Leiden Journal of International Law, 23 (2010), pp. 53–77
© Foundation of the Leiden Journal of International Law doi:10.1017/S0922156509990331

Indian Courts and International Law

V. G. HEGDE*

Abstract
The approach of Indian courts towards international law has been consistently evolving. Initially, the Indian constitutional framework provided a flexible basis for the application and use of international law, the reasons for which could be seen in the socio-political context of India as a developing country. India, for its part, continued to argue that it remained essentially at the periphery of the mainstream international law, as it had no role in formulating some of the basic principles of international law. For the Indian courts the first substantive encounter with international law emerges in the context of several territorial-related issues. The socio-political context forms the next phase, for the Indian courts to have recourse to diverse international legal norms relating to the environment and human rights and applying them as a persuasive tool. Later, the development context brings a complex array of commercial, environmental, and other related international legal norms into the Indian legal system. For Indian courts, in the present context, the correct sourcing and identification of international legal norms and their application remain a huge challenge. The majority of the legal systems of developing countries for varied historical reasons continue to treat international law as an exotic legal tool to be used sparingly, perhaps only to broaden the interpretation of or sustain a comparable domestic legal norm.

Key words
Indian courts; foreign law; international law; legal structures; relationship

1. Introduction

The emphasis on European contributions to the development of modern international law tends to overshadow those of other states and entities to the evolution of norms relating to the conduct of states. Many global societies outside Europe, however, developed norms defining the contours of the state, thereby extending its scope to diverse legal relationships.[1] For example, certain norms regulating state conduct were in vogue on the Indian subcontinent from early times and these were strictly adhered to.[2] The idea of sovereignty distinguished the origin

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* Associate Professor, Centre for International Legal Studies, School of International Studies, Jawaharlal Nehru University, New Delhi [vghegde@gmail.com].

1 These normative developments have been termed 'legal pluralism'. In another sense the term used is 'fragmentation'. It has been pointed out that 'fragmentation is in this regard a "natural" development (indeed, international law was always relatively "fragmented" due to the diversity of national legal systems that participated in it)'. M. Koskenniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 4 April 2006, at 12.

2 The origin and establishment of the state in ancient India has been well documented. For example, Sukra salutes the Tree of State with six principles of statecraft (*sandhi* – agreement, *vigraha* – hostilities, *yana* – marching or mobilization, *asana* – readiness to attack, *dvaidhibhava* – division of troops or double-dealing, and *asraya* – subordinate alliance) as its protecting branches, its four beautiful flowers (*sama* – conciliation, *dana* – concession, *danda* – force, and *bheda* – dissension), and its three fruits (*dharma*, *artha*, and *kama* – religious,

https://doi.org/10.1017/S0922156509990331 Published online by Cambridge University Press

of European notions of international law from others, and it dominated global affairs for centuries.[3] Much later, the end of Second World War brought significant and far-reaching changes in the composition and evolution of the international community, with scores of new states joining it. These new states hoped for the creation of a more equitable and egalitarian world order.[4] The realization of such an order was not easy. At the other end of the scale, the establishment of a viable domestic legal structure that would effectively deal with varied internal political and socio-economic tensions was also an enormous challenge to these new states. Reformulation of the colonial legal structures inherited by these states from their previous regimes was simply not feasible. Accordingly, these new states continued with the existing legal structures, hoping to transform them gradually. The features of the Indian legal system, as it exists today, are essentially a British legacy. While the structures of Indian courts retained this colonial legacy, the response of the political establishment of the new India towards international law was anti-colonial. In this setting, India resisted acceptance of certain international legal norms in whose formulation it had had no role to play. Joining with other Asian and African countries, India sought to question the legality of some of the basic principles of international law, and consistently argued that it in essence remained at the periphery of the international legal system.[5]

The British and other European powers came to India armed with their specific notions of law and justice. They firmly believed that their idea of justice was superior to the native legal structures. These notions of superiority, however, have been disputed, for these European powers, formally and on an equal footing, were dealing with another well-developed legal system. The first British and European settlements established in India during the seventeenth century, for instance, were allowed 'by leave of a regularly established government, in

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social, and economic welfare). See N. Singh, *India and International Law* (1969); N. Singh, 'The Concept of Legal Regimes: Its Origin, Development and Attendant Factors', in M. K. Nawaz (ed.), *Essays on International Law in Honour of Krishna Rao* (1970), 20; C. H. Alexandrowicz, '*Kautilyan* Principles and the Law of Nations', (1965–6) 41 *British Year Book of International Law* 301; C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (1967); R. P. Anand, New *States and International Law* (1972); M. Sornarajah, 'The Asian Perspective to International Law in the Age of Globalization', (2001) 5 *Singapore Journal of International and Comparative Law* 284; P. C. Jessup, 'Diversity and Uniformity in the Law of Nations', (1964) 58 AJIL 351; the *Indian Journal of International Law* has published several articles on this issue since its inception in 1960. Some of them could be noted here: C. J. Chacko, 'International Law in India: Ancient India', (1960) 1 *Indian Journal of International Law* 184 (published in two parts); N. Singh, 'International Law in India: Mediaeval India', (1962) 2 *Indian Journal of International Law* 65 (published in three parts).

3 R. P. Anand, 'Sovereignty of States in International Law', in Anand, *Confrontation or Cooperation: International Law and the Developing Countries* (1987); S. D. Krasner, *Sovereignty: Organized Hypocrisy* (1999); R. A. Brand, 'Sovereignty: The State, the Individual, and the International Legal System in the Twenty-First Century', (2002) 25 *Hastings International and Comparative Law Review* 279; W. P. Nagan, FRSA, and C. Hammer, 'The Changing Character of Sovereignty in International Law and International Relations', (2004) 43 *Columbia Journal of Transnational Law* 14.

4 R. P. Anand, 'Role of the "New" Asian–African States in the Present International Legal Order', (1962) 56 AJIL 395; Anand, *supra* note 2; see also B. S. Chimni, *International Law and World Order* (1993); U. Baxi, 'The New International Economic Order, Basic Needs and Rights: Notes towards Development of the Right to Development', (1983) 23 *Indian Journal of International Law* 225.

5 R. P. Anand, 'Attitude of the Asian–African States toward Certain Problems of International Law', (1966) 15 *International and Comparative Law Quarterly* 56; M. Mushkat, 'The African Approach to Some Basic Problems of Modern International Law', (1967) 7 *Indian Journal of International Law* 335; R. Khan, 'International Law: Old and New', (1975) 15 *Indian Journal of International Law* 371.

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possession of the country, invested with the rights of sovereignty, and exercising its powers'.[6] The native Indian legal system was with the passage of time gradually transformed into a British legal system. The courts were, accordingly, established based on British laws, slowly dislodging the Indian way of dispute settlement.[7]

The Indian Supreme Court, whatever its form and jurisdiction, was established in 1773.[8] The British legal system and the courts established under that system treated local Indians and the British differently. It took another century and a half to introduce some kind of procedural and substantive equality into the Indian court structures. The Government of India Act, 1935, formally established a seemingly more egalitarian Federal Court, a predecessor of the present Indian Supreme Court.[9] This Federal Court had a defined jurisdiction. It primarily had exclusive jurisdiction over any dispute between the Federation and other provincial units, or any dispute that existed between provincial units *inter se*. Appeals lay to the Federal Court from any high court in British India if that court certified that the case involved a substantial question of law as interpreted by the Government of India Act, 1935.[10] There was no specific reference to international law in this colonial enactment. The Indian Supreme Court had its first formal encounter with international law immediately after its independence, when it had to decide the constitutional validity of executive action initiated for the purpose of territorial adjustments. Only in recent years has the higher judiciary in India increasingly invoked a diverse set of international legal norms, particularly in the field of human rights[11] and the environment, to find new ways to achieve the ends of justice.[12]

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6 Lord Brougham in *Mayor of Lyons* v. *East India Company* in M. P. Singh (ed.), *V. N. Shukla's Constitution of India* (1992), 1; C. H. Alexandrowicz, 'Mogul Sovereignty and the Law of Nations', (1955) 4 *Indian Year Book of International Affairs* 317; C. H. Alexandrowicz, 'The Discriminating Clause in South-East Asian Treaties in Seventeenth and Eighteenth Centuries', (1957) 6 *Indian Year Book of International Affairs* 126; C. H. Alexandrowicz, 'Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries', (1960) 100 RCADI 207.

7 The ancient Indian way of dispute settlement is through negotiation and conciliation. The institutional structure for dispute settlement at the village level comprised a cross-section of the people (like juries). The common Indian word used for this purpose is *panchayat*. The Indian Constitution was amended in 1992 (73rd Amendment) to provide formal authority to *panchayats* to deal with local-level developments, including settlement of local disputes. Accordingly, *panchayats* possess quasi-judicial powers in this regard. The *lok adalat* (people's court) is another informal way of settling disputes by means of negotiation and conciliation. India has a separate ministry that looks after *panchayat* affairs; see www.panchayat.gov.in.

8 Singh, *supra* note 6, at 4; the Regulating Act, 1773, was the first parliamentary act that was passed after the East India Company had acquired de facto sovereignty over vast territories in the north-east of India. This enactment primarily aimed at better management of the affairs of the East India Company.

9 The Federal Court, established pursuant to Government of India Act, 1935, consisted of a chief justice and not more than six other judges. This format continued even after India became independent. The first sitting of the Indian Supreme Court in the independent India had six Indian judges. For a history of the Supreme Court see www. supremecourtofindia.nic.in.

