constitutionally.

Finally, let us refresh our memories of Unocal's operations in Myanmar (earlier Burma) vis-à-vis human rights. In 1993, Unocal, a California based oil company, entered into a joint venture with the State Law and Order Restoration Council (SLORC) and Myanmar Ministry for Oil and Gas Enterprises regarding oil and gas exploration in the Yadana gas field.<sup>91</sup> Whereas Unocal undertook to make the largest investment in the project,<sup>92</sup> the SLORC assumed the responsibility of clearing the land along the pipeline's path and providing labour, material and security.<sup>93</sup> This business partnership resulted in serious human rights violations—from forced dislocation to torture, forced labour, murder and rape.<sup>94</sup> As the Burmese government institutions were closely linked with the project, there was no hope of getting any redress at the municipal level. Victims' search for justice for human rights abuses outside the municipal framework continues as the trial of several cases under the *Alien Tort Claims Act* has offered mixed hopes but no concrete relief or positive results as yet.<sup>95</sup>

On the basis of above examination of the case studies of Bhopal, Enron and Unocal, one could say that they are instructive in at least three respects. First, foreign investment by MNCs could result in violation of all types of human rights—from civil and political to social, economic and cultural. Second, there are no strong reasons to believe that governments will be able to perform successfully their role of human rights guardians. Past experiences show that states, especially developing ones, may act in connivance with (or under pressure of) MNCs, or may consider behaving as a "good host" to foreign investment higher on their priority list than the protection of human rights. Third, contrary to a popular belief, foreign investment by MNCs could result in human rights violations in democratic and non-democratic settings alike; Bhopal and Enron demonstrate that democracy and a liberal, human rights enriched Constitution are no fool proof guarantee against corporate human rights abuses.

<sup>90</sup> The report of Human Rights Watch documents in detail this complicity. Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), online: Human Rights Watch <<http://www.hrw.org/reports/1999/enron/>>. See also Kelley, *supra* note 18 at 511-2.

<sup>91</sup> See David I. Becker, "A Call for the Codification of the Unocal Doctrine" (1998) 32 *Cornell International Law Journal* 183 at 186; John C. Anderson, "Respecting Human Rights: Multinational Corporations Strike Out" (2000) 2 *University of Pennsylvania Journal of Labour and Employment Law* 463 at 464.

<sup>92</sup> Becker, *ibid.* at 186.

<sup>93</sup> Anderson, *supra* note 91 at 464.

<sup>94</sup> Kelley, *supra* note 18 at 508-9.

<sup>95</sup> See a catena of cases: *Doe v. Unocal* 963 F. Supp. 880 (C.D. Cal., 1997); *Doe v. Unocal* 27 F. Supp. 2d. 1174 (C.D. Cal., 1998); *Doe v. Unocal* 67 F. Supp. 2d. 1140 (C.D. Cal., 1999); *Doe v. Unocal* 110 F. Supp. 2d. 1294 (C.D. Cal., 2000); *Doe v. Unocal* 248 F. 3d. 915 (9<sup>th</sup> Circuit Court of Appeal, 2001); *John Doe I v. Unocal* 2002 U.S. App. LEXIS 19263 (9<sup>th</sup> Cir. Cal., 2002); *Doe v. Unocal* 2003 U.S. App. LEXIS 2716 (9<sup>th</sup> Cir. Cal., 2003). See also Becker, *supra* note 91; Anderson, *supra* note 91; John Cheverie, "United States Court Finds Unocal may be Liable for Aiding and Abetting Human Rights Abuses in Burma" (2002) 10 *Human Rights Brief* 6.

### III. FOREIGN INVESTMENT AND DEVELOPING COUNTRIES: TO ALLOW OR NOT TO ALLOW?

Though the previous section examined the negative impact of foreign investment by MNCs on human rights and development in developing countries, I am also interested in exploring the strategies that developing countries could employ to exercise a reasonable level of control on the *flow* and *direction* of foreign investment.

Regarding the entry and continuance of foreign investment, states, especially developing ones, face a Hobson's choice: should they allow foreign investment by MNCs or refuse it, considering that it might have a negative impact on human rights as well as local developmental issues and raise questions of states' autonomy or sovereignty?<sup>96</sup> Or is there a middle path available,<sup>97</sup> that is, developing countries could negotiate the terms and conditions of foreign investment to their advantage? Could collective bargaining help in improving the bargaining position of developing countries? Furthermore, what role could human rights and civil society organs play in ensuring that host countries are able to exert greater control over the flow and direction of foreign investment?

