

Memorandum

**ENVIRONMENTAL CONTROVERSIES: COULD AN INTERNATIONAL
FORUM FOR DISPUTE SETTLEMENT SOLVE THE DILEMMA IN BHOPAL
CASE?**

Omar T. Mohammedi, Esq.

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I-FACTS

Union Carbide of India Ltd. (U.C.I.L), a subsidiary of an American corporation called Union Carbide (UCC), produced pesticides at its Bhopal plant. A dangerous ingredient contained in pesticides, the methyl isocyanate gas, leaked on December 2, 1984 and caused one of the worst environmental disasters. About 2,000 people are thought to have died and hundreds of thousands were injured¹.

As a result of that incident, the Indian government facilitated a legal aid process, which resulted in over 2000 claims being filed in the Bhopal District Court. In 1985, the Indian government passed the Bhopal Disaster Act which authorized it to represent the Bhopal victims (consolidating 6,500 claims filed in India)². Before resorting to adjudication, the Indian government (representing the victims) and UCC tried to resolve their dispute through a compromise. However, the Indian government rejected the \$200 million offer by UCC and filed suit in the United States³.

The Indian government argued that U.S. courts had a commitment to both American citizens and the world community to decide upon the liability of a U.S. company for an accident which occurred in one of its overseas subsidiaries⁴. In addition, the Indian government argued that its legal system was ill-equipped to handle such a complicated case. The UCC countered this position with the argument

¹. See Mark Galanter, Legal Torpor: Why So Little Has Happened in India after the Bhopal Tragedy, 20 TEX. INTL L. J. 273 284 (1985).

².THE BHOPAL GAS LEAK DISASTER ACT SECTION 3 (1) (1985). Reprinted in 25 I.L.M. 884 (1986).

³. See Jamie Cassels, The Uncertain Promise of Law: Lessons from Bhopal, 29 OSGOOD HALL L. J. 13 (1991).

⁴ Id. at 27. For additional commentary on the issue of liability of a transnational corporation for the acts of its subsidiary, see Walter Kolvenbach, European Reflections on Bhopal and the Consequences for Transnational Corporations, 14 INTL BUS. LAW. 357(6) (Nov. 1986) and Charles C. Hillman, Multinational Enterprise Liability for Ultra hazardous Activities, 15 INTL BUS. LAW. 66(5) (Feb. 1987).

that India as a sovereign state had a regulatory interest over the Bhopal plant, and therefore it could not argue that its legal system was inadequate⁵.

The federal court accepted the UCC argument on the grounds that earlier cases supported the view that the regulatory interest of the host state in the control of industries within its territory was a strong factor favoring dismissal on the ground of "forum non conveniens"⁶. Judge Keenan reasoned that as a matter of public interest, it would be paternalistic to impose U.S. environmental standards on the Indian government, especially when the plant was regulated by Indian law. He stated "to retain the litigation [in the United States] would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation."⁷ After the U.S. court dismissed the case, the Indian government filed suit for damages of \$3 billion before the Bhopal district Court⁸. In December 1987, the Bhopal District Court ordered UCC to pay \$270 million in interim relief⁹. The UCC appealed to the State High Court which reduced the interim payment to \$190 million¹⁰. Again, UCC appealed the High Court decision before the Indian Supreme Court¹¹. Finally, on February 14, 1989, after a long period of 4 years and 2 months, the supreme court approved a settlement agreement between

⁵. For detailed discussion of both parties' arguments see, Cassels, *supra* note 3 at 16-17.

⁶. *Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 842 (S.D.N.Y. 1986). *aff'd in part and modified in part*, 809 F. 2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

⁷. In *Re: Union Carbide Corporation Gas Leak Disaster at Bhopal, India* in December 1984, 601 F. Supp. 1035, in *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE* 69 (The Indian Law Institute 1986).

⁸. *Union of India V. Union Carbide Corp.*, No 1113 (D. Bhopal, India 1986).

⁹. See Sanjoy Hazarika, *Bhopal Payments by Union Carbide Set at \$470 million*, *NY. Times*, Feb. 15, 1989, at A.1.

¹⁰. *Id.*

¹¹. *Id.*

the parties in which UCC promised to pay \$470 million¹². The settlement resulted in a dismissal of all criminal charges and civil suits in India against UCC. Accordingly, the court ordered the award to be paid in a lump sum by March 1989¹³.

Brief Evaluation of the Bhopal case

The dispute resolution in the Bhopal case involved the following elements: An international environmental accident caused by a transnational corporation, parent company environmental responsibility through its own subsidiary, a host state (India) representing the victims, and two national legal systems (the U.S. and India).

In addition, the Bhopal case presented three possible scenarios in an international environmental dispute : A dispute between a state (India) and a private party(UCC/UCIL), between private parties(the victims and UCC/UCIL), or between states(the U.S. and India). However, The procedures of the case fit only the first scenario, in which India sued for damages before the U.S. and Indian courts on behalf of its citizens against the UCC, a private party.

It is very interesting that India, a sovereign state, resorted to the court of a foreign nation to seek remedies for its citizen¹⁴. At the same time, a major multinational corporation, whose policy is to maintain "centralized integrated corporate strategic planning and control", denied its responsibility for its subsidiary¹⁵.

The problem with the Bhopal settlement was the time it took which failed as a speedy dispute resolution. The other problem is the low compensation settlement

¹². Id.

¹³. Id.

¹⁴. As one commentator noted, the desire to use the United States as a forum was based on the Indian people conviction that the Indian legal system was incapable of handling the litigation. See Galanter, *Supra* note 1 at 273, 284.

¹⁵. Id.

which was only \$470 instead of \$3 billion originally sought by Indian government. The compensation settlement was not only minimal in comparison to the disaster but no criminal or civil liability was asserted¹⁶.

In addition, in environmental disaster, the victims should not have to wait four years to be compensated. Fortunately, the Supreme Court approved the settlement agreement between the parties. Otherwise the case might have still been in litigation which would only benefit the lawyers at this point¹⁷.

Notwithstanding Bhopal, there may be ways to rectify the inadequacy of Indian legal system so as to resolve future international environmental disputes more quickly¹⁸.

At this point, however, the Bhopal case demonstrated the ineffectiveness of India, a developing country to deal with such an environmental disaster. In addition, To rectify its legal system, India would require a great deal of financial sources and technical expertise which developing country does not usually possess.

Thus, to rectify the actual problem, the application of domestic environmental laws of parent based corporations may be applied to regulate activities of the subsidiaries operating in another country. In this case the US law may be applied on extraterritorial basis and the US forum may also be another possibility.

The other alternative is to resort to an international forum. environmental disputes are not a state problem per se. In fact, in most environmental controversies the injured are private parties. Therefore, private parties should not be bared from

¹⁶. Id. at 281.

¹⁷. "The hopes of the victims were raised impossibly high, while behind closed doors, they were being used simply as bargaining chips by lawyers jockeying for control of the litigation." See Cassels, *Supra* note 3 at 11.

¹⁸. See Covell, *The Bhopal Disaster Litigation: It's Not Over Yet*, 16 N.C.J. INT'L. & COM. REG. 304-305 (1991) (suggesting new legislation that could remedy problems like those in Bhopal, such as jurisdiction consolidation of claims, interim relief, and distribution of compensation).

seeking remedies in the international arena. In the Bhopal case an international alternative should have been provided and private parties should have had the standing to sue before an international forum. In addition a recognized international environmental standard should be developed to render MNCs internationally liable for their environmental accidents.

Knowing that there is a choice of forums and international environmental standards, citizens of India (a developing country not able to protect its own environment) would have international environmental protection. The application of international environmental standards will not only correct, to some extent, the inadequacy of national laws dealing with environmental disasters, but decrease the prospect of environmental disputes. Therefore, rather than focusing totally on "ex post facto" dispute settlements, efforts would concentrate on methods of dispute avoidance as well¹⁹.

However, given the undeveloped state of international environmental law, I will not suggest ways to prevent dispute resolution, particularly when such international environmental standard does not exist yet. Rather, I will provide some possible alternatives to the actual environmental disputes mechanism with respect to the Bhopal case.

Within this context the analysis will attempt to answer the following questions:

- A. Why was international law not considered in the Bhopal case ?
- B. What is the role of international law in providing a dispute resolution mechanism which will protect the environment and effective process for the affected parties?
- C. Can an international forum of dispute resolution rectify the inadequacy of Indian national law in dealing with environmental controversies?

¹⁹. See Bilder, *The Settlement of Disputes in the Field of the International Law of the Environment*, 1 HAGUE RECUEIL DES COURS [HAGUE R.C.] 159-160 (1975).

D. Can domestic environmental laws if applied extraterritorially, be more effective to resolve disputes of transnational character?

Discussion

The record for resolving international environmental disputes reflect the nature of international law which lacks a central law making authority and a comprehensive enforcement mechanism. International environmental disputes have long existed between states²⁰. For the most part, countries have sought to address the environmental issues through multilateral or bilateral arrangements. Such instruments are largely a function of diplomacy and politics in which each member is prepared to discuss the mutual awareness of the environmental degradation, but at the same time unwilling to commit to compulsory adjudication. The list of environmental agreements is extensive²¹. Nevertheless, due to their "soft law" character²², these agreements provide no binding enforcement mechanism.

Within the last ten years more than 150 multilateral agreements have been concluded. Nevertheless these agreements though they are impressive in number, they do not have the force of law to stop the environmental damages²³.

²⁰. Increase in environmental disputes paralleled growth following World War Two. See Zalop, Approach to Enforcement of Environmental Law: An International Perspective, 3 HASTING INTERNATIONAL & COMP. L. REV. 299 (1980).

²¹. For a list and detailed discussion of the various environmental agreements and treaties see generally WILLIAM WEINER, INTERNATIONAL ENVIRONMENTAL LAW (1993).

²². States may decide to forgo an agreement based on joint declarations and recommendations, usually referred to as "Soft Law". These declarations do not have the force of a formal legal binding agreement. They are guidelines and non-binding principles. The typical language of "soft law" provisions is the word "should" instead of "shall". For details on "soft law" environmental agreements see JESSICA TUCHMAN MATHEWS, PRESERVING THE GLOBAL ENVIRONMENT, 252-253 (1991). See also Pierre-Marrie Dupuy, Soft Law and the International Law of the Environment, MICH. J. INT'L. 420-429 (1991)

United Nation Conference on Environment and Development (UNCED)²⁴ though considered the biggest event in the history of environmental agreements, in which a hundred and seventy five countries participated, its twenty seven principles comprise vague objectives and no legal solution to the protection of the environment.