10 There are, however, some changes. The Government of India Act, 1935, had provided for appealing to the Privy Council from the original jurisdiction of the Federal Court in constitutional maters. Although this appealing provision no longer exists, the binding or persuasive nature of the Privy Council decisions within the Indian court system is a matter that needs careful consideration. In the absence of any authoritative interpretation the Indian courts feel comfortable in taking recourse to English cases.

11 A.-M. Slaughter and W. Burke-White, 'The Future of International Law is Domestic (or the European Way of Law)', (2006) 47 *Harvard International Law Journal* 327; Y. K. Tyagi, 'The Conflict of Law and Policy on Reservation to Human Rights Treaties', (2000) 71 *British Yearbook of International Law* 181.

12 S. J. Sorabjee, 'Equality in the US and India', in L. Henkin and A. J. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the US Constitution Abroad* (1994); P. Chandrasekhara Rao, *The Indian Constitution and*

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This study is of Indian courts, and it will examine the way in which they perceive international law. However, the main focus is limited to the analysis of the decisions of the Indian Supreme Court. International law, it should be noted, remains an exotic, yet persuasive, legal tool for Indian courts, and is usually invoked at the level of high courts and the Supreme Court, although the lower judiciary gets to invoke some elements of international law and foreign law at the procedural level.[13] The study identifies three distinct contexts, besides examining the context of the constitutional framework, through which Indian courts traversed and contributed to the development of international law. It should, further, be noted that this contextualization, categorized below, is typical of a developing country such as India as to how it seeks to perceive and internalize international law.

The first context develops from 1947 to 1970. During this phase India had to deal with an array of complex territorial and boundary issues and their resolution within its constitutional framework.

The second context emerges during the 1970s and continues into the 1990s. In this phase India, encountering intense socio-political and economic turmoil, faces several internal challenges. In response to this, one could see Indian courts taking up several environment and human rights-related cases.[14] Finding no suitable internal legal principle on which to fall back, the Indian Supreme Court invariably turned to international law and related sources. In this period we also see some measure of ambivalence in the approach of the Supreme Court to applying international law as a stand-alone source of domestic legal system. In other words, the Supreme Court would primarily base its decision on a domestic legal provision, with international law providing the added justification.

India's new economic agenda forms the backdrop for the analysis of the third context, which begins somewhere in the early 1990s and continues till this day. In this phase, although the environment and human rights continue to remain

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International Law (1993); S. K. Agrwala, 'Law of Nations as Interpreted and Applied by Indian Courts and Legislature', (1962) 2 *Indian Journal of International Law* 431.

13 Some examples of these procedural requirements invoked by the lower judiciary – i.e., district courts and below – could be broadly identified. These are (a) ensuring the observance of human rights in custody; (b) enforcement of foreign judgments; (c) Internet crimes; (d) extradition matters; (e) service of summons in foreign jurisdictions; (f) implementation of arbitral awards; (g) matrimonial cases and issues concerning maintenance; (h) bail applications of foreign nationals, particularly with regard to sureties and related issues; (i) enforcement of intellectual property rights; (j) recognition and dissolution of marriages solemnized in India and outside India; (k) breach of contract suits, specially in cases where this suit has been dismissed in other (foreign) jurisdictions; (l) dealing with restitution decrees granted in another country; (m) issues concerning inter-country adoptions; (n) breach of contract by multinational companies; (o) child custody and alimony matters; (p) environmental issues and granting of injunctions and so on in a suit.

14 U. Baxi, 'Taking Human Suffering Seriously: Social Action Litigation before the Supreme Court of India', in N. Tiruchelvan and R. Coomaraswamy (eds.), *The Role of the Judiciary in Plural Societies* (1987); U. Baxi, *Indian Supreme Court and Politics* (1980); U. Baxi, *From International Law to the Law of Peoples* (2006); R. Bahdi, 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts', (2002) 34 *George Washington International Law Review* 555; W. Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere', (2004) 5 *Melbourne Journal of International Law* 108; J. Goldsmith, 'Should International Human Rights Law Trump US Domestic Law?', (2000) *Chicago Journal of International Law* 327; B. Desai, 'Enforcement of the Right to Environment Protection through Public Interest Litigation in India', (1993) 33 *Indian Journal of International Law* 27.

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the primary source of contention, the Indian Supreme Court has moved into considering more complex international commercial and trade matters as well.[15]

2. The constitutional context

The exclusive reference to international law in the constitution can be found in Article 51. This provision is hortatory in nature, as it exhorts the Indian state to make all possible endeavours to adhere to and respect international law. The Constitution of India is a comprehensive document containing provisions relating to fundamental rights granted to individuals and directions to the Indian state with regard to certain policy adherences. It also includes various aspects relating to institutional mechanisms. While fundamental rights are strictly enforceable, the policy directions to the state are not. The Indian Supreme Court, time and again, had to deal with the issue of the primacy of Part III (dealing with fundamental rights)[16] over Part IV (Directive Principles of State Policy) in cases of conflict. The Directive Principles of State Policy are, as the Court puts it, fundamental in the governance of the country, but may not necessarily override the fundamental rights.[17] Article 51, as part of the Directive Principles of State Policy, refers to international law. It states that

> The State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of the organized peoples with one another; and (d) encourage settlement of international disputes by arbitration.

One may refer to the drafting history of this provision to understand Indian thinking at that time on international relations and international law. According to some commentators, the drafting of Article 51 was inspired by the Havana Declaration of 30 November 1939, adopted under the auspices of the International Labour Organization (ILO).[18] The declaration referred to the promotion of international

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15 Several new pieces of legislation come into effect during this phase on account of India's increasing role in global affairs. For the courts it becomes a necessity to find ways and means to interpret some of this new legislation in the context of India's multilateral obligations within certain global institutions, e.g. the World Trade Organization (WTO). To meet the challenges of its new economic agenda India enacted new legislation such as, for example, the Indian Arbitration and Conciliation Act, 1996 (based on the UN Commission on International Trade Law (UNCITRAL) model); several new intellectual property laws, such as the Geographical Indications of Goods (Registration and Protection) Act, 1999, Protection of Plant Varieties and Farmers' Rights Act, 2001, Biological Diversity Act, 2002. Some existing laws were amended; for example the Patents Act, 1970, and the Copyright Act, 1957, were amended to give effect to the obligations undertaken under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) concluded under the auspices of the WTO. These examples are representative, as there are many other areas such as, for instance, labour, human rights, and the environment, in which India brought out a plethora of new laws.

16 Fundamental rights include some of the basic rights granted to individuals, such as equality before the law, equal opportunity, freedom of speech and expression, protection of life and liberty, and the right to freedom of religion. The Indian Supreme Court, in one of its earliest cases, stated, 'The whole object of Part III of the Constitution is to provide protection for the freedom and rights mentioned therein against arbitrary invasion by the State.' *State of West Bengal* v. *Subodh Gopal Bose*, AIR1954 SC 92.

17 Unlike provisions relating to fundamental rights that are enforceable, directive principles are unenforceable. Art. 37 provides that the directive principles (in Part IV of the Indian Constitution) are not enforceable by any court, but the principles laid down are nevertheless fundamental in the governance of the country. This provision also places a duty on the state to apply these principles in making laws.

18 This declaration was adopted by the representatives of the governments, employers and work-people of the American Continent at the Second Conference of American States Members of the International Labour

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co-operation and the imperative need to achieve international peace and security by the elimination of war as in instrument of national policy. It also referred to international law as the actual rules of conduct between governments and respect for treaty obligations in the dealings of organized peoples with one another. The similarity of the language between the declaration and Article 51 of the Indian Constitution is evident, and for this reason the prevailing assumption is that the formulation of Article 51 is based on the declaration. Just a few years before the formulation of Article 51, India had participated in the negotiations and adoption of the UN Charter.[19] Thus some imprints of the language of the Charter could also be seen in the formulation of Article 51.

The initial draft of what was to become Article 51 had a more definitive language.[20] The language of the final text was a watered-down version. These changes can be addressed briefly. The phrase 'the State shall', for example, became 'the State shall endeavour to'. The reference to international law as the 'firm establishment of the understandings of international law' was reduced to 'foster respect for international law and treaty obligations'. The phrase 'elimination of war as an instrument of national policy' that had appeared in the original draft was completely deleted.

All these changes and deletions suggest that India had perhaps anticipated future bitter engagements with some of its neighbours. The incursions into Kashmir followed by a skirmish in 1948 must also have had their effect on this drafting exercise. The Kashmir imbroglio, the sharing of Indus waters, and other territorial claims[21] by its neighbours contributed to the moderation of this provision. Pakistan constantly advocated the judicial settlement of all these issues, while India, on the other hand, was totally opposed.[22] On both Kashmir and sharing the Indus waters, India had preferred negotiated settlements. It was even prepared to go for arbitration rather than a binding judicial settlement. The inclusion of clause (d) in Article 51, referring

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Organization held in Havana on 21 November–2 December 1939. India was a member of the ILO and some of the members of the Constituent Assembly perhaps either attended this meeting or had knowledge of this Declaration; see Chandrasekhara Rao, *supra* note 12.

19 The Indian delegation, it has been pointed out, played an active role in the drafting of the provisions concerning the United Nations General Assembly. See M. S. Rajan, *India and Making of the UN Charter in United Nations and World Politics* (1995), 315; R. P. Anand, 'Jawaharlal Nehru and International Law and Relations', in Anand, *Studies in International Law and History: An Asian Perspective* (2004), 16; M. Sahovic, 'Nehru's Ideas and the Future of International Law', (1989) 29 *Indian Journal of International Law* 94.

20 The draft, *inter alia*, stated, 'The State shall promote international peace and security by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organized people with one another'; see B. Shiva Rao, *The Framing of India's Constitution, Select Documents* (1967), 14.

