LIABILITY OF MULTINATIONAL CORPORATIONS FOR ENVIRONMENTAL DAMAGE WITH SPECIAL REFERENCE TO THE BHOPAL GAS LEAKAGE CASE

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for the award of the degree of

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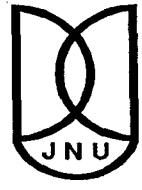

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CERTIFICATE

Certified that this dissertation, **LIABILITY OF MULTINATIONAL CORPORATIONS FOR ENVIRONMENTAL DAMAGE WITH SPECIAL REFERENCE TO THE BHOPAL GAS LEAKAGE CASE,** submitted by **ASHUTOSH KUMAR VISHAL** in partial fulfillment of the requirements for the award of the **Degree of Master of Philosophy,** is the outcome of the research done by him and has not been previously submitted for any other degree of this or any other university.

I recommend that this dissertation be placed before the examiners for evaluation.

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CONTENTS

CHAPTER I

INTRODUCTION

The rapid growth of industrialization has brought about tremendous changes in human life in terms of better living conditions, improved healthcare and availability of resources. For last few decades globalization has accelerated development and diminished the traditional notion of State boundaries. This has also created problems to the environment in the form of pollution, deforestation, global warming and others. This raises debate between development and environment. The market system often does not produce better results, when results are judged in terms of human lives and freedoms and not in terms of commodity productions.[1] We live in a society of risks[2]. The risk to the human life and risk to the environment are attributed to human activity in form of development. Multinational corporations[3] (MNCs) are the driving force of the world economy. They wield more effective power and wealth than many nation states. All that which comes with this power has been shifting from nations to the giant MNCs

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1 Michael Carley & Ian Christie, *Managing Sustainable Development*, (London and Sterling; Earth Scan Publication Ltd., 2000) p. 25.

2 Eva Selin, *Collective Risk and Environment* in Lennant Sjoberg (Ed.) *Risk and Society* (London ; Allen & Unwin ,1982) p.151

3 Many terms for Multinational Corporations has been such as translation corporation, transnational enterprises, multinational enterprises, for this study multinational corporations will be used.

that now dominate the global economy.[4] According to World Investment Report of the United Nations (1998), the largest MNCs generated more assets than the combined GDPs of countries like China, India, South Korea, Malaysia, Singapore and Philippines.[5] It has been argued that the progressive integration of the world economy through international production has shifted the balance of power away from states and towards world markets. That shift has led to the transfer of some power in relation to civil society from territorial states to non territorial MNCs.[6] MNCs have eroded the traditional concept of sovereignty.[7] State sovereignty refers to supreme political authority, where political authority in turn refers to the legitimate exercise of coercive power. [8]

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4 Errol Mendes and Ozay Mehmet , *Global governance, Economy and Law* (Newyork;Routledge,2003) p.117

5 World Investment Report, United Nations, 1998. The Cigarette Company Philip Moris has sales greater than the GDPs of 148 countries.

6 S. Strange, *The Retreat of the State: the Diffusion of power in the world Economy*, (Cambridge; Cambridge University Press, 1996). p.44 .

7 Stephan D. Krasner , Globalisation and Sovereignty "in David A. Smith, Dorothy J. Solinger and Steven C. Topile ed .*States and Sovereignty in the Global Economy*,(London: Routledge, 1999) P. 34.

8 State sovereignty thus refers to a state capacity and right to exercise supreme coercive power within its territory. This, too, has both internal and external implications. This capacity requires it to have legitimate power that can prevail on all those within its jurisdiction who engage in environmentally injurious activities. Internally, it requires states to appropriate and manage their own infrastructural and productive projects, regulate uses of the environment, and ensure restitution, assistance, and rehabilitation. Externally, states are obliged not only to defend their territory for their citizens, but also to protect it from environmentally transmitted harm from outside their borders Peter Penz Environmental Victims and State Sovereignty: A Normative Analysis in Christopher Williams edited. *Environmental Victims*, (London; Earth Scan Publications Ltd., 1998), p. 27.

MNCs are capable of inflicting more harm to persons and environment. They are capable of doing more harm than private individuals because they engage in activities that transcends state boundaries and effective control and are capable of causing more extensive injuries to persons or harm to property, other resources and the environment both domestically and transnationally. [9] Environmental problems are traced largely to normal economic activities exploration, extraction, production, distribution, consumption, and disposal of both wastes and products.[10]There are number of incidents when MNCs activities have resulted in environmental disasters such as Sandoz Chemical Leak in Rhine, Amoco Cadiz Oil Leak, Exxon Valdez Oil Spill in Alaska and Bhopal Gas Leak Disaster. They have been accused of collaborating with non popular governments and indulging in gross human rights violations (e.g. Shell Oil Company helped Nigerian Government to execute world known Ken Saro Wiwo and other environmental activists). They openly indulge in forum shopping for countries with lax health and environmental laws. They take advantage of differing governmental regulatory standards and

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9 Jordan J Praust, "Human rights Responsibilities of Private Corporations" *Vanderbilt Journal of Transnational Law*,Vol.35. pp. 801-25

10 Nazli Chourci , Multinational Corporations and the Global Environment , in Nazli Chourci (ed,) *Global Accord, ;Environmental Challeges and International Responses* (London; MIT,1995) p.206

undertaking dangerous and polluting activities in countries having weak health and safety regulations or enforcement.

States particularly, developing countries face problems in regulating these MNCs. The structural organisation too makes it difficult to regulate the behaviour of MNCs. Whenever there is any environmental damage MNCs uses different tactics to avoid liability. They deny the problem, blame the victim. delay court hearing and try to settle with government.[11]

Environmental law now regulates most aspects of a MNCs activities. Environment liability developed in various nations usually relate to clean-up cost in respect of 'contamination'. Here, liability takes the form of a penalty or fine, following breach of a prohibition. Sometimes, compensation and even clean-up costs are added.[12]

Plan of the Study

First chapter "Multinational Corporations and International Law" deals with the legal personality of corporations in

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[11] Christopher Williams, An Environmental Victomology" in Christopher Williams ed. *Environmental Victims* (London: Earth Scan Pub.,1988) p.13

[12] Jenny Steele,Damage, Uncertainty, and Risk: Trends in Environmental Liability ,in Thomas Wilhelmsson and Samuli Huri (Ed.) From *Dissonance to Sense : Welfare State Expectations, Privatisation and Private Law (Aldershot; Ashgate Pub. 1999)*, p.482

international law, how the structural and organisational position poses problems in their regulation and give accounts of the development of soft laws which are presently practiced.

Second chapter "Liability and Litigation" explains the issue of liability of multinational corporations for environmental damages. It describes the development of no fault liability in various jurisdictions.

Third chapter "Bhopal Gas Leak Disaster" is taken as a case study. Bhopal disaster involves social, political, administrative, judicial and scientific lacuna, when a developing country faces such a devastating situation.

The concluding chapter gives conclusion gives some recommendations regarding what should be done to make multinational corporations more liable to the environment and the people of developing countries, where deleterious effects of their operations are mostly felt.

CHAPTER – II

MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW

INTRODUCTION

Multinational Corporations (MNC) have been described as the 'main actors' and most significant economic players in the world economy'.[1] They are prime agents of the global political economy[2] and the most important economic institutions of our time.[3] This chapter deals with the problems relating to definitions of MNCs, their status in international law, international regulations in the form of codes of conducts available by different International Organisations, MNCs self regulatory codes and environmental law regulation in the form of different principles.

Definition:

Generally, the term MNC refers to a corporation with affiliated business operations in more than one country. There are many definitions

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1 C.A. Michalet, 'Translational Corporations and the changing International Economic System', *Transnational Corporations*, Vol. 3, Feb. 1994, p.14.

2 D. Held and McGrew, 'The End of the Old Orders? Globalisation and the Prospects forward order', *Review of International Studies*, Vol.24, December 1998, p.231.