The effort to create a comprehensive international legal forum for environmental disputes was made as early as 1972²⁵. The Stockholm Conference recognized the balance between nation's right to exploit its own resources with its extraterritorial responsibility to avoid injury to another country²⁶. Although the Conference did not achieve significant results, it created the incentive to globalize environmental problems and established an international standard within which dispute resolution would serve the objectives of the member states. As a result countries with varying environmental policies used different approaches in creating international environmental agreements to settle their environmental disputes.

During our search for a practical and effective means to resolve disputes of transnational environmental nature we discovered many hurdles. One of the predominant problems that environmental law is encountering is its dependence on the archaic nature of international law which in practice recognizes only state actions.

Hence, in most cases, only countries are recognized as responsible actors.

Citizens or Non-Governmental Organizations (NGOs) enjoy virtually no rights under

²³. UNITED NATIONS ENVIRONMENT PROGRAMME, REGISTER FOR INTERNATIONAL TREATIES AND OTHER AGREEMENTS IN THE FIELD OF THE ENVIRONMENT, UN Doc. UNEP/GC. 16/Inf. 4 (1991) (listing 152 multilateral agreements).

²⁴. See Report of the United Nations Conference on Environment and Development, United Nations Conference on Environment and Development, at 50, 73, U.N. Doc. A/CONF. 151/26 (VOL. iv) (1992) [hereinafter UNCED Report].

²⁵. See the 1972 Stockholm Declaration on the Human Environment, adopted by consensus by the Stockholm Conference on the Human Environment on June 16, 1972. U.N. Doc. A/CONF. 48/14/Rev. 1.1.

²⁶ Declaration of the United Nations Conference on the Human Environment, June 1972, Principle 21, DPT'S ST. BULL., July 24, 1972, Principle 21 at 118, June 16, 1972, 11 I.L.M. 1416, 1420, reprinted in U.N. Doc. A/CONF. 48/14/Rev. 1 (1973) [hereinafter Stockholm Declaration].

international law and, therefore, no standing is granted to them. A case such as Bhopal, though it is a human catastrophe, cannot be brought before the International Court of Justice given the involvement of individuals as parties.

The other problem comprises the lack of an existing international environmental regulatory body which left international disputes in a state of disarray. In addition, the politicized atmosphere regarding international environmental problems has adversely altered the international efforts towards enacting a binding international environmental code and establishing an authoritative body to implement such a code.

Eventually, the harmful activities caused by MNCs and the state of complexity that MNCs could add to the already complicated transnational environmental issues

These perplexing issues surrounding transnational environmental dispute made our task troublesome and hard to provide effective practical solutions vacant of any legal and political controversies.

Notwithstanding the lack of an existing international environmental body of binding rules and non-existing international forum, I attempted to provide humble suggestions in a light of the Bhopal case.

The focus of this memorandum will be on the following topics:

- A. The nature and evolution of international environmental law and its role in providing and international forum for transnational environmental disputes;
- B. Possible methods of dispute resolutions that international law may offer to resolve international environmental controversies;
- C. Possible international forums that may resolve the inadequacy of Indian law in dealing with the environmental dispute in which MNCs is the respondent .
- D. Extraterritoriality: An interim use of domestic environmental regulations of parent based corporation to regulate subsidiaries abroad.
- E. Necessary international Initiatives: A need for international environmental code for MNCs.

A. The nature and development of International Environmental Law and its Role in Providing an International Forum for Transnational Environmental Disputes

Dispute resolution in an environmental controversy can follow two roads. The first road may stay within the realm of national law. In this case the national courts of India and the United States referred to private international law and domestic rules of procedural and substantive law. The other road for dispute resolution of environmental controversies can fall within the realm of international law which may be an important alternative to national laws.

Considering the failure of national laws in Bhopal case, why was international law not considered initially in Bhopal?

Although environmental issues have become part of virtually every question in the global decision-making process today, international environmental law is still in its initial stage of development. Therefore, judicial dispute resolution is ill-equipped to deal with a specific environmental disaster such as the problem of transfer and effects of hazardous technology in the Bhopal case²⁷. The absence of internationally recognized environmental norms and institutions leave the parties without any choice but national laws and national courts.

The nature and complexity of international environmental disputes and its interdependence with principles of state sovereignty, economic and national interest, immunity and the limited liability of the state, have clearly dictated the method of dispute settlements²⁸. Due to the inherent nature of the world political system, the

²⁷. See Milton R. Wessel, *Alternative Resolution for the Socioscientific Dispute*, 1 J. L. & TECH. 1, 3-6 (1986).

²⁸. Stockholm Declaration (Principle 21), *supra* note 26 at 118.

statute of International Court of Justice²⁹, the Hague Convention for the Pacific Settlement of International Disputes³⁰, and various multilateral and bilateral treaties, the official parties in most transnational environmental disputes are nation-states.

Nonetheless, modern international law provides that a state has the duty to ensure that activity within its jurisdiction does not cause damage to the environment of another state. This new approach was established by the Trail smelter Arbitration³¹.

The arbitral tribunal in the Trail Smelter stated that:

"Under the principle of International Law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury of fumes in or to the territory of another state or to the property or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." ³²

The Stockholm Declaration on Human Environment of 1972 codified this international environmental principle and balanced the interest between the state's

²⁹. Pursuant to Article 34 of the Statute of the International Court of Justice: "Only States may be parties in cases before the Court". Statute of the International Court of Justice, 1949, 59 Stat. 1055 [hereinafter ICJ Statute].

³⁰. The Hague Peace Conferences of 1899 and 1907 each produced such a convention: 29 July 1899, 32 Stat. 1799 (1901-3), T.S. no. 392; 18 October 1907, 36 Stat. 2199 (1909-11), T.S. No. 536, respectively.

³¹. Trail Smelter Case (Canada V. United States), Arbitral Award, March 11, 1941, 3 U.N. Report of International Arbitral Awards 1938 (1949). The case started in 1928 and did not end until 1941. *Id.* at 1965. A Canadian company, the consolidated Mining and Smelting Company of Canada, LTD, operated a Smelter in British Columbia, on the Columbia River about eleven miles from an international boundary. The Smelter emitted sulphur dioxide that drifted down the Columbia River Valley and harmed crops, woodlands and fisheries in the state of Washington. Canada admitted liability and agreed to establish an arbitral tribunal to settle the question of damages authorizing it "to apply the principles of both international law and US law."

Trail Smelter Case (Canada v. United States), Arbitral Award, March 11, 1941, 3 U.N. Report of International Arbitral Awards 1938 (1949).

³². See Note, Beyond the Bargaining Table: Canada's Use of Section 115 of the United States Clean Air Act to prevent Acid Rain, 16 CORNELL INT'L L. J. 193, 197 (1983). Although the United States reportedly contributes significant toxics into Canada's environment, the United States has registered substantive legislative initiatives on transboundary acid rain.

right to exploit its resources and its responsibility "not to cause damage of others or areas beyond the limits of national jurisdiction."³³

The Trail Smelter case and the Stockholm Declaration reiterated the general principles of international responsibilities and territorial sovereignty of a state which marked the starting point for a discussion of international legal standards and methods of dispute resolution. The established principle has also been echoed in principle 2 of the recent UNCED's Declaration³⁴.

The established principle of international environmental law, however, did not and still does not guarantee a compulsory commitment of a country to resolve environmental claims¹. Countries may recognize an environmental threat, yet they may be unwilling to formulate an international standard to deal with them. The position of a country to decide whether to participate in environmentally protective actions depends largely from its discretionary power inherited from its national sovereignty.

In addition, due to the principle of territorial sovereignty, a state naturally resists the application of a third party dispute resolution method since the intervention of a third party may threaten the state's national control over its territorial interests.

Under such circumstances one has to be aware that though countries may submit to dispute settlement on national matters, they are often hesitant to accept the process on an international level based upon their fear that they may compromise their territorial integrity to more powerful nations.

³³. Stockholm Declaration, Supra note 26.

³⁴. Principle 2 of the UNCED states: "States have, in accordance, with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. UNCED Declaration, Supra note 24.

³⁵. See generally Blinder, Some Limitations of Adjudication as an International Dispute Settlement Technique, 23 VA. J. INT'L L. (1982).

The characteristic of most environmental agreements is principally their reliance on the good faith of their contracting parties to abate further damage to the environment³⁶. These agreements provide a more peaceful alternative to the contentious and third party methods of dispute settlement. Even, the recent UNCED declaration, calls on states to resolve their environmental disputes peacefully rather than suggesting legal remedies to environmental transnational disputes³⁷.

Accordingly, states generally prefer to solve their own environmental problems through negotiations and consultations³⁸. The rationale behind this theory is that since states must continue to peacefully co-exist, and because environmental disputes are of significance, they are better solved by the parties involved rather than by a third party. Negotiations and other non-judicial techniques have some merits in terms of maximum flexibility³⁹ Nevertheless, the peaceful process of environmental dispute resolution is valid only when the parties can agree to agree.

B. Possible methods of dispute resolution that International Law may offer to resolve international environmental controversies

Beyond the process of negotiation or other political means, there is a variety of international dispute resolution procedures that the international community including countries, international organizations, and private parties, including MNCs, may use. Although there is not an international forum that specifically resolves issues of

³⁷. In its Principle 26 UNCED Declaration states "States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations." See UNCED Report supra note 24.

³⁸. For details see Stein, *The Settlement of Environmental Disputes: Towards a System of Flexible Dispute Settlement*, 12 SYR. J. INT'L L. & COM. 286 (1985).

³⁹. Id.

environmental nature, international law offers certain techniques such as mediation, arbitration, and adjudication that may be useful to resolve environmental disputes and assess the conflict in a judicial and remedial manner.

1. Mediation:

Although similar to negotiation techniques, it involves a third party who is involved in the dispute. The role of the mediator is to advise the disputants to reach an agreement. He has no interest in the outcome of the dispute but to bring the disputants to a point of consensus on the substantive and important issues of debate⁴⁰.

In practice mediation may be useful in cases where the parties have totally opposite view points. Using the third party may be useful in that it will discourage the disputants from taking extreme positions and it will help them reach a compromise. This method of non-adversarial settlement will not always work, but it is a very useful first step. Mediation may also be useful in cases where the disputants have similar environmental laws and a common interest in preserving environmental sovereignty. The mediator will have the opportunity to point out these positive common attitudes of the parties towards environmental preservation and help them achieve a mutually acceptable solution.