It should also be noted that the changing ideology about the role of the state poses another problem: states are now expected to act and regulate primarily (if not solely) to support and secure private sector activities and private property, including the intellectual property rights.<sup>98</sup> This runs counter to the conventional role regarding the protection and promotion of human rights assigned to states.<sup>99</sup>

#### A. "Is It All about Bargaining?"

The core issues related to foreign investment—which country gets *how much* foreign investment *from where* and on *what terms*—are the subject matter of bargaining and negotiations between potential investors and countries seeking foreign investment.<sup>100</sup> In other words, who controls the flow and direction of foreign investment depends essentially on the relative bargaining power of the parties involved in negotiation.<sup>101</sup> The stand of concerned parties is guided by "risks"—risks *to* and *of* foreign investment<sup>102</sup>—and "returns"—both to the investor and the investment host.

<sup>96</sup> See *Trends in International Investment Agreements*, *infra* note 102 at 87-88.

<sup>97</sup> Sornarajah, *supra* note 1 at 45-50.

<sup>98</sup> Pritchard, for example, argues: "A market economy needs a legal system to define and protect the rights of the private sector against encroachment by government, to remove special privileges accorded to state-owned enterprises and to reduce risk and transaction costs between private parties." Pritchard, *supra* note 1 at 2. See also Douglas Webb, "Legal System Reform and Private Sector Development in Developing Countries" in Pritchard, ed., *supra* note 1 at 45-6.

<sup>99</sup> "A strong and vigorous state is not only seen as a prerequisite to the protection of civil and political rights ... it is also seen as essential to protect economic and social rights." Rajagopal, *supra* note 8 at 191.

<sup>100</sup> "The relationship between the host state and a [multinational enterprise] will be the outcome of a bargaining process between them." Muchlinski, *supra* note 2 at 104.

<sup>101</sup> See Muchlinski, *ibid.*

<sup>102</sup> "The principal measures against which investors seek protection are expropriations, nationalisations and other major cases of deprivation of property and infringement of property rights of investors." UNCTAD, *Trends in International Investment Agreements: An Overview* (New York: U.N., 1999) at 76 [*Trends in International Investment Agreements*]. See also Pritchard, *supra* note 1 at 2.



The relative strength of MNCs and states has another role to play: whereas developed countries and the MNCs based therein promote an ideology conducive to foreign investment,<sup>103</sup> developing countries put more emphasis on developing regimes or strategies which ensure that foreign investment by MNCs works primarily for local development.<sup>104</sup> For example, one major reason why the final draft of the UN Code of Conduct on Transnational Corporations, proposed in 1990 by the United Nations Commission on Transnational Corporations, failed to materialise was because of the conflicting objectives of developed and developing countries: developed countries emphasised the need for including MNCs' rights in the Code whereas developing countries considered inclusion of responsibilities more important.<sup>105</sup>

### B. *Relative Bargaining Position of MNCs and Developing Countries*

Under international law, states have an unlimited, absolute right to decide whether to allow foreign investment within their territory, and if so, then from whom, in which areas and on what terms.<sup>106</sup> It is also suggested by the proponents of bargaining theory that developing countries could, in fact, have stronger position,<sup>107</sup> and that the bargaining power of host states have increased on account of the emergence of many MNCs operating within the same industry.<sup>108</sup> Furthermore, that one should not overemphasise factors such as low wages, presence of raw materials, lax environmental measures, etc. present in developing countries as foreign investment is not solely determined by these factors.<sup>109</sup>

It seems however, that the actual position regarding the bargaining position of developing countries vis-à-vis MNCs is totally different. Undoubtedly, all states in principle can regulate foreign investment by MNCs by employing various techniques

<sup>103</sup> "Recent policy initiatives at the international level concerning TNCs focus instead on developing guidelines to facilitate FDI, with the principal issues being the development of standards for fair and equitable treatment, national treatment, and most favored nation treatment." Fowler, *supra* note 42 at 3. See also Seid, *supra* note 17 at 69-97.

