

Law and Development

Teaching Material

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PART ONE
UNDERSTANDING THE CONCEPT OF DEVELOPMENT

CHAPTER 1- PRINCIPLES AND CONCEPTS OF DEVELOPMENT

Objectives

The study of economic development is one of the newest, most exciting, and most challenging branch of the broader disciplines of economics and political economy and this chapter is mainly to give you highlight about the important concepts and nature of development economics, core values, and objectives of development , and indicators of development and growth. At the end of this chapter you will be able to

- describe the importance of studying development economics
- identify the difference between growth and development
- assess the core values of development
- elaborate the important objectives of development

1.1 The Nature of Development Economics

Traditional economics is concerned primarily with the efficient least – cost allocation of scarce productive resources and with the optimal growth of these resources over time so as to produce an ever – expanding range of goods and service. By traditional economics it simply means the classical and neoclassical economics taught. Traditional neoclassical economics deals with an advanced capitalist world of perfect markets. consumer sovereignty. automatic price adjustments. decisions made on the basis of marginal, private – profit and utility calculations; and equilibrium outcomes in all product and resource markets. It assumes economic “rationality” and a purely materialistic, individualistic and self- interested orientation towards economic decision making. Political economy goes beyond traditional economics to study, among other things, the

social and institutional processes through which center groups of economic and political elites influence the allocation of scarce productive resources now and in the future, either exclusively for their own benefit or for that of the larger population as well. Political economy is, therefore, concerned with the relationship between politics and economic decision making.

Development economics has an even greater scope. In addition to being concerned with the efficient allocation of existing scarce (or idle) productive resources and with their sustained growth over time, it must also deal with the economic, social, political, and institutional mechanisms, both public and private, necessary to bring about rapid (at least by historical standards) and large-scale improvements in levels of living for the masses of poverty – stricken, malnourished, and illiterate peoples of Africa, Asia, and Latin America. Unlike the more developed countries, in the Less Developed Countries (LDCs), most commodity and resource markets are highly imperfect, consumers and producers have limited information, major structural changes are taking place in both the society and the economy, and disequilibrium situations often prevail (prices do not equate supply and demand).

In many cases, economic calculations are dominated by political and social priorities such as building a new nation in Africa, replacing foreign advisors with local decision makers, resolving tribal or ethnic conflicts, or preserving religious and cultural traditions, religious and cultural traditions. At the individual level, family, clan, religious, or tribal considerations may take precedence over private, self – interested utility or profit – maximizing calculations.

Thus, development economics, to a greater extent than traditional neoclassical economics or even political economy, must be concerned with the economic, cultural, and political requirements for effecting rapid structural and institutional transformations of entire societies in a manner that will most efficiently bring the fruits of economic progress to the broadest segments of their populations. As such a larger government role and some

degree of coordinated economic decision making directed toward transforming the economy are usually viewed as essential components of development economics.

We, who study law and development economics, must therefore be sensitive to the uniqueness and diversity of third world societies. We must also recognize that there are few, if any, truly universal principles or “laws” of economics governing economic relationships that are immutable at all times and in all places. There are at best only tendencies. For example, increased consumer demand tends to elicit a greater quantity supplied. But, as we shall discover later, conditions do exist in many developing countries under which this positive supply response may not operate.

Because of the heterogeneity of the developing world, there can also be no single development economics, no universal third world economics applicable to any or all LDCs. Rather, development economic must be eclectic, attempting to combine relevant concepts and theories from traditional economic analysis along with new models and new broader multidisciplinary approaches derived from studying the historical and contemporary development experience of America, Asia, and Latin America. Today development economics is field on the crest of a breaking wave theories and new data continuously emerging. These theories and statistics sometimes confirm and sometimes challenge traditional ways of viewing the world. The ultimate purpose of development economics, however, remains constant: to help us better understand third world economies on order to help improve material lives of three-quarters of the global population.

1.2 Some Critical Questions: Why Do We Study Development Economics?

An introductory course in development economics should help students gain a better understanding of a number of critical questions about the economies of developing nations. The following is a sample list where 20 such questions followed by the chapters (in parentheses) in which they are discussed. They illustrate the kinds of issues faced by almost every developing nation and indeed, every development economist.

1. What is the real meaning of development, and how can different economic concepts and theories contribute to a better understanding of the development process?
2. What are the sources of national and international economic growth? Who benefits from such growth and why? Why do some countries make rapid progress toward development while many others remain poor?
3. Which are the most influential theories of development and which of them are compatible? Is underdevelopment an internally (domestically) or externally (internationally) induced phenomenon?
4. What can be learned from the historical record of economic progress in the now developed world? Are the initial conditions similar or different for contemporary LDCs from what the developed countries faced on the eve of their industrialization?
5. How can improvement in the role and status of women have an especially beneficial impact on development prospects?
6. Is rapid population growth threatening the economic progress of developing nations? Do large families make economic sense in an environment of wide spread poverty and financial insecurity?
7. Why is there so much unemployment in the developing world, especially in the cities, and why do people continue to migrate to the cities from rural areas even though their chances of finding a job are very slow?
8. Do third world educational systems really promote economic development, or are they simply a mechanism to enable certain select groups or classes of people to maintain positions of wealth, power, and influence?
9. As 60% to 70% of many LDC populations still reside in rural areas, how can agricultural and rural development best be promoted? Are higher agriculture prices sufficient to stimulate food production, or are rural institutional changes (land redistribution, roads, transport, education, credit, etc. also needed?
10. What do we mean by “environmentally sustainable development”? Are there serious economic costs of pursuing sustainable development as opposed to

simple output growth, and who bears the major responsibility for global environmental damage-the rich north or the poor south?

11. Is expanded international trade desirable from the point of view of the development of poor nations? Who really gains from trade, and how are the advantages distributed among nations?
12. Should exports of primary products such as agricultural commodities be promoted, or should all LDCs attempt to industrialize by developing their own heavy manufacturing industries as rapidly as possible?
13. How did developing nations get into such serious foreign – debit problems, and what are the implications of this debt for the economies of both less developed and more developed nations?
14. When and under what conditions should LDC governments adopt a policy of foreign – exchange control, rise tariffs, or set quotas on the importation of certain “nonessential “goods in order to promote their own industrialization or to ameliorate chronic balance of payments problems” and world bank “structural adjustment” lending on the balance of payments and growth prospects of heavily indebted LDCs?
15. Should large and powerful multinational corporations be encouraged to invest in the economies of poor nations, and if so, under what conditions? How have the emergence of the “global factory” and the globalization of trade and finance influenced international economic relations?
16. What is the impact of foreign economic aid in rich countries? Should developing countries continue to seek aid, and if so, under what conditions and for what purposes? Should developed countries continue to offer such aid, and if so, under what conditions and for what purpose?
17. Are free markets and economic privatization the answer to development problems, or do third world governments still have major roles to play in their economies?
18. What is the role financial and fiscal policy in promoting development? Do large military expenditures stimulate or retard economic growth?

19. How did the economic transition from communism to capitalism in the former Soviet Union and Eastern Europe affect international private investment and foreign aid to the third world?
20. What are the most significant issues facing the development world in the twenty-first century? Will greater global interdependence between first and third world nations help or hinder development prospects?

These and many similar questions are analyzed and explored in the following chapters. The answers are often more complex than one might think, Remember that the ultimate purpose of any course in development economics is to help students think systematically about economic problems and issues and formulate judgments and conclusion on the basis of relevant analytic principles and reliable statistical information. Because the problems of development are in many cases unique in the modern world and not often easily understood through the use of traditional economic theories, we may often need unconventional approaches to what may appear to be conventional economic problems. Traditional economic principles can play a useful role in enabling us to improve our understanding of development problems, but they should not blind us to the realities of local conditions in less developed countries.

1.3 The Role of Values in Development Economics

Economics is a social science. It is concerned with human beings and the social systems by which they organize their activities to satisfy basic material needs (e.g. food, shelter, and clothing) and nonmaterial wants (e.g. education, knowledge, spiritual fulfillment). Because they are social sciences, economists face the some what unusual situation in which the objects of their studies – human beings in the ordinary business life – and their activities are rooted in the same social context. Unlike the physical science, the social science of economics can claim neither scientific laws nor universal truths. As mentioned earlier, in economics there can only be tendencies, and even these are subject to great variations in different countries and cultures and at different times. Many so – called general economic models are in fact, based on a set of implicit assumption about human

behavior and economic readings that may have little or no connection with the realities of developing economies. To this extent, their generality and objectivity may be more assumed than real. Economic investigations and analyses cannot simply be lifted out of their institutional, social, and political context, especially when one must of the human dilemmas of hunger, poverty and ill health that plague so much of the world's population.

It is necessary, therefore, to recognize from the outset that ethical or normative value premises about what is or not desirable are central features of the economic discipline in general and of development economics in particular. The very concept of economic development and modernization represent implicit as well as explicit value premises about desirable goals for achieving.

1.4 Traditional Economic Measures

In strictly economic terms, development has traditionally meant the capacity of a national economy, whose initial economic condition has been more or less static for a long time, to generate and sustain an annual increase in its gross national product (GNP) at rates of perhaps 5% to 7% or more. (A measure similar to GNP- known as the gross domestic product, (or GDP) is also used. The difference between GNP and GDP will be explained in Chapter2. A common alternative economic index of development has been the use of rates of growth of income per capital or per capital GNP to take into account the ability of a nation to expand its output at a rate faster than the growth rate of its population. Levels and rates of growth of real per capital GNP (monetary growth of GNP per capital minus the rate of inflation) are normally used to measure the over all economic well – being of a population–how much of real goods and services is a variable to the average citizen for consumption and investment.

Economic development in the past has also been typically seen in terms of the planned alteration of the structure of production and employment so that agriculture's share of both declines and that of the manufacturing and service industries increases. Development strategies have therefore usually focused on rapid industrialization, often at

the expense of agriculture and rural development. Finally, these principal economic measures of development have often been supplemented by casual reference to non economic social indicators: gain in literacy, schooling, health conditions and services, and provision of housing, for instance. A description of various attempts to generate these social indicators of development to supplement per capital GNP, in particular the United Nations human development.

On the whole, therefore, prior to the 1970s, development was nearly always seen as an economic phenomenon in which rapid gains in overall and per capital GNP growth would either “trickle down” to the masses in the form of jobs and other economic opportunities or create the necessary conditions for the wider distribution of the economic and social benefits of growth, problems of poverty, unemployment, and income distribution were of secondary importance to “getting the growth job done”.

1.5 The New Economic View of Development

The experience of the 1950s and 1960s, when many third world nations did realize their economic growth-targets but the levels of living of the masses of people remained for the most part unchanged, signaled that something was very wrong with this narrow definition of development. An increasing number of economists and policymakers now clamored for the “dethronement of GNP” and the evaluation of direct attacks on widespread of absolute poverty, increasingly inequitable income distributions, and rising unemployment. In short, during the 1970s, economic development came to be redefined in terms of the reduction or elimination of poverty, inequality, and unemployment within the context of a growth of economy. “Redistribution from growth” becomes a common slogan. Dudley seers posed the basic question about the meaning of development succinctly when he asserted:

The questions to ask about a country’s development are therefore: What has been happening to poverty? What has been happening to unemployment? What has been happening to inequality? If all three of these have declined from high levels, then beyond

doubt this has been a period of development for the country concerned. If one or two of these central problems have been growing worse, especially if all three have, it would be strange to call the result “development” even per capita income double.

This assertion was neither idle speculation nor the description of a hypothetical situation; a number of developing countries experienced relatively high rates of growth of per capita income during the 1960s and 1970s but showed little or no improvement or even an actual decline in employment, equality, and the real incomes of the bottom 40%, of their populations. By the earlier growth definition, these countries were developing; by the newer poverty, equality, and employment criteria, they were not. The situation in the 1980s and early 1990s worsened further as GNP growth rates turned negative for many LDCs and governments, facing mounting foreign – debt problems, were forced to cut back on their already limited social and economic programs.

But the phenomenon of development or the existence of chronic state of underdevelopment is not merely a question of economics or even one of quantities measurement of incomes, employment, and inequality. Underdevelopment is a real fact of life for more than 3 billion people in the world—a state of mind as much as a state of national poverty. As Denis Goulet has so forcefully portrayed it:

Underdevelopment is shocking: the squalor, disease, unnecessary deaths, and hopelessness of it all ! No man understands if underdevelopment remains for him a mere statistic reflecting low income, poor housing, premature mortality or underemployment. The most empathetic observer can speak objectively about underdevelopment only after undergoing personally or vicariously, the ‘shock of underdevelopment’. This unique culture shock comes to one as he is initiated to the emotions which prevail in the “culture of poverty”. The reverse shock is felt by their life is neither human nor inevitable....the prevalent emotion of underdevelopment is a sense of personal and social impotence in the face of disease and death, of confusion and ignorance as one groups to understand change, of servility toward men whose decisions govern the course of events, of hope

lessens before hunger and natural catastrophe. Chronic poverty is a cruel kind of hell, and one cannot understand how cruel that hell is merely by gazing upon poverty as an object. Development has been treated by economists as if it were nothing more than an exercise in applied economics, unrelated to political ideas, forms of government, and the role of people in society. It is high time we combine political and economic theory to consider not just ways in which societies can become more productive but the quality of the societies which are supposed to become more productive – the development of people rather than the development of things.

When we deal in parts two and three with such major issues of development as poverty, inequality, unemployment, population growth, rural stagnation, and environmental decay, the mere identification of these topics as problems conveys the value judgment that their improvement or elimination is desirable and therefore good. That, there is widespread agreement among many different groups of people – politicians, academics, and ordinary citizens—that these are desirable goals do not alter the fact that they arise not only out of a reaction to an objective or normative value judgment about what should be.

It follows that value promises, however carefully disguised, are an integral components of both economic analysis and economic policy. Economics can not be value-free in the same sense as, say, physics or chemistry. Thus the validity of economic analysis and the correctness of economic prescriptions should always be evaluated in light of the underlying assumptions or value premises. Once these subjective values have been agreed on by a nation or, more specifically, by those who are responsible for national decision making, specific development goals (e.g., greater income equality) and corresponding public policies (e.g., taxing higher incomes at rates) based on “objective” theoretical and quantitative analyses can be pursued. However, where serious value conflicts and disagreements exist among decision makers, the possibility of a consensus about desirable goals or appropriate policies is considerably diminished. In either case, it is essential, especially in the field of development economics that one’s value premises always are made clear.

1.6 Economies as Social Systems: The Need to Beyond Simple Economics

Economics and economic systems, especially in the third world, must be viewed in a broader perspective than that postulated by traditional economics. They must be analyzed within the context of the overall social system of a country and, indeed, with an international, global context as well. By social system we mean the interdependent relationships between so-called economic and non economic factors. The latter include attitude towards life, work, and authority; public and religion; cultural traditions; systems of land tenure; the authority and integrity of government agencies; the degree of popular participation in development decisions and activities; and the flexibility or rigidity of economic and social classes. Clearly these factors vary from one of the world to another and from one culture and social setting to another.

Throughout this module we shall discover that resolving problems to achieve development is a much more complicated task than some economists would lead us to believe. Increasing national production, raising levels of living and promoting widespread employment opportunities are all as much a function of the values, incentives, attitudes and benefits, and institutional and power structure of both the domestic and the global society as they are the direct outcomes of the manipulation of strategic economic variables such as saving, investment, product and factor price, and foreign- exchange rates. Looking back over these years, it is now clear that, in their preoccupation with growth and its stages and with the provision of capital and skills, development theorists have paid insufficient attention to institutional and structural problems and to the power of historical, cultural and religious forces in the development process.

Just as some economists occasionally make the mistake of confusing their theories with universal truth, so they also sometimes mistakenly dismiss these non-economic variables as “non-quantifiable” and therefore of dubious importance. Yet these variables often play a critical role in the success or failure of the development effort.

Many of the failures of development policies have occurred precisely because these non-economic variables (e.g., the role of traditional precise rights in allocating resources and distributing income or the influence of religion on attitudes towards modernization and family planning) were intentionally or unintentionally excluded from the analysis. Although the main focus of this module is in development economics and its usefulness and in understanding problems of economic and social progress in poor nations, we will also try to be mindful of the crucial roles that values, attitudes, and institutions play in the overall development process.

What do we mean by development?

Because the term development may be different things to different people, it is important at the outset to have some working definition or crop perspective on its meaning. Without such a perspective and some agreement on measurement criteria, we would be unable to determine which country is actually developing and which is not. According to World Bank, which during the 1980s championed economic growth as the goal of development, joined the chorus observers taking a broader perspective when, in its 1991 world development report, it asserted:

The challenge of development is to improve the quality of life. Especially in the world's poor countries, a better quality of life generally calls for higher incomes but it involves much more. It encompasses as ends in themselves better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom, and a richer cultural life.

Development must therefore be conceived as a multidimensional process involving major changes in social structures, popular attitudes, and national institutions, as well as the acceleration of economic growth, the reduction of inequality, and the eradication of poverty. Development, in its essence, must represent the whole gamut of change by which an entire social system, turned to the divers basic needs and desires of individuals and social groups within that system, moves away from a condition of life widely

perceived as unsatisfactory toward a situation or condition of life regarded as materially and spiritually better.

1.7 Three Core Values of Development

Is it possible to define or broadly conceptualize what we mean when we talk about development as the sustained elevation of an entire society and social system toward a “better” or “more human” life? What constitutes the good life is a question as old as philosophy and humankind, one that must be periodically reevaluated and answered afresh in the changing environment of world society. The appropriate answers for third world nations in the first decade of the twenty first century is not necessarily the same as it would have been in previous decades. But we agree with Goulet and others that at least three basic components or core values should serve as a conceptual basis and practical guide line for understanding the inner meaning of development. These core values sustenance, self-esteem, and freedom- represent common goals by all individuals and almost all societies and cultures at all times. Let us therefore examine each one of the values in short.

1.7.1 Sustenance: The ability to meet Basic needs

All people have certain basic needs without which life would be impossible. These life-sustaining basic human needs include food, shelter, health, and protection. When any of these is absent or in critically short supply, a condition of “absolute underdevelopment” exists. A basic function of all economic activities, therefore, is to provide as many people as possible with the means of overcoming the helplessness and misery arising from a lack of food, shelter, health, and protection. To this end, we may claim that economic development is a necessary condition for improvement in the quality of life and there by for development. Without sustained and continuous economic progress at the individual level, as well as the societal level, the realization of economic human potential would not be possible. One clearly has to “have enough in order to be more’ Rising per capital incomes, the elimination of absolute poverty, greater employment opportunities, and

narrowing income inequalities. Therefore , having economic growth constitute the necessary but not the sufficient conditions for development.

An alternative way of saying much the same thing was put forth in the United Nations' 1994 human development report. The report asserts the following;

Human beings are born with certain capabilities. The purpose of development is to create an environment in which all people can expand their capabilities, and opportunities can be enlarged for both present and future generations. The real foundation of human development is universalism in acknowledging the life of everyone. Wealth is important for human life. But concentrating on it exclusively is wrong for two reasons. First, accumulating wealth is not necessary for the fulfillment of some important human choice. Second, human choices extend far beyond economic well-being.

1.7.2 Self-Esteem: To be a person

A second universal component of the good life is self-esteem—a sense of worth and self-respect, of not being used as a tool by others for their own needs. All peoples and societies seek some basic form of self-esteem although they may call it authenticity, identity, dignity, respect, honor, or recognition. The nature and form of this self-esteem may vary from society to society and from culture to culture.

However, with the proliferation of the “modernizing values” of developed nations, many societies in third world countries had a profound sense of their own worth suffer from serious cultural confusion when they come in contact with economically and technologically advanced measure of worth.

The relevant point is that underdevelopment is the problem of the majority of the world's population. As long as esteem or respect was dispensed on grounds other than material achievement, it was possible to resign oneself to poverty without feeling disdained. Conversely, once the prevailing image of the better life includes material welfare as one

of its essential ingredients, it becomes difficult for the materially “underdeveloped” to feel respected or esteemed

1.7.3 Freedom from Servitude: to Able to Choose

A third and final universal value that we suggest should constitute the meaning of development is the concept of human freedom. Freedom here is to be understood in the sense of emancipation from alienating material conditions of life and from social servitude to nature, ignorance, other people, misery, institutions, and dogmatic beliefs. Freedom involves an expanded range of choices for societies and their members together with a minimization of external constraints in the pursuit of some social goal called development. W.Arthur Lewis stressed the relationship between economic growth and freedom from servitude when he concluded that ‘the advantage of economic growth is not that wealth increases happiness, but that it increases the range of human choice.’ Wealth can enable people to gain greater control over nature and the physical environment (e.g., through the production of food, cloth, and shelter) than they would have if they remained poor. It also gives them the freedom to choose greater leisure, to have goods and service, or deny the importance of these material wants and choose to live a life of spiritual contemplation. The concept of human freedom should also encompass various components of political freedom including, but not limited to, personal security with the rule of law, freedom of expression, political participation, and equality of opportunity. Some of the most notable economic success stories of the 1970s and 1980s (Saudi Arabia, Chile, South Korea, Singapore, Malaysia, Thailand, Indonesia, Turkey, and China among others) did not score development program (UNDP).

1.8 The Three Objectives of development

We may conclude that development is both a physical reality and state of mind in which society has, through some combination of social, economic, and institution process, secured the means for obtaining a better life. Whatever be the specific components of this better life, development in all societies must have at least the following three objectives:

1. To increase the availability and widen the distribution of basic life-sustaining goods such as food, shelter, health, and protection.
2. To raise levels of living, in addition to higher incomes, the provision of more jobs, better education, and greater attention to cultural and humanistic values, all of which will serve not only to enhance well-being but also to generate greater individual and national self-esteem.
3. To expand the range of economic and social choice available to individuals and nations by freeing them servitude and dependence not only in relation to other people and nation-states but also to the forces of ignorance and human misery.

