Legal transplantation by Asian courts in environmental litigation:
Investigating the Sri Lankan Chunnakam case (2019) for insights into success

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環境訴訟におけるアジアの裁判所による法の移植
―スリランカのチュンナカム事件の検討―

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要約

最近、持続可能な開発を促進するために環境訴訟において法の移植（legal transplantation）を活用するアジアの裁判所の役割は、国内環境法におけるギャップを埋めるその機能により、大きな学術的関心を集めている。アジアではこの問題に関する文献が増加しているにもかかわらず、スリランカは見過ごされてきた。公益訴訟におけるスリランカ司法は、外国法や国際法の内容を固有の（indigenous）法規範に調和させることで、国内環境法のギャップを積極的に埋め、持続可能な開発に貢献してきた。また、スリランカの公益訴訟は、インドの判決を移植しながら発展してきた。本論文は、画期的な公益訴訟であるチュンナカム事件を検討し、持続可能な開発における法の移植の視点を明らかにすることにより判決を分析する。外国投資プロジェクトに関わるこの事件では、裁判所は、政府と外国企業が適切な環境社会配慮を行わなかったと判断した。司法はインドの判決と国際的な環境原則に基づいて法規範を作り出し、国内環境法におけるギャップを埋めた。この研究は、司法による同種の法域への法の移植の背景と妥当性について貴重な洞察を提供する。また、投資家が認識すべき手続上の欠陥も浮き彫りにする。さらに、外国投資に基づく経済発展計画を達成するため、発展途上国における環境規制の時代遅れの執行メカニズムを刷新する必要性を強調する。

Key words
legal transplantation, public interest litigation, sustainable development, Asian courts, foreign investments

1. Introduction

It has been widely recognized that to protect the environment, a state must have an effective governance structure, an independent judiciary, and enforce environmental laws and regulations (Preston, 2014). In many jurisdictions, courts are recognized as innovative players upholding citizen rights and environmental protection (Voigt & Makuch, 2022; Krämer, 2016). In particular, Asian courts have reactively filled the domestic legal voids with environmental litigation against investment projects to protect the environment and safeguard citizen rights. This movement resonates with the broader trend in Asian courts, contributing to establishing human rights and the rule of law linking sustainable development (Yap, 2017: 1, 13). Before discussing the litigation in investments, the evolution of the ever-growing sustainable development concept, which is often linked to the environment and economy, will be briefed.

Sustainable development is a decision-making framework that holds the government primarily responsible for achieving human well-being in the short and long term (Sachs, 2015). In the process, a new branch of international law called "international sustainable development law" has evolved (Atapattu & Puvimanasinghe, 2019: 141). Scholars have been drawn to international sustainable development law because it provides an extensive framework for international environmental law (Atapattu, 2012: 209; Ershov, 2023).

Sustainable development in the international law realm thrived in the 20th century because of European environmental pollution caused by unprecedented economic development (Smallwood, 2024: ch 1). The tension between economic development and industrial pollution was the driving force behind the "United Nations Conference on the Human Environment" (1972), which led to the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).[(1)] The Stockholm Declaration conceived the concept of sustainable development (Atapattu & Puvimanasinghe, 2019: 143).

Subsequently, the concept burgeoned with the most quoted definition presented by the World Commission on Environment and Development (WECD) report, "Our Common Future": "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (WECD, 1987: 43) Principles 3 and 4 of the 1992 Rio Declaration on Environment and Development (Rio Declaration)[(2)] further outlined the balance between environmental protection and economic growth.

The first discussion on the social development component was conducted in 1995 by the Copenhagen Declaration on Social Development[(3)] (Atapattu & Puvimanasinghe, 2019: 145). Later, at the 2002 World Summit on Sustainable Development, the Johannesburg Declaration combined three elements of sustainable development: economic growth, social inclusion, and

environmental protection.[4] The 2030 Agenda introduced 17 Sustainable Development Goals (SDGs) and 169 targets, emphasizing the need to address the "three dimensions—economic, social, and environmental—in a balanced and integrated manner."[5]

As will be detailed in the next section, this article delves into how courts engage in legal transplantation by adopting foreign judgments from similar jurisdictions to create new legal norms, thereby filling domestic legal voids. It is important to understand the reactive role of courts in promoting sustainable development by developing domestic environmental laws via legal transplantation in environmental litigation.

Courts create "judge-made law" through legal transplantation (Mousourakis, 2019: 180), referencing foreign judgments from comparable jurisdictions when the legal issue exceeds the scope of existing laws. Such transplanted judgments serve to fill the respective legal void. Additionally, "judge-made laws" apply international environmental principles or cite foreign judgments when resolving environmental disputes arising from investment projects with transnational impacts in similar jurisdictions (Michaels, 2014; Scott, 2009). "Judge-made law" is a term used in common law jurisdictions to describe judicial decisions that are precedent and have a similar effect to that of legislation (Mulkey, 2016/2004: 9-10). These decisions provide valuable insights into potential legislative and policy amendments and establish novel legal norms.

Asian courts often apply international environmental law principles, such as the polluter-pays principle (PPP), sustainable development, and the doctrine of public trust, in their judgments to address domestic legal voids (Angstadt, 2023: 319; Ghosh, 2021; Rajamani, 2007). Bodansky illustrated that the court's gap-filling "independent role" in interpreting domestic law with international law is clear when non-governmental organizations (NGOs) prosecute "against the government and political branches" that failed to enforce environmental laws (Bodansky, 2011: 75): "[I]n these contexts, national courts serve not merely as a tool to effectuate national policies, but as 'an agent of an emerging international system of order'" (Bodansky, 2011: 76).

Asian developing countries often welcome foreign investors as they seek more investments in economic development. Consequently, Asia experiences many environmental problems, including climate issues (Lin & Kysar, 2020; Wang, 2010; Tan, 2004). The rising trend in Asian courts where investors are accused of environmental harm and non-compliance with environmental standards in public interest litigation (PIL) indicates that Asia is off-track in terms of sustainable development (Atapattu & Puvimanasinghe, 2019; Rajamani, 2007). Notably, NGOs are the claimants in these environmental lawsuits, appearing for the affected people (Atapattu & Puvimanasinghe, 2019; Rajamani, 2007).

As regards socioeconomic issues, PIL is the main judicial approach to gaining social justice for marginalized citizens in India (Rajamani, 2007; Krishnan, 2015; Holladay, 2012). When development projects result in environmental pollution, rendering water and land unfit for people's access and causing health impacts, as well as affecting livelihoods, these issues create socioeconomic problems rather than delivering the expected positive outcomes of the projects.

India's prominent role in enhancing PIL has attracted broader scholarly attention because of its innovative perspective and impact on other Asian jurisdictions' environmental cases (Rajamani, 2007; Holladay, 2012; Yeh & Chang, 2015). The Sri Lankan judiciary is an Asian jurisdiction influenced by the Indian judiciary.

Scholars have widely discussed the progressive role of the Sri Lankan judiciary in PIL, particularly in enhancing sustainable development (Weeramantry, 2005; Puvimanasinghe, 2021; Puvimanasinghe, 2009). However, no attention has been paid to the courts' impact on legal transplantation in Sri Lankan environmental PIL, particularly in developing legal norms and filling legal voids. This study therefore focuses on the role of the Sri Lankan courts in PIL through legal transplantation, pursuing the concept of sustainable development.