<sup>104</sup> See generally Seid, *supra* note 17 at 99-118. Seid though concludes that developing countries have no "common strategy on how to tackle the issue of global investment rules." *Ibid.* at 116.

<sup>105</sup> *Draft of the U.N. Code of Conduct on Transnational Corporations*, U.N.E.S.C.O.R., 45th Session, U.N. Doc. E/1990/94 (1990). See generally Kwamena Acquah, *International Regulation of Transnational Corporations: The New Reality* (New York: Praeger, 1986) at 108-20; Muchlinski, *supra* note 2 at 592-7.

<sup>106</sup> Each state has the right "to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities." U.N. General Assembly Resolution 3281 (XXIX) (1974): *Charter of Economic Rights and Duties of States*, Article 2(2)(a). Article 2(2)(b) further provides that each state has a right "to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies." See also the U.N. General Assembly Resolution 1803 (XVII) (1962): *Permanent Sovereignty over Natural Resources*.

<sup>107</sup> See Muchlinski, *supra* note 2 at 105-6, referring to the position taken by Professor Moran. See also Joseph M. Grieco, "Between Dependency and Autonomy: India's Experience with the International Computer Industry" in *Multinational Corporations*, *supra* note 17 at 55.

<sup>108</sup> Sornarajah, *supra* note 1 at 18. In fact, Moran goes one step further and argues: "Third World countries will have to play an active role in stimulating rivalries within the international corporate sectors in which they are seeking investment." *Multinational Corporations*, *supra* note 17 at 13 [emphasis in original].

<sup>109</sup> See Pritchard, *supra* note 1 at 5.

at the entry and/or post-entry stage.<sup>110</sup> Even so, it would be misleading, in my view, to suggest that the bargaining position of developing countries is equal or higher to that of MNCs.<sup>111</sup> This is more so because on an “international political level, the relative cohesion of the third world [has] decreased considerably.”<sup>112</sup> MNCs also set in motion a “race to the bottom” to exert more leverage during investment negotiations; it is doubtful if developing countries are capable of setting their investment priorities in the face of competition between countries for investment dollars.<sup>113</sup> Besides, there are reasons to believe that states may, in fact, be ready to forego their regulatory power over the activities of MNCs in favour of short-term economic gains.<sup>114</sup>

In sum, it is a challenge for developing countries to create an atmosphere conducive to foreign investment and at the same time ensure that doing so does not work, directly or indirectly, against their local needs<sup>115</sup> or the realisation of human rights.<sup>116</sup>

### *C. Regulating the Flow and Direction of Foreign Investment: How to Bargain with MNCs?*

It is generally agreed that the countries that are host to foreign investment should regulate the flow and direction of such investment, in order to ensure that it serves their specific needs. There is, however, lesser consensus on how to exert the required control, which strategies to adopt and at what stage(s). States have entered into varied kinds of agreements—from bilateral to multilateral and regional<sup>117</sup>—to deal with the issue of foreign investment.<sup>118</sup> Despite the fact that bilateral investment agreements are on the rise since the 1990s<sup>119</sup> and seems to be the favoured strategy currently,<sup>120</sup> it is likely that states might move more towards multilateral or global agreements, especially under the umbrella of WTO in future.<sup>121</sup> This may happen

<sup>110</sup> See Muchlinski, *supra* note 17 at 172-203; Sornarajah, *supra* note 1 at 83-114.

<sup>111</sup> See, for example, *Trends in International Investment Agreements*, *supra* note 102 at 29. The study also suggests further the strategies that could be adopted to protect the special developmental needs of developing countries. *Ibid.* at 88-92.

<sup>112</sup> *Ibid.* at 30.

<sup>113</sup> For example, could India prioritise its investment needs? In other words, could it seek investment, as a matter of priority, in primary health and roads rather than in soft drinks, mineral water and potato chips industries? See also S. S. Singh & Suresh Mishra, “State and Market: A Constitutional Analysis” in *Legal Dimensions of Market Economy*, *supra* note 33, 13 at 15.