3 R. Sally, Multinational Enterprise Political Economy and Institutional Theory: Domestic Embeddedness in the context of Internationalization', *Review of International Political Economy*, 1 (1) Spring 1944, p.168.

of multinational corporations. One definition that puts certain conditions for any corporation to be termed as Multinational Corporation is first, it should have a certain minimum size, ownership or control on production or service plants outside its home state ; and second it should incorporate these plants into a unified corporation strategy.[4] According to another definition, a MNC is a cluster of corporations of diverse nationality joined together by ties of common ownership and response to a common management strategy.[5] Another term that has been commonly used is "multinational enterprises" (MNE). One author, distinguishing between an MNE and transnational corporation; defines MNE as an entity "composed of free standing units replicated in different countries", and transnational corporation as consisting of vertically integrated units that produce goods and provide services in more than one country. Additionally, the term "enterprise" is generally viewed as more inclusive than the term "corporation" since for the most part "corporation refers only to business that possess a legal character and state recognition and excludes unincorporated entities such as partnerships and joint enterprises.[6]

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4 Luzius Wildhaber, Some Aspects of the Transnational Corporation in International Law, *27 Netherlands International Law*, Review, 29,1980,p.80

5 Detlev F. Vagts, The Multinational Enterprise: A New Challenge for Translational Law, *Harvard Law Review*,Vol.83,1970,p.740.

6 Ibid, p. 740

The multiple definitions allows multinational corporations to use financial and other devices to conceal their transnational nature, and thus to avoid responsibility under the norms developed in international and national law.

Legal Personality

International law is primarily state centric. States are subjects under international law and so multinational corporations are invisible as 'subjects' of the law; they exists as 'objects'.[7] The legal status of multinational corporations flows directly from the dominant positivist view that identifies international law with positive acts of state consent. According to legal positivism States are the only official 'subjects' or 'persons' of international law. They seems to be the only entities with full, original and universal legal personalities; they are the only proper actors bound by international law.[8] Non-state entities such as individuals, corporations and international organisations are capable of asserting legal personality. There appears to be decline of the state centricity of

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[7] See R. Higgins, in "Conceptual Thinking About The Individual Under International Law", in R. Falk, F. Kratochwil and S. Mendolvitz, (Eds), *International Law: a Contemporary perspective*, (Boulder ;Westview Press, 1985), p.478, defines a subject' as an entity 'bearing rights and responsibilities' without the intervention of a state, whereas objects do not bear rights and responsibilities.

[8] B.W. Janis, 'Individuals as Subjects of International Law', *Cornell International Law Journal*, 17 (1984), p.91.

international law. The role of multinational corporations is defined by reference to its ties to a particular state through the laws governing nationality and state responsibility.

The international legal personality of corporations was first confirmed in the *Barcelona Traction, Light and Power* case as resembling that of individuals as nationals of a state.[9] A corporation is thus regarded as having the nationality of the state in which it is incorporated and in whose territory it has its registered office. Corporation cannot sue nor be sued under international law, except through the state under the laws governing nationality of claims and the doctrine of state responsibility. Earlier , Corporate were not so developed and were localized in operations. Today corporations span many national jurisdictions and in some cases, they defy easy determination of nationality.[10]

It has been argued that multinational corporation are challenging traditional concepts of corporate law and international law. Legal concepts fashioned to serve the needs of the largely agrarian society of yesterday, in which the role of business enterprise was both limited and local, have

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[9] Belgium V. Spain, Judgment (Second Phase), *ICJ Reports* 1970, pp. 3-357.

[10] See generally, S. Strange, the Retreat of the State: The Diffusion of Power in the World Economy, Cambridge University Press, Cambridge, 1996 Oscar Schachter, 'The Decline of the Nation State and its Implications for International law', *Columbia Journal of Transnational Law*, 36 (7) 1997, pp.7-23.

become archaic in a world where business is conducted world wide by giant corporate groups composed of affiliated companies in dozens of countries.[11]

The implications are very problematic while trying to establish corporate liability and responsibility. Under international law, corporate liability must be founded through the law governing State responsibility and nationality when nationality is difficult to determine. The separation of legal identity between different companies is a universal legal assumption regarded as fundamental by the commercial world.[12] Thus the parent company of a wholly owned subsidiary is no more responsible legally, for the unlawful behavior of the subsidiaries and moreover, establishing corporate responsibility is made more elusive when domestic legal doctrines (share holder limited liability and entity theory) shield parent corporations from domestic legal liability for the actions of its subsidiaries.[13] MNCs use complex and confusing corporate structures thus, able to distance and separate the parent , headquarters, and the company

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[11] Blumberg, *The Multinational Challenge to Corporation Law. The Search for a New Corporate Personality*,(Oxford ; Oxford University Press), 1993, p. vii.

[12] See Peter Muchilinski, note 6, p. 1

[13] Ibid, p. 1.

from the local operating subsidiaries , which protects them from legal liabilities.[14]

Codes of Conduct

MNCs is expected to respect the sovereign interest of the host state. The latter is in turn also duty bound to reciprocate by fulfilling what it has undertaken while contracting with the MNCs.[15] There has been number of attempts to bind regulations on MNCs. United Nations unsuccessfully attempted to draft an international code of conduct for business in the 1970s and 1980s.[16] The organization for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 when it established its first Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws.[17] In 1977 the International Labor Organization (ILO) adopted its Tripartite Declaration of Principles concerning Multinational Enterprises which calls upon

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[14] Richard Meeran ,Liability of Multinational Corporations: A Critical Stage In The UK, in T.Kamminga and Saman Zia Zariffi (Ed.) *Liability Of Multinational Corporations Under International Law*, (Hague; Kluwer Law International,2000) p251-263

[15] See Charter of Rights and Economic Duties of State.

[16] Development and International Economic Co-operation: Transnational Corporations, UN Doc. E/1990/94; Draft United Nations Code of Conduct on Transnational Corporations, May 1983, 23, *ILM*, 626, 1984.

[17] Organisational for Economic Co-operation and Development, Guidelines for Multinational Enterprises, June 21, 1976, 15 *ILM* 969, 1976. The OECD Updated these Guidelines in 2000. See. OECD Guidelines for Multinational Enterprises available at <http://wwwoecd.org//>

business to follow the relevant ILO conventions and recommendations.[18] Further, in January 1991 United Nations Secretary General, Mr. Kofi Annan proposed a "Global Compact" of shared values and principles at the World Economic Forum.[19] The Global Compact asks business voluntarily to support and adopt nine core principles, which are divided into categories dealing with general human rights obligations, standards of labor and standard of environmental protection.[20] On August 13, 2003, the United Nations Sub-commission on the promotion and protection of Human Rights approved the "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights."[21] The thrust in these norms has been upon universal principles in the areas of human

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[18] See International Labour Organisation, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. November 16, 1991, 17 *ILM* 422,.

[19] Secretary General Kofi Annan, Address at the World Economic Forum In Davos, Switzerland, January 31, 1999, *UN Document.* SG/SM/6448,1999.

[20] Nine principles of Global Compact are::

Human Rights: 1. Business should support and respect the protection of internationally proclaimed human rights within their sphere of influence; and

2. make sense they are not complicit in human rights abuses. labour

3. Business should uphold the freedom of association and the effective recognition of the rights to collective bargaining.

4. the elimination of all forms of forced and compulsory labour;

5. the effective abolition of child labour; and

6. elimination of discrimination in respect of employment and occupation.

Environment (7) business should support a precautionary approach to environmental challenges

8. Undertake initiatives to promote greater environmental responsibility; and

9. encourage the development and diffusion of environmentally friendly technology. See U.N. The Global Compact".wwwun.org /parterners business/1st htm

[21] See "Responsbilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights", Sub commission Res. 2003, 16, UN DOC. E/CN. 41 Sub. 2/2003 available at <<http://*www.unhchr.ch/nenu* 2/2/55 sub/55. suib. htm>>.

rights and environmental concern. It is felt that the general level of understanding of existing codes is inadequate and unclear.[22] These norms are voluntary in nature except the "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights."

Codes of Conducts are usually made in areas where there is no agreement that the breach of a principle will result in liability . They are supposed to be soft laws and expected that in future that these conducts will be accepted as hard laws.[23]

Corporate codes of conducts

There are increasing demands that MNCs live up to minimum recognised standards of human rights where ever they operate. MNCs are accepting voluntary codes of conducts for ethical and social responsibilities. In 1991, Levi Strauss adopted the " Global Sourcing and Operationg Guidelines",[24] in 1992 Reebok adopted "Human Rights

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22 Ans Kolk, Rob Van Tulder, "International Codes of Conduct and Corporate social Responsibility, Can Transnational Corporations Regulate themselves?", *Transnational corporations*, Vol. 8, No. 1, April 1997, pp. 143-76.

23 Menno T. Kamminga and Saman Zia Zafari, (ed) in Introduction, *Liability of Multinational Corporations Under International Law: An Introduction.* (The Hague Kluwer Law International, 2000,) p. 8

24 www.LeviStrauss.com/about/code.