Mediation has proven successful in many environmental disputes⁴¹. For instance, it was important to end a disagreement between the city of Seattle and British Columbia in the Skagit Dam dispute⁴².

⁴⁰. See generally Watson and Danielson, Environmental Mediation, 15 NAT. RESOURCES L. 687 (1982).

⁴¹. Mediation has mostly been used in disputes involving shared waterways. For detailed Review of many United States Cases involving environmental mediation see Cooper, The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms, 24 CAN. Y.B. INT'L L. 285 (1986).

As mentioned above mediation or other peaceful means of dispute resolution are only useful to the extent that the parties are ready to settle their differences without invoking the judicial process. This method was not successful in the Bhopal case because the Indian government representing its citizens refused initial settlement amount suggested by UCC. In addition, the mediation process may last forever if the mediator cannot bring the two parties to agreement.

2. Adjudication

Adjudication is another technique that international law may offer to the disputants to resolve their international conflicts. Adjudication in international environmental disputes may involve the application of international law principles and the use of an international tribunal, i.e. the International Court of Justice.

Adjudication in general and in environmental conflicts in particular is not a preferred method of dispute settlement due to its binding and judicial characteristic. The following analysis, however, will demonstrate the necessity to use this technique of dispute settlement in certain circumstances.

a-The International Court of Justice(ICJ)

The International Court of Justice was established as a leading institution of adjudicatory competence to resolve disputes of an international nature⁴³. However,

⁴². See Note, High Ross Dam: The International Joint Commission Takes a Hard look at the environment consequences of Hydroelectric power Generation-The 1982 Supplementary Order, 58 WASH. L. REV. 445 (1983).

In this case Canada protested Seattle's proposal to build a dam for a hydroelectric facility on the basis that it was going to create flood waters which would endanger a recreation area in Canada. The dispute lasted for forty years and was not to end if the International Joint Commission (IJC), an investigative and judiciary agency established in 1909 by agreement between the US and Canada, did not form a mediation group of experts including diplomats, Technicians and environmentalists to fashion an outcome acceptable to both parties.

see generally SETTLEMENT OF INTERNATIONAL DISPUTES BETWEEN CANADA AND THE USA, Resolution adopted by the American Bar Association and the Canadian Bar Association (Sept. 1979) [hereinafter INTERNATIONAL DISPUTES].

⁴³. The International Court of Justice was established by the Hague Peace Conferences of 1899 and 1907. Its objective was to provide a single forum for all of the world's legal systems. Since the 1945, the court became the judiciary branch of the United Nations. See generally THE INTERNATIONAL COURT OF

because of its adversarial, win-lose nature, as well as its limitation to only adjudicate cases where both parties are states, the ICJ has played an insignificant role in resolving conflicts of an environmental nature. As mentioned above, international environmental law is a very politicized subject in which countries have traditionally been reluctant to recognize state liability in their disputes, but rather prefer to resolve their problem through political negotiations and other peaceful means or to some extent through a voluntary agreement of arbitration ⁴⁴.

Many lawyers and state officials believe that adjudication through the ICJ promotes hostility rather than compromise and cooperation for a satisfactory settlement. They believe that the ICJ may not be a flexible process to help shape workable solutions. Therefore, nations are usually hesitant to risk losing in a dispute where important sovereign interests are at stake⁴⁵.

However, adjudication through the ICJ may still be a useful process where negotiations, mediations and agreements, to establish arbitration, have reached an impasse. Furthermore, it may prove to be an important step in removing the dispute from a heavily charged political atmosphere. In the US-Canada Gulf of Maine dispute, the two countries recognized the role of the ICJ to resolve their environmental controversy and the merit of removing the issue from their political arena⁴⁶.

JUSTICE AT CROSSROADS (Damrosch ed. 1987). The book discussed the role of the ICJ international dispute settlement.

⁴⁴. Baxter, *Settling Our Canadian-United States Differences: An American Perspective*, 1 CAN. -US. L. J. 5,6 (1978) (Courts are not appropriate forum for achieving compromise or deciding policy issue).

⁴⁵. See Bilder, *International Dispute Settlement and the Role of International Adjudication*, in ICJ AT CROSSAD, supra note 43 at 166-72.

⁴⁶. Prior to the Gulf of Maine case, the United States and Canada resolved their boundary conflicts through peaceful diplomatic negotiations, treaty making, and sometimes through ad hoc arbitration. In this case, however, all peaceful means had broken and arbitration was not a good option as the scope of the dispute involved disagreement over applicable law, geography, ecology and oceanography, activities or conduct of the parties, and methodology". In this situation it was recommended that nations resort to third party resolution options so as to reach an equitable and definitive clarification of the increasingly complex issue. See Schneider, *The Gulf of Main Case: The Nature of an Equitable Result*, 79 AM. J.

Recognizing the need to make itself more accessible and to provide more flexibility in its decision-making authority, the ICJ attempted to improve its dispute settlement. Accordingly, in 1978 the ICJ adopted new rules which allowed the use of "ad hoc" chambers⁴⁷. The chambers were comprised of special panel judges in situations where it was requested by the parties.

The chamber method offers the disputants the opportunity to participate in the selection of the judge while preserving the security of an independent judicial process and a binding remedial decision⁴⁸. This approach has combined the advantage of arbitration in the first instance, and adjudication in the second. Therefore, it may enhance the reputation of the Court in resolving issues of special matters such as the environment. Accordingly, the disputants will have the opportunity to choose assessors of environmental expertise to facilitate the task of the judge in technical issues, while at the same time, they are assured of an independent and objective rules in determining their rights and remedies⁴⁹. The United States-Canada Gulf of Maine case has proven the success of the new chamber method of dispute resolution within the framework of environmental law⁵⁰.

INT'L L. 539 (1985). See Robinson and Colson, *Some Perspectives on Adjudicating Before the World Court: The Gulf of Maine Case*, 79 AM. J. INT'L L. 578 (1985).

⁴⁷. See Schwebel, *New Life for World Court*, 23 VA. J. INT'L L. 376 (1983). In response to its criticism that its "machinery and structure" made it slow and unresponsive and therefore not viable as a dispute resolution mechanism, the ICJ enacted new rules. The chamber method established by the court may provide flexibility of an ad hoc arbitration with the advantage of adjudication since consideration is given to the disputant views concerning the selection of judges to be seated in the chamber. This new approach is sought to ameliorate the adjudication process of the ICJ and therefore provide a better incentive for the parties to bring their dispute before it. The use of chambers is expressly provided for in article 26 to 29 of the ICJ Statute. In addition article 50 provides procedures for carrying out inquiries and obtaining expert opinions. See Note, *International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute*, 23 VA. J. INT'L L. 474-479 (1983).

⁴⁸. See Shneider, *the Gulf of Main Case*, supra note 46 478-479.

⁴⁹. *Id.* at 480. Under the special agreement between the two countries, the ICJ chamber was composed of three judges and two ad hoc members chosen by the parties.

Although the Gulf of Maine case demonstrated the relative success of the chamber procedure in providing a judicial forum for international environmental disputes, the ICJ has not been a preferred forum for settling international environmental disputes⁵¹. In addition, because only states can be parties before it, the ICJ has barred many environmental disputes where the litigants are private parties⁵². Due to the nature of the parties in Bhopal, this case cannot be adjudicated under the chamber of the ICJ which could have been an important forum to apply international principles to environmental responsibilities.

3. Arbitration

Arbitration in international law in general and in environmental law in particular, may prove to be an effective alternative to settle disputes which could not be resolved by diplomatic means or through mediation. Arbitration is similar to judicial adjudication in at least one respect since the decisions are made by a neutral party and are binding. Nevertheless, arbitration differs from judicial resolution since disputing parties can choose the arbitrators and structure the features of the arbitral process themselves rather than facing a pre-set framework⁵³.

⁵⁰. In this case, the two countries recognized the benefit of using the ICJ chamber since they were able to retain some of the flexibility of the arbitration, while benefiting from the binding nature of the judicial ruling. The use of the chamber as an independent authority in the Gulf of Maine dispute has proved to be successful in ending the dispute between the US. and Canada. See Stein, *Supra* note 38 at 290.

⁵¹. Although environmental agreement recognized that judicial dispute resolution as viable alternative to their "Soft Law and non Binding dispute mechanism", ICJ was not their preferred selection to dispute settlement. For instance, in Antarctica Mineral Convention, though article 57 provides additional forums for dispute settlement notably the ICJ, it urged the parties to settle their disputes without resorting to ICJ. Article 57(1). Deborah Cook Waller, *Death of a Treaty: The Decline and Fall of the Antarctica Minerals Convention*, 22 *VANDERBILT JOURNAL OF TRANSNATIONAL LAW*, 657-658 (1989). See also F. ORREGO VICUNA, *ANTARCTICA MINERAL EXPLOITATION: THE EMERGING LEGAL FRAMEWORK* 12-24 (1988).

⁵². Statute of the International Court of Justice, *supra* note 29, Article 34(1).

The Hague Convention of 1907 defined the goals of international arbitration as "the settlement of disputes between states by judges of their own choice on the basis of respect for law."⁵⁴ Accordingly, The Hague Convention of 1907 created a Permanent Court of International Arbitration as a forum to settle disputes between states. The amendment of 1962, allowed private parties, including MNCs, and international organizations to participate in the dispute settlement process when at least the other party in the dispute is a state.

The Trail Smelter case is the oldest and most famous arbitration on an environmental dispute⁵⁵. The matter was first referred to "IJC" by the United States. The IJC report recommended payment by Canada of \$350, 000 to cover damages through 1932. The United States rejected the Commission's report⁵⁶. After a long period of fruitless negotiations and continuing pollution damages, the two parties negotiated a convention in 1935 under which they agreed to form an arbitral tribunal so as to decide the issues of damages⁵⁷. Pursuant to the Convention, the parties agreed to apply both international and United States law and to be bound by and comply with the decision of the tribunal. They also gave either side the power to enforce the tribunal's order⁵⁸. The tribunal consisted of two arbitrators from the United States and

⁵³. In arbitration the arbitrators are chosen by the disputants, the forum is determined by the parties, the applicable rules of law, upon which the arbitral tribunal is to be based, can be determined by the parties to the dispute. For details see generally J. MERILLS, *INTERNATIONAL DISPUTE SETTLEMENT*, 70 (1984).

⁵⁴. The Hague Peace Conference 18 October 1907, 36 Stat. 2199 (1909-11), T.S. no. 536.

