MNCs and Environmental Hazards International Perspectives
MNCs AND ENVIRONMENTAL HAZARDS: INTERNATIONAL PERSPECTIVES

International concern for environment protection and sustainable development is comparatively of recent origin. Multinational Corporations (MNCs) are corporations which own or control its production facility and conduct a trans-boundary activity. The industrial revolution gave corporations a prominence, size, and complexity that put an end to their low legal visibility. However, the corporations were recognized as special sorts of actors demanding the attention of specially adapted laws. These days a Multinational Corporations (MNCs) could grow into a very large entity and have a significant role in the policy making process in the developing country, having in mind that MNC has international network of corporations that operates in many countries. Some times their home countries also in most cases encouraged them to go abroad.

Multinational Corporations (MNCs) have a big influence on international relations and local economies in the period of Globalization. Two characteristics of multinational corporations are of particular relevance to international integration. First, the MNC tends to centralize the policy-making process and to integrate the activities of the affiliates. Second, the MNC has a wide variety of options in making business decisions. Likewise, the present generation owes a duty to generations yet unborn to preserve the diversity and quality of our planet’s life sustaining environmental resources. This duty is sometimes said to be an emerging norms of customary international law, including the more recently treaty generated custom of the “common heritage of mankind.” However, in its real sense, the global environmental problems caused by international corporations

1 Huawei Adolf, Hukum Perdagangan International 2005, p. 70.
2 Christopher D. Stone The Place of Enterprise Liability in the Control of Corporate Conduct 90 YALE. L.J. 4 (1980).
3 Padma Legal Control of Multinational Corporation in India (1992) 2 S.C.J.p. 49.
(MNCs) are still characterized by piecemeal, overlapping, and often contradictory classifications.\(^6\)

It is indeed, well accepted that state practice is an important component in the development of international law.\(^7\) In these days, Multinational Corporations (MNCs) are playing an increased role in the development of international law. But the status of MNC as a subject of international law is still debatable. International law views corporations as possessing certain human rights, but it generally does not recognize corporations as bearers of legal obligations under international criminal law.\(^8\)

For years, it was believed that this wind of change did not blow in the direction of MNCs, and so they remained at the periphery, not the center, of international law.\(^9\) However, the past few years have witnessed amazing developments in the international legal system, leading to the indisputable recognition that international law has started, and will continue, to play a greater role in the lives of people across the globe.\(^10\) A pertinent question is whether the ongoing changes in the international system will be wide enough to accommodate business enterprises, especially MNCs.

The actualities have changed the law is changing.\(^11\) The past six decades have ushered in some significant changes to the international legal system, with the inclusion of several other entities, notably international organizations and individuals (to some extent), as subjects of international law. However, MNCs

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9 Henry J. Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context: Law, Politics, Morals at 1385 (3rd ed. 2008). Stating that non – state actors, such as corporations, occupy the margins of the legal regime on human rights that is focused on states.
have a few characteristic to be recognized as a limited subject of international law such as there’s cross border aspect in MNC.

Among the accidents that occurred in recent decades, many, if not most, gave rise to litigation before civil courts, involved private plaintiffs and defendants, and were governed by private law. International regulation of MNCs has sometimes been urged. Tragedies such as Bhopal and Chernobyl are testimony to the environmental hazards that have destroyed not only large segments of existing populations but have caused considerable ecological damage by big industries. For the victims of this kind of disaster there are first of all a number of questions about how to obtain adequate compensation from those responsible. Beyond that there is a complex of problems about the duties of multinational companies operating on a world-wide basis without comprehensive international legal controls over their activities. In both areas, the role and responsibility of governments towards the international community are vital considerations.

So, economic entitlements of Multinational Corporations (MNCs) must be accompanied by ecological obligations. Unfortunately for MNCs, they do not work within a single, unified international legal environment on the contrary, an MNC faces a different legal context in every country within which it operates. The gap cannot be bridged unless the various national jurisdictions in which the Transnational Corporations (TNCs) operate adjust their the policies and measures in a coordinated manner. In the words of Dr. Kurt Waldheim, then Secretary General of UNO “The environmental problem is one which no nations, no continents, no hemisphere, no race, no system can handle alone.” This opinion also applied to the Multinational Corporations (MNCs). The global

18 K.C. Goyal Industrial Management and Pollution Control 1994, p.5.
environmental conventions, treaties and laws, which resulted from the deliberations of multilateral environmental forums and negotiation, have contributed to the consummation of sustainable development as a global ideal.19

In relation to the environment, similar stark stereotypes prevail. Some argue that MNCs are responsible for major technological innovations beneficial to the environment, and have, in any case, an environmental track record superior to smaller local firms. Others see MNCs as the main vehicles for large-scale environmental degradation, particularly in developing countries where they are mainly unaccountable for their activities. Indeed, the quality of the environment and restore the balance of nature which our technological growth and our shortsightedness have impaired. The cost of our progress is being translated into monetary terms, and the price of repairing the damage to our environment will be high.20

Dominic Mc. Goldrick suggests that “Sustainable Development” can be structurally conceived as having a three pillar ed temple like structure. The three pillars are composed of International Environmental Law, International Human Rights Law International Economic Law. The attractiveness of such a temple is that it presents sustainable development as integrating and interactive. It has elements of an objective, a process and principle. It overarches a broad range of discipline yet it is separate. Its central pillar is international environmental law, a discipline of international law.21 However, there are broadly, three sets of laws and regulations relevant to international business by Multinational Corporations (MNCs), viz., a) International laws, treaties, conventions etc. b) Laws of foreign countries, and c) Laws of home country.


6.1 INTERNATIONAL ENVIRONMENTAL LAW

“International Environmental Law” is a new concept and its scope remains unclear.22 The international environmental law was first established based on environmental problems that crossed the borders among nations. International environmental treaty law has mainly developed as cross-border environmental protection.23 In 1984, an explosion occurred at Union Carbide’s plant at Bhopal in India by Multinational Corporation (MNC), as a result of which poisonous emissions killed over 2,000 people. As a result, not only were Indian regulations tightened up, but there was wave of environmental legislation throughout the industrialized world.24

In most states, environmental law began with domestic laws25 to protect endangered species, such as seals, whales, fish and migratory birds. As early as 1300, as royal decree was issued in London prohibiting the use of low-grade coal for heating because it created excessive smoke and soot. The only known case of capital punishment because of an air pollution violation occurred in the 13th century when a Londoner violated this order.26 In the early twentieth century, environmental law consisted mostly of domestic legislation. In the middle of the twentieth century, bilateral and regional legislation gained prominence. By the late twentieth century, the emphasis on global cooperation became the dominant trend. The evolution of environmental law in the past century has been linked to the growing acceptance of the notion of collective global responsibility. Indeed, as a matter of policy, the EPA may impose stricter regulations on industries.27

Recently, the focus of environmental law has shifted from the creation of global frameworks to deal with environmental problems to compliance with those frameworks. As a result, the primary actors in environmental law have shifted

22 Supra Note 6 at p. 1660.
24 Supra Note 16 at p. 41.
27 “Technology-Based Emission and Effluent Standards and the Achievement of Ambient Environmental Objectives” 91 YALE. L. J. 797 (1982).
from the state and the global community to corporations. As a consequence, environmental policies must develop along legally holistic lines. By legally holistic means that environmental policy makers should consider all the laws and policy options available to incentivize or discourage a particular behavior and not limit their responses to the enactment of domestic or international environmental regulations or treaties. However, Environmental legislation is developing rapidly. In addition considerable attention is being given to the environmental impact of new technological development.28

The very first environmental problems that established a Principle of international Environmental Law were the utilization of water between neighboring countries. The existence of absolute territorial sovereignty29 which exemplified by the Harmon Doctrine in 1895 which granted unrestricted sovereignty concerning its territorial waters, without consideration of downstream States or possible interests of other neighboring states. This of course created a rejection mostly by downstream States that converting the absolute territorial sovereignty theory to restricted territorial sovereignty theory. This controversy between the upstream and downstream States was settled agreements leading to a principle of reasonable utilization of waters.

Unlike other branches of International Law, International Environmental Law has developed in a piecemeal, ad hoc manner in order to address particular problems such as accidental spills from oil tankers, dumping of hazardous wastes, loss of biological diversity, thinning of the stratospheric ozone layer, global warming, tropical deforestation et. Treaties are usually negotiated around particular issues in the nature of framework conventions which are flexible, based on consensus, to be followed by protocols which lay down hard obligations. One of the oldest provisions against pollution is to be found in the Swedish Code of 1734, which required from the owner of a sawmill adoption of the necessary

29 According to this principle, every State has the absolute right to freely utilize its territory and airspace for its purposes, even if this utilization causes environmental damage beyond its national boundaries (Harald Hohmann, Precautionary Legal Duties and Principles of Modern International Environmental Law. P. 14).
measures to prevent sawdust from obstructing the free flow of a stream or from penetrating into cultivated land.\textsuperscript{30}

International Environmental Law received its structural framework towards the end of the 1960s, when post World War II reconstruction led to unprecedented global economic development and the development of environmental consciousness at a global level.\textsuperscript{31} International Environmental Law contains codes of practice, recommendations, guidelines, resolutions, declaration of principles, standards and “framework” or umbrella treaties which do not fit into the categories of legal sources referred to in Art 38 (1) of the International Court of Justice (ICJ) Statute. Thus, they are not laws in the sense of that article. They are not legally binding as “hard law” represented by custom, treaty and established general principles of law. These instruments are described as soft laws. A major obstruction to the growth of faulty liability regime in international environmental law is that State are seldom prepared to agree that the activities which are most essential for their survival are prohibited by their own agreement.\textsuperscript{32}

If transnational torts discriminate against living in the jurisdiction of subsidiary companies of Multinational Corporations (MNCs), what legal response is appropriate? One straightforward answer is to amend the rules of private international law, particularly in the U.S., that discriminate against foreign litigants. The key problem is one of access to courts, although related problems of applicable law, the enforcement of judgments, inequalities in pre-trial discovery, and so on, also need to be addressed. The movement toward a global judgments convention in the Hague Conference on Private International Law may provide part of the answer here, but even if that effort results in a viable treaty that is widely ratified by states, it may still contain room for the application of the \textit{forum non conveniens} doctrine.