Production Standards"[25] and other MNCs have come with their codes of conducts. These self imposed codes of conducts vary widely in their content and are difficult to implement systematically. These codes have minimalist approach towards human and environmental rights. They have come after MNCs had been attacked continuously for human rights violations. At the international law , voluntary codes of conducts can be given a legally binding status. For example , the WTO agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitry Measures (SPS) establish an obligation on states to use relevant standards developed by an appropriate international organisations as a basis for national regulations affecting internationally trade goods This obligation has the effect of converting standards developed by organisations such as Codex Alimentarius Commission, which the organisations themselves do not regard as binding, into mandatory obligations for WTO members.[26]

United Nations Policy on MNCs

The UN policy on MNCs has its origin in the decolonisation process after World War II. Although the political influence of the old metropolitan powers diminished, their economic influence upon the newly

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[25] www.reebok.com/humanrights .

[26] Sol Picciotto, "Rights, Responsibilities and Regulation of International Business", *Columbia Journal of Transnational Law*, Vol.42, 2003, pp.131-51.

independent states continued. This was interpreted by many of the Developing states as evidence of continuing economic imperialism. The new independent states gained a majority that has come to be known as "Group 77" in the UN. This resulted in the development of the concept of a New International Economic Order (NIEO)[27] and articulation of the 'right to economic self-determination'. These developments may be seen as the main source of UN policy concerning MNCs.

In 1972 the Economic and Social Council of the UN requested the UN Secretary General to establish a group of eminent persons to study the impact of multinational corporations (MNCs) on world development and international relations. The Group recommended for the setting up of a UN Commission on Multinational Corporations and a UN Centre on Multinational Corporations to oversee and develop UN policies in this area.[28] These bodies were soon renamed UN Commission on Transnational Corporation (UNCTC) and UN Centre on Transnational Corporation (UNCTC). UN adopted a philosophy that was not opposed to investment by MNCs in developing countries which also required their regulations so that they could become instruments of development. Rather making way for adverse relationship the vision was a co-operative one. The making of

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[27] The Declaration on the Establishment of New International Economic Order; GA Res. 3202 of 16 May 1974, *UN GAOR Supp.*, 6th Special Sess.

[28] See UN Document. E/5500/aDD 1(Part i) 24 May 1974, 13, *ILM,* (1974), p.8.

draft on multinational corporations was marred by differences. The capital exporting states were concerned about using the code primarily as a means of protecting multinational corporations against discriminatory treatment. The Group of 77 countries , supported by the socialist countries, were concerned to use the code as a means of subjecting the activities of MNCs to greater regulations, in line with the contents of the UN Charter of Economic Rights and Duties of State. Finally, the Economic and Social Council (by Resolution 1980/60 of 24 July 1980) that the code should include provisions relating to the treatment of transnational corporations, jurisdiction and other related matters:[29]

There was little disagreement as to the provisions on the environment. One of the three provisions on the environment read as follows:

> " according to Article 43, Transnational Corporations shall carry out their activities in accordance with national laws, regulations, established administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Transnational corporations should, in performing their activities, take steps to protect the environment and where damaged to rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose.''[30]

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[29] See Un Commission on Transnational Corporations, Information Paper on the Negotiations to the Code of Conduct on Transnational Corporations, 22 *ILM* (1983) p. 177 at p. 181.

[30] See note 16 ,Article 44. Transnational corporations shall , in respect of the products ,process and services they have introduced or purpose to introduce in any country , supply to the competent authorities of that countries of that country on request or on regular basis , as specified by these authorities , all relevant information concerning:

The code contains the genesis of principles of liability. It requires the multinational corporations to repair the environmental damage it may cause to the host economy.

By 1990's the UNCTC itself was beginning to have doubts about the universal codes on obligations. The investment by MNCs increased in developed countries and developing countries languished far behind. This led to new policy by UNCTC that is "New Code Environment.[31] The debates over nationalization and international obligation on equity ownership structure were replaced by reduced equity and non equity forms of investment structured by firms.[32] Host states in place of local ownership as evidence of control focused to capture large share of economic benefits.[33]

Regional Efforts

When the United States, Canada and Mexico designed the North America Trade Agreement (NAFTA), side agreements on labour standards and environmental protection were added by the Clinton administration.

Characterstics 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 mitigate their harmful effects.

31 E/C. 10/1990/5 para. 39.

32 Ibid., para 45.

33 Ibid., para 47.

These NAFTA protocols on labor and the environment created no new international standards. Rather they simply required each member state to vigorously enforce their own (preexisting labor and environmental laws). The North American Agreement on Environmental Cooperation (NAFTA's side agreement on the environment) created a Commission on Environmental Cooperation (CEC). Individuals and NGOs can file complains before the CEC. The CEC then has the power to manage a lengthy review and dispute settlement process. In theory ideas have the power to impose fines on any of the three parties to NAFTA for failures to enforce their environmental laws. The CEC does not have the power to impose fines directly against a MNC that violates environmental laws.[34]

The European Union (EU) has taken regional steps to promote labor and corporate social responsibility. Within its program under the Generalized System of Preferences (GSP),[35] the EU has created a unique incentive scheme that extends economic preferences to developing nations that have upgraded their labor rights and environmental regulations. The key features of the EU's GSP include tariff modulation, country sector graduation, and special incentive arrangements. The special incentive

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[34] Peter Newell, "Environmental NGOs, TNCs and the Question of Governance in Dimitris Stevis & Valerie J. Assetto (ed.), *The International Political Economy of the Environment*, (Colorado; Lynne Reinner Pub., 2001), pp.85-101.

[35] GSP programs are a component of the UNCTAD institutional framework.

provision refer to labor rights and environmental protection. The European Union has even introduced a framework for the application of these types of self-regulatory instruments called 'environmental agreements', defined as agreements between industry and public authorities on the achievement of certain environmental objectives.[36] The OECD Guidelines are voluntary as they have not created any enforcement mechanism to go along with them. These instruments have prescriptions as to how multinational corporations should conduct themselves in relations to the environment of their host States.[37] They refer merely to the precautionary principle and do not involve the contemplation of any liability for non-observance. These guidelines require multinational corporations to;

" Access and take into account in decision making, foreseeable environmental and environmentally related health consequences of their activities, including sitting decisions, impact on indigenous natural resources and foreseeable environmentally related health risks of products as well as from the generation, transport and disposal of waste.[38]

However, the Guidelines have a unique importance because they promote direct involvement by MNCs and they seek to avoid double standards with respect to labor rights and the environment. The Guidelines are important because they provide a link between the state and the

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[36] Phillip, Sands, *Principles of International Environmental Law* (Manchester, New York, Manchester University Press 1995) Vol., 1, p.98.

[37] See note 17 ,p.967

[38] Ibid.

corporate level through the establishment of National contact points in each home country. The OECD seeks to link its member states to various non-state actors, and then promote corporate social responsibility via mutual participation.

At the time of United Nations Conference on the Human Environment (Stockholm, June 1972), the law on MNCs were not envisaged because environment law was less developed. There were very few international agreements on environment protection. Now the situation is significantly different. Despite large gaps and great disparities between the regions, there is now a significant body of rules of international environmental law at regional and global levels. Those rules in one way, affect every geographic and political region and state, and influence, directly or indirectly virtually every type of industrial activity, and multinational corporations dealing with particular service or manufacture, process or transport of a commodity. It is now frequently directed towards particular types of activity and, even towards particular multinational corporations. The United Nations Centre on Transnational Corporations prepared, in cooperation with the United Nations Environment Programme a study entitled, 'Environmental Aspects of the Activities of Transnational Corporations : A Survey', which notes the involvement of MNCs in critical global environmental interdependencies that can be resolved only

through increased cooperation between the involved and affected states, and it examines the reasons for environmental regularity laxity of the Governments of both host and home countries.[39] It notes that the governments of host countries, particularly smaller developing nations, are often poorly equipped for effective environmental protection and vulnerable to a bargaining process.[40] In 1987, the UN General Assembly recommended that "multinational corporations should establish progressively in the host countries, the skills and technological capabilities needed for environmentally sound management of industry even in the absence of legislation on desirable environmental standards."[41]

International law does not allow states to conduct any activities within their territories, or in common spaces, without regard for the right of other states or for the protection of the global environment. This point is some times expressed by reference to the maxim *sic utere tuo, ut alienum non laedas* or 'principles of good neighbour lines.[42]

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[39] UNCTC Environmental Aspects of the Activities of Transnational corporations: A Survey ST/CTC/SS (United Nations Publications, Sales No. 85 11.A.11), Chapter I and II.

[40] Ibid.

[41] See G.A. Resolution 42/186, annex, para 47(h).