1.9 Summary and Conclusions

Development economics is a distinct yet very important extension of both traditional economics and political economy. While necessarily also concerned with efficient resource allocation and the steady growth of aggregate output over time, development economics focus primarily on the economic, social, and institutional mechanism needed to bring about rapid and large-scale improvements in levels of living for the masses of poor people in third world nations. As such, development economics must be concerned with the formation of appropriate public policies designed to effect major economic, institutional, and social transformations of entire societies in the shortest possible time. Otherwise, the gap between aspiration and reality will continue to widen with each passing year. It is for this reason that the public sector has assumed a much broader and more determining role in development economics than it has traditional neoclassical economic analysis.

As a social science, economics is concerned with people and how best to provide them with the material means to help and realize their full human potential. But what constitutes the good life is a perennial question, and hence economics necessarily involves values and value judgments. Our very understanding with promoting development represents an implicit value judgment about good (development) and evil

(underdevelopment). But development may mean different things to different people. Therefore, the nature and character of development and the meaning we attach to it must be carefully spelled out.

Any realistic analysis of development problem necessitates the supplementation of strictly economic variables such as incomes, price, and savings rates and with equally relevant information's of non-economic or institution factors, including the nature of land tenure arrangements; and influence of social and class stratifications; the structure of credit, education, and health system; the organization and motivation of government bureaucracies; the machinery of political administration; the nature of popular attitudes to ward work, leisure, and self-improvement; and the values, roles, and attitudes of political and economic elites. Economic development strategies that seek to raise agricultural output, create employment, and eradicate poverty have often failed in the past because of economic elites.

Despite the great diversity of developing nations-some large, others small; some resource-rich, others resource-barren; some subsistence economies, others modern manufactured-good exporters; some private-sector-oriented, others run by the government-most share common problems that defined their underdevelopment. We will discuss these diverse structures and common characteristics of LDCS.

CHAPTER TWO

DIMENSIONS OF DEVELOPMENT OF DEVELOPING COUNTRIES

Objectives

We have already seen the concept of development and its measurements. We will use these concepts and their measurements as guideline in understanding the depth and width of the problems of countries of the third world. This chapter gives a short account of the dimensions of the development problems of poor nations.

These countries have both similarities and difference in economic, geographical, historical, social, cultural and institutional factors. Here, it is attempted to shortly familiarize the student with the diversities and common features of developing countries. The chapter is divided into two parts. The discussion starts with the differences among developing countries and proceeds to their common characteristic features.

At the end of this chapter you will be able to

- familiarize yourself with dimensions of development problems of poor countries.
- elaborate an overview of the diverse structure of developing nations.
- describe common characteristics of developing countries

2.1. An Overview of the Diverse Structures of Developing Countries

This section portrays the structural diversity of developing nations. With this intention, we will do an examination of eight critical components. These are

1. The size of the country(geographic area, size of population, and income levels)
2. Its historical and economical background;
3. Its endowments of physical and human resources;

4. Its ethnic and religious composition;
5. The relative importance of its public and private sector
6. The nature of its industrial structure;
7. Its degree of dependence on external economic and political forces and
8. The distribution of power and the institutional and political structure within the nation.

Dear students, each of the above components are discussed in detail below. In doing this, we will focus on regional comparisons of the developing countries of Africa, Asia, and Latin America and their sub regions.

2.1.1. Size and Income Level

Evidently, economic potential of a country is significantly determined by its physique and population size, and its level of national per capita income. These are also major factors differentiating one developing country from another. In the world of developing countries, larger and populated nations such as Brazil, India, Nigeria and Ethiopia exist side-by side with small countries like Paraguay, Nepal and Djibouti respectively.

This size provides both advantages and disadvantages. Large size usually presents advantages of diverse resources endowment, large potential markets, and lesser dependence on foreign sources of materials and products. But it also creates problems of administrative control, national cohesion, and regional imbalances.

However, it is to be noted that there is no necessary relationship among a country's size, its level of per capita income, and the degree of equality or inequality in the distribution of that income. For example, as compared to Ethiopia, the neighboring country, Kenya is smaller in geographic and population size. But Kenya has about 3 times the per capita income of Ethiopia at official exchange rate. But Kenya has also lesser per capita income than Brazil and some other larger developing countries.

2.1.2. Historical Background

The other source of diversity among the developing countries is their traditional and colonial heritages; apparently, countries have their own different cultural background accumulated in their history making them to have different social and economic institutions. Moreover, developing nations were at one time or other colonies of western European countries. The European colonial powers had a dramatic and long-lasting impact on the economic, political and institutional structures of their African and Asian colonies. The economic structures of these nations, as well as their educational and social institutions have typically been modeled on those of their former economic rulers.

Hence, the diversity in colonial heritage together with the indigenous cultural differences have resulted different structural problems in these countries. Depending on their colonial heritage, there fore, the countries are required to take different measures. Countries like those in Africa that only recently gained their independence are likely to be more concerned with consolidating and evolving their own national, economic and polity's structures than with simply promoting rapid economic development. Their policies may, consequently, reflect a greater interest in these immediate issues.

Latin American countries have a longer history of political independence plus a more shared colonial heritage. Therefore, in spite of geographic and demographic diversity, the countries possess relatively similar economic, social, and cultural institutions and face similar problems, In Asia, on the other hand, different colonial heritages and the diverse cultural traditions of the indigenous peoples have combined to create different institutional and social patterns.

2.1.3 Physical and Human Resources

Endowments of physical and human resources are other sources of disparities in economic growth potential of the countries. If we deal with the physical resource endowments, on the one hand, there are countries which are extremely and favorably endowed in resources such as minerals, raw materials, and fertile land. On the other hand, there are also poorly endowed nations where endowments of raw materials and minerals and even fertile land are relatively minimal.

Moreover, geography and climate can also play an important role in the success or failure of development efforts. Other things being equal, it is said that, island economies seem to do better than landlocked economies. With respect to climate also temperate zone countries do better than tropical zone nations.

Developing countries are also distinguished one from the other in their human resource endowments. The human resource endowments includes not only the number of people and their skill levels but so also their cultural outlooks, attitudes toward work, access to information, willingness to innovate, and desire for self-improvement.

Furthermore, the level of administrative skill will often determine the ability of the public sector to alter the structure of production and the time it takes for such structural alteration to occur. This has to do with the whole complex of interrelationships between culture, tradition, religion, and ethnic and tribal fragmentation or cohesion. Thus the nature and character of a country's human resources are important determinants of its economic structure and these clearly differ from one region to the other.

2.1.4. Ethnic and Religious Composition

Ethnicity and religion often play a major role in the success or failure of development efforts. Evidently, the greater the ethnic and religious diversity of a country the more likely it is that there will be internal strife and political instability. There is also distinction in ethnic and religious composition among nations. Presently more than 40% of the world's nations have more than five significant ethnic populations.

In most cases, one or more of these groups face serious problem of discrimination. Over half of the worlds less developed countries have recently experienced some form of interethnic conflict. Just in the first half of the 1999s, ethnic and religious conflicts leading to wide spread death and distinction took place in many African countries and some countries of other regions.

But neither overt physical conflict nor widespread violence is necessary to disrupt an economy or cause political instability. If development is about improving human lives and providing a widening range of choice to all peoples, racial, ethnic, or religious discriminations can be equally destructive. For example through out Latin America, indigenous populations have significantly lagged behind other groups on almost every measure of economic and social progress. In these countries, being indigenous makes it such more likely that an individual will be less educated, in poorer health, and in a lower socio economic structure than other citizens. This is particularly true for indigenous women,

Ethnic and religious diversity need not, however, necessarily lead to inequality, turmoil, or instability. There have been numerous instances of successful economic and social integration of minority or indigenous ethnic population in countries as diverse as Malaysia and Mauritius. The point is that the ethnic and religious composition of a developing nation and whether or not that diversity leads to conflict or cooperation can be important determinants of the success or failure of development efforts. Too often, economists neglect to recognize this fundamental fact.

2.1.5. Relative Importance of the Public and private Sectors

Most developing countries have mixed economic system, featuring both public and private ownership and use of resources. The division between the two and their relative importance are mostly determined by the historical and political circumstances of the countries. Thus, in general, Latin American and South East Asian nations have larger private sectors than South Asian and African nations.

The degree of foreign ownership on the private sector is another important variable to consider when differentiating among less developed countries. A large foreign owned private sector usually creates economic and political opportunities as well as problems not found in countries where foreign investors are less prevalent.

Economic policies, such as those designed to promote more employment, will naturally be different for countries with large public sectors and ones with sizeable private sectors. Direct government investment projects and large rural work programs may take precedence in economies dominated by the public sectors. In the private oriented economies, however, special tax allowances designed to induce private businesses that can employ more workers might be more common. Although the problem to be solved may be similar, the solution can differ in countries with significant differences in the relative importance of the public and private sectors.

2.1.6 Economic Structure

Developing countries are predominantly agrarian in economic, social, and cultural outlook. Labour force in most of these countries is overwhelmingly engaged in agriculture. The agricultural Sector contributes significantly also to the GDP of many of the poor nations. Farming is not merely an occupation but a way of life for most people in Asia, Africa, and Latin America.

Nevertheless, there are great differences between the structure of agrarian systems and patterns of land ownership in Latin America. Asian agrarian systems are some what

closer to those of Latin America in terms of patterns of land ownership. But even the similarities are lessened by substantial cultural differences.

It is in the relative importance of both the manufacturing and service sectors that we find the widest variation among developing nations. Most Latin American countries possess more advanced industrial sectors. But in the 1970s and 1980s countries like Taiwan, South Korea, and Singapore are rapidly becoming industrialized states.

In spite of common problems, therefore, development strategies may vary from one country to the next depending on the nature, structure, and degree of interdependence among its primary, secondary, and tertiary industrial sectors.

2.1.7. External Dependence: Economic, Political and Cultural

The degree to which a country is dependent on foreign economic, social, and political force is related to its size, resources endowment, and political history. For most developing countries, this dependence is substantial. In some cases, it touches almost every facet of life. Most small nations are highly dependent on foreign trade with the developed world. Almost all small nations are dependent on the importance of foreign and often inappropriate technologies of production. This fact alone exerts an extraordinary influence on the characteristics of the growth process in these dependent nations.

But even beyond the strictly economic manifestations of dependence in the form of the international transfer of goods and technologies is the international transmission of institution and values. Most notably are systems of education and governance, and attitudes toward life, work, and self. The transmission phenomenon brings mixed blessing to most less developed countries especially to those with the greatest potential for self reliance. A country's ability to chart its own economic and social destiny is significantly affected by its degree of dependence on these and other external forces.

2.1.8 Political Structure, Power and Interest Groups

In the final analysis, it is often not the correctness of economic policies alone that determines the outcome of national approaches to critical development problems. The political structure and the vested interests of ruling elites (e.g., large landowners, urban industrialists, bankers, foreign manufacturers, the military, and trade unionists) will typically determine what strategies are possible and where the main barriers to effective economic and social change may lie.

The concentration of interests and power among different segments of the populations of most developing countries itself is the result of their economic, social, and political histories, and is likely to differ from one country to the other. Nevertheless, whatever the specific distribution of power among the military, the industrialists, and the large landowners of Latin America, the politicians and high level civil servants in Africa, the oil sheiks and financial of the middle east, or the land lords, money lenders, and wealthy industrialists of Asia-most developing countries are ruled directly or indirectly by small and powerful elites to a greater extent than the developed nations are.

Effective social and economic changes thus require either that the support of elite groups be enlisted or that the power of the elite be offset by more powerful democratic forces. Either way, economic and social development will often be impossible without corresponding changes in the social, political, and economic institutions of a nation. Such institutional changes may include: land tenure systems, forms of governance, educational structures, labor market relationships, property rights, the distribution and controls of physical financial asset, laws of taxation and inheritance and provision of credit.

2.2 Common Characteristics of Developing Countries

Dear students, the foregoing discussions have demonstrated why it is sometimes risky to generalize too much about such a diverse set of nations. Nevertheless, common economic features of developing countries permit us to view them in a broadly similar framework.

This section portrays various dimensions of the development gap between rich and poor countries and similarities of poor nations. These include level and the growth rate of income, unemployment and underemployment, population growth rate, economic structure, political and institutional factors, and degree of dependence. We will attempt to identify these similarities and provide illustrative data to demonstrate their importance. For convenience, we can classify these common characteristics into seven broad categories.

- I. Low levels of living which is characterized by income inequality, poor health, and inadequate education
- II. Low levels of productivity
- III. High rates of population growth and dependency burden
- IV. High and rising levels of unemployment and underemployment
- V. Substantial dependence on agricultural production and primary product exports
- VI. Prevalence of imperfect markets and limited information
- VII. Dominance, dependence and vulnerability in international relations.

2.2.1. Low Levels of Living

In developing nations, general level of living tends to be very low for the vast majority of people. This is true not only in relation to their counterparts in rich nations but often also in relation to small elite groups within their own societies. These low levels of living are manifested quantitatively and qualitatively in the form of low income (poverty), inadequate housing, poor health, limited or no education, high infant mortality, low life and work expectancies, and in many case a general sense of malaise and hopelessness. Let us look at some recent statistic as comprising certain aspects of life in the underdeveloped countries and in the more economically advanced nations.

A. Per capita national income: As we all know from the previous knowledge of economics, the GNP per capita is often used as summary index of the relative economic well-being of people in different nations. One common distinguishing feature of developing countries as compared to developed nations is the extremely low level of income. In 1997, the total national product of all the nations of the world was valid at more than \$29 trillion, of which more than \$22 trillion originated in the economically developed regions and less than \$7 trillions was generated in the less developed nations.

The difference in income between rich and poor nations will be apparent when one takes in to account of the distribution of world population. In this term, this means that almost 80% of the world's income is produced in the economically developed groups by 20% of the world's people. Thus the remaining four-fifths of the world's population is producing only one-fifth of total world output. In the year of 1997, the collective per capita incomes of the under developed countries averaged less than one- twentieth of the per capita income of rich nations.

B. Growth Rates of Income: Many developing countries not only have much lower levels of per capita income but also have experience of slower GNP growth than the developed nations. For example, the average growth rate slowed considerably during the 1980s. The real per capita GDP even declined by 0.2% in 1990 and in 1991 between 1985 and 1995 economic growth in Latin America and the Caribbean averaged 0.3% and in Africa-1.1% while growth in the developed countries was averaging 1.9% per annum.

In fact, during the 1980s and early 1990s, the income gap between rich and poor nations widened at the fastest pace in more than the other three decades. The impact of this widening gap is striking. If, for example, we take the income levels of the richest 20% of the world's population in comparison with the poorest 20% we find that whereas in 1960 the income ratio was 30 to 1 at the end of 1991 the rich were receiving 61 times the income of the poor. Table 1 gives the details of the ever-growing income disparity between the richest and poorest 20% of the world's population.

C. Distribution of National Income: The growing gap in per capita incomes between rich and poor nations is not the only manifestation of the widening economic disparity between the world's rich and poor. To appreciate the breadth and depth of third world poverty, it is also necessary to look at the growing gap between rich and poor within individual LDCs.

All nations of the world show some degree of income inequality. There are large disparities between the income of the rich and of the poor in both developed and underdeveloped countries. Nevertheless, the gap between rich and poor is generally greater in less developed nations than in developed nations.

Comparing the share of national income that accrues to the poorest 40% of a country's population with that of the richest 20% can be used as an arbitrary measure of the degree of inequality. In this case, we discover many African and Latin America countries to be with substantial income inequality. Nevertheless, most Asian countries have either moderate inequality or lesser inequalities in overall income distribution.

Moreover, there is no obvious relationship or correlation between levels of per capital income and degree of income inequality. Kenya, with the same low per capita income as India has a much wider income disparity between the top 20% and bottom 40% of the population. Similarly, Kuwait, with almost the same high per capita income as Belgium has a much lower percentage of its income distributed to the bottom 40% of its population.

D. Extent of Poverty: The magnitude and extent of poverty in any country depend on two factors: the average level of national income and the degree of inequality in its distribution. Clearly, for any given level of national per capita income, the more unequal the distribution the lower is the inclusion of poverty. Similarly, for any given distribution, the lower the average income level, the greater is the inclusion of poverty. But how is one to measure poverty in any meaningful quantitative sense?

During the 1970s, as interest in problems of poverty increased, development economists took the first step in measuring its magnitude within and across countries by attempting to establish a common poverty line. They went even further and devised the now widely used concept of *absolute poverty*. It is meant to represent a specific minimum level of income needed to satisfy the basic physical needs of food, clothing, and shelter. In order to ensure continued survival, one common methodology has been used to establish an international poverty line at, say, a constant U.S. \$370 per year (based, for example, on the value of the 1985 dollar and then attempt to estimate the purchasing power equivalent to that sum of money in terms of a developing country's own currency).

We see that in the last decade of the 20th century, some 1.3 billion people, or 32% of the developing world population, were living in absolute poverty. Looking at individual regions, we find the highest poverty rate (43%) in South Asia (Bangladesh, India, Pakistan, etc.) where the largest number of poor people lives (515 million). But sub-Saharan Africa with 219 million absolute poor has by far the fastest poverty growth rate. It is estimated that during the first decade of the 21st century, African poverty rates will approach 50 percent.

E. Health: In addition to struggling on low income, many people in developing nations fight a constant battle against malnutrition, disease, and ill health. Life expectancy in 1998 still averaged only 48 years compared to 63 years among other third world countries and 75 years in developed nations. Infant mortality rates (the number of children who die before their first birthday out of every 1,000 live births) average about 96 in the least developed countries and 8 in developed countries.

In the mid-1970s, more than 1 billion people, almost half the population of the developing world (excluding China), were living on diets deficient in essential calories. One-third of them were children under 2 years of age. These people were concentrated in the poorest countries. In the 1990s the situation consumption and widespread famine. In

both Asia and Africa, over 60% of the population barely met minimum caloric requirements necessary to maintain adequate health.

The extent of human deprivation in terms of some key health indicators is also another indicator of the low standard of living of these nations. For example, 766 million people in poor countries are without access to health services, 1.2 billion do not have access to safe drinking water, 1.9 billion (almost half the population) live without sanitation facilities, and 158 million children under age 5 are malnourished. Another often-used measure of child malnutrition is the percentage of children who are underweight. In the early 1990s statistics revealed that 67% of the children in Bangladesh were underweight; 63% in India, 43% in South Africa, 42% in Vietnam, 38% in Ethiopia, and 36% in Ghana and Nigeria. The access to clean drinking water is one of the most important measures of sanitation. Waterborne diseases such as typhoid fever, cholera, and a wide array of serious or fatal diarrhea illnesses are responsible for more than 35% of the deaths of young children in developing countries. Most of these diseases and resulting deaths would be quickly eliminated with safe water supplies.

To make matters worse, medical care is an extremely scarce social service in many parts of the developing world. In 1995, the number of doctors per 100,000 people averaged only 4.4 in the least developed countries, compared with 217 in the developed countries. The ratio of hospital beds to population is similarly divergent between these two sets of nations.

Moreover, when one realizes that most of the medical facilities in developing nations are concentrated in urban areas where only 25% of the population resides, the woefully inadequate provision of health care to the masses of poor people becomes strikingly clear. For example, in India, 80% of the doctors practice in urban areas where only 20% of the population resides. In Bolivia only one –there. In Kenya, the population-to-physician ratio is 672 to 1 for the capital city of Nairobi and 20.000 to 1 in the rural countryside where 87% of the Kenyan population lives. In terms of health expenditures, more than

75% of LDCs government outlays are devoted to urban hospitals that provide expensive, western-style curative care to a minority of the population.

Finally, no discussion of health problems would be complete without mentioning the terrible human toll that AIDS is inflicting on millions of people in developing countries. After tuberculosis, AIDS is now the second leading infectious cause of deaths among adult men and women. To date, an estimated 6 million people worldwide have died of AIDS and more than 30 million have contracted the human immunodeficiency virus (HIV) that causes it. 90% of all these people live in LDCs. At the beginning of 1998, out of the total number of these victims 66% them were residing in Africa while Asia and Latin America had 21% and 43% respectively.

F. Education: The spread of educational opportunities is the final indicator of the very low levels of living that is pervasive in developing nations. The attempt to provide primary school educational opportunities has probably been the most significant of all LDC development efforts. In most countries, education takes significant share of the government's budget.

Yet in spite of some impressive quantitative advances in school enrollments, literacy levels remain strikingly low compared with the developed nations. For example, among the least developed countries, literacy rates average only 45% of the population, the corresponding rates for other third world nations and the developed countries are approximately 64% and 99%, respectively. There is high level of children dropouts of primary and secondary school, and out of the estimated illiterate adults, more than 60% are women. Moreover, the education of children who do attend school regularly is often irrelevant to the development needs of the nation, in which they live,

We can summarize the major illustrations of the low standard of living of the poor nations by listing the following points, Firstly, there is low relative levels and, in many countries, slow growth rates. Of national income, moreover, the real per capita income is either growing at a low level or in many countries stagnating The pattern of income

distribution of the poor countries is highly skewed with the top 20% of the population receiving 5 to 10 as much income as the bottom 40%. Consequently, great masses of third world populations are suffering from absolute poverty, with up to 1.3 billion people living on subsistent income of less than \$370 per year.

The low standard of living is also manifested in the social aspects. Large segments of the populations are suffering from ill health, malnutrition, and debilitating diseases, with infant mortality rates running as high as 10 times those in developed nations. In education, these countries are characterized by low levels of literacy, significant school dropout rates, and inadequate and often irrelevant educational curricula and facilities. Most important is the interaction of all six characteristics, which tend to reinforce and perpetuate the pervasive problems of “poverty, ignorance, and disease” that restrict the lives of so many people in the developing world.

2.2.2. Low Levels of Productivity

In addition to low levels of livings, developing countries are characterized by relatively low levels of labor productivity. The concept of a production function is often used to describe the way in which societies go about providing for their material needs. Production function is systematically relating outputs to different combinations of factor inputs for a given technology.

But in less developed countries the concept of technical engineering concept of a production function must be broadened by adding some important factors. Among its other inputs, this includes managerial competence, access to information, worker motivation, and institutional flexibility. Throughout the developing world, levels of labor productivity are extremely low compared with those in developed countries. This can be explained by a number of basic economic concepts. For example, the principle of *diminishing marginal productivity* states that if increasing amounts of a variable factor (labor) are applied to fixed amounts of other factors(e.g., capital, land, materials), the extra or marginal product of the variable factor declines beyond a certain number.