A second response is to rely more heavily on human rights standards, including in particular the idea of a universal right of access to justice that

\textsuperscript{31} Abhijeeet Sinha and Surojit Chatterjee \textit{Environmental Rights- A cause for concern} 2001 (4) ALT at p. 1.
\textsuperscript{32} S.Sumitra \textit{Bases and Extent of State responsibility Liability in International Law for Environmental Pollution} 27 JILI (1987) 410.
contains a cross-border component. This is essentially the approach of the Charter on Industrial Hazards and Human Rights, which sets out in Article 29(1) a human right to choice of forum.\(^{33}\) This is complemented by a human right to be free from legal rules restricting effective access to justice, as set out in Article 29(2).\(^{34}\) While the approach of the Charter may well be criticized for emphasizing the rights of the plaintiff while making no provision for the legitimate rights of defendant companies, it does provide an aspirational guide that may help provide a moral counter to the Summers argument.

A third response to the inadequacies in transnational tort law is to move from a regime based largely on regulation and tort toward a regime that does more to emphasize the criminal liability of corporations for environmental harm. This approach has gained considerable support in recent years, particularly in respect of death and injuries at work, and has started to attract more attention on the environmental front. According to the *Trail Smelter Case* arbitral award of 1941, no state has the right to make use of its own territory in any manner that might lead to emissions causing *serious* and *clearly provable* damage to the territory of another States or the property of its residents.\(^{35}\)

When business faces a stronger domestic and international regulations on activity with a global environmental division, business interest have been able to prevent or delay the formation of a global environmental damage. Certain business sectors have been able to use their asset and ability to put forward technical solutions toward pollution damage issue, hazardous and noxious substances.

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33 Article 29(1) provides: “All persons adversely affected by hazardous activities have the right to bring law suit in the forum of their choice against alleged wrongdoers, including individuals, governments, corporations or other organizations. No state shall discriminate against such persons on the basis of nationality or domicile.” Charter on Industrial Hazards and Human Rights, available at http://www.globalpolicy.org/socecon/environment/charter.htm.

34 Article 29(2) provides: “All states shall ensure that in the specific case of any legal claiming arising from the effects of hazardous activities, any legal rule otherwise impeding the pursuit of such claims, including legislative measures and judicial doctrines, shall not prevent affected persons from bringing suit for full and effective remedies. In particulars, states shall review and remove where necessary, legal restrictions relating to inconvenient forum, statutory limitations, limited liability of parent corporation, enforcement of foreign money judgments and excessive fees for civil suits.” Available at http://www.globalpolicy.org/socecon/environment/charter.htm.

In the environmental issues, international environmental law gives certain legal aspects to the MNC. Certain international laws provided guidelines, and Principles that have to be complied by the MNCs. The most popular principles are the Precautionary Principle, Sustainable Development Principle, Polluter Pays Principle and State Responsibilities. The MNCs must comply with these principles, as the principles have become widely known in the international society. These principle were found in international conventions, such as: Declaration Rio 1992 and World Summit on Sustainable Development (WSSD) in Johannesburg 2002. WSSD is the world declaration among the traditional actors and non-traditional actors that shows the Sustainable Development Principle is not only state’s responsibilities but also all aspects of mankind.

The principles that UN Global Compact adopt related to the business sector.36

1. To support the precautionary approach in answering environmental challenge.
2. To perform initiative to promote bigger responsibilities to the environment.
3. To support the development of more environmental friendly technology.

However, in several cases like Union Carbide Corporation Gas Plant Disaster at Bhopal India (1986),37 the dispute that arose with a claim against the MNC because of the violation of the right of suitable environmental and trans-boundary environmental harm, does not give satisfaction to the principles that must be complied by MNCs. The American Court held that the MNCs cannot be held liable because those principles had not been recognized as a general principle of law or customary international law and besides the principles only bind the member of international society not binds the non state actors.

The court argument is not strong enough because by looking at the number of country who ratified many conventions and implement the sustainable principle development as legal duties in their national law, it proves that this principle has

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36 Principles 7, 8, 9 of the UN Global Compact 2000.
been recognized as a custom. The Bhopal tragedy induced legislative activism in India. On the other hand, the ratio of environmental protection as a part of human right also has the support of the Article 1 of Stockholm Declaration and Rio Declaration. Although this instrument not legally binding but it’s been accepted without reservation by 179 states in the UN conferences on Population and Development in 1994. Other than that, there many conventions which demand MNC liability as a comprehensive subject of international law; embargo regulation and Nuclear Convention constitute that every legal entity including person and MNC have to comply with the regulation. This shows that MNC could be a potential subject of international environmental law as in MNC as a subject in an investment dispute settlement in front of international arbitration forum.

The Bhopal tragedy in India has highlighted the fact that the health, environmental and safety standards that are followed by the MNCs in the developed countries have not been followed by their subsidiaries in the host developing nations. The ideal is that the MNCs should use in their foreign operations the best techniques available to them. Though this is not practicable at present, at least the minimum essential standards in siting and designing the plants manufacturing toxic substances and other safeguards relating to their operations and maintenance must be followed. However, international environmental law is not yet sufficiently equipped to extract such guarantees from the MNCs.

6.2 INTERNAIONAL HUMAN RIGHTS LAW

It is question to examine that Multinational Corporations (MNCs) violate human rights and which law regulate them. The 1972 United Nations Conference on the Human Environment adopted unanimously a Declaration of Principles on the Human Environment. It states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality which

40 See Article 38 and 39 of the UN Draft Code on TNCs and generally the various resolutions concerning transfer of hazardous technology, and protection against harmful product, in particular resolution 37/13, of the UNGA.
permits a life of dignity and well being…” Although Article I quite clearly does not purport to create a legal obligation for its signatories, it is strikingly similar in tone to Article 1 (3) of the United Nations Charter, which defines as one of the organisation’s purposes to promote and encourage respect for human rights and fundamental freedoms. Since that time, human rights law has gone through a massive development. 41 Letter, under various domestic laws and international instruments the states are assuring individual’s human rights. Now the question is: how could individual’s human rights be protected, if it is breached by Transnational Corporations (TNC) or Multinational Corporations (MNC). Is there any remedy available for such violation?

TNC/MNCs are violating human rights by their activities. They have been accused of violating human rights to life, including the right to enjoy life, freedom from forced or slave labour, freedom from deprivation of or injury to health, enjoyment of a clean and healthy environment, air pollution, water pollution, environmental damping. Multinational Corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. 42 Although in some cases developed countries are protecting TNC’s violation of human rights, however, in practice, still the situation is not sufficient, an moreover, in the case of developing countries the situation is different.

The distinctive regulatory problem posed by TNCs is their ability to operate as an integrated command and control system through two dis-aggregated institutional structures. The first of these structures is the collection of discrete corporate units-parent, subsidiary, sister and cousin companies- that make up the TNC group. The second dis-aggregated structure housing the TNC is the global system of separate nation-states in which those corporations are registered and do business. Thus, although decision-making within a TNC often occurs within a vertically integrated command structure, that same degree of integration is not available to regulations. Since the parent and subsidiary companies are legally distinct, they must be subject to separate and independent systems of inspection and regulation. But in practice the companies are not subject to the discipline of

shared liability, since in most instances the parent company is not liable for the activities of the subsidiary following the principle of House of Lords (UK) decision in *Salomon v Salomon*, which is followed in most of the countries of the world. In theory, there is no court anywhere in the world that exercises jurisdiction over all the components of TNC doing business in three or four continents. In these circumstances, the TNC enjoys a degree of autonomy from national jurisdiction that is unique in the global legal order.

Furthermore, there is no international backstop to hold companies accountable when national regulatory systems are insufficient. International law says about state responsibility if it does any internationally wrongful act, but there is no clear indication about TNC’s or any private entities. Finally, recently UN Norms on the Responsibilities of Transnational Corporation had been adopted, however, still the problem is how this Norms will be binding? What is the legal consequence of it, if the TNC and any other private entities don’t follow this Norms? What would be the remedy for violation of individual’s human rights? Therefore, we need to re-think about these issues. And we are waiting for the future when all the victims of human right violation by TNC/MNC will get justice and sufficient remedy.43

“Though corporations are capable of interfering with the enjoyment of a broad range of human rights, international law has failed both to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights.”44

International law is virtually silent with respect to corporate liability for violations of human rights,45 and has neither articulate the human rights obligations of corporations nor provided mechanisms to enforce such obligations.46 The above statements have been the subject of severe structures by a section of the scholarly community who view them as a misstatement of the law.47

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43 http://www.thedailystar.net/law/2004/06/02/hr.htm.
46 Supra Note 44 at pp. 2025-2026.
47 Jordan J. Paust, *Human Rights Responsibilities of Private Corporations* 35, VAND J. TRANSNAT’L.L. 801, 802 (200); Andrew J. Wilson, *Beyond Unocal: Conceptual*
Some of these scholars, supported by human rights activists, have proceeded to argue that international human rights law imposes direct duties on corporations and other private actors.\(^4\)

The two opposing positions have been challenged by the United Nations Secretary-General’s Special Representative on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG)\(^4\) mandated by the UN’s apex human rights body, inter alia, to identify and clarify the obligations of corporations in international law. The UN Secretary-General Kofi Annan appointed Professor John Ruggie of the Kennedy School of Government at Harvard University to this position in July 2005.\(^5\) Within the terms of his original two-year mandate, which, upon his request, has since been extended by another year, the SRSG has come to the conclusion that the position of the corporation in international law has undergone some change, but that this change is not as far-reaching as that expressed by a number of academics and civil society groups.