[42] Patricia Birnie & Alan Boyle, *International Law & The Environment*, (Oxford: Oxford University Press, 2002), p. 89.

International environment law has evolved following principles which needs to be taken into account while performing any activities relating to environment. It is important for MNCs to follow this in their production processes.

Polluter-pays Principle

The 'polluter pays' principle is essentially a principle of economic policy for allocating the costs of pollution, rather than a legal principle. It was adopted by OECD in 1972 as a fundamental principle for allocating costs of pollution prevention and control measures.[43] Since then the allocation has evolved from partial towards full internalization of externalities. Its purpose is to induce the polluter to bear the expenses of preventing and controlling pollution to ensure that the environment is in an acceptable state. In order words, the cost of these measures should be reflected in the cost of goods and services.

Principles 16 of the Rio Declaration highlights the essential features of PPP: National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in

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[43] OECD Reccomendation C 1992 reproduced in 28 *ILM.* 1989

principle, bear the cost of pollution, with due regards to the public interest and without distorting international trade in investment and the national authorities should endeavor to internalize environmental costs.[44] E.E.C. adopted a programme of action which endorsed the PPP principles.[45] Article 25 of the 1986 Single European Act has provided the legal basis as a part of EEC environmental competence: Action by the community relating to the environment shall be based on the principle that preventive action should be taken, that environmental damage should as a priority to rectified at source and that the polluter should pay.[46] It has the legal force which OECD recommendation lacks.

The User-Pays Principle (UPP)

UPP is concerned with resource pricing rather than pollution. The OECD tends to refer to it simply as resource pricing, treating it more as a question of common sense than as a principle.[47] It has not been elaborated to the same degree as PPP. Indeed, there is not enough agreement on the definition of UPP for it to have been officially adopted by the OECD.[48] In

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[44] Rio Declaration on Environment and Development 1992, A/CONG. 151/26, 1992.

[45] Declaration on an Environmental Action Programme, 1973, and EC Council Recommendation on the Application of the "Polluter pays Principle", 1974.

[46] Joseph Henri Jupille, Sovereignty, Environment and Subsidiarily in the European Union in ,Karan T.Litfin (Ed.),The Greening of Sovereignty in World Polics (London;MIT,1998), pp.237- 239.

[47] Water resource management; integration, demand management, and ground water protection; recommendation C(89) 12 (Final) adopted on 31 March 1989.

[48] See note O.E.C.D., 1992.

Annex 2 an informal note is reproduced which describes UPP. It emanated from the OECD in 1988.

Essentially, UPP states that the price of a natural resource should reflect the full range of the costs involved in using it, including the cost of the external effects associated with exploiting, and transforming and using the resource.

The Precautionary Principle

In the *Corfu Channel* case the International Court Justice stressed the importance of establishing Albania's actual knowledge of the risk to British warships as a condition of its responsibility for damage..'[49] Foreseeability , rather than actual foresight , is required by the ICLs articles on International Liability .The emphasis which modern treaties place on prior environmental impact assessment of projects likely to affect other states or areas beyond national jurisdiction shows that states are not free to close their eyes to the possible consequences of activities they authorize.[50] This principle was first officially mentioned ministerial declaration of the second International Conference on the Protection of

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[49] Barboza, *4th Report on International liability UN Doc.* A/CN/ 4/413; (1998), 25.

[50] Ibid., 5th Report, UN Doc. A./CN. 4/423; (1989), 26-33.

the North Sea (1987) and fully stated in the Bergen Ministerial Declaration of May 1990 as under

> "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[51]

PPP has rapidly been integrated into official thinking in developed countries. For instance, it was reaffirmed by the OECD Environmental Committee meeting at ministerial level in January 1991.[52] Principle 15 of the Rio Declaration says:

> "In order to protect the environment, the precautionary approach by states according of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.[53]

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[51] The Declaration was adopted at the regional conference on the follow-up to the report of the World Commission on Environment and Development in the ECE Region, held in Bergan, Norway on 8-16 May 1990.

[52] OECD Environment Committee at Ministerial Level, Communiqué, Paris, 31 January 1991, para 38.

[53] Rio Declaration on Environment and development, *ILM*, Vol. 31, 1992, p. 876.

A similar practice is envisaged in ILC draft articles, in UNEP 'principles' and by the ECE convention on Environmental Impact Assessment.[54]

The Subsidiarity Principle

The essence of this principle (SP) is that political decisions should be taken at the lowest possible level. It is reflected in the Single European Act in the subsection dealing with the environment. (Art. 130 R.4). The Treaty on European Union (Treaty of Maastricht') expresses the spirit of subsidiarity in its first line. Article 3b states that in areas which do not fall within its exclusive competence, the community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the community."[55] A reference to SP can be discerned in Principle 10 of the Rio Declaration, which states that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level.

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[54] ILC, Draft Articles on 'International Liability' Article 11, *UN Doc. A/CN.* 4/428 (1990); UNEP, Principles of Environmental Impact Assessment, 1987; Principles of co-operation in the utilization of Natural Resources shared by two or more states, 1978.

[55] See note at 47, pp.237- 239..

Conclusion

The codes of conducts established by international instruments are non binding. They do not deal with liability for environmental damages .Voluntary codes of conducts evolved by MNCs, too, do not specify the question of liability and can be seen as a mere veil to escape from question of liability. These approaches generally take MNCs as part of solution rather than problems as it can be noticed from the Global Compact. No international regulations have come which directly regulates and make MNCs more responsible and liable.

Polluter Pays Principle (PPP) requires political decisions.. The more recent OECD recommendation on the application of PPP to accidental pollution emphasized that polluter should meet the cost of reasonable measures to prevent and control accidental pollution. Precautionary Principle (PP) comes in to play when 'there are threats of serious or irreversible damage.' Subsidiarity Principles (SP) urges that these decisions be taken by the authorities which are close to the population concerned. Although these principles are not legally binding on MNCs, but theses should be followed by MNCs to protect environment as the failure in taking precautions will entail liability on MNCs.

CHAPTER – III

LIABILITY OF MULTINATIONAL CORPORATIONS

INTRODUCTION

International liability implies a secondary or functional international obligation, namely that of compensation which arises vis-à-vis the victim states as a result of the polluting state's violation of its Primary Obligation i.e. the responsibility to ensure that activities under its control or jurisdiction do not cause extraterritorial damage.[1] It is an essential concept with regard to transboundary environmental injury. Principle 22 of the Stockholm Declaration recognizes the duty of the state" to develop further the international law of liability and compensation"[2]. The Rio Declaration emphasis the development of national rules in addition to the further development of international rules for all adverse affects of environmental damage including, implicitly , liability for damage to the environment itself.[3]

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1 Handle, Gunther, "State liability for Accidental Transnational Environmental Damage by Private Persons", *American Journal of International Law*, Vol. 74, No. 3, July 1980, p. 525.

2 Report of Stockholm Confrence on Human Environment, International Legal Materials, Vol. 11 (1972), p.1416.

3 Report of the United Nations Conference on Environment and Development , 1992,UN Doc. A/CONF.151/,Vol. 1-14

The function of liability is to shift the loss from an innocent victim to the responsible causal agent, as a matter of equity or corrective justice.[4] Though in environmental matters, its primary role is that of mitigating measures, its imposition or threat of imposition could also induce the responsible actor to prevent or reduce the risk of harm.[5] Another function of liability is a means of enforcement to vindicate rights that have been violated.[6] There are several well established theories which regulate issues related to liability on the international and national plane, such as principle of strict liability, transnational enterprise liability, negligence, public nuisance, trespass, misrepresentation and breach of warranty.

This chapter deals with principle of strict liability ,state liabilty for MNCs activities ,compensation in international as well national law ,definition of environmental damage ,threshold at which environmental damage entails liability, international civil liabilities, civil and criminal liabilities in municipal law, liability of parent company and home state liability for environmental damage done by MNCs.

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4 See Oscar, Schachter "The Emergence of International Environmental Law" *Journal of International Affairs*, Winter 1991, p. 481.

5 Ibid.

6 Ibid.

PRINCIPLE OF STRICT LIABILITY

The principle of strict liability states that liability can be held even without proving fault. In *Rylands Vs. Fletcher*[7] it is stated that " the person who for his lands and collects and keeps there any thing like it to be a mischief if its escapes must keep it at his peril and if does not do so , is prima face answerable for all the damage which is the natural consequence of its escape."

