Chapter – 2

Evolution of Right to Clean and Healthy Environment and Transnational Corporations: International Legal Framework

‘Even God does not know what sustainable development means.’

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The Frame

This chapter discusses the evolutionary course of right to clean and healthy environment at the international level in specific reference to TNCs. It explains the relationship this right enjoys with international human rights law. It analyses the manner in which such a right has been enforced under extraterritorial laws at domestic level particularly US (under ATCA). It also looks into what kind of implications such a right has for bilateral investment treaties which are crucial for protecting investments made by various TNCs.

The Focus

This chapter focuses on how violations of the right to clean and healthy environment committed by TNCs are redressed at international level, ATCA and BITs.

The Objective

The objective of the chapter is to understand various remedies that have been invoked by victims of violation of right to clean and healthy environment against TNCs and how TNCs have used their rights under BITs in cases involving alleged violations of right to clean and healthy environment by them.

2.1 Introduction

TNCs have emerged as highly influential entities engaged in the business of providing goods and services across the globe. Their capacity to violate right to clean and healthy environment in this process is now well known while their capacity to strengthen it is gradually being realised and explored. Despite their influential presence at the world stage, subjecting them to right to clean and healthy environment at the international level has proved to be daunting.

2.2 Liability of the State for Environmental Damage caused by Corporations under International Law

Corporate liability for violation of human rights has posed a highly complex challenge for international law. Part of the complication is due to recognition of only States as subject of international law while other non-state actors (which also include
corporations) are regarded as objects thereof. Accordingly, international law confers rights and imposes obligations on the States instead of the corporations themselves. Application of this principle is clearly evident in the following two judgments.

In the context of rights of a corporation, an interesting issue came before the International Court of Justice (ICJ) in *Barcelona Traction Case*. Barcelona Traction, Light and Power Company, Limited was incorporated in 1911 in Canada as a holding company with the objective of developing an electric power production and distribution system in Spain. It incorporated various subsidiary companies in order to achieve this objective. After the First World War, its share capital was very largely held by Belgian nationals. It was declared bankrupt by various organs of Spain. Belgium claimed reparation for the damages suffered by Belgian nationals in their capacity as its shareholders. ICJ held that only that state enjoys right of diplomatic protection on behalf of a corporation whose nationality it enjoys. A corporation enjoys the nationality of that State under whose laws ‘it is incorporated and in whose territory it has its registered office’. Further, such State will determine whether it will grant such protection and if yes, the extent and duration thereof. Non-exercise of such right by such State does not extinguish such right and therefore, national States of shareholders of a corporation cannot exercise it.

In the particular context of environmental damage caused by corporations, responsibility is imposed on the State under whose jurisdiction the corporation is incorporated. In *Trail Smelter case*, Consolidated Mining and Smelting Company of Canada Ltd. obtained a charter of incorporation from Canadian authorities in 1906 and acquired a smelter plant located at Trail (British Columbia, Canada). It became one of the best equipped and largest smelting plants in the continent. Its operations lead to emission of sulphur dioxide fumes which entered into upper air currents and thereby carried it as fairly continuous stream down the valley entering USA and

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4 ibid 42.
5 ibid.
6 ibid 44.
7 ibid 49.
thereby causing damage in Washington. Being aggrieved, USA initiated arbitration proceedings against Canada. Tribunal concluded that damage is caused and accordingly awarded damages and directed Trail Smelter to refrain from doing so in future.9 It held that under international law, Canada is responsible for the conduct of the corporation.10 It imposed duty on Canada to ensure that such conduct is in consonance with obligations of Canada under international law.11

Due to such a position of TNCs under international law, they have largely been immune from direct obligations under international law.12 However, over a period of time, rigid application of the above rule has been relaxed and non-state actors are also being recognized as subjects of international law though to a varying extent.13 This extension is one of the greatest achievements in the field of international law in recent times.

2.3 Right to Clean and Healthy Environment as part of International Human Rights Law

The relationship between right to clean and healthy environment with international human rights law has evolved over a period of time. There was a phase when the relationship between the two was only implicitly recognised. However, this phase did not last long. After a particular point of time, their relationship got explicit recognition.

2.3.1 Implicit Recognition

Eruption of Second World War within a short span of nearly two decades after the end of First World War proved to the international community that an entirely new and deeply committed approach was required in order to avert the threat of Third World War. The most significant positive outcome of Second World War was the emergence of human rights (in their modern sense) on the international scene and the sincere commitment of international community towards them. This sincerity was

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9 ibid 1933.
10 ibid 1965.
11 ibid 1966.
12 Donald K Anton and Dinah L Shelton, Environmental Protection and Human Rights (Cambridge University Press 2011) 864.
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reflected in the formation of United Nations (UN). UN was created essentially to restore human dignity which turned out to be the worst casualty during the Second World War. Preamble of the Charter to UN proclaimed this commitment unequivocally. Charter stated ‘promoting and encouraging respect for human rights’ through seeking ‘international co-operation’ as one of the purposes of establishing UN. Preamble of the Charter of the UN laid the foundations for the regime of human rights that evolved later and proved to be of profound influence on human civilization. Since then, language of human rights has emerged as the language of humanity setting the trend of formulating newer claims in this language, at the international as well as national level. And it is promising to note that with passage of time, commitment to human rights have got strengthened pervading all human discourse. In our contemporary world, it is no more possible to discuss intellectual property rights (IPR), international trade law, corporate law, securities law, investment law etc. without taking into account their impact on human rights. However, Charter neither identified human rights nor indicated that right to clean and healthy environment should form their part. Although UN lacked any specific mandate regarding environment in UN Charter, it engaged in the task and regulated specific environmental problems.

2.3.1.1 International Bill of Human Rights

Universal Declaration of Human Rights (UDHR) was the first international instrument adopted by the General Assembly in 1948 wherein human rights were enumerated in one single document. Later on, international community felt that human rights should be classified into Civil and Political Rights (also referred to as first generation rights) and Economic, Social and Cultural rights (also referred to as second generation rights) for their better codification and implementation. Two

separate covenants namely – International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural rights (ICESCR) were accordingly adopted in 1966. Together, UDHR, ICCPR & IESCR comprise International Bill of Rights. International Bill of Rights was further supplemented by four regional human rights instruments, namely – European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950; European Social Charter (ESC) 1961; American Convention on Human Rights (ACHR) 1969 and African Charter of Human and People’s Rights (African Charter) 1981. They together constitute the core of international human rights law, although the enumeration of human rights therein is not exhaustive and subsequent additions have been made into this list. Dichotomy between Civil and Political rights and Economic, Social and Cultural rights and their consequent compartmentalization was finally broken (and perhaps forever) in 1993. International community recognized that all human rights are ‘universal, indivisible, interdependent and interrelated’.\(^\text{18}\) Fulfillment of CPRs would in turn lead to better implementation of ESCRs and vice versa. Both complement each other. One cannot be implemented without the other.

ICESCR recognized the link between environment and human rights.\(^\text{19}\) However, it did not specify right to clean and healthy environment in terms of specific protection.\(^\text{20}\) Furthermore, ICESCR, African Charter of Human and Peoples’ Rights and American Convention on Human Rights (ACHR) recognized linkage between human rights and environment.\(^\text{21}\) They provided fertile ground in the form of conceptual framework creating a possibility of not only introducing environmental concerns but also scope for subsequent express environmental language.\(^\text{22}\)

There are certain human rights in the international human rights law (namely – right to life, right to health and right to privacy) which has a more pronounced relationship with right to clean and healthy environment. In absence of its explicit enumeration in the international bill of human rights, right to clean and healthy environment found conscious accommodation in these rights as is elaborated in the following discussion.

\(^\text{19}\) Sands and Peel (n 16) 777.
\(^\text{20}\) ibid.
\(^\text{21}\) ibid.
\(^\text{22}\) ibid.
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2.3.1.1 Right to Life

Right to life is expressly included in all major international and regional instruments relating to human rights. It is rightly regarded as supremely sacrosanct. It is non-derogable even during emergency. Its protection requires States to adopt positive measures. It has been given broad interpretation. Such an interpretation created the possibility of including right to clean and healthy environment within its scope. However, such a protection suffers from one inherent limitation i.e. it must directly threaten life and that too human life giving rise to anthropocentric focus.

2.3.1.2 Right to Health

Like right to life, right to health has been recognized as part of international human rights law. Like right to life, it enjoys intimate nexus to right to clean and healthy environment. WHO has defined health as a ‘state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.’ Spiritual component was attempted to be added in the definition in 1988 but was unsuccessful. The Drafting history and language of Art. 12 (2) of IESCR indicate that it not only includes socio-economic factors contributing to healthy life but also its underlying determinants like ‘food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment’. Intimate relationship between health and environment is evident by the fact that most of the instances of environmental pollution simultaneously involve violation of right to health.

23 Art. 3 of UDHR; Art. 3 of ICCPR; Art. 4 of ACHR; Art. 2 of ECHR.
25 ibid para 5.
26 Art. 11 and 12 of ICESCR; Art. 24 of UN Convention of Rights of Child.
28 Executive Board at first decided to adopt this revised definition but Committee of the world assembly did not consider the revised definition in May 1999. See ‘Body/Mind/Spirit’ <https://nccc.georgetown.edu/body-mind-spirit/documents.php> accessed 9 June 2017.
2.3.1.1.3 Right to Privacy

Right to Privacy is integral part of civil and political rights. It has been invoked in many cases by the victims of environmental harm particularly before European Court of Human Rights. Court has applied the test of margin of appreciation available to the State in order to accommodate environment as an aspect of right to privacy through its various judgments as is discussed hereunder.

In López Ostra v Spain SACURSA (a limited company) built a waste-treatment plant in July 1988 with the objective of addressing the problem of pollution caused by heavy concentration of tanneries located in the town of Lorca. Plant started operation without licence. Applicant, who was living with her family (comprising her husband and two daughters) in Lorca, suffered nuisance caused by the plant for over three years. Thereafter, applicant shifted to a new house on recommendation of her daughter’s pediatrician and suffered inconvenience thereby. Applicant alleged violation of the right to respect for her home u/A 8 (1) that made her private and family life impossible and of degrading treatment u/A 3 of ECHR. Court held that despite margin of appreciation left to Spain, it failed in finding the fair balance between right to respect for home and her private and family life and interest of Lorca’s economic well being in having waste water treatment. However, Court did not find violation of Art. 3 of European Convention of Human Rights which provided protection against ‘torture or to inhuman or degrading treatment or punishment’. Court accordingly awarded damages.

Court continued with the same approach in Guerra v Italy. Applicants were residing in Manfredonia (Foggia) in Italy, one kilometer away from a chemical factory of a company Enichem Agricolura producing fertilizers and Caprolactam which was classified as high risk. Applicants alleged that as part of its production process, factory released large quantities of inflammable gas including arsenic trioxide. In 1989, factory confined its operations only to producing fertilizers. Nevertheless, it continued to be classified as a dangerous. Ministry of Health prescribed measures to

30 Art. 17 of ICCPR; Art. 11 (2) and 21 of ACHR; Art. 8 of ECHR.
32 ibid para 56.
33 ibid 60.
be undertaken by the factory to improve its safety in 1993. However, factory permanently ceased to produce fertilizer in 1994. European Court of Human Rights held that severe environmental pollution may affect well being of an individual and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.\textsuperscript{35} Court found Italy to be in breach of Art. 8 of ECHR by failing to fulfil its obligation to secure right of applicant’s for their private and family life.

However, court took a step backward in \textit{Kyrtatos v Greece}\textsuperscript{36}. Applicants (mother and her daughter) owned a property in South-Eastern part of Greek island of Tinos on the Ayia Kiriaiki-Apokofto peninsula. The property was adjacent to a swamp by the Coast of Ayios Yiannis. The Prefect of Cyclades redrew boundaries of settlement of Ayios Yiannis in 1985 and again in 1988. Applicants alleged violation of Art. 8 of ECHR. Court rejected applicants claim on the ground that disturbing the conditions of animal life in swamp did not constitute attack on private or family life of applicants.\textsuperscript{37} Such an interpretation limits the scope of right to Privacy itself giving it anthropocentric overtones.

Differing judicial sensitivities towards environmental protection resulted in a split verdict in \textit{Hatton v United Kingdom}\textsuperscript{38}. A number of applicants living close to Heathrow Airport in London were disturbed in their sleep due to noise caused by increased air traffic as a result of introduction of a Scheme in 1993. Consequently, they had to shift their home to different places. They challenged the Scheme on the ground of violation of Art. 8 of ECHR. Court held that Art. 8 is applicable in environmental cases irrespective of whether pollution is caused directly by the State or by private industry for which State is responsible.\textsuperscript{39} It recognized the margin of appreciation available to State in such cases which require balancing of competing interests of individual and of community as a whole.\textsuperscript{40} Court by majority found no violation of Art. 8.\textsuperscript{41} However, minority regarded majority decision as a backward step by giving precedence to economic considerations over basic health conditions and therefore, out of sync with emerging concern over environmental issues all over

\textsuperscript{35} ibid para 60.
\textsuperscript{36} No. 41666/98 ECHR 2003 \textless http://hudoc.echr.coe.int/eng?i=001-61099\textgreater accessed 20 January 2017.
\textsuperscript{37} ibid 53.
\textsuperscript{38} No. 36022/97 ECHR 2003 \textless http://hudoc.echr.coe.int/eng?i=001-61188\textgreater accessed 20 January 2017.
\textsuperscript{39} ibid para 98.
\textsuperscript{40} ibid para 100.
\textsuperscript{41} ibid para 130.
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Europe and the world. Court thus preferred narrow interpretation of right to privacy for protecting environment.

But in Fadeyeva v Russia Court again showed inclination towards right to clean and healthy environment. Applicants lived in Cherepovets, approximately 450 metres from the site of a Steel plant owned by Ministry of Black Metallurgy of Russian Soviet Federative Socialist Republic (RSFSR). It was the largest iron smelter in Russia employing 60,000 people. Russian authorities established a buffer zone covering 5,000 metre wide area as ‘sanitary security zone’ in 1965. Council of Ministers came out with a decree in 1974 mandating RSFSR to resettle inhabitants of zone which was never done. Plant was privatized and acquired by Severstal PLC in 1993. Mayor of Cherepovets acknowledged in 1999 that Severstal plant was causing more than 95% of industrial emission. Applicants alleged violation of Art. 8 of ECHR. According to Court, two conditions must be fulfilled to satisfy the requirements of Art. 8 – actual interference with applicant’s private sphere and extent of severity. Court regarded the period beginning with Russia joining ECHR as relevant to the dispute. Court concluded that applicant’s health deteriorated due to her prolonged exposure to industrial emissions from Severstal steel plant. Such exposure adversely affected her quality of life at home. Even after placing applicant on waiting list for shifting since 1999, nothing was done. Court held that despite wide margin of appreciation left to the State, it failed to strike a fair balance between interest of community and applicant’s effective enjoyment of her right to respect for her home and her private life resulting in violation of Art. 8.

It is encouraging to note the engagement of European Court in the task of accommodating grievances pertaining to environment as part of right to privacy through the application of the test of margin of appreciation. However, anthropocentric interpretation of the Court has stifled emergence of distinct environmental human right. Such an approach create a distinct possibility of Court

42 ibid para 5.
44 ibid para 70.
45 ibid para 88.
46 ibid para 123.
2.3.1.4 Right of Indigenous Communities for Protection of their Culture and Natural Resources

Indigenous communities have their unique culture rooted in their surrounding environment. They also depend on the natural resources around them for their livelihood. Their deprivation *inter alia* includes economic exclusion in various forms like inadequate access to traditional subsistence level occupation and formal education system leading to not benefitting thereby, patenting of their traditional knowledge etc. Incidentally, their surrounding environment is also home to the resources (like minerals etc.) valuable to the rest of the world. In their effort to exploit these resources through mining etc., countries give concessions to TNCs to boost their economic growth. However, the manner of doing so by countries as well as TNCs has brought them into sharp conflict with indigenous communities polluting their environment and thereby adversely affecting their livelihood and culture. This is more true for those States which are competing amongst themselves for more foreign investment. Art. 27 of UDHR affords some protection in the form of the right of everyone to ‘freely participate in the cultural life of the community’. However, its focus does not seem to be on diversity and pluralism. These rights are truly elaborated in various articles of the UN Declaration on the Rights of Indigenous Peoples adopted by UN General Assembly in September 2007. In the context of environment, Art. 24, 26 and 29 hold particular significance.

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49 Art. 24: (1) Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services. (2) Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right. Article 26: (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
Indigenous communities have filed many cases against governments of their own States before regional fora (particularly Inter-American Commission of Human Right and African Commission on Human and Peoples’ Rights) for inadequately protecting their rights and thereby leading to severe environmental damage. Few leading judgments are discussed hereinafter –

In *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*\(^{50}\), State oil company (Nigerian National Petroleum Company, NNPC), a majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), were engaged in the business of exploitation of oil reserves. They were alleged to have caused environmental degradation by disposing toxic wastes into environment and local waterways in violation of international environmental standards. They neglected/failed to maintain its facilities causing numerous avoidable spills in neighbouring villages leading to water, soil and air contamination. Nigerian Government has facilitated them by giving its legal and military powers at their disposal. Ogoni communities have not been provided information on dangers created by activities of these companies and were not being involved in decisions affecting development of Ogoniland. They *inter alia* alleged breach of Art. 24 of African Charter on Human and Peoples' Rights which provided ‘right to a general satisfactory environment favourable to their development’. African Court on Human and Peoples' Rights found that the Nigerian Government has granted permission to TNCs in utter disregard to the well-being of Ogonis. Court observed that the ‘intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities’.\(^{51}\) Court ordered – comprehensive clean up of damaged lands and rivers; ensure appropriate environmental and social impact assessments for future oil development; provide

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Article 29: (1) Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. (2) States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. (3) States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.


\(^{51}\) ibid para 69.
health and environmental health risks and meaningful access to regulatory and decision making bodies to communities likely to be affected by oil operation.

Similarly, in *Maya Indigenous Community of the Toledo District v Belize*\(^{52}\), State of Belize granted sizeable logging concessions mainly to two Malaysian timber companies (Toledo Atlantic International, Ltd. and Atlantic Industries, Ltd.) and oil concessions to AB Energy, Inc. on Maya lands in Toledo district. Belize did so without meaningful consultation with Maya people. Logging concessions threatened long term and irreversible environmental damage (top soil erosion due to loss of forest cover leading to rapid changes in soil characteristics impairing re-generational capacity of soil upon which Maya people depended for their subsistence). This would injure rotational system of farming used by Maya people and could further permanently diminish availability of wildlife and plant resources. This could also permanently damage stream flows vital to water supplies which in turn could lead to siltation threatening coastal areas including mangroves and coral reefs. Threat of future environmental damage got aggravated by inability/unwillingness of State to monitor logging and enforce environmental standards. Similarly, Oil concessions also threatened to cause environmental damage. Inter-American Commission on Human Rights held Belize to have violated – Art. II (equality before law, equal protection of law and non-discrimination); Art. XVIII (Right to Judicial Protection) by delay in rendering judgment in domestic proceedings. It further held that granting of logging concessions in the Toledo District have caused environmental damage, which adversely affected some lands wholly or partly within the limits of the territory whereon Maya people had a communal property right. While granting such concessions, State had failed to put in place adequate safeguards and mechanisms and to supervise, monitor and ensure deployment of sufficient staff to oversee that their execution will not further such environmental damage to Maya communities or their lands. Such environmental damage has aggravated State’s failure to respect communal rights of Maya people to property in the lands traditionally used and occupied by them. Court ordered to repair environmental damage and adoption of domestic law through fully informed consultations with Maya people, to delimit, demarcate and title or otherwise clarify and protect their territory.