The regulatory response to environmental damage by TNC has been largely ineffective. International environmental treaties bind state parties, but do not place obligations directly upon Multinational Companies (MNCs). There have been some scholarly explorations of holding the “home” state liable for the activities of TNC headquartered within its jurisdiction,\(^5\) but this approach has largely failed due to both political opposition as well as the problems in jurisdiction and company law \([\text{Salomon v. Salomon}]\). Anderson, an International Environmental Law scholar, criticised, “the greatest challenge for both human

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rights standard and environmental regulation is surely the problem of effective enforcement.” The great example of ineffective regulation of TNC is ‘Bhopal’ case of India. In 1984 a leak of methyl isocyanate gas from a pesticide plant owned by Union Carbide in Bhopal, India, resulted in the loss of over 3,500 lives and the exposure of an estimated 521,000 individuals to the gas that can result in chronic effects, including depression of immune response. Plaintiffs failed in their attempt to sue in the US, and following much-delayed litigation in India the case was settled for $470 million.

Economic entitlements must be accompanied by ecological obligations. Whether tort law is the best way to hold transnational companies accountable? Critics of tort approaches to human rights protection have contended that tort litigation can be slow and costly to mount, and organized in a fragmented, case-by-case basis that undermines that rationality of a consistent regulatory framework. Another problem of the private international law of torts is to decide the proper forum for a suit when the plaintiff and the defendant are in different jurisdiction. Forum non conveniens was originally invoked to protect the defendant from being harassed by a plaintiff choosing a genuinely inconvenient or inappropriate forum. Despite this intent, it has become in many instances a device for parent companies to escape liability for tortuous acts committed abroad. There is further problem in the case of tort litigation, which is that the quantum of damages is likely to be lower in developing countries since wages and medicinal treatment are lower, so compensation will be lower as well.

One may argue that the TNC might be liable under customary international law as they are violating human rights. However, there is also a problem as international law almost exclusively considers that nations will be primarily responsible for the management of human rights. National governments then hold all individuals within their borders responsible for managing human rights.

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according to treaties and customary international law. Every person must act in
good will when exercising his rights and meeting his obligations.53

Despite, growing international environmental interdependence, the
international system lacks a central authority to foster environmental protection.54
A United Nations human rights panel has urged that transnational corporations
and other business enterprises that violate international human rights laws be
subjected to investigation and censure by the UN. The first task of the new UN
Commission on Human Rights was to draft a Universal Declaration of Human
Rights, which was subsequently adopted in 1948.55

International human rights include civil, cultural, economic, political and
social rights as set forth in the International Bill of Human Rights and other
human rights treaties, as well as the right to development and rights recognized by
international laws dealing with humanitarian, refugee, and labour issues, and other
relevant instruments adopted within the UN system. These norms state that “TNCs
and other business enterprises shall be subject to periodic monitoring and
verification by the UN, other international and national mechanisms.”

The only rules of international law on environmental protection may be
derived from the traditional responsibility of states.56 The issue of private sector
responsibility for human rights is most topical in contemporary human rights
discourse. In an era of globalization, the market-oriented policies of liberalisation
of markets, privatization of state-owned enterprises, promotion of foreign direct
investment and deregulation of the private sector have been given prominence.57
Key players in the global economy such as multinational corporations (‘MNCs’),

53    Article 2 of the Swiss Civil Code of 1907, quoted in Rudolf Bystricky Pollution of Surface
54    Detlef Sprinz and Tapani Vahtoranta The Interest-Based Explanation of International
55    Supra Note 41 at p. 439.
56    R.P. Anand Confrontation of Cooperation? International Law and Developing Countries
57    Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and
international financial institutions and multilateral institutions promote these principles. Their wide adoption by states has seen them ceding more powers and competencies to private actors than was the case previously. As a result, it has become increasingly clear that state action alone is not sufficient to guarantee the enjoyment of human rights.

International human rights law imposes a duty on states to protect people from violations of their human rights by state and non-state actors. Thus, the UN High Commissioner for Human Rights has stressed, in recognition of this duty, that states ‘have responsibilities to ensure that the loss of autonomy does not disproportionately reduce their capacity to set and implement national development policy’ through the discharge of this duty, private actors become indirectly accountable for human rights at the international level. They can also be held responsible for human rights at the domestic level.

It is settled that human rights generate three levels of duty for the state: to respect, protect and fulfill human rights. The relevant duty for our purposes is the duty to protect. This duty enjoins the state to take positive action to protect citizens and other people within its jurisdiction from violations that may be perpetrated by private actors or other states.

International law must be rigid enough to assure the continuity of rights and duties. It must be elastic enough to meet the changing conditions of international law and intercourse.


61 *Supra Note* 32 at p. 387.
6.3 INTERNATIONAL REGULATIONS

The term “international regime” describes a form of international cooperation in which common problems and conflicts are sorted out and reliably managed through specific regulations and procedures. Without relating to a superordinate central body, the states agree to resolve problems by coordinating their behavior. In the environmental policy field, the need for regulation and thus for a regime is increasing a rapid pace issue-related successes can only be achieved if all states or at least as many states as possible coordinate their activities.62 This is very important in case of regulating the environmental practices by Multinational Corporations (MNCs).

In theory, there is no court anywhere in the world that exercises jurisdiction over all the components of a MNC doing business on three or four continents. The distinctive regulatory problem posed by MNCs is their ability to operate an integrated command and control system through two dis-aggregated institutional structures. The major institutions entrusted with the implementation environmental policies are the United Nations General Assembly (UNGA), the United Nations Environmental Programme (UNEP), the Commission on Sustainable Development (CSD), the Global Environmental Facility (GEF).63 The international environmental policies and institutions together constitute a diverse body of global environmental governance.

In 1983, at the suggestion of the United Nations Environment Programme (UNEP), UNCTC initiated a joint UNCTC/UNEP project intended to deepen the understanding of the role of TNCs in relation to sustainable development, national environmental policies, pollution-intensive industrial location, environmental management practices and international environmental co-operation.64 According to the Survey, the substantial variation in national environmental regulation an a

62 Gudrun Schwarzer  The International Long-Range Air Pollution Regime 48 Lawand State 80 (1993).

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general of global environmental policies by the TNCs themselves give rise to a number of observed patterns of behavior on the part of TNCs. Some of these are:65

- Loose environmental control by headquarters;
- Variations in the quantity and quality of environmental manpower working in different national subsidiaries;
- Considerations of environmental impacts in project planning only when groups in the relevant host country are concerned with such matters;
- the export of products banned or restricted in home countries to other markets;
- the export of hazardous wastes to nations where environmental awareness and regulation are still incipient;
- concentration of environmental-related R & D efforts in their home countries;
- the non-diffusion of pollution control technologies developed and applied in one nation to similar operations in others;
- exploitation of “double standards” by some firms in the occupational health and safety area.

The survey draws special attention to limitations of the effectiveness of national environmental control systems with regard to actual and potential negative effects that TNC operations. The survey also notes that constraints on unilateral national action may require international co-operation with regard to properly regulating the environmental impact of TNCs.66

By way of conclusion, the Survey advocates the inclusion of environmental protection provision in codes of conduct and guidelines of TNCs. This call is echoed in the draft Nations Code of Conduct on Transnational Corporations (TNCs). In environmental field, the draft code requires the observance by TNCs of a series of norms.

65 Ibid at pp. 161-162.
66 Ibid at p. 162.
These include:

(a) TNCs should carry out their activities in accordance with national laws, regulations and administrative practices relating to the preservation of the host country’s environment and with due regard to relevant national standards;

(b) They should protect the environment and, where it is damaged, they should restore it;

(c) They should disclose all relevant information concerning the products, processes and services they have introduced of propose to introduce in any country;

(d) They should be responsive to request from governments and co-operate with international organizations in developing and promoting national and international standards for the protection of the environment.

The parent and subsidiary companies of MNCs are legally distinct, they must be subject to separate and independent systems of inspection and regulation. Nor are the companies subject to the discipline of shared liability, since in most instances the parent company is not liable for the activities of the subsidiary following the principle in Salomon v. Salomon.67

There have been a number of “soft” initiatives to regulate MNCs by establishing guidelines and Codes of Conduct, including the International Labour Organization (ILO)

Tripartite Declaration of principles concerning Multinational Enterprises and Social Policy,68 the recently revised Organization for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises aims at voluntary compliance with international standards, including general obligations to protect human health and the environment.

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67 [1897] A.C. 22 (Eng). The separation of parent and subsidiary liability was achieved in some jurisdictions, such as the U.S., by way of statute. The House of Lords decision in Salomon has been followed in most common law jurisdictions. See the observation in briggs v. Jmes Hardie & Co. (1989) 16 N.S. W.L.R: 549, 577 (Austl) (In practice the law “Pays scant regard to the commercial reality that every holding company has the potential [to] and, more often than not, in fact, exercise complete control over the subsidiary”.

Although decision-making within a MNC often occurs within a vertically integrated command structure, that same degree of integration is not available to regulators. A legal command to the subsidiary is effective against neither the parent nor against sister companies in the same group. So too, the various subsidiaries within the MNC operate in a variety of sovereign jurisdictions and are subject to differing legal regimes.

Implicit in this point is that governments have an obligation to take action when private activities over which they could exercise control do threaten harm. In a general way this has been accepted with regard to controlling conduct that may cause harm within the state, either to citizens or to foreigners on their state’s territory. International legal obligations also arise when damaging actions within the state spill over into another state, as in cases of cross-frontier pollution.