This article analyses the landmark Supreme Court decision of *Ravindra Gunawardena Kariyawasam v. Central Environment Authority and Others* (2019), popularly known as the Chunnakam case, to explore its contribution to sustainable development through legal transplantation. An NGO petitioned this significant PIL against a foreign investment company for groundwater pollution caused by a thermal power plant, pursued under fundamental rights litigation under the constitution Articles 12 (1)—"[A]ll persons are equal before the law and are entitled to the equal protection of the law"—and 12 (2)—"[N]o citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds."

Filing a PIL against a private party in fundamental rights litigation is precluded by the provisions in Articles 17 and 126 of the constitution which specify that fundamental rights petitions apply exclusively to "executive or administrative actions." The court innovatively held the company accountable for groundwater pollution and ordered compensation for affected residents. This marked the first instance in which the Sri Lankan Supreme Court held a private party accountable in a PIL, thereby expanding the scope of fundamental rights petitions under Articles 12, 17, and 126 to include private individuals.

The judiciary creates a new legal norm to charge private parties with pollution costs in a PIL by transplanting an Indian case decision, *Vellore Citizens Welfare Forum v. Union of India* (1996), and Principle 16 of the Rio Declaration—PPP—filling the constitutional void. Compensation is to be paid to the affected farmers for cleaning and rehabilitating wells used for drinking and cultivation. The case attracted global attention due to the involvement of civil society and environmental activists

and the compensation charged to the investor (Trevelyan, 2023).

The ensuing sections begin with a literature review of the characteristics of Asian courts, with a particular focus on legal transplantation and PIL (Section 2) and subsequently analyze the landmark *Chunnakam* case decision (Section 3). The assessment part (Section 4) explores how the case demonstrates an innovative judiciary approach to legal transplantation, PIL, and the impact on foreign investments. Finally, Section 5 concludes the study.

2. Literature review: Role of Asian courts in environmental litigation

Recently, scholars have focused on several aspects of the role of Asian courts, addressing two features related to the expansion of litigation: (1) legal transplantation and (2) public interest litigation.

2.1 Legal transplantation

The theory of legal transplantation, introduced by Alan Watson in 1974 (Watson, 1993), serves as an instrumental mechanism for understanding the transposition of laws within states. It is commonly defined as "the adoption into the national legal system by one state ... of a rule originating in a foreign state" (Morin & Gold, 2014: 782). This article employs common terminology from the literature, referring to the jurisdiction from which the transplanted legal rule or system originates as the "donor" and the jurisdiction where the legal rule or system is transplanted as the "recipient" (Miyazawa, 2021: 348).

Legal transplantation theory has significantly evolved to meet states' current legal development needs. It has often been a technical assistance tool used to modernize and reform Asian legal systems (Husa, 2018: 129).

This article employs two broadened concepts of legal transplantation that are specifically applicable to transplantation by courts. First, legal transplantation can be introduced by any branch of government, including the "legislature, courts, or administrative bodies" (Mousourakis, 2019: 180). Second, legal transplantation occurs when a state adopts international treaties, resulting in domestic law being increasingly influenced by the incorporation of transnational law (Gillespie, 2008: 662-663).

The expansion of environmental litigation in Asia is intertwined with courts' legal transplantation (Yeh & Chang, 2015: 7-8). A rich body of literature is devoted to the phenomenon of legal transplantation, including its concept and mechanisms. Two clarifications are helpful on this point.

First, this study focuses on the legal norms transposed by court decisions. It concerns the innovative role of Asian courts, which have developed alternative paths to conventional transplantation through legislative rules. Legal transplantation by the legislature is visible in Asian countries because of colonization and globalization (Allison, 2000; Antons, 2017). Instead, this study focuses on the key role of Asian courts in adopting judicial decisions to transplant legal norms from similar jurisdictions.

Second, this article differentiates the concept of legal transplantation from common cross-citations between courts in different jurisdictions. The judicial exchange of ideas is generally encouraged, and reference to foreign judgments in courts boosts domestic environmental law. However, there remains the question of how "transplanting" a law differs from the terminology—citation, reference, applying—used to describe the cross-citation of foreign judgments. Cross-citations do not constitute transplantation unless they create a new legal norm domestically (Efrat, 2022: 6-7). While existing literature may treat the citation of a foreign judgment as a "reference," this article postulates that it falls under legal transplantation when it creates new legal norms that fill domestic legal voids (Gelter & Siems, 2014: 36-39). However, legal transplantation with new legal norms for domestic laws results in contentious issues by filling existing legal voids.

In exploring the role of the Asian courts in legal transplantation, it is important to highlight the rationales and motivations of the courts: Why do Asian courts engage with transplantation in environmental litigation? In this context, two rationales can be highlighted.

One underlying rationale in adopting exogenous judgments into domestic environmental litigation is "justification" (Mousourakis, 2019; Gelter & Siems, 2014: 39). When courts are confronted with legal issues beyond the scope of existing laws and judicial precedents, judges justify their decisions by referring to similar approaches in similar jurisdictions. With the doctrine of precedent (*stare decisis*) in Asian common-law courts, using foreign judgments creates new rules for existing decisions, thus accounting for legal transplantation. Globalization and world trade have increased the trend of Asian courts referring to foreign judicial decisions, which denotes intensified environmental disputes regarding economic activities (Yeh & Chang, 2015: 7-11).

The second rationale is to blend foreign laws with indigenous cultural practices, resulting in innovative judgments and creating new legal norms that fill domestic legal voids (Yeh & Chang, 2015: 7-8; Antons, 2017: 19). Culture and social norms are powerful disciplinary mechanisms that influence social behavior even without laws and are influential in making regulatory laws (Hunter et al., 2002: 102-104).

International environmental principles, as reflected in Asian judicial decisions, are blended with the indigenous social norm of "harmony in society" (Yeh & Chang, 2015: 53-55; Drumbl, 2010: 4, 9). These national courts are "best positioned to interpret and apply international environmental norms in decisions," highlighting "how domestic institutional capacity affects international norm circulation and contestation" (Angstadt, 2023: 319). These approaches are used in developing countries in regions with abundant natural resources (Yap, 2017: 5).

Scholars have focused on the issues and difficulties surrounding legal transplantation. Allison noted that success depends on the context of the two countries, including factors such as the "nature and the principle of the government, its location and extent" and the people's lifestyle (Allison, 2000: 13). Mousourakis argued that "transplant bias" is one issue in transplantation by the legislature that affects "foreign influence," "linguistic tradition," and "knowledge and experience of [the] recipient" (Mousourakis, 2019: 185). This "transplant bias" can be explained by the power and language of the donor country, as well as the understanding of the recipient country, influencing the transplanting laws. This may lead to biased laws that deviate from the original intent of the donor country's legislation. Compared to legislative transplantation, in judicial transplantation, such bias remains relatively low, as judges "carefully consider and evaluate" the foreign legal system (Mousourakis, 2019: 185).

2.2 The development of public interest litigation

Environmental litigation in Asian jurisdictions often takes the form of PIL. Legal transplantation in Asian courts is likewise frequently associated with PIL, especially concerning environmental harms in development projects (Yeh & Chang, 2015: 41).

PIL is a mechanism developed by the Indian judiciary that allows genuinely interested third parties to appear for marginalized communities regarding socioeconomic issues, enabling access to the court (Preston, 2022: 431; Rajamani, 2007: 294). PIL has been transplanted into neighboring South Asian courts in locations such as Sri Lanka in environmental litigation (Bhuwania, 2016: 1-15).