<sup>114</sup> See Acquah, *supra* note 105 at 66; Steven R. Ratner, “Corporation and Human Rights: A Theory of Legal Responsibility” (2001) 111 *Yale Law Journal* 443 at 462; Robert McCorquodale, “Human Rights and Global Business” in Bottomley & Kinley, eds., *supra* note 13, 89 at 97-8. See also Beth Stephens, “The Amoralism of Profit: Transnational Corporations and Human Rights” (2002) 20 *Berkeley Journal of International Law* 45 at 57-8; Muchlinski, *supra* note 2 at 104-7.

<sup>115</sup> See UNCTAD, *World Investment Report (2003)*, *supra* note 20 at 18-9.

<sup>116</sup> Dependency theorists argue that FDI does not help the home countries, which are developing or under-developed on many occasions. See Seid, *supra* note 17 at 17-23. FDI also raises concerns about state sovereignty, especially from developing countries. Seid, *ibid.* at 102-04.

<sup>117</sup> For example, the arrangements at the level of EU, NAFTA, ASEAN and OECD. See UNCTAD, *Trends in International Investment Agreements*, *supra* note 102 at 42-4; Seid, *supra* note 17 at 55-7.

<sup>118</sup> See, for a list of main instruments entered between 1948 and 1999, UNCTAD, *Trends in International Investment Agreements*, *supra* note 102 at 94-103.

<sup>119</sup> *Trends in International Investment Agreements*, *supra* note 102 at 33, and also at 44-7.

<sup>120</sup> See *World Investment Report 2003*, *supra* note 20 at 12.

<sup>121</sup> Currently, a Working Group on Trade and Investment is deliberating upon this issue. A special reference may be made to para. 22 of the Doha Ministerial Declaration, WT/MIN(01)/DEC/1

in spite of present disagreements amongst states, and opposition to the inclusion of investment within the WTO-fold.<sup>122</sup> It also seems that a departure from bilateral to multilateral treaties may suit the interest of developing countries,<sup>123</sup> provided they are able to act with a collective wisdom.

I argue, however, that developing countries—in order to exert control over the flow and direction of foreign investment by MNCs—should adopt an approach of “diversified integration”, rely upon human rights jurisprudence, and try to develop synergy with NGOs, media, consumer and environmental groups, and public-spirited lawyers and academics.

### 1. *Developing Asian countries and the approach of “diversified integration”*

It is critical to the development of (Asian) developing countries that they not only attract foreign investment but also exercise control over the *flow* and *direction* of such investment. An accomplishment of these twin objectives requires effective individual as well as collective strategies. There is, however, a dichotomy between the adoption of individual and collective strategies: though acting individually is beneficial as it allows every country to choose and decide what is best for its specific developmental goals, it undermines the bargaining position of developing countries vis-à-vis MNCs. On the other hand, though collectivity strengthens the bargaining power of developing countries, it makes accommodation of diversified developmental goals more difficult.

There is, therefore, a need to mix the positives of both individual and collective strategies. I advocate for the approach of “diversified integration” as such a mixture. The approach assumes that developing countries could enhance their bargaining power, as well as position vis-à-vis MNCs, if they act collectively. At the same time it also recognises the existence of diversified developmental goals and the necessity for adopting flexible policies. The Asian developing countries should, therefore, act and bargain collectively as far as possible—both inside and outside the WTO—not only for attracting foreign investment but also for controlling its flow and direction.

But how could developing countries act collectively, especially when they have different (and sometimes conflicting) investment needs and usually remain eager to

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(adopted on 14 November 2001) online: World Trade Organisation <[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#tradeinvestment](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#tradeinvestment)>, which is instructive of the future framework: “Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances.”

<sup>122</sup> In fact, the investment—one of the Singapore Issues—has been dropped from the current Doha Round of negotiations in a recent General Council’s decision. *Draft General Council Decision of 31 July 2004*, WT/GC/W/535, para. g, online: World Trade Organisation <[http://www.wto.org/english/tratop\\_e/dda\\_e/ddadraft\\_31jul04\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf)>. See generally Seid, *supra* note 17 at 153-9.

<sup>123</sup> “The problem with the bilateral approach is that Third World and industrialised states are unequal political and economic partners. ... may have significant implications for Third World states.” Gloria L. Sandrino, “The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective” (1994) 27 *Vanderbilt Journal of Transnational Law* 259 at 325.

allure foreign investment by offering various types of incentives to MNCs?<sup>124</sup> The task is undoubtedly ambitious and difficult but not unprecedented or impossible to achieve, for international agreements on various issues and involving not merely developing countries but a mixture of developed, developing and least-developed ones are being reached.<sup>125</sup> As a first step towards attaining the above goal, the developing countries of Asia may constitute a working group to find out both common and diverse interests that they would like to accomplish through foreign investment by MNCs. Once that is done, it is possible to negotiate a regional investment agreement by applying different principles to common interests and diverse interests.