Low levels of labour productivity can therefore be explained by the absence or severe lack of “complementary” factor inputs such as physical capital or experienced management. To raise productivity, according to this argument, domestic *savings* and foreign *finance* must be mobilized. This is to generate new investment in physical capital goods and build up the stock of human capital (e.g., managerial skills) through investment in education and training.

Institutional changes are also necessary to maximize the potential of this new physical and human investment. These changes might include such diverse activities as:

- The reform of land tenure, corporate tax, credit, and banking structures,
- The creation or strengthening of an independent, honest, and efficient administrative service, and
- The restructuring of educational and training programs to make them more appropriate to the needs of the developing societies. These and other non economic input into the social production must be taken into account if strategies to raise productivity are to be succeed.

One must also take into account the impact of worker and management *attitudes* toward self-improvement, people’s degree of alertness, adaptability, ambition, and general willingness to innovate and experiment, and their attitudes toward manual work, discipline, authority, and exploitation. Added to all these must be the physical and mental capacity of the individual to do the job satisfactorily. The economic success stories of “the four Asian tigers”-South Korea, Singapore, Hong Kong, and Taiwan-are often attributed to the quantity of their human resources, the organization of their production systems, and the institutional arrangements undertaken to accelerate their productivity growth.

The conditions of physical health most clearly reveal the close linkage that exists between low levels of income and low levels of productivity in developing nations. It is

well known, for example, that poor nutrition in childhood can severely restrict the mental and the physical growth of individuals. Poor dietary habits, inadequate food, and low standards of personal hygiene in later years can cause further deterioration in a worker's health and can therefore adversely influence attitudes toward the job and the other people at work.

The worker's low productivity may be due in large part to physical lethargy and the inability, both physical and emotional, to withstand the daily pressures of competitive work. We may conclude, therefore, that low levels of living and low productivity are self-reinforcing social and economic phenomena in poor countries, in can also be said that they are the principal manifestations of and contributors to their underdevelopment.

2.2.3 Population Growth and Dependency Burdens

Statistics on demographic evolution by country show that the present rhythm of global population growth is largely the result of the acceleration of growth in the developing regions. Consequently, the population of the third world rose from 1.7 billion in 1950, to 3.313 billion in 1980 and 4.036 billion in 1990. During the same year, the population of the developed countries stood respectively at 832 million, 1.137 billion and 1.210 billion. The demographic load of the third world has been accentuated. Its Share from the total population has been continuously increasing to be 66.9% in 1950, 74.4% in 1980, 76.9% in 1990 and around 80% at the end of the 20th century and beginning of the 21st century. The percentage of the population of the developed countries has fallen from 33.1% to 20% in the course of the same period.

This swift population growth in developing countries is due to their higher birth rate as compared to death rate, though death rate also in high, birthrates (the yearly number of live births per 1.000 populations) in less developed countries are 30 to 40, whereas those in the developed countries are less than half that figure. The crude birthrate is probably one of the most efficient ways of distinguishing the less developed from the developed

countries. There are few less developed countries with a birthrate below 20 per 1.000 and no developed nations with a birthrate above it.

Death rates (the yearly number of deaths per 1.000 populations) in third world countries are also high relative to the developed nations. However, these poor nations have benefited from the progress of medicine for the masses and the campaigns against endemic disease. This was followed by fall in mortality, hence, the differences in death rate between developing and developed countries are substantially smaller than the corresponding differences in birthrates, as a result, the average rate of population growth is now about 2.0% per year in third world countries (2.3% excluding China), even there are certain African countries approaching and even exceeding 3% per annum. This is as compared to population growth of 0.5% per year in the industrialized world. According to UN projections, now a days four out of five inhabitants of the planet are coming from the developing countries.

These high birthrates have considerable socioeconomic implication. Children under the age of 15 make up almost 40% of the total population in these countries. This is as opposed to less than 21% of the total population in the developed countries. Thus in most developing countries, the active labour force has to support proportionally almost twice as many children as it does in richer countries. By contrast, the proportion of people over the age of 65 is much greater in the developed nations.

Both older people and children are often referred to as an economic dependency burden, This means that they are nonproductive members of society and therefore must be supported financially by a country's labor force (usually defined as citizens between the ages of 15 and 64). The overall dependency burden (i.e., both young and old) represents only about one-third of the populations of developed countries but almost 45% of the populations of the less developed nations. Moreover, in the latter countries, almost 90% of the dependents are children, whereas only 66% are children in the richer nations.

We may conclude, therefore, that not only are third world countries characterized by higher rates of population growth, but they must also contend with greater dependency burdens than rich nations. The circumstances and conditions under which population growth becomes a deterrent to economic development is a critical issue.

2.2.4 High Unemployment and Underemployment

One of the principal manifestations of the low levels of living in developing nations is their relatively inadequate or inefficient utilization of labour in comparison with the developed nations. In the 1980s the unemployment and underemployment problem became increasingly pronounced and emerged as one of the most serious development problems.

Unemployment increased as a result of which employment has been growing during the past at a rate which is much slower than the rate of growth of the labor force. Stagnating economic growth, the austerity programs implemented as a result of the structural adjustment programs (SAPs) and high levels of rural-urban migration combined to precipitate this situation. For example, the ILO estimates that in the 1990s productive employment in sub-Saharan Africa increased by only 2.4 per cent per annum at a time when African labor force grown by a much faster rate of 3.3 per cent a year.

Unemployment in the developing world averaged 8% to 15% of the labor force. The unemployment rates in the 1980s for selected African countries were: Botswana 3.2%, Cote D'Ivoire 20%, Ethiopia 23%, Kenya 16.2%, Nigeria 9.7%, Senegal 17.3%, Somalia 22.3%, Tanzania 21.6% Zambia 19%, and Zimbabwe 18.3% (ILO,1991).

The unemployed exhibit two important characteristics, namely their youthfulness and their high level of education. Youth (the age group of 15 to 24) unemployment rates are on the average twice higher than adult unemployment rates. Unemployment is also creeping up the educational ladder. When the underemployed are added to the openly unemployed and when 'discouraged workers' - those who have given up looking for a job

are added in, almost 35% of the combined urban and rural labor forces in poor nations is unutilized.

Given recent and current birthrates in most LDCs, their labor supply will be expanding rapidly for some time to come. This means that jobs will have to be created at equivalent rates simply to keep pace. Moreover, in urban areas rural urban migration is causing the labor force to grow at explosive annual rates of 5%, to 7% in many countries (especially in Africa). The prospects for coping effectively with rising levels of unemployment and underemployment and for dealing with the frustrations and anxieties of an increasingly vocal and educated but unemployed youth are frighteningly poor. The dimensions and implications of the unemployment and migration problem will be discussed in detail in part two of development economics.

2.2.5. Substantial Dependence on Agricultural Production and Primary-Product Exports

The vast majority of people in LDCs lives and works in rural areas. Over 65% are rurally based, compared to less than 27% in economically developed countries. Similarly, 58% of the labor force is engaged in agriculture, compared to only 5% in developed nations. Agriculture contributes about 14% of the GNP of developing nations but only 3% of the GNP of developed nations.

There is striking difference between the proportionate size of the agricultural population in Africa, which constitutes (68%) and south Asia (64%) versus North America (3%) but the average productivity of agricultural labour is almost 35 times greater in North America than in Asia and Africa combined. Although international comparative figures are often of dubious quality regarding both precision and methods of measurements, they, nevertheless, give us rough orders of magnitude. Even after making necessary adjustments for third world non marketed agricultural output, the differences in agricultural labour productivity would still be very sizable.

Agricultural productivity is low not only because of the large numbers of people in relation to available land but also because LDC agriculture is often characterized by primitive technologies, poor organization, and limited physical and human capital inputs. Technological backwardness persists because third world agriculture is predominantly non commercial peasant farming. In many parts of the world, especially in Asia and Latin America, it is characterized further by land tenure arrangements in which peasants rent rather than own third small plots of land. Tenure arrangements take away much of the economic incentive for out put expansion and productivity improvement.

Even where land is abundant, primitive techniques and the use of hand plows, drag harrows, and animal (oxen, and donkey) or raw human power necessitate that typical family holdings be not more than 5 to 8 hectares. In fact, in many countries, average holdings can be as low as 1 to 3 hectares. The number of people that this land must support both directly and indirectly often runs as high as 10 to 15 people per hectare. It is no wonder that efforts to improve the efficiency of agricultural production and increase the average yields of rice, wheat, maize, soybeans, and millet are now and will continue to be top-priority development objectives.

Dependence on primary exports- most economies of less developed countries are oriented toward the production of primary products. These primary commodities form their main exports. For example, for all non-Asian developing countries, these primary products account for over 70% of except in countries blessed with abundant supplies of petroleum and other valuable mineral resources and a few leading Asian exporters of manufactured goods, most LDC exports consist of basic foodstuffs, nonfood cash crops, and raw materials. In sub-Saharan Africa, primary products account for over 80% of total export earning.

Most poor countries need to obtain foreign exchange in addition to domestic savings in order to finance priority development projects. Although private foreign investment and foreign aid are a significant but rapidly declining source of foreign exchange, exports of

primary products typically account for 60% to 70% of the annual flow of foreign currency into the developing world.

Even though exports are so important to many developing nations, LDC export growth (excluding oil exports) has barely kept pace with that of developed countries. Consequently, even in their best years, most non-oil-exporting developing nations have been losing ground to the more developed countries in terms of their share of total world trade. In 1950, for example, the LDCs' share was nearly 33% it has fallen in almost every year since and currently stands at around 20%.

Countries with the poorest 20% of the world's population did even worse. By 1991, their share of world trade had fallen to 1.4%, while countries with the richest 20% had captured 85% of world trade. Most of the success in export promotion since 1970 has been captured by a few OPEC countries in the 1970s and the four Asian tigers; along with a few other NICs in the 1980s and 1990s the majority of LDCs have experienced a continuing decline in their share of world trade.

2.2.6. Imperfect Markets and Incomplete Information

Starting from the 1980s almost every developing country is moving toward the establishment of a market economy for many reasons. Many countries did so at the behest of the World Bank, which kept advocating "market-friendly" economic policies as preconditions for loans. There seemed to be a growing consensus that there had been too much government intervention in the workings of third world economies. This government intervention is sighted by many as the major cause of the problems in the poor nations. Hence, free market and unfettered competition are considered as the key economic growth.

But the presumed benefits of market economies and market-friendly policies depend heavily on the existence of institutional, cultural, and legal prerequisites that are taken for

granted in the industrial societies. In many LDCs, these legal and institutional foundations are either absent or extremely weak. They include:

- The existence of a legal system that enforces contracts and validates property rights.
- A stable and trustworthy currency,
- An infrastructure of roads and utilities that results in low transport and communication costs so as to facilitate interregional trade.
- A well-developed system of banking and insurance,
- Formal credit markets that select projects and allocate loan able funds on the basis of relative economic profitability and enforce rules of repayment, and
- Substantial market information for consumers and producers about prices, quantities and qualities of products and resources as well as the credit- worthiness of potential borrowers.

These six factors, along with the existence of economies of scale in major sectors of the economy, thin markets for many products due to limited demand and few sellers, widespread externalities (costs or benefits that accrue to companies or individuals not doing the producing or consuming) in production and consumption, and the prevalence of common property resources (e.g., grazing lands, waterholes) mean that markets are often highly imperfect.

2.2.7. Dominance, Dependence and Vulnerability in International Relations

For many less developed countries, a final significant factor contributing to the persistence of low levels of living, rising unemployment, and growing income inequality is the highly unequal distribution of economic and political power between rich and poor nations. These unequal strengths are manifested in economic and non economic aspects of the relationships. Economically, the dominant powers of rich nations control the pattern of international trade. They have also the ability to dictate the terms where by technology. foreign aid and private capital are transferred to developing countries.

Other equally important aspects of the international transfer process can serve to inhibit the development of poor nations. One subtle but no, nevertheless, significant factor has been the transfer of first world values, attitudes, institution, and standards of behavior to third world nations. Examples include the colonial transfer of often inappropriate educational structures, curricula, and school system, the formation of western-style trade unions, the organization of health services in accordance with the curative rather than preventive model, and the importation of inappropriate structures and procedures for public bureaucratic and administrative systems.

Of even greater potential significance may be the influence of rich-country social and economic standards on developing country salary scales, elite lifestyle, and general attitudes toward the private accumulation of wealth. Whether there are market-friendly policies or extensive government intervention, such attitudes can often lead to corruption and economic plunder by a privileged minority.

Finally, the penetration of rich-country's attitudes, values, and standard also contributes to a problem widely recognized and referred to as the international **brain drain**. Brain drain is the migration of professional and skilled personnel, who were often educated in the developing country at great expense, to the various developed nations. Examples include doctors, nurses, scientists, engineers, computer programmers, and economists.

The net effect of all these factors is to create a situation of vulnerability among third world nations in which forces largely outside their control can have decisive and dominating influences on their economic and social well being .

CHAPTER THREE

DETERMINANTS OF ECONOMIC DEVELOPMENT

Objectives

Today, countries of the world are divided into rich (developed) countries and poor (developing) countries. There is a wide gap between the rich and the poor countries. The statement that “the rich nations get richer and the poor countries get poorer” has become popular in the literature about world poverty. But what are the explanations for the poor performance of the developing countries? There are two approaches to explain the determinants of economic development; the traditional approach and the institutional approach. Thus at the end of this chapter you will be able to familiarize yourself with.

- Traditional approach to development and
- Institutional approach to development.

3.1 The Traditional Approach (Economic Factors) to Development

The traditional approach to development assumes that economic development is determined by economic factors, like natural resources, capital, technology, etc. Let’s see each of the major economic factors

A) Natural Resources

The principal factors affecting the development of an economy are the natural resources or land. “Land” as used in economics includes natural resources such as fertility of land, its situation and composition, forest wealth, minerals, climate, water resources, sea resources, geographical proximity with rich countries etc. For growth, the existence of natural resources in abundance is essential. A country which is deficient in natural resources will not be in a position to develop rapidly. As pointed out by Lewis, “Other

things being equal, men can make better use of rich resources than they can of poor.” In LDCs natural resources are unutilized, underutilized or mis-utilized. This is one of the reasons for their backwardness. The presence of natural resources is not sufficient for economic growth. What is required is their proper exploitation.

It is often said that economic growth is possible even when an economy is deficient in natural resources. As pointed out by Lewis, “A country which is considered to be poor in resources today may be considered very rich in resources at some later time, not merely because unknown resources are discovered, but equally because new uses are discovered for the known resources.” Japan is one such country which is deficient in natural resources but it is one of the advanced countries of the world because it has been able to discover new uses for limited resources.

B) Capital Accumulation

Capital means the stock of physical reproducible factors of production. When capital stock increases with the passage of time, it is called capital accumulation or capital formation. Capital formation is investment in capital goods that leads to increase in capital stock, national output and income. Capital formation is the key to economic development. On the one hand, it reflects effective demand and on the other hand, it creates productive efficiency for production. Capital formation possesses special importance to LDCs. The process of capital formation leads to the increase in national output in a number of ways. Capital formation is essential to meet the requirements of an increasing population in such economies. Investment in capital goods not only raises production but also employment opportunities. It is capital formation that leads to technological progress. Technological progress in turn leads to specialization and the economies of large scale production. The provision of social and economic overheads, like transport, power education, etc. in a country is possible through capital formation. It is also capital formation that leads to the exploitation of natural resources, industrialization and expansion of markets which are essential for economic progress.

C) Organization

Organization is an important part of the growth process. It relates to the optimum use of factor of production and economic activities. Organization is complement to capital and labor and helps in increasing their product activities. In modern economic growth, the entrepreneur has been performing the task of an organizer and undertaking risks and uncertainties.

The underdeveloped countries lack entrepreneurial activity. Such factors as the small size of the market, capital deficiency, absence of private property and contract, lack of skilled and trained labor, non-availability of adequate raw materials, and infrastructural facilities like transport, power, etc increase risk and uncertainties. That is why such countries lack entrepreneurs.

D) Technological Progress

Technological changes are regarded as the most important factor in the process of economic growth. They are related to changes in the methods of production which are the result of some new techniques of research or innovation. Changes in Technology lead to increase in productivity of labor, capital and other factors of production.

E) Division of Labor and Scale of production

Specialization and division of labor lead to increase in productivity. They lead to economies of large scale production which further help in industrial development. Adam Smith gave much importance to the division of labor in economic development. Division of labor leads to improvement in the productive capacities of labor. Every laborer becomes more efficient than before. S/he saves time. S/he is capable of inventing new machines and process in production. Ultimately production increases manifold. But division of labor depends upon the size of the market. The size of the market, in turn, depends upon economic progress, i.e. the extent to which the size of demand, the general

level of production, the means of transport etc are developed. When the scale of production is large, there is greater specialization and division of labor. As a result, production increases and the rate of economic progress is accelerated. Underdeveloped countries are unable to take advantage of the economics of division of labor and large scale production due to the presence of market imperfections, which in turn keep the size of the market small.

3.2 Institutional Approach to Development

The institutional approach to development is a recent phenomenon. It argues that explanations of the poor economic development are found not only in economic factors but also in non-economic factors. In fact most of these factors are explained by non-economic factors or institutional factors. The institutional approach to development emphasizes more on the institutional factors than the economic factors. They explain this using the case of a metropolitan city. The central city in a metropolitan area, while gaining some high-rise buildings, has a stagnant population and an increasing proportion of poor people. On the other hand, suburbs are prosperous and growing rapidly.

To a certain degree, modern economics is like such a metropolitan area. The traditional economics is at the center of the city. At the same time, the suburbs of economics are expanding rapidly in all directions. The institution approach to development is a case in point. For example, consider shifting the focus from capital and other resources toward the quality of governance. In the suburbs of economics governance is a focus, but not in the city center where capital is the focus.

The institutional factor further argues that most of the economic factors can be obtained in the globalize, market. For example, many Multinational National Corporations (MNCs) are ready to invest a significant amount of capital if conditions are favorable. Besides, LDCs can also borrow technologies from DCs. The institutional factors that determine economic performance include;

A) Type of Government

A country with a monarchy system is less likely to develop as compared with a country with a democratic government. The nature of democracy depends on the level of education, discipline, culture, etc. of the people. In maintaining rules, governments could be soft or strong. To maintain rules and thereby prepare the ground for development, governments need to be strong. To provide for the enforcement of contracts, the prevention of anarchy, and the provision of other public goods, the coercive power of government is necessary.

Good governance is another important factor which determines economic performance of countries. According to Olson M, "Governance is a decisive determinant of economic performance and that with the right economic policy and institutions, poor countries can grow at a very rapid rate." Good governance is reflected by long-term vision, correct policies and effective implementation. For example, in Japan the government decided what type of industries to develop after World War II. It gave emphasis to textile, iron and steel, shipbuilding etc. In recent years, the government shifted towards electronics in response to a change in world market.

Another aspect of good governance is the development of infrastructure. Countries like Hong Kong, Singapore, Malaysia, etc. develop infrastructure and attract foreign capital.

B) Institutions

Availability of technology like the capital good, complementary factors like infrastructure, highly skilled labor, innovation, etc. are required for an economy to grow. To have such technological changes requires a good institution. For example, in making innovations, there could be resistance. To calm such resistance, government effort is required. Thus, institutions that encourage technological innovation and suitability of institution for successful adoption of new ideas is an important question. Political and cultural dynamism help in adoption of new technology and the negative forces such as labour union orthodoxy should be managed properly by good governance. Spread of education and scientific culture are necessary for adoption of new technology

Reservation/Affirmative Action/. Social justice requires that if some sections of the society are deprived, they must be given special attention i.e. reservation is needed. The supporters of reservation justify its use in terms of social justice, equity and to rectify historical mistakes. However, from the point of view of efficiency, it is not justified.

C) *Social Structure of Population*

In some countries, we get a homogenous type of population. Homogeneity of the population leads to the development of national feelings, which is helpful for economic development – for example China, Japan, Korea, and Russia. On the other hand, population of a country could also be heterogeneous _ divided on the basis of language, religion, ethnicity, caste, etc. In such societies, some groups play entrepreneurial role.

D) *Human Capital and Cultural Traits.*

The difference in per capita income among countries could be explained by human capital and cultural traits. In the DCs, human capital and cultural traits in the form of work culture, discipline, good entrepreneurship etc have played an important role. Poor countries are poor because they lack these traits. The cultural traits that perpetuate poverty are the result of centuries of social accumulation and they can't be changed quickly.

Cultural advancement according to M. Olson results in two types of human capital:

- a) Marketable Italic capital; These include more skill, propensity to work harder, more entrepreneurial personality; These qualities result in increase in the quality and quantity of productive outputs. These results in increase in income of persons, groups as well as of nations.
- b) Civic culture. A civic culture leads to the election of good government which adopts good policy. It also results in a disciplined society. Corruption will be less. People pay tax.

PART TWO
LAW AND DEVELOPMENT

CHAPTER FOUR - Human Rights and Development

Objectives

Apart from it being fundamental human rights, development is itself a process in which all human rights are realized. This fact is released not only by human rights agencies, but also by traditional, bilateral and multilateral development agencies. Several bilateral aid agencies now see respect for human rights as an integral part of the development process. Besides the broader conception of the nature of development, several of the issues that are central to development are also issues of human rights. Such issues range from the broad macro-economic policy and regulatory framework to the micro project implementation. The rule of law, which depends among others on impartial and independent courts, seen by proponents of economic growth as a precondition for investment and a free market economy, is also a central human rights concern. Gender relations which are the subjects of development endeavors are also the subjects of women's and therefore human rights. Participation, another key concept in development conceptions and practice, is not only a human right in itself but is also determined by people's ability to make, express, decide on and enforce their choices. At the end of this chapter students will able to:

- understand the concept of development as a human right issue;
- understand the meaning and application of right- based approach to development;
and
- elaborate the gender dimension of development

4.1 Development as a Human Right

4.1.1. Background.

The right to development can be rooted in the provision of the Charter of the United Nation, The Universal Declaration on human Rights and the two International Human Right Covenants. One of the objectives of the charter is to “promote social progress and better standards of life in larger freedom” and “to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction at to race, sex, language or religion.” Through the Charter , member states undertook to promote higher standards of living , full employment and conditions of economic and social progress and development and universal respect for, and observance of , human right and fundamental freedoms for all without distinction at to race, sex, language or religion.

