6 Laws
PH

Constanze Stropp

STRCON002

Prof. Jan Glazewski

09 March 1999

LL.M Environmental Law

Globalisation and its effect on the environment: Legal aspects of environmental harm caused by multinational corporations

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

Table of contents

Introduction.....page 1

Chapter One
A challenge for the law: the multinational enterprise.....page 2

1.) The legal structure of the multinational enterprise.....page 2

a) Multinational groups of holding and subsidiary companies.....page 2

b) The European company.....page 5

2.) An emerging international framework for multinational enterprises?.....page 7

a) United Nations Draft Code of Conduct on Transnational Corporations.....page 7

b) The OECD Guidelines for Multinational Enterprises.....page 8

c) The United Nations Guidelines and Standards.....page 9

d) Technology Transfer: UNCTAD's Draft Code of Conduct.....page 10

e) The European Economic Community- an international regulatory model?.....page 10

3.) The legal effect of the achieved approach of international codes of conduct.....page 11

Chapter Two
Questions of civil liability of multinational enterprises.....page 13

1.) Problems of Jurisdiction.....page 13

a) The power of a court to hear the case.....page 13

b) Declining jurisdiction or stays of proceedings.....page 14

c) Limitation of jurisdiction.....page 16

2.) The law governing foreign corporations and the parent company's civil liability under national law.....page 16

a) The factual background of the Bhopal Case.....page 17

b) The parent company's liability in the Bhopal Case.....page 18

c) Lifting the veil of multinational enterprises.....page 21

Chapter Three
Questions of criminal liability- prosecuting companies for environmental crime.....page 24

1.) Environmental crime as codified in several acts in South Africa.....page 24

2.) Theory of individual liability.....page 24

a) Direct actors.....page 25

b) Indirect actors.....page 25

3.) Theories of corporate liability.....page 25

4.) Criminal liability illustrated on cases of oil spill.....page 26

a) Great Britain.....page 26

b) South Africa.....page 26

c) The Exxon Valdez Oil Spill.....page 27

Chapter Four
Questions of state responsibility and liability.....page 29

1.) Two forms of state accountability:
state responsibility and international liability.....page 29

a) Responsibility of states.....page 30

b) International liability of states.....page 31

2.) Responsibility of importing states.....page 31

a) The multinational enterprise as a private actor.....page 32

b) Legal sources of importer state responsibility for environmental harm.....page 33

(i) The international law of the environment.....page 34

(ii) The law of international trade.....page 37

(iii) Other sources of responsibility
for the importing state.....page 39

3.) Responsibility of exporting states.....page 39

a) Territorial control as a basis of customary
state responsibility.....page 39

(i) The issue of extraterritoriality.....page 39

(ii) Effective control as the basis of state responsibility.....page 41

(iii) Intervention in the sovereignty
of the importing state.....page 43

b) The nationality of the multinational
enterprise as a basis of customary state responsibility.....page 43

Chapter Five
International liability of states for environmental harm.....page 45

1.) The international law commission's study.....page 45

2.) International liability of the host state for environmental harm.....page 46

3.) State liability and its relation to the principle
of strict liability.....page 47

4.) Liability of the home state for accidents
in the host state.....page 48

Chapter Six
Emerging norms of international environmental law.....page 50

1.) Technology transfer by multinational enterprises
and environmental impact assessment.....page 50

a) International standards for EIA.....page 50

b) Domestic law and technology
transfers by multinational corporations.....page 51

2.) The ''Polluter Pays Principle' as an alternative
to state responsibility / liability in the allocation
of transboundary environmental costs.....page 52

a) The OECD Recommendation.....page 52

b) An EC approach: privatising the 'polluter pays principle'.....page 53

c) Prospect of the polluter pays principle.....page 54

3.) The obligation of multinational enterprises
to ensure transparency and information.....page 54

a) Advantage of information disclosure
by multinational corporations and governments.....page 55

b) Analysis of existing intergovernmental
statements on information disclosure.....page 56

(i) Draft Code of Conduct on Transnational
Corporations.....page 56

(ii) OECD Guidelines for multinational enterprises.....page 57

(iii) European Community policy on access
to environmental information.....page 58

4.) International standards for the use and transfer
of hazardous technology by multinational enterprises.....page 59

a) The practice of double standards in the
home country.....page 59

b) International law as a source of environmental
standards.....page 59

c) Domestic regulation to achieve uniformity
of standards.....page 60

(i) The home country legal standard approach.....page 61

(ii) The highest safety standard approach.....page 62

Conclusion.....page 62

Bibliography

Abecassis, David W.; Jarashow, Richard L. — *Oil Pollution from Ships* Second Edition, Londom 1985

Abraham, C. M.; Abraham, Sushila — 'The Bhopal Case and the Development of Environmental Law in India', in: 40 *International and Comparative Law Quarterly*, at 334-365

Adler, Robert W.; Lord, Charles, — 'Environmental Crimes: Rising the Stakes', in: 59 *George Washington Law Review* 1991, at 781-861

Akehurst, M. B. — 'International Liablity for the Injurious Consequences of Acts Not Prohibited by International Law', in: 16 *Netherlands Yearbook of International Law* 1985, at 3-16.

Alya, Ethan D. — 'Subsidiary Corporations under Civil and Common Law', 66 *Harvard Law Review* 1952-1953, at 1227-1237

Bedajaouri, M. — 'Responsibility of States: Fault an d Strict Liability', 10 *Encyclopedia of Public International Law* 1987, at 359-361

Boer, Ben; Fowler, Robert; Gunningham, Neil, — *Environmental Outlook* Sydney 1994

Burnett-Hall — *Environmental Law* London 1995

Carter, P. B. — 'Service of process out of the jurisdiction: forum non conveniens', 57 *British Yearbook of International Law* 1986, 429-447.

Charney, Jonathan I. — 'Transnational corporations and developing public international law', in; *Duke Law Journal* 1983, at 748-788.

Cheshire and North's — *Private International Law* Twelth Edition, London 1992

Dorresteijn, Adrian;
Kuiper, Ina;
Morse' Geoffrey,
European Corporate Law
Boston 1994

Fawcett, J. J.,
'A new approach to jurisdiction over companies in private international law', 37 *International and Comparative Law Quarterly* 1988, at 645-667.

Flemming, John G.,
The Law of Torts
Eith Edition, California 1992

Fowler, Robert
'International Environmental Standards for Transnational Corporations', in 25 *Environmental Law* 1995, at 2-30.

Francioni, Francesco
Scovazzi, Tullio
International Responsibility for Environmental Harm
Graham and Trotman (1991)

Gleckmann, Harris
'Proposed Requirements for Transnational Corporations to Disclose Information on Product and Process Hazards', in *Boston University International Law Journal* 1988, at 89-123.

Goldie, L. F. E.
'Liability for Damage and the Progressive Development of international Law', in: 14 *International and Comparative Law Quarterly* 1965, at 1189- 1264.

Graefrath, Bernhard
'Responsibility and Damages Caused: Relationship between Responsibility and Damages', in: 185 *Recueil des Cours* 184, at 9-150.

Hadari, Yitzak,
'The structure of the private international enterprise', 71 *Michigan Law Review* 1973, at 729-806.

Hadari, Yitzak,
'The choice of national law applicable to the multinational enterprise and the nationality of such enterprises', *Duke Law Journal* 1974, at 1-57.

Handl, Guenther
'State Liability for Accidental Transnational Environmental Damage by Private Persons', in: 74 *American Journal of International Law* 1980, at 525-565.

Hansen, Peter
Aranda, Victoria
'An Emerging Framework for Transnational Corporations', 14 *Fordham International Law Journal* 1990-1991, at 881-891.

Harris, D. J.,
Cases and Materials on International Law London 1991

Horn, Norbert,
Legal Problems of Codes of Conduct for Multinational Enterprises Antwerp-Boston-London 1980

Jenks, Wilfried
'Liability for Ultra-Hazardous Activities in International Law', in: 117 *Recueil des Cours* 1966, at 100-200.

Johnson, Stanley P.
The Earth Summit: The United Nations Conference on Environment and Development, London, Boston (1993).

Kelson, John M.
'State Responsibility and the Abnormally Dangerous Activity', in: 13 *Harvard International Law Journal* 1972, at 197-244.

Kirgis, Frederic L.
'Effective Pollution Control in Industrialised Countries: International Economic Disincentives, Policy Responses, and the GATT', in: 70 *Michigan Law Review* 1972, at 866-918.

Lutz, Robert E.,
Handl, Guenther
Transferring Hazardous Technologies and Substances – The International legal Challenge Graham and Trotman (1989)

McCaffrey, Steffen
'The work of the international law commission relating to transfrontier environmental harm', in: 20 *New York University Journal of International Law and Politics 1987-88*, at 715-731.

McCohery, Joseph;
Piccotto, Sol;
Scott, Colin;
Corporate Control and Accountability Oxford 1993

McDonald, Janet
'Greening the GATT: Harmonising Free Trade and Environmental Protection in the New World Order', in: 23 *Environmental Law* 1993, at 397-474.

Milo, Dario, 'The liability of a holding company for the debts of its subsidiary: is Salmon still alive and well?' 115 *The South African Law Journal* 1998, at 318-345.

Muchlinsky, P. T., 'The Bhopal case: Controlling ultrahazardous industrial activities undertaken by foreign investors', 50 *The Modern Law Review* 1987, at 545-587.

Murase, Shinya 'Perspectives from international economic law on transnational environmental issues', in: 253 *Recueil des Cours* 1995, at 287-399.

Novak, Edward; Steese, Charles W., 'Survey of Federal and State Environmental Crime Legislation', 34 *Arizona Law Review* 1992, at 571-588.

Pickering, Murray A., 'The company as a separate legal entity' 31 *Modern Law Review* 1968, at 481-511.

Pinto, M. C. W. 'Reflections on international Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law', in: 16 *Netherlands Yearbook of International Law* 1985, at 17-48.

Poostichi, Banny 'Follow up to the 1993 Green Paper on Environmental Liability', in: *5 Review of European Community & International Environmental Law* 1996, at 328-333.

Rixon, F. G., Lifting the Veil between holding and subsidiary companies, 102 *The Law Quarterly Review* 1986, at 415-423.

Sands, Philippe *Principles of international environmental law* Manchester, New York (1995)

Schmitthoff, Clive M., 'Salmon in the Shadow' 1976 *Journal of Business Law*, at 305-312.

Schmitthoff, Clive M., 'The wholly owned and the controlled subsidiary', 1978 *Journal of Business Law*, at 218-229.

Schmitthoff, Clive M., 'Multi-National Companies', 1970 *Journal of Business Law*, at 177-184.

Schmitthoff, Clive M., *Schmitthoff's Export Trade* Ninth Edition, London 1990.

Steele, Jenny 'Remedies and Remediation: Foundational Issues in Environmental Liability', 58 *Modern Law Review* 1995, at 616-636.

Vagts, Detlev F., 'The Multinational Enterprise: A new Challenge for Transnational Law', 83 *Harvard Law Review* 1969-1970, at 739-792.

Weatherill, Stephen; Beaumont, Paul, *EC Law* Second Edition 1995

Wooldridge, Frank, *Groups of Companies: TheLaw and Practice in Britain, France and Germany,* London 1981.

Word Commission On Environment and Development *Our Common Future* (The 'Brundtland Report') 1987 Oxford University Press

Zemanik, Karl 'Responsibility of States: General Principles' 10 *Encyclopedia of Public International Law* 1987, at 362-372.

Introduction

Major industrial accidents and situations causing massive environmental harm, which have occurred during the past fifteen years, have often involved multinational enterprises (MNE's). However, the relocation of hazardous activities to the developing countries by multinational companies in the developed world has become a well - established feature of the global economy.

Cases such as the Bhopal disaster show problems that can arise from this practice and, in particular, the difficulties foreign plaintiffs may experience in obtaining adequate compensation for resulting injuries.

The plaintiff may well find, as in the Bhopal Case, that the domestic company, which caused the damage, has insufficient assets to satisfy any judgement against it. The plaintiff will, therefore, need to consider recourse against the exporting parent company.

However, this course of action confronts formidable obstacles.

One obstacle lies, for instance, in establishing jurisdiction over the parent company.

This discussion considers, *inter alia*, obstacles of civil liability, but it will focus furthermore on questions of criminal liability and on the question of state responsibility and state liability. Among the many issues raised one seems to be particularly significant. This is whether the home state of the parent company or rather the host state can be held responsible for a failure to prevent environmental harm.

Finally, Chapter VI looks to the future and focuses on the idea that some consistent or uniform standards should be developed to guide activities of multinational enterprises wherever they occur.

Chapter One

A challenge for the law: the multinational enterprise

1.) The legal structure of the multinational enterprise

The most effective method to trade overseas is to establish of a local branch or subsidiary in the country to which the exports are directed. The progressive intensification of international trade and, as far as the European Union is concerned, the establishment of a single market by the European Economic Community in 1992 favour this kind of trade. Consequently, in many countries, national corporations have expanded into transnational groups of companies.

The exporter wishing to establish a permanent presence in an overseas country has to decide whether it is more advantageous to establish a branch office in that country or to work through a subsidiary incorporated there. The decisive difference between these two types of business organisations is that the subsidiary has a separate and independent legal personality in the overseas country, but a branch office is merely an emanation of the exporter in the overseas country. The exporter is thus himself present in that country through the branch office.[1]

However, the favoured form of intensive export marketing today is to establish a subsidiary company in the country into which exports are directed.[2] By establishing one or more subsidiaries overseas, the parent company becomes a multinational or, as it is sometimes called, a transnational enterprise.[3]

a) Multinational groups of holding and subsidiary companies

Multinational groups are of great economic importance. They consist of networks of inter-connected companies. The various companies are constituted in different countries and are governed by their respective national laws of incorporation, but the majority of shares in these companies are held by a foreign holding company. These

---

[1] C. M. Schmitthoff, *Schmitthoff's Export Trade*, (Ninth Edition 1990), at 318.

[2] P. I. Blumberg, 'The American Law of Corporate Groups', in: McCahery, Piccotto, Scott, *Corporate Control and Accountability* (1992), at 339.

[3] G. Handl, 'Internationalization of Hazard Management in Recipient Countries: Accident Preparedness and Response', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 107.

corporations range in size from a gigantic firm owned by several millions of shareholders to a close corporation held by one or a few shareholders.[4]

Nevertheless the law relating to international corporate investments remains undeveloped, despite the dramatic rise of multinational enterprises since World War II. While the character of business has become multinational, the essence of corporate law remains national.[5]

Multinational enterprises are not organised under any kind of international or supranational law. The law recognises as 'international enterprises' only those entities which are constructed by international law; that is, for example, by treaty or act of an international organisation.[6] In contrast, multinational enterprises are organised under, and governed by, each country's national laws.