⁵⁵. Trail Smelter, *Supra* note 31 (facts cited)

⁵⁶. See The IJC Report on the Trail Smelter Investigation, Docket no. 25, was rendered on 28 February 1931.

⁵⁷. For details see Trail Smelter Arbitral Tribunal, 35 AM. J. INT'L L. 684 (1941).

⁵⁸. See Hoffman, *State Responsibility in International Law and Transboundary Pollution Injuries*, 25 INT'L & COMP. L. Q. 520-522 (976).

Canada and a third neutral one from Belgium who acted as chairman⁵⁹. The arbitral tribunal found more damages between 1932 and 1937 and accordingly fixed an indemnity of \$78,000⁶⁰. The same tribunal concluded in its final decision in 1941 that there had been no additional damage, but set measures to contain further contamination in the state of Washington."⁶¹.

From the environmental prospective, the Trail Smelter arbitration proved to be ahead of its time as it confirmed the principle of international law, the 'Sic Uter' principle which states "use your own property so as not to injure that of another." This was then applied within the framework of environmental principles and served as a very important precedent for cases involving transboundary environmental injury. The Trail Smelter case also affirmed the success of international arbitration in resolving transnational environmental conflicts.

The Trail Smelter arbitral tribunal principle was used in a subsequent environmental dispute between France and Spain, the Lac Lanoux⁶². and between the US and Canada in Gut Dam case⁶³.

⁵⁹. Trail Smelter, supra note 57 at 684.

⁶⁰. Trail Smelter arbitration (United states V. Canada), 3 UNRIAA 1911 (1938), 33 AM. J. INT'L L. 182 (1939).

⁶¹. In its decision the tribunal pointed to the absence of International decisions dealing with air pollution, then it observed that "the nearest analogy will be the water pollution" but it did not find any decision on this matter. It therefore, decided to look at the general principle of International and state practice. Hence, it reached its conclusion on the basis of a broad concept of state responsibility: " Under the principle of international law, as well as of the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein..." The Tribunal holds the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter...." The Trail Smelter shall be required to refrain in the future from causing damage through fumes in the state of Washington". See Note, Our Neighbor's keeper? The United States and Canada Coping with Transboundary Air Pollution, 9 FORDHAM INT'L L. J. 159, 181 (1986). See also Schneider, supra note 46 at 48-49.

⁶². Lac Lanoux Arbitration (France V. Spain), 12 UNRIAA 281, 24 I.L.R. 101. Arbitral Tribunal (November 16 1957).

As demonstrated above, arbitration is generally a very useful method to resolve international disputes including environmental controversies. It can be an efficient technique to repair environmental damages by compensating parties, including those in desperate situations, i.e. the victims in the Bhopal case. If used on a continual basis, it will establish a source of international environmental principles and precedents for disputes between neighboring states.

Arbitration in environmental disputes may include not only the applicable national laws of the disputants but principles of international law as well. The use of international principles in an international arbitration may compensate for any deficiency that may exist in the national laws.

Nonetheless, arbitration like any other techniques, has some limitations and cannot always be a useful technique to environmental dispute resolution. It may encounter some delays when the parties do not agree on the arbitrators or the applicable laws, forums and so forth. Accordingly, though arbitration should be promoted as an international settlement in environmental disputes, in some cases other method of dispute settlement may be more viable.

With respect to the Bhopal case, although MNCs are not international legal persons pursuant to international law, a transnational corporation is a significant actor in the international scene⁶⁴. Accordingly, UCC could have been involved in a dispute involving international law indirectly, through the doctrine of state responsibility determined by the Trail Smelter case and the Stockholm Declaration. In this situation the United States would be representing UCC against the Indian government since UCC is not subject under international law. Nevertheless, the U.S. may have argued

⁶³. Gut Dam Claims (United States V. Canada). 8 I.L.M. 114, 121 (1969). For discussion on this arbitration see Schneider, *supra* note 46 at 48-49, 164-166.

⁶⁴. Stephen C. McCaffrey, The Work of the International Law Commission Relating to Transfrontier Environmental Harm, 20 N.Y.U.J. INT'L. & POL. 715, 728 (1988).

that it could not be responsible for acts or omissions of a U.S.-based corporation through its subsidiary abroad if the U.S. was not exercising de-facto authority of the state⁶⁵. As a result, it may have technically been impossible for the United States to agree to arbitration and therefore, be liable for the acts of UCC. This argument may be countered, however, with an analogy based on state responsibility on Transboundary pollution, cited in the Trail Smelter case. Hamilton correctly stated:

"A State in which a multinational corporation (MNC) is incorporated or headquartered or from which hazardous technology is exported... should be liable for injurious consequences in another state... caused by the operation there of a plant by a subsidiary of the MNC, or by the imported technology. In this scenario, the transfrontier element would consist not of pollution crossing a border, but of the export of hazardous or technology."⁶⁶.

At this point, this analogical principle is just a theoretical argument. Therefore, for it to be recognized under international law, countries have to agree to it or use it under international customary law. To achieve this goal, states would have to assume international environmental liability for the acts of their MNCs. This theory has not reached the recognition of the states. Hence, the above suggested international arbitration between the U.S. and India would be practically inconceivable.

Nevertheless, the above conclusion will not discourage us from suggesting possible forums of arbitration that may have settled the Bhopal case.

C. Possible International Arbitral Forums that may resolve the inadequacy of Indian Law Dealing with Environmental Disputes

⁶⁵. Douglas T. Hamilton, Regulation of Corporation under International Environmental Law, reprinted in the proceedings of the 1989 Conference of the Canadian Council on International Law, Preserving the Global environment [unpublished version, also available in, 93 CAN. COUNCIL INT'L. 3 (1989)].

⁶⁶. Id. at 14.

At this point, the Bhopal case demonstrated the ineffectiveness of a developing country to deal with environmental problems. The Indian lax environmental policy (such as the case of many developing countries)⁶⁷, should be taken into account when selecting a forum for compensatory justice.

Therefore, I would suggest that a host developing country, in transnational investment, should carefully consider an additional clause when entering into an investment agreement with a multinational corporation. The clause may include a choice of forum and applicable law deemed more efficient in securing the right of the host country citizens' to compensate themselves for environmental damages.

Accordingly, an international arbitral mechanism would need to be provided in the contract signed between the Indian government and UCC. The contract would include the use of two possible existing forums provided by international law.

1-The International Center for Settlement of Investment Disputes: (ICSID).

2-A claims Settlement Tribunal.

1-The ICSID: A possible International Forum

The International Center for Settlement of Investment Disputes is an international institution within which foreign private investors and the state may seek to settle their dispute⁶⁸. The parties in the dispute will be the MNCs and the host state.

The use of the ICSID international dispute mechanism could be a possible alternative to national laws in the Bhopal case and therefore offset the inefficiency of

⁶⁷. Developing countries have practically no technology to cope with serious environmental problems in comparison with the developed world. Therefore a strict environmental standard in India would require a substantial amount of financial and technological resources. It was estimated that developing nations would have to spend over \$14 billion in pollution-control costs to establish the same standards as the U.S. has in place. See Steven Shrybman, *International Trade: In Search of an Environmental Conscience*, EPA JOURNAL (July-August 1990).

⁶⁸. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August. 25, 1965, 4 I.L.M. 524 (1965)[hereinafter ICSID Convention].

the Indian courts to deal with the environmental dispute involving investment of a multinational corporation, UCC. Using ICSID would require India, the host country, to agree with UCC, the transnational corporation, that all investment disputes would be taken to the independent self-contained dispute settlement mechanism of ICSID⁶⁹. The applicable law would be agreed by the parties, thereby allowing more alternatives to Indian law⁷⁰. If no agreement was reached between the parties the tribunal would apply the law of 'the contracting state party to the dispute' and 'such rules of international law as may be applicable'⁷¹. The national courts of the enforcing country would be the forum for the award decided by the institution⁷². Failure to enforce the decision would violate the treaty and ultimately allow direct recourse to international law remedies⁷³.

The ICSID's Dispute settlement mechanism offers an additional forum to the Indian government. It also provides efficient lower costs and ensure the enforcement of the awards.

Despite the relative advantages in using ICSID dispute mechanism, its mandate may not be suitable to resolve dispute of environmental nature⁷⁴. ICSID is not an environmental agreement per se. Therefore, it is uncertain whether the issue of

⁶⁹. Id. Article 25(1).

⁷⁰. Id. Article 42(1).

⁷¹. Id.

⁷². Id.

⁷³. June 10, 1958, 7 I.L.M. 1046 (entered into force June 7, 1959).

⁷⁴. Hanson Hosein, Unsettling: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster, 16 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 313 (1993).

reparation and compensation arising from environmental damages will be considered an investment dispute pursuant to ICSID provisions⁷⁵.

In addition, although the host state may have a claim in environmental damages, it may not be able to refer it to ICSID if at the outset of its investment agreement with the multinational corporation, the two parties did not consent to refer their dispute to ICSID⁷⁶. The ICSID dispute settlement recourse requires the consent of the parties at the outset of the investment agreement which are already established between the multinational corporations and the host state. In addition, the process may still be too slow and the arbitral award may still be challenged through an appeal by the losing party⁷⁷.

2-Claims Settlement Tribunal: An Analogy to the US-Iran Claims Tribunal.

The Claims Tribunal technique is another possibility to be considered in future environmental cases similar to the Bhopal case⁷⁸. Through this technique, the victim's state (India) would agree with the MNC's home country (the United States) on a claims settlement tribunal to compensate environmental damages⁷⁹.

⁷⁵. ICSID Convention, supra note 58, Art. 25(1).

⁷⁶. The Consent of the parties to refer to ICSID as a forum to their dispute is required to use ICSID arbitration.

⁷⁷. On average it takes two and a half to three years to complete an ICSID arbitration which is hardly a desirable amount of time to compensate the victims in the Bhopal case. See STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 253 (1990).

In addition, pursuant to article 51, 'either party may request revision of the award' if new facts are discovered within three years of the rendered award. Id. Article (51).

⁷⁸. Although not of an environmental nature, the most prominent example of dispute settlement through the Claims Settlement Tribunal is the United States-Iran. Iran-United States Claims Settlement (Algiers Accords), January 19, 1981, 20 I.L.M 223 (1981).

⁷⁹. Daniel Barstow MacGraw, The Bhopal Disaster: Structuring a Solution, 57 U. COLO. L. REV. 846 (1986).