Furthermore, PIL is a prominent approach in industrializing Asian countries as part of the fight against environmental pollution (Mcallister et al., 2016/2010). It compels law violators to adhere to environmental standards and pay compensation for ecological harms through the mechanisms of "judge-made law" and "sanctions" (Mulkey, 2016/2004).

The role of NGOs in PIL is dominant in Asia, working for vulnerable communities as protection against multi-national companies (Varvastian & Kalunga, 2020). Scholars have demonstrated that the role of NGOs in environmental litigation also falls into the category of legal transplantation. This broader perspective on legal transplantation acknowledges that legal principles can be transmitted not only through formal adoption by states but also through informal channels such as NGOs and transnational expert networks (Reimann, 2020: 692; Goldbach, 2019: 595).

Despite the role of NGOs, holding wealthy companies accountable for environmental harm in developing countries is an "elusive goal" because such companies invest more in litigation defense than victims do (Percival, 2020: 333, 339). However, establishing effective environmental regulatory systems and enforcement mechanisms in developing countries can overcome this obstacle (Percival, 2020: 337; Penca, 2020: 102), as countries with explicit constitutional environmental rights have shown a strong legal basis for enforcement and raising lawsuits for environmental violations (Pedersen, 2019; Bryner, 2022).

The infamous Bhopal tragedy that occurred four decades ago triggered a PIL in which an NGO appeared in court on behalf of the victims against a foreign investor, Union Carbide India Ltd.: a subsidiary of the Union Carbide Corporation of the United States. The judgment in *Charan Lal Sahu Etc. v. Union of India* (1990) resulted in the establishment of a new policy, "The Industry Disaster Fund," to ensure prompt actions in the event of future disasters.

After the Bhopal case, India repeatedly charged investment companies in PIL supported by NGOs, ruling the PPP as part of the law. In *Vellore Citizens Welfare Forum v. Union of India*, (1996) and the Calcutta tanneries case (*M.C. Mehta v. Union of India*, 1997), the investors were charged for the environmental damage and those residents affected by the discharge of toxic industry effluent. Similarly, a chemical factory investor paid the cost of the remediation of polluted aquifers and soil in the *Indian Council for Enviro-Legal Action v. Union of India* case (1996). It is noted that the PPP has become a part of domestic law purely in judge-made law form as an outcome of the judicial transplantation of the Rio Declaration in PIL. Subsequently, India has granted statutory recognition to the PPP through the National Green Tribunal Act 2010. As discussed in Section 3.1, these Indian cases shadowed the evolution of Sri Lankan environmental litigation.

Climate litigation in Asia is also emerging as PIL led by NGOs. In several Indian PIL, courts are engrossed in the impact of climate change on deforestation in development projects (*Association for Protection of Democratic Rights v. State of West Bengal and Others*, 2018; *Ashish Kumar Garg v. State of Uttarakhand*, 2022). Furthermore, a PIL brought by the NGO directed the Indian government to move to a policy on "zero carbon airport operation" in an airport construction project (*Hanuman Laxman Aroskar v. Union of India*, 2018).

While courts have established the necessity of addressing environmental concerns, Setzer & Byrnes criticized the Indian government's recent post-COVID economic policy to relax environmental assessments for approving development projects in order to attract investors, arguing that it may negatively affect rural people's livelihoods (Setzer & Byrnes, 2020: 12).

Similarly, in Pakistan, the famous *Legari* case (*Asghar Leghari v. Federation of Pakistan*, 2015) saw a farmer challenge the state for its failure to implement the National Climate Change Policy. This case decision has led scholars to recognize Asia's significant contribution to climate litigation (Peel & Lin, 2019; Bouwer, 2020).

It has been noted that Asia has contributed substantially to global climate litigation, following an independent path (Peel &

Osofsky, 2018; Setzer & Benjamin, 2020). Asian PIL are not directly focused on international climate governance but on rights-based litigation resulting from environmental harm caused by investment projects (Peel & Osofsky, 2020). In the West, by contrast, climate litigation demands proactive regulatory actions that prioritize climate concerns in government decision-making (Setzer & Benjamin, 2020).

Despite the indirect approach to climate issues, Asian PIL supported by NGOs on climate matters has influenced governments to enact new climate control regulations (Setzer & Benjamin, 2020; Burgers, 2020). For instance, in 2014, the Ministry of Transport in Sri Lanka enacted regulations for Air Emission, Fuel, and Vehicle Importation Standards[(6)] following a court order to implement policies aimed at reducing vehicle emissions and air pollution (including CO_2 emissions) in response to a PIL (*Environmental Foundation Ltd v. Minister of Environment*, 2007). However, due to climate change's cross-cutting nature, environmental depletions require proactive state commitment rather than reactive litigation.

Setzer & Benjamin posit that Asia's right-based approach to climate litigation is because of the enforcement issues in environmental legislation, which resulted from "weak and fragmented institutions, incomplete legal foundations, and limited political will" (Setzer & Benjamin, 2020: 83).

Asian courts have developed new water law norms as a result of PILs filed by NGOs against investment projects. In 2019, Bangladesh became the first country in the world to grant legal personality (*locus standi*) to rivers (Burdon & Williams, 2022: 170). In India, the State High Court granted legal personality to two of India's most sacred rivers, Ganga and Yamuna (Burdon & Williams, 2016: 170). Cullet illustrated several PIL developed by the Indian judiciary that established water rights, expanding the right to life as enshrined in Article 21 of the constitution. These cases (*Hamid Khan v. State of Madhya Pradesh*, 1997; *Vishala Kochi Kudivella Sam. Samithi v. State of Kerala*, 2006; *Pani Haq Samiti and Ors. v. Brihan Mumbai Municipal Corporation and Ors.*, 2012) (Cullet, 2017: 328-329) emphasized the state's duty to ensure access to clean drinking water for all citizens.

3. The Chunnakam case

3.1 Before Chunnakam: Environmental PIL transplanting sustainable development in Sri Lanka's past

First, it is helpful to provide background on environmental and investment laws in Sri Lanka. The Parliament Act required the domestic implementation of international treaties in Sri Lanka's dualist legal system. Article 27 (15) of the constitution stipulates that the state shall promote respect for international law and treaty obligations. However, there is no need to enact law under Article 157—bilateral foreign investment treaties or agreements have the status of law when passed by two-thirds of parliament. This provision promotes and protects foreign investments that are important for the development of the national economy.

Two main laws apply to investment projects in Sri Lanka: Board of Investment of Sri Lanka Law No. 4 of 1978, as amended by its subsequent Amendment Acts (BOI-Law) and the Strategic Development Projects Act of 2008. These laws facilitate and provide exemptions from general legal requirements for foreign investments based on their contribution to the national economy.

The National Environmental (Amendment) Act No. 56 of 1988 (NEA) serves as the umbrella legislation for environmental management. It mandates the Central Environmental Authority (CEA) to regulate, maintain, and control sources of environmental pollution in development projects. The NEA requires developers to submit proposals for both new projects and modifications to existing projects, allowing the CEA to evaluate their potential environmental impact.

Section 23A in Part IV A of the NEA and its respective regulations stipulate conditions for certain projects, mandating them to obtain an Environmental Protection Licence (EPL) and a Scheduled Waste Management Licence (SWML) prior to commencement. The SWML specifies tolerance limits for waste discharges into the environment. Sections 5 and 20A of the BOI- Law empowered BOI to grant subsequent annual EPL for foreign investment projects in consultation with the CEA, following the initial EPL granted by the CEA. Section 23BB in Part IVC of the NEA requires that certain projects follow an Initial Environmental Examination (IEE) or Environmental Impact Assessment (EIA) where necessary.