In another similar *Case of the Saramaka People v Suriname*⁵³, State of Suriname Granted logging and mining contracts to non-Suriname companies (like Chinese companies namely – Tacoba Forestry Consultants and Ji Shen) in Upper Suriname river and Saramaka territory without consulting saramaka people. These concessions increased water pollution, forest damage and restricted access of people of Suriname to land which they needed to hunt, fish and farm and Suriname failed to adequately implement its forestry and environmental laws. Inter-American Court of Human Rights held that Suriname has violated Art. 21 (Right to property), Articles 1 (1) (Obligations to Respect Rights) and 2 (Domestic Legal Effect) of the Convention. Court ordered Suriname to review logging and mining concessions; abstain from acts that may affect existence, value, use or enjoyment of Saramaka territory; implement safeguards to minimize damaging effects of such project on survival of Saramaka people; consult with Saramaka people. Court awarded a total compensation of $7,69,000 ($75000 for extraction of timber and for material property damage; $600,000 for community development fund; $15,000 to forest peoples programme; $70,000 to the Association of Saramaka Authorities expenses of domestic and international proceedings).

The judgments discussed above clearly indicate that right to clean and healthy environment is vital to the very existence of indigenous communities across the world including India and various rights meant for their protection implicitly contributes in the protection of former.

2.3.2 From Implicit to Explicit Recognition of Right to Clean and Healthy Environment

UN got the first opportunity to recognize the relationship between quality of environment and enjoyment of basic rights in 1968 when ECOSOC requested UN General Assembly to hold discussion on preventing environmental degradation.⁵⁴ UN took note of the adverse effects of the modern scientific and technological

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developments, rising population and urbanization on environment.\(^{55}\) It was concerned about consequences of environmental damage on “the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights”.\(^{56}\) It passed a resolution to convene United Nations Conference on the Human Environment (UNCHE) in Stockholm in 1972.\(^{57}\)

2.3.2.1 United Nations Conference on Human Environment 1972

In furtherance of the ECOSOC resolution, UN General Assembly decided to convene UNCHE from 5-16 June 1972.\(^{58}\) It was the first UN conference that focused exclusively on international environmental issues. It came out with comprehensive measures to address environmental degradation. It ‘brought industrialized and developing nations together to delineate the rights of the human family to a healthy and productive environment’.\(^{59}\) It saw massive participation in the form of 6000 persons including delegations from 113 countries of the world (barring Soviet Union, its Eastern European allies and Cuba), representative of every major intergovernmental organizations, 7000 observers sent by 400 non-governmental organizations, invited individuals, and nearly 1500 journalists.\(^{60}\) Such a massive participation added legitimacy to the entire effort in bringing together such diverse representation on one single platform. Despite heated negotiations between developed and developing countries, a consensus was finally forged giving rise for the first time to ‘universally shared environmental agenda’.\(^{61}\) It marked the beginning of an era when protection and preservation of environment came to acquire central focus of deliberations undertaken by the international community.

Preamble of Stockholm Declaration recognised the indispensability of nature not only for physical sustenance but also for ‘intellectual, moral, social and spiritual growth’. It rightly considered man as ‘both creator and moulder of his environment’. It regarded

\(^{55}\) ibid.
\(^{56}\) ibid.
\(^{60}\) Anton and Shelton (n 12) 68.
protection and improvement of environment as ‘urgent desire of peoples of whole world and duty of all governments’. Preamble integrated environment with human rights on one hand and with economic development on the other. Taken together, such integration entailed huge conceptual potential for future as it set the stage for further debates regarding right to clean and healthy environment across the world.

First Principle sets the tone of the declaration itself by categorically recognizing ‘man’s fundamental right to adequate conditions of life in an environment of a quality that permit life of dignity and well-being’. However, out of the twenty six Principles, three Principles (i.e. 21-24) are particularly relevant from the legal point of view. Stockholm Declaration expressed human environment as desire of peoples and duty of governments giving it State centric focus. Thus, Stockholm Declaration is, in essence, State centric but Principle 24 is based on “cooperative spirit of all countries”. However, it is interesting to note that the term ‘enterprise’ finds explicit mention at two places (in Paragraph 7 and Principle 19) in the Declaration. But the Declaration does not define it. Although Paragraph 7 explicitly include acceptance of responsibility by enterprises in the collaborative efforts to achieve environmental goal, the same clause also adds a caveat thereto. According to the preamble, national governments shall have to bear its greatest burden within their jurisdictions. In furtherance thereof, Principle 21 imposes responsibility on states for transborder environmental damage. At the same time, it also recognise their sovereign rights to exploit their own resources. This principle originated in Trail Smelter arbitration (as discussed above). Principle 19 underlines the crucial role that environmental education for younger generations can make for broadening basis of enlightened opinion and responsible conduct inter alia by enterprises. Significantly, Principle 22 mandates States to further develop international law regarding liability and compensation for victims of environmental pollution and other environmental damage. A cogent framework, to the extent it includes pollution by TNCs, was needed to be developed which unfortunately has proved to be still elusive.

Principle 18 mandates deployment of science and technology in identification, avoidance and control of environment risks as well as in solving environmental problems. Having regard to the fact that TNCs play decisive role in developing
modern technology the world over, it may be argued that the principle impliedly include them as well.

It also adopted by consensus an Action Plan containing 109 recommendations. For promoting and coordinating international environmental agenda, establishment of United Nations Environment Programme (UNEP) was another major achievement.

Preamble regards people as the most precious of all things in the world which is indicative of its distinct anthropocentric focus. Nevertheless, it has caused a paradigm shift in the field of right to clean and healthy environment. UNCHE gave UN as well as international community the environmental mandate which was not originally and explicitly found in UN Charter. Conference brought environment within the competence of UN system. Conference stimulated series of initiatives at international, regional and national level. There has been no looking back since then in two senses. Firstly, international environmental law emerged as a distinct discipline resulting in development of dedicated jurisprudence thereof. Secondly, environmental concerns became integral part of all the deliberations undertaken by international community thereafter as well as the resulting outcomes thereof.

### 2.3.2.2 World Charter for Nature 1982

Zaire spearheaded a campaign in favour of drafting and adopting World Charter for Nature. Twenty four developing nations sponsored it in the UN General Assembly. UN General Assembly adopted World Charter for Nature in 1982 by a vote of 111 in favour (including India) and one against by the US. Charter focused on conservation of environment and it applied to diverse set of activities affecting environment. It was designed as a philosophical and political framework to “guide and judge”

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62 ibid 967.
63 ibid 966.
65 European Economic Community initiated its first environmental programme.
66 Many countries established Ministries of environment for implementing environmental laws and policies.
68 ibid 977.
69 ibid 979.
international efforts at conservation. Art. 21 imposed responsibilities on corporations, states, international organizations, individuals and groups to cooperate in nature conservation both within their jurisdiction and beyond; set standards; implement international legal provisions for protection and conservation of nature. Although Charter contained unenforceable general principles, it gave guidance to countries in fine-tuning their laws with ethos of conserving environment. Charter continues to hold immense value for TNCs in fulfilling their responsibility towards conservation of environment.

2.3.2.3 Nairobi Declaration 1982

UNEP convened special session of its Governing Council to commemorate 10th anniversary of UNCHE. It adopted Nairobi Declaration. Declaration regarded Principles of Stockholm Declaration as much valid even after a decade. However, at the same time, it also acknowledged their partial implementation and inadequate impact.

2.3.2.4 World Commission on Environment and Development 1983

UN General Assembly endorsed the conclusion of UNEP’s Governing Council to establish a Special Commission (World Commission on Environment and Development, WCED also referred to as Brundtland Commission) in 1983 for the purpose of considering environmental perspectives for the year 2000 and beyond and to bridge the gap between environment protection and economic development. It was envisaged as an independent body related to the UN system and yet outside the same. The objectives behind its creation inter alia included ‘raising the levels of understanding and commitment to actions of… businesses’. Brundtland Commission submitted its unanimous report on 20 March 1987. Unanimity on issues relating to environment and that too at the international level in a world divided

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70 ibid 990.
71 See for details ibid 982-984.
73 ibid para 2.
76 Our Common Future (n 59) para 9 ch-1.
77 ibid.
ideologically, politically and economically, was a huge achievement in itself at that point of time. It advocated adoption of an interdisciplinary and integrated approach towards common future of mankind.\textsuperscript{78} It recognised the fact that while on the one hand environment is a survival issue for the developing nations, on the other hand development models of the industrialised nations were not sustainable, and both environment and development were inseparable.

Two aspects of the Report are most striking. Firstly, along with governments, targeted audience included private enterprises covering all its variants – from smallest (i.e. one person company) to greatest (i.e. TNCs) in an attempt to explore ‘possibilities for bringing about far-reaching changes and improvements’.\textsuperscript{79} Bhopal Gas Disaster seems to be one of the likely reasons for inclusion of private enterprises in the targeted audience. Nevertheless, such formal and explicit recognition of the link between TNCs and environment was hitherto unprecedented in the world. Such recognition made TNCs integral stakeholders for any future deliberations on environmental issues. Secondly, the report defined the term ‘sustainable development’ as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’.\textsuperscript{80} This definition continues, till date, to be the most widely accepted definition of sustainable development across the world. According to the report, ‘needs’ meant particularly the essential needs of world’s poor as overriding priority and limitations imposed by existing state of technology as well as social organization.\textsuperscript{81} Sustainable development was looked at as a process of change which aimed to bring harmony in resource exploitation, investment direction, technological development orientation and institutional change – so as to enhance current and future potential in meeting human needs and aspirations.\textsuperscript{82}

Report underscored the need of reorienting technological development (in which TNCs play instrumental role) with inclusion of environmental factors therein so as to make it more accommodative of the needs of developing countries.\textsuperscript{83} At the same

\textsuperscript{78} ibid.
\textsuperscript{79} ibid.
\textsuperscript{80} ibid para 1 ch-2.
\textsuperscript{81} ibid.
\textsuperscript{82} ibid para 15 ch-2.
\textsuperscript{83} ibid para 65 and 66 ch-2.
time, it emphasized on the need to strengthen and enforce liability regime for damages from unintended consequences thereof.

Most importantly, it pointed out the need of change not only in attitudes but also in procedures of both public and private sector enterprises which will invariably include TNCs. It took note of their heightened overseas investment activity during that time\(^\text{84}\) while at the same time acknowledging their crucial role as providers of technology and investment particularly in developing countries.\(^\text{85}\) It also highlighted the change in the attitude of the developing countries vis-à-vis foreign exchange as well as investment and the realization of its role in their development process.\(^\text{86}\) More specifically, it recognized that activities of TNCs can majorly impact on environment and resources of nations across the globe as well as on global commons.\(^\text{87}\) It called for sharing of responsibilities by both home and host states of TNCs towards strengthening policies in this regard. For instance – broadening prior environmental assessments of investments being undertaken in home states to include sustainability criteria therein and applying the same on investments elsewhere while at the same time sharing information and recommendation thereof with host countries with due respect to their sovereignty.\(^\text{88}\) It pointed towards the general lack of international measures against TNCs owing to negotiation hassles and recommended that the codes of conduct regarding TNCs should explicitly deal with environmental matters as well as sustainability.\(^\text{89}\)

Report dedicated one entire chapter on industry and effect of its operations on environment particularly the adverse ones. This is significant in the context of TNCs since they are leading players in investing in large scale industries across the world. Apart from the measures undertaken by governments regarding developing regulatory measures, report took note of corporations coming out with their own environmental policy and control units.\(^\text{90}\) While strongly advocating for sustainable industrial development, it called upon the national governments to not only ‘establish clear environmental goals’ but also ‘enforce environmental laws, regulations, incentives

\(^{84}\) ibid para 57 ch-3.  
\(^{85}\) ibid para 58 ch-3.  
\(^{86}\) ibid para 59 ch-3.  
\(^{87}\) ibid para 62 ch-3.  
\(^{88}\) ibid para 62 ch-3.  
\(^{89}\) ibid para 63 ch-3.  
\(^{90}\) ibid para 15 ch-8.
and standards on industrial enterprises’.

Most importantly, it encouraged the industry not to be content with mere regulatory compliances but go a step forward and ‘accept a broad sense of social responsibility while ensuring awareness of environmental considerations at all levels’.

Such urging to the industry of which TNCs were key actors was a clear indication of integration of CSR within the fold of the right to clean and healthy environment. Not only were they required to go beyond mere compliance but become part and parcel of law and policy making in the field of sustainable development. It was made possible through ‘joint advisory councils’.

Being engines of investment, it recommended industrial and financial corporations to include sustainable criteria into their policies.

Report took note of the fact that many nations after Stockholm Conference have recognized right to an adequate environment in their constitution itself thereby putting it at the highest pedestal in their respective legal systems. Besides, it recommended that other set of rights (like right to access of information, right to participate in decision making process, right to legal remedies) will go a long way in furthering States’ responsibility to protect environment. Report desisted from proposing a universal approach applicable to every country owing to wide variation in domestic practices. Nevertheless, it did recommend the need to consolidate and amend relevant legal principles in the form of a new charter which can later become the basis for a Convention.

At the same time, the report called upon the governments to ‘accelerate their efforts to strengthen and extend existing and more specific international conventions’ through accession or ratifications of existing ones; review and revise to harmonise with new technological advancements and negotiate the newer ones. It also recommended a dispute settlement procedure centered on conciliation and arbitration for expeditious settlement of environmental disputes and strengthening of Permanent Court of Arbitration and International Court of Justice for this purpose.
It recognized the ‘special responsibility’ of particularly TNCs regarding strengthening international efforts to help developing countries. Being developers of modern technology, they should do so by adopting highest safety and health protection standards in their plant and process designing; training of their personnel; stringent environmental and safety audits of their plants vis-à-vis local companies which may also be provided to governments and other interested parties.\(^9^9\) It also emphasized the need of taking environmental regulation beyond pollution control enactments to all components of development policy including *inter alia* prior approval for investments (very relevant to TNCs).\(^1^0^0\)

Report recognized the significant role being played by scientific groups and NGOs (global, regional and local) in shaping the global environmental agenda and recommended enhanced role for them in sustainable development. It recommended roping in of NGOs and local community while planning new industrial facilities.

Report proved to be a path-breaking effort undertaken at the international level at that point of time. It underscored the need of replicating the integration of economic and ecological factors into law and decision making systems at the national as well as international level.\(^1^0^1\) It showed the world the developmental trajectory needed to be followed, if our world is not to peril its own existence in future. And since then, there has been no looking back. Environment and sustainable development has become integral part of all human endeavours. With the passage of time, the significance as well as relevance of report has continued to increase.

### 2.3.2.5 United Nations Conference on Environment and Development 1992 (Earth Summit)

Brundtland Report led the way for the UN to convene second UN Conference on Environment and Development (UNCED) in 1992 in Rio de Janeiro, Brazil. Two characteristics of the title of the conference are noteworthy. Firstly, explicit inclusion of the word ‘environment’ therein\(^1^0^2\). Secondly, omission of the word ‘human’ from title indicating a shift in approach from Stockholm to Rio. This shift is a sufficient indication to the world community that environmental concerns will henceforth have

\(^{99}\) ibid para 92 ch-8.
\(^{100}\) ibid para 79 ch-2.
\(^{101}\) ibid para 80 ch-2.
\(^{102}\) Anton and Shelton (n 12) 74.
to be kept at par with developmental concern. It was also symbolic of dilution of anthropocentric focus of the environmental agenda at the international level. Conference was a huge success with massive participation of around 10,000 delegates which included representatives from 172 nations (116 being heads of State), 1400 NGOs and 9,000 journalists who covered the event. It was the first international conference which saw participation of industrial leaders with diplomats and scientists. Participation of industrial leaders meant explicit recognition of the role of TNCs in shaping up of emerging environmental agenda. Conference resulted in international agenda for sustainable development for 21st century encapsulated in the following five documents –

a) United Nations Convention on Biological Diversity  
b) United Nations Framework Convention on Climate Change  
c) Rio Declaration on Environment and Development  
d) Agenda 21  
e) Statement of Forest Principles

These documents are briefly discussed hereunder –

a) **Rio Declaration on Environment and Development**

Although a mere declaration, it contained several legal principles which constitute the core of right to clean and healthy environment. Declaration holds particular significance in the context of TNCs since these principles are also applicable to them.

*Principle of Sovereignty over Natural Resources* is contained in Principle 2 of Rio Declaration. According to this principle, States have sovereign right to exploit their own resources in pursuit of their own environmental and developmental policies. However, such right should be exercised in accordance with the UN Charter and principles of international law. Stockholm Declaration recognized this principle in Principle 21. Principle 2 of Rio Declaration reproduced Principle 21 with addition of two words ‘and developmental’ equating status of environment with development.

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Precautionary Principle is contained in Principle 15 of Rio Declaration. It provides that lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation in the light of threats of serious or irreversible damage. It further provides that ‘precautionary approach shall be widely applied by States in accordance with their capabilities’ for environmental protection. Significance of precautionary principle lies in the fact that since Rio declaration, it has found expression not only in most of the international instruments pertaining to environmental protection but also in national laws.\textsuperscript{105} Principle 4 of Rio Declaration provides that achieving sustainable development is possible through integrating environmental protection into development process and the former should not be considered in isolation from the latter.

Polluter Pays Principle is contained in Principle 16. According to this principle, cost of pollution should be borne by the polluter having regard to public interest and that too in such a manner that it does not cause distortion of international trade and investment. Further, internalization of environmental costs and the use of economic instruments should be promoted. It is directly relevant for corporations generally and TNCs specifically.

Environment Impact Assessment at the national level is provided in Principle 17. Undertaking such assessment is mandated for those proposed activities which are likely to have a significantly adverse impact on environment. This principle is particularly relevant in the case of approval of Foreign Direct Investment (FDI) of TNCs in developing countries.

Participation of all Citizens concerned with environmental issues is contained in Principle 10 as environment belongs to everyone. It requires appropriate access to information (available with public authorities) relating to environment to all individuals. It includes information concerning hazardous materials and their activities in their communities. Every individual shall be provided with an opportunity to participate in decision-making process. In order to facilitate and encourage such public awareness and participation, information should be made available as widely as possible. Such participation should be further strengthened through provisions of effective access to judicial and administrative proceedings.