But International Law has yet to take the final step of imposing responsibility on states for failure to regulate purely private conduct about which the state has no knowledge and whose harmful consequences outside the state are not, at the time when regulation would be appropriate, reasonably foreseeable.\(^{69}\) To impose such an obligation under international law would require states to oversee private activity much more thoroughly and much earlier than is now required.

### 6.3.1 Stockholm Declaration 1972:

Urgent environmental problems elevate to a level of serious international concern by the United Nations Stockholm Conference held in 1972, on the Environment, have placed a great demand on international law to name a world legal order of resolving conflicts between disparate societies who share or do not share in the earth’s limited resources. In response to this demand, however, the international legal and diplomatic community has fostered the development of international law obligations with respect to the environment without concomitant attention to that part of international law-making that serves to build a structure of world environmental order, namely the development of secondary or functional

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rules of international law which exist to promote the practical realization of the substantive or primary rules of international law defining the content of a State’s legal obligations. These secondary or functional rules are the rules of state responsibility.\footnote{Kenneth B. Hoffman “State Responsibility in International Law and Transboundary Pollution Injuries” ICLQ, 1976, vol. 25.} It is a detailed exposition of the twin concepts of the international liability of states and the duty of compensation for transnational pollution damage.\footnote{Giunther Handl The Environment: International Rights and Responsibilities American Society of International Law, (Proceedings of the 74th Annual Meeting, Washington) April 17-19, 1980, at p. 223.}

The 1972 United National Conference on the Human Environment was a concrete manifestation of mankind’s awareness of the need for concerted international action articulated around consistent regional and national policies to protect and in some cases save, the human environment. It clearly showed that this was a collective challenge which the whole international community must take up as a matter of urgency, since “we have only one Earth”.\footnote{Environmental Law an in-depth Review United Nations Environment Programme, UNEP Report No; 2, 1981) at. P. 252.} This conference which passed a “Declaration of the Human Environment” and an “Action Plan” for improving the environment.\footnote{Rudolf Streniz Repercussions of the Right to Sustainable Development – Help or Hindrance? 59 Law and State 132 (1999).}

The global interest and concern about the environmental pollution has arisen in this Conference. The Declaration adopted at the conference declares:

(a) Man has fundamental right to freedom equality and adequate condition of life in the environment of a quality that permits a life of dignity and well being; and (b) Man bears a solemn responsibility to protect and improve the environment for present and future generations.\footnote{Principle 1 of the Stockholm Declaration.}

(b) It requires that the natural resources of the earth including the air, water, land, flora and fauna, and especially representative samples of natural ecosystems must be safeguarded for the present and future generations through careful planning or management, as appropriate.\footnote{Principle 2.}
(c) It recognizes that economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life. 76

Principles 11, 21 and 22 also very significant for the perspective of sustainable development. The Work of the Conference was mainly handled by three committees consisting of all the participating states.

The real environmental destruction today is done by multinational corporations (MNCs), which can simply move operations if one government becomes too difficult. What international body oversees them, or sets rules for their behavior, or holds them accountable when they transgress? The Stockholm Conference considered air pollution only within the context of general pollution problems. 77

Corporations’ shameful practices are being exposed, but it’s not just their shoddy accounting practices. In Bhopal, India more than 8,000 people died in the first three days after 40 tonnes of lethal gas spilled out from Union Carbide’s pesticide factory. People woke in their homes to fits of coughing, their lungs filling with fluid. 520,000 people were exposed to poisonous gases. 150,000 victims are chronically ill, and even now one person dies every two days.

The Stockholm Conference 1971 resolved in its first principle: “Main had the fundamental right to adequate condition of life, in an environment of a quality that permitted a life of dignity and well being …..”78 the recommendation further emphasizes that the burden of environmental polices, such as expansive pollution control mechanisms and stricter process-safety standards, should not be transferred along with technology. This means that ecologically damaging industries should not be relocated to developing countries. This last scenario appears to be self-contradictory because the objective of equality with development economies requires that developing countries strive to achieve the same standards as are observed in developed countries. How can the objective of

76 Principle 8.
77 Supra Note 72, p. 242.
78 P.C. Pati Environment Protection and Judicial Activism in India AIR 1995 p. 35.
equality be realized when, while seeking the most advanced of technologies, the very feature of advancement are denied as part of a technology transfer package? This illogical approach has its roots in a bureaucratic mentality that thrives on minor technical successes rather than seeking practical solutions. The irony is that a guideline that seems to have emerged from an expensive diplomatic exercise on an issue of global significance, in the end, provides everything except a solution.

An international obligation on states to do this may be inferred by analogy from the expanding international law on transnational environmental protection. In 1972, the non-binding but influential Stockholm Declaration on the Human Environment posited a state duty to cooperate in developing international law on liability and compensation for the victims of pollution and other environmental damage caused to areas beyond a state’s jurisdiction by activities within the jurisdiction or control of that state.79 Treaties on oil pollution and related problems seem to reflect an appreciation by states of the need to deal with such questions, if only in order to shift the burden firmly onto the shoulders of the private operators of dangerous facilities.

The concept of respecting and protecting the human environment has as it objective the fulfillment of the legitimate immediate ambitious of individuals and nations as well as the interest of future generations. The rectification of past errors, wherever possible, has as its object the provision of better opportunities for development and progress. In this sense, therefore, the Stockholm Conference on the Human Environment will be neither a beginning nor an end but an unprecedented opportunity to break new ground in the management of a world in which all of us live. 80

6.3.2 The Rio Summit 1992

This summit is popularly known as Earth Summit. This summit declaration proclaims that “Human beings are at the centre of concern for

sustainable development. They are entitled to a healthy and productive life in harmony with nature”. The world is simultaneously facing increasing economic interdependency and intensified demands for protecting the environment. The June 1992 United Nations Conference on Environment and Development (UNCED) in Rio has stimulated awareness of the global character of many environmental problems and the impact of environmental regulation on economic growth. 82

The Rio Declaration on Environment and Development containing 27 principles reflects two major concerns: the deterioration of the environment and its ability to sustain life and the deepening awareness that long term economic progress and the need for environmental protection must be seen as mutually interdependent. The declaration is not legally binding, but a strong moral commitment exists to adhere to the principles. 83

The Rio Declaration lists a series of legal principles; the right to development, intergenerational equity by sustainably managing the recourse base, the duty to treat resources economically, a special status for developing counties, guidelines for international environmental law, plus (something which is relatively new in environmental law) the precautionary principle 84 and the polluter –pays principle 85 Existing customary international law is reinforced by the principles forbidding transnational pollution 86 on cooperation 87 concerning states, duty to notify and inform each other 88 and on the peaceful settlement of environmental disputes. 89

81 Supra Note 21 at p. 291.
83 Supra Note 21 at p. 291.
84 Principle 15.
85 Principle 16.
86 Principle 2.
87 Principle 14.
88 Principle 18 & 19.
Seven years after the Rio Conference proclaimed Agenda 21 (1992) as the guiding principle for global sustainable development \(^{90}\) which is intended to serve as a programme for political action to implement the Rio-Declaration and in particular to implement the principle of sustainable development in the area of development and environmental cooperation.

Having taken into account the relevant provisions of Principles 13 of the 1992 Rio Declaration on Environment and Development, according to which States shall develop international and national legal instruments regarding liability and compensation for the victims of pollution and other environmental damage.\(^{91}\)

The Earth Summit in Rio triggered manifold complaints about the failure of international environmental policies.\(^{92}\) This Environmental Conference was preceded by two meetings: the Tokyo Declaration on Financing Global Environment and Development and the Kuala Lumpur Declaration. At the Tokyo meetings, developed countries emphasized the “need to re-evaluate the thinking which underlies our present society”. They further emphasized that new principles of environmental ethics needed to be established. All that developing countries would have liked to have heard was included in this declaration except for the specifics concerning the transfer of technology. There were commitments for financial assistance and recognition of the need to pass on environmentally safe and sound technology. However, at the Kuala Lumpur meeting, developing countries repeated their positions from the 1972 Stockholm Declaration.

They stated:

“We call on the developed countries to ensure without further delay a balanced, meaningful, and satisfactory conclusion of the Uruguay Round of Multilateral Trade Negotiations. We further emphasize that developed countries should not attempt to impose unilateral restrictions on international trade, in


\(^{92}\) Supra Note 62 at p. 76.
particular, on natural resource-based and other related products on environmental grounds. The Summit dealt with the issues of transferring environmentally sound technology, cooperation, and capacity building under Chapter 34 of Agenda 21. Much of what was said in the two prior declarations was agreed to and constituted the substance of Chapter 34. However, one of the thorniest issues that remained unresolved was the expression “transfer of technology. It is clear that while developing countries are anxious to acquire the state of the art, environmentally safe and sound technology, along with everything that accompanies it, they fail to recognize that there is no state –of the art technology that is designed for and compatible with nationally determined socio-economic and cultural priorities. The idea is to keep cleaner areas less polluted. There is only one way to development, and that is to stop converting the technologies to suit developing countries. Developing Countries have to understand that such conditions encourage TNCs to move outdated plants and technologies to the Third World. On the contrary, if the developing countries insisted on acquiring the same technology that exists in developed countries, they would then at least be assured of less pollution and improvement of their workforce to the highest levels that are compatible with developed nations”.

World leaders tried to avert the impending clash between globalization and environmental ethics. Governments emerged with a plan outlining how to solve the planet’s problems of environment and development. They agreed to develop national and international laws on liability and compensation for victims of pollution and other environmental damage. The creation of the Sustainable Development Commission and Global Environmental Facility (GEF), the Global Governance initiatives after the Earth Summit of 1992, are but a few pointers in the direction of creating a multi–layered integration of management of global environmental change and the economic, political and technological developments responsible of this change.93

The state of our environment has not improved, in fact it has deteriorated. The gap between the world’s rich and poor has widened. Instead of providing

93 Global Environmental Facility (GEF) and other financing arms of the World Bank were established as a result of the Earth Summit with the aim of disbursing funds for the protection of the global environment.
developing countries with the tools for sustainable development, corporations have pushed their dirty technologies and polluting industries on to some of the world’s poorest communities. In the Past years, corporations have not only resisted environmental challenges, they have lobbied to water down international treaties and even succeeded in getting countries to pull out of environmental agreements altogether. They have maintained their unsustainable practices in all sectors.