The use of the tribunal method will be less costly, and more time effective as it avoids the unnecessary extensive litigation and multiple proceedings existing in the judicial systems of both countries. As an analogy to the Iran-U.S. Claims Tribunal, each state would appoint an equal number of tribunal members⁸⁰. The later would appoint a third member group from which one chairman of the tribunal is chosen⁸¹.

The advantage of the claims settlement tribunal in comparison to ICSID is that it has the flexibility to allow both disputants to be private⁸². Although the states will agree to create the tribunal through a treaty such as the "Algiers Accords", private parties (UCC and the Indian victims in the Bhopal case) may appear before the members of the tribunal⁸³. To secure the enforcement of the awards, the agreement should include a clause in which the home state of the MNC would deposit a security account "Escrow Account" such as the one used in the US-Iran tribunal⁸⁴.

Despite the various advantages of using international tribunal techniques to resolve cases such as Bhopal, in practice the acceptance of the process may be very difficult. At the outset, the two countries would have to agree on setting up a tribunal. In the Bhopal case, the U.S. might not have agreed on such a tribunal. It might claim no responsibility over the acts of a subsidiary to its home parent based corporation.

⁸⁰. Algiers Accords, *supra* note 78, article III.

⁸¹. *Id.*

⁸². Toopee, *Supra* note 77 at 202.

⁸³. *Id.*

⁸⁴. *Id.* at 363. The "Escrow Account" would secure the payment, and pay claims in case the Transnational Corporation defaults or refuses to pay. A minimum balance would have to be maintained, with reimbursements made periodically in order to maintain that balance. This security of enforcement as stated in the Iran-U.S. context: "Not only does it provide remarkable ease of enforcement, its existence undoubtedly encouraged many claimants to come to the Tribunal in the first place. In this regard, it is important to recall that, although there were only a few hundred suits files in US courts against Iran when the Claims Settlement was being negotiated, by the time the deadline for tribunal claims passed, no less than 3,836 cases had been lodged, only ninety of which were state-to-state..." *Id.* at 281.

Likewise, since UCC would have to agree on the arbitration, it could block the possibility of using the arbitral tribunal.

Finally, the use of claims tribunal may be an impractical method of dispute resolution as far as MNCs are concerned. For instance, corporations may not be willing to tie up a large sum of money assigned to the security account since it could hurt their financial stability⁸⁵.

At this point, we are not able to suggest an effective international forum to resolve environmental disputes. The lack of an existing enforcement mechanism in environmental disputes may force us to go back to domestic courts and look for an alternative to Indian forum.

D-Extraterritoriality: An Interim use of Domestic Environmental Regulations to Resolve Transnational Disputes

Scholars have criticized the reliance of states on public international law in protecting the global environment. Due to the inherent weakness of international law and lack of an existing international binding adjudicatory system regulating transnational environmental problems, some environmentalists have urged countries with developed environmental legal systems, such as the United States, to apply their strong environmental policies abroad⁸⁶. The extraterritorial application of environmental laws

⁸⁵. Hosein, *Supra* note73 at 316.

⁸⁶. See Lutz, *The Export of Danger: A view from the Developed World*, 20 INT'L L. & POL. 629, 671-76 (1988); Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 NW. U.L.REV. 598,655-62 (1990); Note, *Constructing the State Extraterritoriality: Jurisdictional Discourse, the National Interest, and Transnational Norms*, HARV. L.REV. 1273, 1297-1301 (1990).

in developing countries is especially valid when a subsidiary of their parent based corporation is investing abroad.

Such an approach may prove to be successful in extricating environmental law from the heavily politicized public international law, while securing the rights of individuals harmed by environmental disasters to participate directly in international dispute resolution under the norms of private international law. In addition, states would be less reluctant to recognize the liability of their private citizens, including the subsidiaries of their home based corporation since their sovereignty would not be compromised by the state liability standard⁸⁷.

The principle of Extraterritoriality may be applied through extraterritorial legislation⁸⁸ or through extraterritorial adjudication⁸⁹.

Extraterritorial legislation is applied when the US federal rule, for instance, obligates subsidiaries of US based corporations to abide by the standard promulgated by the Environmental Protection Agency (EPA). Extraterritorial adjudication occurs when the US courts assert jurisdiction over a US corporation whose activities cause environmental harm in the territory of another state. The expansive application of the US domestic environmental legislation and extraterritorial jurisdiction may encourage foreign citizens of lax environmental regimes, particularly developing countries (case of India in Bhopal), to take advantage of the strict US environmental law. Under such circumstances, the victims of environmental damages would be able to secure their

⁸⁷. For detailed discussion on the legal complications involving state liability and its confrontation with the principle of sovereignty, see Note by Harvard Law Review Association, *State Liability and Procedural Norms*, 104 HARV. L. REV. 1492-1503 (May 1991).

⁸⁸. This refers to the application of one state's domestic legal system to activities occurring within the territory of another state.

⁸⁹. This refers to the US courts, for instance, to resolve dispute arising out of activities carried out by US corporation (personal jurisdiction) in the territory of a foreign state.

remedies and avoid any cap that is usually imposed by developing countries on recovery in personal injury cases⁹⁰.

At the same time, the expansive method would discourage the US corporation to produce or export environmentally harmful products to countries of weaker environmental policy⁹¹. In addition, by applying strict US environmental law the victims of environmental disasters, such as the ones in Bhopal case would have leverage to force the defendant to settle to a higher compensation⁹².

In the Bhopal case, the US courts should have avoided Forum non conveniens argument and instead applied the US strong environmental rules. Protecting the environment is not in the interest of a particular state per se but it is a global issue that is interconnected between states. Therefore, within the limit of respecting the sovereignty of states, strong environmental rules such as the one promulgated by the US should be applied to activities of its multinational corporations (MNCs) operating abroad to protect citizens of the Third World.

US corporations should assume liability either through export of harmful products or through subsidiaries producing harmful articles in developing countries. The expansive application of US jurisdiction has already been applied in the Dow Chemical Co. V. Alfaro case⁹³. In this case, Costa Rican farm workers were permitted to bring suit in US courts for environmental harm caused by a pesticide manufactured

⁹⁰. For instance, in India judges impose low damages awards and almost never impose punitive damages, see Galanter, *Supra* note 1 at 273, 274. (Bhopal case is just an illustration of the low awards that the victims received). Costa Rica places a cap at \$1500 per person) on recovery for personal injury cases, See Wihele, *Texas Courts Opened to Foreign Damage Cases*, N.Y. TIMES, May 25, 1990, at B6, col. 3.

⁹¹. See *Dow Chem. v. Alfaro*, 768 S.W. 2d. at 687-89 . In dicta Doggett, J. explained that (the outcome of this case will oblige multinational corporations to reduce their exports of hazardous pesticides to foreign countries that might not ban the use of such substances.).

⁹². In Bhopal case if the US law was applied the, the Union Carbide Corporation (UCC) would have paid in compensation much more than \$470 million.

⁹³. See *Dow Chem. v. Alfaro*, 468 S. W. 2d 674, 679 (Tex. 1990).

in the US and exported to Costa Rica. The court in this case statutorily abolished the forum non conveniens doctrine in suits to enforce a personal injury or wrongful death claim in Texas courts⁹⁴.

The expansive application of strong environmental legislation and adjudication can be criticized to the extent that this method may be controversial. First, some scholars reiterated that developing countries may have to tradeoff their economic development for environmental protection⁹⁵. Second, others believe that as a matter of comity the US law should not be extended to other independent states which is a form of new imperialism⁹⁶. In fact, this argument has been used in Bhopal case to dismiss the dispute in the US.⁹⁷

With respect to personal jurisdiction, constitutionally, the US courts may assert jurisdiction over US corporation inside or outside the territory of the US. In addition, the courts have jurisdictional power over foreign corporations that have business within the US⁹⁸. Minimum contact with the US, however, can still be an element to allow expansive jurisdiction by the courts over foreign corporations⁹⁹.

⁹⁴. Dow Chem. Co. v. Alfaro, 768 S.W.2d 674, 679 (Tex.1990), cert. denied, 111 S.Ct. 671 (1991).

⁹⁵. See Note, Constructing the State Extraterritorially, Supra note 86 at 1273, 1297-1301.

⁹⁶. Grudman, The New Imperialism: The Extraterritorial Application of United States Law, 14 INT'L. LAWYER, 257, 264-66 (1980).

⁹⁷. Judge Keenan Statement , Infra at 2.

⁹⁸. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-18 (1984) (the court in this case set sail the conditions to support general jurisdiction against foreign corporations "doing business" in the US).

⁹⁹. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Therefore, according to the principle of personal jurisdiction, the application of extraterritorial jurisdiction in environmental issues should govern disputes resolution when a subsidiary of an American based corporation is a party to the dispute¹⁰⁰.

In addition, the US environmental law can be applied expansively as an analogy to other extraterritorial legislation enacted by the Congress and enforced by the US courts. For instance, the US Antitrust law binds all corporations and their activities in foreign states if the corporate activities have a substantial and foreseeable effect on the US market¹⁰¹. The Export Administration Act is another example of extraterritorial legislation per se that applies to US corporations and their subsidiaries operating overseas¹⁰².

If antitrust legislation is extraterritorially applied, it would also be feasible to enact environmental laws that have the same expansive effect. Accordingly, environmentalists have already proposed the extensions of the National Environmental Policy Act (NEPA)¹⁰³ to bind activities carried out by the US corporation in foreign countries and enforce the US governmental regulations against foreign subsidiaries of US multinational corporations¹⁰⁴

¹⁰⁰. Piper Aircraft Co. v. Reyno, 454 US 234, 247-51, 255 (1981) , See also Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 AM. J. COM. L. 579, 590, 594-95 (1983).

¹⁰¹. The US antitrust extraterritorial application is based on The subject matter jurisdiction within which the US government protect its economic interests as a matter of public policy. Accordingly, the US antitrust laws, the US courts have jurisdiction on any act abroad that violate the US antitrust laws and tend to have effect or a foreseeable injurious effect to the US commerce. The effect test in the US antitrust law is the major component to assert US antitrust jurisdiction. The expansive application of the US antitrust laws allegedly ignored the principle of comity thereby generated formal and informal governmental protests.

The most comprehensive book on the US antitrust laws and its controversial extraterritorial application is written by, BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST, VOLUME 1 (Second Ed. 1993).

¹⁰². See Tittmann, Extraterritorial Application to US Export Control Laws on Foreign Subsidiaries of US Corporations: An American Lawyer's View from Europe, 16 INT'L. LAW, 730, 731-32 (1982).