21 See R. Khan, *Kashmir and the United Nations* (1969); C. J. Chacko, 'The Rann of Kutch and International Law', (1965) 5 *Indian Journal of International Law* 147; P. Chandrasekhar Rao, 'Indo-Pakistan Agreement on the Rann of Kutch: Form and Content', (1965) 5 *Indian Journal of International Law* 176; H. Singh, 'The Indo-Ceylon Agreement of 1964: The Question of Separate Electoral Registers', (1965) 5 *Indian Journal of International Law* 9; H. Singh, 'The Kachchativu Question', (1968) 8 *Indian Journal of International Law* 49; B. S. N. Murti, 'The Kutch Award: A Preliminary Study', (1968) 8 *Indian Journal of International Law* 51; T. S. Rama Rao, 'An Appraisal of the Kutch Award', (1969) 9 *Indian Journal of International Law* 143; V. S. Mani, 'The 1971 War on the Indian Sub-continent and International Law', (1972) 12 *Indian Journal of International Law* 100.

22 See N. D. Gulati, *Indus Water Treaty: An Exercise in International Mediation* (1973); see also A. A. Michel, *The Indus Rivers: A Study of the Effects of Partition* (1967); S. C. McCaffrey, *The Law of International Watercourses* (2007).

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to India's commitment to encouraging 'settlement of international disputes by arbitration' as one of its stated policies should be seen in this context. However, there were strong reservations about this reference to settling disputes through arbitration.[23]

This also explains why India sought to place this reference to international law and other related issues in Part IV of the constitution. International legal norms are not directly enforceable within India *sans* appropriate domestic legislation giving effect to these norms.[24] Despite this, Indian courts have largely succeeded in opening new windows to welcome international legal norms through creative interpretative techniques, aligning it, for example, with fundamental rights. This combination of fundamental rights and international legal norms has, in fact, produced an exemplary and potent body of jurisprudence, expanding in the process the scope and application of certain norms relating to human rights and the environment. It should be noted that the scope of Article 51, as its language suggests, is limited. The framers of the Indian Constitution, for practical reasons and also for the reasons stated above, injected a language into Article 51 that seems to work within the realm of possibilities.

While Article 51 of the constitution provides the substantive reference to international law, there are other procedural provisions which concern treaty-making.[25] The Indian constitutional scheme vests power and authority with the executive to conclude a treaty, while clearly demarcating a line between the formation of a treaty and its performance.[26] In recent years this dual responsibility of the executive to conclude and to implement the treaties has become a contentious issue in India.[27] For implementation is linked to Article 253 of the constitution that places power in the parliament 'to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decisions made at any international conference, association or other body'.

Article 253 could be regarded as articulating a 'transformation doctrine', essentially a positivist–dualist position.[28] However, the emerging case law from the Indian

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23 Chandrasekhar Rao, *supra* note 12, at 7.

24 See National Commission to Review the Working of the Constitution, *A Consultation Paper on Treaty-Making Power under Our Constitution* (2001); see also C. H. Schreuer, 'The Interpretation of Treaties by Domestic Courts', (1971) 45 *British Year Book of International Law* 255.

25 Art. 246 of the Indian Constitution distributes legislative power between the union (i.e. federation) and the states (i.e. federal units). The various matters of legislation have been enumerated in three lists in the seventh schedule to the Constitution. List I is the Union List; central government has the power to legislate on all items listed there. List II is the State List; states have the power to legislate on items listed there. Finally there is List III, which is termed the Concurrent List. Both the centre and the individual state could legislate on all items listed on the Concurrent List.

26 Entry 14 of the Union List enumerates the scope of the executive in treaty-making. This power of the executive extends not only to the 'entering into treaties and agreements with foreign countries', but to the 'implementing of treaties, agreements and conventions with foreign countries'.

27 See S. K. Jha, *Final Act of WTO: Abuse of Treaty-Making Power* (2006).

28 This doctrine requires that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically 'transformed' into municipal law by the use of the appropriate constitutional machinery, such as an act of parliament. In *Attorney-General for Canada v. Attorney-General for Ontario*, the position taken by Lord Atkin is well known. He pointed out that the making of a treaty was an executive act, while the performance of its obligations, if they involved alteration of the existing domestic law, required legislative action. See M. N. Shaw, *International Law* (1997), 129, 151; see

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Supreme Court in recent years seems to favour the doctrine of 'incorporation'.[29] This changeover happened in the UK courts in 1977 with the decision of the Court of Appeal in *Trendtex Trading Corporation* v. *Central Bank of Nigeria*. In *Gramophone Company of India Ltd* v. *Birendra Bahadur Pandey and Others* (hereinafter *Gramophone* case)[30] the Indian Supreme Court, while referring to the *Trendtex* decision,[31] stated, 'Two questions arise, first, whether international law is, of its own force, drawn into the law of the land without the aid of a municipal statute and, second, whether so drawn, it overrides municipal law in case of conflict'. If the municipal law conflicts with international law, the Court further noted that

> [T]he sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. *Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law.* National Courts will endorse international law but not if it conflicts with national law.[32]

In *Vishaka and Others* v. *State of Rajasthan and Others*[33] the Indian Supreme Court appeared to have moved from transformation doctrine to incorporation doctrine. In this case the Court stated *inter alia* that 'Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.' While the English courts moved from transformation to incorporation doctrine with regard to the implementation of customary international law, the Indian Supreme Court, on the other hand, seemed to have moved a step further by taking into account the norms as embodied in the international conventions.[34] Indeed, some of these norms incorporated in the

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also B. R. Opeskin, 'Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries', (2001) 27 *Commonwealth Law Bulletin* 1242.

29 The 'incorporation' doctrine holds that international law is *ipso facto* part of municipal law, and there is no need to invoke constitutional machinery to recognize it as part of municipal law. It has been argued that the incorporation doctrine is strictly applicable with regard to customary international law. The Indian Supreme Court has come closer in recognizing this doctrine in *Vishaka and Others v. State of Rajasthan and Others*, AIR 1997 SC 3011. English cases are legion, starting with *Buvot v. Barbuit* (1734), *Triquet v. Bath* (1736), *R v. Keyn* (1876), *West Rand Gold Mining Co. v. R* (1905), *Commercial and Estates Co. of Egypt v. Board of Trade* (1925), *Chung Chi Cheung v. R* (1939), *Thai-Europe Tapioca Service Ltd v. Government of Pakistan* (1975), *Trendtex Trading Corporation v. Central Bank of Nigeria* (1977), *Maclaine Watson v. Department of Trade and Industry* (1988), and *Ex Parte Pinochet (No. 1)* (2000). See generally for discussions on this case law Shaw, *supra* note 28.

30 AIR 1984 SC 667.

31 The Supreme Court noted that Lord Denning, 'who had once accepted the transformation doctrine without question, later veered round to express a preference for the doctrine of incorporation and explained how courts were justified in applying modern rules of international law when old rules of international law changed'. Ibid., at 671.

32 Ibid. (emphasis added). See also *Additional District Magistrate, Jabalpur v. Shivakant Shukla* (hereinafter *ADM, Jabalpur*), AIR 1976 SC 1207; *Tractoroexport, Moscow v. Tarapore & Company and Another*, Manu/SC/003/1969.

33 AIR 1997 SC 3011.

34 Ibid. The Court stated, *inter alia*, 'in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance . . . until a legislation is enacted for the purpose'.

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international conventions are customary norms, and the Court found, prima facie, no difficulty in accepting them, albeit with certain reservations.

It is, however, not yet clear what position Indian courts, specifically the Supreme Court, would take if a domestic norm conflicts with a customary norm of international law.[35] In *Additional District Magistrate, Jabalpur* v. *Shivakant Shukla*[36] the Supreme Court noted, after referring to several authorities, that

> [I]f there be a conflict between the municipal law on one side and the international law or the provision of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the court should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with international law or treaty obligations.

Even in later cases relating to the protection and preservation of the environment, the Court kept the door of 'consistency' of customary international law with municipal law open. Unlike the English courts, the Indian Supreme Court is not yet ready to grant customary international law any primacy over municipal law in case of conflict. In *Vellore Citizens Welfare Forum* v. *Union of India and Others*[37] the Court, referring to the 'precautionary principle' and the 'polluter pays principle' as part of the environmental law of the country, stated,

> Even otherwise, once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.[38]

The reasoning of the English courts in accepting customary norms as part of the municipal system without looking for any transformation needs consideration when looking to see whether Indian courts would accept this radical position. The reasoning, in fact, takes into account the nebulous and complex nature of international law and its formation. The primary reason for this change was rooted in the idea that the courts could not otherwise recognize changes in the norms of international law. The *Trendtex* decision states, *inter alia*, that 'it is the nature of international law and the specific problems of ascertaining it which create the difficulty in the way of adopting or incorporating or recognizing as already incorporated a new rule of international law'.[39] The Indian Supreme Court has yet to take into account the complexity of sourcing correct and updated trends in international law on a continuing basis. The period taken for the formative process of international

35 The Supreme Court has stated that in case of such a conflict the domestic law would prevail for all practical purposes. The Court has also said that the effort would be not to read conflict into the interpretations of the domestic law. It would, therefore, look for a harmonious interpretation. The Court, however, looks at treaties differently. It states, 'If there is any deficiency in the Constitutional system it has to be removed and the State must equip itself with the necessary power'. See *Maganbhai Ishwarbhai Patel v. Union of India and another*, AIR 1969 SC 783 or (1970) 3 Supreme Court Cases (SCC) 400.

36 *ADM, Jabalpur*, *supra* note 32, at 1207.