The UDHR contains a number of elements that became central to the international community’s understanding of the right to development. It attaches importance, for example, to the promotion of social progress and better standards of life and recognizes the right to non-discrimination, the right to participate in public affairs and the right to an adequate standard of living. It also contains everyone’s entitlement to social and international order in which the rights and freedoms set forth in the Declaration can be fully realized. An important step towards the recognition of the right to development was General Assembly resolution 1161(XII). In this resolution the General Assembly expressed the view “that a balanced and integrated economic and social development would contribute towards the promotion and maintains of peace and security, social progress and better standards of living, and the observance of and respect for human rights and fundamental freedoms”.

This theme was taken up at the International Conference on Human Rights held in Tehran from 22 April to 13 May, 1968. The Conference expressed its belief “that the enjoyment

of economic and social rights in inherently linked with any meaningful and profound interconnection between the realization of human rights and economic development”. It recognized “the collective responsibility of the international community to ensure the attainment of minimum standard of living necessary for the enjoyment of human right and fundamental freedoms but all persons throughout the world”. In 1969 the General Assembly, in its resolution 2542(XXIV), adopted the declaration on Social progress and development, which states that “Social progress and Development shall aim at the continuous raising of the material and spiritual standards of living of all members of society with respect for and in compliance with human rights and fundamental freedoms.”

In its resolution 4(XXXIII) of 21 February, 1977, the Commission on Human rights decided to pay special attention to consideration of the obstacle impeding the full realization of economic, social and cultural rights, particularly in developing countries, and of national and international action to secure the enjoyment of those rights. Recognizing the right to development as a human right, the Commission recommended to the Economic and Social council that it invites the Secretary – General to undertake a study on “the international dimensions of the right to development as human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the new International Economic Order and fundamental human needs”.

The Declaration on the Right to Development, which stated unequivocally that the right to development is a human right, was adopted by the United Nations in 1986 by an overwhelming majority, with the United States casting the single dissenting vote. This Declaration came almost thirty-eight years after the adoption of the Universal Declaration of Human Rights, according to which human rights constituted both civil and political rights (Articles 1 to 21) and economic, social, and cultural rights (Articles 22 to 28). In fact, the Universal Declaration reflected the immediate post-war consensus about human rights based on what President Roosevelt described as four freedoms—including the

freedom from want—which he wanted to be incorporated in an International Bill of Rights.

There was no ambiguity at that time about political and economic rights being interrelated and interdependent components of human rights, and no disagreement that “true individual freedom cannot exist without economic security and independence.” And the credit should rightfully go to Mrs. Eleanor Roosevelt, who was the head of the U.S. delegation during the drafting of the Universal Declaration, for having first identified and advocated for the right to development when she stated, “[W]e are writing a bill of rights for the world, and . . . one of the most important rights is the opportunity for development.” The consensus over the unity of civil and political rights and economic, social, and cultural rights was broken in the Fifties, with the spread of the Cold War. Two separate covenants, one covering civil and political rights and another covering economic, social, and cultural rights, were promulgated to give them the status of international treaties in the late Sixties, and both came into force in the late Seventies. It took many years of international deliberations and negotiation for the world community to get back to the original conception of integrated and indivisible human rights. The Declaration on the Right to Development was the result. However, the single dissenting vote by the United States set back the process by several years, during which the international community could have tried to translate such a right to development into a reality. Issues were raised about the foundational basis of this right, its legitimacy, justiciability, and coherence.

The world was still divided between those who denied that economic, social, and cultural rights could be regarded as human rights, and those who considered that economic, social, and cultural rights as not only fully justifiable human rights but as essential human rights. Claims and counterclaims continued to be made by both the groups in different forums. Finally, a new consensus emerged in Vienna at the Second UN World Conference on Human Rights in 1993. The Declaration adopted there reaffirmed “the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right .

4.1.2 The Content of the Right to Development

The declaration on the Right to Development under its Article 1 state that “ the right to development as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic , social, cultural and political development , in which all human rights and fundamental freedoms can be fully realized.” The rights include:

- ✓ Full Sovereignty over natural resources
- ✓ Self determination
- ✓ Popular participation in development
- ✓ Equality of opportunity
- ✓ The creation of favorable conditions for enjoyment of other civil, political, economic, social and cultural rights.

The human person is identified as the beneficiary of the right to development, as of all human rights. The right to development can be invoked both by individuals and by peoples. It imposes obligations both on individual states – to ensure equal and adequate access to essential resources- and on the international community- to promote fair development policies and effective international cooperation. The Vienna declaration and Programme of Action, The World Conference on Human rights, held in Vienna in 1993, dealt extensively with the right to development. It adopted the Vienna Declaration and Programme of Action which recognizes that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. The World Conference reaffirmed by consensus to the right to development as a universal and inalienable right and an integral part of fundamental human rights. It further stated that, “while development facilitated the enjoyment of all human rights, lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”

Subsequent articles in the Declaration clarify the nature of this process of development further and elaborate on the principles of exercising the right to development. For

example, Article 1 recognizes that not only “every human person” but “all peoples” are entitled to the right to development. Article 1, Clause 2 even explicitly refers to the right of peoples to self-determination. But that does not mean that “peoples’ rights” can be seen as countering to or in contradiction? From an individual’s or “every human person’s” right. Article 2, Clause 1 categorically states that it is “the human person” who is the central subject of development, in the sense of the “active participant and beneficiary of the right to development.” Even if “peoples” or collectives of “human persons” are entitled to some rights such as full sovereignty over the natural wealth and resources in terms of territory, it is the individual human person who must be the active participant in and beneficiary of this right.

The process of development, “in which all human rights and fundamental freedoms can be fully realized,” would lead to, according to Article 2, Clause 3, “the constant improvement of the well-being of the entire population and of all individuals, on the basis of *their active free and meaningful participation* in development and in *the fair distribution of benefits* resulting there from [emphasis added].” Article 8 elaborates this point further by stating that the measures for realizing the right to development shall ensure “equality of opportunity for all” in their access to basic resources, education, health services, food, housing, employment and in the *fair distribution of income*. The realization of the right would also require that *women have an active role* in the development process, and that “appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.”

To realize this process of development to which every human person is entitled by virtue of his right to development, there are responsibilities to be borne by all the concerned parties: “the human persons,” “the states operating nationally,” and “the states operating internationally.” According to Article 2, Clause 2, “all human beings (persons) have a responsibility for development individually and collectively,” and they must take appropriate actions, maintaining “full respect for the human rights and fundamental freedoms as well as their duties to the community.” Human persons thus are recognized to function both individually and as members of collectives or communities and to have

duties to communities that are necessary to be carried out in promoting the process of development. But “the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development” is of the State’s, as Article 3 categorically suggests. This responsibility is complementary to the individual’s responsibility as mentioned above, and is only for the creation of conditions for realizing the right and not for actually realizing the right itself. Only the individuals themselves can realize the right. The actions of the states needed for creating such conditions are to be undertaken at both the national and the international levels.

At the national level, Article 2, Clause 3 points out that, “states have the right and the duty to formulate appropriate national development policies,” and Article 8 says that states should undertake “all necessary measures for the realization of the right to development,” and again, “should encourage popular participation in all spheres.” In addition, the states are required by Article 6, Clause 3 to take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social, and cultural rights, because the implementation, promotion and protection of these rights would be essential for realizing the right to development as all human rights and fundamental freedoms are indivisible and interdependent” (Article 6, Clause 2.) The states are also expected to take resolution steps to “eliminate the massive and flagrant violation of human rights” resulting from apartheid, racial discrimination, colonialism, foreign domination and occupation, etc. (Article 5).

In regards to the obligation of the states operating at the international level, the Declaration emphasizes the crucial importance of international cooperation. First, the states have a duty “to cooperate with each other in ensuring development and diminishing obstacles to development . . . and fulfill these duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, [and] mutual interest . . .” (Article 3, Clause 3). This has been further reiterated in Article 6, which states that “all states should cooperate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms.” Indeed, Clauses 2 and 3 clarify conditions required to fulfill the realization of

fundamental freedoms and human rights as mentioned in Article 1. “All human rights and fundamental freedoms are indivisible and interdependent” and the “implementation, promotion, and protection of civil, political, economic, social, and cultural rights” deserve equal attention (Article 6, Clause 2). And failure to observe civil and political rights as well as economic, social, and cultural rights may result in “obstacles to development” that the states are responsible to eliminate (Article 6, Clause 3).

Finally, according to Article 4, the states have the duty, individually and collectively, to formulate international development policies to facilitate the realization of the right to development. It recognizes that sustained action is required to promote rapid development of developing countries and then declares:

“As a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.”

4.1.3 Controversies Regarding the Right to Development

Once the right to development is viewed in this manner—as a human right derived from an implicit social contract binding civil society that identifies duty-holders both nationally and internationally, (primarily the nation-states and the international community, individuals, and groups operating in civil society) with the obligation to deliver this right—it should be easy to appreciate the controversies surrounding this right. First, for many years and especially during the Cold War period, the Western democracies and the Second World socialist countries were not willing to treat civil and political rights and economic, social, and cultural rights at par, or on equal terms, not to speak of regarding them as components of an integrated whole of an international bill of rights. That is why we not only had two separate covenants on these two sets of rights, but also the Western block was upholding the civil and 11 Universal Declaration of Human Rights, 1948, Preamble. Political rights and the Socialist countries pressured for the economic and social rights.

On a formal plan, the controversy was to have been resolved with the adoption of the right to development. But the reasons for taking these contrary positions kept lingering and was further complicated by the Third World countries putting forward the case of the right to development in the name of the collective rights of a group of countries to bring about a New International Economic Order. If some of the industrialized countries would not support the economic and social rights, they would find it even more difficult to support the right to development. Discounting the purely political and Cold War reasons for the countries taking their respective positions, the reasons for Western countries supporting civil and political rights but opposing economic and social rights as human rights can be summed up as follows: (a) human rights are individual rights, (b) they have to be coherent, in the sense that each right holder must have some corresponding duty-holder whose obligation would be to deliver the right, and (c) human rights must be justifiable. All these criticisms, if they are valid, would hold against the right to development.

The identification of human rights completely in terms of individual rights would imply total acceptance of the theory of natural rights. As Donnelly puts it, in the Universal Declaration of Human Rights, “human rights are clearly and unambiguously conceptualized as being inherent to humans and not as the product of social cooperation. These rights are conceptualized as being universal and hold equally by all, that is as natural rights.” In that paradigm, human rights are only personal rights, based on negative freedom, such as the rights to life, liberty, and free speech, whereby the law prohibits others from killing, imprisoning, or silencing an individual who has a claim to such freedoms that the state is expected to protect.

Economic and social rights are associated with positive freedoms which the state has to secure and protect through positive action. They are not natural rights, therefore, according to this view, not human rights. Collective rights are more than individual rights and to the extent the right to development are essentially linked to collective rights as well as positive economic rights, it would be disqualified from being regarded as a human right. All these arguments have been substantially repudiated in the literature. The

Universal Declaration has many elements going beyond the principles of natural rights. In fact, it is firmly based on a pluralistic foundation of international law with many elements of economic and social rights, considering an individual's personality as essentially molded by the community.

Indeed, logically, there is no reason to take the rights of a group or a collective (people or nation, ethnic or linguistic groups) to be fundamentally different in nature from an individual's human rights so long as it is possible to define the obligation to fulfill them and duty-holders to secure them. Even personal rights can be taken as rights to be protected by individuals and groups. Furthermore, it is well established that the identification of civil and political rights with negative rights and economic, social and cultural rights with positive rights is too superficial because both would require negative (prevention) as well as positive (promotion or protective) actions. So logically, it is hard to regard only civil and political right as human rights and economic and social and collective rights as not human rights. As we have noted above, it is ultimately for the concerned people to decide what they would regard as human rights and which the states would have the obligation to deliver.

In terms of this approach, the assertion of a human right would require the identification of a set of duty-holders who are in a position to help to deliver the rights and that demands are placed on them that they should try to help. If these claims can be made legal, with appropriate legislation, covenant, or treaty, then such obligation may become binding. Otherwise, they remain a moral standard which may not have a legal sanction, but which in many situations may be as forceful in persuading all the duty holders to deliver those rights.

In this perspective, any economic or social right for an individual or a collective can qualify as a human right provided the moral standard or the ethical assertion of the right is accepted by all people in a particular civil society, and provided it is possible to identify at least a group of possible duty holders, if not one specific duty holder, who are in a position to deliver that right and who are willing to accept their obligations to help.

From that point of view, the economic, social, and cultural rights according to the international covenant, and the right to development according to the Declaration of 1986, are all human rights. They have been adopted by the international community of states through a legitimate process of consensus building at the United Nations, and they have enumerated the rights and all the duty holders, primary among them being nation-states complemented by the international community of other states and multi-lateral agencies. What would be needed is an agreement about the procedures to be followed and the programs to be implemented by all the duty holders.

In addition, what may be needed is to formulate a legislative basis for the obligations morally accepted to become legally obligatory. It will be seen from these discussions that the third criticism that the human rights must be justiciable does not have a decisive force. The skeptics who doubt the appeal and effectiveness of ethical standards of rights-based arguments would not consider a right to be taken seriously unless the entitlements of those rights are sanctioned by a legal authority, such as the state, based on appropriate legislation. As Sen puts it, these skeptics would say, “Human beings in nature no more are born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring.” This criticism confuses human rights with legal rights. Human rights are based on moral standards on a view of human dignity, and which have many different ways of fulfillment depending on the acceptability of the ethical base of the claims. This does not, of course, obfuscate the importance or usefulness of such human rights translated into legislated legal rights. In fact, every attempt should be made to formulate and adopt appropriate legislative instruments to ensure the realization of the claims of a human right once it is accepted through consensus. These rights would then be backed by justiciable claims in courts and by authorities of enforcement.

But to say that human rights cannot be invoked if they cannot be legally enforced would be most inappropriate. For many of the economic and social rights and the right to development, and even for some elements of civil and political rights, the positive actions that are necessary may often make it very difficult to identify precisely the obligations of

particular duty holders to make them legally liable to be prosecuted. Enacting appropriate legislative instruments for any of these rights would often be a stupendous task, and it would be often useful and necessary to find alternative methods of enforcement of the obligations rather than through the courts of law.

Collective Rights vs. Individual Rights

There is a different type of criticism which has been most persistently leveled against the right to development, in particular, in addition to the criticisms mentioned above that are applicable to all rights other than the civil and political rights. The right to development was promoted both by the Third World protagonists and First World critics as a collective right of states and of peoples for development. We have already dealt with the problem of the admissibility of collective rights as human rights, as against individual rights, and have argued that it is perfectly logical to press for collective rights to be recognized as human rights. But then care must be taken to define the collective rights properly and not in opposition to individual rights per se. Indeed there are legal institutional agreements and covenants that have recognized and built upon collective rights, and the Declaration on the Right to Development itself has recognized the collective right of peoples in its Article 1 when it states that every human person and all peoples are entitled to the human right to development and also the right to self-determination, exercising “their inalienable right to full sovereignty over all their natural wealth and resources.” But now these collective rights are seen as opposed to, or even superior to, the right of the individual. The Declaration on the Right to Development states categorically (Article 2) that “the human person is the central subject of development and should be the active participant and beneficiary of the right to development.”

In the case of collective right, such as that to self-determination, the right-holder may be a collective such as a nation, but the beneficiary of the exercise of the right has to be the individual. There may of course be some occasion when the right of a particular individual may come into conflict with the right of a collective. An obvious example would be the closed-shop practices of a trade union conflicting with the right to work of a

particular unemployed person. But the beneficiaries of a trade union practice must be all individual workers, and not just the trade union, as an organization, its management and its treasury. It is also quite possible that different rights or different individuals enjoying a right may come into conflict in some specific situations. It would be necessary to institute some transparent procedures to resolve these conflicts. But such procedural restrictions in dealing with the exercise of a rights does not detract from the nature and importance of the collective right seen as built on individual rights. It is important to note this point on the integral relationship between the collective and the individual in understanding the human rights approach to development.

The Commission on Human Rights, in a resolution (No. 5 XXXV) as early as in 1975—well before the Declaration on the Right to Development, was adopted—stated that “development is as much a prerogative of nations as of individuals within nations.” Indeed, in many cases individual rights can be satisfied only in a collective context, and the right of a state or a nation to develop is a necessary condition for the fulfillment of the rights and the realization of the development of individuals. Indeed, most of the demands of the developing countries during the 1970s, when the content of the right to development was negotiated, can be put forward in these terms. The integrated program of commodities, the generalized preference scheme, industrialization, and technology transfers and all the essential components of the New International Economic Orders were the claims made on behalf of the developing countries which were all meant to be preconditions for development of all peoples in those countries.

Many of these proposals may not be relevant any more in the changed conditions of the world economy, and the developing countries themselves may not put them forward as parts of their development agenda. But during the Seventies and Eighties they were regarded as highly relevant, and this is reflected in the wording of the preamble of the Declaration of the Right to Development. However, they were never meant to disregard the primacy of individual rights which used the foundations of human rights theory and which developed over time with collective rights complementing the individual rights. Those who detract from the significance of the right to development by arguing that it is a

protection of a collective right of the state or the nation, in conflict with the individual rights foundations of the human rights tradition are more often than not politically motivated. The Third World proponents of the right to development also must take a serious note of the implication of the human rights approach to development as collective rights of a nation or a state.

The exercise of those rights must lead to the realization of the right of all individuals to development, which means a particular process of development where all human rights and fundamental freedoms can be fully realized. We have analyzed the text of the Declaration to establish that this would imply (a) effective participation of all individuals in the decision-making and the execution of the process of development, which would necessarily require transparency and accountability of all activities, (b) equality of access to resources, and (c) equity in the sharing of benefits. Now it must be clear that economic growth and development of a state or a nation does not automatically lead to this process of development. In fact, if very specific policies are not taken to realize such development, the economic growth of a state increases often tends to the concentration of income and wealth, making the rich richer, even if not always the poor poorer. The main motivation behind the developing countries' clamoring for the New International Economic Order was the demand for equity in dealing with the running of the international economic system, in all its trade, financial, and technological relationships. The specific methods of such running of the world economy may have changed over time, and the international economic order of today, defining the relationship between the different economies and the rules and procedures of their interactions, is quite different from the international economic order of the Sixties and Seventies. But the basic requirements for equity and justice in the process of development fulfilling the human right to development have not changed. So if a country wants to develop along the path of the right to development, it must ensure the fulfillment of all the human rights consistent with equity and justice.

4.1.4 Right – Based Approach to Development

Greater normative clarity and detail provided by the international instruments and the authoritative interpretations of treaty bodies and human rights mechanisms, which list and define the content of development, including the requirements of, for example, health, education, housing and governance. International standards in the form of treaties, declarations, guidelines and bodies of principles are public and readily accessible tools describing in remarkable detail the institutional and developmental requirements of the various guaranteed rights while some sectoral development matrices have focused exclusively on selected economic sectors. The more comprehensive human rights framework provides guidance on all areas of human development, including health, education, housing, personal security, justice administration and political participation. There is no shortage of examples of harm caused by development agreements, projects and activities that have taken inadequate account of human rights concerns.

Rights-based approaches include measures of protection organically incorporated in development plans, policies and projects from the outset. More effective and complete analysis; traditional poverty analyses, based their judgments on income and economic indicators alone. A human rights analysis reveals additional concerns of the poor themselves, including the phenomena of powerlessness and social exclusion. A more thorough analysis yields better responses and better results. A more authoritative basis for advocacy and for claims on resources, with international legal obligations and national commitments empowering development advocates in their quest to have, for example, basic social services given priority over military expenditure, or sounding the alarm when "progressive realization" of economic and social rights stalls, is reversed, or is compromised by conflicting trade or adjustment agreements.

There is no single, universally agreed rights-based approach although there may be an emerging consensus on the basic constituent elements. Today, OHCHR and its partners are working to define the operational implications of such approaches, and to explain their practical "added value" more clearly to development planners and professionals. A

host of United Nations programmes, non-governmental organizations, national institutions and bilateral agencies are now cooperating and contributing to the development of rights-based approaches.

What is a Rights-Based Approach to Development?

A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. Essentially, a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development. The norms and standards are those contained in the wealth of international treaties and declarations. The principles include equality and equity, accountability, empowerment and participation. A rights-based approach to development includes the following elements:

- Express linkage to rights
- Accountability
- Empowerment
- Participation
- Non-discrimination and attention to vulnerable groups

EXPRESS LINKAGE TO RIGHTS- The definition of the objectives of development in terms of particular rights - as legally enforceable entitlements - is an essential ingredient of human rights approaches, as is the creation of express normative links to international, regional and national human rights instruments. Rights-based approaches are comprehensive in their consideration of the full range of indivisible, interdependent and interrelated rights: civil, cultural, economic, political and social. This calls for a development framework with sectors that mirror internationally guaranteed rights, thus covering, for example, health, education, housing, justice administration, personal security and political participation. By definition, these approaches are incompatible with development policies, projects or activities that have the effect of violating rights, and they permit no "trade-offs" between development and rights.

ACCOUNTABILITY - Rights-based approaches focus on raising levels of accountability in the development process by identifying claim-holders (and their entitlements) and corresponding duty-holders (and their obligations). In this regard, they look both at the positive obligations of duty-holders (to protect, promote and provide) and at their negative obligations (to abstain from violations). They take into account the duties of the full range of relevant actors, including individuals, States, local organizations and authorities, private companies, aid donors and international institutions. Such approaches also provide for the development of adequate laws, policies, institutions, administrative procedures and practices, and mechanisms of redress and accountability that can deliver on entitlements, respond to denial and violations, and ensure accountability. They call for the translation of universal standards into locally determined benchmarks for measuring progress and enhancing accountability. For all human rights, States must have both the political will and the means to ensure their realization, and they must put in place the necessary legislative, administrative, and institutional mechanisms required to achieve that aim.