As far as the common interests are concerned, developing countries may agree on the principle of “non-lowering of standards”, namely, that no country will offer incentives or lower the standards beyond the agreed level. Spar and Yoffie suggest that this is possible:

Rather than directly competing for multinational investment, countries can sometimes agree to common standards for the treatment of multinationals and protocols for taxation. Rather than using wages differentials to compete in the trading arena, national governments can negotiate agreements that regulate their trade and promote more just outcomes.<sup>126</sup>

On the other hand, regarding diverse interests, developing countries should adopt the principle of reciprocity, that is, instead of competing for investment amongst them, countries should support each other’s individual investment needs. Such a mutual cooperation, though difficult to achieve and sustain, would undoubtedly benefit all developing countries.<sup>127</sup>

It is hoped that if developing countries try to institutionalise the approach of diversified integration, they might be able to translate the “race to the bottom” into the “race to the top”. In other words, instead of developing countries being forced to offering incentives or lower their standards, MNCs will offer incentives to get an approval for investment.

## 2. Whether human rights could work as a regulating factor?

I am of the view that the power of the language of human rights could and should be utilised to harness the process of foreign investment by MNCs.<sup>128</sup> Despite cultural apprehensions against the universality of human rights, they could still be used as a starting point of finding commonality amongst the developing countries of Asia.<sup>129</sup>

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<sup>124</sup> Despite the inherent costs, offering incentives often becomes a compulsion for developing countries as they find themselves part of various “bidding wars”. *World Investment Report 2003*, *supra* note 20 at 124, and generally 123-8.

<sup>125</sup> See Spar & Yoffie, *supra* note 11 at 572.

<sup>126</sup> *Ibid.* at 563.

<sup>127</sup> “[S]tates have a clear incentive to cooperate around common norms of governance. ... All parties are better off if they cooperate.” *Ibid.* at 571-2.

<sup>128</sup> Rajagopal though highlights the risks involved for the Third World in relying entirely on human rights discourse, due to its colonial connection, for resistance and emancipation for the oppressed social majorities. Rajagopal, *supra* note 8 at 171-232.

<sup>129</sup> I suggest two guiding tools here. First, to begin with, we could probably start with more basic and non-controversial human rights such as food, health, shelter, clothing, and education. Second, universality

Culture, and cultural diversity, should be used to promote human rights and not to derogate them.<sup>130</sup> In view of wider acceptability of human rights in Western developed countries, the home of a majority of MNCs,<sup>131</sup> it may be relatively more difficult for MNCs to blatantly ignore human rights while negotiating/making investment decisions. This will also ensure that foreign investment is also made in basic services such as education, health care, food and water.

There is another dimension of this argument. It seems that even from the perspective of MNCs, investment in fulfilling basic needs or developing infrastructure in developing countries is a business compulsion for developed countries and/or MNCs based therein.<sup>132</sup> After all, it is in their interest that more and more people are educated, so that they could be allured by the language of advertising; that people receive (good) health care, so that they survive to consume the products manufactured by MNCs; that people earn reasonable wages, so that they retain the potential to buy products (even non-essential ones); that means of transport develop as well as spread to remote areas, so that goods could target a much larger audience; that people have roof over their head (even if that happens on account of debt), so that they have some space for storing leisure items.

Conversely, if the foreign investment by MNCs is not *seen*<sup>133</sup> by the general public in developing countries as making a positive difference to their life, it might result in a “backlash” both against MNCs and the foreign investment made by them.<sup>134</sup> Arguably, if this happens, it will harm the interests of both MNCs and the host countries of investment. Therefore, it is in the interest of all concerned parties that the “trumping”<sup>135</sup> power of human rights jurisprudence is used to ensure that foreign investment by MNCs not only not violate basic human rights but also contribute to sustainable as well as egalitarian development.