The "Directive Principles of State Policy" in Article 27 (14) of the constitution outlines the state's obligation to protect and improve the environment. However, Article 29 conditions that Article 27 (14) cannot be challenged in court against the state. Unlike India, the fundamental rights of the Sri Lankan Constitution do not provide explicit provisions for the right to live or to the environment.

Despite the lack of explicit environmental rights or enforceable environmental provisions in the constitution, environmental litigation is filed in the Supreme Court under the general provisions in the fundamental rights Chapter (III) of the constitution. A frequently invoked article in environmental litigation is Article 12, which guarantees equal treatment for all people. Article 126 allows individuals to file a fundamental rights petition in the Supreme Court. However, it only applies to "executive or administrative action" as per Article 17. The Supreme Court contemporarily expanded fundamental rights provisions, allowing for parties genuinely interested in litigation (Puvimanasinghe, 2021).

Liability for environmental damages in Sri Lanka can be imposed through both criminal and civil actions. Civil law allows tort claims under the Civil Procedure Code Ordinance No. 2 of 1889 and its amendments. Criminal cases, such as public

nuisance under Section 98 of the Code of Criminal Procedure Act No. 15 of 1979, address statutory violations classified as nuisances, imposing both physical punishments and financial penalties on perpetrators.

However, victims of environmental harm from large development projects often cannot afford lengthy trials, and NGOs are not permitted to file these claims on their behalf. Instead, PILs are used to address infringements or imminent infringements of fundamental rights, serving as the primary legal mechanism against environmental harm from large projects. While the Supreme Court's rulings in PILs are final and conclusive, it is government institutions that are responsible for enforcing them.

Even before the *Chunnakam* case, the Supreme Court relied on legal transplantation in PIL concerning environmental harms caused by foreign-invested development projects, emphasizing the concept of sustainable development. Despite the constitution's narrow approach to environmental issues, the judiciary innovatively introduced and expanded the concept of sustainable development by broadening fundamental rights litigation through the PIL approach, similar to that in India. These judicial innovations occurred a few decades before the legislature enacted the Sustainable Development Act No. 19 of 2017 to implement the 2030 Agenda and SDGs.

Almost nineteen years before the *Chunnakam* case, the Supreme Court decision regarding *Bulankulama v. Secretary, Ministry of Industrial Development* (2000) (commonly known as the *Eppawela* case) marked an important milestone in Sri Lankan environmental law. In this PIL, the judiciary introduced the soft law concept of sustainable development in 2000, giving it legal recognition despite the absence of legislative enactment at that time (Konasinghe, 2021: 11-12). This was achieved by expanding the available constitutional fundamental rights provisions referring to international law and foreign judgments. The *Eppawela* case decision is a classic example of how the Sri Lankan judiciary transplants foreign legal norms into the domestic legal system in environmental-related PILs, filling domestic legal voids.

The case involved a foreign investment contract between the government and Freeport Mac Moran of the USA and its affiliate, Imco Agrico. The proposed final contract conditions unjustifiably granted the sole and exclusive right to explore and extract phosphate and other minerals in the historically and environmentally sensitive Eppawela area in the North Central Province of Sri Lanka.

The *Eppawela* case contributes to the transplantation of new legal norms in three ways. For one thing, this is the first fundamental rights litigation that has been significantly integrated with PIL by the courts, as it involved seven petitioners including landowners, residents engaged in cultivation of land, and the Chief Buddhist monk in the temple (*Eppawela* case, 243-244). The Supreme Court dismissed the preliminary objections from the respondents, who argued that the case should be rejected because it was based on PIL, which is not explicitly recognized in the Sri Lankan Constitution. The court established a "judge-made law" ruling that the petitioners were qualified and entitled to file a PIL under Article 17 in conjunction with Article 126 (1).

The petitioners challenged the company and responsible government institutions, arguing that the imminent infringement of their fundamental rights under Articles 12 (1), 14 (1) (g), and 14 (1) (h) of the constitution was violated due to the proposed agreement (*Eppawela* case, 243-246). They further highlighted the confidential nature of the contract process regarding the phosphate mine, emphasizing the government's violation of environmental laws (NEA) and the threat posed to the ancient irrigation system still vital for agriculture and livelihoods. The petition is backed by expert reports from the National Academy of Science and the National Science Foundation, both of which opine that the proposed agreement will result in not only environmental disasters but also economic ones.

The court desisted from proceeding with the foreign investment contract, assessing the economic, environmental, and social harm of the proposed agreement (*Eppawela* case, 246-247, 320-321). Respondents were accused of imminent infringement of fundamental rights and ordered the government to accurately explore phosphate mines and follow environmental regulations before signing the contract. Notably, the proactive actions of the petitioners aimed at preventing environmental harm from the proposed agreement.

Secondly, in the *Eppawela* case, for the first time, the judiciary innovatively introduced the sustainable development concept, referencing international environmental law and foreign judgments (*Eppawela* case, 274-278). This blended the sustainable development concept with norms rooted in Sri Lanka's history, all without any legislative background. The case decision transplanted several "soft law" principles from the Stockholm Declaration and Rio Declaration, integrating them into domestic law through judge-made law by the Supreme Court. Despite being a dualist country that needs subsequent legislative enactments, these principles have become binding laws in Sri Lanka following the *Eppawela* case.

While highlighting the state's sovereignty to use natural resources for development under its own environmental policies, as outlined in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, the following soft laws were transplanted into domestic environmental law: Principle 14 of the Stockholm Declaration ("Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment"), Principle 1 of the Rio Declaration ("Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature"), and Principle 4 ("In order to achieve sustainable development, environmental protection shall constitute an integral

part of the development process and cannot be considered in isolation from it").

These principles were transplanted to emphasize the sustainable use of the Eppawela phosphate mine, the country's largest phosphate mine, in alignment with the Sri Lankan Buddhist philosophy of sustainable development (*Eppawela* case, 278). To further justify the transplanting sustainable development concept, the Supreme Court adopted the ICJ case for the first time: the *Gabcikovo-Nagymaros Project* case (*Hungary v. Slovakia*, 1997). The court cited Vice President Judge Weeramantry's opinion regarding the Sri Lankan historical Buddhist philosophy on sustainable development, transplanting the ICJ case. Boyle & Redgwell highlighted that for the first time in the ICJ during the *Gabčíkovo-Nagymaros Project* case, Judge Weeramantry presented the concept of sustainable development, drawing upon Buddhist cultural norms from Sri Lanka (Boyle & Redgwell, 2021: 117; Lowe, 1999: 19-25).

Thirdly, the judiciary introduced the doctrine of public trust, a legal principle that explains that the state holds natural resources as a "trustee" for the public (*Eppawela* case, 253-258). The public trust doctrine was also transplanted by adopting the ICJ case, the *Gabcikovo-Nagymaros Project* case blending with indigenous norms. The court adopted Judge Weeramantry's opinion on the doctrine of public trust, as referenced in the ICJ case, integrating the doctrine of public trust with the systematic philosophy of conserving natural resources: a concept dating back to the third century B.C., as explicated in the great chronicle "Mahavamsa" (*Eppawela* case, 254-256).[(7)] This record established that the king (state) bears the guardianship, not ownership, of natural resources, thus enshrining the roots of the public trust doctrine in Sri Lankan Buddhist philosophy. The judgment further referred to a similar approach in Indian and US courts in *M.C. Mehta v. Kamal Nath* (1977) and *Illinois Central R. Co v. Illinois* (1892), pointing to the public trust doctrine.