\textsuperscript{105} Anton and Shelton (n 12) 81.
Common but Differentiated Responsibilities is provided in Principle 7. According to this principle, different countries should contribute differently to the cause of environmental protection at the international level depending upon their capacities. In essence, it calls upon the developed countries to lead the rest of the world in resolving the environmental problems. Developed countries acknowledge their responsibility regarding the goal of sustainable development in the light of technological and financial resources at their disposal.

Principle of Cooperation ensures global solutions to global environmental problems. Enhanced understanding of our natural environment has made us realise that environmental problems have global dimensions and accordingly their resolution too needs to be global. However, international community comprises of nations which are politically, ideologically, economically and socially divided. Principle 27 incorporates this principle by requiring people as well as States to cooperate in fulfilling the principles of Rio Declaration and also in developing international law regarding sustainable development. This principle was also included as Principle 24 of Stockholm Declaration emphasizing cooperative spirit of all countries irrespective of their size on an equal footing.

Rio Declaration marked a paradigm shift in approach of international community towards environmental problems. It highlighted the deep-rooted inextricable interconnectivity between environment and development. However, at the same time, Rio declaration is regarded as a ‘lost opportunity’ since it failed to mention the expected role of TNCs towards sustainable development.\(^\text{106}\)

b) Agenda 21

Contrary to the failure of Rio declaration as mentioned above, Agenda 21 dedicated one whole chapter (i.e. Chapter-30) titled ‘Strengthening the role of business and industry’.\(^\text{107}\) It recognised the crucial role played by TNCs in socio-economic

\(^{106}\) Morgera (n 104) 12.

\(^{107}\) ‘Stockholm awakened a gluttonous globe to the dangers of reckless violence on Nature. Rio took stock of the perils and prescribed obligations through an Earth Charter. But the developed nations and the imitative developing countries are corruptly unconscionable in robbing and raping Nature. A comprehensive and far-reaching programme for sustainable development is Agenda 21 which constitutes humanity’s creative hunger for survival.’ See Krishna Iyer (n 14) 354.
development of a country.\textsuperscript{108} It regarded them as full participants in its implementation and evaluation.\textsuperscript{109} In this sense, it provided ‘unprecedented framework for corporate environmental responsibility’.\textsuperscript{110} Cooperation of TNCs was considered a \textit{sine qua non} for achieving sustainable development. TNCs were asked to recognise ‘environmental management as among the highest corporate priorities and as a key determinant to sustainable development’.\textsuperscript{111}

To further strengthen the role of TNCs, it proposed following two programmes namely – promoting cleaner production and promoting responsible entrepreneurship.\textsuperscript{112} First programme sets the objective for TNCs ‘to increase the efficiency of resource utilization, including increasing the reuse and recycling of residues, and to reduce the quantity of waste discharge per unit of economic output’.\textsuperscript{113} To fulfil this objective, TNCs along with governments ‘should strengthen partnerships to implement the principles and criteria for sustainable development’.\textsuperscript{114} Governments along with TNCs ‘identify and implement an appropriate mix of economic instruments and normative measures such as laws, legislations and standards\textsuperscript{115} for promoting use of cleaner production. Encouragement was provided for voluntary private initiatives for this purpose.\textsuperscript{116} Governments along with TNCs, academia and international organisations, were called upon to develop and implement concepts and methodologies for internalising environmental costs into accounting and pricing mechanisms.\textsuperscript{117} It encouraged TNCs to report annually on their environmental records and use of energy and natural resources. They were further encouraged to ‘adopt and report on the implementation of codes of conduct promoting best environmental practice’.\textsuperscript{118} Industry and business associations were required ‘to encourage individual companies to undertake programmes for improved environmental awareness and environmental responsibility at all levels so that they are dedicated to the task of improving environmental performance based on

\textsuperscript{109}ibid.
\textsuperscript{110}Morgera (n 104) 13.
\textsuperscript{111}Agenda 21 (n 108) para 30.3.
\textsuperscript{112}ibid.
\textsuperscript{113}ibid para 30.6.
\textsuperscript{114}ibid para 30.7.
\textsuperscript{115}ibid para 30.8.
\textsuperscript{116}ibid.
\textsuperscript{117}ibid para 30.9.
\textsuperscript{118}ibid para 30.10.
internationally accepted management practice. The phrases ‘individual companies’ and ‘at all levels’ are particularly relevant for TNCs as it will help in covering all their affiliates as well as partners in supply chain.

Second programme sets twin objectives for itself, namely – encouraging stewardship in management and utilisation of natural resources by entrepreneurs and increasing number of entrepreneurs who are engaged in enterprises that subscribe to and implement sustainable development policies. In order to achieve these objectives, Agenda 21 encouraged TNCs to adopt policies on sustainable development globally. They should make technologies which are environmentally sound, available to affiliates substantially owned by the parent company in developing country without external charges. They should also encourage their overseas affiliates to change their procedures in appreciation of local ecological conditions and share their experiences with local authorities, national governments and international organisations. They should ensure responsible and ethical management of products and processes from health, safety and environmental aspects view points. Onus of doing so is placed on the business and industry which should enhance self-regulation through appropriate codes, charters and initiatives which should be integrated into every aspect of business planning and decision making facilitating transparency and dialogue with employees and public.

TNCs should increase research and development both of environmentally sound technologies and environment management systems. Organisations and agencies of UN should improve mechanisms for business and industry inputs, policy and strategy formulation processes to ensure that environmental aspects are strengthened in foreign investment.

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119 ibid para 30.14.
120 ibid para 30.18.
121 ibid para 30.22.
122 ibid.
123 ibid.
125 ibid.
126 ibid para 30.25.
127 ibid para 30.28.
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Learning from past failures on the implementation front, Rio conference established a high level Commission on Sustainable Development (CSD) for overseeing progress in implementation of Agenda 21 at the international, regional and national level.\(^{128}\)


The timing of organizing Rio conference was peculiar. During this time, global investment climate was undergoing significant changes. Soviet Union got disintegrated resulting into many new nations coming into existence. WTO was established to reduce trade barriers and settle trade disputes. In fact, 1990s was considered to be the dream decade for foreign capital (and in turn for TNCs) in the world as ideology of economic globalization, free trade, deregulation and privatisation came to dominate the world. It was in this decade that foreign capital came to be regarded as the only panacea for development. As a result, competition for attracting more and more of foreign capital grew fierce amongst developing nations. Therefore, they felt strong temptation to dilute standards meant for environmental protection within their domestic jurisdictions triggering race to the bottom. TNCs which were principle instrumentalities of foreign investments across the globe got highly conducive business environment globally and highly receptive political regimes in such countries. This period witnessed developing countries amending their legal as well as policy framework to attract more foreign investment.

Earth Summit+5 review undertaken in 1997 of the implementation of UNCED agenda showed overall worsening trend\(^{129}\) amidst some progress in institutional development, international consensus building, public participation and actions of private sector enabling many countries succeeding in reducing pollution as well as the rate of

\(^{128}\) ibid para 38.11.
resource degradation. Right to public participation in environmental decision making and access to information was ensured through Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in 1998.

2.3.2.6 Millennium Development Goals 2000 (MDGs)

At the dawn of new millennium, the then UN Secretary General Kofi Annan proposed to convene summit in Millennium Assembly in 2000. For this purpose, Secretary-General came out with Millennium Report which set promotion of sustainable future as one of the focus of international community. According to the Report, the promise of the UN Charter of promoting ‘social progress and better standards of life in larger freedom’ needs to be fulfilled by providing ‘freedom of future generations to sustain their lives on this planet’. Not impressed with the scant attention paid to the environmental challenges during the preparatory debates for the Millennium Summit, Report called upon the world leaders to show exemplary vision if ‘we are to bequeath a liveable Earth to our children – and theirs’. Summit saw unprecedented gathering in the form of 103 Heads of State and 89 Heads of Government. Summit unanimously adopted Millennium Declaration. It included ‘respect for nature’ as one of the fundamental values essential to international relations in 21st century. This value led to the identification of ‘protecting our common environment’ as one of the key objectives of the declaration. As part of this key objective, all environmental actions will be impregnated with new ethic of conservation and stewardship. Thus, it is through Millennium Declaration that environmental concern became integral part of UN mandate and accordingly of international agenda. This was further strengthened by inclusion of ‘environmental sustainability’ as seventh goal of Millennium Development Goals (MDGs) in 2000. It required States to integrate sustainable development into their policies and reverse loss of environmental

130 ibid para 9.
132 ibid.
135 ibid.
resources; reduce biodiversity; halve population without sustainable access to safe drinking water and basic sanitation. Targets fixed as part of MDGs were to be achieved by 2015. UN regarded MDGs as its successful initiative.\textsuperscript{136}

\subsection*{2.3.2.7 World Summit on Sustainable Development (WSSD) 2002}

To mark 10\textsuperscript{th} anniversary of Rio conference, UN convened World Summit on Sustainable Development in Johannesburg in 2002. This was second review of implementation of Rio agreements. Review found gap in implementation – fractured approach towards sustainable development; no major changes in the unsustainable patterns of consumption and production; lack of mutually coherent policies or approaches in the areas of finance, trade, investment, technology and sustainable development; lack of financial resources and no improvement in transfer technology mechanisms.\textsuperscript{137}

It is noteworthy that its title did not expressly mention the word ‘environment’ as its part.\textsuperscript{138} At the same time, the term ‘development’ was retained therein but the same was prefixed by the term ‘sustainable’. The resulting term ‘sustainable development’ better reflected its focus and was more in consonance with the contemporary environmental ethos. Nevertheless, it took the mandate of previous global conferences and agreements further. It did not expend the conceptual framework agreed upon in Rio. It mainly concerned itself with the strategies that may be adopted for implementation of the commitments made in Rio. Thus, its main objective was to assess the performance towards fulfilling the ideals of Rio conference. Its outcomes included –

\begin{enumerate}
  \item Johannesburg Declaration on Sustainable Development (hereinafter Johannesburg Declaration)
  \item Johannesburg Plan of Implementation
  \item WWSD Partnerships for Sustainable Development
\end{enumerate}


\textsuperscript{138} Anton and Shelton (n 12) 79.
While regarding Rio conference as significant milestone\textsuperscript{139}, Johannesburg Declaration reaffirmed commitment of international community to sustainable development.\textsuperscript{140} It regarded economic development, social development and environmental protection as three pillars of sustainable development.\textsuperscript{141} It called for ‘assuming collective responsibility to advance and strengthen’ these three pillars which were rightly regarded as ‘interdependent and mutually reinforcing’.\textsuperscript{142}

From Rio conference to Johannesburg conference, the recognition of the role of TNCs as partners in fulfilling the mandate of sustainable development has become more pronounced within the international community. Paragraph 27 of Johannesburg Declaration therefore, expressly provided a ‘duty’ on the part of the ‘private sector including large as well as small companies’ in evolving ‘equitable and sustainable communities and societies’. But the Johannesburg Declaration took one more significant step forward and that too in the right direction. Paragraph 29 pointed towards the need for private sector corporations (which would invariably include TNCs) to ‘enforce corporate accountability’ that too in a ‘transparent and stable regulatory environment’. Thus, when it came to implementation of the goals arrived at in Rio, Johannesburg Declaration envisaged a far greater role for TNCs in creating sustainable societies. Further, the role was envisaged not in the language of responsibility but accountability. However, both the terms (corporate responsibility and accountability) were promoted in the Plan of Implementation (annexed to the Johannesburg Declaration) in varied contexts. For instance – in the context of globalization and its relationship with sustainable development\textsuperscript{143} as well as in the context of strengthening institutional framework for sustainable development at international level\textsuperscript{144}. Furthermore, TNCs were specifically encouraged to provide financial and technical assistance to developing countries.\textsuperscript{145}

\textsuperscript{140} ibid para 1.
\textsuperscript{141} ibid para 5.
\textsuperscript{142} ibid.
\textsuperscript{144} ibid part X para 140 (f).
\textsuperscript{145} See ibid para 86 (d).
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The response of business and industry was equally encouraging at the conference. It welcomed the governments’ confidence in its ability to play a role in sustainable development through market mechanisms. It realized the high standards on which its ‘partnerships and grass roots projects’ would be assessed. It expressed its willingness to work together with other major groups and governments in this regard.\(^{146}\) The forum for expression of this response was also significant.\(^{147}\)

However, primary responsibility for sustainable development within its jurisdiction was placed on the State. Accordingly, States were required to enact clear laws for sustainable development and enforce them effectively.\(^{148}\) For this purpose, they were called upon to strengthen governmental institutions as well as promoting fair judicial institutions.\(^{149}\) Furthermore, public participation and access to information were required to be promoted regarding sustainable development laws, policy and implementation thereof.\(^{150}\)

Thus, the role of TNCs was taken up far more intensely in comparison to earlier conferences. A proposal for convention on binding corporate accountability was presented by coalition of NGOs.\(^{151}\) EU also came in support for enhanced corporate social and environmental responsibility at international level.\(^{152}\) However, no concrete breakthrough could be made in this regard.

### 2.3.2.8 World Summit 2005 (New York)

UN Secretary General’s report prepared in 2005 formed the backdrop of World Summit convened in New York in 2005 to monitor progress of implementation of Millennium Declaration. Report highlighted three issues pertaining to environment namely – desertification\(^{153}\); biodiversity\(^{154}\) and climate change\(^{155}\). These goals

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\(^{146}\) WSSD Report (n 139) 118.

\(^{147}\) Multi Stakeholder Event was organized on 4 September 2002. It saw the highest level of participation of major groups (comprising youth; indigenous people; NGOs; local authorities; trade unions; scientific communities; farmers and women) and governments. Its objective was to provide forum to all stakeholders to renew their commitments to sustainable development and to the implementation of Agenda 21 and the outcomes of the Summit. This event constituted a very positive feature of Johannesburg conference.

\(^{148}\) See Plan of Implementation (n 143) para 163 part X.

\(^{149}\) See ibid.

\(^{150}\) See ibid para 164.

\(^{151}\) See ibid para 164.

\(^{152}\) Morgera (n 104) 14.

\(^{153}\) ibid.

required collective action on the part of States and private sector. World Summit brought together more than 170 Heads of State and Government. Such participation was unprecedented. Discussions were undertaken in four areas namely – development, security, human rights and reform. World Summit resulted in an outcome document. Outcome document also, like the report, identified development, peace and collective security, human rights and the rule of law, and strengthening of the United Nations as four priority areas. Surprisingly, environment did not find express mention either in the highest priorities of the report or in the four priority areas of outcome document. However, it did not give environment a complete miss. Commitments regarding environmental protection were included expressly in the form of sustainable development.

### 2.3.2.9 Sustainable Development Goals 2015 (SDGs)

Encouraged by the success of MDGs, States agreed at UN Conference on Sustainable Development in Rio de Janeiro (Rio+20) in 2012 to develop Sustainable Development Goals. In August 2015, UN came out with ‘Transforming Our World: The 2030’ with the agreement of all 193 member states. UN Secretary General termed it as ‘a historic turning point for our world’. In this backdrop, UN formally adopted seventeen Sustainable Development Goals (SDGs) on 25 September 2015 which came into force on 1 January 2016. International community has laid down a highly comprehensive agenda through SDGs for itself. All the goals have the potential to directly or
indirectly contribute to environmental protection and preservation and thereby to the right to clean and healthy environment.

Thus, 2015 marks the entry of our world into a new phase – international community has moved from MDGs to SDGs – a transformation based on heightened commitment towards environmental sustainability in all aspects of human activities. Although both are primarily aimed at States, they suffer from one common limitation i.e. they are not legally binding. Further, 195 countries have adopted first ever universal, legally binding global climate deal through Paris Agreement by limiting global warming to well below 2°C. It encouraged the non-party stakeholders including private sector to address and respond to climate change and scale up their efforts in this regard. The recent decision of the US President Donald Trump to pull out of the Paris Agreement will bring an end to any possibility of US leadership of the march of the global community towards sustainable future since other nations (including India and China) stay committed.

UN is the most representative global organization. It is a platform where all its members States can express their concerns, views and participate in setting the international agenda including environment. UN deserves credit for the sincere efforts made by it due to which environment has become foremost consideration for the international community – movement from implicit to explicit. It is because of the perseverance and commitment of UN that environmental concerns formulated themselves into sustainable development and has become integral part of law and policy making at the international level. The transformation of environmental access to water and sanitation for all; Ensure access to affordable, reliable, sustainable and modern energy for all; Promote inclusive and sustainable economic growth, employment and decent work for all; Build resilient infrastructure, promote sustainable industrialization and foster innovation; Reduce inequality within and among countries; Make cities inclusive, safe, resilient and sustainable; Ensure sustainable consumption and production patterns; Take urgent action to combat climate change and its impacts; Conserve and sustainably use the oceans, seas and marine resources; Sustainably manage forests, combat desertification, halt and reverse land degradation, halt biodiversity loss; Promote just, peaceful and inclusive societies; Revitalize the global partnership for sustainable development.

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calls into sustainable development has taken thirty five long years but the effort has already paid and will continue to pay rich dividends in the future.

2.4 Environmental Damage involving TNCs under Alien Tort Claims Act (ATCA)

Victims of environmental damage caused by TNCs have invoked the regulatory framework provided by ATCA in the hope of effective redressal of their grievances. They have been compelled to resort to this remedy due to pathetic governance standards, questionable judicial independence and undeveloped or underdeveloped environmental jurisprudence in their own nations and weak enforcement mechanisms for violation of the right to clean and healthy environment at the international level. In this sense, ATCA has proved to be the most sought after extra-territorial law for victims of environmental damage.

ATCA was enacted by the First US Congress as part of the Judicature Act 1789. Its peculiar feature is that it contains only one section which provides that the ‘district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. Three conditions are required to be satisfied to file a claim under it. Firstly, claimant must be an alien. Secondly, claim should be for tort only. Thirdly, claimant must show that the alleged tort violate either the ‘law of nations’ or ‘a treaty of US’. However, owing to only one section, the task of deciphering its legislative intent and scope becomes very difficult. US Supreme Court has preferred narrow interpretation of its scope in Sosa v Alvarez–Machain confining it to ‘relatively modest set of actions alleging violations of the law of nations’, namely – offenses against ambassadors, violations of safe conduct and prize captures and piracy. In fact, Court required a claim based on present-day law of nations ‘to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized’. Court justified such a narrow interpretation on two grounds namely – lack of congressional mandate for judicial

166 28 USC 1350.
168 Ibid 2762.
creativity and adverse foreign policy consequences. This led the court to issue judicial caution in the following words:

[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.

2.4.1 Environmental Claims involving TNCs under ATCA

Victims of environmental damage have preferred to base their claims on ‘law of nations’ instead of ‘a treaty of US’. Victims have invoked it in two ways – firstly by basing their claims on norms of international environmental law irrespective of it being part of customary environmental law or of international environmental treaty. Secondly, by expressing their environmental harm as violation of human rights like right to life or right to health or even right to clean and healthy environment. Various US courts have interpreted it to mean a rule commanding ‘general assent of civilized nations’. In order to fulfil the meaning of international law violation under ATCA, alleged wrong must be of mutual concern as expressed in the form of international accords.