'This rule implies that in some cases, a person may be held liable for any injury he has caused , even though he has neither committed moral wrong nor violated reasonable standard of care.[8] So, strict liability excludes any defenses, be they of causal or of other nature and it does not require any causal connection between the person held liable and the damaging event.[9]

The principle of strict liability is accepted in the Convention on International Liability for damage caused by space objects. [10]A series of treaties have established strict liability for hazardous activities. Principles of strict liability is now accepted world wide

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7 Ryland Vs.Fletcher (1986) L.R .3 H.L.p.330

8 Stephen L. Cummings ""International Mass Tort Litigation :Forum Non Conveniens and The Adequate Alternative Forum in Light of the Bhopal Disaster " *Georgia Journal of International and Comparative Law*, Vol.16, No.1,1986,p.126

9 See Izhak England, The Philosophy of Tort Law,(Cambbridge;Cambridge University Press, , 1993) p. 21.

10 Art.1 para. (c) (ii)

for the activities of ultra hazardous and dangerous technology in industrial activities. It is not necessary for victims to establish negligence or other fault.[11] The World Commission on Environment and Development (WCED) and Organization for Economic Cooperation and development (OECD) has proposed strict liability as a legal principle for trans-frontier pollution. In an environmental dispute, an Austrian hydroelectric facilities polluted a river shared by Austria and Yugoslavia. Yugoslavia demanded compensation for the resultant damage, but it did not allege negligence on the part of Austria. There was also no treaty between the parties providing for payment of compensation. But Austria paid compensation because activities within its jurisdiction caused material damage to a neighbouring state.[12] The Indian Supreme Court, in *Oleum Gas Leak* case, held the defendant liable absolutely for the accident which involved the leak of hazardous substances.[13]

State Liability for Environmental Damage Done by MNCs

Article 1 of the International Law Commission's Draft Articles on State Responsibility states that every international

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[11] The rule is justified because it will be difficult for the injured victims of dangerous accidents like toxic chemical spill on explosion to prove intent. See J. Kelsen, "State Responsibility and Abnormally Dangerous Activities" *Harvard International Law Journal*, 13 (1972) p. 243.

[12] See Handle note 1 at pp.525-565.

[13] *M. C. Mehta Vs Union of India*, AIR 1987 SC 965.

wrongful act of a state entails its international responsibility .They are liable for conduct of its various organs in violation of an international obligation. They are also liable for injurious consequences arising out of out of acts not prohibited by international law [14]

The principle of state liability is addressed in many treaties. UN Stockholm Conference on Human Environment, 1972, makes it obligatory for States to ensure that activities within their jurisdiction do not cause damage to areas beyond the limits of their national jurisdiction.[15] They are also made liable for accidental transnational environmental damage by private persons. [16] Principle 21 of the Stockholm Declaration extends the state liability to activities conducted anywhere outside a state's territory as long as that state has priority in exercising control over the injuries conduct.[17] Several treaties provide for controlling states international liability for private activities. Article VI of the 1967 treaty on "Principle Governing the Activities of States in the Exploration and use of outer space" provides international

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[14] UN doc. A / CN.4 /302

[15] See. Report of the Stockholm Conference, UN. DO A/CONF. 48 114, at 7, reproduced in 11 *ILM* 1416, 1420, 1972.

[16] See Handle ,note 1 at pp.525-565

[17] Stockholm Conference on Human Environment *ILM* ,Vol.11,1972,pp.14-16

responsibility of states for "National activities in outer space whether such activities are carried on by governmental agencies or by non-governmental entities."[18] The same provision is found in Article XIV of the 1979 Agreement Governing the Activities of States in the Moon and other Celestial Bodies.[19] Similarly the 1972 Convention on Liability Or Damage Caused by Objects Launched Into Outer Space imposes absolute liability on the launching state which is defined as including a state from whose territory or facility on the contracting state for injurious activities undertaken by private organization.[20] Further, Article 14 of the Declaration of the Principles Governing the Seabed and the Ocean Floor and the subsoil there of Beyond the limits of National Jurisdiction imposes state's responsibility for the activities undertaken by governmental agencies or non governmental entity .[21]

Compensation in International Law

The liability to pay compensation has been recognized in various international instruments. Reparation is the *generic* term which describes the various methods available to a state for

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[18] See, 18 UST 2410, TIAS No. 6347, 61C, UNTS 206.

[19] Report of the Comm. on the Peaceful Uses of Outer space, Annex II, 34 *UN GAOR* (Supp. No. 20) 33, *UN Doc.* A/34/20, (1979) and 18 *ILM* 1434, 1439 (1979).

[20] Art. I, para. (e) ii in 24 UST 2389, TIAS. No. 7762, reproduced in 10 *ILM* 965 (1974).

[21] G.A. Res.2749 (XXV) 1971

discharging or releasing itself from such responsibility . The forms of reparation may consist in restitution, indemnity or satisfaction[22].

The notions of reparation and restitution had long been part of the available legal concepts. In the judgment of the *Chorzow Factory* (Indemnity) case, the PCIJ stated that:

"....reparation must, as far as possible, wipe out all the consequence of the illegal act and re-establish the situation. Which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind bear; the award, if needed be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principle which should serve to determine the amount of compensation due for an act contrary to international law.[23]

Further, in the *Gabicikovo-Nagymaros Project* case Hungary claimed that Czechoslovakia should re-establish the situation which would have existed if the act had not taken place and provide

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[22] E. Jimenez de Arechaga, *Academic de Droit International Recuildes Cours*, (Alphen aan den Rij; Sijthoff & Noordhoff, 1979), p.285

[23] PCIJ. Ser. A. No. 17 at 47. (1927).

compensation for the harm which resulted from the wrongful act.[24] Restoration in the previous form can not be possible in the cases of environmental damage because of various practical difficulties and inconveniences. The European Commission's Green Paper on Environmental Liability recognizes

"an identical reconstruction may not be possible, of course. An extinct species cannot be replaced. Pollutants emitted into the air or water are difficult to retrieve. From an environmental point of view, however, there should be a goal to clean-up an restore the environment to the state which, it not identical to which existed before the damage occurred, at least maintains its necessary permanent functions...[25]

For these reasons monetary compensation takes place. Since money is the common measure of valuable things , monetary compensation must wipe out all the consequences of the illegal act and should correspond to the value which a restitution in kind would bear. This raises the problem of assessing the measure of environmental damage. The environment damage can not be valued on the economic terms and the value of environment is related to

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[24] Hungary, Original Application, 22 October, 1992, para. 32.

[25] EC Council and European Parliamentary Environmental Liability, para 5.2. p. 32 1993.

the social and cultural aspects.[26] The problem also, arises because environmental damage does not fit easily with the traditional approaches of civil and state liability which are designed to compensate an injured person by requiring the responsible person to pay the economic costs of resulting damage which is frequently calculated by reference to a depreciation of the economic value of the damaged item, or the costs of repairing the damage. Pure damage to the environment may be incapable of calculation in economic terms, although it may have an economic value requiring restoration to the state which occurred prior to the damage.[27]

Compensation in Municipal Law

Municipal courts of different countries have awarded compensatory and punitive damages for environmental injury. In *M.C. Mehta Vs Union of India*,[28] the Supreme Court of India held that the quantum of compensation must commensurate with the capacity of the enterprise to pay. In the *Bhopal Gas Leak Disaster Case*; the Bhopal District Court Judge stated that "since an Indian Court had never before tried a toxic tort suit, it was necessary to

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26 John Foster, ""Introduction" in John Foster (Ed.), *Valuing Nature*, (London;Routledge,1997), pp.1-17

27 See Phillip Sands., *Priciples of Internationa Environment Law* , (Manchester ; MIT,1995) p.633

28 M.C.Mehta Vs. Union of India AIR 1987 , SC 965

devise a different measures of damage". He was of the opinion that the court could grant any amount by way of compensation.[29]

ENVIRONMENTAL DAMAGE

Definition

In environmental law various treaties and conventions have defined environmental damage differently. Generally, environmental damage is defined as a damage to natural resources only (air, water, soil, fauna and flora, and their interaction); damage to natural resources and property, landscape and environmental amenity. But no treaties include damage to persons or damage to property in their definitions of environmental damage even though such damage can be consequential to environmental damage. This distinction is reflected in Article 24 of the International Law Commission's Draft Article on International Liability, which addresses harm to the environment and resulting harm to persons or property). The definition of environmental damage of 1988 CRAMARA give broader definition to the damage to the Antarctic environment, providing that environmental damage is " any impact on the living or non living components of that environment or those ecosystems, including harm to atmosphere,

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[29] See Adler, "Bhopal Disaster: Only the Victims Lack a Strategy". *American International Law Journal*, 128, April 1985; p. 132.

marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to the Convention".[30]

The 1985 Vienna Convention on Substances that Deplete The Ozone Layer defines 'adverse effects' in relation to ozone depletion as, *inter alia*, "changes in the physical environment or biota, including changes in climate, which have significant deleterious effects on human health or on the composition, resilience and productivity of natural and managed ecosystems or on materials useful to mankind.[31]

Threshold at which environmental damage entails liability

All pollution or human activity having adverse effects might give rise to environmental damage, it is unlikely that all environmental damage results in liability. There are no agreed international standards which establish a threshold for environmental damage which triggers liability and allows claims to be brought. State practice, decisions of international tribunals and the writing of jurists suggest that environmental damage must be 'significant' or 'substantial' for liability to be triggered. The EC

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30 Art. I. (15);

31 Vienna Convention of Climate Change.

Commission's Green Paper on Environmental Liability identifies several possibilities for determining the level of environmental damage triggering liability. These include defining environmental, damage by reference to 'critical loads', which describe the point at which pollutant becomes concentrated in the environment at a level which cannot be diluted or broken down by natural processes[32].