Following the *Eppawela* case, in the *Watte Gedera Wijebanda v. Conservator General of Forests* case (2009), the Supreme Court reemphasized the impact of judge-made laws that transplanted the non-binding sustainable development concept, adopting the Stockholm Declaration and Rio Declaration into Sri Lankan environmental law (*Wijebanda* case, 358-359). In this case, despite the lack of an explicit reference to environmental rights in the constitution, the first-time judiciary innovatively interpreted that the right to a clean environment is inherent in Article 12 (1)—the right to equal treatment, as linked with an unenforceable Article 27 (14) in the constitution (Duty of the state to protect and improve the environment) (*Wijebanda* case, 356). This marked a significant advancement in sustainable development jurisprudence. The right to a healthy environment was extended to include protection from harmful noise pollution in the case of *Ashik v. Bandula and Others* (2007). In this case, the judiciary also relied on Indian precedents and further ordered the Department of Police to issue regulations to enforce the court's decision (*Ashik* case, 199-201).

3.2 The *Chunnakam* case decision

Before delving into the case decision, it is prudent to briefly review the case's background. Chunnakam (ancient Sinhala name: Hunugama; "හුණුගම") is a densely populated commercial and agricultural area in the Jaffna District in the Northern Province of Sri Lanka. It has been noted that the main electricity power supply source in Chunnakam comprises thermal power plants (pp. 4-5).[(8)] Since 1958, the Chunnakam area has primarily received power from the state-owned Ceylon Electricity Board (CEB) thermal power plant. Since this was destroyed during the war, local private companies provided electricity using similar diesel-powered thermal plants. (The country endured a 30-year terrorist war, which concluded on May 18, 2009. After the war ended, the CEB replaced the old thermal plant with a new one in 2013.)

Due to the insufficient capacity of these local power plants during the war, the BOI selected a foreign investor—Northern Power Company (Pvt) LTD (NPC)—in 2007 to build and operate a thermal power plant to meet the government's requirement to provide electricity for Jaffna (pp. 5, 10). NPC's power plant is also located on leased land owned by the CEB in very close proximity to the CEB's existing thermal power plant. The NPC and the CEB subsequently signed a power purchase agreement in 2007.

The *Chunnakam* case, filed under the fundamental rights Article 12 (1) and 12 (2) of the constitution, involves groundwater pollution causing environmental harm and affecting the livelihood and drinking water of the farming community of Chunnakam due to the thermal power plant operated by NPC (pp. 1-7). In 2015, the petitioner (NGO works toward preserving the environment) by a PIL challenged the NPC (8th respondent) for two reasons: first, violation of the NEA by not obtaining EPL and complying with the procedure for IEE or EIA before commencing operations in 2009, and by increasing the power plant capacity in 2010 beyond the initial capacity (15 MW) without approval.

Secondly, the pollution of groundwater due to the disposal of petroleum waste onto open land has rendered it unfit for human consumption (p. 6). This has had a detrimental impact on farming livelihoods by contaminating wells, which serve as the sole water source for consumption and agricultural activities.

Further, it challenged responsible government institutions (pp. 1-2, 6-7), including the CEA, for failing to enforce the NEA against the NPC and breaching the doctrine of public trust, as residents have a legitimate expectation to access clean water. Other respondents included the ministers in charge and the heads of respective government institutions: CEB, BOI, the National Water Supply and Drainage Board (NWSDB), and respective local authorities. They were challenged for failing to enforce the NEA against the investment company. The Supreme

Court directed the NPC to temporarily halt the operation of the power plant until a decision was reached in the case (pp. 5-6).

The company defended the claim, pointing to two reasons (pp. 8-11). First, just after the end of the war in May 2009, NPC obtained the EPL because CEA was non-existent in Jaffna in 2007. It was further noted that terrorist activities during the war deprived residents of an electric supply through the national grid, and although the Sri Lankan government aimed to provide electricity, the war situation presented practical difficulties. The company refused the claim of an unauthorized increase in capacity.

Second, the NPC is not liable for any groundwater pollution that occurred before 2009 by the nearby CEB thermal power plant (pp. 9-10). The NPC pointed out that in the Chunnakam area, there were severe diesel outflows from the CEB thermal power plant as it was destroyed during 1990 and 1991, and due to this spillage, the area was popularly known as the "oil pond" until 2012. In support of its denial of groundwater pollution from the thermal plant, the NPC presented several expert reports from both local and international institutions.

It has been noted that supporting the NPC's argument, both the CEB and the CEA denied that the NPC is solely responsible for the groundwater pollution (p. 8). Supporting the NPC, the CEB submitted a local expert report that does not conclusively prove whether the NPC had contributed to groundwater pollution with oil at Chunnakam. The CEA also stated that, despite continued inspections in the area, such oil contaminations in groundwater could not be definitively identified as being caused by the NPC.

Concerning the first complaint, the CEA responded that following the application from the NPC on October 12, 2009, the initial EPL was issued on May 20, 2010 (p. 25). Subsequent EPLs were issued by the BOI, with its statutory power in concurrence with the CEA. CEA further noted that the NEA does not mandate an IEE or EIA for 15 MW capacity power plants (p. 8).

The court noted violations of NEA by the NPC (pp. 24-30). The site's works commenced on October 27, 2009, and commercial operation began on December 10, 2009. The NPC had not obtained the EPL before commencing operations, as mandated by the NEA. The court held that although an IEE or EIA was not required for the 15 MW thermal power plant, per section 23 of the NEA, the NPC was still required to obtain the EPL before commencing operations. Furthermore, the NPC failed to renew subsequent annual EPLs on time.

Disregarding the company's denial of the capacity increase, the court held that NPC had unlawfully increased the initial capacity, breaching NEA regulations (pp. 20-21). This was demonstrated by two documents submitted by the BOI and CEA as evidence, showing that the power plant's capacity had indeed been increased beyond 15 MW without adhering to the mandated EIA procedure. The BOI had approved the company's importation of a 30 MW diesel power plant on a duty-free basis, indicating the NPC's plan to increase the capacity at a later stage. Furthermore, the oil contamination investigation report prepared by the CEA clearly stated that the capacity was 30 MW during the inspection conducted in 2015.

The court determined that "it is crystal clear" that the NPC violated the NEA on two occasions, first when increasing the capacity of the power plant without EIA, and then unjustifiably delaying the initial EPL and its annual extensions (pp. 21, 22). The court's "inescapable conclusion" was that the NPC has no authority to commence its operations until the EPL is granted (p. 26). The CEA issued the first EPL on May 20, 2010, seven months after its commencement on October 27, 2009. Subsequent annual renewals of the EPL in 2011, 2012, and 2013 have also been delayed (pp. 24-26).

Furthermore, it has been noted that the CEA and BOI identified the need for a SWML, particularly nearly five years later (p. 30). The CEA agreed with the BOI regarding a conditional EPL on September 30, 2014, to extend the EPL, subject to obtaining a SWML, which the NPC obtained on November 10, 2014.

Regarding the second complaint—groundwater pollution—in 2013 and 2014, the court pointed out CEA and NWSDB reports proving the NPC's liability (pp. 21, 44). The NWSDB reported that the groundwater of farmers' wells around the power plant had been contaminated with oil and grease. Based on reports, the court held that the NPC had been discharging oil-contaminated wastewater onto open land until 2012. Thus, the company is not solely responsible for oil contamination of the groundwater; the court highlighted that previous pollution does not give a "license" for pollution (p. 44).