Unfortunately, victims of environmental harm have faced hurdles on both substantive as well as procedural front. On the substantive side, as per dictum of Sosa case, the term ‘law of Nations’ does not cover environmental law norms. Principles contained in Stockholm Declaration and Rio Declaration (barring Principle 21 of the former and Principle 2 of latter) are not legally binding with disputed status and content as customary international law. In any case, they are primarily aimed against the state and not against the TNCs. Having regard to the peculiar nature of the right to clean and healthy environment, expressing the environmental damage in the

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169 ibid 2763.  
170 ibid 2763.  
171 ibid 2744.  
173 ibid 523.  
174 ibid 524.  
175 Filartiga v Pena-Irala 630 F.2d 876, 888 (1980).  
176 Jaeger (n 172) 520.  
177 ibid 534.
language of right to life has the highest probability of satisfying *Sosa* standard under ATCA.\(^{178}\) On the procedural front, following four doctrines have posed insurmountable hurdles for the victims – doctrine of *forum non conveniens*; doctrine of act of State; doctrine of political question and doctrine of international comity.\(^ {179}\) US courts have laid down following legal standards to be satisfied to surpass these hurdles –

**a) Doctrine of *forum non conveniens***

According to the doctrine of *forum non conveniens*, discretionary power is conferred upon the Court to dismiss an action in case another Court is better suited to hear it. Two conditions must be satisfied in order to invoke this doctrine. Firstly, existence of an alternative forum to pursue the grievance of the petitioner and secondly, *‘private interest factors’* \(^{180}\) and *‘public interest factors’* \(^{181}\) support trial in that alternative forum. In environmental claims under ATCA, victims have found satisfying the twin tests mentioned above to be an extremely onerous burden to discharge.

**b) Doctrine of Act of State**

According to the doctrine of act of State, a US Court will not decide a case if its decision will invalidate official actions of a foreign State taken within its own territory. This is so in order to avoid interference by judicial decisions in executive foreign policy decisions. This doctrine is based on the separation of powers.

**c) Doctrine of Political Question**

Doctrine of political question is invoked in cases involving foreign relations of the US. Like Doctrine of Act of State, it is also based on the principle of separation of powers. Following factors are relevant in determining political question –

\(\ldots\)

\(^{178}\) ibid 536.

\(^{179}\) ibid 525.

\(^{180}\) Private interest factors include – relative ease of access to sources of proof in US and the alternative forum; availability of compulsory process for unwilling witnesses in US and the alternative forum; costs involved in ensuring availability of willing witnesses for trial in US and the alternative forum; possibility of a view for US or the alternative forum, of any affected premises; ability of the US or the alternative forum to enforce any judgment eventually obtained and practical problems involved in making trial easy, expeditious and inexpensive. See *Gulf Oil Corporation vs Gilbert* 67 S.Ct. 839, 843

\(^{181}\) Public interest factors include – congestion in US courts; unfair burden imposed on citizens in the form of jury duty in an unrelated forum; localized controversies to be decided at home; trial in a forum familiar with applicable law and avoidance of unnecessary conflict of laws. See ibid.
[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\textsuperscript{182}

d) **Doctrine of International Comity**

Doctrine of international comity refers to the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation. Under this doctrine, in spite of having jurisdiction over a matter, courts refuse to exercise the same out of deference to the laws or interests of a foreign country. Court takes into consideration various relevant factors while applying this doctrine.\textsuperscript{183}

The gravity of hurdles discussed above can be gauged by the fact that the success rate of environmental claims under ATCA has not been very encouraging. Victims of environmental damage continue to be least successful and consequently most vulnerable due to the judicial interpretations of ATCA.\textsuperscript{184} Courts have refused to grant any relief on one or the other such grounds as is discussed through significant litigations pursued by victims under ATCA hereinafter.

\textsuperscript{182} *Baker v Carr* 82 S.Ct. 691, 710 (1962).

\textsuperscript{183} "(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state." Restatement, Sec. 403(2).

2.4.1.1 Bhopal Gas Leak Disaster involving Union Carbide Corporation

Factual Matrix

Bhopal Gas Leak disaster is the biggest industrial disaster in the history of human civilization causing widespread and serious human suffering, damage to property as well as environment. Union Carbide India Limited (UCIL) was incorporated in India in 1934. In 1969, Union Carbide Corporation (UCC) incorporated in New York acquired 60% stake in UCIL when Bhopal plant was built to produce ‘Sevin’ (a UCC patented pesticide). Plant was merely a processing unit (to mix various chemical components produced elsewhere into the final formula for Sevin). UCIL decided to back-integrate the plant in order to produce components of pesticide itself in view of the requirement of Indian Government to replace import with local manufacture. UCIL issued new stock to finance the project reducing UCC’s stake from 60% to 50.9% in furtherance of another mandate of Indian Government. Operations of the plant generated hazardous waste, solid part whereof was disposed in tanks and pits and waste water was treated and pumped into three solar evaporation ponds lined with low-density black polyethylene sheets to prevent seepage into ground.

In the early morning hours of 3 December 1984, Methyl Isocyanate (MIC), a highly toxic gas, leaked from the Bhopal plant. Leakage resulted into death of around twenty one thousand people, injuring two lakh, death of livestock, crop damage and serious damage to environment. Indian Government shut down the plant. In order to effectively process multitude of the resulting claims, Indian Government enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (Bhopal Act). It entered into a settlement (of all claims, rights and liabilities) with UCC for $ 470 million which was also approved by the Indian Supreme Court. \(^{185}\) In 1994, UCC sold its interest in UCIL. UCIL later changed its name to Eveready Industries India Limited (EIIL) which terminated its lease of Bhopal plant site in 1998. EIIL continued to manufacture batteries and flashlights.

Bhopal gas disaster challenged and tested the efficacy of not only Indian legal system (elaborately discussed in chapter-6) as well as that of ATCA. Over a period of more than three decades, the victims have filed various actions before the courts under

\(^{185}\) Union Carbide Corporation v Union of India (1989) 1 SCC 674.
ATCA at different points of time. All such actions have been rejected by the courts on one ground or the other. Leading judicial decisions pertaining to the disaster are discussed hereunder –

**In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India**\(^{186}\)

(John F Keenan, District Judge; 12 May 1986)

This was the first action preferred by victims on 7 December 1984 (four days after the disaster) in an otherwise long drawn court litigation. Thereafter, 144 additional actions were filed in various courts (California, Connecticut, Columbia, Florida, Illinois, Louisiana, Maryland, New Jersey, New York, Pennsylvania, Tennessee, Texas and West Virginia). Judicial Panel on Multidistrict Litigation joined all such actions (totaling 145 involving 2 lakh plaintiffs) and assigned them to Southern District of New York on 6 February 1985. Indian Government enacted Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, which gave it exclusive right to represent plaintiffs in India and elsewhere. In pursuance whereof, Indian government filed a complaint seeking similar relief as those consolidated. Court appointed a three member Plaintiffs’ Executive Committee (two lawyers to represent individual plaintiffs and one representing UOI) in the pre-trial proceedings. Indian government framed scheme for registering and processing claims arising out of the tragedy resulting in over 4,87,000 claims being filed. UCC sought to dismiss them on the ground of doctrine of *forum non conveniens*. Court elaborately discussed various aspects of the jurisprudence pertaining to the doctrine of *forum non conveniens* as elaborated by the US Supreme Court in its two decisions, namely – *Gulf Oil Corp. v Gibert*\(^{187}\) and *Piper Aircraft Co. v Reyno*\(^{188}\). It dismissed the consolidated case as being barred by the doctrine of *forum non conveniens* while imposing following three conditions, namely – submission of UCC to jurisdiction of Indian Courts and waiver of limitation based defences; consent of UCC to satisfy any judgment delivered by Indian court against it, subject to fulfilment of minimal due process requirements; subjecting UCC to discovery under United States Federal Rules of Civil Procedure, in case plaintiffs appropriately demand. Court justified the dismissal on the following grounds –

\(^{187}\) Gulf Oil (n 180).
\(^{188}\) 102 S.Ct. 252 (1981).
i. Indian legal system offers alternative adequate forum. Court reposed faith in the ability and competence of Indian legislature to intervene and enact a specific law for class actions (Bhopal Act). Since UOI was to represent all claimants, court expressed hope that if the case is transferred to India, Attorney General of India or Solicitor General of India or Advocate General of Madhya Pradesh would be in a better position to represent the victims.

ii. Both the private interest factors and public interest factors pointed towards appropriateness of Indian court to handle the case. 

_In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India_ (Mansfield, Pratt, and Altimari, Circuit Judges; 14 January 1987)

Individual plaintiffs filed appeals. UCC and UOI filed cross-appeal. While plaintiffs continued with their opposition to the dismissal, UOI supported the dismissal order. UCC opposed the conditions attached by the court to its dismissal order citing a temporary order issued suddenly by the Bhopal court to freeze all assets of UCC. It also pointed towards conflict of interest of UOI which would appear both as a plaintiff and defendant in Indian Court and might voluntarily dismiss its claims against itself as defendant or as co-defendant thereby putting entire blame on UCC. UCC astonishingly alleged serious prejudice if UOI was allowed the dual yet conflicting status of both plaintiff and co-defendant in India. It went to the extent of asking the court to authorize Justice Keenan to retain authority to monitor proceedings before Indian Courts and ‘be available on call to rectify in some undefined way any abuses

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189 Most of documentary evidence having a bearing on liability (like design, training, safety and start-up) was available in India; low transportation costs since large number of witnesses were Indian nationals living in India; a fewer translation problems; much of the material held by Central Bureau of Investigation (CBI); Manual regarding start-up was prepared by Indians working under UCIL; many officials of Government of Madhya Pradesh or Municipality of Bhopal, Government of India might be impleaded as third-party defendants who might not be subject to subpoena power of US court due to immunity from suit granted under Foreign Sovereign Immunities Act; viewing of the accident site better done by an Indian court. Union Carbide Corporation (n 186) 852-860.

190 New York being the busiest US district and congested litigation centre; administrative problems due to transportation of large number of witnesses and documents and translation thereof; huge administrative costs of litigation overburdening people of New York in whose subject matter they have hardly any interest; Insignificant US interest in the litigation not justifying expenditure of judicial time and resources to the extent required for dispose the case in comparison to enormous interest of various governmental agencies in creation, operation, licencing and regulation and investigation of plant; ‘Governmental interest’ analysis, ‘most significant relationship’ test, or ‘weight of contacts’ test point clearly towards applicability of Indian law which will be better applicable by Indian courts. ibid 860-866.

191 809 F.2d 195 (2nd Cir. 1987).
of UCC’s right to due process as they might occur in India.\footnote{ibid 205.} This argument was astonishing since UCC did not realize this flaw of Indian judicial system when it opted in favour of India for setting up the plant that too of an inherently hazardous nature. Court also rightly regarded this argument as impractical showing abysmal ignorance of basic jurisdictional principles and in turn frivolous.

Court upheld the dismissal while striking down the second and third condition attached to the dismissal order in order to avoid creation of misunderstanding and problems of interpretation. It acknowledged its limitation regarding futility of continuing jurisdiction since Indian Courts were governed by Indian not US laws. Further, according to the court, it ceased to have any further jurisdiction once a case is dismissed on ground of \textit{forum non conveniens} and therefore, UCC was free to raise defence of denial of due process in US Court at the time of enforcement of judgment against it.

Thus, both the judgments taken together ensured that UCC got what it wanted – trial in India before Indian Courts in accordance with Indian law and that too with no explicit restrictions imposed by the US Court of any kind.

\textit{Bano Bi v Union Carbide Chemicals and Plastics Company Inc}\footnote{984 F.2d 582 (2nd Cir. 1993).} (Newman, Cardamone, and Mahoney, Circuit Judges; 26 January 1993)

Two class actions were filed in Texas State Court in October 1990 post-settlement in India – while on the one hand Abdul Wahid filed suit against UCC and UCIL, on the other, Bano Bi filed suit against UCC, UCIL, Union Carbide Eastern, Inc., Enserch Corporation, Humphreys and Glasgow Consultant Pvt. Ltd., Humphreys and Glasgow Ltd., Ebasco Humphreys and Glasgow Inc. They challenged the settlement between Indian Government and UCC on the ground that conflict of interest of Indian Government being part owner of UCIL; majority of victims considered the settlement inadequate; violation of their due process rights owing to inadequate notice and inadequate presentation; and non-availability of option to exit out of the settlement. In November 1990, appellees removed these actions to two Texas Federal District Courts.
Judge Fisher (Eastern District of Texas) denied Bi’s motion to remand her action to Texas State Court while dismissed Enserch Corporation, Humphreys & Glasgow Consultants Pvt., Ltd., Humphreys & Glasgow, Ltd., and Ebasco-Humphreys & Glasgow, Inc. as defendant.

On 30 January 1991, Judicial Panel on Multidistrict Litigation transferred both the actions to the Southern District of New York (before Judge Keenan). Court refused reconsideration of Judge Fisher’s rulings while at the same time denying Wahid’s motion to remand his actions to Texas State Court. Court dismissed both the actions following the doctrine of *forum non conveniens* and stood by its earlier opinion.

In appeal, the Court confined itself to the threshold issue of whether plaintiffs have standing to maintain action in US Court in spite of the fact that Bhopal Act has granted Indian government exclusive right to represent all those injured in Bhopal gas leak disaster. Court rejected the appeal on the ground of lack of standing of the plaintiffs on the basis of doctrine of act of State. Court held that it will not sit on judgment by a foreign democratic government that victims’ interests will be best served if government represents them exclusively in the Courts around the world. According to the Court, appellants should challenge the settlement in India in accordance with the legislative and judicial channels available to them for this purpose. Further, Court felt that the remand to Texas State Court would be meaningless since it would also reach the same conclusion through applying federal common law.

**Sajida Bano v Union Carbide Corporation and Warren Anderson**

(Level, Pooler and Sack, Circuit Judges; 15 November 2001)

Plaintiffs filed an action in the Southern District of New York in November 1999 (amended in January 2000) which was assigned to Judge Keenan. It made fifteen claims - first six sought civil damages under ATCA for dangers caused by the gas leak disaster itself alleging violations of various international norms of environmental, criminal, and human rights law; next two sought judgments for civil contempt and fraud in connection with UCC’s default in honouring the conditions imposed by the first order of Judge Keenan; last seven (collectively referred as additional

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194 273 F.3d 120 (2nd Cir. 2001).
environmental claims) sought monetary and equitable relief under various common-law theories for environmental harms not related to gas leak disaster but attributable to UCIL plant in Bhopal. While UCC and Anderson filed motions to dismiss or for summary judgment and for order denying class certification, plaintiffs responded with cross motions to strike defendants’ dispositive motions and affirmative defenses under fugitive disentitlement doctrine.

On 28 August 2000, District Court denied plaintiffs cross motions and granted defendants’ motion to dismiss in their entirety on the ground that defendants were not prevented by the fugitive disentitlement doctrine in their defence; plaintiffs lack of standing due to Bhopal Act and 1989 settlement bars all claims. Court ordered closure of entire case and its removal from docket without specifically addressing additional environmental claims.

On appeal, Court held –

a) doctrine of fugitive disentitlement is normally applied by the courts from which the alleged fugitive has fled rather than the other way round in order to ensure non-flouting of its processes, enforcement of its decisions, availability of people for administration of justice and avoiding prejudice to the other side affecting litigation. Since the defendant has flouted authority of Indian Supreme Court and not that of US Court, it is for the former to protect its dignity, efficiency and efficacy.

b) Settlement orders of 1989 fully covered ATCA claims and prevented the sort of claims being presented before it under ATCA.

c) Right to pursue restitution under Indian criminal law does not cover right to pursue civil remedies under ATCA for violation of international law. Any decision to the contrary would fail reasonable expectations of UCC regarding finality of settlements achieved through bargain which will in turn have consequences for effective and efficient settlement of future claims from other disaster.

It is unfortunate to find Court more concerned about failed expectations of UCC rather than the failed expectation and suffering of poorly placed victims of Bhopal disaster. Since the District Court did not address additional environmental claims and
ordered closure of the case, court remanded the case back for review in recognition of extensive and intimate familiarity of Judge Keenon with Bhopal gas litigation. Since the District Court did not give any reason for dismissing environmental claims against Anderson, Court found itself ill equipped to review and similarly remanded them.

_Sajida Bano v Union Carbide Corporation and Warren Anderson_ 195

(John F Keenan, District Judge; 18 March 2003)

Haseena Bi and three organizations (Bhopal Gas Peedit Mahila Udyog Sangathan, the Gas Peedit Nirashrit Pension Bhogi Sangharsh Morcha, Bhopal, and the Bhopal Gas Peedit Mahila Stationery Karmachari Sangh) filed a complaint alleging that since she has shifted her present home in 1990, she has developed chronic abdominal pains, severe burning sensations in her stomach as well as all over her body and recurrent bleeding and rashes on her limbs. They suspected the illness due to their use of water (for drinking and washing) from a local well near her home located 200 metres from the Bhopal plant which had strong, noxious smell of chemicals with an oily layer on top. Greenpeace tested the water from this well on 29 November 1999 and found the same to be contaminated. Complaint alleged that severe pollution to their land and drinking water creating serious health problems was caused by defendants’ acts of recklessly dumping, storing and abandoning huge quantities of highly toxic pollutants at Bhopal plant despite knowing that contamination of their neighbours’ water and land would result thereby.

Defendants argued that the land was in the exclusive ownership, possession and control of the government of Madhya Pradesh for nearly four years including the period of testing by Greenpeace as UCC did not hold any stock in UCIL for over seven years.

Court decided to apply New York law to the environmental claims instead of Indian law since the harm was caused abroad and absence of conflict with the foreign law. Court found the claims to be time barred due to the following reasons –

195 2003 WL 1344884.
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a) Injuries were latent so they did not manifest immediately. Injuries were discovered in 1990. However, claims were actually filed in 2000 (i.e. after ten years). Therefore, the limitation statute New York Civil Practice Law and Rules [N.Y.C.P.L.R 214-c(2)] began to run from the day of manifestation instead of exposure requiring claim to be filed within three years (i.e. by 1993). N.Y.C.P.L.R 214-c(4) contained an exception that limitation period will extend if the plaintiff was aware of injury but there was justifiable delay in discovery of its cause. Accordingly, claims should have been filed by 1996 but were actually filed in 2000. Therefore, court determined environmental claims to be time-barred.

Had the plaintiff’s injury being patent, CPLR 214 would have been applicable under which the claim should have been filed by 1993 but was actually filed in 2000 and hence it was time-barred.

Court also rejected plaintiff’s claims for damage to property as being time-barred under CPLR 214-c as it refused to distinguish between her personal injuries and property damage since they emanated from the same source (i.e. water from the well).

Court refused tolling limitation period since plaintiff was not induced or prevented from filing her claims by any act of UCC. Allegation of concealing information by UCC regarding extent of contamination failed to satisfy requirement of misrepresentation since most of the documents relied upon by the plaintiff were mere internal correspondence and not representation to public.

b) Court rejected application of continuing tort doctrine since this doctrine was applicable in case of damage to property not to persons. Even with regard to property claims, Court refused to apply it since doctrine is applied to property actions seeking injunctive relief and not the one seeking damages.