The term 'multinational corporation' is misleading since a multinational enterprise usually consists of several corporations or other forms of business organisation. Each of these corporations has its own legal identity, but constitutes a single economic entity - the 'enterprise'.[7]

Furthermore, each of these corporations has a 'nationality' of its own. Traditional Anglo-American law attributes to a corporation the nationality of the jurisdiction, which charted it. An accepted Anglo-American ruling is that the legal existence, the governing law of a corporation, and often the domicile, are determined by the law of the state in which the corporation was created.[8]

Conversely, the rule of civil law traditionally decides the nationality of companies according to their principal place of business or central administration; that is, the company 'seat'.[9] The seat rule favours either the place of central administration, from which key business decisions are made and control is exercised, or the principal place of business in order to determine nationality for choice – of - law questions. The law of

---

[4] C. M. Schmitthoff, 'Multi- National- Corporations', 1970 *Journal of Business Law*, at 178.
[5] D. F. Vagts, 'The multinational enterprise: a new challenge for transnational law', 83 *Harvard Law Review* 1969-1970, at 740.
[6] C. M. Schmitthoff, 'Multi- national- Companies', 1970 *Journal of Business Law*, at 177.
[7] Y. Hadari, 'The structure of the private multinational enterprise', 71 *Michgan Law Review* 1973, at 756.
[8] National Bank of Greece v. Metliss, (1959) A. C. 509, 518.
[9] Y. Hadari, 'The choice of national law applicable to the multinational enterprise and the nationality of such enterprises', 1974 *Duke Law Journal*, at 7.

the company's seat determines both its existence as a legal entity and its governing law.[10]

A multinational enterprise may therefore operate in one country as a foreign corporation that is organised in another, but this is not the usual pattern. As stated above, the parent corporation normally operates through subsidiary corporations, each organised in the state where it is to operate.[11]

Thus, the multinational enterprise can be defined as a 'business organisation characterised by a) business operations in two or more countries, b) a unified top direction, and c) legally distinct but economically dependant business units subject to that unified direction'.[12] The various corporations or other legal entities of diverse nationalities are joined together by ties of common control and respond to a common management strategy. In a typical multinational enterprise, the headquarters are a central parent holding company controling the various foreign subsidiaries either directly or through a foreign holding company.[13]

The legal prerequisite which is fundamental to the establishment of an multinational enterprise is the power of a corporation to purchase and hold stock of another corporation. This power is recognised by most legal systems, for example in the United States, Great Britain and Germany.[14]

The formation of corporate groups in the United States did not become lawful until the removal of the statutory bar of one company's shares being held by another, initially in New Jersey in 1988. The major development, in the middle of the twentieth century, has been the internationalisation of USA - based corporate groups. Previously this was usually done either by establishing new subsidiaries or acquiring established local companies.

---

[10] Y. Hadari, 'The choice of national law applicable to the multinational enterprise and the nationality of such enterprises', 1974 *Duke Law Journal*, at 8.

[11] D. F. Vagts, 'The multinational enterprise: a new challenge for transnational law', 83 *Harvard Law Review* 1969-1970, at 742.

[12] Y. Hadari, 'The structure of the private multinational enterprise', 71 *Michigan Law Review* 1973, at 756.

[13] C. M. Schmitthoff,' Multi- National- Companies', 1970 *Journal of Business Law*, at 178.

[14] T.Hadden, 'Regulating Corporate Groups:An International Perspective', in: McCohery, Piccotto, Scott, *Corporate Control and Accountability* (1993), 347.

The pattern of group development in Great Britain has, in many respects, been similar to that in the United States, although there was never a statutory bar on one company holding shares in another.[15]

Additionally German law contains provisions governing associated enterprises and groups of companies, which are defined under Articles 15-19 of the Aktiengesetz of 1965.[16]

One significant requirement is that the company owning the shares in the subsidiary must have sufficient shares to confer effective control.[17] This can be done through the creation of a wholly owned or merely a partly controlled subsidiary.[18]

The question arises as to whether the formal legal view prevails; are the parent company and its wholly owned subsidiary two separate legal entities which may be governed by different national laws, or should more attention be paid to the fact that both form part of the same economic unit. The former theory may be called that of legal separation, the latter that of economic entity.[19] At this point, it is enough to state that Common law favours the theory of legal separation as established *in Salmon v. Salmon & Co. Ltd.*[20]

Regardless of which form or legal technique is used to establish the enterprise as a single economic entity, the interaction between transnational control of business groups and national political institutions generates the most significant legal and political conflicts involving the multinational enterprise. To what extent these obstacles can expand will be shown in the example of a not yet existent 'European Company'.

b) The European company

Against the context of an integrated market, in 1970 the European Commission proposed the statute for the European Company, officially named 'Societas Europea' (SE). The idea behind the SE was to create a supranational business organisation that

---

[15] T. Hadden,' Regulating Corporate Groups: An International Perspective', in: McCohery, Piccotto, Scott, *Corporate Control and Accountability* (1993), at 346.

[16] F. Wooldridge, *Groups of Companies: The Law and Practice in Britain, France and Germany*, (London 1981), at 15.

[17] E. D. Alya, 'Subsidiary corporations under the civil and common law', 66 *Harvard Law Review* 1953, at 1227.

[18] C. M. Schmitthoff, 'The wholly owned and the controlled subsidiary', 1978 *Journal of Business Law*, at 218.

[19] C. M. Schmitthoff, 'The wholly owned and the controlled subsidiary', 1978 *Journal of Business Law*, at 220.

would enable enterprises to restructure their business at a European level, thus avoiding the application of divergent national laws. Since its introduction, the proposal has been amended several times but so far no actual decision has been taken.[21] Only a substantial harmonisation programme has been undertaken in the field of company law. This provides the base for a series of directions that have narrowed the gaps in national company law. In addition to harmonising national company law, the community has begun establishing an independent body of community company law; the European Economic Interest Group (EEIG).

An EEIG may be set up by parties in two or more member states. It helps them co-ordinate activities among enterprises in different Member States.[22] Few formalities are required to form an EEIG, requires and no initial capital has to be contributed. An EEIG grouping has capacities distinct from its members, but it is left to the national law of the member states to determine whether the EEIG has legal personality. The purpose of the EEIG must be limited to facilitating the economic activities of its members, not making profits for itself.[23]

The proposed European Company Statute (ECS) is more ambitious. The ECS has the status of a legal person and is a company with its capital divided into shares. The purpose of the ECS is to fulfil its members' needs and to further their business. An ECS would coexist with national law, yet, in principle, it would operate independently. It would allow the establishment of a European Company on terms laid down in Community legislation. At its most ambitious level, an ECS would resolve the problem of incorporation under different national legal systems by providing a single community vehicle for corporate activity.

However, neither the EEIG nor the ECS is able to establish an entity autonomous of the influence of national law.[24]

---

[20] (1897) A. C. , at 22-58; in more detail see Chapter II.
[21] A. Dorresteijn, I Kuiper, G. Morse, *European Corporate Law* (Boston 1994), 135.
[22] S. Weatherill, P. Beaumont, *EC Law* (1995), at 601.
[23] A. Dorreteijn, I. Kuiper, G. Morse, *European Corporate Law* (Boston 1994), 137.
[24] S. Weatherill, P. Beaumont, *EC Law* (1995), at 602.

2.) An emerging international framework for multinational enterprises ?

The existing municipal law systems, with their varying civil, administrative, and criminal norms, provide a limited legal framework to address questions of liability for environmental damage caused by multinational enterprises.

Thus, despite the increasing concern over the impact of MNE activities generally, and the impact of their activities on the environment specifically, municipal law and international law have been somewhat slow to respond. This has largely been due to legal institutions' inability to address the MNE entity through traditional approaches. Instead, international organisations have begun to approach these concerns about the multinational enterprise and to draft codes of conduct for multinational enterprises.[25]

In a departure from the traditional state practice of establishing treaties binding upon states the code of conduct or guideline has generally been the vehicle selected for advancing these efforts. This code is a non-binding or voluntary instrument of principles, negotiated by various governmental and non-governmental organisations and addressed to the obligations of the states and the direct responsibilities of multinational enterprises.[26]

The character, content, and scope of some of the major codes of conduct will be discussed in the following section.

a) United Nations Draft Code of Conduct on Transnational Corporations

The formulation of a code of conduct for multinational enterprises was made a priority objective of the United Nations Commission on Transnational Corporations (UNCTC). The UNCTC is assisted in its work by a secretariat, the United Nations Centre on Transnational Corporations (UN Centre). So far the Draft UN Code of Conduct is the most far - reaching attempt at establishing international standards on issues relating to multinational corporations.[27]

---

[25] H. W. Baade, *Code of Conduct for Multinational Enterprises: An introductory survey*, in: N.Horn, Legal Problems of Codes of Conduct for Multinational Enterprises (1980), at 416.

[26] R. E. Lutz, G. D. Aron, 'Codes of Conduct and other International Instruments', in: Lutz/Handl, *Transferring hazardous Technologies and Substances- The International Legal Challenge* (1989), at 131.

[27] The Draft Code is reprinted at 23 ILM (1984), at 626.
P. Hansen, V. Aranda, 'An Emerging International Framework for Transnational Corporations', 14 *Fordham International Law Journal* 1990/1991, at 886.

Even though the UN Code is still incomplete and the United Nations recently abandoned its effort to design this Code, the document is worth examining for its approach and coverage of MNE issues.[28]

The Draft Code of Conduct on Transnational Corporations (the Code) contains provisions that are particularly important for those interested in safeguarding the interests of consumers and the environment, and for ensuring that transnational corporations conduct their activities and operations to minimise the danger of injury to the general public and the environment. Explanation of all the Code of Conduct's provisions is beyond the scope this Chapter. I will therefore focus on the provisions dealing with environmental protection.

The Code's provisions on environmental protection (paragraph 41,42 and 43) contain requirements regarding the observance of relevant national laws, regulations and policies, international standards and norms, and the disclosure of information on the hazardous effects of MNE's products, processes, and services. The Code also urges transnational corporations to co-operate with national authorities and international organisations in developing and promoting appropriate standards for protection of the environment at both national and international levels.

As a basic minimum, establishing a broad framework to deal with health and consumer concerns that are affected by the activities of multinational enterprises represents one of the major accomplishments of the UN Code. In addition, some of the most important accomplishments of the Code are the identification of international health, safety, of environmental standards relating to the transfer of hazardous technologies, and of transnational corporations' responsibility to observe these standards.[29]

b) The OECD Guidelines for Multinational Enterprises

In 1976, the member countries of the Organisation for Economic Co-operation and Development (OECD) (which comprises of the major industrialised nations of Western Europe, North America, and the far East), adopted the Declaration on

---

[28] R. J.Fowler, 'International Environmental Standards for Transnational Corporations', 25 *Environmental Law* 1995, at 3.

[29] R. E. Lutz, G. D. Aron, 'Codes of Conduct and other International Instruments', in: Lutz/Handl, *Transferring Hazardous Technogies and Substances- The International Legal Challenge* (1989), at 136.

International Investment and Multinational Enterprises and the Guidelines for Multinational Enterprises.[30]

Primarily, the OECD guidelines have political and social value, but they are not devoid of legal significance. They state broad equitable principles and standards that are to be observed by all parties concerned, multinational enterprises and those dealing with them.[31] Although they do not prescribe legally enforceable rules, they nevertheless constitute a source of law in domains not covered by positive rules of law. As a source of law, the Guidelines are independent of and complementary to positive law, and are to be used to fill the gaps where national or international law does not give an answer. *Inter alia*, the OECD Guidelines state that multinational enterprises should give consideration to 'economic and social progress, including industrial and regional development, the protection of the environment and consumer interests [...]'.[32]

In 1985, the OECD Committee on Investment and Multinational Enterprises agreed on a clarification concerning environmental matters. In the OECD's view, within the framework of laws, regulations, and administrative practices in each of the countries in which they operate, multinational enterprises should take due account of the need to protect the environment and avoid creating environmentally related health problems.[33]

c) The United Nations Guidelines and Standards

The primary UN vehicle for activity in the area of the environmental consequences of economic development and the transfer of hazardous technology was the United Nations Environment Programme (UNEP), established as a result of the Stockholm Conference 1972.[34]

In 1982, two years before the Bhopal accident, UNEP drafted and proposed for the use of governments 'Guidelines on Risk Management and Accident Prevention in the Chemical Industry'. The UNEP Guidelines deal with the managerial and technological

---

[30] The OECD Declaration and Guidelines are reprinted at 15 ILM (1976), at 967, 969.

[31] T. W. Vogelaar,' The OECD Guidelines: their philosophy, history, negotiation, form, legal nature, follow-up procedures and review', in: N. Horn, *Legal Problems of Code of Conduct for Multinational Enterprises*, at 135.

[32] OECD Guidelines, 15 ILM (1976), at 969.

[33] R. E. Lutz, G. D. Aron, 'Codes of Conduct and other International Instruments', in: Lutz/Handl, *Transferring Hazardous Technologies and Substances-The International Legal Challenge* (1989), at 138.

[34] http://www.unece.org/env_h.htm

aspects of chemical processing and identify the major factors, which need to be taken into account in the formulation of safety policies and practices.

d) Technology transfer: UNCTAD's Draft Code of Conduct

Motivated by the developing world's concerns about technology transfers, the UN Commission on Trade and Development has been engaged since 1976 in preparing an International Code of Conduct on the Transfer of Technology.[35]

The goal of such a code for developing states has been to ensure a process that will assist the development of their technological capabilities and to rid such states of MNE abuses, which are often associated with their technologically dependant status. Developed countries, on the other hand, seek to facilitate technology transfers, to protect their intellectual property interests and their financial investments. Reconciling these two divergent viewpoints has left a number of issues still open, and the UNCTAD Code remains a draft.[36]

e) The European Economic Community - an international regulatory model?

The European Economic Community (EEC) is, at least in legal theory, the most powerful regional international organisation in existence today. Within the ambit of its territorial jurisdiction and functional competence, it has the capacity to enact legal rules directly applicable to individuals and to enterprises, and to enforce compliance with such rules autonomously through the levying of fines and penalties.[37]

Therefore, in contradistinction to the OECD and the UN organs mentioned so far, the EEC can enact a directly applicable, legally binding code of conduct for multinational enterprises. It can also force its member states to comply with such a code.

P. Nanda, B. C. Bailey, 'Nature and Scope of the Problem', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 27.

[35] G. M. Wilner,' Transfer of Technology: The UNCTAD Code of Conduct', in: N. Horn, *Legal Problems of Codes of Conduct for Multinational Enterprises*, at 178.

[36] R. E. Lutz, G. D. Arron, 'Codes of Conduct and other International Instruments', in: Lutz/Handl, *Transferring Hazardous Technologies and Substances-The International Legal Challenge* (1989), at 150.

[37] H. W. Baade, 'Codes of Conduct for Multinational Enterprises: An introductory Survey', in: N. Horn, *Legal Problems of Codes of Conduct for Multinational Enterprises*, at 422.

The European Company has not yet come into existence. The idea of European Corporate Law would therefore have remained mainly hypothetical if not for the harmonisation programme carried out by the EC.

The legal instruments for the harmonisation are Directives and Regulations corresponding to Article 189 EC Treaty. Disregarding any possible achievements, it must borne in mind that all EC legislation serves as an instrument of integration determined by the EC Treaty. Additionally, the goal of the EC Treaty is neither the approximation of Member States law, nor the creation of Community - wide business organisations.