¹⁰³. 42 U.S.C. Sub Sec. 4321-4343 (1988).

1-Extraterritoriality: Possible trend to protect the environment in developing countries

Responding to the argument relating to the tradeoff of economic development for environmental protection, it is ironic to justify lax environmental regulations for the sake of economic development. The long term environmental degradation will have an adverse effect on economic development of developing countries.

Conversely, economic development can be achieved through sound environmental policy. Western, and especially, American environmental technologies are advanced. On the other hand, in developing countries environmental know-how technology is almost nonexistent. Therefore, if one of the essential elements is addressed it should be done within the global environment. If going "global pays off" for MNCs, it should not be done at the expense of the environment¹⁰⁵.

MNCs' activities are being "pushed and pulled" towards developing states at a higher rate¹⁰⁶. Thus, environmental regulations of MNCs' country of origin should ensure that MNCs provide the requisite sustainable technical expertise¹⁰⁷ and abide by the strict environmental rules of their home based countries. Economic development

¹⁰⁴. See Paul, Comity in International Law, 32 HARV. INT'L L. J. 1, 73 (1991). The author argues that by refusing to apply US environmental laws to foreign subsidiaries of US multinationals, courts "encourage businesses to consider non economic incentives that distort investment and result in inefficiency.

¹⁰⁵. Recent studies show that MNCs are seeking new resources, market, joint ventures and facility sites. See Earl Anderson, Going Global Pays off for US Chemical Firms, CHEMICAL & ENGINEERING NEWS, Dec. 16, 1991, at 10

¹⁰⁶. Michael S. Baram, Multinational Corporations, Codes and Technology Transfer for Sustainable Development, 24 Environmental Law 35 (1994).

¹⁰⁷. U.N. CENTER ON TRANSNATIONAL CORPORATIONS., WORLD INVITING REPORT, 1991, at 74-77, U.N. Doc. ST/CTC/118, U.N. Sales No. E.91.II.A.1 (1991) (discussing transnational corporations and technology transfer)

of developing countries should not be justified to compromise environmental protection in developing countries.

As first step, MNCs when investing in developing countries should use their technological expertise and exercise due care to prevent environmental harm. Therefore, environmental rules regulating MNCs abroad would be the first attempt towards environmental sound technology transfer. Environmental regulations to which MNCs belong should be applied to activities of the subsidiaries operating in developing countries.

Developing countries do not have the technology and the technical expertise to assess environmental risks. Furthermore, their lack of financial means and legal mechanism would prevent them from enacting regulations similar to those in the developed world¹⁰⁸.

Developing countries are major victims of the global environment degradation caused mostly by the industrialization era of the developed world. Therefore, it is time to protect these countries from further environmental injury. The protection can at least be achieved through the elimination of harmful export products or through regulating MNCs operations within developing countries.

Parents of MNCs are mostly developed country based corporations. Hence, the extraterritorial application of the developed environmental laws to the subsidiaries in developing countries would at least unify the strict environmental laws to all MNCs wherever they invest. Under such circumstances, developing countries would not have to be concerned with discouraging foreign investment while benefiting from their sustainable development. Besides, the corrupt officials in developing countries would

¹⁰⁸. It was estimated that in 1980 developing nations should have to spend over \$ 14 billion in pollution-control costs to establish the same standard as the US has in place. See Steven Shrybman, International Trade: In Search of an Environmental Conscience, EPA JOURNAL, 18 (July-August 1990)

not have the incentive to allow environmental degrading activities in their countries for their own private gain¹⁰⁹.

In addition, the prospect of anti competitive practices by MNCs will be eliminated since the advantage of investing in lax environmental regulations versus strict ones will be removed.

From the adjudicative point of view, judgments rendered in the home based corporation can successfully be enforced. For instance, in the Bhopal case the major parts of UCC assets exist in the US and therefore could be attached to enforce the judgment. Even if the major assets did not exist in the US, the plaintiffs' citizens may have been able to enforce the judgment in India, the place of the accident¹¹⁰.

2-Forum non conveniens: an Unfair decision in Bhopal case:

The US court in Bhopal declared forum non conveniens to dismiss the case espoused by the Indian government. The US courts have frequently used this doctrine to dismiss other international environmental cases as well¹¹¹. The doctrine of forum non conveniens determines whether adjudication of a case would be unfair to the parties in the dispute¹¹². Thus, the courts usually look if another jurisdiction is best suited to hear the case¹¹³.

¹⁰⁹. See Climore, *The Export of Nonhazardous Waste*, 19 ENVTL. L. 879, 879-89(1989)

¹¹⁰. See Smith, *the Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443, 448).

¹¹¹. *Sibaja V. Dow Chem. Co.*, 757 F. 2d 1215, 1219 (11th Cir.), cert. denied, 474 U.S. 948 (1985); *Aguilar v. Dow Chem. Co.*, NO 86-4753 JGD#1 (S.D. Cal. 1987); *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987, aff'd in part and rev'd in part, 883 F. 2d 1553 (11th Cir. 1989)

¹¹². See W. FREEDMAN, *FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS: THE DEFENSE OF FORUM NON CONVENIENS* Sub Sec. 2.1-2.4, at 17-25.).

¹¹³. *SECOND OF CONFLICT OF LAWS* Sec. 84 comment c (1971).

Forum non conveniens appears to be a procedural rather than substantive matter¹¹⁴. Nevertheless, when the US court declared forum non conveniens, in Bhopal case, may have decided substantively on the preferred level of protection. At the end, the level of protection decided by the US court turned out to be unfair to the victims since the Indian environmental regulatory system was incapable of handling such litigation due to its slow, costly, and lack of expertise in pretrial discovery¹¹⁵.

Forum non conveniens in international environmental dispute should consider the best equipped courts to handle prominent environmental cases. Accordingly, in Bhopal case, the applicable US law and US forum were best suited to remedy the case and fairly compensate the victims. Judge Keenan argued that "To retain the litigation [in the Unites] State would yet be another example of imperialism."¹¹⁶ Nevertheless, the Indian government itself resorted to the US courts to seek remedies for its citizen. In this case environmental justice was far more important for Indian government than its public interest to apply its own environmental law.

3-Complications involving application of extraterritorial environmental regulations

The arguments, presented above, encouraging Extraterritoriality should not imply that the expansive use of environmental laws will be the sole solution to solve problems involving transnational environmental problems. The application of domestic laws on

¹¹⁴. Id. See also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981) (holding that substantive law should not decide the forum non conveniens issues); Note, Considerations of Choice of Law in the Doctrine of Forum Non Conveniens, 74 CALIF. L. REV. 565, 565 (1986).

¹¹⁵. P.T. Muchlinski, The Bhopal case: Controlling Ultrahazardous Industrial Activities Undertaken By Foreign Investors, 50 THE MODERN LAW REVIEW 555-556 (1987)

¹¹⁶. *Infra* at 2

an extraterritorial basis may encounter many difficulties and may not always be an adequate solution to the transnational environmental problems.

Due to their expansive personal and subject matter jurisdiction and the far-reaching power to pierce the corporate veil, the US courts have a broad jurisdiction to adjudicate a wide scope of international environmental disputes¹¹⁷. Nevertheless, environmental law is not handled as a separate area within which choice of law will be based on the legal regime that provided the best environmental protection. The choice of law is rather based on the broad principle of tort¹¹⁸.

The lack of distinct environmental treatment of choice of law, will certainly involve many issues that comprise extensive fact patterns and pretrial discoveries. Moreover, the issues involving the problem of piercing the corporate veil and the question of control to assert liability of multinational corporations can be extensive and therefore may lose the real objective of extraterritorial application, that is environmental protection.

In addition, the treatment of transnational environmental disputes within the broad rubric of tort law will involve issues of choice of law that does not particularly serve transnational environmental protection. For instance, in tort law, the court may follow various approaches to determine the applicable law, or the forum under which the case should be decided. For instance, the *lex loci delicti* approach applies the law of the forum in which torts take place¹¹⁹. This trend is favorable when the

¹¹⁷. For details see Born, Reflections on Jurisdiction in International cases, 17 GA. J. INT'L & COMP. L. 1, 34-42 (1987).

¹¹⁸. The Restatement (Second) of conflict of laws does not differentiate environmental torts from other types of torts. See RESTATEMENT (SECOND) CONFLICT OF LAWS Sec. 145 (1971). See also Cooper, The Management of International Environmental Disputes in the Context of Canada-United States Relations: A survey and Evaluation of Techniques and Mechanisms, CANADIAN Y.B. INT'L. L. 276 (1986) (arguing that environmental disputes should be treated as a distinct choice-of-law).

¹¹⁹. See Freedman, Foreign Plaintiffs in Products Liability Actions: The Defense Of Forum Non Conveniens Sec. 7.3, 100-103 (1988).

environmental tort occurs within the territory of the developed world since its environmental regime has the ability to treat and apply its strong environmental law. Conversely, this approach will not be the best remedy to compensate victim of third world citizens since the developing world due to its lax environmental laws is legally ill equipped to litigate cases similar to Bhopal.

The conflict of laws approach is adopted by the Restatement (Second)¹²⁰. It usually applies the law of the state who has the most significant policy interest¹²¹. This approach does not necessarily protect the environment in other states and fairly compensate victims of environmental disasters. In Bhopal case, the "governmental interests" was applied to dismiss the case in the US¹²². As a result Bhopal case was poorly litigated in India.

Due to the limited scope of this paper, I do not want to go into details about torts, conflict of laws, and corporate laws issues. However, I should mention that environmental disputes should be treated as a separate issue outside the framework of general principles of tort and conflict of laws.

International environmental dispute is highly regulated. States that have enacted environmental regulation have a strong interest in the area¹²³. Therefore, for the purpose of jurisdiction, environmental disputes should be treated as public matter, and properly analogized to antitrust regulations.

¹²⁰.RESTATEMENT (SECOND) OF CONFLICT OF LAWS Sec. 6 (1971).

¹²¹. The Restatement does not explain the basis on which the court can decide to balance. See weintraub, *The Conflict of Laws Rejoins the Mainstream of Legal Reasoning* (Book Review) 65 TEX. L. REV. 223 (1986). Therefore, the courts have no guidance determine either the best applicable law or choose the law that would produce the "best policy outcome."

¹²². See *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 862,-66 (S.D.N.Y. 1986), aff'd as modified, 809 F. 2d 195 (2d Cir. 1987).