Further, Court regarded plaintiff’s relief for injunction to remediate off-site soil and groundwater contamination in addition to remediation of former UCIL plant as infeasible and inappropriate and hence rejected the same for various reasons – futility of involving UCC in the task of remediation after severance of its connection with the property; ineffectiveness of issuing directions to foreign government (i.e. Indian
government) regarding the manner of redressing its environmental issues as US court would not in position ever to control remediation process.

Similarly, court refused to grant injunction requiring medical monitoring on the ground of non-feasibility since finding so many people residing 8000 miles away in Bhopal over period of thirty years would be extremely onerous, if not impossible, for defendants.

One wonders if doing business so far away was feasible, being party to operations causing contamination of water in the neighbourhood was feasible, than how medical monitoring became impossible. Court was very impressed by the fact that defendants have voluntarily built a hospital in Bhopal through the proceeds of selling its shares in UCIL. It did not matter to the Court, when pointed out by plaintiffs, that the hospital was not undertaking the task of medical monitoring. For the Court, the remedy for this purpose was better sought from hospital administrative staff. One wonders how Court relieved the founder of the hospital (i.e. UCC) who could have certainly issued necessary directions to the hospital administrative staff for improving medical monitoring.

**Janaki Bai Sahu v Union Carbide Corporation and Warren Anderson**¹⁹⁶ (Sahu I)

(John F Keenan, District Judge; 1 December 2005)

Plaintiffs filed class action complaint alleging UCC and Warren Anderson liable for contamination of soil and drinking water supply to sixteen communities around Bhopal plant on three grounds namely – UCC being direct participant and joint tortfeasor; UCC working in concert with UCIL in causing or exacerbating and/or concealing pollution problem; UCIL acting as alter ego of UCC necessitating lifting of corporate veil.

Defendants moved for summary judgment under Federal Rules of Civil Procedure (Fed.R.Civ.P 56) and/or dismissal under Fed.R.Civ.P 12 (b) (6) refuting all the contentions of plaintiffs.

At the outset, Court pointed out that although present action is not regarding pollution from the gas leak disaster but from the general operations of the Bhopal plant, all of

the plaintiff’s claims can be dismissed on the basis of doctrine of *forum non conveniens* as was done in the first action. Nevertheless, court decided to dismiss plaintiff’s actions on merits except the one relating to corporate veil piercing for which it allowed more time for additional discovery.

Court dismissed the challenge of direct liability/joint tortfeasor claim as a matter of law for two reasons. Firstly, piercing of corporate veil is a condition precedent for suing UCC (being the parent corporation of its subsidiary UCIL). Secondly, acts of UCC do not justify direct/joint tortfeasor liability. Court concluded that instead of acting in concert (as alleged by plaintiffs) UCC was in fact making efforts to discover and remedy pollution.  

**Janki Bai Sahu v Union Carbide Corp. and Warren Anderson**

(John F Keenan, District Judge; 20 November 2006)

The court in the previous judgment (as mentioned above) granted stay in order to allow more time for additional discovery (60 days) in respect of plaintiff’s action regarding piercing of corporate veil. Court further granted two additional extensions and thereafter discovery concluded on 30 April 2006. Subsequent to additional discovery, plaintiffs filed renewed objections to defendants’ motion for summary judgment on piercing of corporate veil.

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197 Court’s conclusions were as follows –

a) Proposal to back-integrate Bhopal plant was in fact made by UCIL at the behest of Indian government and not UCC which merely approved it in its capacity as parent company.

b) There was no question of UCC transferring inadequate technology to UCIL. Document titled “Union Carbide’s 1973 Capital Budget Proposal” was of UCIL and not of UCC. It was falsely referred to as such by plaintiffs. It established that UCIL opted to develop its own technology instead of that of UCC.

c) Court interpreted the two out of context quotations (extracted from UCC documents and relied upon by plaintiffs) to conclude that UCC suggested measures to UCIL to prevent pollution. Court took into consideration the following various factors to reach its conclusion –

- Document titled ‘Bhopal Site Rehabilitation & Asset Recovery Project’ (which plaintiffs alleged to be belonging to UCC and court found to be belonging to UCIL) if, in fact belonged to UCC and prepared by its engineers, was indicative of UCC’s efforts to remedy pollution and cooperate with Indian authorities.

- UCC’s approval of burial of toxic waste was not cover-up as alleged but an approval of UCIL’s efforts to remedy pollution problem at Bhopal plant since NEERI’s report specifically recommended burial and Government of Madhya Pradesh also requested burial.

- UCC could not be held responsible for UCIL project if no remediation work was undertaken after UCC severed its ties with UCIL through selling stocks.

UCC was not responsible for termination (through surrender) of land lease for the plant site by UCIL in 1998 since at that time UCC neither had any connection with UCIL nor was it a party to the lease. ibid.  

198 2006 WL 3377577.
In absence of any conflict being pointed out between law relating to piercing to corporate veil in India and New York, Court held the applicable law to be that of New York. Lifting of corporate veil requires two conditions to be satisfied - first, owner should exercise complete domination over the corporation\textsuperscript{199} and second, such domination was used to commit fraud or wrong thereby injuring the party which seek to pierce the veil. Court referred to its previous judgment to conclude that the documents relied upon by the plaintiff tend to negate the domination needed for the first requirement to be satisfied. Court held that the three statements of Warren Anderson\textsuperscript{200} indicated nothing more than the fact that UCC may have controlled legitimate policies of its subsidiary which is not enough having regard to plenty of contradictory evidence. For the Court, holistic view of the evidence on record before it merely showed UCL as subsidiary of UCC. However, it dismissed the action for not meeting second requirement for lifting of corporate veil on various grounds.\textsuperscript{201}

Court denied request of the plaintiffs to grant more time for additional discovery on the ground that it has already done it thrice (total period of five months) delaying disposition of the matter. Court felt that further discovery would be futile since plaintiffs have failed to show likelihood of additional evidence and how further discovery would help in revealing. Court also found no merit in plaintiffs’ reliance over doctrine of unclean hands since unclean activities attributed to the defendants were not alleged in the complaint and were different from claims at issue.

\textsuperscript{199} Court needs to look into following factors for satisfying the first condition – absence of corporate formalities; inadequate capitalization; use of corporate funds for personal purposes; overlap in ownership, officers, directors, and personnel; common office space; amount of business discretion of the corporation; whether a parent corporation deals with the subject corporation at arm’s length; whether parent and subsidiary corporations are treated as independent profit centers; payment of the allegedly dominated corporation’s debts by a parent corporation; and whether the corporation had property that was used by the parent as its own. ibid 4.

\textsuperscript{200} (First statement): ‘Suppose we were a 40 percent owned company or a 35 percent owned company, raises some inquiries on our part, do we want to participate around the world where you have less than absolute control?’;

Second statement: ‘I am telling you if I knew personally of any location in the corporate world of Union Carbide that had an unsafe operation it would have been shut down’.

Third statement: ‘Yes . . . We had operated \[the Bhopal site\] safely for seven years.’ ibid 6.

\textsuperscript{201} The grounds were following:

a) UCIL had changed its name to EIIL.

b) No abuse of corporate form since EIL was a functional and financially viable corporation with market capitalisation of ₹ 5.19 billion or $ 115 billion. Inference of abuse could have been drawn in case EIL was defunct or having negligible worth.

Court took serious note of the purposeful omissions by counsel regarding it as outrageous and designed to intentionally mislead the Court. After ignoring such evidence, no evidence was left. Sahu II (n 198).
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*Janki Bai Sahu v Union Carbide Corporation and Warren Anderson*202 (Sahu IV)

(John F Keenan District Judge; 26 June 2012)

Plaintiffs brought action for negligence, public and private nuisance, and strict liability claims against UCC, seeking compensation and punitive damages as well as medical monitoring. Discovery lead defendants to renew their motion for summary judgment as to all theories of liability. Court described the discovery undertaken for two years as a ‘discovery expedition worthy of Vasco da Gama’203 resulting into series of court orders204 relating thereto. In order to bring finality to these proceedings pending in court for last nearly eight years, Court decided to resolve liability issues on merits on the basis of entirety of expanded records post discovery. As in Sahu II, Court decided the applicable law to be that of New York. Further, in the absence of defendants’ objection to plaintiffs’ claims in nuisance, Court assumed (but did not find) plaintiffs standing to pursue the same. As in Sahu II, plaintiffs’ sought to make defendants liable on three counts – UCC participated directly or in concert with UCIL in causing pollution through its approval to back-integration, designing of Bhopal Plant, transfer of technology to UCIL, knowledge of water pollution risks, intimate participation in efforts of environmental remediation; UCIL acted as general or specific agent of UCC and the latter ratified acts of the former after the fact; UCIL acted as alter ego of UCC. Court granted defendant’s motion for summary judgment rejecting all the claims of the plaintiff on the following grounds –

a) Capital Budget Proposal (CBP) 1973 or its endorsement by UCC Management Committee Meeting (as reflected in its minutes) or CBP’s review in 1977 instead of suggesting direct participation of UCC in any pollution activity indicated that UCIL proposed manufacturing process and wasted disposal systems.

b) Regarding designing of waste disposal system, Court held that UCIL was primarily responsible for design and construction of waste disposal system at

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202 2012 WL 2422757.
203 ibid.
Bhopal plant for various reasons - UCC explored the possibility of a pesticide manufacturing plant in 1966 although it did not take any step to erect the same and UCIL actually undertook its construction; UCC offered only limited guidance to UCIL; UCIL was to have primary responsibility for designing and providing facilities for waste disposal; UCIL purchased manufacturing process design packages from UCC under Design Transfer Agreement of 1974 which was silent regarding designs for waste disposal facilities; UCIL’s representation to Bhopal public health authorities stating that the proposed methods for its waste disposal plans ‘are in use at the plant of the Principals of UCIL in US’ did not establish that UCC dictated the designing of waste treatment and disposal system but merely indicated its intention to adopt standard waste disposal methods; ponds actually constructed at the Bhopal plant differed from earlier suggestions of UCC in attempt to reduce costs as suggested by engineering consultants of UCIL (Humphreys & Glasgow); language of UCC’s endorsement of the proposal of spraying liquid from evaporation ponds into the air clearly indicated that UCC had limited role.

c) Regarding UCC’s knowledge about waste disposal problems, Court held that plaintiff failed to show any special relationship between UCC and UCIL over and above the holding-subsidiary, which by itself was not sufficient to impose a duty on the part of the former to change latter’s waste disposal plans for the plant. According to the Court, UCC officials communicated its concerns to UCIL employees on numerous occasions for instance identifying acid-bearing process wastes as major disposal problem for proposed back-integrated project in absence of nearby waterway, or suggesting clay lining being used for evaporation pond or suggestions regarding pond size. UCIL undertook responsibility of designing waste disposal system in accordance with the regulations of Government of India (mandating waste disposal in solar evaporation ponds).

d) Regarding transfer of technology, Court held that groundwater pollution was caused by waste disposal at Bhopal not by the technology generating the by-product waste; any unproven technology used at Bhopal was developed by UCIL); no review was necessary since UCIL developed its own CO, 1- naphththol, and Sevin processes; UCIL evaluated Sevin batch carbamoylation process in pilot plants indicating that it was a new manufacturing process
different from UCC’s commercially operated Sevin manufacturing process; design report packages provided by UCC did not incorporate features unique to India and therefore UCIL was responsible to modify the process, equipment and engineering standards in the light of equipment and materials in India; although UCIL agreed to give change notices for design modifications to UCC, however latter’s participation was confined only to major changes in design aspects like plant capacity, raw material specifications and construction materials; UCC agreed to give training and instructions for technical personnel for a fee and only when requested by UCIL; absence of allegation of negligence on the part of UCC in its review of design changes, provision of technical changes contributing to creation of pollution.

e) Court found no evidence of UCC and UCIL participating in creation of nuisance; UCC’s endorsement of UCIL’s CBP 1973 was not a tort; UCC was neither negligent nor contributed in any way to environmental pollution in training or other technical assistance provided to UCIL.

f) Court failed to find existence of agency relationship between UCC and UCIL in absence of evidence that former manufactured pesticides, or entered into contracts/other business dealings on behalf of the latter or acted in latter’s name. Ratification by UCC of the acts of UCIL was inconsequential since ratification presumes existence of agency relationship which is absent between the two. Court regarded agency argument as an attempt to circumvent veil piercing requirements.

g) Regarding alter ego liability, Court held that in absence of any allegation or evidence that UCC dominated (if it did) UCIL to commit fraud or wrong harming plaintiff, piercing of corporation veil to prevent such fraud or wrong was not needed. It based itself on various factors to reach this conclusion – refusal to rely on M.C. Mehta v Union of India\textsuperscript{205} for applying Indian law regarding corporate veil piercing claim in absence of any suggestion therein that Shriram was either being a subsidiary or holding company or in any case was a member of a corporate group, leading the court to conclude that Indian law disregarded separate entities of parent and subsidiary in cases involving hazardous waste; UCIL/EIIL was not a shell corporation since it was always

\textsuperscript{205} AIR 1987 SC 1086.
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adequately capitalised; EIIL economic viability was relevant to determine its legitimacy as corporation, not its ability to pay a specific amount of damage; UCC did not control UCIL through World Agricultural Products Team (WAPT comprising UCC, Union Carbide Eastern, Union Carbide Agricultural Products and UCIL) which included UCIL itself and gave discretion to UCIL managers; public statements\textsuperscript{206} made by Anderson after the gas leak merely indicated that the sale by UCC of design packages to UCIL for latter’s use in designing and constructing Bhopal plant and did not imply former’s micro-management or control over design and operations in Bhopal; UCIL purchased basic manufacturing process designs from UCC for a substantial sum of money indicating absence of domination of former by the latter.

h) Court denied any individual liability against Anderson on account of various factors – his participation as member of UCC’s Management Committee in decision to back-integrate and use unproven technology were considered inconsequential since they are decisions of UCIL; in absence of documentary evidence that the area was residential in 1973 or the UCC management knew it to be residential and in the light of plant being allotted by the Government of Madhya Pradesh, there was no question of UCC and Anderson approving construction of Bhopal Plant near residential area.

i) Regarding equitable relief, court reiterated its conclusion drawn in \textit{Bano II}, holding - clean up of aquifer or groundwater would require permission and supervision of Government of India and would create problems of potential conflict with Indian authorities and lack of control; medical monitoring would require identification of every resident living in the vicinity of plant and further of those who continue to be exposed to toxins, requiring soil and drinking water testing throughout Bhopal, rendering it impossible; Court would be unable to supervise remediation of private property, water supplies and overall habitable environment in India thereby rendering its injunctive power impracticable.

j) In May 1986, UCIL informed UCC about its inability to find ‘safe practical and acceptable’ method for cleaning the sludge from the tanks. UCC

\textsuperscript{206} Anderson stated in an interview published in the Hartford Courant that the Bhopal Plant was ‘the same in terms of design criteria’ as UCC’s plant in Institute, West Virginia, but that it was ‘constructed in India, designed in India.’ Sahu IV (n 202).
responded by forwarding to UCIL on 2 September 1986 procedures recommended by Dupont and the Manufacturing Chemists Association noting that it had no additional advice to offer in this respect. In October 1987, UCIL proposed a sludge neutralization and disposal plan on the basis of its own experiments. UCC provided guidelines to UCIL for disposal of Sevin and Naphthol tars but latter could not develop any proposal for disposing two tarry residues. Government of Madhya Pradesh directed UCIL in 1991 to dispose tarry residues without any involvement of UCC.

k) UCIL directed Bhopal remediation project along with NEERI and its consultant Arthur D Little in accordance with directions of Indian Government without involvement of UCC. Government of Madhya Pradesh reclaimed (sometime after gas leak) part of the plant comprising three solar evaporation ponds to establish an industrial estate for the benefit of gas victims. It retained NEERI in 1989 to investigate potential environmental damage and to propose decontamination procedures. In April 1990, NEERI reported no land or water contamination in the area of the ponds and suggested conversion of Pond III into a secure landfill for containing sediments and contaminated soil leaving 11 hectares of solar evaporation pond for reuse. Court found no involvement of UCC in the leakage from this Pond III since burying toxic waste therein was proposed by NEERI and mandated by Indian Government. In 1992, NEERI issued another report recommending environmental management plan for containing pond contents in secure landfill which was endorsed by the Indian Government as well as Madhya Pradesh Government. Thus, the court concluded absence of any evidence either in the minutes of the meeting or otherwise suggesting UCC’s intimate participation in Bhopal clean-up as well as regarding UCC’s approval for creation of landfill in a solar evaporation pond.

Accordingly, Court directed the clerk to close this case.
Chapter 2: Evolution of Right to Clean & Healthy Environment & Transnational Corporations: International Legal Framework

**Janki Bai Sahu v Union Carbide Corporation, Warren Anderson**

(Guido Calabresi, José A Cabranes, and Barrington D Parker, Circuit Judges; 27 June 2013)

Plaintiffs preferred appeal in US Court of Appeals for Second Circuit. Regarding direct liability of UCC, Court regarded the judgment of District Court as ‘clear and thorough opinion’ and upheld the same in the following words: ‘Under either public or private nuisance no reasonable juror could find that UCC participated in creation of contaminated drinking water.’

Regarding indirect liability of the UCC as well, Court found no error in the conclusions reached by the District Court. After undertaking independent review of record, court held that no reasonable juror could find for Sahu on any of the theories (i.e. concerted action, agency liability and piercing of the corporate veil) and affirmed the order of the District Court.

Court concluded the judgment with the following categorical observations:

Sahu and many others living near the Bhopal plant may well have suffered terrible and lasting injuries from a wholly preventable disaster for which someone is responsible. After nine years of contentious litigation and discovery, however, all that the evidence in this case demonstrates is that UCC is not that entity.