Nevertheless, in the area of environmental accidents caused by multinational enterprises some harmonisation of the EC has taken place. The one major example is the so-called 'Seveso Directive'.

The activities of the European Community related to industrial accidents are carried out under the Seveso Directive 82/501/EEC on Major Accident Hazards of Certain Industrial Activities. This Directive aims at preventing, preparing for and responding to major industrial accidents and minimising their consequences for workers, the population and the environment. Currently proposals for a revision of the Seveso Directive are again under discussion.[38]

3.) The legal effect of the achieved approach of international codes of conduct

Although the codes of conduct mentioned may cover many of the MNE activities, the legal effect of an international code's pronouncement concerning MNE behaviour may be not clear, especially in light of the voluntary nature of many codes.

In contrast to a legally binding international treaty, the legal effect of a voluntary code is measured by its impact on state practice. If embraced by states and implemented through municipal legal process, a voluntary code of conduct can be just as imposing in its treatment of MNE behaviour as a binding treaty among host and home countries.[39]

Furthermore, there are arguments that the code principals guiding behaviour of states and multinational enterprises may change into a binding obligation. In supporting this it

[38] http://www.unece.org/env./indaccid/manual/noframe/r10.htm#unep

is argued that the principles contained in the codes may subsequently be employed in treaties. In such a case, the responsibilities of the parties provided would be guided by the international rules applicable to treaties.[40]

Another possibility is that the code principles become customary international law, since they represent official statements of states and reflect their official position. But several obstacles must be overcome before customary law comes into existence. The initial one is that all parties view the codes as voluntary, and thus lacking the essential opinio juris for them to be binding. Although states will regularly comply with the terms of a code, these state practices will not be deemed customary law without clear evidence that the states intend to be bound.[41]

However, the code of conduct approach is not totally without value. The code approach is important because it provides a forum in which the disparate interests and objectives of the various parties are presented. Moreover, concern about environmental hazardous accidents has profited from this approach. Because of the importance of the area of environmental accidents, the subject has attracted international community's attention far more quickly than through multilateral treaty-making approaches, which are generally slower to negotiate and to conclude. By drawing attention to specific problems, codes have informed and educated the international community. They have also partially defined the relevant tasks for states and multinational enterprises, and have begun to define the ways international law might apply.[42]

---

[39] N. Horn,' Codes of Conduct for MNE's and transnational Lex Mercatoria: an internationa process of learning and law making', in: N. Horn, *Legal Problems of Codes of Conduct for Multinational Enterprises*, at 51.

[40] D. J. Harris, *Cases and Materrials on International Law* (London 1991), at 46.

[41] Art 38 lit b of the Statut of the International Court of Justice

[42] R. E. Lutz, G. D. Aron, 'Codes of Conduct and other International Instruments', in: Lutz/Handl, *Tranferring Hazardous Technologies and Substances-The International Legal Challenge* (1989), at 157.

Chapter Two:

Questions of civil liability of multinational enterprises

1.) Problems of Jurisdiction

Some of the important legal problems which a court faces when dealing with foreign corporations are, first, has the court jurisdiction to determine this case and, secondly, if so, what law should apply ? These two questions arise in every case with foreign elements.[43] Sometimes a third question may arise, namely, how to 'lift the corporate veil'.

It is beyond the scope of this discussion to describe all the different conflict of law rules, which determine the question of jurisdiction in the different modern states. Consequently focus will be on South African private international law. Because in this regard South African law is still somewhat primitive, many of the problems arising from transactions of multinational enterprises are new to the South African courts. Attention will therefore be paid to English law, a traditional source of legal inspiration. Under the traditional rules jurisdiction involves three major issues:

a) - whether a court has power to hear the case,

b) - whether the court will decline jurisdiction,

c) - whether there is a limitation upon the exercise of jurisdiction.[44]

a) The power of a court to hear the case

The same principle applies for corporate defendants as to individual defendants, namely, the defendant is subject to the jurisdiction of the English court if he is present in England. Since a company cannot literally be present in a state, a corporate defendant has to have required artificial presence. This fulfils the Companies Act 1985: a company registered in England under the Companies Act 1985 is regarded as present in England and service of a writ can be effected by sending it to the registered office of the company.[45][46]

---

[43] J. Hadari,' The choice of national law applicable to the multinational enterprise and the nationality of such enterprises', 1974 *Duke Law Journal*, at 2.

[44] Chesire and North's, *Private Internationa Law*, at 180.

[45] Chesire and North's, *Private International Law*, at 185;

C. M. Schmitthoff, 'The wholly owned and the controlled subsidiary', *Journal of Business Law* 1978, at 222

Since most large corporate groups function through wholly owned subsidiaries, the question arises as to what principles apply to cases where a foreign company carries out business by means of a wholly owned subsidiary.[47]

According to the principles of company law, the foreign parent and English subsidiary are separate legal entities.[48] In most cases, the subsidiary will carry on its own business, not that of the parent. The result is that the foreign company will not be present/ resident in England.

However, in the rare situations where a subsidiary does operate on behalf of the parent company, it is possible to regard the parent company as being present in England.[49] In such cases the current English law still places undue reliance on notions of agency. The United States courts, in comparison, have looked at the economic realities of the situation and applied the doctrine of the corporate veil.

However, if the parent and subsidiary form one economic unit, it should be possible to establish jurisdiction against the foreign parent on the basis of the presence of its subsidiary in England, or indeed against a foreign subsidiary on the basis of the presence of the parent in England.[50]

b) Declining jurisdiction or stays of proceedings

Although a court has the power to try a case, it can refuse to take jurisdiction and stay the proceedings. The power to stay proceedings is derived from the court's inherent jurisdiction, which is preserved by statute.[51]

This power is exercised in three situations; first, where the doctrine of 'forum non conveniens' applies; secondly, where there is a foreign choice of jurisdiction clause and, thirdly, where there is agreement on arbitration.

Because of the important role of the 'forum non conveniens' doctrine played in one of the world's worst environmental accidents, the Bhopal Case, discussion will focus on this doctrine.

---

[46] Rome v. Punjab National Bank [1990] 1 All England Report, at 58.
[47] See Adams v. Cape Industries Plc [1991] 1 All England Report, at 929.
[48] Salmon v. Salmon & Co. Ltd. [1897] AC, at 22
[49] Chesire and North's, *Private International Law*, at 188.
[50] J. J. Fawcett, 'A New Approach to Jurisdiction over Companies in Private International Law', 37 *International and Comparative Law Quarterly*, at 663.
[51] Williams and Glyn's Bank plc v. Astro Dinamico Compania Naviera SA [1984] 1 All England Report, at 760.

The doctrine of 'forum non conveniens' was exhaustively considered by the House of Lords in the *Spilada Maritime Corpn v. Cansulex Ltd* Case. This set out a number of principles.[52] 'The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties'.[53]

One important requirement is that the subsidiary of the multinational enterprise must be incorporated as an independent subsidiary in another state, so that the state can be said to have jurisdiction. Cases where an action in tort is brought by a resident against a non-resident will not be analysed in this discussion.

The Spilada Case developed three conditions, which the 'forum non conveniens doctrine' applies. These are, firstly, the existence of an alternative and adequate jurisdiction, secondly, the existence of private interest concerns (the location of sources of proof, access to witness's, etc.), and, thirdly, the existence of public interest concerns (the foreseeable administration difficulties, the interest of the home and the host state, the applicable national law, and such like.).

Although these are the basic principles, English courts have laid down a number of others. One requires a clearly more appropriate forum abroad. The burden of proof is on the defendant to show that there is another forum available, which is clearly more appropriate than the English forum.[54] It is not enough to show that England is not the natural or appropriate forum for trial. Neither is it enough to establish a mere balance of convenience in favour of the foreign forum. In ascertaining whether there is a clearly more appropriate forum abroad, the search is for the country with which the action has the most real and substantial connection.[55]

The doctrine of forum non conveniens was of major importance in the decision of Judge Keenan in the Bhopal Case.[56]

---

[52] [1987] AC, at 460;
P. B. Carter, 'Service of process out of the jurisdiction: forum non conveniens', 57 *British Yearbook of International Law* 1986, at 429.
[53] [1987] AC, at 476.
[54] Chesire and North's, *Private International Law*, at 223;
[1987] AC, at 474.
[55] Trendex Trading Corpn v. Credit Suisse [1980], 3 All England Report, 721 at 734.
[56] The Judgment is reprinted at 25 ILM 1986, at 771.

Here, the Indian government, acting on behalf of the Indian victims, chose the American jurisdiction and filed a complaint with the United States District Court, New York. The American Court dismissed the case on the grounds of the doctrine of forum non conveniens. It held, *inter alia*, that " the taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation [...]".[57]

Thus, the judgement shows that not only legal considerations but also the political responsibility of a host state in industrial accidents will take part in a juridical decision. Judge Keenan's views on this point echo the concerns over loss of sovereignty expressed by many countries in relation to the control of multinationals. An admission by the home country that the host country is the better forum may give greater legitimacy to the host country's controls over the firm. However, the home country cannot simply wash its hands of involvement when a major accident occurrs in the overseas subsidiary of one of its corporations. It must be prepared to acknowledge that, in certain cases, the parent company may be the major source of harm, and that therefore the home forum ought to be open to the foreign plaintiff.[58]

c) Limitations on jurisdiction

Jurisdiction under the traditional rules is subject to certain limitations. An example are the limitations that affect the subject matter of the issue or limitations relating to persons between whom the issue is joined, such as immunity of foreign sovereigns.[59]

2.) The law governing foreign corporations and the parent company's civil liability under national law

After establishing jurisdiction, a court has to determine which law should govern the corporation's internal and external affairs. Again the answer is dependent on each country's private international law (conflict of law) rules.[60] As a general rule, the law

---

[57] 25 ILM (1986), at 795.

[58] P. T. Muchlinski, 'The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken By Foreign Investors', 50 *Modern Law Review* 1987, at 580.

[59] For further discussion see: Chesire and North's, *Private International Law*, at 252.

[60] A. Kiss, Present limits to the enforcement of state responsibility for environmental damage, in: Francioni/Scovazzi, *International Responsibility for Environmental Harm*, at 10.

of the country of the company's domicile not only determines the existence of a corporation but also governs its internal affairs.[61]

As far as external affairs are concerned, a court will hesitate to apply the corporation's personal law to foreign company's transactions with outside parties.

In the Bhopal Case, for example, the United States District Court applied three different choice of law rules to justify that Indian law was the applicable law.[62] 'The "governmental interest" analysis, employed by many jurisdictions, requires a court to look at the question of which state has the most compelling interest in the outcome of the case. The "lex loci delicti analysis" used in other jurisdictions indicates that the law of the state where the tort occurred should be applied. Other states apply the "most significant relationship" test, or "weight of contract" test, which evaluates in which state most of the events constituting the tort occurred'.[63]

However, to determine which law is the applicable law is only the first step to deciding questions of civil liability in cases where multinational enterprises are affected. The example of the Bhopal Case will demonstrate how complex the justification of civil liability under national law can become.

a) The factual background of the Bhopal Case

On the night of December 2-3 1984, a lethal substance known as methyl isocynate (MIC) was released from a chemical plant operated by Union Carbide India Limited (UCIL) in the city of Bhopal, India. In this most devastating disaster world - wide, about 2.660 persons died and between 30.000 to 40.000 sustained serious injuries.[64]

UCIL is an Indian company, incorporated under the laws of India in 1934.

Union Carbide Corporation (UCC), a company incorporated in the State of New York, holds 50,9 % equity shares in UCIL.[65]

In its first move, the Indian government, acting on behalf of the victims, chose the American jurisdiction and filed a complaint with the United States District Court in

---

[61] Y. Hadari, 'The choice of national law applicable to the multinational enterprise and the nationality of such enterprises', 1974 *Duke Law Journal*, at 7.

[62] 25 ILM (1986), at 59.

[63] 25 ILM (1986), at 59.

[64] P. Nanda, B. C. Bailey,' Nature and Scope of the Problem', in: Lutz/Handl, *Transferring Hazardous Technologies and Substances-The International Legal Challenge*, at 8;
25 ILM 1986 at 772.

[65] T. Scovazzi,' Industrial Accidents and the Veil of Industrial Accidents', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm*, at 403.

New York. A year after the suit was brought, District Judge Keenan dismissed the case on the grounds of forum non conveniens and determined Indian law applicable law.[66]

b) The parent company's liability in the Bhopal Case

A final settlement was reached on 14 February 1989, when the Supreme Court of India ordered the parent UCC to pay the sum of US $ 470.000.000 to India in full settlement of all claims.[67]

Since the Bhopal settlement was mainly motivated by the compelling need for victim relief, certain legal questions, likely to occur in similar cases, remained unanswered. Some of these legal issues are discussed in this Chapter.

First of all, the reason for trying to hold the parent company liable is that in most cases the assets of the subsidiary amount only to a small amount of the needed compensation.

The law of tort in India is founded on English law as applied to India prior to independence. The relevant question in cases like the Union Carbide litigation is how English tort law, in particular the rule in *Rylands v. Fletcher* has developed in Indian Law.[68] In essence, the rule as originally formulated in 1866 is that where a person brings an inherently hazardous thing on to his land, he is strictly liable for all damages that results if it escapes.[69]

The facts of the Bhopal Case point clearly to the presence of a hazardous activity on the site of the plant, and the escape of something dangerous that caused injury to those outside the plant. But the plant was built on the insistence of the Indian authorities as a part of their programme for self-sufficiency in the pesticides industry, and under their supervision. This can be seen as public interest defence against strict liability.[70]

Another problem is determining whether the parent company was the owner or the controller of the 'dangerous thing' when the accident occurred. Under English law of

---

[66] 25 ILM (1986), at 771.

[67] C. M. Abraham, S. Abraham, 'The Bhopal Case and the Development of Environmental Law in India', 40 *International and Comparative Law Quarterly* 1991, at 339.

[68] P. T. Muchlinsky, 'The Bhopal Case', 50 *Modern Law Review* 1987, at 564;
R. Burnett-Hall, *Environmental Law* (London 1995), at 999.

[69] [1868] L.R.3 H.L. at 330.

[70] P. T. Muchlinsky, 'The Bhopal Case', 50 *Modern Law Review* 1987, at 564.

tort, 'control' is a very basic idea involving the literal physical control of the land or thing causing the injury.[71]

In the present case, however, the parent's place of business was New York, and therefore physical control was difficult to prove. A more fruitful approach in cases like this might be to invoke the principles of 'business control', arguing that the business control exercised by the parent over the subsidiary was such that the acts of the subsidiary were, in fact, the acts of the parent company.

In the Bhopal Case, corporate policy in relation to health, safety and environmental affairs demanded that operations were conducted according to 'superior standards of safe designs and practices' and that management control systems had to be maintained to assure observance of corporate policies and procedures on safety'.[72] Thus, if one accepts that health, safety and environmental affairs a policy area covered by Union Carbides' control system, one can state that the parent company also controlled the extremely hazardous activity that led to the accident.