37 AIR 1996 SC 2715 or (1996) 5 SCC 647.

38 Ibid., at 2719.

39 Shaw, *supra* note 28, at 133.

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legal norms through state practice is becoming increasingly shorter. In addition to this, the subject matter being dealt with by international law is also becoming increasingly diverse and complex. Despite this, the observations of the Indian Supreme Court in several cases indicate that there is still some hesitancy in recognizing prima facie the legality and applicability of customary norms of international law within domestic legal structures. The Court continues to stick to the requirement of 'consistency' of customary international law with the municipal law.[40]

3. The territorial context: 1947 to 1970

The relationship between Articles 51 and 253 was first examined substantively by the Indian Supreme Court in *Maganbhai Ishwarbhai Patel* v. *Union of India and Another* (hereinafter *Maganbhai*).[41] The Supreme Court dealt, albeit briefly, with four cases that preceded *Maganbhai* in examining this relationship. That the subject matter of these four cases containing elements of international law related to the aspects of determination of boundaries was no accident. As stated above, in its first two decades of existence the Indian government was burdened with complex territorial and boundary negotiations as a consequence of partition of the subcontinent. The implementation processes that were the outcome of some of these negotiations were challenged before the Indian courts by the affected Indian citizens. The important question was whether the territory could be ceded to another country through an executive decision or whether it should be done through a constitutional amendment. The adjustment of an undefined boundary through marking was regarded as something that could be effected through an executive act.[42] The adjustment of the boundary or territory pursuant to an order of the arbitral tribunal was regarded as a ceding of the territory, necessitating a constitutional amendment.[43] In these cases, decided immediately after India gained independence, the important issue related to the preservation of its sovereign identity vis-à-vis its neighbours. In one case that was to decide the extent of Indian occupation of Goa, issues related to the applicability of the 1949 Geneva Conventions and the consequent applicability of Article 51.

40 Consider the statement made in the *West Rand Gold Mining Co. Case* (1905). It is stated that whatever had received the common consent of the civilized nations must also have received the assent of the United Kingdom and as such would be applied by the municipal tribunals. See Shaw, *supra* note 28, at 131. It could be argued that even this averment by the English courts poses this issue of 'civilized nations'. How does one categorize 'civilized and non-civilized nations'? For an authoritative elucidation of the concept concerning 'General Principles of Law Recognized by Civilized Nations' see P. S. Rao, 'The Indian Position on Some General Principles of International Law', in B. N. Patel (ed.), *India and International Law* (2005), 33.

41 AIR 1969 SC 783 or (1970) 3 SCC 400.

42 It has been concluded that treaties relating to the conduct of war, the cession of territory and the imposition of charges on the public purse do not need an intervening act of legislation before they can be made binding upon the citizens of the country. A similar situation exists also with regard to relatively unimportant administrative agreements which do not require ratification as they do not purport to alter municipal law. See Shaw, *supra* note 28, at 138.

43 Ibid. It has further been noted that internal laws are required when a treaty affects private rights, creates financial obligations for the state, or involves the cession of territory through an agreement or through an order of the arbitral tribunal.

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The earliest case was *Midnapore Zamindary Co. Ltd.* v. *Province of Bengal and Others*.[44] The Court[45] in this case noted that 'disputes as to boundaries between two independent States cannot be the subject of inquiry of municipal courts exercising jurisdiction in either State'. This case was followed by *In re The Berubari Union and Exchange of Enclaves*[46] (hereinafter *Berubari I*). *Berubari I* was a reference by the president of India to the Indian Supreme Court on certain questions concerning the transferring to East Pakistan (now Bangladesh) of the Berubari Union and the exchange of certain enclaves, pursuant to an agreement concluded between the prime ministers of India and Pakistan. The government of India argued that this agreement between two prime ministers 'ascertained and delineated the exact boundary and did not involve alteration of territorial limits of India or alienation or cession of Indian Territory'.[47] The government of India further argued that this agreement between two prime ministers could be 'implemented by executive action alone without Parliamentary legislation whether with or without a Constitutional amendment'.[48]

The Court, however, did not agree with the contention that it was the ascertainment of the boundary between the two countries. The Court further noted that there was ceding of territory pursuant to an order of the tribunal duly constituted by both states. This was not merely a marking of the boundary. The Court concluded that in order to cede the Berubari Union an amendment of the constitution was necessary.[49] Following this case, the Indian Supreme Court in *Ramkishore Sen and Others* v. *Union of India*,[50] also known as *Berubari II*, again had to deal with the question of the transfer of a small portion of territory to East Pakistan. The Court, after considering the facts of the case, came to the conclusion that a constitutional amendment was not necessary to transfer or readjust some of the territories in the present case.

The *Maganbhai obiter dicta* concerning both *Berubari I* and *Berubari II* should be noted. The Supreme Court stated, *inter alia*,

> Ordinarily an adjustment of a boundary which International Law regards as valid between two Nations, should be recognized by the Courts and the implementation thereof can always be with the Executive unless a clear case of cession is involved when Parliamentary intercession can be expected and should be had. This has been the custom of Nations whose Constitutions are not sufficiently elaborate on this subject.[51]

The *ratio* of *Maganbhai* sums up the scope of executive order that could implement and determine the relationship between Articles 51 and 253, when it stated, *inter alia*, that 'The decision to implement the Award by exchange of letters, treating the Award as an operative treaty after the boundary has been marked in this area,

44 [1949] Federal Court Reports (FCR) 309.
45 The Indian Supreme Court was still termed a Federal Court operating under the provisions of the Government of India Act, 1935.
46 AIR 1960 SC 845; see V. S. Mani, 'The *Berubari* Cases from the Perspective of International Law: A Critique', (1971) 11 *Indian Journal of International Law* 655.
47 *Magan bhai*, *supra* note 41, at 796, para. 41.
48 The Indian Supreme Court, referring to one of its earlier cases, *Rai Sahib Ram Jawaya Kapur v. The State of Punjab* (1955) 1 Supreme Court Reports (SCR) 225, dealt with the width of the executive action in the absence of legislation.
49 This Advisory Opinion by the Indian Supreme Court resulted in the 9th Amendment to the Constitution.
50 AIR 1966 SC 644.
51 Ibid., at 801.

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is within the competence of the Executive wing of Government and no Constitutional amendment is necessary.' In brief, with this decision in *Maganbhai* the Indian Supreme Court appeared to overrule its earlier view in *Berubari I* that the executive cannot implement an arbitral award to adjust a territory without parliamentary approval.

The fourth case, *Rev. Mons. Sebastiao Fransisco Xavier Dos Remedios Monteiro* v. *The State of Goa*,[52] brought before the Supreme Court the issue of annexation of Goa in 1961 and its after-effects. The question of nationality was an important issue.[53] The argument was that India was an occupying power under the 1949 Geneva Conventions and it had certain obligations pursuant to that status. India argued that 'by occupation is meant occupation by armed forces or belligerent occupation and occupation comes to an end by conquest followed by subjugation'.[54] The Supreme Court noted that 'A territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army.'[55] The Court, accordingly, had to answer the question of whether India continued to be an occupying power, and it noted that 'If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.'[56] The Court pointed out that once the occupation ceases, the protection also ceases. In this case the annexation of Goa ceased within a few hours, and accordingly the Court held that the occupation also ceased the moment annexation was over.[57]

During this phase the Supreme Court had to deal with limited issues concerning international law. Adjustment of the territory and nationality were the key elements. The Court predictably dealt with these issues within its constitutional mandate.

4. The socio-economic context: 1971 to 1990

In this phase the courts moved into considering the legality of varied socio-economic policies adopted by the Indian government. These policy issues were examined by the higher judiciary within the parameters of the constitution linking it to certain basic international legal principles primarily in the field of human rights and the environment. The territorial and boundary issues ended almost with the first phase

52 AIR 1970 SC 329 or (1969) 3 SCC 419.

53 Ibid. The petitioner, a resident of Goa, chooses to retain his Portuguese nationality after the annexation of Goa by India in 1961. The petitioner had obtained a temporary permit to stay in India till 1964. He did not ask for its extension or renewal. Accordingly, he was convicted and sentenced under the Foreigners Act. The petitioner contended that he was covered under the Geneva Conventions Act, 1960, that gave effect to the 1949 Geneva Conventions within the Indian territory.

54 Ibid., at 333. The Court noted that Geneva Convention Act gave no specific right to anyone to approach the Court. The Act was passed under Art. 253 of the Indian Constitution read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the agreement signed and merely provided for certain matters based on Geneva Conventions.

55 Ibid., at 335.

56 Ibid., at 336. The Court concluded that 'In the present case the facts are that the military engagement was only a few hours duration and then there was no resistance at all'.

57 So, the Court concluded, 'The Geneva Conventions ceased to apply after December 20 1961. The Indian Government offered Rev. Fr Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese national he could only stay in India on taking out a permit. He was, therefore, rightly prosecuted under the law applicable to him. Since no complaint is made about the trial as such, the appeal must fail'. Ibid.

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itself, although some issues concerning migration of people across the borders would surface in a different form at a later phase.[58] In this phase, the Supreme Court through several landmark cases began to widen the ambit of personal freedoms by linking it to international legal norms specifically in the field of human rights.[59] The Court would source international legal norms or other foreign legal elements to supplement existing domestic norms. A survey of Supreme Court cases in this phase shows that India vigorously pursued its developmental policies, albeit with halting steps.[60]

At the political level, India seemed to be taking a more pragmatic view of itself and its role in international relations. The colonial context also appears to be receding into the background. Some important decisions of the Supreme Court delivered during this phase and providing a new direction for the treatment of international legal norms within the Indian legal system are briefly considered below.