Establishing the appropriate threshold depends on the facts of each case, and may vary according to local or regional circumstances. Liability can be closely related to the adoption of regulatory standards.

Civil liability for environmental damage

Civil liability regimes have usually developed in relation to specific activities which are considered to be ultra-hazardous. These treaties are treaties relating to civil liability claims with respect to nuclear damage, treaty regime dealing with claims to pollution from shipping, and other treaties dealing respectively with pollution caused by the exploitation of offshore oil and gas, damage caused during the carriage of dangerous goods by various

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[32] See Phillip Sands, at note 27, p 637.

means of transport, and damage resulting from transboundary movements of hazardous wastes.

Civil Liability in Case of Nuclear Damage

A number of conventions were developed and adopted during the early 1960s in the field of civil liability for nuclear damage. These treaties aims to provide strict, though not unlimited, civil liability of nuclear operators. These include the following: the 1960 Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention), the 1963 Supplementary Convention on Third Party Liability in the Field of Nuclear Energy (Brussels Supplementary Convention)and 1963 Convention on Civil Liability for Environmental Damage (Vienna Convention). These Conventions deal with the operator's liability for nuclear damage and have a similar structures. The Paris Convention exclusively deals with claims by individuals under civil law . It provides remedies through private legal actions against nuclear plant operators of in domestic courts.[33] Liability under the Convention is strict and channelled onto the operator of a nuclear installation for damage resulting from a nuclear incident in the territory of a

[33] Article 13 of the 1960 Paris Convention

contracting state.[34] This means that the operator will be liable for all accidents at and in relation to its nuclear installations, even during transportation of nuclear substances from or to its nuclear installation.[35] Claims for compensation are further simplified. The operator will be liable for damage to or loss of life of any person or damage or loss of property if proved.[36] It does not provide absolute liability since liability is fault based and exceptions to the operator's liability are provided by Article 4 and 9. Even in Vienna convention certain exceptions are provided. Generally, actions must be brought within ten years from the date of nuclear accidents.[37] Jurisdiction over actions generally lie with the courts of the party in whose territory the nuclear accident occurred [38] and a state may not, except in respect of measures of execution, invoke any jurisdictional immunities.[39] Judgments are enforceable in the territory of any party, and the convention is to be applied without discrimination as to nationality, domicile or residence.[40]

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34 Article 1 (a)(I) of the 1960 Paris Convention

35 Article 4 of 1960 Paris Convention

36 Article 3 of 1960 Paris Convention

37 Art 8.

38 Art 13 (a)

39 Art 13 (e)

40 Art 13 (d) and 14.

The Chernobyl accident highlighted the inadequacies of the liability regime established by the Paris and Vienna Conventions that without participation of major nuclear nations, such as the Soviet Union, treaties on nuclear safety was of no use.

Civil Liability for Oil Pollution

The *Torrey Canyon* disaster prompted moves for legal instruments to improve the position of those people wishing to claim for oil pollution damage. The matter was debated in Legal Committee of the Inter Governmental Maritime Consultative Organisation (International Maritime Organisation as known now) and resulted in the adoption in 1969 of the Civil Liability Convention [41] provides that where pollution damage is caused by ships carrying oil, the ship owner is strictly liable.

But liability is limited. In 1971 , a further convention was adopted named Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage[42] as amended in 1992 by two protocols[43]. It governs the liability of ship

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41 In force 19 June 1975; 973 UNTS 3. See also, Lisa Son, Oil pollution and the Environment. The question of liability in petroleum Industry in India, Legal, Financial & Environmental Issue, *ILI* Foundation, 2000, New Delhi, pp. 238-251.

42 In force 10 October, 1978; (1972) 11 *ILM* 284.

43 Now collectively known as the 1992 Civil Liability and Fund conventions. Entered into force 30 May 1996.

and cargo owners for oil pollution damage. They too established a strict liability and compulsory liability insurance system. The strict liability principle is subject to limit, which is in turn linked to the tonnage of the ship.[44]. It provides an additional tier of compensation that is funded by cargo interests in cases where claims for compensation are greater than the limit of the ship owner's liability under the Civil Liability Convention.

The liability in nuclear and oil spills damage is limited. This means that claimants will not normally have a problem in obtaining compensation where the claim does not exceed the limits of insurance coverage. However, where a claim or a related group of claims exceed the limit of liability, this means that the claimants will not be fully compensated for their loss. Argument in favour of limited liability, particularly in the context of nuclear liability, is that it will be impossible for those persons engaged in potentially environmentally harmful activities to get insurance coverage . In the case of oil pollution and nuclear damage under the Paris Convention and the 1997 supplementary compensation convention, additional funds are available to provide compensation, as has

[44] International Oil Pollution Compensation Funds, Annual Report on the Activities of the IOPC Funds (1992) 11.

occasionally happened in practice with the oil pollution compensation fund.[45]

Civil and Criminal Liability In Municipal Law

The domestic legislation in many countries such as United States, the United Kingdom, Australia, Canada, Hong Kong, Germany, Spain have accepted imposition of strict and no-fault based liability for corporate environmental damage. Civil and criminal environment liability as a legal technique for regulating corporate behavior can be felt in the corporate management. It is noted that 'of all the types of corporate bureaucracy that the law may seek to discipline, the business corporation is most appropriately suited to the technique of enterprise liability, ideals of acceptable social conduct are conveniently transmitted in monastery signals that the business organisation can translate, in turn in to its native tongue the language of profits and losses.[46]

The 1980 US comprehensive Environmental response. Compensation and Liability Act (CERCLA), more commonly known as the 'Super fund' Act has developed more comprehensive

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[45] D. Wilkinson, moving the Boundaries of Compensable Environmental Damage Caused by Marine Oil Spills: The Effect of Two New International Protocols, 5 *Journal of Environmental Law*, 71 1993.p.27

[46] Stone: The place of Enterprise Liability in the control of corporate conduct', 90 *Yale Law Journal* ,1980,pp. 1-77.

civil liability at national level. It is pool of $1.6 billion to help financing clean up of existing hazardous waste sites and chemical spills.[47] It allows the corporate veil to be pierced to inflict personal liability on both company directors and even shareholders for corporate environmental damage. [48] Section 107 (a) of CERCLA imposes strict liability in a manner that has been interpreted by some US courts to enable the corporate veil to be pierced so that company directors, corporate officers, and even lenders and shareholders, are threatened by personal liability.[49]

US laws provide for the private enforcement of environmental laws and regulations through the provision of citizen suits, most of which are filed against companies. This provision authorize private citizens to file a lawsuit against 'persons', which for this purpose includes corporations and partnership that have violated statutory provisions, regulations, orders or permits. In this way corporate environmental liability is extended beyond the firms to the shareholders, company directors and even corporate creditors and lenders. Further, US case law have developed a fact-specific

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[47] See, Kant E. Portney, *Controversial Issues in Environmental Policy*, Vol. 1. (Newbury Park ,Sage Publications, , 1992,) pp. 144-145.