Under the ICESCR, States are required to take immediate steps for the progressive realization of the rights concerned, so that failure to take the necessary steps, or any retrogression, will flag a breach of the State's duties. Like wise under the ICCPR, States are bound to respect the rights concerned, to ensure respect for them and to take the necessary steps to put them into effect. Some rights claimed in some jurisdictions may not be justifiable before a court, but all rights must be enforceable. While primary responsibility under the human rights system lies with individual States, the international community is also duty bound to provide effective international cooperation, inter alia in response to shortages of resources and capacities in developing countries.

EMPOWERMENT- Rights-based approaches also give preference to strategies for empowerment over charitable responses. They focus on beneficiaries as the owners of rights and the directors of development, and emphasize the human person as the centre of the development process (directly, through their advocates and through organizations of

civil society). The goal is to give people the power, capacities, capabilities and access needed to change their own lives, improve their own communities and influence their own destinies.

PARTICIPATION- Rights-based approaches require a high degree of participation, including from communities, civil society, minorities, indigenous people, women and others. According to the UN Declaration on the Right to Development, such participation must be "active, free and meaningful" so that mere formal or "ceremonial" contacts with beneficiaries are not sufficient. Rights-based approaches give due attention to issues of accessibility, including access to development processes, institutions, information and redress or complaints mechanisms. This also means situating development project mechanisms in proximity to partners and beneficiaries. Such approaches necessarily opt for process-based development methodologies and techniques, rather than externally conceived "quick fixes" and imported technical models.

NON-DISCRIMINATION AND ATTENTION TO VULNERABLE GROUPS- The human rights imperative of such approaches means that particular attention is given to discrimination, equality, equity and vulnerable groups. These groups include women, minorities, indigenous people and prisoners, but there is no universal checklist for who is most vulnerable in every given context. Rather, rights-based approaches require that such questions be answered locally: who is vulnerable here and now? Development data need to be disaggregated, as far as possible, by race, religion, ethnicity, language, sex and other categories of human rights concern. An important aspect of rights-based approaches is the incorporation of express safeguards in development instruments to protect against threats to the rights and well-being of prisoners, minorities, migrants and other often domestically marginalized groups. Furthermore, all development decisions, policies and initiatives, while seeking to empower local participants, are also expressly required to guard against simply reinforcing existing power imbalances between, for example, women and men, landowners and peasants, and workers and employers.

Are Rights-Based Approaches New?

While it has recently received unprecedented attention, the idea of rights-based approaches is not a new concept. Many of its elements have been tried and tested for years. There is a growing catalogue of successful case studies registered by many countries and many programmes. The assistance programme administered by OHCHR has been based on international human rights standards since 1955. The ILO has operated within a rights framework that predates the United Nations itself. UNICEF has been developing such approaches for several years. UNDP has long pioneered people-centered approaches. Development NGOs like Oxfam, Care and others have also embraced rights-based approaches. Each has made an important contribution to the evolution of the concept and related practices.

The Committee on Economic, Social and Cultural Rights in its General Comment on international technical assistance warned that proposals for the integration of human rights into development activities can too easily remain at a level of generality. The Committee has long recognized that development cooperation activities do not automatically contribute to the promotion of respect for human rights simply by addressing thematic human rights concerns such as health, education or governance. It has cited as evidence the many activities undertaken in the name of "development" that have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. Offering practical advice on how integration can be better achieved, the Committee has recommended that United Nations development strategies should expressly recognize the "intimate relationship" between development activities and efforts to promote respect for human rights; that development cooperation activities should be subject to human rights impact assessment; that development personnel should receive human rights training; and that human rights obligations should be taken into account at every stage of development projects (i.e. needs assessment, project identification, project implementation, project monitoring and project evaluation).

In its deliberations, the Committee has noted that international development agencies must scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, which promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or which involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Conversely, such agencies should act as advocates of projects and approaches that contribute not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights.

4.2 Gender Dimension of Development

Right – based approaches to development emphasize non- discrimination, attention to vulnerability and empowerment. Women and girls are among the first victims of discrimination. They are the most vulnerable and the least empowered in many societies. To protect women’s rights, the international community has created specific standards. In 1979, the United Nation General Assembly adopted the Convention on the elimination of all forms of discrimination against women. The convention, which entered into force on 3 September, 1981, establishes women’s right to non-discrimination on the basis of sex and affirms equality in international law. It is monitored by the Committee on the Elimination of Discrimination against Women. Recent world conference, including Vienna (1993), Cairo (1994) and Beijing (1995), have confirmed the strong link between the gendered nature of violations of human rights and the advancement of women’s right. The 1993 Vienna declaration and programme of action affirmed the human rights of women as an inalienable, integral and invincible part of the human rights and demanded that the equal status and human rights of women be integrated into the mainstream of the United Nation System – wide activity.

Gender mainstreaming has been defined by the United Nations as the process of assessing the implications for women and men of any planned action, including legislation, policies and programmes, in any area and at all levels (ECOSOC Agreed

Conclusions 1997/2). In 1998, the Economic and Social Council (ECOSOC) adopted resolution 1998/11 on mainstreaming a gender perspective into the policies and programmes of the United Nations system, and decided to pay particular attention to what has been called the "feminization" of poverty, its causes and remedies. The Organization has now committed itself to integrating a gender perspective into all areas of United Nations work, including development. In resolution 2000/5, the Commission on Human Rights affirmed the need to apply a gender perspective in the implementation of the right to development, inter alia by ensuring that women play an active role in the development process. It emphasized that the empowerment of women and their full participation on the basis of equality in all spheres of society is fundamental for society. At its fifty-fifth session, the Commission requested all human rights treaty bodies, special procedures and the Sub-Commission on the Promotion and Protection of Human Rights to adopt a systematic gender perspective when implementing their mandates (E/CN.4/RES/1999/41). In accordance with this resolution, OHCHR is endeavoring to mainstream gender issues both within and outside the Office. Gender concerns will be reflected in the conceptualization, implementation and evaluation of human rights policies, strategic planning, and the setting of priorities and objectives.

Feminist approaches to development are generally concerned with ensuring that whatever else it does, development serves to satisfy women's needs and to further their interests and aspirations. The feminist perspective has become increasingly influential over the past three decades. There is clearly some overlap between feminist perspectives on development and other perspectives. For example, initial attempts to integrate women's interests into development theory focused upon the need to alleviate women's poverty by ensuring that they receive the benefits of foreign aid and public services such as healthcare and food subsidies. This approach is consistent with welfarist approaches to development. However, it has been criticized for its failure to challenge the inequities implicit in the social and economic structures that define the lives of many women in LDCs.

Other feminist approaches to development have focused on integrating women into the economic system and combating sex-based discrimination in the productive sphere. From this perspective, the primary policy objective is to ensure that women in developing societies attain the same benefits as women in modern societies and in particular, formally equal access to credit and labor markets. This approach can be characterized as an extension of modernization theory. Taking a slightly different tack, some feminists have observed that women in LDCs are more productive than men in many activities and have used this to observation to justify the implementation of policies designed to increase women's access to economic opportunities. Of course those types of policies can also be readily justified from an economic perspective.

Recent feminist scholarship on development issues has adopted an approach known as GAD, this approach resembles the welfarist perspective outlined above. This is because GAD focuses upon improving women's well-being which is broadly conceived to include more than just measures of wealth and income. Significantly, however, women's well-being is equated with freedom from oppression and self-empowerment. Moreover, unlike other feminist approaches to development, the GAD approach is concerned with reducing discrimination against and oppression of women in the private sphere, *i.e.* the household, as well as the public sphere, *i.e.* the world of paid employment. Thus for example, feminist scholars who adopt the GAD approach pay great attention to the fact that increasing women's access to income-generating activities will not necessarily enhance women's welfare if they continue to perform significant amounts of unpaid household labor and must cede control over any income they generate to the men within their households.

Like other perspectives on development, the feminist perspective has many policy implications that have little to do with the design of legal institutions. For example, from a feminist perspective, reducing spending on social services such as childcare and healthcare is frequently undesirable since it shifts the responsibility for providing those services in to women and so merely adds to their burden. By contrast, such spending cuts

may be defensible from an economic perspective for countries with major deficit or inflation problems.

The feminist perspective also has a number of implications for the design of legal institutions. However, the question of whether pursuing legal reforms is an appropriate strategy for attaining gains for women has been a subject of debate among feminists. Some feminists argue that legal systems designed and dominated by men and male values and maintained by educated elites cannot possibly be responsive to women's needs, especially the needs of poor uneducated women. However, the dominant view among feminists seems to be that unless the current inequities in legal systems are addressed, "we abandon the reform task to those for whom the issue of gender equity is not a priority, casting our legal fate in their hands."

As far as law-making institutions are concerned, the overarching goal of empowering women demands that they ultimately be included in all sorts of law-making processes. On the other hand, feminists generally seem to take the view that beneficial reforms can be effected by any type of law-making institution. Consequently, feminists have opportunistically sought to ensure that feminist perspectives are taken into account in the formulation of both international and domestic law and in law-making conducted in legislative, adjudicative, and administrative fora.

Feminist scholars are also concerned with reforming both substantive legal rules and the manner in which they are enforced to ensure that law does not serve to exclude some or all women. Different scholars have focused on different ways in which legal institutions exclude women. However, in LDCs, the literature seems to focus on the following substantive areas of law: family law, property law, employment law, criminal law, and human rights law.

The focus on family law is derived from the concern with improving the quality of women's private as well as their public lives by, for example, increasing their rights to economic support from their spouses in the event of marital breakdown. As far as

property law is concerned, feminists are primarily concerned with reversing the effects of both formal and informal legal rules that limit women's rights to own and inherit land. Labor and employment law demands attention to the extent that laws governing discrimination, sexual harassment, the provision of child-care facilities, parental leave, and part-time work affect women's abilities to combine child-rearing with participation in the workforce.

The criminal justice system requires attention to the extent that it can contribute to reducing various forms of violence against women including domestic violence, rape, genital mutilation and trafficking in women. Finally, entrenching rights to gender equality in human rights laws can serve to provide a legal basis for challenging all sorts of public policies that unjustly reduce women's quality of life.

4.3 Implementing the Right to Development

The recognition of the right to development as an inalienable human right confers on it a claim to national and international resources and obliges states and other agencies of society, including individuals, to contribute to its implementation. According to the Declaration on the Right to Development, the primary responsibility of implementing the right to development belongs to states. The beneficiaries are individuals. The international community has the duty to cooperate to enable states to fulfill their obligations under Articles 1, 55, and 56 of the UN Charter. Accordingly, the Vienna Declaration calls for effective implementation of the right. The Vienna Declaration and Programme of Action, in fact, states categorically, "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments." Further, "enhancement of international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations." to development through policies at the national level with equitable economic relations and a favorable environment at the international level. The identification of the corresponding obligations at the national level would, therefore, be the first step in implementing the right to development.

National obligations should begin with the formulation of a set of policies applicable to the implementation of each of the constituent rights of the right to development individually, as well as in combination with each other as part of a development program. They should be categorized as measures that prevent violation of any right and measures that promote the improved realization of all rights. According to our definition of the right to development, violation of any one right would mean violation of the right to development itself. The design of any program for the promotion of a right, therefore, must ensure that any other right will not be adversely affected.

To operationalize these rights, and to know when they are or are not realized, these rights, must be represented by some indicators whose value would increase, as the rights are increasingly realized. In the case of economic, social and cultural rights, which are supposed to be progressively realized, the value of the indicators should be able to increase monotonically with the progressive realization of the rights. That will be the case if these indicators are indices represented by real numbers. For simplifying the operational procedures to implement a right, attempts should be made to combine the different characteristics of a right by suitably weighting them into a single index.

Indeed, most of these rights will have a number of characteristics or dimensions. For example, the economic rights will have to combine the availability of the corresponding economic goods with the access to those goods in a manner that is consistent with the human rights standards. Those standards have been defined in terms of at least five characteristics as discussed earlier, so that the access should be at least equitable, non-discriminatory, participatory, accountable, and transparent. All these have to be ascertained and reflected in an indicator that combines it with the indicator for the availability of goods and is represented by an index for the realization of the right. For instance, the index of the right to food should reflect both whether sufficient food is available and whether everybody or the target population of the poor or the vulnerable will have access to that good in, say, let us an equitable or non-discriminatory manner. All these exercises, of course, in actual practice, may not be very precise, giving only

approximate answers. But they must be sensitive to the relevant issues and aware of the purpose of the exercise for assessing the comprehensive outcomes of not just what is achieved but also how it is achieved.

It may not be easy to build up an overall indicator for the right to development. This is because to convert a vector comprising a number of distinct elements into a scalar or an index would require a process of averaging or weighting the various elements that would be open to fundamental objections. However, expressing the right to development as a vector of all the rights would make it possible to establish whether there has been an improvement in the realization of the right to development; it would not, of course, allow comparisons to be made between the achievements of two or more countries, or even within the same country over time. The only way to do this is to build a consensus through open public discussions about the relative importance of the different levels of achievement.

This, however, would not prevent the formulation of a program for development that takes into account the inter-linkages between the objectives of realizing the various rights including, as mentioned above, the right to the need to expand resources, GNP, technology, and institutions. What differentiates the program for realizing the right to development from other conventional programs of development is not only the differences in the objectives to be realized but also the manner in which they are to be realized. This type of development imposes additional constraints on the development process, such as maintaining transparency, accountability, equity, and non-discrimination in all the programs. In addition, the program must ensure overall development with equity, or transformation of the structure of production, which reduces inter-regional and interpersonal disparities and inequities.

Like all other development programs, such a program would be subject to constraints in resources, technology, and institutions. The importance of the constraints is not as apparent if one is seeking to achieve individual rights in isolation. But as part of a country's overall development program, the right to development is very much a matter

of modernization and technological as well as institutional transformation, which relaxes the technological and institutional constraints over time.

Therefore, the right to development is also related to increasing resources over time by making the most efficient use of the existing resources through proper fiscal, monetary, trade, and competitive market practices and by promoting the growth of resources and expanding the opportunities for trade. Achieving the right to development requires the same fiscal and monetary discipline, macro-economic balance, and competitive markets as any other form of prudent economic management. The basic difference is that prudent management in furtherance of achieving the right to development is expected to bring about a more equitable outcome of the economic activities that make an improved realization of all the components of that right possible.

CHAPTER FIVE

DEVELOPMENT AND DEMOCRACY

5.1 Defining the Concept of Democracy

“Democracy means the organization of society for the benefit and at the expense of everybody indiscriminately and not for the benefit of a privileged class.”

George Bernard Shaw.

The concept of "democracy" is contestable. It is understood by many people to mean a form of government in which a significant portion of the governed society has a franchise to elect members of the governing body. Other observers would argue that a "true" democracy is a system of government that embraces a universal adult franchise. While we may not agree on one uniform definition, there are certain universal attributes of a democratic society namely:

- Equality of all citizens before the law without regard for race, ethnicity, religion, region, gender, or any other social or biological differences;
- The supremacy of the rule of law;
- Full participation of people in how they are governed;
- The principle of separation of powers between the executive, legislature and judiciary;
- Freedom of expression, association, conscience and affiliated family of rights;
- Periodic elections as a means of choosing alternative ideas for public policy.

Any society that claims to be democratic must have all of these elements. Those that aspire to build a democratic society must have most of these elementary things in place or

must be taking genuine steps towards their achievement. The popular understanding of the term "democracy" is that there are three basic forms: direct, representative and constitutional. . A brief outline of the historical development of each will provide a solid foundation of knowledge on which the concept of constitutional democracy can be further explored.

5.1.1. Direct democracy

This is a form of government in which the right to participate in making political decisions is exercised directly by all citizens, acting under procedures of majority rule. In large states, direct or participative democracy is not possible.

Debate continues as to the origins of democracy. However, the city-states of ancient Greece stand out as one of the earliest examples of codified and institutionalized democratic principles. The motivating force for the development of democratic political institutions in the Greek states was their desire to discover the best system of government that would maintain the liberty of the citizen. Their solution was a system in which the whole citizen body formed the legislature. All citizens had a voice and a presence in the formulation of the rules that governed their society. All citizens were eligible to hold executive and judicial offices, some were elected, while others were assigned by lot. In this early form of democracy, all officials were directly responsible to the popular assembly, which was qualified to act in executive, judicial and legislative matters.

It should be noted that Greek democracy, which may be epitomised as the expression of the interests of all citizens, rested on a society radically different from that which exists today. In the first place, the city-states were small enough to allow for direct participation in judicial and legislative affairs. Secondly, only male native-born Athenians were citizens and so were participants in this process. Slaves, women and foreigners, who together made up the majority of the population of any Greek city-state, were excluded. Thirdly, in ancient Greece, the notion that a citizen was in some way unique did not operate. Each citizen was part of a collective and public whole. Public life was significant

and private life was not taken into account. Finally, the concept of citizenship carried with it military responsibility, either as a warrior or as a contributor of funds. This early version of democracy, now known and frequently referred as "classical democracy", was both flawed and vulnerable to manipulation.

5.1.2. Representative democracy

This involves the selection of government officials by the people being represented. The most common mechanisms involve election of the candidate with a majority or a plurality of the votes.

Representatives may be elected or become diplomatic representatives by a particular district (or constituency), or represent the entire electorate proportionally proportional systems, with some using a combination of the two. Some representative democracies also incorporate elements of direct democracy, such as referendums. A characteristic of representative democracy is that while the representatives are elected by the people to act in their interest, they retain the freedom to exercise their own judgment as how best to do so.

A. Parliamentary democracy

Parliamentary democracy is a democracy where government is appointed by parliamentary representatives as opposed to a 'presidential rule' by decree dictatorship. Under a parliamentary democracy, government is exercised by delegation to an executive ministry and subject to ongoing review, checks and balances by the legislative parliament elected by the people.

B. Liberal democracy

A Liberal democracy is a representative democracy in which the ability of the elected representatives to exercise decision-making power is subject to the rule of law, and

usually moderated by a constitution that emphasizes the protection of the rights and freedoms of individuals, and which places constraints on the leaders and on the extent to which the will of the majority can be exercised against the rights of minorities

5.1.3. Constitutional democracy

This is developed to counter this possibility and is a form of representative democracy in which the powers of the majority are enshrined in constitutional provisions designed to guarantee the individual and collective rights of all citizens. These citizenship rights are enshrined in a constitution and can be amended to reflect social change.

Industrialization came to be seen as not just the economic and technological changes that underpinned a growing prosperity, but to include the political and social changes that emerged as well. This led to the realization that, when the leaders of a state embraced economic progress via industrialization, they had to be prepared to accommodate the social and political change that accompanied it. The most perilous of those changes, from the perspective of the propertied classes, were the growth of individualism and the demand for political influence. To maintain stability in the state and to avoid the economically disruptive effects of civil unrest, it was necessary to devise political institutions that would prevent any individual or group from gaining control of the organizations of government. Peaceful political change is a significant strength of the modern constitutional democratic state.

What characterizes a constitutional democratic state? In the modern world, constitutional democracy is the chief type of non-autocratic government. A definition of a constitutional democracy is that it should provide:

1. a system of periodic elections with a free choice of candidates
2. competing political parties
3. universal adult suffrage
4. political decisions by majority vote
5. protection of minority rights

6. an independent judiciary
7. constitutional safeguards for basic civil liberties, and
8. the opportunity to change any aspect of the governmental system through agreed procedures.

In most modern constitutional democracies there is a constitutional document providing for fixed limitations on the exercise of power. A constitution assigns certain specified powers to different structures of governments by:

1. limiting the powers of each structure and the establishing arrangements for their co-operative interaction
2. specifying the individual rights or liberties of the individual that are protected against the exercise of state power
3. providing a statement of the methods by which the constitution may be amended.

The significance of political parties in the development of constitutional democracy is worth noting. A political party is an organization through which the electorate is involved in both the exercise and transfer of power. It is the presence of two or more political parties within a democratic structure that separates constitutional democracy from the pseudo-democratic structures found in single-party totalitarian states. Political parties in a constitutional democracy, on the other hand, are independent of the state. They are concerned with the integration and representation of many interests and beliefs, and, crucially, they are open to wide public participation. There is competition between parties to achieve government. Even if a party is too weak to form a government, it has the ability to influence government policies and legislation. Parties act as a means of representing all interests in the membership of the constitutional democracy and at the same time provide an efficient and peaceful means for the transfer of power in the state.

5.2 The Interaction between Democracy and Development

Democracy and development are complementary, and they reinforce each other. The link between them is all the stronger because it originates in the aspirations of individual and peoples and in the rights they enjoy. Indeed, history shows that cases where democracy and development have been dissociated it mostly resulted in failure. Conversely, the interlinking of democratization and development helps both of them to take root durably. For political democracy, in order to consolidate itself, needs to be complemented by economic and social measures that encourage development; similarly any development strategy needs to be ratified and reinforced by democratic participation in order to be implemented.

The interdependence of democracy, development and human rights was spelled out in the 1993 Vienna Declaration. Panel members pointed out that recognition of that interdependence of the right to democracy and the right to development is not something new. The United Nations Charter, international agreements, the 1986 Declaration on the Right to Development and the Convention on the Elimination of All Forms of Discrimination against Women all mention it. But the implementation of those rights, which have been endorsed by international law, entail both greater solidarity on the part of the international community and the respect by States of their international obligations. This section saw the rule of law or the primacy of law as the thread that can link the construction and consolidation of democracy to the construction and consolidation of development, as well as the way of consolidating their common bedrock: the respect of human right.

Democracy is the system in which “sovereign power lies with the people”, the methods with which it can be exercised can vary depending on the social system and economic development peculiar to each country. Those methods also tend to change depending on political, demographic, economic and social change. Democracy cannot be conceived of without freedom, but it also entails the rule of law and the voluntary restrictions that

result from it, in other words the existence of a common rule issued by those who have been chosen by the people to define its content.