¹²³. *Harrison V. Wgeth Laboratories*, 510 F. Supp. 1,4 (E.D. Pa. 1980). (Dismissing the case on the ground that the British regulatory framework has a strong interest in regulating the Pharmaceutical industry and therefore British courts would be the right forum.).

Similar to the US antitrust laws, the US environmental law should be applied on the US corporations operating abroad. The effect test, the basis on which the US antitrust law is applied extraterritorially should also be used in environmental law¹²⁴. Environment accidents occurring in one state will generally affect the global environment including the US territory¹²⁵

Strong environmental regulations are needed to restrict the environmental hazardous activities of the MNCs in developing countries. If the US law is applied extraterritorially and international environmental lawsuits are treated as public law claim, the US environmental regulations may be effectively applied.

The complication of choice of law and choice of forum in private law will be eliminated since in public matters those issues become only one. In public law cases, courts of one country will hardly apply the regulation of another state¹²⁶.

Many developing countries have the tendency to resort to the US courts to seek environmental justice knowing the protection that the US law offers with respect to the environment. Case in point, the Indian government resorted to the US courts to seek remedy for its citizen.

In addition, regulating the US MNCs operating abroad would not necessarily mean ignoring the regulation of another state (especially developing countries). It can rather be considered as a concerted effort between the north and south to provide extra

¹²⁴. Supra note 101.

¹²⁵. For instance, the Chernobyl nuclear accident that happened in April 26, 1986 has spread its radiations throughout the world. Even the United States reported radiation increase within its territory. See Ronald Sullivan, Fallout Found in US said to pose no risk, *NEW YORK TIMES*, May 13, 1986, at A6. For details on Chernobyl disaster see Jillian Barron, After Chernobyl: Liability For Nuclear Accidents Under International Law, 25 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW ASSOCIATION* 647-652 (1987). See also Hunter, Towards Global Citizenship in International Environmental Law, 28 *WILLAMETTE L. REVIEW* 547-548 (1992).

¹²⁶. See *Hayes v. Gulf Oil Corp.*, 821 F. 2d 285, 290 (5th Cir. 1087)

protection and eliminate the MNCs environmental abuse. MNCs have the tendency to take advantage of weak environmental policies.

The US environmental law if applied extraterritorially to Bhopal, would have protected the remedial interest of the victims and would have served as a precedent from which MNCs could exercise due diligence to prevent environmental accident in developing countries.

The extraterritorial application of strong environmental legislation, though not considered the only solution, it should contribute to the public international law in protecting the transnational environment. It could be a significant legal stride in implementing higher environmental standard within the international community. It would also guarantee to private parties the right to sue directly rather than being represented by states¹²⁷.

Nevertheless, the extraterritorial environmental regulation should not be the only basis in protecting the transnational environment. The ultimate goal is to strengthen international environmental law and create an international environmental institution capable of dealing with international environmental disputes.

In addition, the world community should help developing countries improve their environmental protection and provide them with the technological expertise to do so. This will enhance the enactment of comprehensive environmental laws and contribute to the enforcement of those laws. Finally, harmonizing environmental policies between states is the key in creating a sound binding international environmental law.

¹²⁷. See Stand, *The Environment, Community and International law*, 30 HAR. INT'L. L. J. 393, 397 (1989). He noted "International law, as presently conceived, does not provide an alternative to the state acting as international attorney general." Domestic environmental law, by contrast, often relies on private suits by interested individuals and groups. See J. MILER, *CITIZENS SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 4 (1987).

E-Necessary International Initiatives: A Need for International Environmental Code

International system in which states are the major players, has been attacked as being "unecological"¹²⁸, and not able to deal with global environmental problems¹²⁹. The need to create a "new international rule of law" to protect the environment and to "strengthen international mechanism for the protection of the environment" has been expressed on many occasions¹³⁰.

The need for the establishment of international tribunals has also been suggested¹³¹. These tribunals would not only grant standing right to states but to private parties as well¹³². Some scholars still believe that ICJ may be the first initiative¹³³. In fact, a new group was formed in 1989, called the "Center for International Environmental Law." Members of the center sought to bring environmental cases before the ICJ as legal representatives of governments¹³⁴.

¹²⁸. LYNTON K. CADWELL, IN DEFENSE OF EARTH: INTERNATIONAL PROTECTION OF THE BIOSPHERE 105 (1972)

¹²⁹. Jan Schneider, New Perspectives on International Environmental Law, 82 YALE L. J. 1659, 1671 (1973).

¹³⁰For instance, Governor Mario Cuomo, The Earth Summit: A Universal Challenge, Address Before the Trusteeship Council Chamber, United Nations, New York City, Mar. 1992, printed in part EARTH SUMMIT TIMES, Mar. 13, 1992; THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE: THE REPORT ON ENVIRONMENT AND DEVELOPMENT 12 (1987) [hereinafter OUR COMMON FUTURE].: "Government need to fill major gaps in existing national and international law related to the environment, to find ways to recognize and protect the rights of present and future generations to an environment adequate for their health and well-being....."

¹³¹. See Amedro Postiglione, International Court For The Environment within The United Nations, 20 ENVIRONMENTAL LAW, 321 -326 (1990).

¹³². OUR COMMON FUTURE, supra note 130 at 334

¹³³. Id. NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 164 (1989)

On the other hand, others believe that "overall, it is unlikely that the International problem of transfrontier pollution will be resolved by ICJ."¹³⁵ In any event to date ICJ does not show the characteristic of being a capable environmental forum in which state and private parties can be parties.

The establishment of Associations for environmental arbitration, similar to the ones established to resolve commercial disputes¹³⁶, will also be an important step to create international Arbitral rules and forums for transnational environmental disputes. Such institutions would offer additional forums and alternative dispute resolutions in which private parties including MNCs and state would have faster and relatively cheaper means to resolve environmental disputes. If such institutions are established cases such as Bhopal would have a Global environmental protection needs strong and comprehensive international environmental law which necessitates a forum of judgment in addition to the forum of mediation. The passage from moral, social and political commitment, to the protection of the environment , to a legal environmental responsibility has become inevitable. Global environmental protection can no longer be delegated to the bureaucratic agreements in which political and economic considerations are always in the forefront.

¹³⁴. Ann Kornhauser, Pollution Suits Go International at New Center, *LEGAL TIMES*, June 12, 1989, at 6.

¹³⁵. Timothy M. Gulden, Transfrontier Pollution and the International Joint Commission: a superior Means of Dispute Resolution, 17 *SW. U. L. REV.* 49 (1987).

¹³⁶. Notably, International Chamber of Commerce (ICC), *UNCITRAL Rules on Arbitration*, American Arbitration Association, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, and the Permanent Court of Arbitration, The Hague, 1962.

Institutions and organizations such as ICSID, the World Bank¹³⁷, International Monetary Fund (IMF), and the GATT¹³⁸, among others, should establish integral

¹³⁷. The World Bank has taken concrete step to incorporate environmental consideration. JOINT MINISTERIAL COMMITTEE OF THE BOARD OF GOVERNORS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND, ENVIRONMENT AND DEVELOPMENT: IMPLEMENTING THE WORLD BANK'S NEW POLICIES 7 (1987) [hereinafter ENVIRONMENT AND DEVELOPMENT].

The major effort to address environmental issues occurred in 1987. President Conable stressed the need to reorganize the world Bank, including procedures for analyzing environmental effects of loans. *Id.* He reiterated the link between environment and development. See Conable, *Development and the Environment: A Global Balance*, FIN. & DEV., Dec. 1989, at 4.

Accordingly, new guidelines were enacted to address environmental importance to loan projects and called for the development of "Policy Interventions" to influence attitudes and awareness of the global environment. *Id.*

The World Bank then established environmental departments to review the individual loan projects. *Id.* The new guidelines extended lending to environmental projects thereby creating the Global Environmental Facility (GEF). The GEF mission is solely to fund environmental projects in the Third World. *World Bank Sets Up Energy Environmental Fund*, FIN. TIMES, June 17, 1991, available in LEXIS, Nexis Library

The Bank's commitment to the environmental protection suggested the implementation of environmental policy into project-oriented loan agreement and structural adjustment lending. See IBRD, *STRIKING A BALANCE: THE ENVIRONMENTAL CHALLENGE OF DEVELOPMENT* 19 (1989).

The "Green policy" initiative undertaken by the Bank, whether it will result in improving the environment, at a minimum, the environment has become an important element to its lending projects.

¹³⁸. Agenda 21, of the Earth Summit, one of the most important events in the history of the environmental forums, explicitly documented the idea that international trade and protection of the environment must be viewed as complementary. U.N. Doc. A/CONF. 151/rev. Reprinted in the United Nations Conference on Environment and Development (UNCED), 138 (Johnson Ed. 1993).

the GATT, considered the regulatory body of world trade should actively amend its provisions to implement environmental rules. The director of the GATT explicitly acknowledge the need to enter upon this approach. In his presentation to the UNCED. *Id.* Mr. Dunkel asserted that trade is not an end to itself, rather it is a means to an end. the end is environment sustainable economic development. See Agora, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 728 (1992).

The suggested amendment of the GATT required the acknowledge of environmental goals and values as part of the GATT policy. Some scholars suggested the amendment of article XI exception, others. For details about the limitations of article XI exceptions deal with environmental issues. Others suggested the establishment of a side agreement which will address environmental issues. See Thomas E. Skilton, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation*, 26 CORNELL INTERNATIONAL LAW JOURNAL, 480(Spring 1993).

The new agreement would clarify the ambiguous criteria and unravel the controversial disputes that are causing inefficiency in the GATT Dispute Mechanism. This may entail the incorporation of new environmental principles. For details see Elizabeth Patterson, *International Trade and the Environment: Institutional Solution*, 21 ENVTL. L. REP. 603 (Oct. 1991). See also Kyle McSarrow, *International Trade and the Environment: Building a Framework for Conflict Resolution*, 21 ENVTL. L. REP. 589-593 (Oct. 1991).

The Uruguay Round that lasted seven years ended with success on December 15, 1993. The Round sought to create, by 1995, the World Trade Organization (WTO). Issues such as agricultural subsidies,

environmental rules in which various investment, trade activities should conform. Special environmental forums should also be created within these institutions to resolve environmental problems. If environmental rules and special forums had existed within ICSID, it would have alleviated the environmental dilemma in Bhopal and other transnational environmental disputes.