[48] T.S Rama Rao "Relationship Between A Parent Company And Its Subsidiary-National And International Law Dimensions" *Indian Journal Of International Law*, Vol.30, 1990 ,pp.72-81

[49] *Patricia Thomas, Environmental Liability,* (International Bar Association, 1991)

standard for establishing corporate officer or share holder liability called the 'Prevention Test'. This test focuses on whether an individual could have prevented or significantly abated the release of hazardous substances from a site. The court takes into accounts two factors in analyzing evidence of the individual's authority to control the corporation's waste-handling practices. First, the individual's ostensible capacity to control the environmentally sensitive activities, does the share holder hold a management position within the corporation, such as officer or director? Secondly, the court examines the distribution of power within the corporation including the shareholder's position in the corporate hierarchy and the percentage share of the corporation which he or she owes.[50]

Australian laws imposes strict, criminal liability in the form of individual fines for directors and managers of offending corporations. Further New South Wales Environmental Offences and Penalties Act is the first piece of Australian legation to make directors or managers liable for imprisonment.[51] Spanish national law also holds Spanish company directors to have individual criminal liability for corporate environmental damage. The

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[50] Ibid

[51] Ibid

amendment in the criminal code first established the offence of an environmental crime[52] and later provided that certain conduct endangering or causing hazards to public health constitutes a criminal offence.[53]

In US, US Clean AIR (Amendment) Act of 1990 and in Canada 'Canadian Environmental Protection Act, also establish individual criminal liability for environmental damages.[54] In the third world countries, Hong Kong establish director's criminal liability for their part in a company's environmental offences.

Under section 10A of the Water Control Pollution Ordinance (WCPO) for example, directors are specifically included within one of the three groups being (a) the person who actually committed the offence, and (b) the occupier of the premises or owner of the vessel. These latter two groups are subject to a strict liability test in respect of any offence under the Ordinance. Section 11 clearly provides that a lack of intention, knowledge or negligence on the

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52 Article 347 bis introduced in 1983 'The Article Punishes the emission of substances that are potentially hazardous to the atmosphere, wild life, agriculture and human live.

53 Article 384 bis (b) introduced in 1989, Article 15 bis of the criminal code established the general basis for criminal liability of company directors.

54 See supra note, 85.

part of these two groups does not absolve them from potential criminal liability.[55]

In India, there are a number of legislation on environmental protection, which deal with the civil and criminal liability of the offender. The offence of public nuisance is contained in chapter XIV of the Indian Penal Code(IPC) of 1860.[56] Specific provisions prescribing punishment for fouling water and air are contained in sections 277 and 278 of IPC. Also section 133 of Code of Criminal Procedure (CrPC) empowers a magistrate to take cognizance of the public nuisance and to take appropriate steps.[57] Article 51A (g) of the Indian Constitution mentions about the fundamental duty of the citizen to protect and improve environment. After the Stockholm Conference on Human Environment, 1972, a number of laws concerning environmental protection were enacted in India as follows: The Environment (Protection) Act, 1986, The Water (Prevention and Control of pollution) Act, 1974, Air (Prevention and Control of pollution) Act, 1981, The National Environment Tribunal Act, 1995.

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55 Ibid.

56 Indian Penal Code, Act No. XLV of 1860

57 The signifance of this provision in relation to pollution control is seen in famous case, *Ratlam Municipality Vs. Vardhichand,* AIR 1980 , Supreme Court , p. 1622

Environmental disaster and the liability of the parent MNC

In case of environmental damage, MNCs are liable in the municipal law of the host country, the place where these environmental damage take place. But ,often ,this would be, insufficient either because of the lack of adequate legal system or the subsidiary responsible for the harm did not have sufficient funds to pay damage. Further, suing the parent company in its home state also becomes difficult because of doctrine like *forum non conveniens* which require that litigation should be brought before the court which is more convenient.

Liability of the Parent company

The principle of parent company liability for the environmental damage done by its subsidiaries is evolving in current international and municipal law. In the United states, the court recognize the liability of parent companies for harm generated by subsidiaries. In *Amoco Cadiz oil spill* case an American court stated the principle of liability :

> "As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration ,production, refining, transportation and sale of petroleum products throughout the world, Standard is responsible for

the tortious acts of its wholly owned subsidiaries and instrumentalities, AIOC and Transport."[58]

In the Bhopal gas Leak Disaster case the liability of the parent company was recognised

Duty Of Home States To Impose Liability On Their MNCs

The home states of MNCs have always claimed the right of diplomatic protection of foreign investment. MNCs have relied on diplomatic protection of the home state. Home State provide them safety for their investments and intervention in times when they face disputes with host states. There is duty implicit in this power of protection . This exercise of the power is possible only to the extent that the foreign investor act in a manner consistent with his corporate duties in the host state .The duty of good corporate citizenship on the part of the foreign investor has now become the basis on which home state give protection to its MNCs . Thus it is duty of home states to ensure that multinational corporations act according to international law in their operations. The environmental law creates an international public policy to ensure that a MNCs headquartered within its state does not does not harm

[58] *Re Oil By The Amoco Cadiz Off The Coast Of France* on march 10,1978 (1978)American Maritime Cases2123

the environment of the host state in which it operates through a subsidiary .

Conclusion

There are nearly a dozen treaties concluded .Almost all of these treaties utilize the same basic model of a strict but limited liability to facilitate the bringing of claims in municipal courts for compensation for the victims of environmental damage. However, this civil liability treaties have some problems. The most important problem is that most of the treaties are not in force or ratified. Even, when treaties are ratified, corporate environmental liability on multinational corporations are less developed. These international civil liabilities does not provide compensation of corporate environmental damage beyond the narrow confines of recognized ultra-hazardous such as nuclear power stations and crude oil carrying ships. Several domestic jurisdictions are trying to impose both civil and criminal corporate environmental liability. The problems that claimants face is that the national law may not provide that certain types of harm are compensable, such as certain kinds of economic loss or environmental damage.

CHAPTER – IV

BHOPAL GAS LEAK DISASTER

INTRODUCTION

The Bhopal gas leak disaster has left a deep scar on the human psyche, in terms of the catastrophic proportions and the callousness of the safety measures shown in a plant controlled by a multinational company in a developing country.[1] It is acknowledged as the worst kind of event in human history. Bhopal disaster involved the scientific, legal and administrative structures of modern society. It has raised doubts about the mode of development what has been promulgated. It revealed the double standards practiced by multinational corporations in developing countries .It also it showed inability of the developing countries to handle such situations administratively legally and socially..

This chapter provides a descriptive analysis of the Bhopal gas leakage case. The second part gives a background of the events leading to the catastrophe caused by the MIC gas leakage in the UCC's Bhopal plant. The third part deals with the issue of culpability and negligence of UCC for failing to take adequate and reasonable safety measures in its Bhopal plant. The fourth part highlights the negligence on the part of the Indian government in

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[1] Bharat, Desai, "The Bhopal Gas Leak Disaster Litigation: An Overview", *Asian Year Book of International Law*, Vol.3,(1993) pp.163-179.

failing to take preventive steps in granting license to UCC for manufacture of MIC gas. Finally, the fifth part deals with the litigation concerning Bhopal gas leakage case in Indian and U.S. courts.

The Background

During the night of 2-3 December 1984, around 30-40 tonnes of methyl isocyanate (MIC), stored in a huge tank, escaped from the Union Carbide factory located in Bhopal, Madhya Pradesh, India. The leaked MIC gases which were yellow, choking and intensely irritating to the eyes and lungs. It caused death of more than 3000 people and leaving more than 2,00,000 people injured-many seriously and some permanently[2].

It exposed the inadequate and improper industrial safety system in India. The safety aspect was ignored even at the time of granting license for location of the plant of Bhopal in 1969.[3] Dangers to the inhabitants of the area was perceived very early and even shifting of the plant was suggested which was ignored. The accident probably began as the result of a runaway reaction of the

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2 Ibid., p. 163.

3 Even in 1969 the site was located not far from many slum colonies, the Institute of Education and other residential areas. Licensing authorities failed to take cognizance of Union Carbide's past record. At the time of granting of licence in India, Government of Canada had already rejected and cancelled the licence of a sister plant of carbide on environmental grounds. See Vijay Shankar Varma "Bhopal: Unfolding of a Tragedy", *Alternatives*, (XI), 1986.p.140

MIC with water. One of the reasons attributed to this happening was that an untrained worker was handling it. Several employees of the UCIL stated before the permanent People's Tribunal on Industrial and Environmental Hazards and Human Rights that factors like design inadequacies, operation practices, poor quality of training of workers, lack of information and illegal plant modifications were responsible factors for the disaster. Union Carbide maintained double standards regarding plant design, operation, executive management and community relations.