Justice guarantees the exercise of democracy as it serves to enforce the principle of equality before the law, the right of all individuals to express their opinion within the society to which they belong, and the right to be heard and to put their case. Democracy is, therefore, viable only if it has a reliable and independent judicial system. The free participation of citizens is a second precondition since it allows them to exercise their right to freedom of thought and to be different. It also enables civil society to express itself not only within each nation but also on the international scene — something which is becoming a necessity in an increasingly interdependent world.

As regards human rights, the dialectic relative to the universality of those rights and, by contrast with the distinctive features of social systems, the universality of the historical and cultural traditions and the economic contexts in which they are embodied, was the subject of lengthy debate. At the end of the debate, Panel members, nevertheless, reaffirmed their espousal of the terms of the 1993 Vienna Declaration, namely that “while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be born in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.

It is a fact that, if human rights are to be guaranteed and if democracy is to work, communities and individuals, both men and women, need not only to have access to justice but also, before that, to be aware of the law and to understand it. Similarly, the lack of justice directly compromises development, first because it encourages mismanagement and corruption, and second because it discourages investment and economic exchanges.

There can be no development in a context of arbitrariness or in the absence of the rule of law. In order to construct and to institutionalize, there needs to be a minimum degree of

certainty: one needs to know what rule is applicable and how it is applied. It should be pointed out that the notion of the rule of law or the primacy of law has wider implications than the much more concrete notion of rule by the law, which refers to the authorities' daily enforcement of existing laws, whether they good or bad, just or unjust. The rule of law, on the other hand, which is the contrary of arbitrariness, is based on the reign of the general principles of the law and on the concept of justice in society, hence its importance in relation to a democratic government.

That rule of law entails, for power to be exercised, legitimacy, transparency and accountability. Those three elements, which underpin the rule of law, are vital for both the democratic process and the process of development. But for that rule of law, which goes hand in hand with citizenship, to be able to establish itself within a society, a juridical culture needs to have grown up, and that is something which requires short, medium and long-term strategies to be prepared. For such a culture requires an apprenticeship, education and the ability to understand legislation. It implies that everyone knows how justice works. But that knowledge is possible only if access to justice is equal and if it is the same for everyone. Unequal access to justice, depending on the socio-economic group to which people belong, depending on their ethnic group or their sex, for example, is in contradiction with justice and the rule of law.

An enabling legal and regulatory framework is one in which laws and regulations are clear, transparent, and applied uniformly, and in a timely manner, by an objective and independent judiciary. Where legal systems are weak and the application of law is uncertain and/or enforcement is arbitrary, they tend to distort economic transactions, foster rent-seeking activities, and discourage private capital flows, all of which undermine national development. Where adherence to rule of law is weak, security of private property is also weak, and investment prospects are low.

CHAPTER SIX
THE LAW OF SUSTAINABLE DEVELOPMENT AND GOOD
GOVERNANCE

Objectives

Besides its legal aspect, sustainable development has clear philosophical, scientific, economic and political dimensions. However, like all the social institutions created by man so far, the institution of sustainable development too will acquire its specific form via the science of law and its application by court decisions. In other times, philosophy in particular paved the way for the work of lawyers. Today, unfortunately, lawyers have little to gain from the other sciences where sustainable development is concerned. The theory of sustainable development is new and still under development. In contrast, the social problems that must be solved by sustainable development cannot afford to wait. The purpose of this chapter is therefore , to enable law students to grasp the primary knowledge on the interrelation of law and sustainable development.

6.1 From Economic Development to Sustainable Development

The Rio Conference on the Environment (1992) will live on in mankind's history as the occasion which put an end to obsession with economic development. That "development" was no more than misrepresented growth of wealth along with a corresponding frantic squandering of mankind's natural reserves. The Rio Conference is memorable because it succeeded in offering mankind the new

vision of sustainable development: no longer quantitative but qualitative development, in other words, a balanced striving for all human values, whether material or intangible, in harmony with nature.

In reality, what happened was that misconceptions were abandoned and development resumed its true meaning and moral content, which does not consist in the consumption of material goods but in improving education and health, securing a good natural

environment, establishing harmonious co-existence between people in a just and peaceful world, and encouraging the stable joint development of civilization and nature, in other words a development having all that "quality of life" which had ceased being accessible to most of mankind. "Quality of life" includes, in particular, employment, which in the developed countries, however, can only be achieved by appropriate restructuring of their sustainable economy and not by its expansion. Thus, after Rio insistence a unilateral economic growth is not just an outdated policy but one that is both illegal and unethical.

6.2. What is Sustainable Development Law?

What is sustainable development, and what, in particular, is 'international law on sustainable development' (or in short, 'sustainable development law')? Certain international processes have provided guidance, and commonly accepted elements of answers, to these questions. Sustainable development is most commonly defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." In short tautology, it means 'development that is sustainable.' Development can be defined as a collective process of change toward improvements in quality of life for human beings and their communities, and sustainability can be seen to refer to the need for development to be integrated, socially, economically and environmentally sound, oriented to the long-term, and hence, able to last. The concept of sustainable development, in international law, requires accommodation, reconciliation and integration between economic growth, social justice (including human rights) and environmental protection objectives, towards participatory improvement in collective quality of life for the benefit of both present and future generations. The term 'sustainable development law' describes an emerging corpus of international legal principles and instruments which address the intersections between international economic, environmental and social law (including human rights law), towards development that can last for the benefit of present and future generations.

6.3 Sustainable Development in International Policy

Our Common Future, the influential 1987 *Brundtland Report*, sought for solutions to parallel problems of global environmental degradation and global lack of social and economic development, by asking for these challenges to be addressed in an integrated way, for the interests of present and future generations. In the *Brundtland Report*, as mentioned above, sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

At the United Nations Conference on Environment and Development, the 1992 *Rio Declaration*, States that it is committed to “the further development of international law in the field of sustainable development” (Principle 27). In the 1992 *Agenda 21* States that this involved the “further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns” (1.a).

In the 1997 *Programme of Action for Further Implementation of Agenda 21*, States further agreed that “it is necessary to continue the progressive development and, when appropriate, codification of international law related to sustainable development. Relevant bodies in which such tasks are being undertaken should cooperate and coordinate in this regard.” (para. 109).

The 2002 World Summit on Sustainable Development *Johannesburg Declaration* specifically commits to “assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels” (para. 5). The *Johannesburg Plan of Implementation* mandated the UN Commission on Sustainable Development to “(e) take into account significant legal developments in the field of sustainable development, with due regard to

the role of relevant intergovernmental bodies in promoting the implementation of Agenda 21 related to international legal instruments and mechanisms.” (para 148 at e)

In international law, the concept of sustainable development has gained some definition over the course of the past two decades. It is not clear that sustainable development has, as yet, the character of a customary norm of international law. But neither is it void of all meaning or normative value in international law. Rather, it can be argued that the concept of sustainable development has a dual nature in international law. It can be considered as an interstitial norm, which serves to reconcile other conflicting norms related to the environment, the economy and social development (including human rights), and also simply the object and purpose of many international treaties and legal instruments. In the recent decisions of international courts and tribunals, the concept of sustainable development facilitates the reconciliation and integration of other norms concerning socio-economic development and protection of the environment. It appears to have played such a role in *Gabcikovo – Nagymaros Case* at the International Court of Justice:

“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind, - for present and future generations of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. *This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.*” (Emphasis added).

The Permanent Court of Arbitration reaffirmed this reasoning in its Arbitral Award for the *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands)* (May 24, 2005). In this case, The Netherlands, which had created nature

reserves along the path of the historic 'Iron Rhine' railway line, sought to prevent its reactivation. Belgium argued that the upgrading of the Iron Rhine Railway was part of a shift from road to rail transportation, assisting in the reduction of greenhouse gases, in order to contribute to sustainable development. The Tribunal balanced environmental protection against socioeconomic development, finding that the application of environmental measures by the Netherlands could not amount to a denial of Belgium's transit right, nor could these measures render the exercise of such a right unreasonably difficult. In its reasoning, the Tribunal refers to the "notion[]... of sustainable development", and at para. 59, states that: "[e]nvironmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate such harm. This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties."

The implications of these cases for the meaning of the sustainable development in general international law are clear. In instances where trade liberalization rules, as economic development norms, intersect with environmental norms, the concept of sustainable development may play a normative role in guiding a balanced, mutually supportive and integrated outcome. It may also, as is touched upon below, play such a role when social development norms are involved.

In international treaty law, sustainable development is an agreed objective of many international trade treaties, both at the global and regional levels. As such, sustainable development can be considered part of the 'object and purpose of a growing number of treaties, and therefore, directly relevant in the interpretation of their provisions. The concept appears, often as an objective or preambular reference, in most international statements and declarations related to environmental, social and economic issues since the 1992 Rio de Janeiro Earth Summit. It has also featured as an object and purpose of many international economic, social and environmental treaties involving developed and

developing countries, as a concept which guides the decisions of international courts and tribunals, and the holdings of judges in national courts around the world.

To date only the 2002 *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific* provides a definition for ‘sustainable development’. At article 3(1)(a), the parties adopted the following statement: “...[S]ustainable development means the process of progressive change in the quality of life of human beings, which places them as the centre and primary subjects of development, by means of economic growth with social equity and transformation of production methods and consumption patterns, sustained by the ecological balance and life support systems of the region. This process implies respect for regional, national, local, ethnic and cultural diversity, and full public participation, peaceful coexistence in harmony with nature, without prejudice to and ensuring the quality of life of future generations.”

According to international treaties and tribunals, the concept of sustainable development is clearly relevant to international law related to the environment and to natural resources. But it is also directly relevant for economic and trade law, and has been further defined in these contexts. The 1994 *Marrakesh Agreement Establishing the World Trade Organization* recognizes sustainable development among its objectives. This is confirmed in the 2001 *Doha Declaration* declares: “We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement.” And several Reports of the WTO Panel and Appellate Body directly address the concept of sustainable development in world trade law. This social element was also later highlighted in the outcomes of the 2002 World Summit for Sustainable Development, which concluded, in the *Johannesburg Plan of Implementation*, at para. 140 (c), that there was a need to “promote the full integration of sustainable development objectives into programmes and policies of bodies that have a primary focus on social issues”, noting that, “[i]n particular, the social dimension of sustainable development should be strengthened...”

Sustainable development law and policy has only begun to be addressed by existing institutions, and not in an adequately integrated way. In public international law, the overarching concept of sustainable development vitiates fragmentation. It inspires cooperation, coherence and innovative governance systems. Further research need to be undertaken on the necessary principles, rules and policies, in order to make a valuable contribution to the development of this field, assisting scholars, countries and international institutions to formulate international law in a more integrated, principled manner, to address intersections between different international legal regimes and to implement the myriad new international treaties and instruments in the field of sustainable development.

6.4 Sustainable Development and Good Governance

6.4.1 The Concept of Good Governance

Good governance, as a concept, is applicable to all sections of society such as the government, legislature, judiciary, the media, the private sector, the corporate sector, the co-operatives, societies registered under the Societies Registration Act, duly registered trusts, organizations such as the trade unions and lastly the non- government organizations (NGOs). Public accountability and transparency are as relevant for the one as for the other.

The foremost test of good governance is the respect for rule of law. As the saying goes, howsoever high a person may be, the law is above him and has to be considered supreme. The governance must be based on rule of law. Every lawfully established government must govern according to the laws of the land. All its actions must uphold the rule of law and any effort to take the law in one's own hand or to undermine the law by anyone, howsoever high and mighty he may be, must be dealt with speedily, decisively and in an exemplary manner. It is unfortunate that even after fifty years of independence, one cannot say with confidence that the governance in most states is based on rule of law.

In any discussion on good governance, attention must be focused on the primary responsibilities of the government. These must include the maintenance of law and order, administration of justice, and welfare of economically and socially weaker sections of society in terms of provision of safety net for them. Here again, it is seen that, in its anxiety to do thousand and one other things, these primary responsibilities have been neglected over the years.

6.4.2 Good Governance and Sustainable Development

It is widely recognized that good governance is essential to sustainable development. Well-functioning legal institutions and governments bound by the rule of law are, in turn, vital to good governance. Weak legal and judicial systems – where laws are not enforced and non-compliance and corruption are the norm – undermine respect for the rule of law, endanger environmental degradation, and undermine progress towards sustainable development.

Practitioners in the development field have increasingly turned their attention to reforms to improve legal and judicial institutions and promote the rule of law and good governance. For example, various United Nations agencies such as the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP), as well as the World Bank and other regional development banks, are directing increasing resources to reform legal and judicial institutions. While many factors play an important role in development, good governance is now recognized as playing an essential role in the advancement of sustainable development.

Good governance promotes accountability, transparency, efficiency, and rule of law in public institutions at all levels. In addition, it allows for sound and efficient management of human, natural, economic, and financial resources for equitable and sustainable development. Moreover, under good governance, there are clear decision making procedures at the level of public authorities, civil society participation in decision-making processes, and the ability to enforce rights and obligations through legal mechanisms.

These aspects of good governance do not in themselves ensure that society is run well nor do they guarantee sustainable development. However, their absence severely limits that possibility and can, at worst, impede it. Without proper functioning institutions of governance based on the rule of law that promote social stability and legal certainty, there cannot be investment and assumption of risk that form the basis of market economy development, let alone sustainable development. Indeed, the strength of the rule of law is the best predictor of a country's economic success. Furthermore, deficiency in the rule of law encourages high rates of corruption, with further devastating consequences on the confidence of economic actors. This lack of investment, in turn, slows economic growth and consequently deprives the governments of resources to invest in education, social safety nets, and sound environmental management, all of which are critical for sustainable development.

PART THREE
LAW AND DEVELOPMENT IN ETHIOPIA

CHAPTER SEVEN - LAW AND DEVELOPMENT IN ETHIOPIA

7.1 General Overview of Ethiopian Economic Development

Ethiopia is desperately poor. It contains one of the largest concentrations of poor people on the planet. Ethiopia ranks 170 out of 177 countries on the human development indicator and on present trends will fail to meet any of the MDGs by 2015, and this has implications for the extent to which the whole of Africa will meet them. GDP per capita has increased marginally from \$102 to \$113 between 2000 and 2004, but still remains at one of the lowest levels in the world. 31 million people live below the national poverty line (on less than half a dollar a day) and between 6 and 13 million people are at risk of starvation each year. Not only Ethiopia is poor but it is equally poor: 81% of the population of 77 million live below a poverty line of \$2 a day. There has been little improvement in either income or consumption poverty in the last decade.

Livelihoods are predominantly based on agriculture, which accounts for 85% of employment, 45% of national income and over 90% of export earnings. But, Ethiopian agriculture remains low-input, low-value and subsistence-oriented, and subject to frequent climatic shocks. Labour productivity in agriculture is low and the country suffers increasingly from shocks of drought, which often lead to severe harvest failure and famine, and affect not only current but future levels of consumption. In the last major drought in 2002/03, over 13 million people in more than half of the districts of the country were affected.

The most pressing concern of rural communities is the continued pressure on limited land resources. High population growth, slow rural-urban transition and limited employment opportunities outside farming have combined to make a significant reduction in landholdings from 0.5 hectares per person in the 1960s to 0.11 in 1999. Intensive use of

smaller plots of land is contributing to environmental degradation in turn feeding back into even lower levels of agricultural productivity, and effectively locking many into a poverty trap.

Patterns of social exclusion affecting particular social groups or segments of the population contribute to increasing vulnerability in Ethiopia. Women are especially disempowered. There have been gradual gains in gender equality in Ethiopia but there is also a deep conservatism that pervades gender roles, severely proscribing what women can and cannot do, especially in rural areas. The extent to which gender inequity in Ethiopia is deep-rooted is epitomised by the widespread acceptance, by women themselves, of violence against women.

Women's poverty is characterized by their limited access to resources, services and employment, and inability to claim their rights: only 9% of women have access to agricultural extension services and 12% to agricultural credit; only 32% of permanent civil service posts are held by women, and only 10% of those are in professional cadres. The relatively high prevalence of harmful traditional practices, such as female genital mutilation, early marriage, and marriage by abduction significantly affects the vulnerability of women and girls, for example by increasing the risk of HIV infection, reducing their chances of finishing school, and violating their reproductive and sexual rights.

The overall health status of people in Ethiopia is extremely poor. Life expectancy is 54 years. Despite some improvements in recent years, the rates for maternal mortality, under-five mortality and infant mortality are high. High fertility is a major contributor to poverty. The main health problems are communicable diseases, due to poor personal hygiene, poor garbage and waste disposal practices, and lack of an adequate and safe water supply. The major causes of death are infectious diseases (TB, respiratory illnesses, malaria, gastrointestinal infections, meningitis, AIDS and leishmaniasis). Malaria is one of the country's worst health problems. 68% of the population is at risk of infection and

malaria accounts for 10-30% of the disease burden in all age groups. Ethiopia is one of the world's 22 top countries for tuberculosis incidence.

In the past 40 years, the performance of the Ethiopian economy has been variable, with a very poor underlying trend of 0.2% annual growth in GDP per capita over the period 1961-2003. Due to the dependence of the economy on agriculture, growth has historically been affected by climatic variability, the terms of trade (eg the effects of volatility in international coffee prices), and conflict. Growth spurts have tended to be short-lived and associated with positive climatic shocks such as good rainfall. The main driver of growth in agriculture has been the expansion of land under cultivation rather than increased productivity, which is unsustainable in the medium to long term.

There is little in the way of export-led growth: Ethiopia is a landlocked country and trade (both internal and external) is constrained by the large distances and poor transport infrastructure. Growth rates increased in the 1990s, and since the war with Eritrea ended in 2000, the Ethiopian economy has performed relatively well, even despite the drought in 2002/03. Over the past five years the average growth rate has been 4-5% per annum, although this translates to only 2-2.5% growth in GDP per capita given rates of population increase, falling far short of what is needed to meet the \$1 a day MDG.

7.2 Brief Discussion on Ethiopian Government Plans for Poverty Reduction

In 2002, the Government produced its first PRSP, the Sustainable Development and Poverty Reduction Programme (SDPRP), setting poverty reduction as the core objective with economic growth as the principal means to achieve it. The SDPRP was built upon the following four pillars:

- agricultural development-led industrialization and food security;
- the justice system and civil service reform;
- governance decentralization and empowerment and
- capacity building

In the 3 years since its launch the Government made good progress in maintaining macroeconomic stability and in boosting the poverty focus of its expenditures. Economic growth was hit by the drought of 2002/3, but has since rebounded strongly. The Government took important initiatives in the launching of the Coalition for Food Security and its comprehensive programme for capacity building. During the SDPRP period, the Government's pro-budget allocation and progress in increasing domestic revenues have contributed to the upward trend in many social indicators. Progress in various areas was constrained, however, by the need for policy development to achieve the Government's objectives. These included:

- overcoming the policy and institutional constraints to the development of the private sector;
- re-thinking rural development strategies to foster employment generation, crop diversification and private sector involvement in rural areas;
- strengthening rural urban linkages and focusing on growing urban development issues;
- operationalising the national population policy;
- strengthening decentralized institutions to create the conditions for accountable and responsible local government and enhanced democratic participation and
- strengthening monitoring and evaluation systems, and taking forward partnership commitments.

Many of these points are addressed in the second PRSP, the Plan for Accelerated and Sustained Development to End Poverty (PASDEP), which the Government is in the process of finalizing. Like its predecessor, the PASDEP has very strong Government ownership. For the first time, it was debated and approved by the Parliament. It has been designed to accelerate the effort to reach the MDGs. It is build on the first poverty reduction strategy, and is innovative in several important respects.

The PASDEP reflects a consensus that pro-poor growth is a fundamental priority. The programme centers on a growth strategy for the next five years consisting of eight elements:

- (i) Commercialization of agriculture and promoting much more rapid non-farm private sector growth;
- (ii) Geographical differentiation, with a greater emphasis on urban development;
- (iii) Population policy;
- (iv) Addressing gender inequalities;
- (v) Infrastructure development;
- (vi) Risk management and vulnerability;
- (vii) Scaling up service delivery to reach the MDGs; and
- (viii) Generating employment.

The PASDEP advocates continuing to pursue the strategy of agricultural development-led industrialization, but with a more balanced approach to urban development and with important enhancements to capture the private initiative of farmers and encourage the shifts to diversification and commercialization of agriculture. It advocates a private sector push, especially on exports, to create jobs and reduce foreign exchange constraints.

There is a reinforced emphasis on good governance, with plans to accelerate local empowerment, and exploit regional differentiations. Decentralization, first to the regional, and then to the district (woreda) and sub-district (kebele) levels, remains a centerpiece of the Government's strategy both to improve responsiveness and flexibility in service delivery, increase local participation, and democratize decision-making. Policy reforms are expected to be enacted in a number of key domains during the PASDEP programme, including revisions to civil and commercial law, human rights, sexual/gender harassment, and children's and HIV/AIDS-affected persons' rights. A justice sector capacity building programme will aim to train and support the judiciary. The Human Rights Commission and Ombudsman's Office will both be strengthened as part of the PASDEP, with the establishment of systems and procedures, and capacity-building and

increased gender sensitivity. The emphasis on civil service reform and capacity building will continue, with a focus on strengthening staffing and incentives, and setting service standards for responsiveness to the public. There is also an increased emphasis on training of Parliamentarians.

The PASDEP is a Government-driven plan for poverty reduction, with clear targets and indicators to measure progress annually which provide the framework for result-oriented policies and strategies. The PASDEP is a medium term plan consistent with meeting longer term development objectives. However, some of the PASDEP targets may be over-ambitious and are unlikely to be affordable within the resources, which currently appear to be available. In some areas, the linkages to the MDG targets could be more explicitly developed. There remains a need to make sure that the PASDEP and sector strategies are fully compatible and consistent, which will help in ensuring that the targets are met through linkages with the budget and with the policy and results matrix on which monitoring and evaluation will be based. Further work is needed on developing the linkages between various sectors; including how cross-cutting issues such as gender, HIV/AIDS, population, vulnerability, the environment and governance could be more effectively mainstreamed across the sectors.