Some feel that the Rio Declaration does not define what the balance between development and environmental protection should be like. Others contend that the Rio Declaration has established the principle of sustainable development in universal international law, and that all that now remains is to clarify its contents. Yet others regard “sustainable development” as a “guideline” for future environmental standards, not a present day, new concept of customary international law or indeed of binding law (jus cogens).  

6.3.3 Johannesburg Summit: 2002

Johannesburg, South Africa – As government leaders meet in Johannesburg for the second Earth Summit. Corporations’ shameful practices are being exposed, but it’s not just their shoddy accounting practices. The world needs corporations to be held accountable to the following laws – and held accountable to these laws no matter where they operate in the world.  

- Accept liability for environmental damage and compensate victims of pollution;
- Accept liability for the damage no matter when it happens, what the cause or who in the corporation is responsible;
- Accept responsibility for damage and injury beyond national borders including accidents in the oceans and atmosphere.
- Ensure that they do not infringe upon basic human rights;
- Disclose all information regarding releases into the environment to the public;

94 Supra Note 89 at. Pp. 143 – 144.
• Protect human and social rights including the highest standards for rights to health care and a clean environment;

• Avoid influence over governments, combat bribery and practice transparency;

• Allow states to maintain their sovereignty over their own good supply;

• Implement a precautionary principle and take preventative action before environmental damages or health effects are incurred; and

• Promote and practice clean and sustainable development.

In short, corporate criminals (MNCs also) must own up, clean up, and pay up.

6.4 DOCTRINE OF FORUM NON CONVENIENCE:

Under the forum non convenient doctrine, a court exercises its discretion not to hear an action despite having in persona jurisdiction, subject matter jurisdiction and proper venue under the applicable state and federal venue statutes. The United States Supreme Court first enunciated the doctrine in Gulf Oil Corp. v. Gilbert and it companion case Koster v. Lumbermens Mutual Casualty Co. (commonly referred to collectively as the Gulf Oil case) and reiterated its analysis in Piper Air Craft co. v. Reyno. However, forum non conveniens is not a federally created device its roots are in the common law.

The Bhopal disaster led to a classic international legal case in which Union Carbide used the forum non conveniens doctrine, to avoid being sued in the United States. Under this doctrine, courts can dismiss or ‘stay’ a case if the location is inappropriate or inconvenient for the defendant. Forum Non Conveniens has been routinely used by US Corporations over the last two decades to block cases involving personal injury and/or environmental damage suffered overseas. UK Companies have used the doctrine in a similar way. In Australia, however, the High Court has insisted on a more ‘globally responsible’ forum non conveniens approach, enabling Australian companies to be sued here if something goes wrong abroad.

97 330 U.s. 518 (1947)
Forum Non Conveniens only exists in common law countries. In Civil Law Nations it is unknown. The European Union’s 1986 Brussels Convention, for example, provides an automatic right to sue a Multinational Corporation in its home country. In a draft ruling in December 2004, the European Court of Justice (ECJ) said that the UK forum non conveniens doctrine was incompatible with the United Kingdom’s obligations under the European Union’s Brussels Convention.\(^{100}\) The ECJ said that forum non conveniens detracted from the legal protection the Convention sought to promote. Plaintiffs wasted time and money when cases were removed to another country if a just outcome proved unachievable in the other country it was difficult to restart the case in the UK and if a fair result could be obtained in foreign proceedings, this would require further expense and probably involve considerable delay. In the latter respect, the UK forum non conveniens doctrine: … could be regarded as incompatible with Article 6 of the European Convention on the protection of human rights and fundamental freedoms.\(^{101}\)

It confirmed the ECJ’s decision will mean the death of the forum non convenience doctrine in the United Kingdom. Bristish Corporations will no longer be able to use it to have case removed from UK Courts. As a recent article in a British Industry Journal Sakd: “A resolution of this issue bringing it in line with other European Countries will make it impossible to stay claims on the grounds of ‘forum non convenience’ in England. This is a scary possibility for Multinational Companies (MNCs).\(^{102}\) The Federal Rules of Civil Procedure provide the manner in which service of process may be made on a foreign corporation and define the geographical extent of effective process in all case not covered by federal statutory provisions as the “territorial limits of the state in which informs the courts when foreign corporations are amenable to process so that in personam jurisdiction may be had over them in diversity and most nondiversity suits.\(^{103}\)

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100 Andrew Owusu v. N.B. Jackson case C- 281/02.
101 Article 6 states that everyone is entitled to a fair determination of their rights ‘within a reasonable time’.
Unfortunately, the move from national law to international responsibility is not easy. International law still operates on the basis of states owning duties to each other rather than on the basis of private individuals or organizations having transnational obligations (except in the area of war crimes and crimes against humanity). The victim who wishes to pursue a remedy from some foreign person or company that has injured him is therefore at present compelled to operate within the state system and to find a national jurisdiction whose courts will allow a suit to be brought and will be fit and able to reach a proper conclusion. Courts are often reluctant to take on such cases when critical events have occurred in some other country, and the victims may find themselves unable to find a single national jurisdiction which combines adequate law on the problem, judicial readiness to hear the case, fair standards of compensation, and authority over both the plaintiff and the defendant.  

6.4.1 Rules of Forum Non Convenience:

The traditional forum non conveniens rule in common law countries – from the 1936 St. Pierre Case in the UK – was that a court could not refuse to consider a case within its jurisdiction unless the plaintiff’s choice of forum was: “Oppressive or vexatious to the defendant or would be an abuse of process in some other way”. The rationale of the old rule was to stop a vindictive plaintiff deliberately harassing a defendant through legal action in a remote and inconvenient location. Since taking a company to court in its own country could not amount to harassment, local corporations had no escape from their home courts under the tradition rule.

However, in the 1980s both the US abandoned the traditional forum non convenience rule, primarily due to an overload of commercial litigation in their courts entirely involving foreign parties. Instead, they adopted a ‘most suitable’ or ‘more appropriate’ forum approach, balancing foreign and local factors the most ‘natural’ country to host the litigation. This imposed an immediate handicap on foreign plaintiffs, especially in human rights cases, where

104 Supra Note 14 at p. 649.
the event causing the injury or damage the witnesses and much of the evidence would invariably by located in the plaintiff’s own country – key factors suggesting a forum non convenience dismissal under the new doctrine.

In the *Piper Air Craft Case*, the US Supreme Court endorsed formal discrimination against foreign claimants, stating that a foreign plaintiff’s a choice of the US for legal action ‘deserves less deference.’ The common law doctrine of forum non convenience permits a federal court to dismiss a case if adjudication in another forum would better serve the interests of justice and convenience of the parties. The principles of international comity refer to “the recognition one nation allows within its territory to the legislative, executive or judicial acts of another nation.”

### 6.4.2 Most Suitable Forum

The forum non convenience doctrine was meant to spare both the defendant and the forum court the burdens of litigations in an inappropriate venue. In *Oceanic Sun Line (1988)* and *Voth* Australian High Court refused to adopt the ‘most suitable forum’ approach in forum non convenience matters, instead devising its own ‘clearly inappropriate forum’ test. As with the US/UK approach, Australian Courts will balance the foreign and local factors in a case. But a dismissal will only be granted if the defendant can show that it is ‘oppressed’ or ‘harassed’ by the plaintiff’s choice of Australia for legal action. This retains the rationale of the traditional doctrine, making it impossible for Australian companies to obtain a dismissal from their own courts on forum non convenience grounds.

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107 454 US 235 at 256.
108 In federal courts, forum non conveniens is not governed by Federal Rules of Civil Procedure. Unlike transfer of venue under FED R. C1 V.P. 1404 (a), forum non convenience determinations result in the dismissal of the action, requiring plaintiff to file suit in another forum. “The availability of an adequate alternative forum is a prerequisite for a forum non conveniens dismissal”. Comment, Brooke Clagett, Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign plaintiffs. 9 TUL. ENV’lL. L.J. 513, 517 (1996).
111 (1988) 165m CKR 197.
112 (1990) 171 CLR 538.
The High Court’s refusal to follow US/UK approach strong criticism. It was accused of ‘judicial imperialism’ for not allowing international cases to be heard in the country where they had the ‘greatest connection’. As one critic said of the Australian approach, ‘no policy, other than that of naked and open chauvinism, supports it.’\textsuperscript{113} But, in \textit{Renault v. Zhang}\textsuperscript{114} however, the High Court affirmed the ‘clearly inappropriate forum’ test as Australian law. And it stated that even where the law of a foreign country had to be applied to decide a case, Australia would not be a ‘clearly inappropriate’ forum for hearing the matter.

- The \textit{OK Tedi Case}\textsuperscript{115} showed the benefits of the Australia approach. The case concerned pollution of river system and adjoining land in Papua New Guinea from the OK Tedi copper mine woned by Australia Corporate giant BHP. The OK Tedi landowners sued BHP in the Victorian Supreme Court for environmental damage. In the US a forum non conveniens dismissal would have been expected where, as in the \textit{OK Tedi case}, all the plaintiffs resided in a foreign country, the damage occurred entirely within that country, and much of the necessary evidence was located in the foreign land. But there was no point in BHP seeking a forum non conveniens dismissal. Under the Australian test it would have to show that it was being ‘harassed’ by the choice of Melbourne – its corporate headquarters – for court action.