The Supreme Court of Sri Lanka ruled against both the private investor (the NPC) and government institutions (CEA and BOI), detailing remedial measures (pp. 61-65). The investor was accused of commencing thermal power plant operations without an EPL, unlawfully increasing its initial capacity beyond 15 MW and polluting groundwater by releasing untreated oil effluents onto open land. A 20 million LKR compensation was charged to the company by applying Principle 16 of the Rio Declaration—PPP, referring to the Indian Supreme Court case decision in *Vellore Citizens Welfare Forum v. Union of India* (1996) (detailed later), to compensate the affected farmers for cleaning their oil polluted wells. It was ordered that the NPC pay 20 million LKR within three months, with the NWSDB directed to distribute this compensation to the affected residents based on damage assessments to wells conducted by a panel including the BOI and CEA. The Supreme Court further ruled that both the CEA and BOI violated Article 12 (1) concerning the fundamental rights of residents of the Chunnakam area and the petitioner.

Noticeably, despite the petitioner's plea for a permanent closure of the power plant, the court, considering the necessity for electricity, allowed the plant to resume operations under the

condition that a comprehensive mechanism be implemented to prevent future environmental damage by the NPC, thereby ensuring the sustainability of the court's decision (pp. 61-63). The court ordered the NPC to resume operations only after obtaining the necessary EPL and SWML and ensuring adequate measures to prevent water contamination and environmental pollution. Furthermore, the court ruled that the NWSDB must test the water quality of 50 wells located within a 1.5 km radius of NPC's thermal power station quarterly and bi-annually, starting one year after operations resume. Notably, both the BOI and CEA were directed to take immediate steps under the NEA to establish regulations preventing environmental harm, including provisions for suspending the operation of the 8th respondent's (NPC) power plant until corrective actions are taken and verified.

4. Lessons from the *Chunnakam* case

This section examines how the Chunnakam case created a new legal norm in Sri Lanka transplanting foreign judgments and international law principles, further promoting the legal recognition of sustainable development in investment projects. The analysis is based on three aspects: legal transplantation, the public-interest litigation approach, and impact on foreign investments.

4.1 Legal transplantation in the *Chunnakam* case

First, the judgment is significant because the Supreme Court filled a legal void in the fundamental rights chapter of the Sri Lankan constitution, creating a new judge-made law through legal transplantation. The constitution is void of explicit provisions for filing a PIL against private parties, as Articles 17 and 126 allow fundamental rights action only against the executive or administrative authorities. This means that a non-state institution/person cannot be included as a respondent in fundamental rights litigation.

In the *Chunnakam* case, the court for the first time charged the water pollution cost from a foreign investor, NPC (8th Respondent), in a PIL by applying PPP, broadening the fundamental rights Articles 12 (1), (2), 17, and 126. This transplantation incorporated Principle 16, PPP of the Rio Declaration, and the precedent from the Indian Supreme Court detailed below. So far, the *Chunnakam* case is the only judgment to apply the PPP to charge a non-state party. While Sri Lanka had no adopted law in international agreements on the environment, the judiciary transplanted PPP from the Rio Declaration, creating a new legal norm to charge a private party in an environmental PIL.

The judiciary, by transplanting the PPP, highlighted the responsibility of the government to establish mechanisms that ensure polluters bear the cost of pollution (*Chunnakam* case, 63-64). To justify the new legal norm by applying the PPP, the judgment refers to a similar Indian case (*Vellore Citizens Welfare Forum v. Union of India*, 1996). This was a PIL under Article 32 of the Indian Constitution. The decision to apply PPP charged industries to pay compensation to affected people for contaminating farming lands, groundwater, and the Palar River in Tamil Nadu: the main water source for residents in the area. The judiciary further justified the transplantation of the PPP by citing several Indian rulings that similarly applied the PPP to require investors to compensate those affected by pollution.

Furthermore, the judiciary referred to another Indian Supreme Court decision, *N.D. Jayal v. Union of India* (2004), to broaden the scope of Article 12 (1) of the Sri Lankan Constitution to include environmental rights (*Chunnakam* case, 52). The *Jayal* case extended Article 21 of the Indian Constitution (right to life) to the right to a clean environment. This case is further accepting scientific reports on water pollution (*Chunnakam* case, 43-44). The *Chunnakam* case decision asserted that the Sri Lankan judiciary was shadowed by Indian judgments to employ legal transplantation when creating new legal norms filling constitutional voids.

Additionally, transplantation from the Australian and USA courts was also apparent in the *Chunnakam* case. The *Australia Conservation Foundation Incorporated v. Minister for the Environment and Energy* (2017) case is referenced to further emphasize the soundness of the EIA as an accepted procedure worldwide (*Chunnakam* case, 43). The USA *Mono Lake* case (*National Audubon Society v. Superior Court*, 1983) was transplanted to further establish a public trust doctrine for the state's responsibility for the people's common heritage of groundwater (*Chunnakam* case, 49).

Environmental regulations are effective tools for environmental protection when supported by efficient administration (Bodansky, 2010: 84). Although the Sri Lankan judiciary plays an exemplary role in environmental protection, the legislature and the executive/administration should implement the PPP. A uniform regulatory approach may be more effective for pollution prevention and project continuity compared to the judiciary's case-by-case approach.

It has been ruled against both the BOI and CEA that it is necessary to enforce and monitor regulations under the NEA to prevent future environmental harm (*Chunnakam* case, 62-64). This includes suspending the operation of the 8th respondent's (NPC) power plant in the event of any further violations after the resumption of operations, until corrective actions are taken and verified. Referring to precedent cases, this emphasis was highlighted in the *Chunnakam* case, where the judiciary implied the government's responsibility to regulate projects. Referring to the *Wijebanda* case, it was emphasized that the PPP applies to hold incompetent regulators accountable for regulatory failures. The *Eppawela* case was cited again to emphasize that the party responsible for environmental damage must bear the cost of recovery from such environmental harms, as opposed to increased taxation of the people.

Thus, while the Rio Declaration is generally not legally

binding, the Sri Lankan judiciary ruled in the *Chunnakam* case that such soft laws become part of domestic law when adopted in Supreme Court decisions (*Chunnakam* case, 47-49). Further referring to the verdict on the EIA process in the *Eppawela* case, the judiciary adopted Principle 17 of the Rio Declaration (Requirement of EIA) and Principle 15 (Precautionary Principle). Notably, Principle 10 of the Rio Declaration is emphasized, pointing to the importance of public participation in environmental decision-making and the right to access environmental information held by public authorities.[(9)] To underscore the transplantation of Principle 10 into domestic law, the judiciary highlighted that it is reflected in the 1993 regulations of the NEA, which permit public comments in the IEE and EIA processes.

The Sri Lankan judiciary's judge-made law is of a binding nature in Sri Lanka, as is often referred to and highlighted in Supreme Court decisions as a responsibility of the public authorities (*Chunnakam* case, 48-49). Also, the judiciary noted that the NEA and its regulations on IEE and EIA reflect Principle 10 of the Rio Declaration. Implementing the Rio Declaration imposes a political responsibility on states, and reactive judgments are insufficient to address the increasing environmental depletion, particularly in developing countries.

Although the Sri Lankan judiciary plays an exemplary role in environmental protection, the task of implementing the PPP primarily lies with public authorities, allowing the public to participate in decision-making processes. They must enact necessary regulations and policies to ensure accountability for environmental pollution, which helps continue development projects without interruption. Establishing robust environmental regulatory systems and enforcement mechanisms in developing countries is crucial for mitigating environmental harm (Percival, 2020: 337; Penca, 2020: 102).