Environmental rules and MNCs

With respect to MNCs, many voluntary environmental codes of conducts have been enacted. Various Associations, such as the International Chamber of Commerce¹³⁹, have developed generic environmental codes of conduct.

The ICC, in its new charter calls on member corporations to "apply the same environmental criteria internationally."¹⁴⁰

Other international organizations such as the Organization for Economic Cooperation and Development (OECD), have also developed environmental guidelines for MNCs¹⁴¹. The guidelines call on MNCs to give priority with regard to "economic and social progress, including industrial and regional development, the protection of the environment of host country...."¹⁴² and to "take due account of the

audiovisual, financial services, and aviation were successfully resolved. See INTERNATIONAL HERALD TRIBUNE, December 15, 1993, at 1, 5. While these problems had been given first class attention, environmental issues regrettably appeared to be taking a back seat.

The postponing negotiations on environmental provisions is a set back to the environment and shows lack of commitment by the GATT to the environment protection.

¹³⁹. INTERNATIONAL CHAMBER OF COMMERCE, THE BUSINESS CHARTER FOR SUSTAINABLE DEVELOPMENT, Pub. No 210/356 A (1991) (On file with environmental law) [hereinafter ICC CHARTER]

¹⁴⁰. INTERNATIONAL CHAMBER OF COMMERCE, THE BUSINESS CHARTER FOR SUSTAINABLE DEVELOPMENT, Pub. No. 21/356 A (1991).

¹⁴¹. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, C (84) 90), May 1984.

¹⁴². Id.

need to protect the environment and to avoid creating environmentally-related health problems."¹⁴³

The guidelines provided by the OECD and the new ICC charter have raised public awareness with respect to the environmental protection and put pressure on the activities of MNCs. Nevertheless, they merely consist of indisputable principles and recommendations rather than binding legal rules. These guidelines and charters will stay within the realm of wishes and suggestions if binding international rules do not exist to enforce such an initiative.

With respect to preventive devices to environmental accidents, a number of international organizations, notably the United Nations Centre on Transnational Corporations¹⁴⁴., the International Labour Organization (ILO)¹⁴⁵, the OECD¹⁴⁶, and

¹⁴³. Id.

¹⁴⁴. The draft Code of Conduct on The United Nations Centre on Transnational Corporations stipulates the following:

"Transnational corporations shall/should in respect of the products, processes and services they have introduced or propose to introduce in any country, supply to the competent authorities of that country on request or on a regular basis, as specified by these authorities, all relevant information concerning:

[1] Characteristics of these products, processes and other activities including experimental uses and related aspects which may harm the environment and measures and costs necessary to avoid or at least to mitigate their harmful effects;[and]

[2] Prohibitions, restrictions, warnings and other public regulatory measures imposed in other countries on grounds of protection of the environment on these products, processes and services."

U.N. Commission on Transnational Corporations, Report of the Special Session, ECOSOC Official Records Supp. (No. 7) at 22, 41 (1983); reprinted in U.N. CODE OF CONDUCT ON TNCS, U.N. Doc. ST/CTC/SERA (1986).

¹⁴⁵. In 1985, The International Labour Organization (ILO) adopted a resolution in which it emphasized the basic responsibility of the central management of MNCs for the organization and control of all their subsidiaries Units, and the need for safety information disclosure by MNCs. Resolution Concerning the Promotion of measures Against Risks and Accidents Arising Out of the Use of Dangerous Substances and Processes in Industry, ILO (71st session) (1985).

The ILO Code of Practice on Safety, Health, and Working Conditions in the Transfer of Technology to Developing Countries, is most comprehensive set of recommendation ever adopted by an international organization on MNCs.

For details see ILO, CODE OF PRACTICE ON SAFETY, HEALTH, AND WORKING CONDITIONS IN THE TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES, GOVERNING BODY (1986); See also Harris Gleckman , Proposed Requirements for Transnational Corporations to Disclose Information on Product and Process Hazards, 6 BOSTON UNIVERSITY OF INT'L L. J 93-94 (1988).

the World Bank¹⁴⁷, have addressed the duty of MNCs to inform about their hazardous activities. Thus, these organizations adopted detailed environmental Guidelines and offered recommendations in the area of hazard and risk disclosure. These Guidelines, however, lack the enforceable legal degree which can regulate and bind the activities of MNCs to the disclosure principle.

Corporations have also developed their own environmental codes of conduct. Bhopal case, among others have pushed MNCs towards obtaining their own economic health to establish environmental guidelines. Environmental accidents caused by MNCs created a bad reputation for MNCs and eroded customer confidence in product safety¹⁴⁸. Hence, MNCs of US and western European origin have the motivation to improve their own environmental policy and enlist codes that will prevent corporate environmental misconduct¹⁴⁹. In addition, subsidiaries commenced to abide by the code of their parents to preserve consistency in their environmental practices¹⁵⁰

¹⁴⁶. The OECD Guidelines state that MNCs should :

Cooperate with competent authorities, inter alia, by providing adequate and timely information regarding the potential impacts on the environment and on environmentally related health aspects of all their activities and by providing the relevant expertise available in the enterprise as a whole; [and] take appropriate measures in their operations to minimize the risk of accidents and damage to the environment, and to cooperate in mitigating adverse environmental effects,"
OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES, General Policies Chapter, 1-2(1976), Reprinted in OECD, OECD AND THE ENVIRONMENT, AT 191 (1986).

¹⁴⁷. The World Bank Guidelines on Safety information recommend the disclosure of

(1) The name of the substance [as given in various appendices];
(ii) General description of the analytical methods available to the developer for determining the presence of the substance, or references to such methods in the scientific literature;
(iii) A brief description of the hazards from the substance;".

WORLD BANK, GUIDELINES FOR IDENTIFYING, ANALYZING AND CONTROLLING MAJOR HAZARDOUS INSTALLATIONS IN DEVELOPING COUNTRIES Sec. II.G. (1985) (hereinafter WORLD BANK).

The World Bank Guidelines call on corporations to disclose potential hazard accidents at the site as well: "(i) A description of the potential sources of a major accident or events which could be significant in bringing one about;....". See Id.

¹⁴⁸. See Michael S. Baram, Report for Recommendation 90-3: Risk Communication as a Regulatory Alternative for Protecting Health, Safety and Environment, in ADMINISTRATIVE CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS 1990, at 207, 214-17 (1990)

When it comes to MNCs activities in developing countries, however, MNCs refrained from extending the application of their codes to regulate the activities of their subsidiaries¹⁵¹.

The voluntary private codes of conduct are merely internal policies of MNCs and therefore no outside legal obligations are imposed upon these corporations. The private environmental codes would not produce international responsibility since there is not an international binding environmental code. **In addition, even if these private codes created a duty of care within MNCs to protect the environment, this duty is overlooked when a developing country is the host country.**

MNCs are certainly taking advantage of the lax environmental policies in developing countries and the lack of an existing international binding environmental rules. Thus, accident such as the one in Bhopal will always be expected.

To prevent such an abuse, an international standard should be established to regulate MNCs activities when local environmental rules are weak or non existent. The international standard should be enforced by an international authoritative body. In addition, environmental institutions whose membership would include MNCs and

¹⁴⁹. Id. at 214-17, 304-05. For instance many US corporations realized the need to adopt environmental codes in order to improve their environmental performance, see Harvey L. Pitt & Karl A. Croskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L. J. 1559 (1990). The most advanced code of conduct is the one enacted by Dow Chemical in which it addresses plant safety, regulatory compliance, and waste reduction. For discussion on Dow codes see BRAHAM, PATRICIA S. DILLON & BESTY FUFFLE, *MANAGING CHEMICAL RISKS* 123-45 (1992). Some western European corporations particularly in the automotive industry have also developed environmental codes similar to their American counterparts. See SCHMIDHEINLY, *THE BUSINESS COUNCIL FOR SUSTAINABLE DEV., CHANGING COURSE* 103 (Volvo), 197-201 (Norsk Hydro), 305-08 (Volkswagen) (1992).

¹⁵⁰. European subsidiaries of U.S. companies are increasingly following codes of their parents to prevent inconsistencies in environmental practice. For instance, this model was followed by Manville Corp., Allied Signal Co., and Digital. See U.N. CENTRE ON TRANSNATIONAL CORPORATIONS AND INDUSTRIAL DISCLOSURE AT 54-55, U.N. Doc., ST/CTC/111, U.N. Sales No.E91.II.A.18 (1991).

¹⁵¹. See JOHN M. KLINE, *INTERNATIONAL CODES AND MULTINATIONAL BUSINESS* 89-162 (1985).

their subsidiaries, should be established. The membership of the MNCs to these institutions will identify MNCs that are willing to abide by the international environmental standard.

Conclusion

The Bhopal case has demonstrated the need for an alternative international dispute resolution mechanism to resolve disputes relating to transnational issues of an environmental nature. However, due to the undeveloped state of international environmental law and the lack of an international environmental body of rules, an international environmental dispute mechanism may also be ill-equipped to resolve complex issues of an environmental nature. Environmental disputes are mostly related to the public policy of the state and therefore involve the question of sovereignty which has hindered the use of international forums by private parties as an alternative to their national remedies.

Attempting to resolve an international dispute involving an environmental disaster is a very delicate and intricate undertaking. The factual complexities of environmental disputes and the absence of a recognized international environmental set of binding rules leaves dispute resolution in a primitive stage whether the disputes are between states , private parties and states, or between private parties. Until the legal systems of most states accept the use of an international environmental forum and recognize the existence of an international environmental standard, cases such as Bhopal may remain within the realm of national laws.

Nonetheless, the application set forth by extraterritorial environmental domestic regulations may be an interim solution to effectively compensate victims of environmental disasters and Bhopal case could have been the first example.

The extraterritorial application of environmental law for the purpose of protecting the environment should be encouraged as an alternative. At the same time,

any international environmental principle such as the one asserted in the Trail Smelter case and reiterated in Stockholm Declaration, should be reinforced to protect the global environment. Finally, international forums to resolve transnational environmental disputes should always be considered if they are best suited to offer a relatively effective remedy.

The coupled domestic and international efforts can only help shape international environmental binding rules. The territorial principle of public international law, established by in the Smelter case and reiterated in the Stockholm and UNCED Declaration may be complemented with the application of extraterritorial domestic legislations as long as the protection of the environment does not interfere with the sovereign right of the state.

Presently, there is not a comprehensive set of rules or existing international forums to resolve transnational environmental disputes. Therefore, as environmental lawyers we should use the best possible alternatives to solve the environmental disputes and to protect the global environment.