In *Additional District Magistrate, Jabalpur* v. *Shivakant Shukla* (hereinafter *ADM, Jabalpur*)[61] the Supreme Court amplified the scope of Article 21 of the Indian constitution by referring to Articles 8[62] and 9[63] of the Universal Declaration of Human Rights (UDHR). This was one of the earliest cases, decided in 1976, that sought to link fundamental freedoms and human rights. It dealt with the issue of personal liberty at a time when this freedom was taken away by the executive through a Presidential Order under Article 359. The Court then referred to the UDHR to amplify

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58 *Sarbananda Sonowal v. Union of India and Another*, AIR 2005 SC 2920.

59 During the 1970s and 1980s the Indian Supreme Court had to hear several cases concerning personal liberty. The Court had held that Art. 21 was the sole repository of the right to life and personal liberty against its illegal deprivation by the executive. There is a host of cases linking Art. 21 (on personal liberty) with other freedoms. Linkages with international legal norms, particularly with human rights treaties, also could be seen in some of the cases. The subject matter dealt by these cases broadly related to (a) rights of prisoners; (b) rights of inmates of protective homes; (c) the right to legal aid; (d) the right to a speedy trial; (e) the right against cruel and unusual punishment; (f) the right of release and rehabilitation of bonded labour; and (g) the right to compensation. See *R.C. Cooper v. Union of India*, AIR 1970 SC 564 or (1970) 1 SCC 248; *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207: (1976) 2 SCC 521; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 or AIR 1978 SC 597; *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494 or AIR 1978 SC 1675; *Jolly George Varghese v. Bank of Cohin* (1980) 2 SCC 360 or AIR 1980 SC 470; *Bachan Singh v. State of Punjab* (1980) 2 SCC 684 or AIR 1980 SC 898; *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 98 or AIR 1979 SC 1369; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 or AIR 1981 SC 802; *Dr. Upendra Baxi v. State of U.P.* (1983) 2 SCC 308; *Sheela Barse v. Secretary, Children Aid Society* (1987) 3 SCC 96 or AIR 1987 SC 656; *Upendra Baxi v. State of Uttar Pradesh*, (1986) 4 SCC 106 or AIR 1987 SC 191.

60 Some important cases that challenged the emerging developmental paradigm can be listed. In *Rural Litigation and Entitlement Kedndra, Dehradun v. State of Uttar Pradesh*, AIR 1985 SC 652, mining operations in Doon Valley were challenged; in *State of Bihar v. Banshi Ram Modi*, AIR 1985 SC 814, the mining lease for extracting mica was questioned; in *Sachidanand Pandey v. State of West Bengal*, (1987) 2 SCC 295, the issue related to the construction of a luxury hotel at the expense of the zoological garden; in *Ambica Quarries Works v. State of Gujarat*, AIR 1987 SC 1973, the issue related to the mining lease granted within a forest area; *M.C. Mehta v. Union of India*, AIR 1988 SC 1037, was about appropriate action against some 75 tanneries located on the banks of the river Ganga near Kanpur; *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, AIR 1988 SC 2187, considered the issue of authority or power of the executive to decide or make policy decisions concerning the exploitation of natural resources; *State of Bihar v. Murad Khan*, AIR 1989 SC 1, was about protection under the Wild Life Protection Act; for a detailed account and analysis of some of these cases see R. Khan, 'Environment v. Development Revisited: Contributions of India's Judiciary to the Conflict Resolution', in Ko Swan Sik, M. C. W. into and J. J. G. Syatauw (eds.), *Asian Year Book of International Law* (1992), 11.

61 *ADM, Jabalpur*, *supra* note 32.

62 Art. 8 provides that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law.'

63 Art. 9 provides that 'No one shall be subjected to arbitrary arrest, detention or exile.'

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the provisions of personal liberty and held that it cannot be withheld, even during the worst of times. The Court stated,

> While dealing with the Presidential Order under Article 359(1), we should adopt such a construction as would, if possible, not bring it in conflict with the above Articles 8 and 9. From what has been discussed elsewhere, it is plain that such a construction is not only possible, it is also pre-eminently reasonable. The Presidential Order, therefore, should be so construed as not to warrant arbitrary arrest or to bar right to an effective remedy by competent national tribunals for acts violating basic right of personal liberty granted by law.[64]

The 1980 case of *Jolly George Varghese and Another* v. *The Bank of Cochin*[65] typically represents some of the emerging linkages between domestic procedural law and human rights. It also, in one sense, shows the creative use of an international legal norm to amplify the ambit of human rights in the context of an individual plight in the peculiar conditions of a developing country. According to the Court, the case involved

> a profound issue of constitutional and international law and offers a challenge to the nascent champions of human rights in India whose politicized preoccupation has forsaken the civil debtor whose personal liberty is imperilled by the judicial process itself, thanks to Section 51 (Proviso) and Order 21, Rule 37, Civil Procedure Code.[66]

The Court further noted and framed the issue in the following way: 'From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights'.[67] The Court posed the question whether it would be a fair procedure to deprive a person of his personal liberty merely because he had not discharged his contractual liability in the face of the constitutional protection of life and liberty. The Court, however, underscored difficulty in reconciling the international legal principle as embodied in Article 11 of the International Covenant on Civil and Political Rights (ICCPR) with provisions of municipal law. It said as much when it noted,

> Even so, until the municipal law is changed to accommodate the Covenant what binds the Court is the former, not the latter . . . From the national point of view the national rules alone count . . . With regard to interpretation, however, it is a principle generally recognized in national legal system that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations.[68]

64 ADM, Jabalpur, *supra* note 32, at 1260; though this was the minority view of Justice H. R. Khanna.
65 AIR 1980 SC 470 or (1982) 2 SCC 360.
66 Ibid., at 471.
67 Ibid., at 471. Art. 11 of the International Covenant on Civil and Political Rights provides, 'No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.'
68 Ibid., at 473. The Supreme Court quoted extensively from an earlier decision of the Kerala High Court, namely *Xavier v. Canara Bank Ltd*, 1969 *Kerala Law Journal* 927. This case had examined the question of whether there was any conflict between s. 51 of the Civil Procedure Code and Art. 11 of the ICCPR.

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The 1984 decision of the Supreme Court in the *Gramophone* case[69] continues to be one of the authoritative restatements of its position concerning the applicability of international law within the domestic sphere. It elaborates on the theoretical and practical aspects of the operation of 'transformation' and 'incorporation' doctrines and other sources of international law dealing with this issue.

The Court invariably had to look for specific international legal norms to arrive at a decision in this case, as the issue concerned the right of a landlocked state to the innocent passage of goods across the soil of another state. Surveying various sources and authorities, the Court noted that there were divergent views on this issue, one supporting it as an inherent right of transit across neighbouring countries, the other saying that these rights were not principles recognized by international law but arrangements made by sovereign states. The result of the lack of unanimity, the Court further noted, had been that 'the landlocked countries have to rely on bilateral, regional or multilateral agreements for the recognition of their rights. The very existence of innumerable bilateral treaties . . . raises a presumption of the existence of a customary right of transit.'[70]

Referring to the process of codification under international law, the Court discussed the entire issue in the context of the 1965 Convention on Transit Trade of Land-Locked States, to which both India and Nepal were parties. Besides this, the Court also referred to various international conventions relating to copyright and the Indian legislation on copyright to arrive at the correct interpretation of the word 'import', and it concluded that

> [T]he word 'import' in Sections 51 and 53 of the Copyright Act means 'bringing into India from outside India', that it is not limited to importation for commerce only but includes importation for transit across the country. Our interpretation, far from being inconsistent with any principle of international law, is entirely in accord with International Conventions and the Treaties between India and Nepal. And that we think is as it should be.[71]

The *Gramophone* case underscored the difficulties in sourcing international law in the absence of a domestic norm to arrive at a decision. However, a survey of cases during this phase shows that the Supreme Court adopted a more interactive approach to international law. The role of a sensitive and proactive judiciary in attempting to reach out to the wider world also needs to be noted and perhaps needs separate consideration. Leaving aside territorial issues, several key principles of international law, even though as persuasive tools, enter the ambit of discussion in various decisions. In the next phase we could see the Court becoming more proactive in applying several emerging and complex international legal norms.

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69 *Gramophone*, *supra* note 30, at 669. The case considered the issue of the right of passage of Nepalese goods through Indian territory, and the extent of this right. The specific issue related to the definition of 'import' in relation to s. 53 of the Indian Copyright Act. The question framed by the Court goes like this: 'Can an unauthorized recording of a record (which, for short, adopting trade parlance, we call a pirated work), whose importation into India may be prohibited, but whose importation into Nepal is not prohibited, be taken across Indian territory to Nepal?'

70 Ibid., at 672.

71 Ibid., at 680.

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5. The development context: 1991 and beyond

The decade of the 1990s was crucial for India as it embarked on a new economic agenda. This change in economic policy also seems to have had an impact, somewhat subtly, on the courts. Although in some instances the intervention of the Court had helped to bring back a semblance of orderliness into the working of the various socio-political structures, in several others it had taken a view in conformity with new development agenda. It is possible to discern an increase in the number of diverse and complex cases with international law elements. Besides environment, human rights, and gender-related issues, a brief survey lists several cases whose subject matter related to international trade, arbitration agreements, double taxation agreements, and other related issues. This phase also has cases that dealt with issues concerning terrorism, the definition of terrorism, the rights of the child, extradition matters,[72] and issues relating to migration. In one case, aggression was the issue. In *G. Basi Reddy* v. *International Crop Research Institute and Another*[73] the issue related to the implementation through domestic legislation of the UN Convention on Privileges and Immunities.