**Jagarnath Sahu v Union Carbide Corporation and Madhya Pradesh**

(John F Keenan, District Judge; 30 July 2014)

Plaintiffs filed amended complaint (removed Warren Anderson as one of the defendant and added State of Madhya Pradesh) seeking compensatory and punitive damages to their property. They sought injunction directing Government of Madhya Pradesh to cooperate in any court ordered clean-up of site (being the present owner of site of Bhopal plant). At the outset, court acknowledged the presence of evidence which was absent in Sahu I and which established genuine issues of material fact. Judge Keenan accepted a fresh beginning so far as the record of Sahu I in

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208 ibid 6.
209 ibid 7.
210 ibid.
211 ibid 9.
212 2014 WL 3765556.
combination with new documents. Court applying New York Law rejected all arguments of plaintiffs on the following grounds -

a) *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*\(^{213}\) did not lay down any new standard and therefore Sahu I was not a "dead letter". Court distinguished the two on facts as well. In *re MTBE*, Exxon had knowledge that the gasoline containing MTBE would be spilled and it was substantially certain that it would thereafter leak into groundwater whereas in *Sahu I* documentary evidence on record before the court did not indicate any tortious conduct by UCC.

b) In absence of any evidence of UCC’s actual tortious conduct, plaintiffs joined together all steps leading to construction of the MIC unit, which will fail in the light of the clear demarcation of responsibilities between UCC and UCIL. When evidence clearly showed that the cause of pollution to be waste disposal at Bhopal, UCC cannot be made liable for overall manufacturing operations of UCIL merely by providing MIC process technology. Court also rejected the argument of problems of leaks and toxin discharge beyond permitted levels since waste disposal problems were distinct and irrelevant to liability for MIC process itself.

c) Regarding UCC’s designing of waste disposal system of Bhopal plant, court reiterated its conclusion drawn earlier – UCC merely offered preliminary evaluation and limited feedback to UCIL; UCIL disregarded many of UCC’s concerns while creating waste disposal system in consultation with local contractors.

d) Court rejected the contention based on UCC’s corporate policy manual on environmental affairs that UCC had oversight authority over waste handling on following considerations – manual itself mentioned that its affiliates might modify or expand such policies; manual regarded its international affiliates as separate legal entities preserving thereby accountability of the BoD of affiliates for management thereof and recognising the rights and interests of host government and non-UCC stakeholders; manual delegated upon international affiliates like UCIL, responsibility for development and administration of a management system following UCC pattern but modified

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\(^{213}\)134 S. Ct. 1877 (2014).
by the latter to suit its activities and adapted in accordance with its legal, political and social constraints; manual regarded development of context-specific policies and procedures ensuring environmental compliance as responsibility of its affiliates.

e) Court rejected the contention that UCC was a substantial factor in remediation reiterating its conclusions drawn earlier – although UCC’s soil-washing plan for ponds was implemented but evidentiary record failed to indicate any environmentally destructive effects caused thereby; on-site joint review, as requested by UCIL to UCC for finalizing an acid sludge disposal action plan, never actually took place; clean-up standards and rehabilitation strategy for Bhopal site was developed by UCIL in consultation with NEERI, Arthur D Little and Government of Madhya Pradesh; although meetings regarding remediation took place at UCC, plaintiffs failed to point anything on record relating thereto, to substantiate that UCC was a substantial factor in causing tort; although conversion of third evaporation pond into a landfill emerged as a primary cause of soil and groundwater contamination but the idea of doing so was mooted by NEERI instead of UCC; plaintiffs failed to substantiate that UCC participated in the landfill, instead, it was Madhya Pradesh Pollution Control Board which ordered directing conversion of third pond into a landfill on the recommendations of NEERI roping in Indian government as well.

f) Court reiterated its conclusions regarding UCC’s approval of back-integration of Bhopal plant.

Court found no basis for enjoining State of Madhya Pradesh and accordingly refused to issue injunction against it in the light of its conclusion that UCC was not liable for damage and therefore there would be no court-ordered clean up. It instructed the Clerk to close this case.

Plaintiffs have filed appeal in the Second Circuit Court of Appeals to reverse the above decision.\(^{214}\)

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Researcher’s Observation on Bhopal Gas Leak Disaster

a) Courts have assigned all litigations relating to Bhopal to Judge Keenan who has not found any merit in any of the claims till date in the last three decades of this litigation.

b) The torturous course of Bhopal Gas Leak Disaster Litigation in various US Courts under ATCA is evidence of the fact that the task of making holding company liable for environmental damages caused by its subsidiary and that too in a foreign country is extremely complex. Furthermore, holding company ensures that its relationship with its subsidiary is structured (through various contractual clauses) in such a manner that former maintains control over the latter while successfully avoiding liability. Financial might of TNCs ensures that they hire best of the lawyers available in a given country who do not mind challenging the claim on all possible technical nuances of law, delaying the matter further. It unevenly tilts the balance in favour of TNCs.

c) Having regard to the nature of Bhopal Gas Leak Disaster, it was impossible for affected people to accurately gauge extent of damage and its long lasting impact. Indian Government which represented the affected people was also ill equipped (not having access to full information about the disaster) to assess the environmental damage, particularly its adverse effects in the long run. Therefore, instead of hiding behind the technicality of 1989 settlement, UCC as a truly socially responsible TNC, should have responded to suffering of people and volunteered to rescue local communities from environmental damage which continued to persist.

d) Limitation period should have been relaxed given the fact that victims are poor, illiterate and ignorant and that too from a developing country.

e) Litigation is still continuing and victims continue to fight for justice which has proved elusive so far.

2.4.1.2 Environmental Damage involving Amlon Metals Ltd.

Factual Matrix

This case involved dispute between two corporations namely – Amlon Metals Ltd. (Amlon, incorporated in New York having principal place of business in New York
which was the sole American agent for Wath Recycling Ltd. (Wath) incorporated in UK having principal place of business in Wath-on-Dearene, South Yorkshire and Euromet, incorporated in UK having principal place of business in London) and FMC Corporation (FMC, incorporated in Delaware having principal place of business in Chicago).

In August 1988, Amlon entered into contract for reclamation of copper residue produced in a pesticide plant operated by the FMC in Baltimore, Maryland to be shipped to Wath for drying and other processing. One of the important conditions in the contract was that the copper residue should be free from impurities in accordance with a sample tested by Amlon and not a hazardous waste.

In pursuance of the contract, Amlon procured twenty containers and caused them to be delivered to FMC’s Baltimore plant in preparation for shipping additional copper residue to Wath. Wath personnel noticed strong odour coming from containers. Since the odor continued for a week, Wath initiated its own examination of the material and notified to British Government about the problem. Wath’s examination revealed the presence of a number of organic chemicals, including xylene (concentration above ten times of the FMC’s disclosure), 7-hydrogen (allegedly carcinogenic pesticide intermediary) and chlorinated phenols (may form dioxin upon exposure to heat and a catalyst).

On 20 December 1989, plaintiffs sued FMC in Commercial Court of Queen’s Bench Division of the British High Court of Justice which dismissed the same on the ground that US law should apply since all the actions alleged to be taken by FMC were taken in US.

Amlon Metals Inc. v FMC Corporation

(William C Conner, District Judge; 13 December 1991)

Plaintiffs filed complaint on 7 June 1991 in New York Court in US alleging misrepresentation of composition and characteristics of copper residue and failure in disclosing presence of organic chemicals in material both before and after arrival thereof in England which may present imminent and substantial danger to human health and to environment. Plaintiffs argued inter alia that defendant’s conduct

violated law of nations particularly principles enshrined in UNCHE to which US was a signatory.

Court held plaintiff’s reliance on Stockholm principles to be misplaced. Court regarded such principles lacking any specific proscription as they merely generally refer to responsibility of nations to ensure that activities undertaken within their borders do not damage environment beyond borders.\(^{216}\) Thus, the court dismissed the complaint.

**Researcher’s Observation**

Peculiar characteristic which distinguish this case from others is the fact that environmental claims arose out of purely commercial transaction between two corporations. Accordingly the action was not filed by human beings victimized by environmental damage but instead by a corporation. This decision is of great significance for environmental activists who hoped that ATCA will provide effective redressal to the victims aggrieved by environmental damage. Court’s refusal to regard Stockholm principles (which were part of UNCHE that were hailed as heralding a new era of environmental jurisprudence) as failing to meet the ATCA standards, raised serious doubts about legal enforceability of the principles of UNCHE in particular context of ATCA.

### 2.4.1.3 Environmental Damage in Oriente Region involving Texaco Inc.

**Factual Matrix**

Texaco Petroleum Company (TexPet) was a fourth level subsidiary of Texaco. It started exploration and drilling of oil in Oriente region of eastern Ecuador in 1964. TexPet started operating a petroleum concession in 1965 for a Consortium which was equally owned by TexPet and Gulf Oil Corporation. Almost a decade later in 1974, Government of the Republic of Ecuador acquired 25% shares in the Consortium through PetroEcuador (state-owned oil agency). Within a short span of two years, PetroEcuador acquired stake of Gulf Oil in the Consortium thereby becoming the majority stakeholder therein. In 1989, PetroEcuador took over the operation of Tans Ecuadorian oil pipeline from TexPet. In 1990, PetroEcuador also took over from

\(^{216}\) ibid 661.
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TexPet the operation of drilling activities of the Consortium as well. TexPet relinquished all its interests in the Consortium in June 1992. As a result, Consortium was fully owned by PetroEcuador. Aggrieved by severe and widespread environmental damage, plaintiffs approached two US courts, namely – US District Court for the Southern District of Texas and US District Court for the Southern District of New York.

**Sequihua v Texaco, Inc.** 217

(Norman W Black, Chief Judge; 27 January 1994)

Plaintiffs (residents of Ecuador) filed action against Texaco in the Harris County, Texas in late August 1993 which was promptly removed to US District Court for the Southern District of Texas. Court dismissed it on the ground of doctrines of international comity and *forum non conveniens*. Court relied on the affidavits of two Ecuadoran Supreme Court Justices to conclude that Ecuador provides private remedies for tortious conduct as well as an independent judicial system having sufficient procedural safeguards. Thus, Ecuador provided an adequate and available forum although not offering same benefits as that of an American system. Both private interest factors 218 and public interest factors 219 also favour Ecuador instead of US.

**Aquinda v Texaco Inc.** 220

(Rakoff, District Judge; 12 November 1996)

Two class action suits were filed in the US District Court for the Southern District of New York – first, on behalf of around 30,000 inhabitants (mainly members of indigenous tribes) of Oriente regions of Ecuador and second, on behalf of at least 25,000 residents of Peru, living downstream from Oriente region. Both class action lawsuits alleged that oil operation activities of Texaco in the preceding nearly three

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218 All plaintiffs resided and their medical records available in Ecuador; affected land, air and water were in Ecuador; all evidence and compulsory processes were available in Ecuador; high cost of obtaining attendance of witnesses; being a case involving environmental pollution, view of premises was possible only in Ecuador; questionability of enforcement of US court in Ecuador. ibid 64.
219 Administrative difficulties due to court congestion; involvement of Ecuador’s local interest; strong objection by Ecuador to the exercise of jurisdiction by US court; burden of jury service on US citizens in a litigation having no relation to their community; possibility of unnecessary parallel litigation in Ecuador; possibility of conflict of laws and application of foreign law. ibid.
decades (from 1964 to 1992) had polluted rain forests and rivers in Ecuador and Peru. It alleged that Texaco’s activities in Ecuador were designed, controlled, conceived and directed through its operations in US. Plaintiffs sought money damages on the basis of negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy and violations of ATCA. They also sought extensive equitable relief to redress contamination of water supplies and environment which included - financing for environmental cleanup to create access to potable water and hunting and fishing grounds; renovating or closing the Trans Ecuadorian Pipeline; creation of an environmental monitoring fund; establishing standards to govern future Texaco oil development; creation of a medical monitoring fund; an injunction restraining Texaco from entering into activities that risk environmental or human injuries, and restitution. New York Court was selected for filing action since headquarters of Texaco was in New York and the decisions taken by its executives in headquarters contributed to environment damaging activities of consortium in Ecuador.

Both the actions were initially assigned to Judge Vincent Broderick. Before filing of Jota action, Texaco sought dismissal on three grounds – (a) failure to join Republic of Ecuador; (b) International comity; (c) forum non conveniens. Texaco also relied on the letter from ambassador of Ecuador to US who stated that Government of Ecuador considered the suit as an affront to its national sovereignty. Judge Vincent Broderick reserved decision regarding the dismissal as premature (despite stating that dismissal may be appropriate). It ordered further discovery on two issues – firstly, whether Texaco, in fact, directed alleged activities in Ecuador from US and secondly, whether extensive evidence from Equador would be necessary to prove plaintiff’s claims. It also stated that any dismissal on grounds of doctrine of forum non conveniens would be subject to consent of Texaco to submit to the jurisdiction of courts in Ecuador. After his death, discovery was completed under the supervision of Judge Parker and Magistrate Judge Smith.

The cases were reassigned finally to Judge Rakoff. Court dismissed it on ground of forum non conveniens, international comity and failure to join PetroEcuador and Republic of Ecuador (as both were not subject to suit in US under the Foreign Sovereign Immunities Act) as indispensable parties. According to the court, presence
of headquarter of defendant in New York was inadequate to shift the balance in favour of US court which otherwise tilt heavily against it and in favour of Ecuador.

**Aguinda v Texaco Inc.**

(Rakoff, District Judge; 12 August 1997)

Plaintiffs applied for reconsideration on the ground that Ecuador had decided to withdraw her objection to US court exercising jurisdiction and sought to intervene in the case. Court denied Ecuador’s motion of intervention and plaintiffs’ motion of reconsideration on the following three grounds –

a) Court found the motion to intervene as untimely since it has come only after dismissal of the complaint by the court. Court refused to permit electoral changes happening in Ecuador to cause change in Ecuador’s stand taken earlier before it in the interest of finality of litigation. Further, court regarded such permission to be prejudicial to the defendant particularly when latter has reached settlement with Ecuador even before commencement of present litigation.

b) Waiver of sovereign immunity must be complete and unambiguous whereas Ecuador’s waiver was subject to various limitations and conditions enabling it to get all the benefits but not owning the potential liabilities.

c) Ecuador and Petroecuador were found to have no legal interest, after reaching a formal settlement with defendant.

**Jota v Texaco, Inc.**

(Newman and Leval, Circuit Judges and Wexler, District Judge; 5 October 1998)

Appeals were filed by Aguinda and Ashanga plaintiffs against dismissal of their complaints. Aguinda plaintiffs appealed against denial of their motion for reconsideration whereas Ecuador appealed from denial of its motion to intervene on the grounds of *forum non conveniens*; international comity and failure to join as an indispensable party.

Court vacated and remanded the appeal. It found the dismissal on the first two grounds (i.e. *forum non conveniens* and international comity) as erroneous in absence

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221 175 F.R.D. 50 (S.D.N.Y. 1997).
222 157 F.3d 153 (2nd Cir. 1998).
of any condition on Texaco to submit to Ecuador jurisdiction. Court upheld the third ground (i.e. failure to join an indispensable party) only to the extent of supporting dismissal so much of complaint as sought to enjoin activities currently under Republic’s control. However, court found Ecuador’s motion to intervene to be late and not including full waiver of sovereign immunity.

After remand, Texaco consented to personal jurisdiction in Ecuador regarding Aguinda plaintiffs and in Peru regarding Jota plaintiffs. It also agreed to waive its defences based on limitations. Ecuador, on its part, informed the Court that it was not willing to waive its sovereign immunity and be treated as a party to the lawsuit under any circumstances.

**Aguinda v Texaco Inc.**\(^{223}\)

(Rakoff, District Judge; 30 May 2001)

Texaco renewed its motion for dismissal on ground of *forum non conveniens* after supplying additional information regarding suit in Ecuador and Peru. Court dismissed action on the ground that Ecuador was adequate alternate forum; private and public factors favoured Ecuador; presence of claim under ATCA did not preclude dismissal; and Ecuadorian law which permitted bringing of similar action in Ecuador did not preclude dismissal. Further, Court held that plaintiffs’ attempt to bring Consortium’s oil extraction activities as violating environmental norms of customary international law under ATCA cannot be successful in absence of any precedents to that effect. Court also concluded that in any case none of the actions taken by Texaco in US had anything to do with environmental damage complained by plaintiffs.

**Acquinda v Texaco, Inc.**\(^{224}\)

(Cardamone, Leval and Sotomayor, Circuit Judges; 16 August 2002)

Plaintiffs appealed contending that District Court has abused its discretion in finding Ecuador as an adequate alternative forum. Court of Appeals dismissed the contention and upheld the decision of the District Court on the following grounds –

a) Ecuadorian Statute (Law 55) was enacted by Ecuador requiring termination of competence of Ecuadorian courts in case a law suit is filed outside the territory

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\(^{224}\) 303 F.3d 470 (2nd Cir. 2002).
of Ecuador. Its retroactivity was doubtful. Court would consider, if this case were to be dismissed under Law 55 and the same were to be upheld by highest court of Ecuador.

b) Absence of tort judgments from the docket of Supreme Court of Ecuador were not too important since many plaintiffs have successfully sued TexPet and PetroEcuador for causes arising out of the facts alleged in the present litigation. Further, other US courts too have found Ecuador to be an adequate forum for tortious claims.

c) Although Ecuadorian courts did not permit class actions, but they permit joining together, in a single lawsuit, of persons aggrieved by similar causes of action.

d) Ecuadorian procedure being less efficient than US procedure does not by itself render Ecuador inadequate as an alternative forum.

e) Both Private interest factors\textsuperscript{225} as well as Public interest factors\textsuperscript{226} favour Ecuadorian forum instead of US.

\textit{Researcher’s Observation}

In the prolonged legal battle, all the courts have decided in favour of Texaco. Courts have found Ecuadorian court as adequate alternate forum despite concluding that US courts may offer more benefits. Further, like India, settlement reached with Texaco has gone against the interests of people of Ecuador in the litigation.

\textsuperscript{225} All plaintiffs and the members of their putative classes lived either in Ecuador or Peru; they sustained their injuries either in Ecuador or Peru; they had their medical and property records either in Ecuador or Peru; records of decisions taken by the consortium were in Ecuador; records of roles of PetroEcuador and the Republic of Ecuador (on which Texaco relied) also existed in Ecuador; ease of access to sources of proof would be more in Ecuador in comparison to US. Plaintiffs failed to establish that parent company Texaco made decisions regarding oil operations in Ecuador or that evidence of any such decisions was located in US; translation difficulties posed by 55,000 putative class members of different indigenous groups speaking various dialects would be too burdensome for a New York court; easier for Ecuadorian court to view polluted areas; Ecuadorian court may join Republic of Ecuador as well as PetroEcuador as necessary parties to the suits which had not been the case in US court in absence whereof such court would be incapable to effectively ordering several aspects of equitable relief. ibid 479.

\textsuperscript{226} Ecuadorian local interest in the matter were very substantial as compared to US; Consortium’s preference to oil exploration over environmental protection was conscious choice of Ecuadorian Government; American dockets were comparatively more congested than that of Ecuador; Ecuadorian lands and people being the focus, Ecuadorian law will be applicable to the matter. ibid.
2.4.1.4 Environmental Damage in Indonesia involving Freeport

Factual Matrix

Plaintiff Tom Beanal (leader of Amungme Tribal Counsel of Lambaga Adat Suku Amungme, LEMASA) was a resident of Tamika, Irian Jaya in Indonesia. He filed suit against two Delaware corporations headquartered in New Orleans, Louisiana (Freeport-McMoRan, Inc. and Freeport-McMoRan Copper Gold, Inc.). Freeport owned an Indonesia-based subsidiary named P.T. Freeport Indonesia (PT-FI) which operated Grasberg Mine (an open pit copper, gold and silver mine situated in the Jayawijaya Mountain covering approximately 26,400 square kilometers in Irian Jaya, Indonesia).