Alternatively, a court could find the parent company liable on the grounds of negligence.[73]

If it could be shown that the parent company was under a duty of care to the victims to provide a safe system of work at the plant, and had failed to discharge that duty by properly supervising the subsidiary's activities, then the parent company could be held liable. However, a major problem would be establishing a causal link between the parent company's acts and omissions and the accident. The acts of the subsidiary itself can break the chain of causation. Since a subsidiary is a separate legal person at law, it can act independently in a way that makes it the principal tortfeasor.

By contrast, a finding of liability against the subsidiary might not be difficult. The subsidiary is the principal controller of the plant for purposes of Rylands v. Fletcher liability. For example, liability of UCIL in negligence might not be hard to establish, since certain vital safety devices were out of action at the time of the accident, there was no public warning system at the plant and other factors.[74]

---

[71] J. G. Flemming, *The Law of Torts*, at 342.

[72] P. T. Muchlinsky, 'The Bhopal Case', 50 *Modern Law Review* 1987, at 572.

[73] J. G. Flemming, *The Law of Torts*, at 101.

[74] P. Nanda, B.C.Bailey, 'Nature and Scope of the Problem', in Lutz/Handl, *Transferring Harzardous Substances-The International Legal Challenge*, at 9.

However, a finding of liability against the subsidiary would, in most of cases, be quite unsatisfactory. Often the assets of the subsidiary amount only to a small proportion of the sum needed to compensate the victims.

Nevertheless, two more possible approaches to parent company liability exist.
One of them is the institute of vicarious liability under the law of tort.[75]
The institute of vicarious liability states that the law holds one person responsible for the misconduct of another, although he is himself free from personal blameworthiness or fault. The institute of vicarious liability is therefore an instance of strict liability.[76]
Vicarious liability has been applied to only three relationships: those of master and servant, of principal and agent and of employer and independent contractor.
The justification for holding a master liable for the torts of his servant, committed in the course of employment, is the master's control over the servant[77]. But, in most cases, the parent company exercises only a general power of direction that falls short of control over how the subsidiary fulfils its tasks. Thus the relationship between parent and subsidiary does not seem not to be analogous to that of employer and employee.

A closer analogy appears to be with the relationship of employer and independent contractor. In this case, sufficient independence between the parties enables the court to exclude the vicarious liability of the employer, except in cases where the acts commissioned by the employer are extra - hazardous and require the employer to take reasonable precautions against harm. Should the independent contractor act negligently, the employer must compensate the injured party as the primary tortfeasor.[78] However, the decisive question remains unanswered; was the parent under a direct duty of care towards the victims, entailing a duty to supervise the dangerous manufacturing process carried out by the subsidiary, and did a breach of that duty cause the accident.

---

[75] P.T. Muchlinsky,' The Bhopal Case', 50 *Modern Law Review* 1987, at 568.
[76] J. G. Flemming, *The Law of Tort*, at 366.
[77] J. G. Flemming, *The Law of Tort*, at 369.
[78] Honeywill & Stein Ltd. v. Larkin Bros. Ldt. [1934] 1 K. B. 191 (CA.)

A final possibility is that the subsidiary should be regarded as the agent of the parent company for the purposes of vicarious liability.[79]

In company law, the corporate veil is lifted where the subsidiary is so controlled by the parent company as to be its agent for the purposes of liability.[80] A similar analysis could be used to impose liability on the parent company for the torts of its subsidiary.[81] But the crucial requirement for this kind of liability remains that the premises are occupied by the subsidiary as an agent for the parent company. In the Bhopal Case, for example, the parent never had particular interest in the site of the Bhopal plant. Only UCIL was ever admitted to occupy the plant as a tenant.

Alternatively, a court may wish to apply an 'enterprise entity concept'.[82]

The essence of this approach is to regard the corporate group as a single economic entity, to which legal rights and obligations attach, notwithstanding its legal organisation into separate companies. This theory differs from the doctrine of 'lifting the corporate veil' in so far as the court's approach is dictated by the economic organisation of the group, rather than the legal doctrine of corporate personality.

Whatever conclusion a court comes to, it has to consider the implications of a finding against one corporation on future cases involving issues of foreign company liability. Corporate structures and organisations are many and varied. Not every function of the multinational enterprise entails control by the parent. Thus, a court must be careful not to introduce sweeping presumptions of fact as to the nature of parent - subsidiary relations in multinational enterprises.

To find a solution for the problem of parent - subsidiary liability, the doctrine of the 'corporate veil' has been developed.

c) Lifting the corporate veil of multinational enterprises

In cases involving transnational enterprises, courts are confronted with a difficult question. Does the parent company fall within the jurisdiction of the court because the

---

[79] J. G. Flemming, *The Law of Tort*, at 369.

[80] Smith Stone & Knight Ltd. v. Birmingham [1939] 4 All England Report, at 116.

[81] Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd. [1921] 2 AC at 465.

[82] C. M. Schmitthoff, *Salmon in the Shadow*, 1976 Journal of Business Law, at 311;
F. G. Rixon, 'Lifting the veil between holding and subsidiary companies', 102 *Law Quarterly Review* 1986, at 423.

subsidiary's place of business is in its jurisdiction, or does the question of liability of the holding company for debts of its subsidiary arise ?

As the parent company and the subsidiary are two different legal persons, the question has, in principle, to be answered in the negative. But exceptionally, however, courts are prepared to lift the veil of corporateness.[83]

The term 'lifting the veil' is derived from its use in the United States. It lacks any precise and generally accepted definition.[84]

At least three separate and distinct meanings can be attributed to this term. First, it may mean that a veil exists between members of the company and outsiders. This veil is, in a sense, 'lifted' when the law goes behind the corporate personality to the individual members. Secondly, a veil may be said to exist between the company and its members.

Thirdly, the term is sometimes used to imply that several economic realities are joined or one economic entity divided by a veil.[85] Since the third definition is most commonly used in cases of multinationals, this will be the focus of the following discussion.

When considering how to lift the corporate veil, a court has to answer the question on whether the formal legal view prevails that the parent and its wholly owned subsidiary are two separate legal entities, or whether the entities form one economic unit.

English law favours the theory of legal separation, as established in the decision Salmon v. Salmon & Co. Ltd. The House of Lords held that 'once the artificial person has been created, it must be treated like any other independent person with its rights and liabilities appropriate to itself'.[86]

But the Salmon & Salmon judgement also indicated possible exceptions to the separate entity concept, such as the existence of fraud, the abuse of the corporate form, and agency. The fact that the company is wholly owned does not, as such, constitute an abuse of the corporate form. In those cases actually disregarding the corporate entity, like the Amoco Cadiz Case, the recurring theme is that courts will focus on the whole

---

[83] D. Milo, ' The liability of a holding company for the debts of its subsidiary: is Salmon still alive and well ?', 115 *The South African Law Journal* 1998, at 324.

[84] M. A. Pickering: 'The company as separate legal entity', 31 *Modern Law Review* 1968, at 482; T. Scovazzi, 'Indusrtial Accidents and the Veil of Transnational Corporations', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm*, at 396.

[85] M. A. Pickering,' The company as separate legal entity', 31 *Modern Law Review* 1968, at 482.

[86] [1897] AC,at 22-58

enterprise as a single economic unit, rather than on the multiple corporate forms used by such an enterprise.[87] [88]

On 16 March 1978, after steering gear failure, the super - tanker Amoco Cadiz went aground in the territorial waters of France. The subsequent spill of about 230.000 tons of crude oil polluted the coast for 375 km., destroyed 30 % of marine fauna and 5 per cent of marine flora. The ship was owned by Amoco Transport Co. (Transport), a corporation with Libyan nationality. All Transport's stock was indirectly owned, through several subsidiaries, by the parent company Standard Oil (Standard), a United States corporation located in Chicago. The subsidiary most involved in the accident was Amoco International Oil Co. (AIOC), also a United States corporation wholly owned by Standard.[89] The most interesting part of the decision relates to determining of the persons responsible for the accident.

'As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, transportation and sale of pretoleum products throughout the world, Standard is responsible for the tortuous acts of its wholly owned subsidiaries AIOC and Transport. Standard exercised such control over its subsidiaries AIOC and Transport, that those entities would be considered to be mere instrumentality's of Standard. Standard is therefore liable for its own negligence and the negligence of AIOC with respect to the operation, maintenance and crew training of Amoco Cadiz. Standard therefore is liable to the French claimants for damages resulting from the grounding of Amoco Cadiz'.[90]

This decision may be seen to strengthen an emergent norm of international law, which recognises, under the doctrine of lifting the corporate veil, that multinational enterprises will be held strictly liable for accidents from hazardous activities conducted by their subsidiaries.

---

[87] Lloyd's Law Report (1984), II, at 306.

[88] Y. Hadari,' The structure of the private multinational enterprise', 71 *Michigan Law Review* 1973, at 773.

[89] T. Scovazzi,' Industrial Accidents and the Veil of Transnational Corporations', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), 413.

[90] Lloyd's Law Reports, [1984] II, at 338.

Chapter Three:

Questions of criminal liability - prosecuting companies for environmental crime

1.) Environmental crime as codified in several acts in South Africa

The codification of environmental crime in South Africa is contained in different acts of national legislation, for example sec. 2 (1) of the Marine Pollution Act No. 6 of 1981; sec. 29 (2) of the Environment Conservation Act No. 73 of 1989; sec. 58 of the Marine Living Resources Act No. 18 of 1998 and section 151 of the National Water Act of 1998.

The category of environmental crime therefore encompasses a wide and disparate group of crimes committed in differing forums, industries and under many different circumstances.

2.) Theory of individual liability

One of the government's primary reasons for enforcing environmental laws is deterrence. But one can argue that companies consider corporate fines to be little more than business expenses. Conversely, when personal loss of liberty is at stake, the deterrent effect dramatically increases.[91]

In South Africa, sections 34 (7), (8), and (9) of the National Environmental Management Bill follow this insight and establishes the individual criminal responsibility of the manager, agent, employee, and director of a corporation.

Establishing individual liability presents special problems when a crime occurs in the context of a corporate bureaucracy. Most corporate crimes involve several individuals at different levels within the corporate hierarchy. When lower-level employees commit crimes with the approval of their superiors, both may be held responsible. Although, in the area of regular crimes, establishing the liability of the individual who physically performs the criminal activity presents no particular problems, determining the responsibility of superiors in the corporate hierarchy poses special difficulties.

---

[91] E. F. Novak, C. W. Steese,' Survey of federal and state environmental crime legislation', 34 *Arizona Law Review* 1992, at 575.

a) Direct actors

A defendant employee cannot escape liability by pleading that he acted in the name of or for the benefit of a corporation. The degree of intent required to establish the liability of the direct actor is generally set forth in the criminal provisions of corporate regulatory statutes.

In South Africa such provisions are found in the Companies Act 61 of 1973, sec. 250 and sec. 441.

For the purpose of imposing liability upon a corporate body under any law, a South African court has also to look at sec 332 of the Criminal Procedure Act 51 of 1977.

b) Indirect actors

Those who command or authorise a corporate crime are themselves liable for the crime as principals.[92] To hold corporate managers liable for criminal conduct which occurs under their supervision strongly discourages them from ordering crimes and gives them a powerful incentive to develop practices which eliminate illegal behaviour.[93]

3.) Theories of corporate liability

Generally, one does not think of a corporation as a violator of criminal laws because it can neither form the requisite mental state nor be imprisoned. Therefore, American courts have derived the doctrine of the 'respondent superior'. This respondent superior doctrine is derived from agency principles of tort law. Under this doctrine, a corporation may be held criminally liable for the acts of any of its agents if an agent (1) commits a crime (2) within the scope of employment(3) with the intent of benefiting the corporation.

A second theory of corporate 'mens rea' is the collective knowledge doctrine of American courts. Under this theory, courts sum up the knowledge of a corporation's employees to create one large state of mind.[94]

How far South African courts will follow the developments of American courts remains to be seen.

---

[92] See for example in South Africa sec. 34 (7), (8) and (9) of the National Management Bill.

[93] Development in the law, corporate crime: 'Regulating corporate behaviour through criminal sanction's, 92 *Harvard Law Review* 1979, at 1260.

[94] E. F. Novak, C. W. Steese, 'Survey of federal and state environmental crime legislation', 34 *Arizona Law Review* 1992, at 575.

4.) Criminal liability illustrated on cases of oil spill

a) Great Britain

Prosecution for pollution offences in Great Britain is regulated by the Prevention of Oil Pollution Act 1971 and by the Merchant Shipping Regulations of 1983. The discharge of oil is subject to provisions and conditions. Thus, oil tankers may not discharge oil or oily mixtures at all, unless certain conditions are satisfied.[95] Failure to comply with these regulations constitutes a criminal offence. These regulations state clearly that the owner, which in most cases will be a company, and the master may each be liable to prosecution for the same incident.[96]

But those accused of offences under the regulations may avail themselves of a number of exemptions and defences. The regulations provide, for example, that a person thus charged may escape conviction if he shows that he took all reasonable precautions and exercised all due diligence to avoid committing of the offence.

However, the number of prosecutions still lags behind the number of offences committed.

Three main reasons exist for the inadequate enforcement of oil pollution regulations. The first reason is the present concentration of enforcement responsibility on the flag state. Prosecution may only be brought to Great Britain in respect of foreign vessels if the offence in question has been committed in the territorial waters of Great Britain and if a suitable defendant is available.[97]

The second reason is a technical one; in many cases of deliberate discharge it is difficult to identify the polluter, especially in busy shipping lanes.

The third reason concerns the imposition of fines, which are regarded as pitched at levels that are highly unlikely to have any deterrent effect.[98]

b) South Africa

Apart from international conventions aimed at oil pollution control in internal waters, South Africa has its own national legislation to control pollution along its coastline: the prevention and Combating of Oil Pollution of the Sea by Oil Act 6 of 1981.

---

[95] D. W. Abecassis, R. L. Jarashow, *Oil Pollution from Ships*, (London 1985), at 347.
[96] D. W. Abecassis, R. L. Jarashow, *Oil Pollution from Ships*, (London 1985),at 349.
[97] Pianke v. The Queen (P. C.) A.C. 1979, at 113.

The main provisions for criminal liability of the master and the owner are contained in sec. 2 (1), (2) and sec.30 (2). As in Great Britain, an offence is committed directly by the master or the owner if any oil is discharged from a ship.

In South Africa also, the accused may evade liability by proving that the oil was discharged for the purpose of securing the safety of the ship or of preventing damage to the ship, sec. 2 (2).

Thus South Africa faces the same problem of inadequate enforcement as Great Britain. But the prosecution of environmental crime is often also rather a political issue, as will be shown with the Exxon Valdez Case.

c) The Exxon Valdez Oil Spill

On 24 March 1989, the Exxon Valdez super - tanker plowed into Bligh Reef in Alaska's pristine Prince William Sound, spilling an estimated 10.8 million gallons of crude oil. Over 1000 sea otters and at least 36.470 birds died from direct and indirect contact with oil during the first summer after the spill.[99]

Although the precise causes of the spill remain unclear, several facts place much of the blame on Exxon's corporate shoulders. The United States Cost Guard reported that the Captain of the vessel, J. Hazelwood, ten hours after the accident, still had a blood alcohol level exceeding regulatory limits. Hazelwood had a record of convictions for driving while intoxicated, a record that was well known in Exxon's corporate management.