6.4.3 Bhopal disaster and doctrine of forum

In the Bhopal disaster case, before the US case began, the Chief Justice of the Supreme Court of India said: It is my opinion that these cases must be pursued in the United States… It is the only hope these unfortunate people have.\textsuperscript{116} In 1986 the Bhopal survivors and relatives of the dead sought compensation in the United States from the parent Union Carbide Corporation. They were represented by the Indian Government which had declared itself the sole litigant in relation to the disaster.

\textsuperscript{114} (2002) 210 CLR 1 VR 491.
\textsuperscript{115} \textit{Dagi v. BHP} (1995) 1 VR 428.
The Law \textsuperscript{117} empowered the Union of India to take over the conduct of all litigation in relation to the tragedy. The first question before the government was where it should file a suit on behalf of the victims of the tragedy – before the U.S. court where the Union Carbide Corporation, the parent company of the Union Carbide India Ltd., had the headquarters or before the Bhopal District Court under which jurisdiction UCIL was located. The government opted for the U.S court thinking that this is the appropriate forum for adjudication of the claims to the best interests of the victims. The plea of the plaintiffs, including the Union of India, was that the courts in India are not up to the task and have yet to reach full maturity. This it was said, was due to the restraints placed upon it by the British colonial rulers, who shaped the Indian legal system.\textsuperscript{118} Rejecting the plea and holding that the Indian courts are the most appropriate forum, Justice Keenan of the U.S. District Court observed:

To retain the litigation in this forum, as plaintiffs request 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. The Union of India is a world power in 1986, and its courts have the proven capacity to meet out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can must vindicate their claims before the independent and legitimate judiciary ….”\textsuperscript{119}

According to Judge Keenan of the New York District Court, however, the Indian connection with the case far outweighed the interests of citizens of the United States in the matter. The presence in India of the overwhelming majority of the witnesses and evidence… would by itself suggest that India is the most convenient forum for this … case,\textsuperscript{120} Besides, to retain the case in the United States would be a forum of ‘imperialism’, imposing U.S rules, standards and values on a developing nation: To deprive the Indian Judiciary of this opportunity to stand tall before the world send to pass judgment on behalf of its own people

\begin{itemize}
\item \textsuperscript{117} Bhopal Gas Leak Disaster (Processing of claims) Act, 1985.
\item \textsuperscript{118} P. LeelaKrishnan Law and Environment 1992, pp. 138-139.
\item \textsuperscript{119} Union of India v. Union Carbide Corporation, (1986) 2 Comp LJ 169 (US) at 195.
\item \textsuperscript{120} In re Union Carbide 634 F. Supp. 842 (1986), 866.
\end{itemize}
would be to revive a history of subservience and subjugation from which India has emerged. 121

The US forum non convenience doctrine means Union Carbide and other US Multinationals are not held to account in the United States when things go wrong overseas. Under the US approach it is difficult for the liability of such companies to be tested in US Courts. As (then) Justice Deane of the Australian High Court pointed out, the US approach meant, for example, that in the *Piper Aircraft Case*: Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania.122

The difficulty of suing US Companies in their home Jurisdiction makes it hard to obtain enforceable judgments allowing access to the assets of such firms. In addition, allowing foreign cases to be readily dismissed for forum non conveniens helps US Corporations escape domestic standards in their overseas operations (although other factors are also relevant). As Professor Joel Paul said in the Harvard International Law Journal:

*By allowing transnational business to choose legal system imposing a lower regulatory burden than the United States, US Courts have effectively lowered regulatory standards. By refusing to exercise jurisdiction in a case like In re Union Carbide, a court effectively allows a US manufacturer to avoid US tort liability and encourages other manufacturers to locate plants abroad.*123

Apart from the *Bhopal case*, US courts have cited the *Piper Aircraft* decision to dismiss many other foreign claims for forum non convenience. According to the International Business Law Review, 470 lawsuits have been filed against US Companies over the last 20 years for injuries allegedly caused by use of the pesticide DBCP on banana plantations in developing countries. Largely

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121 Ibid.
because of the US forum convenience doctrine, however,… no US Court has yet heard a case on its merits even though the first DBCP case was filed in 1984.124

However, notwithstanding the refusal of US Courts to accept responsibility for cases such as the Bhopal litigation, the balance in ensuring corporate accountability is not necessarily in Australia’s favour. The US offers avenues for legal action not available in other countries. As Monash University’s Professor Sarah Joseph explains, US laws such as the Alien Torts Claims Act (ATCA), the Torture Victims Protection Act (TVPA) and the Racketeer Influenced and Corrupted Organizations statute: …. Provide plaintiffs with unique substantive causes of action against [US and other Multinational corporations] that have breached their human rights.125

When the case returned to India, the Indian Government lodged a $US 3.3 billion claim against Union Carbide in the Bhopal District Court. In 1989, however, it agreed to a $ 470 million settlement discharging the company from all future claims over the disaster. The bulk of this money remained in the Bank of India until 2004 when the Indian Supreme Court ordered that it be distributed to 566,000 claimants, who were to receive several hundred dollars each.126

6.5 INTERNATIONAL CODE FOR TNCs ON ENVIRONMENT

It is not anticipated that the Code of Conduct will be legally binding or that it will be directly enforceable.127 Environmental aspects in the relations between MNCs and the host countries have also been incorporated into the codes of conduct that have been prepared in the recent times.128 Bhopal gas tragedy and consequent litigation has also revealed that need for evolving over all controls over the activities of MNCs especially when they are engaged in hazardous operations. Such a need was felt all over the world and the Secretary- General of the United Nations has rightly responded to it by evolving some methods in his

report. The first step he suggested was risk assessment and involvement of factory employees and the community in the development of methods to identify the hazards and second step was about evolving strategies to plan and reduce the consequences of accidents and to settle the claims of liability. As part of its programme on environmental health criteria World Health Organization (WHO) is engaged in a wide-ranging efforts to collect scientific information on the harmful effects for human health of all damage to the environment.129

Organizations and citizens whose activity involves increased hazard for other persons (transport organizations, Industrial enterprises, building workers, possessors of cars and the like) are bound to make compensation for harm caused by the source of increased hazard unless they prove that it arose as a consequence of vis major or the intention of the victim.130 But the question as to the extent of liability of the parent company for the environmental harm caused by its affiliate was left open for further discussion. Had Bhopal tragedy was covered by industrial insurance, the victims would have received the necessary relief without much delay. It took four years to reach settlement and the distribution of relief is still going on in Bhopal. Speedy trial and early disposition of claims is as important as the fundamental right to life. All the theories of liability – the effect theory and enterprises theory pinpoint the liability on the parent American Company UCC which controlled the Indian company UCIL in its establishment and functioning besides playing a significant role in decision making. UCC not only owes a duty of care toward Indians but people in general. It is the basis of human rights jurisprudence and MNCs are subjected to the international human rights obligation. Similarly the Government of Madhya Pradesh and Government of India also are liable when the MNCs permitted by them are violating the international human and environment rights.

Since then various codes of conduct were developed. United Nations General Assembly, the International Labor Organization [ILO], the food and Agricultural Organization [FAO] and the Organization for Economic Cooperation

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129 Supra Note 72 at p. 246.
130 The Provision about increased hazard is contained in Article 454 of the Code of 1964, the code is that of the Russian Soviet Federative Socialist Republic. It is corresponding to the Article 90 of the Basic Principles of the Civil Litigation, 1962, cited in E.L. Johnson, No Liability without fault – The soviet View 20 Currt L. Prob. (1967) 168.
and Development [OECD] have incorporated the environmental aspects and the relations between the MNCs and the host country. The developing countries, united as the Group of 77, have maintained a common position throughout the various global negotiations dealing with the formulation of codes of conduct for TNCs.\textsuperscript{131} Since most conditions they sought to rectify have yet to be resolved, perhaps they could consider new approaches – for instance, to create functional organizations at the interregional level to regulate the activities of TNCs.\textsuperscript{132}

A parallel and related recognition has emerged in free trade negotiations, where the proposed global agreement emerging from the Uruguay Round of General Agreements of Tariffs and Trade (GATT) and regional agreements such as the North American Free Trade Agreement (NAFTA) have been recognized to require specific, additional measures concerning environmental, health, and safety matters. However, considerable uncertainty exists about how to apply environmental standards to TNCs in this new era of Free trade, liberalization of national economies, and promotion of FDI. TNCs are key players in terms of development activity, and the perception that they operate in a vacuum between ineffective national laws and non-existent or unenforceable international laws has heightened concerns about the current reach and effectiveness of environmental regulation, particularly where TNCs are operating in developing countries. A considerable amount of attention has been devoted in recent years by TNCs and others to the notion of self-regulation of environmental, health, and safety matters. This may in part reflect a belief that TNCs are beyond any form of regulatory control and should develop their own rules to meet public expectations. It may also constitute an effort by TNCs to anticipate further regulation,\textellipsis\textsuperscript{133}

The Inter-governmental Working Group on a Code of Conduct prepared a Draft Code. The first part contains a preamble and the second part refers to a set of provisions on definition and the scope of application of the code. The first section of the third part relates to the general duty of TNCs to respect the sovereignty, laws and policies of the countries in which they operate. There is

\textsuperscript{131} Kwamena Acquaah \textit{International Regulation of Transnational Corporations: The New Reality} 1986 at p. 32.

\textsuperscript{132} \textit{Ibid} at p. 33.

\textsuperscript{133} http://www.questia.com/googleScholar.qst;jsessionid=LfpJdJFFgZJQ8 wv1PpGp2k3j GNh8jSp pvS26nwLh F2K2pbnG7Q7T11581092936f1888687908?docId=5000274495.
general agreement that the TNCs should respect the national sovereignty of these countries, that they are subject to their laws and to their jurisdiction and they should respect the right of these countries to regulate and supervise the activities of TNCs in their territories.  