The Government of Ethiopia recognizes that good economic and social sector policies, if they are to be implemented successfully, depend on effective state capacity. Capacity building is central to the Government's strategy for reducing poverty. The PASDEP identifies civil service reform and decentralization as priorities, particularly strengthening the capability of local government to formulate and implement development plans, manage resources and deliver services to citizens. It also demonstrates commitment towards making further progress on core aspects of public sector reform and democratic governance that the rights of all its citizens, as enshrined in the constitution. However, the PASDEP does not adequately identify the critical contribution that civil society could make to reinforce accountability to citizens, and in advancing empowerment and voice.

7.3 The Legal Framework of Ethiopia and Development

The discussion in this section of the material examines the laws and regulations that Ethiopia has in place and that serve as the basis for its ability to achieve sustainable development. The discussion enable students to analyze questions like : How closely do existing laws reflect emerging global standards? What inconsistencies or gaps are present in the legal framework? Often discovered through this review are opportunities to make relatively small changes that may result in significant openings for development and expansion.

7.3.1 Company Law and Corporate Governance

A. Introduction

Company law is crucial in market economies; it sets the legal environment for the creation and continuing operation of privately owned businesses. Good company law is especially critical in transition-economy countries. It can encourage new investment and provide investor protection by setting forth clear a objective and rules for a company's ongoing internal governance; it can encourage entrepreneurship by making it easy to start up and register a company; and it can encourage businesses to come out of the underground economy into the publicly registered, tax-paying economy.

Ethiopia's current company law is part of its Commercial Code, which has remained unchanged since its enactment in Imperial times (1960). It is patterned after the French Commercial Code as it was in effect in 1960. The company law was effectively suspended during the Communist Derg period (1975–1991), when formation of new limited liability companies was not permitted. The company law was restored to full effect under the present Government. Although the current company law has been basically adequate for conditions to date, it needs to be updated. The present Government recognizes this and appointed a committee under the Department of Justice, which has been working on an updated version for more than 2 years .

One distinct issue involving company law is that of startup and registration of new companies. Although that has been a problem in the past, it is no longer so according to all persons who were interviewed, including practicing lawyers and accounting firm professionals, company officials, registry officials, and donors. That is due to implementation with donor help of revised and streamlined company registration procedures and forms in the Ministry of Trade and Industry.¹

B. Types of Companies.

The current company law provides for four forms of companies, as can also be expected in the forthcoming new company law:

- *General partnership*, in which the partners are personally liable for the partnership's obligations (Commercial Code Articles 280-95);
- *Limited partnership*, in which one or more general partners are personally liable for the partnership's obligations and one or more limited partners are liable only to the extent of their agreed contribution (Articles 296-303);
- *Share company*, which may offer shares publicly and has no upper limit on the number of shareholders, which roughly corresponds to a French SA, a German AG or an English PLC, and which is identified by the company's name and the initials "SC" (Articles 302– 509); and
- *Private limited company*, which has fewer formalities than a share company; which may not offer shares publicly and may not have more than 50 members; which roughly corresponds to a French SARL, a German GmbH, an English private limited company, or a U.S. limited liability company; and which is identified by the company's name and the initials "PrPC" or "PLC" (Articles 510-543).

¹ It should be noted that although the company law covers registration generally (Commercial Code Articles 86– 123), most provisions for company registration are contained in other, more recent laws, namely, Proclamation 67/1997, Regulation 13/1997, Proclamation 376/2003, and Regulation 95/2003.

Both share companies and private limited companies provide limited liability for their shareholders/ members, meaning those persons are not personally liable for the company's debts and other obligations.

C. Corporate Governance

The current company law contains important provisions for corporate governance, although many of these would require revision to comport with governance provisions of other countries and current international best practice. Among the significant corporate governance provisions are a requirement in share companies that conflict-of interest dealings between a company and a director must receive prior approval of the board of directors

(Article 356); that state a company may not make loans to a director (Article 357); that state directors are personally liable to the company for failure to carry out their duties that include a duty of due care and diligence (Article 364); and that state a company may sue a misbehaving director upon approval of shareholders representing 20% of the capital (Article 365)—although currently the law does not provide for shareholder-derivative litigation as is the case in other countries.

At the same time, the current law contains provisions that are contrary to international best practices and facilitate insider minority control and hinder transparency in governance. Such provisions can seriously discourage new investment.

These include permitting a share company to issue bearer shares (Article 325—this is inadvisable because anonymous bearer shares can lead to hidden ownership and tax evasion); permitting a share company to impose restrictions on free transfer of its shares (Article 333—this is not appropriate, at least in widely held companies, because it prevents share liquidity), and permitting a share company to limit the number of votes which shareholders may exercise at shareholder meetings (Article 408—this is counter to the “one share one vote” principle which assures control in proportion to investment).

7.3.2 Contract Law

A. Introduction

The law of contracts governs the commercial relationships between parties, typically buyers and sellers of goods, services, and rights. The development of an efficient market requires a clear and predictable law that adequately covers such basic issues as contract formation, obligations of the parties, and available remedies when one party is in breach, as well as more complex issues such as force majeure (natural disasters and other “Acts of God”) and assignment of rights to third parties. However, other components of the legal system are just critical. Contract law is of little practical use if the general legal, business, and government environments act to suppress the formation of efficient commercial agreements.

Ultimately, the law and legal support systems must be sufficient to allow parties to assess and allocate risk. Components of this support system include the legal community’s ability to understand and apply legal principles in the contract drafting and dispute-resolution phases; sufficient information that allows for an informed assessment of risks and obligations; the judiciary’s ability to resolve disputes; the existence of alternative dispute-resolution systems; civil society and the State’s roles in supporting and regulating the commercial sector; and the commercial sector’s willingness to seek legal advice.

Against a backdrop of State support for the needs of commerce, three distinct sectors are needed: a strong, responsible practicing bar; a commercial sector that is at least minimally knowledgeable in legal principles; and civil society support systems.

Though the written law on contracts (the Law of Obligations in the 1960 Civil Code) in Ethiopia is comprehensive and reasonably well thought out, most of the other components critical to an efficient culture of commercial contracts are either non-existent or seriously underdeveloped. Ethiopia’s traditional customary legal system is widely used by individuals and small commercial enterprises and is reported to be reasonably

efficient. Individuals with commercial disputes often turn first to the customary system (usually the elders of a community or urban neighborhood), then to the courts only if the dispute cannot be resolved. Judges indicate that they review the findings of the elders as if they had come from a lower court. This state of affairs is not necessarily a barrier to the development of a domestic market system. It is, however, a system which will not be viable for business in the international market, and the dependence upon customary dispute resolution will need to be reduced by individuals wishing to enter the global marketplace.

The 1960 Civil Code was promulgated under Emperor Haile Selassie as a result of national recognition and adoption of a modern legal system. The law is loosely based upon the *Code Civil* of France (a document that has remained virtually unchanged since Napoleon's time), but was obviously drafted to reflect some more contemporary notions of contract law.

The Civil Code is law in the civil tradition at its core, but with introduction of some common law principles. For example, there is heavy reliance on the requirement of good faith of the parties (a civil law concept) throughout the law on contracts—in the interpretation of contracts (Article 1732) and in a judge's authority to make decisions that take good faith into account (Article 1785)—but there is also a seeming preference for the award of damages (Article 1776) over specific performance. With its Book of Obligations (Book IV) covering general contracts, and Book V devoted to the so called Special Contracts, the law on contracts fills a daunting of 275 pages. Most of the familiar concepts of formation, obligations of the parties, remedies, and exceptions to the general rules are found in Book IV.

Five specific types of contracts that are afforded special treatment in Book V are: (a) Assignment of Rights; (b) Performance of Services; (c) Custody, Use, and Possession of Chattels; (d) Contracts for the Sale of Immovables; and (e) Administrative Contracts. There is little interest demonstrated in Ethiopia in acceding to the United Nations

Convention on Contracts for the International Sale of goods or in revising the law to conform with, for example, the much simpler UNIDROIT Principles.

B Contract Formation

As with other Civil Law systems, Ethiopia's Civil Code explicitly requires only an "expressed agreement of the parties" (Article 1680 (1)) for a contract to be a prior valid. As a practical matter, however, the traditional elements of offer, acceptance, and defined subject are also required in order to make a determination that the parties have agreed. Book V has similar formation provisions for the Special Contracts.

No writing is required (Article 1681 (1)), with administrative and immovables contracts. For those contracts that must be in writing, two witnesses are also required and the contract must be registered in a court or with a notary. The Civil Code spells out that unless otherwise agreed, the locus of the conclusion of the contract shall be the place where, and time when, the acceptance is sent (Article 1692).

Article 1695 provides for something like the American "mirror image rule," requiring the acceptance to substantively echo the offer. Specifically, the Article states that "a contract shall not be deemed to be completed unless the parties have expressed their agreement to all the terms of the negotiation." The nominal difference is that where, under the mirror image rule, agreement to the terms can be implied from a simple acceptance of the offer, Article 1695 seems to require that there will be some expression of agreement after there has been a final manifestation of the terms.

The doctrine of Mistake is treated in the formation section of the Code, in a group of articles titled "Defects in Consent." The Code requires the mistake to relate to a fundamental component of the contract, and to be of a type that had the mistake not been made, the mistaken party would not have entered into the contract (Article 1697). This right is, however, cut back by Article 1701, which disqualifies mistakes that relate only "to the motives which led to the making of the contract." Nowhere in the Code,

unfortunately, is there a definition of “motives.” The other defects in content are the typical faults which destroy a contract ab initio, such as fraud, deceit, incapacity, and unconscionability.

C Excuses for Non-Performance

The Civil Code provides both of the common legal defenses for non-performance of obligations—Force Majeure and Suspension of Performance (due to the insecurity of the suspending party). The Force Majeure provisions (Articles 1792–94) require impossibility of performance as the standard, and expressly disqualify excuse where the occurrence was foreseeable or where performance would be possible but financially onerous. Anticipatory breach (Articles 1788–89) is only available where a party “informs [the other party] in an unequivocal manner that he will not carry out his obligations under the contract.”

D Remedies and Enforcement

The closest Code that comes to making warranty provisions are the requirements that “the parties shall be bound by the terms of the contract and by such incidental effects as are attached to the obligations concerned by custom, equity and good faith, having regard to the nature of the contract” (Article 1713), and that “the creditor shall not be bound to accept a thing other than that due to him...” (Article 1745). If these principles are violated, the non breaching party is entitled to either cancel the contract or demand enforcement (Article 1771). It is unclear whether this provision means that the non breaching party may demand conforming performance or if it means that the party may simply keep the contract alive and seek damages. The latter interpretation is supported by the language of Article 1776, which allows the award of specific performance only where it is of “special interest to the party requiring it and the contract can be enforced without affecting the personal liberty of the debtor.” The Code provides for a rather generous 10-year period of limitations.

The Code's damaged provisions are, as is typical in Civil Law systems, shared by all the breaches of law and agreement that result in civil liability (e.g., torts and contracts). The basic rule for damages is that they should be "equal to the damage caused to the victim by the act giving rise to the liability" (Article 2090). The damages must be foreseeable (Article 2101) and are adjustable according to issues of good faith (Article 2097), which would presumably include unreasonable lack of mitigation of damages by the non-breaching party. The law adheres to a "loser pays" system for court costs and attorneys' fees.

Though the Civil Code provides much of what is necessary to determine the law on contracts, it presents a number of downsides. It is, of course, not a new law. The Civil Code was written with the help of distinguished legal scholars from both Ethiopia and abroad, but lacks features that would make it more efficient. There is very little dynamism to the Code. Moreover, as is pointed out elsewhere in this report, the practical use of the Code was suspended during the Derg, from 1974 to 1991, so opportunities to explore the efficiency of the law experienced a large gap. And, in the post-Derg period, such tight controls on commercial activity have been in effect—especially on international commerce—that the law remains largely untested. The Code itself contains flaws that would certainly have a chilling effect on its use without significant judicial and scholarly analysis made widely available to the practicing bar and the business community. For example, important terms and phrases are left undefined. No legislative history is available to clear the confusion, and little scholarship is made available, almost none in English. An Ethiopian judge said that he often uses a commentary that was written on the Code of Civil Procedure.

Though court decisions and, in some cases, judicial opinions are supposed to be transcribed and made available, the number and thoroughness of the opinions to be released is left to the court. No efficient system is in place for the publication of opinions. Because of this lack of informational infrastructure, contradictions in the written law go unresolved and lead to potentially higher risk and uncertainty for parties to agreements. For example, though the Code expressly allows unwritten contracts, Article 1728 requires

“any party bound by a contract [to] affix his handwritten signature thereto.” Though it can be reasonably assumed that this would apply only in cases where a written contract has been done, there is no disinterested authority that can provide such logic to a judge.

7.3.3 Real Property Law

Introduction

Real property law is crucial in a market economy; it provides the legal environment for a business to own, use, and sell land and buildings as well as to use them as collateral to obtain credit. Good property law is especially critical in transition-economy countries; a good law enables entrepreneurs to acquire land freely to produce goods and services in a secured ownership environment, which is a necessity in planning for the long term. A good property law must also be accompanied by an objective and standardized titling system.

Under Ethiopia’s Constitution, all land is owned by the State, a circumstance which is hardly conducive to a free market in land transactions. Furthermore, Ethiopia has never had a widespread system of land survey and titling. At the same time, however, the Constitution and other laws support extensive private use and quasi-ownership of land by Ethiopians and, in limited cases, by foreigners. This includes the right of private persons to own buildings and fixtures on the land, their right to lease land from the State on a long-term basis, farmers’ right to continue using rural land permanently for agriculture and in limited cases to lease it to investors or otherwise develop it commercially, and the State’s right and frequent practice to expropriate urban or rural private land use rights and sell those to private investors. Further, the city of Addis Ababa has a working cadastral titling system, and survey and titling projects have just begun with donor help that in several more years could cover much of the significant commercially desirable land in Ethiopia.

Through these limited rights, there is an active market in land transactions although that market is much more politically controlled and opaque, and the rights are less secure and predictable, than in market-economy countries or than should be the case for optimal economic development in Ethiopia.

The main features of Ethiopian land law and the governing federal laws are described below. It is important to note that although overall land *policy* is set at the *federal* level (in the laws cited below), *administration* of the law has been delegated almost entirely to innumerable *local* authorities which include municipalities (in urban areas) and regions, woredas, and kebeles (in rural areas). A kebele is a group of villages forming an administrative unit, and a woreda is a group of kebeles forming a larger administrative unit within a region .

Private Landholding Rights: the Federal Constitution (Proclamation 1/1995)

These competing concepts are in the Constitution itself, which states that ownership of land “as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia...and shall not be subject to sale or other means of exchange” (Article 41/3), but also states that “Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital” (Article 40/7); that the “government shall ensure the right of private investors to the use of land [on] the basis of payment arrangements established by law” (Article 40/6); and that the “government may expropriate private property for public purposes subject to payment in advance of compensation .. .” (Article 40/8). Private land ownership was recognized in imperial times but was abolished during the Communist Derg period. The Constitution’s current prohibition of private ownership continues that latter state of affairs.

Private Landholding Rights—Urban versus Rural

Ethiopian law treats urban and rural land separately. The underlying conditions are different; in urban areas, especially Addis Ababa, there is growing commercial development and a recognized need for an active market in commercial and residential real estate; in rural areas subsistence farming and continuous subdivision and fragmentation of plots are often the rule and there is a desire to encourage farmers to remain on—and invest in—their land rather than migrate to crowding cities. In practice (and oversimplifying somewhat), the urban land law results in a real estate market and substantial *income* for the State through leasing of land rights to private persons; the rural land law results in substantial *control* by the State in agricultural areas. (Ethiopia also has pastoral/communal lands not falling into either of these categories or covered by the laws below; this Report does not deal with those.)

Urban: the Urban Land Law (Proclamation 272/2002)

The main urban land law, Proclamation 272/2002, is mostly concerned with leasing from the State, and most privately held land in Addis Ababa and other cities is held by such leases. Leases of improved (built) land can be privately sold or mortgaged, and space within buildings can be privately leased to tenants on a negotiated basis. In Addis Ababa there is a fairly active market in leasing, sales of leases, and even bank mortgaging of buildings on leased land.

The leases themselves tend to be short documents whose contents are determined by State agencies, and often require construction by the lessee as a condition of maintaining a lease (and all construction is subject to approval by the State). The method for determining rent for land leases is determined by the State—it can be through auction, by direct negotiation, or by other dealing with or without public notice. The leasing is done (and the land is owned) at the municipal or regional level, not at the federal level (in Addis Ababa the agency that leases the land is the Municipal Land Administration Department).

Proclamation 272/2002 is overly detailed on matters that are determined by the market in a market economy, and it provides for State control and discretion at every step. For example, leases are permitted “in conformity with the law which [the] Region or City government makes” and may be offered through auction, negotiation, or “according to the decision of [the] Region or City government” (Article 4); a leasehold title deed shall be conferred on a person to whom urban land “is permitted,” the details of the deed “to be specified by Region or City Government” (Article 5); there is a highly detailed schedule of maximum permissible lease terms for separate categories of use and location, examples being up to 50 years for commerce in Addis Ababa and up to 70 years for commerce in lesser towns (Article 6); there are formal requirements for lease renewal and renewal “as per the agreement to be reached, unless the urban land is wanted for public interest”—“public interest” being defined simply as “that which an appropriate body determines as a public interest” (Articles 2 and 7)—and rent amounts “shall be stipulated by regulations to be issued by [the] Region or City Government (Article 8); the leased land must be used for the prescribed activity within a period of time to be specified by the authorities and any change in use must be approved by them (Article 12); and in any event the authorities “may clear and take over urban land [whether leased or otherwise held] which is necessary to commit for a public interest” (Article 16).

Rural: The Rural Land Administration and Use Law (Proclamation 456/2005)

This Proclamation provides for granting land “holding rights” free of charge to farmers already on the land, for issuance to them of a title certificate identifying the plot concerned, and for survey and cadastral registration of the title (a process now in its beginning stage). This is all done at the woreda and kebele levels. For a farmer who is farming “for a living,” this right has no time limit but is not entirely secured; it can be taken away if the farmer leaves the land for 2 years (perhaps to try city life) (see Article 9) or if the land gets damaged as determined “in the land administration law of the regions” (Article 10).

A farmer's holding should be of a minimum size which provides for his family's "food security" (Article 2/10), and it may be transferred by inheritance to members of his family who are also engaged in farming, but may not be freely sold (Article 8/5). For non-farmers, including private investors, the duration of a rural landholding right is not perpetual but "shall be determined by the rural land administration laws of regions" (Article 7). Regarding commercial development, a farmer may lease to an investor land "of a size sufficient for the intended development...for a period of time to be determined by rural land administration laws of regions" (Article 8/1); and a holder "may undertake development activity jointly with an investor" under a contract "which shall be approved and registered with the competent authority" (Article 8/3). These provisions can be used to facilitate private investment, but their language makes clear that it will be subject to close State regulation and control.

Expropriation, Urban or Rural: the Expropriation and Compensation
Law (Proclamation 455/2005)

This Proclamation grants governmental bodies at all levels sweeping powers to expropriate land for business purposes. Recent examples were cited involving floriculture and coffee farms, urban office building and hotel expansion, and planned commercial development in "para-urban" areas where cities are expanding and taking over formerly rural land. The broadness of the authorizing language speaks for itself: the State may "expropriate rural or urban landholdings for public purpose where it believes that it should be used for a better development project to be carried out by public entities, private investors . . . or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose" (Article 3).

If a landholder refuses to hand over the land when required, the "administration may use police force to take over the land" (Article 4/5). The Proclamation also requires that displaced landholders should be compensated and it has much detail (again, in highly discretionary language) on valuation of their holdings and resolution of disputes with

them. Needless to say, disputes often arise. Cases were cited in which they have gone on for years without court or other resolution; on the other hand, cases were cited—especially in sparsely populated, forested, or grazing areas—in which persons displaced were agreeable to the process and received employment from the newly established business. The issues which have been raised by displaced holders include lack of notice, inadequate or no compensation, delays, rough eviction procedures, and no provision for resettlement.

When land rights are expropriated, the Government may sell the rights to the new investors for prices which are unrelated to—and may far exceed—the compensation paid to displaced landholders. The theory behind this is that the land and its value belong to the State whereas compensation is owed only for the value of the buildings considered separately. The sale prices can also be set at a level which effectively subsidizes the new investment if the investment produces jobs or other social benefits. In any event, the sales represent a revenue source for the government. One of the most important features of the expropriation process from investors' viewpoint is that it is managed entirely by the government without need for direct investor involvement.

Landholding by Foreigners: The Civil Code, the Investment Law (Proclamation 280/2002), and Regulation 84/2003 Implementing the Investment Law

The Imperial-Era 1960 Civil Code (which is still in effect) states that “no foreigner may own immovable property situated in Ethiopia except in accordance with an Imperial Order” (Article 390). That is currently interpreted to prohibit direct holding of land use or leasehold rights by foreign individuals and foreign-registered companies. It is not, however, deemed to apply to diaspora Ethiopians who have returned to invest in Ethiopia even though they retain foreign citizenship, including, in many cases, U.S. citizenship. Further, it was stated in interviews that it does not apply to Ethiopian registered companies in which both foreigners and Ethiopians are investors and to which an Ethiopian makes an investment in the form of a beneficial contribution of land rights to

the company. This may apply even in cases where the foreign investors own a controlling interest in the company.

For *residential* property, the Investment Law has a specific exception from the Civil Code, providing that a foreign investor may “own a dwelling house or other immovable property requisite for his investment” (Article 38).

The Investment Law does not cover landholding as such but, in combination with its implementing Regulation 84/2003, it importantly specifies business areas which are reserved exclusively for “Ethiopian nationals,” including banking, insurance, and broadcasting; and areas exclusively reserved for “domestic investors,” which it defines to include foreign nationals permanently residing in Ethiopia and having made an investment there. (These include a long list of business areas including retail trade; most wholesale, export, and import trade; hotels; and construction.)