Another counterargument is that judicial transplantation is an "infringement of [the] privacy" of citizens, where alien laws come into force beyond people's democratic representation in the legislature (Mousourakis, 2019: 29). It is the central duty of the state to adopt international laws filling the domestic legal gap. "Too much discretion" on the judge's part regarding adopting foreign judgments may consequently "undermine" legislature (Gelter & Siems, 2014: 40).

There remain more general issues concerning foreign transplantation of the PPP by the judiciary. For example, in the *Chunnakam* case, does the charged cost fairly compensate for the environmental damage? Mukherjee offers a distinct interpretation of the PPP as applied by Indian courts, referring to the same *Vellore* judgment (which the *Chunnakam* decision referenced) (Mukherjee, 2023). Mukherjee demonstrated that the environmental cost is not just the "tangible cost" but should include the "full environmental cost," including the cost of preventing environmental pollution (Mukherjee, 2023: 337). Notably, the judiciary also refers to the *Vellore* judgment, underscoring that the polluter's responsibility includes compensating victims and repairing environmental degradation; even so, it imposed a 20 million LKR compensation on the NPC for the victims to clean their wells, stating that the amount should cover "at least a part of the substantial loss, harm, and damage caused to the residents ... and of soil ..." (*Chunnakam* case, 64). However, the judgment did not specify the costs of pollution for restoring environmental damage or outline the methodology the judiciary used to evaluate compensation for water pollution costs following the PPP. This analysis provides insights for assessing environmental costs in future judgments, as well as regulations to be made under the NEA, as directed by the court to the CEA.

4.2 Broadened fundamental rights-based public interest litigation approach

The *Chunnakam* case broadened the PIL approach introduced in the *Eppawela* case and followed subsequent case decisions, thereby expanding the scope of constitutional fundamental rights. As discussed, despite Sri Lanka having no explicit constitutional provisions for PILs, these are accepted by courts following India. Environmental PILs are brought to the courts under the fundamental rights provisions of the constitution, primarily under Article 12, which ensures the right to equal treatment, and are only applicable against executive or administrative actions under Article 17 of the constitution. Both the PIL approach and citizens' environmental rights have been developed by the judiciary, addressing constitutional gaps through legal transplantation. This is particularly evident when legal issues span various fields of current law and judicial precedents.

Following the doctrine of precedent, later decisions broadened the legal norms regarding environmental rights. In other words, the Sri Lankan judiciary in the environmental rights realm is seen as dynamic in the sense that courts can introduce new rules whenever needed. In the *Chunnakam* decision, the judiciary pointed to precedent interpretations of environmental rights in PIL (*Chunnakam* case, 47-52).

Although the constitution does not explicitly provide for PIL, the judiciary in Sri Lanka has reaffirmed the application of fundamental rights provisions to include environmental rights through PIL (*Chunnakam* case, 49). The judiciary consequently referred to "an application of this nature, which has the flavour of public interest litigation and which raises important issues regarding the right of a section of the citizens of this country to have their sources of water protected from pollution" (*Chunnakam* case, 15).

Amarasinghe demonstrated that the *Chunnakam* case further strengthens the constitutional approach of environmental rights PIL in Sri Lanka (Amarasinghe, 2022) because the judiciary accepted the case as a PIL while the petitioner filed it under Articles 12 (1), 17, and 126 of the constitution.

Furthermore, it is significant that in the *Chunnakam* case, the petitioner was neither a resident of the Chunnakam area

nor of the Northern Province (*Chunnakam* case, 1, 5). The petitioner's office was situated in the Western Province, far from Chunnakam. Notably, in all previous PILs discussed, residents or affected parties were included in the fundamental rights petition along with an environmental NGO. This indicates that, despite the absence of directly affected residents as petitioners, the Supreme Court accepted the application as a public interest case on behalf of the affected residents while the NGO, located outside the Chunnakam area, was the sole petitioner representing the affected residents. This represents a further expansion in Sri Lankan PIL, encouraging genuinely interested parties to involve themselves in environmental issues.

As noted, the legal norms, sustainable development, and public trust previously transplanted in the *Eppawela* case from an ICJ decision, blending with Buddhist norms on sustainable development into a judge-made law, are further expanded in the *Chunnakam* case (*Chunnakam* case, 51). The judiciary emphasized the responsibility of the state and its institutions to ensure that development projects balance economic development with the well-being of the people, thereby promoting sustainable development. It was further stressed that if development projects harm the quality of life of people and destroy the environment, they do not constitute true development.

Additionally, the BOI and the CEA were highlighted as having a duty to uphold the objectives of the NEA and its regulations (*Chunnakam* case, 47-50). The judiciary, drawing on the precedent set in the *Eppawela* case, further emphasized the importance of public trust and the need for careful consideration of IEE and EIA. As discussed, Principles 17, 15, and 10 of the Rio Declaration were transplanted, reflecting these principles in the NEA and its regulations aimed at achieving sustainable development.

The judiciary stressed the government's duty to facilitate and ensure the citizens' right to information on environmental matters handled by the government, as well as to encourage public participation in the decision-making process (*Chunnakam* case, 48-50). Additionally, it was emphasized that effective access to both judiciary and administrative proceedings should be provided, including avenues for redress and remedies. The *Mono Lake* case cited by the judiciary further justifies the public trust doctrine.

The *Chunnakam* decision further affirmed the environmental rights-based PIL that the judiciary had pointed to in precedent interpretations of the constitution's environmental rights in several PIL. Additionally, all these cases underscored the public trust doctrine, highlighting the state's responsibility for environmental conservation and sustainable development. The landmark cases cited—the *Eppawela* case (2008), *Wijebanda* case (2009), *Premala Perera v. Tissa Karaliyadde* (2009), and *Environmental Foundation Ltd v. Mahaweli Authority* (2010)—suggested the contemporary development of PIL, transplanting foreign judgments (*Chunnakam* case, 49).

4.3 Lessons for future foreign investments

We will now turn to a discussion of the impact of environmental litigation on foreign investments. As noted, the Supreme Court highlighted legal breaches in the project: violating NEA by not following EPL and EIA procedures. However, it is noted that the investor faced practical difficulties in obtaining initial EPL, as CEA had not maintained an office in Jaffna. While the BOI approved duty-free machinery imports for the 30 MW power plant (despite being aware that the initial capacity was 15 MW and that any increase beyond this would require an EIA), the requirement for conducting an EIA should have been clear to the BOI.

Both CEA and BOI have a statutory duty to ensure compliance with environmental procedures and regulations and facilitate investment projects, e.g., supplying electricity to Jaffna during the war, as the government could not make this provision. Also, both organizations have experience with previous judiciary actions on foreign-invested development projects that violate similar provisions in the NEA (i.e., the *Eppawela* case).

The main loophole in this situation lies in weak institutional mechanisms for enforcing NEA and environmental regulations for development projects. The legal gap refers to the absence of legal provisions addressing environmental rights and regulations that assess and compel polluters to be liable for environmental and social harm. Additionally, the absence of institutional practices to learn lessons from previous similar cases, which underscored the importance of the EIA procedure, is notable. The merits of the EIA as a powerful tool to assess the impact on the environment and livelihood dependency have been well-recognized worldwide (Fisher, 2022) and often by the judiciary in environmental PIL.