Although hundred civil lawsuits have been filed seeking damages and other relief from losses caused by the spill, only two criminal cases were filed. The state of Alaska indicted Captain Hazelwood for negligent discharge of oil, for operating a vessel while intoxicated, and for reckless endangerment. An Alaskan jury acquitted Hazelwood of all but a single charge: negligent discharge. Thus the Captain responsible for the largest and most damaging oil spill in United States history was merely sentenced to 1000 hours of community working in the oil spill cleanup and ordered to pay US$ 1.000 in restitution to the state.[100]

---

[98] D. W. Abecassis, R. L. Jarshow, *Oil Pollution from Ships*, (London 1985), at 351.

[99] R. W. Adler, C. Lord, 'Environmental Crimes: Raising the Stakes', 59 *George Washington Law Review* 1991, at 782.

[100] R. W. Adler, C. Lord, 'Environmental Crimes: Raising the Stakes', 59 *George Washington Law Review* 1991, at 783.

The question arose whether Hazelwood was being used as a scapegoat for the real culprit, the oil company.

On February 27, 1990, the United States returned a five-count indictment against the Exxon Shipping Company and the Exxon Corporation, charging them with violations of the Clean Water Act, the Refuse Act, the Migratory Bird treaty Act, the Ports and Waterways Safety Act, and the Dangerous Cargo Act. All these charges are misdemeanours, carrying maximum penalties of over US$ 600 million. However, several weeks before the trial date, the parties submitted a Plea Agreement whereby the Exxon Corporation and the Exxon Shipping Corporation pleaded guilty to misdemeanours under the Clean Water Act, the Refuse Act, and the Migratory Birds Act. Under the Agreement, the two corporations were fined US$ 100 million.

Perhaps most notable in this story are the agents who have not been indicted.

The government has been criticised for not bringing criminal charges against senior Exxon management and their corporate officers. The Exxon Case raises serious questions about the federal government's willingness to take as aggressive a criminal posture against major corporate executives as against small individual violators.

The Exxon Case also sharply calls into question the adequacy of the criminal provisions of environmental laws in the United States. Although environmental crimes are conducted generally by corporations in the normal cause of business, the results are more severe than those of many other crimes. These crimes that jeopardise the well - being of one or more individuals are considered serious enough to impose strict criminal penalties. Environmental crimes that endanger even more members of the public deserve at least similar treatment.[101]

---

[101] R. W. Adler, C. Lord, Environmental Crimes: Raising the Stakes, 59 *George Washington Law Review* 1991, at 788.

Chapter Four

Questions of state responsibility and liability

1.) Two forms of state accountability: state responsibility and international liability[102]

In cases involving multinational enterprises, like the Bhopal Case and the Exxon Valdezz Case, the host states in which the accident occurred, have never formally claimed international complaints vis-à-vis the home state of the multinational enterprise.[103]

Nevertheless, these accidents were so serious and of such a vast scale that they endangered fundamental public interests relating to the protection of the human environment. Accordingly, in each case the host state was compelled to act on behalf of the victims. In the Bhopal Case, the Indian government acted as 'parents patriae' for its injured citizens, claiming that it had a public duty of representation by virtue of its interest and obligation to protect, preserve, and restore the earth, air, waters, and economy of the Republic.[104]

In addition, the Indian government passed the Bhopal Act, which gave the government "the exclusive right to represent, and act in place of every person who has made, or is entitled to make a claim, and for all purposes connected with such claim in the same manner and to the same effect as such person".[105]

In other cases, the host state granted provisional compensation for the victims, since the assets of the subsidiary of the multinational corporation amounted often to only a proportion of the actual costs of the damage. It is also it possible that adequate financial resources might not be available or accessible at all. Thus, comprehensive compensation of the victims depends on whether the host state or the home state of the company is willing and able to share financial responsibility.[106]

---

[102] In practice a distinction has been drawn between responsibility/liability of states as under international law, and civil liability of any legal or natural person under the rules of national law, which I will follow in this chapter.

[103] S. Murase, 'Perspectives from international economic law on transnational environmental issues', 253 *Recueil des Cours* 1995, at 386.

[104] P. T. Muchlinsky ,'The Bhopal Case: controlling ultrahazardous industrial activities undertaken by foreign investors', 50 *Modern Law Review* 1987, at 550.

[105] The Bhopal Act is reprinted in 25 ILM (1986), at 884.

[106] G. Handl ,'State liability for accidental tansnational environmental damage by private persons', 74 *American Journal of International Law* 1980, at 526.

In large-scale environmental hazards involvement of this nature by the host state can be seen as an element that shifts the nature of the dispute settlement from a private law approach to the level of inter-states relations.
Hence, the question to be answered is whether the home state or the host state can be held accountable for the harm caused by multinational enterprises.

a) Responsibility of states

Responsibility of states means that an internationally wrongful act, committed by one state against another, entails certain consequences for its author in the form of new obligations towards the victim, as, for example, reparation in the form of restitution, indemnity and satisfaction.[107]
The transfer of technology, hazardous products and waste may constitute an internationally wrongful act if its author violates primary rules of international law. Those rules are contained in treaties among states or customary international law, and impose obligations on states, the breach of which can be a source of responsibility.[108]
First of the forms international responsibility of states may take must be clarified. Basically, two different regimes of responsibility for a wrongful act can be identified.[109]
The first regime of responsibility for a wrongful act is the one of fault responsibility. According to the traditional view, such a regime is characterised by the fact that in addition to the breach of the international obligation, it is up to the victim state to prove, the psychological fault of the acting person.
Fault responsibility is in contrast to objective responsibility or responsibility without fault.[110] In the traditional view, the latter is characterised by the fact that responsibility does not require fault, but arises from the mere breach of an international obligation. One can further distinguish two different regimes of objective responsibility: absolute and relative responsibility. Under the institute of relative responsibility, the state accused of the wrongful act may invoke one of the circumstances precluding the

---

[107] D. B. Magraw, 'International Legal Remedies', in: Lutz/Handl, *Transferring Hazardous Technologies and Substances-The International Legal Challenge* (1989), at 241.
[108] The different kinds of rules will be discussed in detail in Chapter IV (2);
D. B. Magraw, 'International Legal Remedies', in: Lutz/Handl, *Transferring Hazardous Technologies and Substances-The International Legal Challenge* (1989), at 241.
[109] R. P. Mazzeschi, 'Forms of International Responsibility for Environmental Harm', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm(1991)*, at 16.
[110] K. Zemanek, 'Responsibility of States: General Principles', 10 *Encyclopedia of Public International Law* (1987), at 365.

wrongfulness. Under the concept of absolute responsibility no circumstances precluding wrongfulness are allowed.[111]

However, responsibility based upon fault for omissions persisted in customary law, because the theoretically subjective element of fault can be objectively determined by measuring the omission against the international standard of due diligence.[112]

b) International liability of states

Alongside the different forms of responsibility, the duty to repair material damage is known as liability. Since this duty is also one of the consequences of state responsibility, the term liability may be and occasionally is used synonymously with responsibility. However, liability is more frequently employed in a narrow sense, describing the duty to compensate damage without wrongdoing.[113]

International liability can be described generally as state accountability in circumstances were the accountability exists regardless of the international lawfulness of the underlying acts or omissions.[114]

Phrased differently, the state in which an activity occurs (the exporting / a home state) may be obliged to make reparations to the state in which that activity causes harm (the importing/ a host state). This holds even if the activity in question is lawful under international law.

The question arises, whether the exporting state, from which a hazardous substance is exported in an internationally lawful manner, should be obliged to make reparations to the state into which the substance is being imported. This is addressed in Chapter V below.

First I will discuss the possible international responsibility of the home and host states that results from a violation of a primary rule of international law.

2.) Responsibility of importing states

Environmental disasters like the Bhopal tragedy raise three fundamental questions about an importer state's responsibility for environmental injury.

---

[111] R. P. Mazzeeschi ,'Forms of International Responsibility for Environmental Harm', in: Francion/Scovazzi, *International Responsibility for Environmental Harm(1991)*, at 16.

[112] K. Zemanik. 'Responsibility of States: General Principles', 10 *Encyclopedia of Public International Law* (1987), at 365.

[113] R. P. Mazeschi, 'Forms of International Responsibility for Environmental Harm', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm*, at 17.

First, what are the legal sources of that state's international responsibility for such disasters?

Secondly, what is the precise scope of the responsibility imposed upon an importing state by each of these sources?

And thirdly, to what extent and in what directions will tragedies such as Bhopal influence the development of the international law of importing state responsibility?[115]

a) The multinational enterprise as a private actor

The first problem in justifying state responsibility for acts of multinational enterprises is that a multinational corporation is a private law person.[116]

From the point of view of international law, actions of private law persons are not directly attributable to the state in whose sphere of jurisdiction they have been accomplished. However, the state acts and can only act through human beings. Persons acting in their capacity as officials of the state concerned, or under expressly given state orders, are not to be considered private law persons in the present sense. They represent the state, and direct state responsibility is involved if the act violates international law.[117]

But sometimes the level of protection afforded by international law in relation to certain situations is particularly high. Consequently, the responsibility of a state for damaging actions committed by private law persons may comprise more than usual. This is the case with a multinational enterprise, which is capable of causing tremendous harm to the environment and to individuals.

In the case of the multinational enterprise, therefore, the private nature of the actor should not constitute an absolute impediment to establishing state responsibility of the country of origin. On the contrary, one can argue that the multinational enterprise is a particularly conspicuous private actor in implementing rules of environmental control. The multinational enterprise is more visible than small local firms are. It is normally subjected to more extensive administrative control because of the complex trade and

---

[114] D. B. Magraw, 'Transboundary Harm: The international law commissions study of "International Liability", 80 *American Journal of International Law* 1986, at 318.

[115] See below, Chapter VI.

[116] J. I. Carney,' Transnational Corporations and Developing Public International Law', 1983 *Duke Law Journal*, at 751 ff.

[117] G. Sperduti,' Responsibility of states for activities of private law persons', 10 *Encyclopedia of Public International Law* 1987, at 373.

antitrust regulations. Its foreign operations may enjoy the coverage of national insurance programmes, especially if they are located in a less developed country.[118] Thus, even as private entity, the multinational enterprise is in principle capable of engaging the international responsibility of the home or host country. This responsibility exists to the extent that the country fails to exercise adequate control over those activities of the MNE that have caused significant environmental harm.

b) Legal sources of importer state responsibility for environmental harm

The issues of importer state responsibility for environmental injury raise problems on a wide scale and do not clearly separate themselves from the responsibilities attributable to multinational enterprises and exporting states.

The situation can arise that injury is restricted to the people or environment of the host state, as in the Bhopal Case. The harm, however, may also spread, causing significant injury to third state populations or environments, so called transborder pollution. Furthermore, the harm may spread to the marine environment, to the global commons or to outer space; areas in which all the states are interested but over which no state exercises exclusive jurisdiction or control.

Where injury remains localised, the importing state may be called to account by its own citizens. Where the injury spreads beyond national borders, the host state becomes the source state for transnational injury. It may be held responsible to the injured persons, either singly, or jointly, with the exporting state or multinational enterprise.

This scenario becomes even more complex because three bodies of law govern the transborder transfer of hazardous goods and technologies and contribute directly or indirectly to international law of importing state responsibility.[119]

In the first place, this is public international law, as embodied in customary law and multilateral or bilateral treaties, to which both the importing and exporting states are parties. Secondly, the national regulatory laws of the importing and exporting state

---

[118] F. Fracioni,'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm (1991)*, at 280.

[119] H. H. Koh, 'Responsibility of the Importer State',in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 172.

influence questions of international law. Finally, it is possible that private contracts can determine obligations between states or a multinational enterprise and a state.[120] The public international law rules, which directly govern importer state responsibility, are derived from two different sources. One source is the international law of the environment, the other is the law of international trade.[121]

These two sources, work at cross purposes with one another, causing tension, particularly where they seek to distinguish between the responsibilities of developed and developing importing states. While the law of the international trade generally restrains the freedom of nations to restrict imports, the international law of the environment restrains their freedom to permit imports that are likely to cause environmental injury.

(i) The international law of the environment

In conventional international law on the protection of the environment a number of treaty arrangements containing rules on state responsibility that apply in cases of environmental harm. Examples are the 1972 Convention on International Liability for Damage Caused by Space Objects,[122] the Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, March 1974,[123] and the Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, Basel, March 1989.[124]

However, no international agreement has expressly outlined the environmental duties of importing states.[125] Indeed, in most agreements on environmental protection, either there are no rules at all on responsibility or the rules are very general and vague. Many agreements contain only a special clause in which the states pledge themselves to take "all appropriate measures" or to make "appropriate efforts" to control and reduce sources of pollution.

---

[120] Texaco v. Libya, 17 ILM (1978), at 1;
Aminiol Case, 21 ILM (1982), at 976.
[121] H. H. Koh, 'Responsibility of the Importer State', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 173.
[122] Reprinted in 10 ILM (1971), at 965.
[123] Reprinted in 13 ILM (1974), at 546.
[124] Reprinted in 28 ILM (1989), at 657.
[125] H. H. Koh, 'Responsibility of the Importer State', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 175.

Such agreements do not establish the strict obligation not to pollute, but only the obligation to 'endeavour' to prevent, to control and to reduce pollution.[126]

In customary international law the problem of responsibility of the importer state is much more controversial.
First, one has to analyse whether real and binding customary law obligations to prevent pollution in the importing state exist. If they do, their breach creates responsibility for a wrongful act.
International practice shows that a customary rule on environmental protection is accepted in international law, but that such rule places only a general obligation on the states to prevent substantial pollution.[127]
This customary rule of state responsibility has its origin in principles of good-neighbourlines and was first used with regard to transfrontier pollution between neighbouring states. Two of the most important international cases in this regard are the Trail Smelter Arbitration and the Corfu Channel Case. In the Trail Smelter Arbitration[128] the following important principle was laid down:

> 'No state has the right to use or to permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.'[129]

The Corfu Channel Case[130] confirms the obligation of non-harmful use of the territory. The International Court of Justice (ICJ) stated that Albania's responsibility to Great Britain arose, among other reasons, from the obligation of every state "not to allow knowingly its territory to be used for acts contrary to the rights of other states". The Corfu Channel Case may have freed customary rule from the limit of relations between neighbouring states and extended it to relations between distant states. Furthermore, the applicability of this customary rule has expanded to cover new spaces and new resources. While initially the rule was limited to protecting the

---

[126] R. P. Mazeschi, 'Forms of International Responsibility for Environmental Harm', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm (1991)*, at 19.
[127] R. P Mazzeschi, 'Forms of International Responsibility for Environmental Harm', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm (1991)*, at 28.
[128] *American Journal of International Law* 1941, at 684.
[129] D. J. Harris, *Cases and Materials on International Law* (1991), at 245.
[130] ICJ Reports (1949), 3ff.

territory or the resources of other states, it was then extended to protect of the marine environment and the common spaces and the environment as a whole.[131]

Thus, one can state that the rule on protection of the environment has widened the sphere of supervisory obligations of the states. It places obligations on the state not only to overseeing its own territory, but also to control activities carried out beyond its territory.