_Beanal v Freeport-McMoRan, INC_227

(Duval, District Judge; 10 April 1997)

Plaintiff alleged that Freeport has committed environmental torts, human rights abuses, and cultural genocide. In specific reference to environmental torts, plaintiff alleged that mining operations and drainage practices of defendants have resulted in environmental destruction causing human costs to indigenous people. Due to mining operations several mountains stood hollowed; rivers rerouted; forests stripped; river system having increased toxic and non-toxic materials and metals; water discharged from mining operations containing tailings have caused pollution, disruption and alteration of natural waterways causing deforestation; starvation and health safety hazards; water (both surface and ground) degradation; acid mine drainage have resulted in sulfide oxidation and leaching; both tailings drainage and acid mine drainage were mismanaged. Defendants have failed to – adhere to zero waste policy; maximize environmental rehabilitation; comply with acid leachate control policy; adequately monitor destruction of Irian Java’s natural resources; unacceptable enclosed waste management system; breach of international duty to protect one of the last great natural rain forests and alpine areas in the world.

Defendants _inter alia_ contended that plaintiff lacked standing; alleged environmental practices do not violate law of nations; claims being barred by the doctrine of act of

state as well as the doctrine of local action; failure to join Republic of Indonesia (being an indispensable party).

Court decided that plaintiff had standing to file action on his own behalf for environmental torts. However, relying on Aguinda and Amlon cases, Court concluded that plaintiff failed to show violation of international law. According to the court, none of the principles relied upon by the plaintiff standing alone (i.e. Polluter Pays Principle, Precautionary Principle and Proximity Principle) satisfied the test of an international tort due to lack of universal consensus in the international community as to their binding status and content. Court held that alleged conduct of Freeport (merely being corporate policies only) even if true, did not constitute tort in violation of law of nations.

**Beanal v Freeport-McMoRan, Inc.**[^228]  
(King, Chief Judge, Smith and Stewart, Circuit Judges; 29 November 1999)

Court rejected plaintiff’s appeal holding that the treaties and agreements (including Rio Declaration) relied upon by the plaintiff lacks universal acceptance by international community. Court observed:

> The sources of international law cited by Beanal and the amici merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.[^229]

Court cautioned that during the course of adjudicating environmental claims under international law, environmental policies of US should not interfere with that of other governments more so when the damage occur within their territories not affecting the neighbouring countries.

**Researcher’s Observation**

This case was unique in the sense that it did not involve class action yet *locus standi* of an individual plaintiff was upheld.

[^228]: 197 F.3d 161 (5th Cir. 1999).
[^229]: ibid 167.
2.4.1.5 Environmental Damage in Peru involving Southern Peru Corporation

Southern Peru Copper Corporation (defendant) was a US corporation headquartered in Arizona having principal place of business in Peru. It was operating copper mining, refining, and smelting operations in and around Ilo since 1960. Asarco Incorporated (a Delaware corporation having principal place of business in Peru) owned majority stake in defendant. Asarco Incorporated was itself a wholly owned subsidiary of Group Mexico, S.A. de C.V. (a Mexican corporation having principal place of business in Mexico City).

Plaintiffs (Eight residents of Ilo, Peru) alleged that defendant’s operations in and around Ilo, Peru, emitted large quantities of sulfur dioxide and very fine particles of heavy metals into local air and water which had caused respiratory illnesses (asthma and lung disease) to them.

Since 1960, Peruvian Government had constituted commissions to conduct annual and semi-annual reviews of impact of defendant’s operations on regional ecology and agriculture which confirmed environmental damage. Consequently, Government had imposed fines, permitted area residents to seek restitution and directed defendant to modify its operations to control pollution and other environmental damage. Defendant was required to meet emission and discharge norms fixed by Peru’s Ministry of Energy and Mines (MEM) under Peruvian environmental laws enacted in 1993.

_Flores v Southern Peru Copper Corp._230

(Haight, Senior District Judge; 16 July 2002)

Plaintiffs filed action before US district court for the Southern District of New York claiming that egregious pollution caused by defendant violated their rights of life, health and sustainable development. On the other hand, defendants contended that the action should be dismissed since the plaintiffs had failed to state claim under international law and alternatively on grounds of _forum non conveniens_ and doctrine of comity of nations.

Court rejected the attempt to disguise environmental claim as human rights claim through the following observations:

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Plaintiffs attempt to distinguish the present case from those discussed above by characterizing their claims as based on human rights law, rather than environmental law, and by pointing to the specific rights they invoke, i.e. the right to life, right to health, and right to sustainable development. But the labels plaintiffs affix to their claims cannot be determinative. Severe environmental pollution necessarily has an impact on human life, and the cases discussed above all involved allegations of environmental pollution that had injured people or that risked injuring people. Furthermore, the international law sources considered in the above cases are relevant to plaintiff’s claims in this case.\textsuperscript{231}

Court reviewed judicial decisions and voluminous international documents submitted by the plaintiffs to conclude that plaintiffs’ failure to show any general consensus that environmental pollution harming human life, health and sustainable development within nation’s borders, violated any well-established rules of customary international law. In this regard, court observed:

While nations may generally agree that human life, health, and sustainable development are valuable and should be respected, and while there may be growing international concern over the impact of environmental pollution on humanity, plaintiffs have not demonstrated any general consensus among nations that a high level of pollution, causing harm to humans, is universally unacceptable.\textsuperscript{232}

According to the court, although Art. 3 and Art. 25 (1) of the Universal Declaration of Human Rights; Article 12 of the International Covenant on Economic, Social, and Cultural Rights and Art. 1 and 11 of World Charter for Nature are drafted in language of rights, yet they fail to identify any prohibited conduct. Court regarded plaintiffs’ reliance on opinion of individual scholars falling short of any existing universal norm. Further, human rights listed in Restatement (Third) of Foreign Relations Law (1987) were held by the court to be inclusive and not exhaustive. So, the ones not listed may have achieved status of customary law or may achieve that status in future. However, plaintiffs failed to show the same.

\textsuperscript{231} ibid 519.
\textsuperscript{232} ibid.
Chapter 2: Evolution of Right to Clean & Healthy Environment & Transnational Corporations: International Legal Framework

Regarding the doctrine of *forum non conveniens*, court held that both private interest factors\(^{233}\) and public interest factors\(^{234}\) tilted heavily in favour of Peruvian court as appropriate forum. Further, judicial reforms undertaken after Fujimori regime (which corrupted judicial system) make Peruvian courts adequate forum.

*Flores v Southern Peru Copper Corp.*\(^{235}\)

(Kearse, Jacobs and Cabranes, Circuit Judges; 29 August 2003)

Plaintiffs appealed and contended that District Court – failed to recognize customary international law rights to life and health and they are sufficiently determinate to constitute well-established, universally recognized norms of international law; refused to give sufficient probative value to various professional affidavits, conventions, and declarations of multinational organizations submitted by them; accepted Peru as adequate alternative forum.

Court decided to review the decision of District Court afresh. However, the court added a very important rider to its judgment by observing that only Congress or Supreme Court can resolve the complex and controversial issue of meaning and scope of ATCA (although neither had done it so far). After making detailed analysis of the meaning of customary international law court affirmed the decision of district court on all the counts for the following reasons –

a) **Right to life and right to health are insufficiently definite to constitute rules of customary international law.** However, Art. 25 of UDHR, Art. 12 of ICESCR and Principle 1 of Rio Declaration (relied upon by the plaintiffs) are boundless and indeterminate expressing virtuous goals to facilitate agreements of states who otherwise disagree on methodology of achieving them.

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\(^{233}\) Action bought by Peruvian residents, for damages caused in Peru, by operations undertaken in Peru; principal fact witnesses including plaintiffs and defendants operating personnel were in Peru; many witnesses including plaintiffs spoke only Spanish; most of the pertinent documents were in Peru that too in Spanish; translation and testimony of witnesses would lead to protracted trial; premises were in Peru; contingent fee arrangements were available under Peruvian law. ibid 541.

\(^{234}\) High levels of congestion in Southern District Court involving many challenging cases; jurors were from community which has no relation to litigation; Peruvian laws, regulations and decrees relating to mining and environmental protection might have to be applied by trial court and jury; translational requirements of testimony and documents. ibid 543.

\(^{235}\) 414 F.3d 233 (2nd Cir. 2003).
b) Treaties, conventions and covenants relied upon by plaintiffs failed to show existence of customary international law against international pollution for the following reasons –

- Although Non-self-executing ICCPR is ratified by US, ‘right to life’ lacks required definiteness to be a rule of customary international law. Hence it cannot be the basis for plaintiffs claim for international pollution.
- USA was yet to ratify American Convention on Human Rights (ACHR). In any case, it hardly specifically referred to environmental pollution mentioning acceptable limits.
- Art. 12 (1) and (2) (b) of unratified ICESCR were relevant to environmental pollution but fails to specify acceptable levels of pollution and thus are vague and aspirational in that sense. Even if sufficient to create rule of customary international law, they did not govern conduct of private actor but applies only to State parties.
- US was yet to ratify UN Convention on the Rights of Child. Moreover, its Art. 24 (1) and (2) (c) were extremely vague and clearly aspirational not specifying any parameters deferring them to States’ own practices. They did not govern conduct of private players.

c) Plaintiffs’ reliance on various resolutions of General Assembly were also of no avail since in absence of proof of uniform state practice such resolutions were merely advisory at best.

d) Plaintiffs’ relied on other multinational declarations namely – American Declaration of Rights and Duties of Man and Principle 1 of Rio Declaration. According to the court, while the former being aspirational not creating any enforceable obligations, the latter was broad and aspirational whose language did not indicate intention of the State parties to be legally bound by it. So, both the declarations failed to evidence customary international law.

e) Plaintiffs’ reliance on decisions of ICJ and European Court of Human Rights were also of no avail since none of them were empowered to create binding norms of customary international law. While decisions of the former u/A 59 of ICJ statute were binding only as between parties to the dispute and that too in respect of that dispute, the decisions of the latter (u/A 32 of European Convention) apply principles enshrined in the European Convention for the
Protection of Human Rights and Fundamental Freedoms which is applicable only to its regional parties.

f) Court relied on Supreme Court decision in *Paquete Habana*\(^\text{236}\) and Art 38 of ICJ statute to conclude that scholarly works are only subsidiary or secondary sources of customary international law. Therefore, it rejected plaintiffs’ reliance on several affidavits of international law scholars stating that ‘In sum, although scholars may provide accurate descriptions of the actual customs and practices and legal obligations of States, only the courts may determine whether these customs and practices give rise to a rule of customary international law’.\(^\text{237}\)

g) Court concluded that other instruments relied upon by the plaintiffs neither gave rise to nor evidenced concrete international legal obligations, either cumulatively with above evidence or individually.

*Researcher’s Observation*

Courts have consistently taken the position that under ATCA, Rio principles do not have legal enforceability in Courts due to lack of laying any specific standards therein. Human rights certainly enjoy higher degree of global consensus and acceptability at the international level in comparison to environmental rights. Therefore, victims of environmental damage preferred to couch their grievance in the language of human rights. However, even this strategy did not prove successful since court expressly rejected such an attempt which is definitely a setback for enforceability of right to clean and healthy environment.

2.4.1.6 Environmental Damage in the island of Bougainville, Papua New Guinea involving Rio Tinto

Island of Bougainville is situated in South Pacific just off the main island of Papua New Guinea (PNG) and is rich in natural resources, including minerals like copper and gold. Its rivers particularly Jaba river has been the main source of food. Rio Tinto Plc. (a British corporation) and Rio Tinto Ltd. (an Australian corporation) together constituted Rio Tinto group. It built a mine in village of Panguna which involved

\(^{236}\) 175 U.S. 677 (1899).

\(^{237}\) ibid 265.
displacing villages and destroying massive portions of rainforest which needed assistance of government of PNG and so making government share 19.1% of profits from its operations. It was part of an international mining group headquartered in London and operating over sixty mines and processing plants in forty countries.

*Sarei v Rio Tinto Plc.*238 (Rio Tinto I)

(Morrow, District Judge; 9 July 2002)

Alexis Holyweek Sarei (a California resident who lived in Bougainville during 1973 to 1987) and twenty one individuals (residing in Bougainville and other places in PNG) filed putative class actions against Rio Tinto plc and Rio Tinto Ltd. They inter alia alleged that –

a) Mine produced more than one billion tons of waste which defendant deposited in Kawerong-Jaba river system turning river valleys into wasteland, destroying entire forests as well as three thousand hectares of land.

b) Most of tailings so deposited ended ultimately in Empress Augusta Bay destroying the fish that used to be major food source for Bougainvillians.

c) Dust clouds from the mining operations combined with emissions from the copper concentrator creating poisonous mix which polluted air and thereby caused – rise in upper respiratory infections, asthma and TB; chronic middle ear infections resulting in impaired hearing; obesity to women as their traditional diet got substituted with European tinned and packaged food.

They inter alia invoked rights to life, health and security of persons; violations of international environmental rights. They sought court’s intervention on grounds of negligence, public nuisance, private nuisance, strict liability, equitable relief and medical monitoring.

Defendants sought dismissal on grounds that lack of subject matter jurisdiction for failing to make cognizable claim under ATCA. Alternatively, they sought dismissal on doctrine of *forum non conveniens* (PNG or Australia being a more appropriate forum); issues raised being non-justiciable under doctrine of Act of State or doctrine of Political Question.

238 221 F. Supp.2d 1116 (C.D. Cal. 2002).
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Court held –

a) Since the plaintiffs failed to specifically state the parameters of rights to life and health or the kind of conduct which would violate them (despite plaintiffs’ reliance on ICCPR, UDHR, ADRDM, ACHR, ACHPR, ECPHRFF), such rights are insufficiently specific to support a claim of environmental harm under ATCA. Court rejected plaintiffs’ reliance on Rio and Stockholm Declaration for not showing that environmental harm caused by the defendants went beyond the Bougainville Island. However, court regarded plaintiffs’ claim on the grounds of sustainable development and UNCLOS as valid since US had signed (though not ratified) UNCLOS and 166 countries had ratified it which reflected customary international law.

b) Regarding environmental claims, court regarded exercise of jurisdiction by US court as unreasonable for various reasons – occurrence of alleged conduct exclusively in PNG; all plaintiffs except Sarei being residents of PNG; defendants, though not residents of PNG, have conducted significant business therein for many years. PNG had the right to regulate exploitation of natural resources without outside interference as its sovereign right. Accordingly, PNG was an adequate forum.

c) Both parties agreed that judicial system of PNG is independent and unbiased, PNG permitted litigation of subject matter as well as Contingency fee arrangements. According to the court, despite unavailability of class actions and contingency fee counsel and constraints of discovery, PNG continued to be adequate forum for the purpose of doctrine. Nevertheless, court rejected defendants’ reliance on doctrine of forum non conveniens on the ground that private interest factors favoured US courts and public interest factors were neutral. Further court found Australia to be not an adequate alternative forum for this purpose.

239 Plaintiffs’ and other Bougainvilleans were engaged in civil war with PNG government for the past ten year and the government was colluding with defendants; plaintiff’s ability to identify lawyers on contingency fee basis was unclear; difficulty in compelling production of critical witnesses and document. ibid 1174.

240 Public interest factors do not favour PNG courts over US courts since records indicated delay of several years in disposal of cases of similar nature in PNG; for some of plaintiffs’ claims PNG law would be applied by courts but many issues brought under ATCA required interpretation of international law and not that of PNG. ibid 1175.
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d) Court sought and accepted the ‘Statement of Interest’ filed by the Department of State (respecting principle of separation of powers) which opined that continuation of adjudication of the present action “would risk a potentially serious adverse impact on [Bougainville] peace process and hence on the conduct of (United States) foreign relations”. Nevertheless, it did not specifically state if doctrine of state or doctrine of political question or doctrine of international comity was applicable.

e) Since defendants’ undertook mining activity in pursuance of an agreement which was entered into by PNG government with their subsidiary BCL and codified as Copper Act, PNG’s conduct was public and governmental in nature rather than private and commercial. Also, Rio Tinto was not a state actor but a private player.

f) Court refrained from ruling on the merits of the allegations concerning doctrine of political question since doing so will essentially involve judging both pre-war and wartime conduct of PNG government which according to the ‘Statement of Interest’ filed by Department of State may have serious implications on the peace process.

Sarei v Rio Tinto Plc 242 (Rio Tinto II)

(Fisher and Bybee, Circuit Judges and Mahan, District Judge; 12 April 2007)

Plaintiffs appealed. Rio Tinto cross-appealed contending that ATCA requires exhaustion of local remedies. On the issue of exhaustion of local remedies, court gave split verdict. Majority affirmed that ATCA did not require exhaustion of local remedies. It reversed the dismissal by the District Court of all claims as non-justiciable political question. Further, it vacated dismissal of UNCLOS claims on the ground of doctrine of act of state and doctrine of international comity. On the other hand, minority affirmed District Court’s dismissal mandating exhaustion of local remedies under ATCA.

In Sarei v Rio Tinto Plc 243 (Rio Tinto III) court remanded the case back to District Court for the limited purpose of determining whether to impose an exhaustion requirement on plaintiffs. Court did so because the District Court did not analyse...

241 ibid 1181.
242 487 F.3d 1193 (9th Cir. 2007).
243 550 F.3d 822 (9th Cir. 2008).
exhaustion as a discretionary matter. On remand in *Sarei v Rio Tinto Plc*²⁴⁴ (Rio Tinto IV), District Court regarded imposition of prudential exhaustion requirements as necessary *inter alia* on plaintiff’s claims regarding right to health; right to life and international environmental violations but not on their other claims. Accordingly, Court gave the option to the plaintiffs to either withdraw or submit *inter alia* claims relating to right to health; right to life and international environmental violations. Plaintiffs decided to withdraw the same (while reserving the right to file an amended complaint in case the matter is remanded). Since plaintiffs decided to withdraw claims relating to right to health; right to life and international environmental violations, it deprived the *en banc* court of an opportunity to decide on the merits thereof.²⁴⁵

*Researcher’s Observation*

This case turned out to be the only one concerning environmental harm under ATCA wherein doctrine of *forum non conveniens* although invoked by the defendants was found in the favour of plaintiffs. An interesting aspect of this case is that both the parties considered that judicial system of PNG was independent and unbiased, yet plaintiffs opted for US courts for adequate redressal of their grievances. Due to plaintiffs withdrawal of their claims relating to right to health, right to life and international environmental violations, such claims could not be decided on merits stifling the development of jurisprudence thereon.

*Researcher’s General Observations Regarding Environmental Claims against TNCs under ATCA*

The long drawn litigations as discussed above, when looked as a whole show following characteristics –

i) Bhopal gas Leak Disaster case should be distinguished from other environmental claims litigated under ATCA for many reasons –

a) This was not a case of continuing environmental damage caused by normal operations of the industrial activity. It was an accident resulting in gas leak for few minutes causing catastrophic human suffering to their life and property.

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²⁴⁵ *Sarei v Rio Tinto, Plc* 671 F.3d 736 (9th Cir. 2011).
Although plant stopped operations shortly after the leak, people in surrounding areas continue to suffer its brunt. Toxic waste continues to lie there. There is no evidentiary problem in the case since everything is so well acknowledged and reported.

b) Unlike other countries as shown above, India had a track record of a vibrant democracy with independent judiciary which has shown its independence on numerous occasions through its judgments barring the exception of emergency phase.

c) Unlike the approach of other sovereign countries involved (as shown above), Indian Government enacted a law taking upon itself to litigate all the claims even in foreign courts.

ii) Inapplicability of Rio principles on private actors like TNCs has also weighed heavily in the mind of the court.

iii) Severity of Environmental damage, by its very nature, is likely to have pronounced local effect – worst casualty will be suffered by human beings, animals, plants, soil, rivers, lakes etc. which live in and around surrounding area.

iv) Environmental damage is not alleged as part of human rights in most of the cases, 
Flores case being an exception. The two are separately alleged.246

v) Host state is always regarded as indispensable party in such actions thereby weakening the claim against the concerned TNC.