Paras 41 to 43 relate to environmental protection. The TNCs are asked to carry on their activities in conformity with national laws and with due regard to international standards. TNCs are called on to disclose to the public in the countries in which they operate clear and comprehensive information on the structure, activities and policies of the TNCs as a whole. Such information should be disclosed at regular intervals.

6.5.1 The U.N. Code of Conduct:

The UN Draft Code of Conduct on Transnational Corporations (TNCs) contains several specific obligations addressed directly to the MNCs. They include:

1. The obligation to respect the national sovereignty of the countries in which they operate and the right of each state to exercise its full sovereignty over its natural resources within its territory.
2. The obligation to be subject to the laws of the host country and the explicit duty to carry on their activities in conformity with the developmental policies, objectives and priorities of the respective governments.

In the light of the new interpretation given to development including the safeguarding of the environment, it should implicitly mean an obligation not to unreasonably alter the ecological balance of the host country through their activities. The Draft Code also provides for the insertion of review and renegotiation clauses in the contracts between the MNCs and the host countries. Even in the absence of such clauses also, the parties should review and renegotiate the contract if there has been a fundamental change of the circumstances on which

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135 Ibid at p. 78.
136 The text of the draft reproduced at 23 ILM 626 (1984).
137 Article 6 of the UN Draft Code on TNCs.
138 Article 7.
139 Article 43.
the contract or agreement was based.\textsuperscript{140} The basis of the law of contract is that the parties should perform their duties under the contract in good faith.

On this basis, one might assume that whenever an enterprise starts a hazardous activity, in the territory of a state, there is inherent in the nature of the agreement itself, an understanding that it will not cause any serious adverse effects on the health of the people or the environment of the country. If such be the case, a major accident or disaster of Bhopal type or an act of massive pollution of the environment on the part of the MNC might amount to delinquent conduct or a wrongful breach of its implied undertaking. But the question has yet to be affirmatively answered whether such a disregard/violation of the basic obligations of the contract is such a fundamental change of circumstances contemplated by Article 1 of the Draft Code. A related question is if such an incident may be a good defence for the host country for expropriating the concerned entity.\textsuperscript{141}

Whenever an enterprise starts a hazardous activity in the territory of a state, there is an inherent duty in the nature of the agreement itself, an understanding that it will not cause any serious adverse effects on the health of the people or environment of the country. If an accident like Bhopal tragedy results from the activity of the MNC it might amount to delinquent conduct or a wrongful breach of duty.

The code also imposes an obligation on the MNCs to respect the human rights and fundamental freedoms in the host countries.\textsuperscript{142} Right to Clean Environment is a significant aspect of new human rights jurisprudence. It is a duty of MNC to protect and preserve that environment. However, strong the Code may be its binding nature is a questionable aspect. The States have to enforce the Code, which is addressed to the MNCs. Developed Nations may not agree to enforce the

\textsuperscript{140} Article 11.
\textsuperscript{141} Supra Note 128 at p. 543.
\textsuperscript{142} Article 13.
Code. There are also certain direct obligations on the MNCs in the matter of protection of the environment under Articles 41 to 43 of the Draft.\textsuperscript{143}

Here the duty of the MNCs is both preventive as well as curative and it includes also a duty to supply full information regarding the characteristics of their products and other activities which may harm the environment, and the measures and cost necessary to avoid or at least to mitigate their harmful effects.\textsuperscript{144}

Recent policy of the United Nations Code of Conduct for Transnational Corporations, initiatives at the international level concerning TNCs focus instead on developing guidelines to facilitate FDI, with the principal issues being the development of standards for fair and equitable treatment, national, and most favored nation treatment.

The proposed Code of Conduct for Transnational Corporations (TNCs) is proposed by the U.N. General Assembly states the following objectives:

1. The prevention of TNCs interference in the internal affairs of the host countries and collaboration with racist regimes;
2. The prohibition of restrictive business practices by TNCs;
3. The transfer of technology and management skills by TNCs to developing countries on equitable and favourable terms;
4. The regulation of repatriation of profits by the TNCs; and
5. The adoption of provisions to promote reinvestment of TNCs profits in developing countries.

\textsuperscript{143} Article 41: TNCs shall/should carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. TNCs shall/should in performing their activities, take steps to protect the environment and where damaged, to (restore it to the extent appropriate and feasible) (rehabilitate it) and should make efforts to develop and apply adequate technologies for this purpose. Article 42: TNCs 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; Article 43: TNCs shall/should be responsive to requests from Governments of the countries in which they operate and be prepared where appropriate to co-operate with international organizations in their efforts to develop and promote national and international standards for the protection of the environment.

\textsuperscript{144} Supra Note 128 at p. 544.
TNCs have historically self-regulated their international operations regarding human rights and the environment. Today, there is little international law that clearly states the human rights to a healthy environment. There is even less international law regulating corporations. Some of the most overlooked and powerful non-governmental actors in the human rights arena are TNCs and other business enterprises. There is no applicable “hard law” and little “soft law” pertaining to Transnational Corporate accountability. The most notable “soft law” is the single principle that calls for the promotion of corporate responsibility in the Johannesburg Summit. Nearly all “non-binding” aspiring declarations are “soft law”. “Hard law” is what lawyers use at a domestic level. Skeptics of “soft law” often call it “moralizing without consequences”.

Efforts to develop criminal law to punish international war crimes have led to an increased awareness of the need to ensure individual responsibility for violating human rights in other countries. This awareness has even led to the acknowledgment of the right to a sustainable global environment. An increasing number of human rights activists have requested that the United Nations establish uniform legal obligations for TNCs regarding human rights.

Until the U.N. Norms were adopted, the activists’ efforts were unsuccessful. An initiative from Sub-Commission Resolution 1997/11 formed a Working Group on working Methods and Activities of Transnational Corporations and requested a working document on human rights and TNCs. The document included both human rights obligations and environmental requirements for TNCs. With some minor changes, on August 13, 2003, the Sub-Commission approved the Norms on the Responsibilities of Transnational Corporations and other Business.

The UN Norms as adopted are not a voluntary initiative of corporate social responsibility. The many implementation provisions show that they amount to more that aspiration statements of desired conduct. Although not voluntary, the Norms are not a treaty, either Treaties constitute the primary sources of International Human Rights Law. Regional Courts can cite to the Norms when determining the requirements of states and encouraging them to scrutinize corporations’ conduct within their jurisdiction. Often ‘soft law’ is considered too
vague to provide any authority when applying these rules to disputes, however, this is not the case with the norms. They can be cited as persuasive legal authority when a TNC violates the environmental rights of indigenous people in developing countries.

The Norms also compel TNCs to abide by international principles with regard to the environment and human rights and conduct their activities in a way that contributes to sustainable development. TNCs must conform to national laws and regulations relating to preserving the environment of the states in which they operate.

6.5.2. OECD Guidelines:

The Guidelines for Multinational Enterprises adopted by Governments of OECD member countries in June 1976: “Companies or other entities whose ownership is private, State or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others.” 145 In the annex of which certain Guidelines are embodies. 146 For the purpose of the Code of Conduct it may perhaps be helpful to adopt the definition given in the O.E.C.D. Guidelines, which is as follows:

“These usually comprise companies or other entities whose ownership is private, State or mixed, established in different countries and so linked that one or more might be able to exercise a significant influence over the activities of others and in particular to share knowledge and resources with others.” 147 The MNEs accordingly, are under an obligation to give due consideration to those countries’ (The host countries) aims and priorities with regard to economic and social progress, including industrial and regional development and the protection of the

146 Supra Note 128 at p. 544.
environment. However, the observance of these Guidelines is only voluntary and not legally enforceable.

In 1984, the OECD has issued a clarification of environmental concerns in the OECD Guidelines for MNEs. The clear intent of the Guidelines, it is explained, is that, enterprises, whether they are domestic or multinational, should, within the framework of laws, regulations and administrative practices in each of the countries in which they operate, take due account of the need to protect the environment and to avoid creating environmentally related health problems. In environmental matters, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.

The enterprises should, in particular (a) assess and take into account in decision-making the foreseeable consequences of their activities which could significantly affect the environment; (b) co-operate with competent authorities, inter alia, by providing adequate and timely information regarding the potential impacts on the environmental and on environmentally related health aspects of all their activities and by providing the relevant expertise available in the enterprise as a whole’ and (c) take appropriate measures in their operations to minimize adverse environmental effects.

The OECD has five or six major working parties dealing with different aspects of multinational corporation (MNC) behavior, all of them subsumed under the Industry Committee. The current environmental policy principles developed for OECD countries and applied in the developing countries have been summarized by Opschoor and Turner as follows:

148 Supra Note 48 at p. 544.
149 OECD. Clarification of the environmental concerns expressed in paragraph 2 of the General Policies Chapter of the OECD Guidelines for MNEs, reproduced at 25 ILM 494 (1986).
150 Ibid para. 3.
151 Ibid Para 4.
(i) The ‘polluter pays’ principle: i.e. the polluters pay the cost of meeting socially acceptable environmental quality standards.

(ii) The prevention or precautionary principle: this explicitly recognizes the existence of uncertainty (environmental and social) and seeks to avoid irreversible damages in relation to the imposition of a safety margin into policy; it also seeks to prevent waste generation at source, as well as retaining some end-of-pipe measures.

(iii) The economic efficiency/cost effectiveness principle: this applies both to the setting of standards and the design of the policy instruments for attaining them.

(iv) The decentralization principle: to assign environmental decisions and enforcement to the lowest level of government capable of handling it, without significant residual externalities.

(v) The legal efficiency principle: this seeks to preclude the passage of regulations that cannot be realistically enforced.