A survey of the environment cases of the Indian Supreme Court shows that even in the absence of comparable domestic norms, the Court continued to accept certain emerging norms of international law as part of the law of the land. In *The Vellore Citizens Welfare Forum* v. *Union of India and Others*[74] the Court examined in detail the concept of 'sustainable development'. In *Karnataka Industrial Areas Development Board* v. *Sri C. Kenchappa and Others*[75] the Court dealt with issues concerning environmental degradation and its consequences. References also should be made to *Andhra Pradesh Pollution Control Board* v. *M. V. Nayudu*[76] and *Narmada Bachao Andolan* v. *Union of India.*[77] In *M. C. Mehta* v. *Kamal Nath*[78] the Supreme Court dealt with public trust doctrine. The public trust doctrine was reiterated in *Intellectual Forum* v. *State of Andhra Pradesh.*[79]

After considering the developments in the field of international environmental law, as outlined above, the Court had no hesitation in holding that the concept of

72 *Suman Sood v. State of Rajasthan*, (2007) 5 SCC 634.

73 AIR 2003 SC 1764; India has no exclusive legislation on 'state immunity'. S. 86 of the Indian Civil Procedure Code provides the basis for the application and interpretation of laws relating to immunities. It provides, *inter alia*, that 'No foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government.' It is therefore the prerogative of the executive to decide the status of a 'state'. See B. Sen, *A Diplomat's Handbook of International Law and Practice* (1965); Sompong Sucharitkul, 'Jurisdictional Immunities in Contemporary International Law from Asian Perspectives', (2005) 4 *Chinese Journal of International Law* 8. Although several immunity-related cases have been brought before the Indian courts, the basic international legal framework that had been laid down by the Supreme Court in *Harbhajan Singh Dhalla v. Union of India*, AIR 1987 SC 9, continues to be the most authoritative.

74 AIR 1996 SC 2715 or (1996) 5 SCC 647; this case was about the pollution caused by the enormous discharge of untreated effluent by the tanneries and other industries in the state of Tamil Nadu, particularly in Vellore, where nearly 35,000 hectares of agricultural land had become either partially or totally unfit for cultivation; see also *T.N. Godavarman Thirumulpad v. Union of India*, AIR 2005 SC 4256.

75 AIR 2006 SC 2038 or (2006) 6 SCC 371.

76 MANU/SC/0032/1999; the second case was decided in 2001 ((2001) 2 SCC 62).

77 (2002) 10 SCC 664.

78 MANU/SC/1007/1997.

79 (2006) 3 SCC 549.

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sustainable development had been accepted as a part of customary international law although its salient features have yet to be finalized by international law jurists.[80] This statement by the Court raises several key issues. First, it seems to be oblivious to the fact that the process of the formation of customary international law is usually a long and arduous one. Second, the customary norms under international law are formulated by consistent state practice rather than by the writings of the jurists, although their writings will have lot of persuasive value. The Court, however, had no hesitation in holding that

> The precautionary principle and the polluter pays principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty . . . Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law.[81]

A caveat to this statement comes in the next sentence, when the Court says, ‘It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.’[82] This could be regarded as the ‘final frontier’ for the Indian courts, and has been the consistent position of the Indian Supreme Court for the last six decades.

In this phase the concerns of the Court with regard to the environment shift somewhat towards development. We could consider the case of *N. D. Jayal and Another* v. *Union of India and Others*,[83] wherein the petitioners were seeking the intervention of the court concerning the safety[84] and environmental aspects of the Tehri dam,[85] a dam being built in a seismic zone in the Himalayan region. The Court refers to the sustainable development debate, and goes on to add something which amply shows the ambivalence of the Court to the emerging economy with the new economic agenda firmly in place. Consider the following statement of the court, which seems like an attempt to reconcile two opposite views:

> The right to development cannot be treated as a mere right to economic betterment or cannot be limited to a misnomer for simple construction activities. The right to development encompasses much more than economic well being and includes within its definition the guarantee of fundamental human rights. The ‘development’ is not related only to the growth of GNP . . . It is an integral part of human rights. Of course, construction of a dam or a mega project is definitely an attempt to achieve the goal

80 Ibid. The Supreme Court had held in that the ‘polluter-pays principle’ and the ‘precautionary principle’ were the sound principles.

81 *Vellore Citizens*, AIR 1996 SC 2720.

82 Ibid.

83 AIR 2004 SC 867; see also *K.M. Chinnappa v. Union of India and Others*, AIR 2003 SC 724.

84 The petitioners had sought to conducting a three-dimensional (3D) non-linear test to evaluate the earthquake susceptibility of the dam against the maximum credible earthquake. However, the Court refused to go into this question, as the safety aspects were considered by the Supreme Court in an earlier case, in 1992, namely *Tehri Bandh Virodhi Sangarsh Samiti v. State of Uttar Pradesh*.

85 The Tehri dam, located in the Himalayan region, was constructed at the confluence of the Bhagirathi and Bhailangana rivers in the neighbourhood of the town of Garhwal, in the state of Uttaranchal (now Uttarakhand), resulting in the relocation of entire town.

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> of wholesome development. Such works could very well be treated as an integral component for development.

In this case the Court examined each of the components of the conditional clearance, including (a) catchment area treatment; (b) rehabilitation; (c) command area development; (d) flora and fauna; (e) water quality maintenance; (f) disaster management; and (g) creation of a new Bhagirathi Basin Management Authority. After examining these aspects, the majority decision of the Court pointed out that the petitioners had disputed 'the extent of compliance only and not that there is no compliance at all'. The majority decision found that there was compliance, although with certain lapses. According to the Court, these lapses in compliance could be taken care of by monitoring agencies.[86]

A similar pattern could be seen in *Essar Oil Ltd* v. *Halar Utkarsh Samiti and Others*.[87] The Court first outline various principles of the Stockholm Declaration to sustain humanity and its environment. While emphasizing the need to balance economic and social needs, on the one hand, with environment considerations, on the other, the Court stated,

> Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which we breathe. *However, there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other.*[88]

The Court interpreted section 29 of the Wildlife (Protection) Act, 1972, and sought to answer the question whether it could be stated that the laying of pipelines through a sanctuary necessarily results in the destruction of wildlife. The Court, considering the legal position in the United Kingdom and other countries, noted that it would ultimately be a question of fact to be determined by experts in each case, and accordingly asked the state government to obtain an environmental impact report from expert bodies. It also sought an environmental management plan. The Court also laid emphasis on transparency and sharing of information with those who were affected by this decision.

From the environment to human rights the approach of the Supreme Court, as one can see, has been changing, and more emphasis is being placed on socio-economic

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86 Dharmadhikari J, while dissenting from these conclusions, particularly on the safety aspects of the dam, observed, 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of a series of reversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environment degradation.'

87 AIR 2004 SC 1834; the issue related to the laying of pipelines to transport crude oil from a single buoy mooring in the Gulf across a portion of the Jamnagar Marine National Park and Marine Sanctuary located along the lower lip of the Gulf of Katchch in the state of Gujarat. The Court had to decide the legality, as challenged through several public interest petitions, of laying the pipelines, in accordance with the provisions of the Wildlife Protection Act, 1972, the Forest (Conservation) Act, 1980, and the Environment (Protection) Act, 1986.

88 Ibid. (emphasis added).

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parameters. As discussed earlier, in *Vishaka and Others* v. *State of Rajasthan and Others*[89] the Supreme Court focused its attention on 'societal aberration and assisting in finding suitable methods for realization of the true concept of "gender equality"; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation'.[90] The Court stated, *inter alia*, 'There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.'[91] The Court decided to specify guidelines and norms for due observance at all workplaces or other institutions until legislation was enacted for the purpose.

Even the issues relating to terrorism have taken centre stage during this phase of the Court. The Supreme Court, in particular, had occasion to deal with certain legal and definitional aspects of terrorism. The thinking of the Court concerning 'international terrorism' and 'human rights' is instructive. In *People's Union for Civil Liberties and Another* v. *Union of India*,[92] the constitutional validity of certain provisions of the Prevention of Terrorism Act, 2002 (hereinafter POTA), were challenged. The *obiter* of the Court reflects the emerging new realities.[93] Recognizing terrorism as a challenge to the whole community of civilized nations, the Court noted that the activities of terrorists in one country might take on a transnational character, as they carried out attacks across one border, received funding from private parties or a government across another, and procured arms from multiple sources. Referring to domestic and international aspects of terrorism, the Court referred to international dimensions of terrorism.[94]

89 AIR 1997 SC 3011 or (1997) 6 SCC 241; see also *Nilabati Behera v. State of Orissa* (Manu/SC/0307/1993); *People's Union for Civil Liberties v. Union of India and Another*, AIR 1997 SC 1203 or (1997) 3 SCC 433; and *Chairman, Railway Board and Others v. Mrs. Chandrima Das and Others*, AIR 2000 SC 988 or (2000) SCC 465. All three cases deal with the issue of the payment of compensation in cases of violations of human rights by the state; see also S. V. Manohar, 'The Indian Judiciary and Women's Rights', (1996) 36 *Indian Journal of International Law* 1; S. V. Manohar, 'Judiciary and Human Rights', (1996) 36 *Indian Journal of International Law* 39.

90 *Vishaka*, AIR 1997 SC 3011, at 3012.