This broad understanding of 'control' raises another question. Does the power of an importing states, as a territorial state, empower it to exercise effective control over the hazardous activity, as compared to the control actually exercised over that activity by the multinational enterprise itself and the exporting state.

To answer this question, the concept of effective control must be defined.

It seems clear that this kind of control presupposes, among other things, knowledge of the risks posed by the activity and the means to effectively regulate or manage such risks.[132]

Particularly when dealing with developing countries, the theoretical authority to regulate does not translate into effective control of the regulated activity. In fact the importing state may control only one segment of the activities of the multinational enterprise centred in its territory. Such activities may be planned or modified by a parent company located in a foreign country. It may thus happen that a hazardous technology will be later directed by the parent company to produce more dangerous substances because of changing production or marketing strategies of the multinational group. Policies like this might escape the control of the host country authorities, or even go unnoticed for lack of administrative and technical expertise in the supervision.[133]

Assuming, however that the importing state can exercise effective control over an imported hazard, the next question concerns which of the three entities exercising some control over the injurious activity (the multinational enterprise, the exporting

---

[131] R. P. Mazzeschi, 'Forms of International Responsibility for Environmental Harm', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm (1991)*, at 28.

[132] S. C. McCaffrey 'The Work of the International Law Commission Relating to Transfrontier Environmental Harm', 20 *New York University Journal of International Law and Politics* 1987-88, at 720.

state, or the importing state), might in fact be best situated to averting the disaster.[134] Under this inquiry, an importing state would be assigned international responsibility for an international accident only if it had the closest causal relationship to the activity and was the 'cheapest accident avoider', i.e., the state whose control bore most directly on the occurrence of the accident.[135]

(ii) The law of international trade

The impact of international trade on environmental issues was first examined by the Brundtland Commission in its report 'Our Common Future'.[136]
The report pointed out that poverty was the most important cause for environmental deterioration, and that of an increased growth of the world economy was needed.

To some extent, all environmental policies imposed by importing nations interfere with the transborder flow of trade. However, the conventions and treaties that comprise international economic law say virtually nothing about importing nations duties to protect the environment. This is because the conventions and treaties were designed to enhance, not restrict, the flow of trade among exporting states, importing states and multinational enterprises.[137] Importing state environmental duties are thus almost entirely neglected by most agreements. Similarly, multilateral codes of conduct for multinational enterprises discussed above address environmental issues in only vague and nonbinding terms. They speak more about the duties of the multinational enterprises than about duties of the importing states.
The General Agreement on Tariffs and Trade (GATT) and its side codes most directly constrain an importing states' freedom to impose domestic regulation upon potentially hazardous production facilities.

---

[133] F. Francioni, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?, in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 287.
[134] H. H. Koh,'The Responsibility of the Importer State', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 181.
[135] S. C. McCaffrey, 'The Work of the International Law Commission Relating to Transfrontier Environmental Harm', 20 *New York University Journal of International Law and Policies* 1987-88, at 722;
G. Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Persons', 74 *American Journal of International Law* 1980, at 535.
[136] World Commission on Environment, *Our Common Future (1987)*
[137] H. H. Koh,' Responsibility of the Importer State', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 183.

In order to explain the difficulties arising between environmental protection and liberalisation of trade I will detail two important rules of the GATT.
Article I of the GATT, the most favoured nation clause, stipulates that whenever a party makes a tariff concession on a certain product, the benefit of the concession must be extended to all contracting parties.
Article III of the GATT requires that under internal taxation imported products may not be treated worse than domestically produced goods.
Thus, in the interest of the environment, the terms of Article I nor Article III of the GATT does not permit importing states to discriminate between products based on their origin.[138]

Some exceptions in the GATT provisions, however, remain Articles XX (b) and XX (g) of the GATT present the most important ones.
Article XX (b) states that states may adopt "measures [...] necessary to protect human, animal or plant life or health".
Article XX (g) authorises states to adopt "measures [...] relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".
An importing state could theoretically invoke this exemption to Articles I and III to prevent foreign companies from conducting business activities that ignore the environment.[139]
However, with regard to importing state responsibility, Article XX of the GATT leaves unanswered the crucial question of to what extent this exemption permits countries to restrict imports with the aim of promoting the environment.
In answering this question the GATT's general articles provide less help than the various side codes negotiated during the Tokyo Round do.

Since the present GATT framework cannot of take environmental concerns into consideration in the same manner as it does trade matters, several authors have

[138] F. L. Kirgis, 'Effective Pollution Control in Industrialised Countries: International Economic Disincentives, Policy Responses, and the GATT', 70 *Michigan Law Review* 1972, at 890.
[139] H. H. Koh,' Responsibility of the Importer State', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 185.

proposed amendments to the GATT.[140] Either the provisions of the GATT itself could be amended or an interpretation or a subsidiary agreement could be signed.

(iii) Other sources of responsibility for the importing state

Finally, do importing states assume any responsibility under international law, when they enact domestic legislation or when they conclude private business contracts that facilitate hazardous imports? The answer is negative, one since international customary law is created by state practice. Neither in the domestic nor in the international arena has state practice proven sufficiently consistent to generate international custom.[141]

Although many nations have enacted national and environmental safety laws, only a few duties are so common to all of those laws as to be deemed customary international legal obligations.[142]

3.) Responsibility of exporting states

The analysis of existing treaty obligations that establishes host state responsibility also applies similarly to home state responsibility. Specific rules establishing home state responsibility do not yet exist.

Nevertheless, there are sources worth to be considering as a basis for an emergent customary law of exporting state responsibility. This is territorial control over an element contributing to the damage and nationality of the person or entity causing the damage.[143]

a) Territorial control as a basis of customary state responsibility

(i) The issue of extraterritoriality

One fundamental rule of international environmental customary law is the duty of states to prevent activities that cause damage to objects or persons situated in the

---

[140] J. McDonald, 'Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order', 23 *Environmental Law* 1993, at 397.

[141] H. H. Koh,' Responsibility of the Importer State', in: Lutz/Handl, *Tranferring Hazardous Substances-The International Legal Challenge* (1989), at 188.

[142] Such exceptions may be the requirement of Environmental Impact Assessment and Exchange of Information, see Chapter VI.

[143] M. Bothe, 'The Responsibility of Exporting States', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 159.

territory of other states taking place in their territory. This is based on territorial control over the source of damage.[144]

It is worth to applying this principle to the export of hazardous goods or technology. The manufacture of a dangerous product by the multinational company in one country and its export to another may result in damage in the other state.[145]

Does the exporting state have the duty to prevent such damage, as in the case of transfrontier pollution?

The traditional view that states are internationally responsible for the conduct of private parties only in so far as such conduct takes place within their territorial jurisdiction, is based on the observation that individuals are subject to the exclusive powers of the territorial state. When individuals go abroad, states normally lose control over them. Therefore the responsibility shifts to the foreign state in whose territory they reside.

However, the multinational enterprise has the ability to disrupt this symmetry. Through its foreign subsidiaries, the multinational enterprise is able to spread into foreign countries without ever losing its substantial connection with the country of origin.[146] Under these circumstances, it is difficult to derive state authority to 'control' activities of multinational enterprises, when the subsidiaries are no longer under the jurisdiction of the home state of the parent company.

The necessary connection between foreign subsidiaries to the home state is mainly given by the de facto responsiveness of its foreign subsidiaries to the parent company. Consequently, by retaining control over the parent company, the home state may exert a decisive influence over the foreign subsidiaries by prescribing to the former the standards or rules of conduct to be followed by the latter.[147]

Home countries have shown themselves capable of extending the material reach of their public control over multinational enterprises' foreign activities. States have also

---

[144] S. Murase,' Perspectives from international economic law on transnational environmental issues', 253 *Recueil des Cours* 1995, at 389.

[145] M. Bothe,'The Responsibility of Exporting States', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 160.

[146] F. Francioni,'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible ?', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 283.

[147] F. Francioni, 'Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?, in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 283.

been willing to claim the enforcement abroad of such regulatory powers in order to control the MNE's foreign operations.

Legislation in the United States, for example, provides for certain cases and for certain products prior consent by the importing country; compliance with the importing country's law as a prerequisite for the export; requirements of notification to U.S. authorities who in turn inform the importing countries; total or partial ban on exports.[148]

Theses rules reflect new and encouraging developments.

Another example is the Export Administration Act of 1979 which authorises the President of the United States "to prohibit or curtail the exportation o any goods, technology, or other information [...] to the extent necessary to further significantly the foreign policy of the United States or to fulfil its declared international obligations."

In the Siberian Pipeline Affair of 1982, President Reagan acted under the Export Administration Act and ordered suspension of trade with the Soviet Union. This suspension was not only concerning corporations inside the territory of the United States, but also subsidiaries of United States companies, which the United States authorities regarded as 'passive instrumentality's' of the parent companies.[149]

However, these examples are exceptions to the rule that generally no export restrictions exist. Thus, when home countries deny admissibility of control over the MNE's compliance with essential environmental standards in host countries, the issue of consistency is raised. The proposition that exterritorial control of the multinational enterprise may be desirable and good is unacceptable when it serves the purpose of advancing a national interest of the home country while denying the existence of a similar exterritorial control to advance an international environmental public policy.

(ii) Effective control as the basis of state responsibility

As discussed above, one can argue that with importer state responsibility customary law places obligations on the state not only with regard to overseeing the state's own

---

[148] M. Bothe,' The Responsibility of Exporting States', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 163.

[149] S. Murase,'Perspectives from international economic law on transnational environmental issues', 253 *Recueil des Cours* 1995, at 391.

territory, but also with regard to control over activities carried out outside their own territory.

In this context the 1972 Stockholm Declaration on the Human Environment embodies this idea, providing in Principle 21 that

> "states have [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction".[150]

This principle is followed almost verbatim in the 1992 Rio Declaration, Principle 2.[151] Originally, the principle was understood to mean that 'jurisdiction' and 'control' were a single concept, both referring to legal ties with the state. However, in recent years, it appears that 'control' has become separated from 'jurisdiction' and that the conjunction "or" has acquired a special meaning. Consequently, it is considerable to say that 'control' now refers to the factual capacity of effective control over the actors outside the territorial jurisdiction of the state.[152]

To conclude, today a general rule of international law exists binding the states to oversee activities within their jurisdiction or control. This is to prevent these activities causing significant environmental harm either to the territory of other states or to common spaces and resources.[153]

Assuming that the government of the home state has the means and resources to exercise control over the activities of the subsidiaries abroad, again the question arises as to the kind of control necessary to justify home state responsibility.

In order to hold a home state responsible under international law, one has to base the state's responsibility on the notion of 'effective control'. Such effective control can only be achieved by domestic home state legislation, like the one mentioned above in the United States.

---

[150] The Stockholm Declaration is reprinted in 11 ILM 1972, at 1416.

[151] Even though both Declarations are not legally binding, and merely serve as guidelines, many of their principles can be seen as restating customary international law.

[152] S. Murase, 'Perspectives from International Economic Law on Transnational Environmental Issues', 253 *Recueil des Cours* 1995, at 394;
F. Francioni, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Orign be Held Responsible?', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 289.

[153] R. P. Mazzeschi ,'Forms of International Responsibility for Environmental Harm', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 29.

The above analysis shows that the current regime of international environmental law only imposes a soft duty of domestic environmental regulation on importing and exporting states. No strict obligation of importer state responsibility yet exists. Hopefully disasters like Bhopal and Exxon Valdez have had positive side effects in that states will start thinking creatively and even produce the political will to adopt some binding legal norms over importing and exporting state responsibility.

(iii) Intervention in the sovereignty of the importing country

Another problem with attributing of responsibility to the home country of the multinational enterprise is that extraterritorial control by a home country would interference with the host country's sovereignty.

A prerogative of sovereignty is the exclusivity of the exercise of territorial powers.[154] However, a serious problem between home and host state sovereignty will not arise, since in the absence of specific treaty obligations, a host state under customary international law will be free to refuse to co-operate in enforcing foreign safety regulations within its territory. An importing state is also free to refuse requests from the country of origin of the multinational enterprise for on-site inspections, monitoring, and so on.[155]

Consequently, the caution over interfering with the sovereignty of the host state is not justified.

b) The nationality of the multinational enterprise as a basis of customary state responsibility

No general rule of international law requires a state to control the behaviour of its nationals abroad in a certain way. However, the responsibility of a flag state in relation to vessels carrying its flag does exist. The UN Convention on the Law of the Sea (1982) provides a sophisticated allocation of environmental responsibilities between coastal states, flag states and, where deep seabed mining activities are involved, the sponsoring state.[156]

---

[154] H. Steinberger,' Sovereignty', 10 *Encyclopedia of Public International Law* 1987, at 408.

[155] F. Francioni, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held responsible?', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm (1991)*, at 286.

[156] UN Law of the Sea Convention, 1982, reprinted in ILM (1983), 1261, 1293.

The export of hazardous goods and technology could involve similar issues. Such exports often occur within the system of a multinational corporation. The question thus arises as to the existence of any obligations of the home state of a parent company has in relation to such exports.[157]

As mentioned above, the traditional answer to the problem would have been that states are not responsible for the behaviour of their nationals and corporations abroad. However, the question of states legal duties to control the operation of "their" corporations' abroad is worth rethinking.

Since specific treaty obligations are not in existence yet this will again involve two main codes of conduct relating to multinational enterprises; the UN Code of Conduct on Transnational Corporations[158] and the OECD Guidelines for Multinational Enterprises,[159].

Unfortunately, these codes of conduct do not contain substantive provisions on the specific question of home state responsibility. This is because the main thrust of these documents does not lie with the powers and corresponding obligations of the home state of the parent companies. On the contrary, their main concern is to safeguard the free regulatory power of the state in which the company or its subsidiaries operate. Thus, host state control, not home state responsibilities is the issue.

To summarise, one can say that it is not yet possible to justify the existence of customary international rules, which establish home state responsibility on grounds of the nationality of the parent company of the multinational enterprise.

---

[157] M. Bothe ,'The Responsibility of exporting States', in:Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge (1989)*, at 165.

[158] The Draft Code is reprinted in 23 ILM (1984), at 626.

Chapter Five

International liability of states for environmental harm

1.) The International Law Commission's study

The liability of states for environmental damage in relation to particular activities is addressed by a small number of treaties. The 1972 Convention on International Liability for Damage caused by Space Objects and the United Nations Convention on the Law of the Sea are examples.[160]

Apart from these treaties, the International Law Commission (ILC) has been working since the late 1970s on the liability of states for acts not prohibited by international law.[161]

First of all, the ILC has been attempting to codify the law of state responsibility. From the outset, it has agreed that the topic of state responsibility should deal only with international wrongful acts of states. At the same time, the ILC recognised that a state could engage in activities that are not prohibited by international law, such as those involving space objects and nuclear reactors, but which might cause harm in other states. The ILC's approach so far has been to propose rules that encourage establishing treaty regimes and that assert a primary obligation. State responsibility, in contrast, is considered a set of general secondary obligations of the legal consequences of wrongful acts or omissions.[162]

International liability as conceptualised by the ILC combines several principles which are contained in draft Articles.