Reflections on these environmental policy principles and their practice in various parts of the world have produced mixed results, even in their proponents’ view. Organization for Economic Cooperation and Development (OECD) issued a Declaration on International investment and MNEs in the Annex of which guidelines are embodied. The MNEs are accordingly under an obligation to give due consideration to the host countries aims and priorities with regard to economic and social progress, including industrial and regional development and the protection of environment. These guidelines are only advisory and not mandatory. They are not legally enforceable. But it reflects the agreement of international community to the aspect of duty of MNCs to abide by the laws, controls and regulations of the state in which the MNC operates like any other domestic corporation.

6.5.3 OECD: TNC CODE: HELSINKI\textsuperscript{155}

1. MNCs should respect host country laws goals and priorities concerning protection of the environment.
2. MNCs should preserve ecological balance, protect the environment, adopt preventive measures to avoid environmental harm, and rehabilitate environments damaged by operations.
3. MNCs should disclose likely environmental harms and minimize risks of accidents that could cause environmental damage.
4. MNCs should promote the development of international environmental standards.
5. MNCs should control specific operations that contribute to pollution of air, water, and soils.

MNCs should develop and use technology that can monitor, protect and enhance the environment. The tasks of the Centre, in Formulation, is quite simple. The centre collects and analyzes information concerning the implementation of the Code on the basis of reports which it receives from the governments and the documentation supplied by the Ngos and other UN organizations and specialized agencies. It also investigates “as directed by the Commission” substantive issues relating to the code and gives the Code and gives the Commission all necessary help and support.\textsuperscript{156}

6.5.4 Voluntary Corporate Environmental Code of Conduct:

Transnational Corporations exercise enormous economic power and engage in practices that result in the release of large amounts of pollution. However, the conduct of Transnational Corporations frequently is not effectively regulated by any environmental regime since domestic law (especially in developing countries) often is not adequately enforced, it typically does not address the environmental activities of overseas corporations, and international law is not adequate to fill in the gaps. Given the lack of effective laws concerning

\begin{flushleft}
\textsuperscript{155} http://umdrive.memphis.edu/rhbhagat.internationalmanagement/chap 017ppt#276,16,Table 17-4:environmentalprotection.
\textsuperscript{156} Pieter Sanders \textit{Implementing International Codes of Conduct for Multinational Enterprises} XXX (1982) Am. J. Comp. L. 253
\end{flushleft}
pollution that govern Transnational Corporations (TNCs), a recent trend has been
the emergence of voluntary corporate codes of conduct. Although corporations
have no legal obligation to follow these codes, the demands of the market may
persuade international companies to adopt voluntary environmental codes in order
to remain competitive. Compliance with these voluntary codes can result in
reduced pollution.

The International Organisation for Standardization (ISO), a non-
governmental body that develops worldwide standards to facilitate the
international exchange of goods, has created a series, ISO 14000, of voluntary
environmental management standards for corporations. ISO 14000 does not
include specific environmental regulations for corporate compliance. Instead, the
series contains general procedures for developing management systems that
address the environmental impacts of corporate activities, including pollution, and
thus can be adapted to different types of organizations. In order to become
certified under ISO 14000, the top-level management of an organization must
establish an environmental policy that takes into account all activities of the
company which have environmental implications, and commits the organization,
among other things, to the prevention of pollution.

The Environmental Management System must have a planning process
that creates specific environmental goals, methods of implementation and
operation, and a system of monitoring and measuring environmental performance.
Because ISO 14000 certification-like compliance with other voluntary codes of
conduct - is sometimes contractually required by a company’s customers to do
business, ISO 14000 can encourage organizations to develop policies that reduce
pollution.

Several other corporate codes of conduct relating to pollution prevention
have been established. One example is the Ceres Principles, a Moral Code of
Environmental Conduct that corporations can choose to adopt. It facilitates
investment by shareholders in companies that have taken steps to improve their
environmental performance. By 2000 approximately fifty-four major U.S.
Corporations, including, General Motors, Ford Motor Company, Ben & Jerry’s
Ice Cream, and Domino’s Pizza, had endorsed the Ceres Principles. The
International Chamber of Commerce (ICC), a non-governmental organization, has developed a set of environmental standards known as the Business Charter for Sustainable Development. The ICC also documents examples of successful environmental management practices for other companies to model.

In addition, the United Nations has established the Global Compact, a set of voluntary corporate codes that incorporates principles from international Environmental and Human Rights Treaties. A final example is the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Corporations, which include a chapter of the environment.

So far these Codes are all of a so-called voluntary character and not legally binding. This comment will deal only with one specific aspect, perhaps the most difficult of all the manner implementation.\textsuperscript{157} Even if a Code of Conduct for Transnational Corporations is not regarded as directly law-making and obligatory, it would be rash to qualify it as a paper tiger.\textsuperscript{158} On the other hand, a Code of Conduct can effect no sudden miracles. It must be supplemented by bilateral and multilateral harmonization measures and investment treaties, by the infinite variety of national legislations, by various schemes providing for host state or private local participation in the ventures and plants of transnational corporations, and by the hundreds of specific contracts between states and corporations.

6.6 ENFORCEMENT OF INTERNATIONAL LAW

Some industries discharge untreated wastes directly into waters.\textsuperscript{159} In recent years Multinational Corporations are also causes of the Environmental Pollution. An important question is how international law regarding pollution can be enforced. There is no international police agency with the authority to enforce international law or any international court system with broad compulsory jurisdiction to make binding decisions on countries without their consent.

\begin{footnotesize}
\bibitem{157} Ibid.
\bibitem{158} Luzius Wildhaber \textit{Some Aspects of the Transnational Corporation in International Law} XXVII Neth. Intl.L.Rev. 88 (1980).
\bibitem{159} Henry Landis. \textit{Legal Controls of Pollution in the Great Lakes Basin} XLVIII Can. Bar. Rev. 67 (1970),
\end{footnotesize}
Despite the lack of a central force, however, countries generally comply with their international legal obligations. Among other reasons, this is because countries will usually only assume obligations in the first place if they believe it is in their interest to do so. In the event of non-compliance, economic sanctions may sometimes be imposed under the terms of certain agreements, and non-violating countries may sometimes take other measures against countries that violate international law. In this field, global and regional international organizations have an important role to play vis-à-vis their member states. The risk of negative publicity may also persuade countries to comply with their obligations.

The economic and legal systems of third world countries obviously differ widely. However, it is possible to classify these countries into certain types. With respect to legal systems, one may classify countries into two types or classes: (1) countries which have laws based on the Civil Code, including all of the countries which are ex-French colonies, as well as various others which have adopted laws based on either the French or the Swiss commercial and civil codes; and (2) countries which have laws based on either the English or the American legal systems, including those countries which are either ex-British or ex-American colonies, as well as a limited number of countries which have adopted laws based on these systems. Against this background, it is possible to identify the major legal problems which arise by Multinational Corporations (MNCs) on Environmental Pollution.

If the development of international law were to become widely accepted, it could go some way towards dealing with the problem of controlling multinational companies without the necessity of reaching international agreements on the matter. The mechanisms available for incorporating such a development without a treaty are essentially limited to customary law and what are called ‘the general principles of law recognized by civilized nations’. Customary law, however, relies on the passage of time and other elements which could delay a clear incorporation of the desired rules into international law.

160 Supra Note 72 at p. 263.
162 From the traditional list of the ‘sources’ of International law contained in Article 38 of the Statue of the International Court of Justice, annexed to the United Nations Charter.
General principles, on the other hand, may be derived by the International Court of Justice from principles of law existing in the national law of states. To the extent that such national law could be shown to have explicitly or implicitly adopted the view that governmental regulation is obligatory, even in the case of activity that is potentially harmful only outside the state’s territory, to that extent also a similar international legal duty might be said to exist. To safeguard both National and International society in 1971 the World Bank Economic Survey, directed the attention of the World Community “to the role of Multinational Corporations (MNCs) which is some time viewed with awe since their size and power surpassed the Host Country’s entire economy and to the need to formulate a positive policy and establish effective machinery for dealing with the issues raised by the activities of these Corporations.\textsuperscript{163}

Support for this conclusion could be argued directly or by analogy from a variety of national and international sources. The US National Environmental Policy Act (1970), for example, has been interpreted by the courts to require environmental impact statements not only for government projects in the United States but even for those whose potential impact is solely outside American territory.\textsuperscript{164} Similarly, the Nordic Convention on the Environment (1974)\textsuperscript{165} recognizes the duty of states to assess the extra-territorial environmental danger from projects within their territory. The Organisation for Economic Cooperation and Development (OECD), in its guidelines on multinational enterprises, commits member states to improving the ‘welfare and living standards of all people both by encouraging the positive contributions which multinational enterprises can make and by minimizing and resolving the problems which may arise in connection with their activities’.\textsuperscript{166}


\textsuperscript{165} Ibid.

But, although this approach would allow the basic principle of state responsibility to operate in these questions and hence make a state financially liable for the unregulated harmful conduct of companies which it allows to incorporate within its territory, it would not produce much greater precision in the rules to which the international community would like to hold the multinational themselves. This would leave a serious gap in the international legal control of those companies and, perhaps more important, would leave the multinationals themselves in doubt as to precisely what was expected of them—a dangerous situation where future Bhopals are concerned.

Actual experience in resolving environmental controversies demonstrates that however attractive separability is in theory, it has not been achieved in fact. The setting up of an independent regulatory body covering environmental clearance, monitoring and enforcement could make a positive contribution to solving the problem.

In International law regime, there are many conventions and regulations to regulate the activities of Multinational Corporations (MNCs) are legally and morally liable for its activities if they cause any harm to the citizens and environments where they operate.

Tragedies such as Bhopal and Chernobyl are testimony to the environmental hazards that have destroyed not only large segments of existing population but have caused considerable ecological damage by big industries. These tragedies caused the rise of the wave of environmental legislation throughout the industrialized world. Such various International conventions, regulations and code of conducts and their enforcement have been discussed under this chapter.