91 Ibid., at 3015.

92 AIR 2004 SC 456.

93 Ibid. 'Terrorist acts', the Court noted, were 'meant to destabilize the nation by challenging its sovereignty and integrity, to raze the constitutional principles that we hold dear, to create a psyche of fear and anarchism among common people, to tear apart secular fabric, to overthrow democratically elected government, to promote prejudice and bigotry, to demoralize the security forces, to thwart the economic progress and development and so on.' 'This', the Court further noted, 'cannot be equated with usual law and order problems within a State.' Referring to the character of terrorism as 'inter-state, inter-national or cross-border', the Court stated that it was not 'a regular criminal justice endeavour'. 'Terrorism', it noted, 'is definitely a criminal act, but it is much more than mere criminality.'

94 Ibid. The Court further noted, 'Terrorism in a single country can readily become a threat to regional peace and security owing to its spillover effects. It is, therefore, difficult in the present context to draw sharp distinctions between domestic and international terrorism. Many happenings in the recent past caused the international community to focus on the issue of terrorism with renewed intensity. The Security Council unanimously passed resolutions 1368 (2001) and 1373 (2001); the General Assembly adopted resolution 56/1 by consensus, and convened a special session. All these resolutions and declarations, *inter alia*, call upon Member States to take necessary steps to "prevent and suppress the financing of terrorist acts". India is a party to all these resolutions. Anti-terrorism activities in the global level are mainly carried out through bilateral and multilateral co-operation among nations. It has thus become our international obligation also to pass necessary laws to fight terrorism.'

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The Court also referred to the Report of the Policy Working Group on the United Nations and Terrorism,[95] which urged the global community to concentrate on a triple strategy to fight terrorism. These strategies, as noted by the Court, were (i) to dissuade disaffected groups from embracing terrorism; (ii) to deny groups or individuals the means to carry out acts of terrorism; and (iii) to sustain broad-based international co-operation in the struggle against terrorism. Based on these, the Court averred,

> Therefore, the anti-terrorism laws should be capable of dissuading individuals or groups from resorting to terrorism, denying the opportunities for the commission of acts of terrorism by creating inhospitable environment for terrorism and also leading the struggle against terrorism. Anti-terrorism law is not only a penal statute but also focuses on pre-emptive rather than defensive State action.[96]

On the issue of balancing within the constitutional mandate the protection and promotion of human rights and the combating of terrorism, the Court stated,

> If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to human rights. Our Constitution laid down clear limitations on State actions within the context of the fight against terrorism. To maintain this delicate balance by protecting 'core' Human Rights is the responsibility of Court in a matter like this. The constitutional soundness of POTA needs to be judged by keeping these aspects in mind.[97]

The Court upheld the constitutional validity of POTA. In *Madan Singh* v. *State of Bihar*,[98] the Supreme Court was again concerned with the definition of terrorism. The Court noted that finding a definition of terrorism had haunted countries for decades and it dealt elaborately with that issue.[99]

The incursion of illegal migrants into India from the bordering states was the issue in *Sarbananda Sonowal* v. *Union of India and Another*.[100] The Court considered

95 Ibid., at 466; Report of the Policy Working Group on the United Nations and Terrorism, UN Doc. A/57/273-S/2002/875, 6 August 2002.

96 Ibid., at 466.

97 Ibid. The Court also had to deal with the legality and constitutional validity of the POTA provisions relating to the forfeiture of property of any person prosecuted and ultimately convicted.

98 AIR 2004 SC 3317. Twenty persons faced trial for alleged commission of various offences punishable under the Indian Penal Code, Terrorist and Disruptive Activities (Prevention) (TADA) Act, 1987, and the Arms Act. One of the main contentions of the appellants was that there was no evidence to show that the accused persons were terrorists or extremists or that the activities or actions alleged were encompassed by the provisions of the TADA Act to be described as terrorist acts.

99 Ibid. The Court noted attempts to define terrorism at the global level, such as under the League of Nations; that the UN member states have still not agreed on a definition, apparently on account of what at times has been revealed to be state-sponsored terrorism, both at national and international levels; that there are issues concerning terminology consensus; that there is no single comprehensive convention on terrorism which some countries favour in place of the present 12 piecemeal conventions and protocols; that the lack of agreement on a definition of terrorism has been a major obstacle to meaningful international countermeasures.

100 AIR 2005 SC 2920; the writ petition filed before the Supreme Court by way of public interest litigation was for declaring certain provisions of the Illegal Migrants (Determination by Tribunals) Act (Act No. 39 of 1983), 1983 (hereinafter IMDT Act) as *ultra vires* the Constitution of India, null and void, and the consequent

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various status reports on the influx of migrants into the state of Assam and also the status reports on the implementation of the Illegal Migrants (Determination by Tribunals) Act (Act No. 39 of 1983) (IMDT Act). The consequences of such an influx were also considered by the Court. Taking into account the entire issue in its historical context, it considered the implementation of various accords concluded between the government of India and the government of Assam on one side and the agitating or affected parties on the other. The legal effects of such accords and their implications on the demography of Assam were also considered by the Court. It also considered the plea that the foremost duty of the central government was to defend the borders of the country, prevent any trespass, and make the life of the citizens safe and secure.

On the definition of 'aggression', the Court surveyed a whole range of sources and also referred to various international legal scholars, the Charter of the United Nations, the Work of the International Law Commission and the UN Special Committee on Aggression, and noted that 'a consensus was arrived at and an agreed definition was approved by the United Nations General Assembly on 12 April, 1974 *vide* Resolution No. 3314 (XXIX)'. The Court further noted the different facets of aggression by referring to 'ideological aggression' and also 'the promotion of the propaganda of fascist–Nazi views, racial and national exclusiveness, hatred and contempt for other peoples', and 'indirect aggression, of intervention in another State's internal or foreign affairs', including 'direct or indirect incitement to civil war, threats to internal security, and incitement to revolt by the supply of arms or by other means' and 'economic aggression'.[101] On the issue of the deportation of aliens, the Court noted that they also possessed several rights and the procedure for their identification and deportation should be detailed and elaborate in order to ensure fairness to them.[102] The Court, *inter alia*, held that the provisions of the IMDT Act were *ultra vires* the Constitution of India.

In this phase several cases relating to the interpretation and application of bilateral double taxation avoidance agreements were also before the Supreme Court. This also shows the changing face of the Indian judiciary, which now considers

declaration that the Foreigners Act, 1946, and the Rules made thereunder should apply to the state of Assam. See also *Sarbananda Sonowal v. Union of India* (II), (2007) 1 SCC 174; this case dealt with the validity of two pieces of internal, subordinate legislation amending Foreigners (Tribunals) Order, 1964, and the other, the Foreigners (Tribunals for Assam) Order, 2006. These amendments were incorporated by the government to give effect to the earlier 2005 decision of the Supreme Court in *Sarbananda Sonowal v. Union of India*.

101 *Supra* note 98. The Court also referred to the Statement of India's Representative to the Sixth Committee on the definition of Aggression, which emphasized the need for a comprehensive definition. This statement, the Court noted, also referred to the 'unique type of bloodless aggression from a vast and incessant flow of millions of human beings forced to flee into another State', thereby impairing the economic and political well-being of the receiving victim state, threatening its very existence.

102 Ibid. The Court further noted, 'The power to refuse admission is regarded as an incident of the State's territorial sovereignty. International Law does not prohibit the expulsion en masse of aliens. Reference has also been made to Article 13 of the International Covenant of 1966 on Civil and Political Rights which provides that an alien lawfully in the territory of a state party to the Covenant may be expelled only pursuant to a decision reached by law, and except where compelling reasons of national security otherwise require, is to be allowed to submit the reasons against his expulsion and to have his case reviewed by and to be represented for the purpose before the competent authority. It is important to note that this Covenant of 1966 would apply provided an alien is lawfully in India, namely with valid passport, visa etc. and not to those who have entered illegally or unlawfully.'

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legal issues ranging from international taxation to Internet domain names. Several foreign companies and establishments have increasingly had recourse to the Indian judicial system. We could briefly consider some of these important cases and the way in which, in these cases, the Supreme Court has treated the issues concerning international law, international trade, and economic law, including a few cases concerning intellectual property rights.

In *Union of India* v. *Azadi Bachao Andolan* (Movement for Preserving Freedom),[103] the Court had to deal with the legality of the investment patterns of certain foreign institutional investors (FIIs). These FIIs were based in Mauritius, taking advantage of the Indo-Mauritius Double Taxation Avoidance Convention, 1983 (DTAC). Relying on DTAC and other regulatory frameworks that flowed from the DTAC, they invested large amounts of capital in shares of Indian companies with expectations of making a profit by the sale of such shares without being subjected to tax in India.[104] These companies were registered or incorporated in Mauritius and their main purpose was to invest in the Indian share market, without being liable to be taxed. The petitioners, *inter alia*, argued that these companies were controlled and managed from countries other than India or Mauritius and as such they were not 'residents'[105] of Mauritius and able to benefit from the DTAC.[106]

The Court had to consider the scope and application of section 90 of the Indian Income Tax Act in relation to the DTAC with Mauritius. The Court dealt with the issue of exercise of fiscal jurisdiction by states and the complexities involved in moderating such a jurisdiction through bilateral tax treaties. The Court, in fact, outlined the rationale behind concluding tax treaties. It stated,

> Every country seeks to tax the income generated within its territory on the basis of one or more connecting factors such as location of the source, residence of the taxable entity, maintenance of a permanent establishment and so on. A country might choose to emphasize one or the other of the aforesaid factors for exercising fiscal jurisdiction to tax the entity. Depending on which of the factors is considered to be the connecting factor in different countries, the same income of the same entity might become liable to taxation in different countries. This would give rise to harsh consequences and impair economic development. In order to avoid such an anomalous and incongruous situation, the Governments of different countries enter into bilateral treaties, conventions or agreements for granting relief against double taxation. Such treaties,

103 AIR 2004 SC 1107; see *Commissioner of Income Tax v. P.V.A.L. Kulandagan Chettiar*, AIR 2004 SC 3411.

104 S. 90 of the Indian Income Tax Act dealt with the relationship between DTACs and the Income Tax Act. In other words, it *inter alia* covered the agreements concluded by the government of India with the government of any country outside India (a) for the granting of relief in respect of income tax payable in the other country; (b) for the avoidance of double taxation of income; (c) for exchange of information for prevention of evasion or avoidance of income tax; (d) for the recovery of income tax as per the laws of either country; and to make necessary provisions as may be necessary for implementing the agreement. The other important feature of s. 90 was that DATC provisions prevailed over the provisions of the Income Tax Act for granting relief of tax or, as the case may be, avoidance of double taxation to the extent they were more beneficial to the assessee.