2.4.2 Corporations under ATCA: Recent Shift in Judicial Approach

Certain judicial decisions relating to ATCA have raised the issue of corporate liability. General understanding prior to Sosa case was that corporations could be liable under ATCA.247 Debate regarding corporate liability under ATCA was ignited by the following observation of Justice Souter in Sosa case (although it did not involve the issue of corporate liability):

246 ibid.
A related consideration is whether international law extends the scope of liability for a violation of given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791–795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with Kadic v. Karadžić, 70 F.3d 232, 239–241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).248

The problem of corporate liability was further complicated by the confusion created by following three judgments. In Kiobel v Royal Dutch Petroleum249, Ogoni community members from Nigeria sued Shell (incorporated in Netherlands), Royal Dutch Petroleum (incorporated in England) as well as their joint subsidiary in Nigeria for violations of their human rights in Nigeria. Court held that corporations cannot be held liable under ATCA for their human rights violations. Whereas in Flomo v Firestone Natural Rubber Co.250 and John Doe VIII v Exxon Mobil Corporation251 courts held that corporations can be held liable under ATCA.

In appeal, US Supreme Court in Kiobel v Royal Dutch Petroleum Co.252 unanimously (although by different reasoning) upheld the territoriality principle regarding scope of ATCA. Majority opinion applied presumption against extraterritoriality of ATCA.253 Majority relied on the ground that neither the text nor its historical background indicates that Congress intended it to have extraterritorial reach. According to majority, nothing indicated that ATCA was enacted ‘to make the United States a uniquely hospitable forum for the enforcement of international norms’.254 Interestingly, US Supreme Court took note of the objections raised by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom regarding extraterritoriality of ATS. Court also cautioned that acceptance of petitioners arguments may lead other nations to take US citizens into their courts for

248 Sosa (n 167) 2766.
249 621 F.3d 111 (2d Cir. 2010).
250 643 F.3d 1013 (7th Cir. 2011).
251 654 F.3d 11 (D.C. Cir. 2011).
253 ibid 1664. (Chief Justice Roberts delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined).
254 ibid 1668.
alleged violations of law of nations in the United States, or anywhere in the world. Exhibiting judicial restraint, court opined that presumption against extraterritoriality ‘guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches’. Applying the presumption against extraterritoriality, court barred the claim concluding that all the relevant conduct has taken place outside the US. Further, they went to the extent of observing that even if the claims ‘touch and concern’ the US territory, it must do so with sufficient force to displace the presumption. However, minority opinion instead of applying the presumption against extraterritoriality of ATCA, found the jurisdiction under ATCA to exist when distinct American interests were at issue, which was not the case at hand. They concluded such jurisdiction not existing, since defendant corporations were foreign (having connection with US in that their shares were traded on NYSE, and their office in New York City was owned by their separate but affiliated company to explain business to potential investors); alleged conduct had occurred outside US; they have not directly indulged but had helped non-American nationals to do so. They regarded such American presence of defendants as minimal and indirect for becoming sole basis for legal action.

Supreme Court judgment is seen by human rights scholars and activists as a blow to the cause of victims. It is interesting to note that this is the same Supreme Court which two years back held and that too with unanimity that corporations are entitled to enjoy fundamental rights particularly freedom of speech and expression. Thus, reading the two judgments together lead to the conclusion that in US, corporations are bearer of fundamental rights under US Constitution but not of human rights obligations. Further, they are exempt from human rights challenges under ATCA also.

Environmental damage, caused by business operations of TNCs has hardly been and after the recent Supreme Court decision, will not be adequately redressed under ATCA. Despite its attractiveness, ATCA framework has turned out to be a poor

\[255\] ibid 1669.
\[256\] ibid.
substitute for properly constituted international environmental regime. Further, non-binding nature of the conventions and declarations relating to the right to clean and healthy environment has also proved to be a major obstacle.

ATCA as a classical example that extraterritorial laws have not been much effective in redressing the grievances of victims of violations of right to clean and healthy environment by TNCs for reason elaborated above. However, host states have sought to protect the right to clean and healthy environment through taking measures which have been challenged by the TNCs as infringing their right under international investment law as is elaborated hereinafter.

2.5 Right to Clean and Healthy Environment vis-à-vis TNCs under International Investment Law

By the end of the last century, foreign investment came to be regarded by countries (particularly developing and underdeveloped) around the world as a sine qua non for their development. Among the top ten FDI recipients in the world, five are developing economies.260 This belief gained strength due to various factors like failure of New International Economic Order (NIEO); disintegration of Union of Soviet Socialist Republics (USSR); and establishment of WTO. TNCs have emerged as a major source of foreign investment flows for such nations.261 It has increased latter’s dependence on the former in their developmental trajectory. In order to attract more foreign capital, such nations entered into ‘race to the bottom’ and opened their economy for foreign players unmindful of the consequences on right to clean and healthy environment domestically.262 In this backdrop, right to clean and healthy environment has faced stiffest challenge in recent past in the field of law relating to foreign investment. This is so despite the emphasis given to incorporation of environmental considerations in foreign investment through Agenda 21. At the international level, regulatory framework for protecting foreign investment has consolidated itself in the form of multilateral and bilateral mechanisms and has been

262 India, China, Vietnam, Bolivia, Colombia, Ecuador, and Peru.
particularly successful in recognizing TNCs as rights holders and thereby protecting their rights. Due to relative weakness of multilateral regime, home states have preferred negotiating BITs to secure interests of their TNCs. States have entered into BITs primarily for two reasons. Firstly, BITs facilitate flow of foreign capital into host States through enhancing investor confidence. Secondly, foreign investment contributes to the economic development of host states. However, both the assumptions are contested in contemporary times. A surge was witnessed in 1990s in many BITs being signed between nations which have been skewed in favour of home states since host state vie for foreign investment amongst themselves. Therefore, 1990s is regarded as a ‘rosy decade’ for TNCs. The real success of such regime is rooted in the adoption of international investment arbitration as a mechanism for dispute settlement. It tilts the scale significantly in favour of TNCs and against the host states. In all the cases discussed below, TNCs involved have claimed victimization due to measures undertaken by the sovereign states in order to strengthen the right to clean and healthy environment and sought redressal thereof. Many measures aimed at protecting environment have been regarded as expropriation of property of TNCs by various arbitral tribunals and have proved to be major setback for right to clean and healthy environment. Noteworthy arbitral awards are discussed hereinafter -

i. **Metalclad Corporation v United Mexican States** – Metalclad Corporation was incorporated in Delaware, USA and had a wholly owned subsidiary named Eco-Metalclad Corporation, incorporated in Utah, USA. The latter in turn owned 100% shares in a Mexican corporation named Ecosistemas Nacionales, S.A. de C.V. (ECONSA). ECONSA acquired another Mexican company Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. (COTERIN) in 1993 in order to acquire, develop and operate its hazardous waste transfer station and landfill in the valley of La Pedrera, located in Guadalcazar which in turn was located in the Mexican State of San Luis Potosi (SLP). Metalclad alleged that Mexico through its local governments of

SLP and Guadalcazar, interfered and precluded its development and operation of a hazardous waste landfill in violation *inter alia* of Art. 1110 of Chapter 11 of the investment provisions of the North American Free Trade Agreement (NAFTA). During the ongoing dispute, Governor of SLP issued an Ecological Decree in 1997 declaring a Natural Area (including the area of landfill) for the protection of rare cactus. Tribunal did not feel the need to go into the motive or intent behind the Ecological Decree but nevertheless, regarded its implementation as tantamount to expropriation. Tribunal also found the project to be in accord with Art. 1114 of NAFTA (as clearly indicated by the permits issued thereto) which permitted a ‘party to adopt, maintain or enforce any measure it consider appropriate to ensure that investment activity is undertaken in a manner sensitive to environmental concerns’. 266 Accordingly, the Tribunal directed Mexico to pay US $ 16,685,000 as compensation to Metalclad Corporation within a period of 45 days of the award, failing which an interest at the rate of 6% compounded monthly will be paid on unpaid award or any unpaid part thereof. 267

**ii. S.D. Myers, Inc. v Government of Canada**268 – S. D. Myers, Inc. (SDMI) was a privately held corporation incorporated in Ohio, USA and engaged in the business of remedying hazardous waste namely polychlorinated biphenyls (PCB). Canada had inventory of waste contaminated with PCB. Myers wanted to do business of transporting it into USA, recycle and dispose the same in a safe manner. It had an affiliate by the name Myers Canada incorporated in Canada in 1993. The former provided the latter with capital, know-how and managerial direction. It got regulatory approvals of US government in 1995 for importing waste into its own country. Canada responded by imposing a ban on exporting PCB waste to USA. Canadian government defended the ban on the basis of environmental concerns due to exports of PCB wastes by firms like S.D. Meyers. However, after some time, Canada lifted the ban taking an exactly reverse position that such lifting will be both economically and environmentally beneficial to Canada if such waste is removed from Canada

266 *ibid* 27.
267 *ibid* 35.
by firms like S.D. Meyers. S.D. Meyers challenged the ban for violating Chapter 11 of the investment provisions of the North American Free Trade Agreement (NAFTA). Tribunal concluded on the basis of evidence that there was no legitimate reason for the Canadian government for introducing the ban at the first place. The real intention of Canadian government behind the environmental measure was a protectionist one to save Canadian PCB disposal industry from competition against US firms.

iii. *Compañía Del Desarrollo De Santa Elena, S.A. v The Republic of Costa Rica* - Compañía Del Desarrollo De Santa Elena, S.A. (CDSE) was incorporated in Costa Rica in 1970 and US citizens were its majority shareholders. Main objective behind its incorporation was purchasing Santa Elena (located in Guanacaste Province of Costa Rica) in order to develop its large portions as a tourist resort. Accordingly, after purchasing Santa Elena for roughly U.S. $ 3,95,000, it started developing the same. Costa Rica issued an expropriation decree for Santa Elena in 1978 paying U.S. $1,900,000 as compensation to CDSE. CDSE claimed instead U.S. $ 40,337,750. The expropriation decree was aimed at adding substantial area to the then existing Santa Rosa National Park in order to maintain stable population of large feline species. Protracted legal battle followed thereafter for next 21 years leading to commencement of arbitral proceedings. Costa Rica was compelled to consent to such proceedings due to delay of US $175,000,000 Inter-American Development Bank loan under Section 2378 (a) of Helms Amendment 1994. Tribunal acknowledged that even if the objective of expropriation is as benevolent as environmental protection and expropriatory environmental measure was beneficial to society as a whole, compensation must be paid. Accordingly tribunal decided that the date of valuation of the property is the date on which the taking of the property occurred. Therefore, subsequent environmental measure of the Government was irrelevant to valuation.

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269 ibid 1428.
270 ibid.
272 ibid 192.
273 ibid 196.
274 ibid 197.
Tribunal directed Costa Rica to pay US $16,00,000 by way of compensation for expropriation of property within 21 days failing which simple interest will accrue at the rate of 6% p.a.\textsuperscript{275}

It is noteworthy that the above-mentioned leading arbitral awards were decided against the State and in favour of TNCs. The otherwise laudable object of environmental protection was rejected as an inadequate justification. These arbitral awards are reflective of the neo-liberal thought dominating the world during that period of time.\textsuperscript{276} Investment arbitration enjoy weaker international mandate in comparison to environmental instruments since latter represent a far wider consensus of the international community.\textsuperscript{277} However, obligations under investment law are more precise and therefore stronger than those under environmental law. It is interesting to note that the leading arbitral awards discussed above are given in post-Rio phase when sustainable development has become the unanimously accepted language of development around the globe.\textsuperscript{278} Conclusions reached by the arbitral tribunals seem oblivious of such a paradigm shift. They seem more to compartmentalise environmental protection and investment protection and segregate the two, defying the general trend as reflected in the adoption of philosophy of sustainable development in all the fields of law and policy at the international level. Such obliviousness seems purposeful.\textsuperscript{279} It leads to unwarranted insulation of investment law from other competing tendencies like environmental law.\textsuperscript{280} It aptly suits the business interests of TNCs.

However, traces of change are beginning to appear as is indicated by the following arbitral awards –

\textit{a) Methanex Corporation v United States of America}\textsuperscript{281} - Methanex Corporation was incorporated in Canada. It was engaged in the business of manufacturing, transporting and marketing methanol (being its largest producer in the world)

\textsuperscript{275} ibid 203.
\textsuperscript{277} ibid 333.
\textsuperscript{278} Part of Millenium Development Goals (MDGs) and the recently developed Sustainable Development Goals (SDGs).
\textsuperscript{279} M Sornarajah \textit{Resistance and Change} (n 276) 334.
\textsuperscript{280} ibid 336.
and was having operations in Canada, USA, New Zealand, Chile and Trinidad and Tobago. Methanol was feedstock for ‘Methyl Tertiary-Butyl Ether’ (MTBE). It never produced or sold MTBE. State of California banned the sale and use of MTBE for posing significant risks to environment. According to Methanex, MTBE posed no risk to human health or environment, instead it was immensely beneficial for environment. Methanex claimed compensation (for violating inter alia of Art. 1110 of NAFTA) nearly US$ 970 million (including interest and costs) for losses caused due to the California ban. Tribunal concluded that the California ban was made for public purpose, was non-discriminatory and done through due process, and was lawful regulation rather than expropriation according to international law.282

b) **Chemtura Corporation v Government of Canada**283 - Chemtura Corporation was incorporated in Delaware, US. It was one of the four registrants of lindane based pesticides in Canada which were used particularly on canola. Chemtura alleged that Canada’s cancellation of lindane registrations (on environmental and health considerations) has inter alia violated Art. 1110 of NAFTA and therefore, claimed damages of US$ 78,593,520. Canada argued that actions of its Pest Management Regulatory Agency (PMRA) were a valid exercise of police powers. Accepting Canada’s contention, tribunal concluded that Canada’s actions did not amount to expropriation since they were in response to rising awareness about the dangers presented by lindane for human health and the environment, were non-discriminatory and were well within its mandate.284 Therefore, Canada had not breached Article 1110 of NAFTA.

Both the above arbitral awards symbolise a promising change. Besides, there are other arbitral awards wherein environmental factors have been considered.285 It shows increasing awareness about their relevance but the degree of relevance attached thereto will vary from one tribunal to another depending upon the facts and circumstance of each case.286 For instance, in Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic, tribunal made

282 ibid 7.
284 ibid 78.
285 M Sornarajah, Resistance and Change (n 276) 338.
286 ibid.
no attempt to reconcile the environmental interests with foreign investment. Arbitrators neither have the expertise not training in adjudication of complicated environmental issues involved in global investments by TNCs.

However, a distinct shift in approach is visible at the international level. Newly emerging economies like India, South Africa and Brazil have created their own space in the international foreign investment climate. They have become exporters of capital with TNCs from developing Asia becoming world’s largest investing group. On the other hand, erstwhile capital exporting nations (like USA, Canada) have become leading importers of capital and have found many arbitration cases filed against them. Therefore, to address this new reality, they are themselves renegotiating their BITs so as to adequately protect their interests. Rethinking is also triggered due to global economic crisis of 2008. While earlier investment treaties did not contain any express provision for environmental protection, the trend seems to be changing and new investment treaties now include such provisions e.g. Model Investment Treaties of US as well as Canada. India is no exception to this trend. It will still be better if such inclusion is also made indicative of the priority in favour of environment in case of conflict. This development will create possibility of more and more arbitral tribunals engaging with the task of interpreting environmental considerations in their decision making. There seems to be a possibility of a general doctrine emerging in the near future on these lines. It is also observed that in many cases, TNCs themselves have decided against pursuing arbitration proceedings in the face of stern opposition from the people. This approach seems to be more in consonance with their CSR policy under which they are required to take into consideration the sensitivities of neighbouring communities.

It is ironical that the States and TNCs which have been at the forefront of developing the binding legal regime in the form of international investment law for protecting rights of foreign investors, have created the most serious roadblocks in the development of a binding legal regime for accountability of TNCs. It is primarily

287 ibid 339.
289 M Sornarajah, Resistance and Change (n 276) 348.
290 ibid 336.
291 ibid 339.
292 ibid 332.
293 ibid 337.
because of their objections at various international fora that such a binding regime continue to elude the world and what is left is an international framework comprising various essentially voluntary measures developed by multiple agencies at different points of time.

2.6 Chapter Conclusion

TNCs have succeeding in avoiding liability under international law which has been largely state centric, though non-state actors have begun to acquire standing under international law in a limited sense. This right also did not find explicit mention in the human rights regime established after the Second World War. It was interpreted as implicit in certain other human rights like right to life, right to health, right to privacy, right to indigenous communities for protection of their culture and natural resources and enforced accordingly. However, Stockholm Conference brought this right to the forefront of the agenda of international community. Report of the Brundtland Commission gave the most widely accepted definition of ‘sustainable development’ and helped develop understanding about various aspects of right to clean and healthy environment. Rio Summit further developed various rights which constitute integral component of right to clean and healthy environment. Johannesburg conference did not add to the substantive content of the right to clean and healthy environment but reviewed the progress since Rio conference. In 2015, UN replaced MDGs (adopted in 2000 of which ‘environmental sustainability’ comprised seventh goal) by SDGs which have come into force from 1 January 2016. UN has played vital role in developing the right to clean and healthy environment and making it integral part of the international agenda.

ATCA (as a classical example of extraterritorial laws) has been invoked by victims for redressal of violation of their right to clean and healthy environment by TNCs namely - Bhopal Gas Leak disaster involving Union Carbide Corporation; Environmental damage involving Amlon Metals Ltd.; Environmental Damage in Oriente Region involving Texaco Inc.; Environmental damage in Indonesia involving Freeport; Environmental damage in Peru involving Southern Peru Corporation; and Environmental damage in the island of Bougainville, Papua New Guinea involving Rio Tinto. However, in none of them they could achieve any success. Main grounds
of rejection of their claims include doctrines like - *forum non conveniens*, act of state, political question, international comity.

BITs too have acquired heightened significance in having adverse impacts on right to clean and healthy environment. Measures taken by the States for protection of right to clean and healthy environment have been rejected by arbitral awards as violating principles of international investment law. But there are few exceptions to this general trend. Few recent arbitral awards have shown relatively better appreciation of right to clean and healthy environment even in the context of international investment law. However, erstwhile host states particularly from Asia have emerged as home states whose TNCs have also entered the area of foreign capital and transfer of technology. Further, there are arbitral awards made against the erstwhile capital exporting nations who have become leading importers of foreign capital. All the factors have created the need for the renegotiation of their existing BITs. India too has come out with its own Modal BIT.