The first principle proposes that the sovereign freedom of states to carry out or permit human activities must be compatible with the protection of the rights emanating from the sovereignty of other states.

The second principle requires states to co-operate in good faith and to take appropriate measures to prevent or minimise the risk of transboundary harm. Where

---

[159] The OECD Guidelines are reprinted in 15 ILM (1976), at 967, 969.

[160] P. Sands, '*Principles of international environmental law*', Volume I (1995), at 648.

[161] M. B. Akehurst, 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law', 16 *Netherlands Yearbook of International Law* 1985, at 3.

[162] M. C. W. Pinto, 'Reflections on International Liability for Injuries arising out of Acts not Prohibited by International Law', 16 *Netherlands Yearbook of International Law* 1995, at 20.

necessary they should to contain or minimise the harmful transboundary effects of such activities by the best practicable, available means.[163]

The third principle relates to reparation and requires a state of origin to make reparations for appreciable harm caused by harmful activities.

Finally, a principle of non-discrimination would require state parties to treat the effects of an activity that arises in the territory or under the jurisdiction or control of another state in the same way had the effects arisen in their own territory.

These draft Articles and the five envisaged principles raise many interesting and complex issues. The facts of the Bhopal disaster will serve to illustrate some of them.

2.) International liability of the host state for environmental harm

As described in Chapter II (2), the plant involved in the Bhopal disaster was owned and operated by Union Carbide India Ltd. (UCIL). The company was incorporated under Indian law and 50.9 per cent of its stock was owned by the Union Carbide Corporation (Carbide). The company is incorporated under the laws of New York and has its headquarters in Connecticut.

The liability topic deals principally with the issue of whether and to what extent India would be liable to other states for any transfrontier consequences of the Bhopal disaster. In fact, there were no known injurious consequences of the Bhopal incident, because the gas that leaked from the UCIL plant never left the territory of India. Assuming, however, that there had been such consequences, the question arises whether injurious activity must be located not only in the state's territory, but must also be under the effective control of that state.[164]

As already mentioned, the concept of control has to be defined more clearly as far as private activities are concerned. The mere fact that a multinational enterprise exporting investments and technology is located in the territory of a state is not enough to automatically entail the responsibility of that state, which actually had to be in control of the local subsidiary. Indeed, generally accepted norms of state responsibility would, in effect, hold a state responsible for the injurious consequences of private conduct only if that activity was or should have been under the effective control of that state. Such a requirement seems to be no less in the context of the

---

[163] P. Sands, '*Principles of international environmental law*, Volume I (1995), at 650.

liability topic. It seems appropriate to demand that this kind of control takes for granted, among other things, knowledge of the risks posed by the activity and the means to regulate or manage such risks effectively.[165]

It would probably not be realistic to presume that a developing country like India would have this knowledge and capability in every case of imported high technology. If, however, it were established that India knew or should have known of the risk involved in the operation of the UCIL plant, and that it had the power to regulate it but failed to do so adequately, then India could be found to have breached an obligation to other states to exercise due diligence in regulating or controlling the plant. If found to be in breach of this obligation, India would have committed an internationally wrongful act and would fall within the state responsibility ambit dealing with internationally wrongful acts.

A more difficult question is whether India would still be liable for those consequences even if it had not breached an obligation of due diligence. In other words, even if it had done all that could reasonably be expected to assure that the plant was operated safely and that the risk of transfrontier injury was properly minimised, would India still be liable?

This question lies at the heart of the liability issue. Essentially it asks whether states will be strictly liable for the injurious tranfrontier consequences.

3.) State liability and its relation to the principle of strict liability

Today new forms of liability have emerged which not only ignore the concept of fault as a constituent factor of the internationally wrongful act, but do not even enquire whether the act attributable to the state is wrongful. This is the outcome of scientific and technological advances, which have obliged international law to adapt itself to new circumstances.[166] The problem posed by new activities, like nuclear energy and the conquest of the space, does not derive from the question of whether they are legitimate or wrongful, but from the fact that, even if they are essential or beneficial, they embody an inherent risk of harm.

---

[164] S. C. McCaffrey, 'The work of the International Law Commission relating to transfrontier environmental harm', 20 *New York University Journal of International Law and Politics* 1987-88, at 719.

[165] S. C. McCaffrey, 'The work of the International Law Commission relating to transfrontier environmental harm', 20 *New York University Journal of International Law and Politics* 1987-88, at 720.

To resolve the problem, some authors have developed the theory of risk liability for ultra-hazardous activities and extended this theory to the protection of the environment.[167] With environmental protection, they hold that the state in whose territory the source of pollution is located is in all cases liable and obligated to pay compensation simply as a result of the occurrence of significant transnational environmental harm.[168] According to some authors, this rule derives from general principles of law recognised by civilised nations.[169]

However, as far as future prospects are concerned, the situations created by activities which are dangerous though not prohibited, have led to the elaboration of a new regime of absolute liability. But instituting strict liability still lies in the future prospect. So far there is not much state practice to accept general rules on strict liability for transboundary harm or agreement upon such rules. As the more important environmental conventions have shown, the liability problem has been excluded to a large extent.[170]

4.) Liability of the home state for accidents in the host state

After this analysis of the question of host state liability, it is worth considering whether a state, such as the United States, would be liable for disasters like Bhopal. The proposition is that a state in which a multinational corporation is incorporated or has headquarters or from which hazardous technology is exported, should be liable for any injurious consequences in an importing state. The argument is that the state of nationality of the corporation, the home state, which had the means of knowing the risk, should be held liable for the damage caused.

In my opinion, the question whether the United States could or should be held liable under contemporary international law for the injuries resulting from the Bhopal disaster, has to be answered in the negative for several reasons.

---

[166] M. Bedjaouri, 'Responsibility of States: Fault and Strict Liability', 10 *Encyclopedia of Public International Law 1987*, at 360.

[167] G. Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Persons', 74 *American Journal of International Law* 1980, at 559;
C. W. Jenks, 'Liability for Ultra-Hazardous Activities in International Law', 117 *Recueil des Cours* 1966, at 176.

[168] J. M. Kelsen, 'State Responsibility and the Abnormally Dangerous Activity', 13 *Harvard International Law Journal* 1972, at 233.

[169] L. F. E. Goldie, 'Liability for Damage and the Progressive Development of International Law', 14 *International and Comparative Law Quarterly* 1965, at 1239.

[170] B. Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damage', 185 *Recueil des Cours* 1984, at 112.

First, a regime that would make the home state of the exporter liable in cases such as Bhopal, would most likely be unacceptable to any technology-exporting country, including developing countries that export technology.
Secondly, exporting state liability would tend to induce laxity on the part of the importing state to fulfil its moral duty and domestic legal obligations to prevent its residents from harm.
Thirdly, there would be economic and social consequences of extending the topic. Imposing liability upon the state from which the hazardous technology is exported could well discourage that state from such exporting, or would lead to much stricter controls upon the kinds of technology. This would make it more expensive for multinationals to operate in the Third World and, thus, would result in a shift of jobs and other wealth-producing activities from the developing countries back to the developed countries.[171]

To conclude, one can say that the rules of state responsibility provide remedies if a primary rule of international law has been violated. But most transfers of hazardous substances do not involve the breach of such a rule. Moreover, even if a break has occurred, the remedies available are typically inadequate to compensate for the harm the transfer of hazardous substances caused.
The emphasis should be on preventing and minimising harm.[172]
The rules on international liability, as a second and controversial form of state accountability currently developing, do not lead to accountability of the exporting state for damage caused in an importing state.
Furthermore, importing states typically have little or no redress against exporting states under the existing legal international regime, and private persons suffering injuries resulting from the transfer of hazardous substances typically have no recourse under international law against any state. Instead, they often face tremendous obstacles when seeking compensation by relying on municipal law remedies, as discussed in Chapter II.
These difficulties might be mitigated through the creation of new environmental norms and principles.

---

[171] S. C. McCaffrey, 'The work of the International Law Commission relating to transfrontier environmental harm', 20 *New York University Journal of International Law and Politics* 1987-88, at 725.

Chapter Six

Emerging norms of international environmental law

1.) Technology transfer by multinational enterprises and environmental impact assessment

The term 'technology transfer' is conceptually distinct from transboundary pollution. The government of a country receiving transferred technologies could, in theory, require mitigating measures or reject those technologies altogether. By contrast, transboundary pollution harms a 'victim' state, i.e. the passive recipient of undesired harm.

The purpose of this section is to describe the application of an analytical planning methodology known as 'environmental impact assessment' or 'EIA' to international transfers of technology. First the evolution of international standards concerning the content and applicability of EIA will be examined.

a) International standards for EIA

EIA can be defined as a component of a planning process by which environmental considerations are integrated into decision- making procedures for activities that may have adverse environmental effects.[173] The principal purpose of environmental impact assessment is to facilitate informed decision-making by means of a thorough scrutiny of anticipated environmental effects. Aided by this analysis, an informed decision-maker should be able to assess how advisable proceeding with proposed actions is, and to modify proposals to eliminate or mitigate their adverse environmental effects.[174]

Since environmental impact assessments were first established in United States domestic law under the 1972 National Environmental Protection Act, they have been progressively adopted by many other national legal systems. Internationally, EIA is required, for example, under the 1985 EC Environmental Assessment Directive,[175] the

---

[172] See the discussion in the following Chapter VI.

[173] D. A. Wirth, 'International Technology Transfer and Environmental Impact Assessment', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 84.

[174] P. Sands, *Principles of international environmental law*, Volume I, (1995), at 579.

[175] Council Directive85/337/EEC.

1991 UN Economic Commission for Europe Convention on Environmental Impact Assessment in Transboundary Context,[176] and the Biodiversity Convention.

The first international instrument to specifically address the nature and scope of the assessment, its use, and participation rights in the process was the EC Council Directive 85/337. This assesses the effects of certain public and private projects on the environment.[177] The Directive states a binding "hard' legal requirement that each of the fifteen EC member states adopts EIA requirements and specifies application of EIA procedures 'before consent is given for projects likely to have significant effects on the environment'. These EIA procedures apply to both private and public projects.[178]

But EIA was also endorsed by non-binding "soft" instruments at the regional and global level, for example, by Principle 17 of the 1992 Rio Declaration, by several recommendations adopted by the OECD and the United Nations Environment Programme (UNEP).

These efforts of the EC, the OECD, and UNEP have fostered a developing international consensus concerning the utility and necessity for EIA at the national level for activities occurring within states own jurisdictions. Thus, many nation states have now adopted national requirements for EIA.

Consequently, the idea that EIA may now be required as a matter of customary law, particularly at the regional level, is arguable.[179]

b) Domestic law and technology transfers by multinational corporations

As previous chapters have shown, the need for strict standards is particularly acute when developing states are the recipients of transferred technologies. However, in cases of transferred technologies international standards for EIA have none the less developed at a much slower pace than those for transboundary pollution. Many countries, however, have now adopted national requirements for EIA. Some national environmental impact assessment procedures, such as those of the United States, Canada and the Netherlands, rely on explicit formal documentation. In other

---

[176] The Convention is not in force , 30 ILM (1991), 802.
[177] P. Sands, '*Principles of international environmental law*, Volume I, (1995), at 583.
[178] D. A. Wirth, 'International Technology Transfer and Environmental Impact Assessment', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 85.
[179] P. Sands, *Principles of international environmental law*, Volume I, (1995), at 594.

countries, such as Germany, the United Kingdom and most of the Scandinavian countries, EIA is implicit in the larger planning process.[180]

2.) The 'Polluter Pays Principle' as an alternative to state responsibility/ liability in the allocation of transboundary environmental costs

Chapter V earlier represented transboundary environmental damage as a transfer of costs from the polluter to an involuntary victim whose government in most of the cases lacks direct means to regulate the source activity.

Arising from that, this chapter will examine another possible approach to the redistribution of these transboundary costs; the 'polluter pays principle' as an alternative to state responsibility and state liability in international law.

The polluter pays principle requires that pollution costs should be borne by the person responsible for causing the pollution and the consequential costs. The practical implications of the polluter pays principle are that it allocates economic obligations in relation to environmentally damaging activities.[181]

a) The OECD Recommendation

The first international instrument to refer expressly to the polluter pays principle was the 1972 OECD Council Recommendation on Guiding Principles Concerning the International Economic Aspects of EnvironmentalPolicies.[182]

This OECD Recommendation endorsed the polluter pays principle of allocating costs of pollution prevention and control measures in order to encourage rational use of environmental resources and avoid distortions in international trade. In 1974, the OECD Council adopted a further Recommendation on the Implementation of the Polluter Pays Principle which reaffirmed that the principle constituted a 'fundamental principle' for the member countries.[183] The 1989 OECD Council Recommendation on the Application of the Polluter Pays Principle to Accidental Pollution extended the principle to imply that

---

[180] D. A. Wirth, 'International Technology Transfer and Environmental Impact Assessment', in: Lutz/Handl, *Transferring Hazardous Substances-The International Legal Challenge* (1989), at 91.

[181] P. Sands, '*Principles of international environmental law*, Volume I (1995), at 213.

[182] The OECD recommendation is reprinted in 14 ILM (1975), at 236.

[183] A. E. Boyle, 'Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm (1991)*, at 368.

'the operator of a hazardous installation should bear the costs of reasonable measures to prevent and control accidental pollution from that installation. The costs must be introduced by public authorities in conformity with domestic law prior to the occurrence of an accident.'[184]

b) An EC approach: privatising the 'polluter pays principle'

Similar considerations also motivated EC environmental policy. In 1973, the Council of Ministers adopted a programme of action on the environment, which endorsed the polluter pays principle. It later recommended that the costs of environmental protection against pollution should be allocated uniformly throughout the EC.[185]

In 1986, the EC Treaty was amended to provide that EC action relating to the environment should be based on the principle that the polluter should pay.[186]

In 1993, the European Commission set out in its Green Paper the possibility of a harmonised EC approach to liability for remedying environmental damage. The Green Paper argued that liability was an effective instrument to facilitate the polluter pays principle.[187] The Green Paper is concerned with both civil liability regimes and with proposed 'joint compensation schemes'. Civil liability regimes, of course, already exist in the various member states and typically depend on causal links connecting damage with particular polluters.

Joint compensation schemes are not limited to providing compensation in any narrow sense, but are envisaged by the Commission as providing funds for remedying environmental damage. It is suggested by the Commission that contributions to such funds could be made by specified parties, such as members of particular industrial sectors and multinational enterprises.[188]

As such, both approaches purport to offer ways of interpreting and applying a polluter pays principle, which might serve as an example for other states.

---

[184] The final OECD Recommendation is reprinted in 28 ILM (1989), at 1320.

[185] See the Declaration on an Environmental Action Programme, 22 November 1973, ILM (1974), at 164; and
Council Recommendation on the Application of the Polluter Pays Principle, 7 November 1974, ILM (1975), at 138.