105 According to Art. 4 of the DTAC, 'resident' of one state should be any person who, under the laws of that state, was liable to taxation therein by reason of his domicile, residence, place of management, or any other criterion of similar nature.

106 Ibid. The Delhi High Court had concurred with the arguments of the petitioners and accordingly had quashed the circulars. Briefly, the findings of the High Court specifically concerning international law were that 'treaty-shopping', by which the resident of a third country took advantage of the provisions of the agreement, was illegal and thus necessarily forbidden; and avoidance of double taxation had been a term of art and meant accordingly that a person had to pay tax at least in one country; avoidance of double taxation would not mean that a person did not have to pay tax in any country whatsoever.

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> conventions or agreements are called double taxation avoidance treaties, conventions or agreements.[107]

The Court first dealt with the constitutional sources of executive authority in concluding a treaty. While noting that the power of entering into a treaty is an inherent part of the sovereign power of the state in the Indian context, the Court stated that

> [M]aking of law under that authority would be necessary when the treaty or agreement operated to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens of others which were justiciable were not affected, no legislative measure would be needed to give effect to the agreement or treaty.[108]

According to the Court, tax treaties were in a different category. Section 90 of the Indian Income Tax Act, 1961 (ITA), accords primacy to these treaties as they

> are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-à-vis other taxpayers, Section 90 of the Income-tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax treaty is less beneficial.[109]

Surveying the case law of various high courts in India, the Court concluded that judicial consensus in India had been that section 90 was specifically intended to enable and empower the central government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happened, the Court further concluded, the provisions of such an agreement, with respect to cases where they apply, would operate even if inconsistent with the provisions of the Income Tax Act. The Court, while referring to the contention of the respondents that as per Article 265 of the Constitution no tax could be levied or collected except by authority of law, pointed out that section 90 was put on the statute book precisely to enable the executive to negotiate a DTAC and quickly implement it.[110]

In *Ishikawajma-Harima Heavy Industries Ltd.* v. *Director of Income Tax, Mumbai*[111] the provisions of the India–Japan Double Taxation Avoidance Treaty were invoked. The notable feature of this tax case is that the appellant, a Japanese company, challenged the taxability of the offshore supply of equipment, materials, and offshore services under the Indian Income Tax Act and the India–Japan Double Taxation Avoidance Treaty.[112] There were several complex issues relating to the taxing of this Japanese company, which was operating in India with several other companies. The Supreme Court, accordingly, noted that

> [I]f an income arises in Japan (contracting State), it shall be taxable in that country unless the enterprise carries on business in the other contracting State (India) through a

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107 *Union of India v. Azadi Bachao Andolan*, AIR 2004 SC 1107, at 1119.

108 Ibid., at 1119. See in this connection *Maganbhai Ishwarbhai Patel and Others v. Union of India and Another*, (1970) 3 SCC 400 (as cited by the Court).

109 Ibid., at 1120.

110 While on this issue the Court considered in detail the whole issue of delegated power of legislation and why a delegatee of legislative power in all cases should have no power to grant exemption. The Court also dealt with the issue of enabling powers of the tax authorities to issue notifications, circulars, etc. under s. 119.

111 (2007) 3 SCC 481.

112 Ibid. The appellant was executing a turnkey project in India, involving a consortium of companies, with the intention of setting up a liquefied natural gas receiving, storage, and degasification facility.

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> permanent establishment situated therein. What is to be taxed is profit of the enterprise in India, but only so much of it as is directly or indirectly attributable to the permanent establishment. All income arising out of the turnkey project would not, therefore, be assessable in India, only because the assessee has a permanent establishment.[113]

The Court concluded that while the '[g]lobal income of a resident . . . is subjected to tax, global income of a non-resident may not be. The answer to the question would depend upon the nature of the contract and the provisions of DTAA.'[114]

Accordingly the Supreme Court held that 'if services rendered by the head office are considered to be the services rendered by the permanent establishment, the distinction between Indian and foreign operations and the apportionment of the income of the operations shall stand obliterated'.[115] In another case, *DIT (International Taxation), Mumbai* v. *Morgan Stanley & Co.*,[116] the Supreme Court considered the interpretation and application of some provisions of the India–United States Double Taxation Avoidance Agreement.

In *Satyam Infoway Ltd.* v. *Sifynet Solutions Pvt. Ltd*,[117] the principal question, as noted by the Court, was whether Internet domain names were subject to the legal norms applicable to other intellectual property rights such as trademarks. The Supreme Court in *Shen-Etsu Chemical Co. Ltd.* v. *M/s Aksh Optifibres*[118] considered the issue of governing law in arbitration. Some important cases in the area of arbitration with some reference to international legal elements, specifically with regard to the appointment of arbitrators (as to the involvement of the courts either in an administrative or judicial capacity), the enforcement of arbitral awards, and the validity of the arbitration agreement should be noted.[119]

A survey of cases in this phase shows the increasing number of references by the Court to foreign legal elements and also to the use of international legal norms to arrive at definitive conclusions. One can perceive the Court's attempts to locate itself in the global context, and the issues raised in the cases reflect this trend.

6. Conclusion

The focus of this study is broadly to decipher the approach of the Indian Supreme Court towards international law. The study proceeded on the assumption that the

113 Ibid., at 511.
114 Ibid., at 514.
115 Ibid., at 515.
116 (2007) 7 SCC 1. Morgan Stanley, a US company, was operating within India through an independent subsidiary established in accordance with Indian laws. The issue concerned determining and attributing 'permanent establishment' (PE) with respect to Morgan Stanley, for the purposes of taxation. Morgan Stanley served as an investment bank engaged in the business of providing financial advisory and other related services. Morgan Stanley Advantages Services Pvt. Ltd. was established as an independent Indian company that provided support services to Morgan Stanley through a mutually concluded services agreement.
117 AIR 2004 SC 3541. There were several intellectual property rights-related cases; one that needs specific mention is *Novartis AG v. Union of India and Others*, (2007) 4 *Madras Law Journal* 1153. This case dealt with s. 3(D) of the Indian Patents Act and its viability and consistency with the TRIPs agreement.
118 (2005) 7 SCC 234.
119 Some important cases in the file of arbitration are *S.B.P. & Co. v. Patel Engineering Ltd*, (2005) 6 SCC 288; *Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388 and see also (2000) 8 SCC 159l; *Renusagar Power Co. Ltd. v. General Electric Co.*, (1984) 4 SCC 679.

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Indian court structure and the interpretative techniques have largely been influenced by the British legacy. While continuing with this legacy in the post-independent context, Indian courts have had recourse to various international legal principles. This examination has been accomplished within four different contextual parameters with specific timelines. Initially, the constitutional context explains the location and reference of international law within the Indian legal system and its interface with the domestic legal structures.

The territorial context considered four cases and all these four cases raised the core issue of boundary or territorial settlement concerning the new India that emerged as an independent state in 1947. In other words, immediately after its independence India had to settle its territorial claims with its neighbours. The question essentially was whether such boundary adjustments were done through executive order or through a constitutional amendment. The court held that if it were a simple adjustment of the boundary, a constitutional amendment would not be necessary. If it were not a simple adjustment, the Court clearly stated that an amendment to the constitution would be required. The first contextual parameter relating to territory had posed limited issues concerning international law.

The scope and reach of international law becomes a little more perceptible in the second contextual parameter, relating to the socio-economic context. A variety of legal issues, particularly with regard to the environment and human rights, appears in this phase. With the advent of a new economic agenda and faster growth prospects the cases in the third context belong to a different group of subject matters ranging from arbitration and taxation to child rights. One could also see foreign companies having recourse to the Indian Supreme Court, frequently with particular regard to economic matters. The reach and scope of the work of the Court in terms of international law and other related issues begin to expand.

Despite all this, the approach of the Indian Supreme Court to some of the key issues that define the relationship between international law and municipal law continues to be conservative. The sourcing of international law, specifically customary international law, is a critical issue. In various decisions, specifically concerning the environment and human rights, the linkages are usually with sustainable development, the precautionary principle, and others. In some of these cases the Court has not moved beyond a particular point and continues to repeat the same sources and arguments. The above examination shows that Indian courts perceive the necessity of international law as a persuasive tool. Accordingly, international legal norms are consistently creeping into the domestic legal arena in different forms. The Indian courts, specifically the Supreme Court, as one could assess from the Indian experience, seek to incorporate or give effect to international legal norms within the domestic sphere, albeit with a measure of caution. For the Indian courts the correct sourcing, identification, and interpretation of the constantly emerging international legal norms remain a challenge, and this challenge, indeed, arises from the very nature and the process of international lawmaking at the global level. In future, the Indian courts will have to find new approaches and an appropriate interpretative context to deal with the complexities of the relationship between international law and municipal law.

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