### 3. *Could NGOs et al. help states in asserting control over the flow and direction of foreign investment?*

Finally, developing countries should also pay attention to develop synergies with those NGOs, media, consumer and environmental groups, labour organisations,<sup>136</sup>

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does not remain an unruly horse if we draw a distinction between “aspirational” and “operational” standards of human rights. See Surya Deva, “Human Rights Violations by Multinational Corporations and International Law: Where from Here?” (2003) 19 Connecticut Journal of International Law 1 at 41.

<sup>130</sup> See Wright, *supra* note 3. Grace also argues that “differences and diversity are also aspects of human rights”, and that despite differences, commonalities could be found. Damian Grace, “Business Ethics and Human Rights” (1998) 4 Australian Journal of Human Rights 59, online: Australian Journal of Human Rights <<http://www.austlii.edu.au/au/journals/AJHR/1998/4.html>>.

<sup>131</sup> See Fowler, *supra* note 42 at 6-7.

<sup>132</sup> A recent report of the UN Commission on Private Sector and Development also urges private sector to contribute towards alleviating poverty. Commission on Private Sector and Development, *Unleashing Entrepreneurship: Making Business Work for the Poor* (2004), online: Commission on Private Sector and Development <<http://www.undp.org/cpsd/fullreport.pdf>>.

<sup>133</sup> In my view, it is essential that foreign investment not only contributes but is also seen as contributing to the promotion of human rights and the realisation of developmental goals.

<sup>134</sup> “There is evidence that a general backlash may develop among the populace of developing states against foreign direct investment.” Kelley, *supra* note 18 at 502.

<sup>135</sup> See Jack Donnelly, *Universal Human Rights: In Theory and Practice* (Ithaca: Cornell University Press, 1989) at 8, citing Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at xi, 90.

<sup>136</sup> See, for the role played by such groups in regulation of foreign investment, Seid, *supra* note 17 at 185-9.

and public-spirited lawyers and academics (NGOs *et al.*) who share a common objective with them,<sup>137</sup> namely, that foreign investment does not remain *foreign* to the realisation of human rights. As these non-state actors operate outside the formal state structure and do not rely upon mere legal means to resist what ought to be resisted, they are often capable of achieving what even states cannot accomplish. Because of this unique position, NGOs *et al.*—acting alone or in co-operation and coordination with developing countries—offer some hope to ensure that foreign investment by MNCs does not work for the development of MNCs alone or of certain sections of a country where the investment is made.

In my view, the networking with NGOs *et al.* is important for a number of reasons. First, the support of NGOs *et al.*,<sup>138</sup> which are already playing a key role in promoting human rights globally,<sup>139</sup> will provide a cushion to states against MNCs' possible backlash and threat of withdrawal. Second, the reliance on civil society organisations will be especially helpful when a state is not fully committed to the realisation of human rights or is acting in connivance with MNCs.<sup>140</sup> Third, on certain occasions NGOs *et al.* could prove far more effective in checking human rights abuses by MNCs as, unlike states, they do not suffer from territorial limitations. In view of the IT revolution, NGOs *et al.* could put pressure on MNCs even in their home states or wherever they operate. Fourth, fostering a bond between developing countries and NGOs *et al.* will also increase the bargaining position, at international forums or otherwise, of developing countries vis-à-vis developed countries and MNCs based therein, as international law as well as the international institutions are already taking cognisance of their resistance.<sup>141</sup>

#### IV. CONCLUSION

This article has tried to uncover the rainbow created by the *sangam* of foreign investment, MNCs and human rights in a developing Asia. The dynamics of the rainbow are explored by taking India as an indicator of developing countries and with the help of the case studies of Bhopal, Enron and Unocal. On the basis of this exploration, I have drawn three conclusions out of which the first two are descriptive whereas the third one is prescriptive in nature. First, it is argued that foreign investment by MNCs, or otherwise, do have and could have detrimental consequences for the

<sup>137</sup> See generally Julie Fisher, *Non governments: NGOs and the Political Development of the Third World* (West-Hartford: Kumarian Press, 1998).