The selected location is a "densely populated" agricultural hub in Jaffna (*Chunnakam* case, 3), which was chosen by the authorities (BOI, CEB, CEA) without proper environmental, social, and economic considerations. The wrong selection of location—surrounded by high-density farming communities that utilize groundwater for agriculture and daily consumption—also impacts the investor and the project's failure. Such a location is unsuitable for a diesel thermal power plant without a proper EIA. To date, groundwater is the only resource in the area not yet to receive permanent water services from the government (NWSDB). The government institutions (BOI, CEA, CEB) did not prioritize these critical aspects when approving the location, which has impacted the project.

The implication of the PPP is also important for the investors. When the Supreme Court created a "judge-made law" to charge private investors for environmental harm, the decision marked a precedent for all investment projects. Both the government and investors should be concerned with the environmental and social impact in the project planning stage, avoiding environmental harms.

5. Conclusion

Widespread environmental degradation and harm to communities caused by foreign companies' development projects have been a well-known reality for decades, as evidenced by disasters in South Asia. Despite lessons learned from infamous environmental disasters and landmark PILs which have established new legal norms to address gaps in domestic environmental laws and mitigate risks, investment companies continue to violate environmental regulations. Notable PIL cases, such as the Bhopal disaster and the *Eppawela* phosphate mining case, along with climate-related litigation, underscore a growing global threat linked to large industries, often disregarding precedents with transnational insights. This issue is particularly acute in developing South Asian countries, where pressing economic development challenges persist.

Sri Lanka, a small island in Asia, similarly faces dual challenges of low economic development and environmental harm due to investment-based development projects. Against this backdrop, the Sri Lankan judiciary's contribution to PIL plays a remarkable role in promoting sustainable development while safeguarding people's fundamental rights, despite the impact of constitutional and legislative voids on dynamic environmental and economic issues. The judiciary has developed new environmental norms through the legal transplantation of international laws and foreign judicial decisions, ruling against law violators and enforcing regulations, thereby highlighting the regulatory role of the government, which has gained wide scholarly attention.

This role of the courts was reaffirmed in the *Chunnakam* case. The judiciary's efforts in legal transplantation have significantly contributed to sustainable development practices and filled a domestic legal gap by broadening the scope of existing constitutional fundamental rights under Articles 12 (1) and 12 (2) to hold private parties accountable for environmental harms for the first time in a PIL. The case decision emphasizes the PPP (Principle 16 in the Rio Declaration), highlighting the need for a systematic regulatory mechanism where polluters pay the cost of environmental pollution. As highlighted in the court decision, this approach should prioritize proactive government regulations under the NEA and efficient institutional mechanisms aimed at preventing industrial pollution rather than relying solely on reactive measures such as charging investors after the fact.

The investor's "environmental misconduct" lost the social trust required to operate the project (Ishikawa, 2023: 178-180). While investors anticipate project sustainability in a foreign country, they must adhere to domestic environmental legal procedures given the sensitivity of environmental issues that are closely tied to livelihoods. Social perceptions and responses are crucial for ensuring the sustainability of investments that aim to deliver economic and social benefits.

Preston's discussion on environmental law highlights that "... institutional responsibility for fundamental environmental values lies with the legislature and the executive rather than the judiciary" (Preston, 2024: 160). The outcome of reactive adjudications is insufficient to address the government's economic targets, investors' expectations, and recovering environmental damages, even though courts continue to perform exemplary work in environmental litigation. On the other hand, it is a blowback for foreign investments since "judges with discretion" for transnational judiciary power appear to constitute an "anti-democratic move" in a country, indicating the failure of state governance (Gelter & Siems, 2014: 40; Burgers, 2020: 59; Graver, 2015).

When administrative authorities fail to enforce laws and fulfill their duties effectively, people are left with no choice but to resort to legal procedures in courts, which can be complex, costly, and time-consuming. Weak enforcement of environmental laws and institutional mechanisms in Sri Lanka leads to environmental harm, disrupts people's livelihoods, and hinders the government's objectives to achieve economic targets through investment projects. These drawbacks arise from various underlying reasons, including historical factors and systemic challenges.

One argument is that the negative impacts of Western colonization are still visible in unsustainable development practices and weak administrative and institutional mechanisms (Atapattu & Gonzalez, 2015: 5-6; Kotzé, 2015: 178-179). Countries rich in natural resources and biodiversity had a sustainable livelihood drastically changed by European colonization and development (McGregor, 2020). The forcible economic policies of the West continued depriving Asian countries that have experienced increased poverty (Atapattu & Gonzalez, 2015: 8-9).

Second, the Northern countries' unilateral approach to drafting international environmental agreements, without considering indigenous sustainable environmental norms, has failed to be effectively implemented in "Southern countries" (Atapattu & Gonzalez, 2015: 8-10; see also, Kotzé, 2015: 180-181; Preston, 2024: 161). Comprehending the indigenous livelihood norms, scholars are concerned with linking those up with the current sustainable development efforts in international law (Bansal et al., 2024; McGregor, 2020). This suggests that incorporating indigenous knowledge into current international laws is necessary because local environmental laws alone cannot address this challenge (Smallwood, 2024).

Asian developing governments should modernize their environmental legal systems and enforcement mechanisms to align with economic goals while ensuring environmental sustainability. This study offers insights from similar jurisdictions and serves as a lesson for investors, enhancing their understanding of potential pitfalls in developing countries.

This research reveals that legal transplantation in environmental law and sustainable development in Sri Lanka is utilized by the courts in PIL to address environmental harm. The courts may develop criteria to apply the PPP, considering total envi-

ronmental damage in future PILs, following the precedent set by the *Chunnakam* case. Investigating how courts have employed legal transplantation to promote sustainable development and the SDGs in PILs over the past few decades represents a new area of research that could lead to a review of existing environmental regulations.

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Notes

(1) Declaration of the United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, UN Doc. A/CONF. 48/14, chapter 1, pp. 3-5.

(2) Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, UN Doc. A/CONF151/26/Res.1(Vol 1), Annex 1.

(3) Copenhagen Declaration on Social Development, Report of the World Summit for Social Development, Copenhagen, 6-12 March 1995, UN Doc. A/CONF.166/9, chapter I, Resolution 1, Annex I.

(4) Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August - 4 September 2002, UN. Doc. A/CONF.199/20, chapter I, Resolution 1, Annex, para. 5.

(5) Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015 in United Nations Summit on Sustainable Development, New York, 25-27 September 2015, UN Doc. A/RES/70/1, preamble, para. 2.

(6) *Air Emission, Fuel, and Vehicle Importation Standards* published in Gazette Notifications 1887/20, 05 November 2014 and 1895/43, 02 January 2015.

(7) The *Eppawela* case cited *Hungary v. Slovakia*, (1997) p.78, which cited "Mahindagamanaya" (B.C. 306) in the Great Chronicle of Sri Lanka. This historical record is in the "Mahavamsa" *Sinhala: මහාවංශ, Mahāvansha* [emphasis added], written by the Buddhist monk Mahanama at the Mahavihara temple in Anuradhapura during the 5th to 6th century CE ("Mahavamsa" chap. 68, pp. 8-13).

(8) In Section 3.2, when citing certain page(s) from the *Chunnakam* case, the relevant page numbers with "p." or "pp." are indicated in parentheses.

(9) The right to access information is a fundamental right under Chapter III, Article 14A of the constitution, established by a constitutional amendment in 2015. Subsequently, the Right to Information Act No. 12 of 2016 was enacted to foster a culture of disclosure among public authorities, subject to several limitations outlined in Section 4 of the Act.

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