Although local legal advice should be sought in interpreting these laws, it is clear that they do not foreclose all landholding opportunities for foreign investors. Several persons interviewed pointed out that the government is encouraging foreign investment. That purpose would be advanced by expanding and clarifying these laws.

Survey, Titling, and Registration of Title

A major factor inhibiting land markets in Ethiopia has been the absence of a reliable, standardized survey and titling system. Uncertainty and disputes over ownership and boundaries continue to be a serious problem and there has been no efficient way to resolve them in the absence of good title records.

7.3.4 Competition Law and Policy

Introduction

In recent years, Ethiopia has taken steps toward opening several sectors of the economy to competition and to encourage and facilitate new entrants into those sectors. The Ethiopian business community has responded very positively to these openings, as demonstrated by a number of new Ethiopian entrants into the banking, textiles and floriculture sectors, for example. The process of introducing free competition into the economy, however, is far from complete.

Despite new entry, important sectors are still overwhelmingly dominated by State-owned enterprises, and the retail sector and financial services are, for the most part, closed to competition from foreign firms. Government monopolies also continue to exist in energy and other sectors.

Even in those sectors where economic liberalization has taken place through reducing barriers to foreign competition and privatization of industry and services, expected economic benefits can be short-circuited by private cartels, barriers created by dominant firms and by public regulations. On April 17, 2003, to safeguard against private and public impediments to free competition taking place, and as part of the move to introduce free market forces into the Ethiopian economy, the Ethiopian Parliament passed the Trade Practices Proclamation No. 329/2003 (“TPP”). This legislation states that the government is committed to “[establishing] a system that is conducive for the promotion of a competitive environment, by regulating anti-competitive practices in order to maximize economic efficiency and social welfare.” It prohibits anticompetitive behavior and unfair or deceptive conduct by one competitor against another; authorizes regulation of prices for basic goods and services in times of shortage; and requires disclosure on labels of basic consumer information such as weights and measures. The law also provides for the creation of two implementing institutions, the Trade Practices Commission and the Trade Practices Secretariat.

Aspects of the law and institutions, however, make it difficult to use them as effective tools for enhancing consumer welfare. First, the law has disparate goals—prohibiting anticompetitive conduct, regulating unfair and deceptive conduct between individual competitors, prohibiting importation of goods at prices that are below wholesale in the country of production, regulating prices for basic goods and services, and regulating product labelling—that divert enforcement from the most harmful anticompetitive conduct and dilute limited enforcement resources. Second, the Trade Practices Commission that has responsibility for addressing abusive conduct by dominant players, many of whom are government-owned and controlled enterprises, is itself part of the government’s Ministry of Industry and Trade. Its members are high-level officials of other Government agencies such as the National Bank. Third, the Commission has no staff of its own and virtually no budget. The Trade Practices Secretariat does have a small staff of approximately five, but it has a clerical, non-investigative, and non-prosecutorial function. Fourth, legal and economic training in competition policy and law enforcement at the university level does not exist.

The TPP has five parts: (a) definitions, objectives, scope, and exceptions; (b) prohibited trade practices; (c) enforcement bodies and appellate rights; (d) labelling and pricing regulations; and (e) remedies for violation. Although the framework law contains the substantive prohibitions and remedies needed to preserve and enhance competition policy, it also gives a great deal of room for interpretation and leaves power to grant exemptions in the hands of a Commission composed of high government officials and the Minister of Trade and Industry. Therefore, to paraphrase what one prominent Ethiopian private businessman said, if the government has no will or desire for competition to drive a sector of the economy, it will not happen, no matter what budgetary or human resources are given to the Commission.

Definitions, Objectives, Scope, and Exceptions

A noteworthy and important feature of the TPP is that State-owned enterprises are subject to the law. They are included in the definition of “persons” and “trader(s)”, and

Article 5, which clearly exempts commercial activities exclusively reserved for the government, does not list commercial activities in which the government participates on a non-exclusive basis. Three Articles in this section of the law are, however, problematic. First, “basic goods and services” are defined vaguely as “goods or services related to the daily material needs of [the] consumer.” Because later provisions of the TPP permit the Minister of Industry and Trade to make recommendations to the Council of Ministers for regulating the price of goods (Article 22) and exempt “basic goods and services” from the TPP (Article 5(3)), the vagueness of this definition may have significant ramifications. It likely grants the Minister, Council of Ministers, and Commission broad and flexible powers to exempt many consumer goods from competition. This power to regulate prices, when viewed in conjunction with the fact that the retail sector is largely closed to foreign companies, suggests lack of confidence in and commitment to competition as an effective regulator of supply and demand for consumer goods and services.

Second, significantly missing from the list of definitions is a definition of “dominance.” In discussions with those who must enforce Article 11(2)’s prohibitions against abuses of dominance, it was acknowledged that this poses a difficulty. Since the law’s passage in 2003, the gap has not been filled by the application of Article 11 to factual circumstances in cases or by the issuance of regulations or guidelines. The Commission lacks the power to issue implementing regulations that may fill some of this gap, but the Council of Ministers or Regional Councils do have the power to do so (Article 29). In the only two actions that the Commission has brought that have involved, among other issues, alleged abuses of dominance, actions brought against total and mobile oil, apparently no analysis was done to determine if the parties were dominant in their markets.

Third, the Commission has the authority to exempt (1) any enterprises that have “significant impact on development and [are] designed by government to fasten growth and facilitate development;” and, (2) “basic [goods] or services that are subject to price regulations” (Article 5). It appears that an exemption on these grounds may be granted, after an alleged violation of the law has taken place. The broad discretion of the commission to exempt enterprises from the law, and to do so ex post facto, does not

provide the assurances and predictability that would encourage innovation, expansion, or entrance by entrepreneurs whose success depends upon free competition.

Prohibited Trade Practices

The substantive provisions of the law prohibit anticompetitive agreements (Article 6) and abuses of dominance (Article 11) and “unfair competition” (Article 10). It should be noted that the TPP does not have a specific provision addressing mergers or advocacy responsibilities. Presumably, some mergers could be addressed under Article 11’s abuse of dominance provisions, as it is done in some countries. It would be helpful if some provision were made to make clear that the commission has an official role to play as advocate on behalf of competition.

The prohibited practices are fairly typical of those found in antitrust laws around the world and follow the EC-Treaty Article 81 and 82 models. Specifically, Article 6 prohibits price fixing, bid rigging (“collusive tendering”), market and customer allocations, and refusals to deal. The Ministry may authorize exceptions to these prohibitions when “the advantages to the nation are greater than the disadvantages” (Article 7). This exception seems to authorize exceptions for national champions and may be used to discriminate against foreign companies, even in those sectors in which foreign firms may participate fully. Article 11(2) prohibits, for the most part, the same kind of monopolistic conduct listed as prohibited in many jurisdictions. It prohibits, for example, price discrimination, tying arrangements, refusals to deal, excessive prices, and predatory pricing. Some of this conduct is not considered illegal in the United States, but is illegal in other developed countries. Prohibiting excessive pricing puts the commission in the position of being a price regulator of a sort, a position that is antithetical to the notion that the market sets prices and output.

Most unusual about Article 11(1), however, is the class of persons to whom the prohibition applies. The language of this Article is not clearly directed at those firms that are likely to achieve dominance. It says that “no person may carry on trade . . . having or

being likely to have adverse effects on market development.” This is unusually broad in that it is not limited to persons who are dominant or likely to achieve dominance, and the effect is that it focuses instead on “market development.” Prohibiting single-firm conduct without regard to the firm’s dominance opens the possibility that either competitively neutral or, even, pro-competitive conduct will be prohibited. It would be reasonable to interpret Article 11 as applying only to those who have dominance because the Article falls under the general heading of “Abuse of Dominance.” But, as indicated above, in the two cases in which this Article was invoked, no analysis of market power or dominance appears to have been conducted.

Article 10 of the proclamation prohibits what are generically called “acts of unfair competition.” It is unusual in that it addresses two different categories of conduct. Articles 10(1) and (2)(a)-(g) address what in the United States are referred to as tortious interference with business, disparagement, misuse of trade names and trade secrets, deceptive comparisons of product performance, and other Lanham Act violations. It is not uncommon to find these provisions in competition laws in Europe, but the provisions should not be confused with the “unfair methods of competition” that are prohibited by Section 5 of the U.S. Federal Trade Commission (FTC) Act. As used in the FTC Act, unfair methods of competition are generally limited to anticompetitive agreements and some of the abuses of dominance that are listed in Ethiopia’s TPP. The FTC would usually become involved in such matters only if there is harm to consumers, and in such cases the focus would be on protecting consumers rather than on protecting one competitor from another. As a general rule, the types of conduct addressed by Article 10 of Ethiopia’s law are handled in the United States as private disputes that competitors resolve in private law suits or alternate dispute-resolution mechanisms such as those provided by the Better Business Bureaus.

In fact, until the passage of the TPP, such disputes were also handled as private matters in Ethiopia. Articles 130-141 of Ethiopia’s Commercial Code of 1960 contain almost all of the same prohibitions contained in Article 10 of the TPP. Now, it appears that the courts have taken the position that the trial of such practices must take place at the Commission

level, and the judiciary is involved only for appellate review. Two drawbacks exist when a competition law gives a competition commission jurisdiction over these kinds of disputes between competitors. First, these disputes often siphon a very large percentage of resources away from enforcement against cartel and abusive behavior that harms consumer welfare as a whole. After handling these individual disputes, competition commissions have little time and resources to investigate and proactively uncover cartel conspiracies and other anti-competitive conduct. A competition commission can easily become bogged down in handling individual disputes which aggressive businessmen keep bringing to the commission's attention.

Trade Practices Commission and Judiciary

The TPP creates a Trade Practices Commission within the Ministry of Trade and Industry that is accountable to the Minister. It also creates a Trade Practices Secretariat. The legal framework for these implementing institutions, along with that of the judiciary, is discussed in the next section, along with an analysis of the functions of these bodies.

Labeling and Pricing Regulations

Articles 20 and 21 of the TPP require prices to be posted and goods to be labeled with country of origin, weight, material content, warranties, and similar matters of interest to the consuming public. Disclosure of such basic information is useful so that consumers can shop and compare goods. The ready availability of accurate information helps competition to thrive. If given the resources to enforce such disclosure requirements, it is appropriate for the Commission to have authority over them.

Article 22 gives the Minister and the Council of Ministers authority to regulate the prices of basic goods and services. In a great understatement, one professional who has studied the TPP called it "paradoxical" to have the Minister of Industry and Trade be responsible both for preventing price fixing agreements and for setting prices. With "basic goods"

undefined, investors in many different sectors are assuming a risk that the calculations that they made when deciding to invest may suddenly be mooted out by price controls.

Remedies

The Commission has rather substantial tools to prevent conduct that is harmful to competition and to deter future conduct. In addition to being able to order the offending party to cease and desist from the harmful conduct, it may order the offending party to take affirmative action to restore the injured party's competitive position or completely cancel the offending party's license to do business. In addition, it may assess substantial fines up to 10% of the value of total assets or 15% of gross total sales. It may also fine individuals who cooperated in the harmful conduct.

7.3.5 Foreign Direct Investment

Introduction

Too many sectors of Ethiopia's economy are closed to foreign investment. Although international corporations do not normally operate in some of these sectors, the restrictions project a generally negative image to potential foreign investors in Ethiopia. In some of the closed sectors, in particular air transport, travel operations, and financial services, the financial and trading skills of foreign investors would likely be a positive influence on domestic investors and stimulate domestic investment activity. In addition, the Government should review and reduce or eliminate its current minimum investment requirements. Moreover, although the Ethiopia Investment Agency (EIA) has taken many positive steps toward encouraging private investment, it lacks resources in terms of the necessary scale and content of its investment promotion activities; its staffing, equipment, and information resources; and its access to and status with other government departments and agencies. To undertake effective promotional work, the EIA should be strengthened.

National policies on investment are critical for encouraging and facilitating foreign investment and maximizing the benefits from it. Ethiopia's current regulatory regime, governing both foreign and domestic investment, has undergone significant changes as part of the reform process started in 1992–1993. The investment regime in Ethiopia is based on a series of investment proclamations issued between 1996 and 2003.²In combination, these laws specify the economic sectors that are open both to domestic and foreign direct investment (FDI); the financial limits and requirements for FDI; the monitoring and reporting requirements; and the financial incentives that are available.

FDI Admission under Ethiopian Investment Law

Unlike many other transition countries, Ethiopia does not have a separate law for FDI. Rather, its various investment proclamations govern both domestic investment and FDI. There are significant distinctions, however, among the type of investments foreigners and domestic investors may make.

Sectors open to FDI

Foreign investors³ are permitted to invest in all economic sectors except those reserved for domestic private sector or State investment. The domestic private investor category includes foreign nationals who are permanent residents⁴ in Ethiopia and who have requested domestic investor status. Moreover, foreign nationals of Ethiopian origin will be considered as domestic investors pursuant of Proclamation 270/2002, even when they

² The key proclamations, which set forth the law governing investment as amended, are Proclamations 7/1996, 37/1996, 35/1998, 36/1998, 116/1998, 168/1999, 280/2002, and 375/2003. (See Annex A for full titles of proclamations.)

³ Proclamation 280/2002, article 2 paragraph 6 defines a foreign investor as “a foreign or enterprise owned by foreign national, having invested foreign capital in Ethiopia, and includes an Ethiopian permanently residing abroad and preferring treatment as a foreign investor.”

⁴Immigration Proclamation 354/2005 and Immigration Regulation 114/2004(Article28) govern the issuance of permanent residence permits.

are not permanent residents of Ethiopia, so long as they have an Ethiopian identification card attesting to their Ethiopian origin.

Sectors open only to the State

Sectors exclusively reserved for investment by the State currently include: transmission and supply of electrical energy through the Integrated National Grid System and postal services, with the exception of courier services and air transport services using aircraft with a seating capacity of more than 20 passengers.⁵ Manufacturing of weapons and ammunition as well as the provision of telecommunication services are open to foreign and domestic investors only when they invest in a joint venture with the State. Investment in generation of electricity (though not its transmission) from hydropower is allowed for both foreign and domestic investors, without any limitation on generation capacity.⁶

Sectors Open to Domestic Investors

A number of sectors are currently reserved for domestic investors, including wholesale trade and distribution (excluding fuel and the domestic sale of locally produced goods from FDI plants); importing (except material inputs for export production); exports of raw coffee, oil seeds, pulses, hides and skins (if bought from the market), and live sheep, goats, and cattle (if not fattened by the investor). Foreign investors are also excluded from the following services and manufacturing activities: construction companies (excluding grade-one contractors) and building maintenance; tanning hides and skins up to crust level; hotels other than those “star-designated”, motels, tearooms, coffee shops, bars, nightclubs, and restaurants, excluding international and specialized restaurants, tour and travel operators, car-hire, taxis, and commercial road and water transport, grain mills, barber and beauty shops, goldsmiths; non-export tailoring; saw milling and non-export

⁵ See Article 3 of Investment (Amendment) Proclamation, Pro.No.375/2003.

⁶ See Article 5 of Proclamation 280/2002

forest products; customs clearance services, museums, and theaters operation, and the printing sector⁷.

Sectors open to Ethiopian nationals

Investment in sectors that the Ethiopian Government considers strategic is reserved to Ethiopian nationals; that is, foreign nationals permanently residing in Ethiopia and foreign nationals of Ethiopian origin, even if they are considered domestic investors, cannot invest in these sectors. The sectors, which are open only to Ethiopian nationals, include banking, insurance, broadcasting, air transport with seating capacity of up to 20 passengers, and forwarding and shipping agency services.

Ownership Limitations and Requirements

Under Article 11 of Proclamation 280/2002, any foreign investor who is allowed to invest pursuant of the proclamation must allocate a minimum amount of investment capital. The proclamation defines “capital” broadly to cover local or foreign currency, negotiable instruments, machinery or equipment, buildings, initial working capital, property rights, patent rights, or other business assets. The Ethiopian Government has relaxed the minimum capital required for foreign investors in its series of Investment Amendments. Pursuant of Proclamation 280/2002, a minimum investment capital is required for wholly-owned operations and joint ventures.

Investment Incentives

Ethiopia offers a number of incentives to investors. First, they are fully exempted from customs duties and import tariffs on all capital equipment and up to 15% on spare parts

⁷ See Council of Ministers Regulations on Investment incentives and Investment Areas Reserved for Domestic Investors No. 84/2003.

and from export taxes. Income tax holidays are given, varying from 1 to 5 years (depending on the sector and region within Ethiopia). In addition, investors can carry forward initial operating losses and are free to use any depreciation method in their financial statement.

Investment guarantees for FDI include full repatriation of capital and profits. The term “capital and profits” encompasses profits, dividends, interest payments on foreign loans, asset sale proceeds, and technology transfer payments. With regard to investment protection, Investment Proclamation 280/2002 provides protection against expropriation or nationalization. It states that no private investment may be nationalized or expropriated except when dictated by public need, and then only in accordance with the law.

In the event of nationalization or expropriation, the constitution guarantees advance payment of adequate compensation corresponding to the prevailing market value of the investment. There has been no instance of expropriation since the assumption of power by the current government in 1991. Because Ethiopia does not distinguish domestic investment from FDI, the country’s incentive system is the same for both. This is a sound, non-discriminatory policy, and it is also the direction pursued by some countries that started with the two-policy strategy. The only possible “discrimination” occurs in the pre-admission of sub sector restrictions discussed earlier in this section.

Post-Admission Restrictions: Performance Requirements

Ethiopian FDI policy does not *explicitly* require foreign firms to meet specific performance goals or guidelines such as export limitations, foreign exchange restrictions for imports, minimum local content levels in manufactured goods, or employment limits on expatriate staff. In some countries, once a foreign investor is permitted to enter the host state, restrictions can still be imposed on the ownership or operation of the foreign investment. The most common forms of post-admission restrictions are performance requirements, which are used to optimize the impact of FDI. Performance requirements are stipulations, imposed on investors, requiring investors to meet certain specified goals

with respect to their operations in the host country. Broadly speaking, Ethiopian investment laws do not have any significant post-admission restrictions.

Screening and Registration

Together with the application for an investment permit, a potential investor must submit supporting documents. The EIA will, upon receipt of the documents, issue a certificate of registration evidencing the formation of a branch of an overseas company. The operation of any business organization in Ethiopia will be governed by the 1960 Commercial Code of Ethiopia, which recognizes the following forms of business organizations: (a) general partnership, (b) limited partnership, (c) share company, and (d) private limited company. The most common of these are private limited and share companies.

Any two individuals may set up a private limited company, but a minimum of five founders is required to establish a share company, which is a public company. An individual investor may also invest as a sole proprietor, with full equity ownership in most areas. Areas open for joint-venture investment with the government are the manufacture of weapons and ammunition and telecommunication services. By reducing the minimum capital requirement, the investment proclamation encourages joint ventures with Ethiopian individuals and companies. Partially or fully foreign-owned companies may sell their shares in accordance with the law. However, there are no stock markets to facilitate the quick disposal of shares.

Acquisition of Immovable Property and Access to Capital

Articles 390–393 of the Ethiopian Civil Code prohibit foreign ownership of immovable property except by “imperial order.” However, Article 38 of Investment Proclamation 280/2002 gives a foreign investor the right to own a dwelling house and other immovable property necessary for his investment. Article 38 of Proclamation 280/2002 can, therefore, be considered an exception to the Civil Code. Legally established foreign companies in Ethiopia have access to domestic bank loans on the same terms as domestic

investors. Exporters also have access to external loans and suppliers' or foreign partners' credit in keeping with the directives of the National Bank of Ethiopia (NBE). However, foreign investors must have their investment capital, external loans, and suppliers' or foreign partners' credits registered with the NBE.

Access to Land

The 1993 Urban Land Proclamation gives investors the use right of land on leasehold for periods of up to 99 years. The land cannot be mortgaged or sold, but the lease value of the land and the fixed assets thereon may be mortgaged or transferred to a third party. State governments and municipal administrations are authorized to allocate rural and urban land free of charge or on lease, in accordance with the provisions of their laws. Investment projects in social services, such as hospitals and educational institutions, may acquire land free of charge, while export-oriented investment schemes may obtain land at reduced lease prices. All other projects may rent land through public auction or through negotiation with the relevant authorities. Regional governments are expected to allocate land to investors within 60 days after receiving their applications.

Article 35 of Investment Proclamation 280/2002 provides that “[when] a regional government receives an application for the allocation of land for an approved investment, it shall deliver within 60 days, the required land to the investor.” However, this does not always occur in practice because there is no sanction if a regional or local government does not meet the 60-day requirement. The lease price of urban and rural land varies according to location, type of investment, and class of land. The high cost of land lease and the lengthy bureaucratic process are considered impediments to investment inflows. This material’s section on Real Property discusses the adverse effects on foreign and domestic investment of the current land laws and procedures and makes a number of recommendations on how they can be addressed.

Exchanging and Remitting Funds

A foreign investor has the right to take the following remittances out of Ethiopia in convertible foreign currency:

- profits and dividends;
- principals and interest payments on external loans;
- payments related to technology agreements;
- proceeds from the sale or liquidation of an enterprise; and
- proceeds from the sale or transfer of shares or partial ownership of an enterprise to a domestic investor.

Although Article 20 of Proclamation 280/2002 guarantees to foreign investors the right to make remittances, domestic investors who do not have the same assurance and remittances are subject to NBE approval. Also the trading rights of foreign investors are limited because import and export trade, except material inputs for export products, is reserved for domestic investors. Ethiopia has signed the World Bank's convention on the settlement of Investment Disputes and Nationals of other States. A Multilateral Investment Guarantee Agency (MIGA) guarantee program is also operational.

Exit from FDI

The Commercial Code of Ethiopia (1960) provides for the dissolution and winding up of legally established business organizations. The possible reasons for dissolution of the different types of business organization recognized by the Commercial Code are also provided. One legitimate reason for the dissolution of a share company, for example, may be the resolution of an extraordinary general assembly of shareholders. Having resolved to liquidate, the general meeting must appoint liquidators, if provisions are not made for such appointment in the memorandum or articles of association. The liquidators must follow the rules and procedures of the Commercial Code in liquidating the share company.

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