<sup>138</sup> NGOs' dependence on donations and the polarisation of media in certain corporate hands are nevertheless matters of some concern, especially if seen from the perspective of developing countries. See Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002) at 121-5. For a Marxist critique of the role played by NGOs, see Petras & Veltmeyer, *supra* note 67 at 128-38. See Dionne Bunsha, "Media Becoming Propaganda Vehicle for Corporates" *The Hindu* (19 January 2004), online: The Hindu <<http://www.thehindu.com/2004/01/19/stories/2004011902161200.htm>>; and also generally Hertz, *supra* note 7 at 133-41.

<sup>139</sup> See John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 497-501; Monshipouri *et al.*, *supra* note 58 at 986-9; Scott Pegg, "An Emerging Market for the New Millennium: Transnational Corporations and Human Rights" in Fynas & Pegg, eds., *supra* note 13 at 23-4; OECD, *Foreign Direct Investment, Development and Corporate Responsibility* (Paris: OECD, 1999) at 14-5. Baxi also explores various techniques such as of reportage, lobbying, global direct action, *etc.* employed to ensure that human rights survive in market economy. Baxi, *ibid.* at 127-8.

<sup>140</sup> See Deva, *supra* note 129 at 2, 49.

<sup>141</sup> See generally Rajagopal, *supra* note 8.

realisation of human rights and developmental objectives, especially in developing countries. This is not to suggest though that foreign investment and MNCs do not have the “potential” to make a positive contribution towards the fulfillment of human rights and development generally. However, whether developing countries are able to exploit this potential of foreign investment or not depends upon the extent to which they could exercise control over the *flow* and *direction* of such investment.

Second, who has an upper hand in controlling the flow and direction of foreign investment depends, to a great extent, on the relative bargaining power of involved actors, namely, MNCs (and their external power centres) vis-à-vis developing countries. I have asserted that the bargaining power of most of the developing countries is considerably less than that of MNCs and their representative organisation, including international financial institutions. The bargaining position of developing countries is further adversely affected by a “race to the bottom” as in many cases such countries compete among themselves to obtain their share of the cake. Given so, it is suggested that developing countries are usually unable or incapable to derive optimal benefits out of foreign investment by MNCs. One could also treat it as a “deficit of capability” on the part of developing countries.

Third, developing countries could enhance their bargaining power, and consequently their position, qua MNCs if they realise their place in an interdependent world and act collectively, as far as possible. *Self-realisation* and *collective bargaining* are, thus, proposed as the two tools that might be employed by developing countries.<sup>142</sup> Developing countries first need to realise their place in an increasingly interdependent (not dependent) world; developed countries and MNCs based therein need developing countries as much as developing countries need them.<sup>143</sup> Further, developing countries could strengthen their position as well as bargaining power vis-à-vis MNCs if they act collectively. An approach of “diversified integration” is suggested to foster a relationship of collectivity while at the same time taking care of specific individual needs of developing countries. It was also emphasised that developing countries should invoke the language of human rights and also foster alliances with NGOs, media, and other socially conscious civil society organs to exercise a control over the flow and direction of foreign investment.

But it remains an open question whether developing countries will understand this and act accordingly, or will allow their exploitation, as they did historically, in newer (and often disguised) forms. Conversely, despite the fact that “the struggle for a fair globalisation will only grow in the future”,<sup>144</sup> it remains uncertain whether developed countries and/or MNCs based therein will appreciate, and act<sup>145</sup> on the words of Chinese philosopher Mozi: “What is the way of universal love and mutual benefit? It is to regard other people’s countries as one’s own.”<sup>146</sup>

<sup>142</sup> The dividends that have resulted on developing countries adopting a collective stand at the WTO negotiations demonstrate the efficacy of these tools.

<sup>143</sup> See “Developing Nations Emerge Stronger: World Bank” *The Times of India* (19 April 2004), online: The Times of India <<http://timesofindia.indiatimes.com/articleshow/626380.cms>>.

<sup>144</sup> *A Fair Globalisation*, *supra* note 75 at 3.

<sup>145</sup> Notably, recently certain rich countries and the World Bank/International Monetary Fund have indicated to provide a debt relief to world’s poorest countries. Elizabeth Becker, “US Backs \$55bn Debt Relief Deal for Poor Nations” *Sydney Morning Herald* (2-3 October 2004) at 42.

<sup>146</sup> W. T. Chan, *A Source Book in Chinese Philosophy* (Princeton: Princeton University Press, 1963) at 213, as quoted by Singer, *supra* note 75 at 214.