[186] See Article 130 (s) (5) of the EC Treaty as amended by the 1992 Maastricht Treaty.

[187] B. Poostchi, 'Follow up to the 1993 Green Paper on Environmental Liability', 5 *Review of European Community & International Environmental Law* 1996, at 328.

[188] J. Steele, 'Remedies and Remediation: Fundamental Issues in Environmental Law', 58 *Modern Law Review* 1995, at 618.

c) Prospect of the Polluter Pays Principle

More recently, the polluter pays principle has been also referred to or adopted in other environmental treaties. Examples of these treaties are the 1985 ASEAN Convention, the 1992 UN / ECE Transboundary Waters Convention, and the 1992 Baltic Sea Convention.[189] The increased attention paid to the polluter pays principle is the result of greater consideration being given to the relationship between environmental protection and economic development. This may lead to further clarification and definition of the principle, since some aspects are still under discussion. One of these is concerned with the extent of the pollution control costs to be paid by the polluter, because state practice does not support the view that all the costs of pollution should be borne by the polluter, particularly in inter-state relations.

Unfortunately, the polluter pays principle has not received the long term broad geographic and subject matter support accorded the principle of preventive action, nor the attention accorded in recent years to the precautionary principle. It is thus doubtful whether this polluter pays principle has achieved the status of a generally applicable rule of customary international law, except perhaps in relation to states in the EC and the OECD member states.[190]

Some countries' objections of to further development of the polluter pays principle are evident in the compromising language adopted by Principle 16 of the Rio Declaration. In this Declaration, the attitude held by a number of states shows that the principle is applicable at the domestic level but does not govern relations or responsibilities between states at the international level.[191]

3.) The obligation of multinational enterprises to ensure transparency and information

One of the most common causes of environmental harm found in the export of risk technologies or substances is lack of adequate information, transparency, or consultation between the parties involved. These parties are the country of origin, the host country, and the multinational enterprise itself.

---

[189] P. Sands, *Principles of international environmental law*, Volume I (1995), at 217.

[190] A. E. Boyle, 'making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm (1991)*, at 376.

[191] P. Sands, *Principles of international environmental law*, Volume I (1995), at 214.

Major accidents such as Bhopal or the 1986 Sandoz Blaze[192] occurred as a consequence of human error. However, their catastrophic consequences were also due to lack of transparency and insufficient information given to the public.[193] Thus, in the area of hazard and risk disclosure transnational enterprises and governments have been addressed by statements from the governing bodies of the Centre on Transnational Corporations, the United Nations Environment Programme, and the OECD.[194]

a) Advantage of information disclosure by multinational corporations and governments

Steps forward relating to information disclosure developments by transnational corporations and governments are part of a broader effort to expand an international framework to regulate hazardous products and processes in international trade and international environmental law. This is evident from the United Nations Centre for Transnational Corporations' effort to create uniform principles on information disclosure for transnational corporations.[195]

The most immediate benefit of a new international framework regulating hazardous processes would be an improvement in world- wide disclosure of relevant health and safety information. Today, health risks and environmental hazards from industrial production can happen and arise without adequate mechanisms for obtaining timely emergency response information. Enterprises involved in international operations as suppliers of technology, are likely to posses the most up- to- date information on the hazards and safe uses of specific technologies. Consequently, these enterprises should be regarded as the primary vehicles for transmission of safety information between countries.[196]

---

[192] H. U. Jessrun d'Olivera, 'The Sandoz Blaze: The Damage and the Public and Private Liabilities', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 430.
[193] F. Francioni, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?', in: Francioni/Scovazzi, *International Responsibility for Environmental* Harm (1991), at 291.
[194] See in more detail Chapter I.
[195] R. Fowler, 'International environmental standards for transnational corporations', 25 *Environmental Law* 1995, at 25.
[196] H. Gleckmann, 'Proposed requirements for transnational corporations to disclose information on product and process hazards', *Boston University International Law Journal* 1988, at 90.

But it is also worth considering that the country of origin is responsible for information related to environmental hazards.

The state under whose control the multinational enterprise's parent company is located is normally also the state in which the technology has been developed, tested, and then first applied at an industrial level. The environmental risk posed by the exported technologies may best be minimised by recognising a duty that the state where the technology was developed and where the expertise for environmental control is available has the duty to supply the relevant information.[197] This goes consequently hand in hand with a deeper understanding of the actual nature of the hazards connected to the industrial applications of the technology in question. The proper discharge of such a duty can provide the essential elements that enable the host country to adopt of legislative or administrative measures to ensure environmental safety. It is doubtful whether the Bhopal catastrophe would have reached its actual consequences had the duty of information been properly discharged.[198]

b) Analysis of existing intergovernmental statements on information disclosure on multinational corporations

A first step is to present two of the 'soft law' non-binding international policy pronouncements to serve as guidelines for national governments to formulate their laws and regulations.

(i) Draft Code of Conduct on Transnational Corporations

The text of the Draft Code reads as follows:

> 'Transnational corporations shall/ should in respect of the products, processes and services they have introduced or propose to introduce in any country, supply to the competent authorities of that country on request or on a regular basis, as specified by the authorities, all relevant information concerning:
>
> [1] Characteristics of these products, processes and other activities including experimental uses and related aspects which may harm the environment and the measures and costs necessary to avoid or at least to mitigate their harmful effects;

[197] F. Francioni, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be held responsible?', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 291.

[2] Prohibitions, restrictions, warnings and other public regulatory measures imposed in other countries on grounds of protection of the environment on these products, processes and services'.[199]

The paragraphs quoted indicate that multinational enterprises which carry out their activities in host countries are subject to these provisions, while multinational enterprises which function exclusively as exporters or licensors are not covered. The quoted sections also indicate that the information should be disclosed to 'competent authorities' in the government, but not necessarily to other public parties.

(ii) OECD Guidelines for multinational enterprises

In 1985 the OECD Committee on Investment and Multinational Enterprises reviewed the interrelated issues of multinational enterprises and the environment. It stated in the OECD Guidelines[200] that multinational enterprises should:

(b) co-operate with competent authorities, inter alia, by providing adequate and timely information regarding the potential impacts on the environment and on environmentally related health aspects of all their activities and by providing the relevant expertise available in the enterprise as a whole;

(c) take appropriate measures in their operations to minimise the risk of accidents and damage to the environment, and to co-operate in mitigating adverse environmental effects, in particular...

(iv) by enabling their component entities to be adequately equipped especially by providing them with adequate knowledge and assistance.

The 1985 clarification to the OECD Guidelines stipulates that multinational enterprises should provide information to 'competent' government authorities; no mention is made of a public disclosure requirement. In 1988, at the OECD Conference on Accidents Involving Hazardous Substances, the OECD member countries agreed that workers, the public, and the competent authorities of neighbouring countries affected by a hazardous installation had the right to receive information about potential risks. The outcome was the decision of the OECD

---

[198] F. Franconi, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?, in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 292.

[199] Reprinted in the UN Code of Conduct on Transnational Corporations, 23 ILM (1984), at 626.

[200] The OECD Guidelines are reprinted in 15 ILM (1976), at 969.

Council on the Exchange of Information Concerning Accidents Capable of Causing Transfrontier Damage (1988).[201]

Although this OECD decision primarily concerns the transmission of information between competent authorities, it finally contains some provisions concerning the information to be transmitted to the public in an exposed country. Under the Decision, the principle of equal right to access has to be respected since it is agreed that 'the countries concerned shall co-operate in ensuring that persons who might be affected in the country of the installation receive the same information that is provided to persons who might be affected n the country of installation'.[202]

(iii) European Community policy on access to environmental information

In general, public access of the to environmental information has become an important issue at the European Community level. As opposed to the non- binding OECD Guidelines, the EC legislation is binding on all 15 member states and may serve as an example to other states.

The EC Environmental Information Directive was the first international instrument to create a right to access to environmental information.[203]

It's intention is to ensure free access to environmental information held by public authorities throughout the EC by setting out basic terms and conditions on which the information should be made available.[204] Establishing a right to information is also in line with the 'Seveso Directive' which is in force in the E C. Under the Seveso Directive, member states must ensure that persons liable to be affected by a major accident within the meaning of the Directive are informed in an appropriate manner of the safety measures and the correct behaviour to adopt in the event of an accident.[205]

---

[201] The OECD Decision is reprinted in ILM (1989), at 249.

[202] H. Smets, 'The Right of Information on the Risks Created by Hazardous Installations at the National and International Levels', in: Francioni/Scovazzi, *International Responsibility for Environmental Harm* (1991), at 452.

[203] Council Directive 90/313/EEC.

[204] P. Sands, *Principles of international environmental law*, Volume I, (1995), at 618.

[205] Directive of the European Communities of 24 June 1982, 82/501/EEC, amended by Directive 87/216/EEC.

4.) International standards for the use and transfer of hazardous technology by multinational enterprises

a) The practice of double standards in the home and host country

Although multinational enterprises are frequently accused of practising double standards, almost no evidence exists to prove differences in the 'cleanliness' of manufacturing technologies.[206]

The lack of sufficient contemporary evidence on of multinational enterprises double standards has been addressed to some extent by two United Nations Studies conducted through the Economic and Social Commission for Asia and the Pacific, and the United Nations Centre for Transnational Corporations. The studies found that very limited transfers of environmental technology occurred in the developing countries studied. They identified a lack of commitment by multinational enterprises to adopt the best available environmental technology in developing countries. It has further been alleged that multinational enterprises are engaged in dumping obsolete environmental technologies in developing countries.[207]

However, although multinational enterprises may have practised double standards in the past, practices and attitudes may be changing in future times. Multinational enterprises seem to be moving voluntarily towards a more uniform approach to environmental, health, and safety practices throughout their operations. But it is highly questionable if the self-regulated approach will be sufficient to effectively change the past history of double standards.

b) International law as a source of environmental standards

In recent years considerable support has been expressed for the development of international environmental standards.

For example, one of the specific objectives achieved at the United Nations Conference of Environment and Development in Rio 1992 was

---

[206] R. Fowler, 'International Environmental Standards for Transnational Corporations', 25 *Environmental Law* 1995, at 11.

[207] R. Fowler, 'International Environmental Standards for Transnational Corporations', 25 *Environmental Law* 1995, at 14.

'to promote, through the gradual development of universally and multilaterally negotiated agreements or instruments, international standards for the protection of the environment [...]'.[208]

When discussing environmental standards, it is possible to distinguish in emerging international standards between uniform or minimum standards.
Substantial criticism has arisen against the concept of uniform standards, for this concept could work against sustainable development by forcing inappropriate priorities on developing countries.[209] Environmentalists worry that uniform standards lead inevitably to a lowest common denominator outcome, which could threaten environmental gains in some countries.
A refinement of the concept of uniform international standards is that of minimum international environmental standards. In this approach, countries would remain free to adopt more stringent environmental standards if warranted by their particular circumstances. This refinement would help preventing the negative effects of downward harmonisation.
However, despite emerging interest in the concept of minimum international standards, the reality is that the prescription of detailed process standards for environmental health, a safety matters through legally binding international agreements does not currently appear to wide spread governmental or industry support.[210]

c) Domestic regulation to achieve uniformity of standards

In the absence of an international approach to the development of environmental standards, it remains open to states to pursue their own approaches with respect to the operations of multinational enterprises, falling within their jurisdiction.

---

[208] S. P. Johnson, *The Earth Summit: The United Nations Conference on Environment and Development* (1993), at 501.
[209] R. Fowler, 'International Environmental Standards for Transnational Corporations', 25 *Environmental Law* 1995, at 19.

(i) The home country legal standard approach

The most commonly stated principle advanced for governing the use and transfer of hazardous technology is:

> 'Transnational corporations should follow home country regulatory standards throughout the world'.[211]

In practical terms this means that, for example, in their operations around the world, U.S. firms should follow the safety standards set by the U.S. Environmental Protection Agency. However, there are considerable limitations on the home country legal standard approach.

The most important limitation is that governmental standards for the regulation of technology are not well developed. Existing rules exist govern basic equipment, like ladders for instance, but complex and advanced technologies are most often not regulated.[212]

Even if regulations for advanced technologies did exist, they would require environmental authorities in the relevant host country to understand and administer differing standards for various MNE facilities according to their country of origin. This could prove totally impractical.[213]

A second limitation on the home country legal standard approach is that regulatory safety rules are based on certain economic and technological assumptions. Such assumptions include, for example, the availability of fire fighting equipment, a steady electrical supply and certain social structures in the work place. By overlooking such assumptions in following home country standards, a firm might apply a standard that was irrelevant, wrong, or even dangerous.[214]

---

[210] R. Fowler, 'International Environmental Standards for Transational Corporations', 25 *Environmental Law* 1995, at 22

[211] H. Gleckmann, 'Proposed requirements for transnational corporations to disclose information on product and process hazards', *Boston University International Law Journal* 1988, at 101.

[212] H. Gleckmann, Proposed requirements for transnational corporations to disclose information on product and process hazards', *Boston University International Law Journal* 1988, at 102.

[213] R. Fowler, 'International Environmental Standards for Transnational Corporations', 25 *Environmental Law* 1995, at 26.

[214] H. Gleckmann, 'Proposed requirements for transnational corporations to disclose information on product and process hazards', *Boston University International Law Journal* 1988, at 102.

(ii) The highest safety standard approach

The second most commonly stated principle is based on achieving internal company engineering consistency:

> 'multinational corporations should follow the highest engineering standards of any country in which they operate everywhere in the world'.

But the fact remains that highest safety standard approach suffers from many of the same drawbacks as the home country legal standard approach. There are no many government approved technology standards that would motivate a reluctant firm to adapt a higher standard than normally followed by the firm practice.[215]

However, the overriding difficulty remaining with these potential industry standards and guidelines is their voluntary and non-binding character. Industry standards offer no mechanisms for ensuring compliance except import and export restrictions. At least soft law instruments executed by states reflect a consensus among some nations over the domestic measures that should be taken,. But these import or export restrictions are limited by the free-trade movement such as the GATT.

Conclusion

The discussion shows that the phenomenon of a multinational corporation has still not found a legal regime that matches its specific characteristics. As far as civil liability is concerned faces a foreign plaintiff, who has suffered injury as a result of the activities of a local importer of hazardous technology a conundrum in deciding on the appropriate legal action to take.

The same uncertainty prevails in international law. Despite the involvement of home countries in the regulation of foreign operations of multinational enterprises and despite the governmental participation of host countries in the settlement procedures occasioned by environmental disasters such as Bhopal, the question of state responsibility / liability for serious environmental harm has so far remained a penumbra.

Consequently there is no doubt that a new international framework need to be formulated, to address concerns of multinational corporations, governments and general public.

As noted in the report of the World Commission on Environment and Development, recent developments offer hope that a broad understanding of the long- term relationship between the environment and economics is being recognised. Evolution of framework for handling hazardous products and processes in international trade and production is part of this development.

[215] H. Gleckmann, 'Proposed requirements for transnational corporations to disclose information on product and process hazards, *Boston University International Law Journal* 1988, at 104.