Culpability and Negligence of UCC

The parent MNC, Union Carbide Corporation, USA, can not deny its culpability and negligence in *Bhopal Gas Leak Disaster* case because it had not taken adequate and proper measures for the safety of the Bhopal plant. The Bhopal plant was designed less safely than Union Carbide Corporation's West Virginia plant [4]

The double standards of plant design and operation can be seen by the fact that there was no death in 17 years of MIC use in

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[4] This is evident in the following respects:

- Lack of redundant safeguards to assure performance and control of vital systems even in event of portal failure of instrumentation and process and control equipment.
- Lack of linkage between crucial instruments and the control panel.

  Lack of automatically operated emergency systems; pressure alarms on MIC tanks pump to circulate lye solution in vent scrubber pump to remove MIC to empty 'dump tank from storage tank undergoing temperature or pressure increases in constrature or pressure increases in contrast to the computerized pressure/temperature sensing system with automatic alarms used for years at West Virginia plant.

USA but in the Indian Plant there were six accidents of leakage before Bhopal gas leakage of 1984. The number of blue-collar workers employed had been reduced to 642 from 850. The management had even cut operator strength and unqualified people were running the plant. The community residing near the plant was not informed that very dangerous materials were used at the factory. They did not know the significance of the alarm that was sounded at the carbide plant the night of disaster.[5]

Negligence by Indian Government

The Government of India and the Government of Madhya Pradesh also failed to take effective preventive steps while granting the license for the manufacture of the highly toxic pesticide Government did not posses adequate information regarding the toxic nature of MIC and allow people to settle near the plant.[6]

Bhopal Gas Leak Case Litigation

***Bhopal Gas Leak Disaster (Processing of Claims) Act,* 1985**

Under the powers conferred by the Constitution of India, the Parliament of India passed an Act entitled, the Bhopal Gas Leak

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5 Barry J. Castleman, and Prabir Purkavastha, The Bhopal Disaster as the case study in double standards, in Jane H. Ivas (Ed.) *The Export of Hazard (Boston; Routledge & KeganPaul , 1985)* pp.214-21..

6 Radhika Rama, Seshan "Government Responsibility for Bhopal Tragedy", *Economic and Political Weekly*, Dec. 15, 1984, pp. 2109-10.

Disaster (Processing of Claims) Act, 1985.[7] The Act was promulgated for the purpose of ensuring that claims arising out of and caused by Bhopal Gas Leak Disaster are dealt with speedily, effectively and equitably. It conferred upon the Government of India certain powers and duties including the exclusive right to represent and act in place of (whether within or outside India) every person (as defined in the Act) who has made or is entitled to make, such a claim.[8] The Act further, provides that with respect to any claims before any court outside the Union of India pending before the commencement of the Act, the Government shall represent, act in place of, or along with such claimant, if such court so permits.[9] The Act further provides that the Government shall have due regard to any matters which such person may urge with respect to his claims and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be

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7 The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.

8 The Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 defines "Claim" as (i) a claim arising out of our connected with, the disaster, for compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered; (ii) a claim arising out of or connected with, the disaster, for any damage to property which has been or likely to be, sustained (iii) a claim for expenses incurred or required to be incurred for containing the disaster or mitigation or otherwise coping with the effects of the disaster (iv) any other claim including any claim by way of loss of business or employment's arising out of or connected with the disaster.

9 Ibid.

associated in the conduct of any suit or other proceeding relating to his claim.[10]

The Act substituted the Government as the statutory agent of the claimants. But section 4 of the Act put some limitation, by giving claimants the right to be represented by a legal practitioner.[11] The central government's power to represent and act for the claimant is not unlimited while taking any action government compromises contrary to the best advantage of the claimant. If the government compromises contrary to the best advantage of the claimant this will be against the mandates of the Act. If it is proved that the government has paid due regard to the relevant considerations and acted in good faith towards securing the best advantages of the claimants, the requirements of the Act would be satisfied.[12] This Act was challenged in the court. The Supreme Court upheld the constitutionality of the Act.[13]

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[10] Ibid.

[11] Section 4 of the Bhopal Act states that in representing and acting in place of any person or in relation to any claim, the Central Government shall have done regard to any matter which sue person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.

[12] Ibid.

[13] *Charanlal Sahu Vs Union of India*, AIR 1990, This declared that the taking over the claims of the victims by the government is not legal. It said that the victims have been divested of their standing because the victims were disabled. The court further said that the Bhopal victims

Litigation in New York District Court

In April 1985 shortly after the Bhopal Act was passed, the Indian government sued Union Carbide in New York District Court. It submitted that its judicial system was not competent to deal with the complex legal issues arising out of this disaster.[14] The government of India's strategy was to either force Union Carbide to submit to US laws on environmental protection, safety regulations, and liability of hazardous industry, and thereby secure compensation for the victims in accordance with law and standards of compensation in the USA, or to ensure that Union Carbide, as a multinational entity, should be brought under the jurisdiction of Indian courts.

The Indian government claimed that inadequate safety equipment at the plant and the defective plant design Union Carbide supplied to UCIL were cause of the release of the lethal gas.[15] It asserted that although Union Carbide knew that safety

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could not be considered to be any match to the multinational companies or in a position by themselves to look after their own interest affectivity. It added that in the prevailing situation they needed the states protection to assert establish and maintain their rights against wrong doers in this mass disaster.

14 Armin Rosencranz and Shyam Divan , Environmenal Law and Policy in India (New Delhi;Deep and Deep Pub. ,1997) pp.547-61.

15 Ved. P. Nanda, , "For whom the Bell Tolls in the Aftermath of the Bhopal Tragedy", *Denver Journal of International Law and Policy*, Vol. 15, Number 3, Spring 1987,pp.155-206.

equipment at the plant was inadequate, it did not take remedial measures.[16] A multinational corporation has a primary, absolute duty to the persons and country in which it has undertaken any ultra-hazardous or inherently dangerous activity. This includes a duty to provide that all ultra-hazardous or inherently dangerous activities be conducted with the highest standards of safety . And also to provide all necessary information and warning regarding the activity involved.

Indian government alleged that : (1) the Union Carbide has breached this duty through its undertaking of an ultra-hazardous and inherently dangerous activity causing unacceptable risks at its plant in Bhopal,[17] (2) Union Carbide did not ensure that its Bhopal plant met the highest standards of safety and also did not inform the Union of Government and its people of the dangers therein, [18] (3) Union Carbide was responsible for errors in the design, management and oversight of the Bhopal plant, resulting in unreasonable and "highly dangerous and defective plant conditions". It enumerated among defective conditions inadequate

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[16] , Upendra Baxi and Thomas Paul, , *Mass Disasters and Multinational Liability: The Bhopal Case* (New Delhi: Indian Law Institute, 1986).

[17] Ibid.

[18] Ibid.

safety measures, faculty alarm systems, storage of huge quantities of toxic chemicals and lack of cooling facilities.[19]

Union Carbide contended that UCIL and the Government of India and the State of Madhya Pradesh, where the plant was located, were responsible for the Bhopal disaster because they had the key role in operating and overseeing the plant. It asserted that while it had sold general design drawings to the UCIL, it was the latter, which had hired other companies to do detailed design and construction.[20] UCC stated that although it had trained some of the plant managers, it was unable to dictate the plants daily operations, as the government of India had barred it from running the plant.[21] It asserted that the Indian government had approved and inspected the plant, knew about the dangers of MIC and refused to allow American employees from UCC to remain in India to provide technical assistance .It also tried to put blame on the state government for allowing people to move close to the plant fence knowing the dangers they would face if there is any accident.[22] It also presented several affidavits designed to refute the contention

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19 See Nanda at note 17 ,pp.155-206

20 Ibid.

21 See in Union Carbide Corporations on p. 856-57.

22 Ibid. 856-58.

that it was responsible for the design and construction of the plant.[23]

Forum non conveniens

UCC opposed Indian government's petition on the ground that the suit should be dismissed from the Federal Courts for trial in India under the doctrine of *forum non-conveniens*[24]. UCC pleaded that the factors pertaining to the parties' private interests, namely; access to proof; availability of compulsory process; cost of obtaining witnesses; view of the premises; expeditions; and inexpensive conduct of the action, favour trial in India.

Indian government contended that an Indian forum was inadequate because the endemic delays caused by high caseloads and certain features of Indian procedural law. For example, Indian procedural law allowed for adjournments during hearing; interlocutory orders; and final appeals in an

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[23] Ibid.

[24] Union carbide had invoked the doctrine of forum non conveniens on the following grounds:

i. The.catastrophe had occurred in Bhopal, which is nearly eight thousands miles away from the American forum; ii. The plant, personnel, victims, witnesses, documentary and other relevant evidences are all located in Bhopal; iii. The pretrial and trial proceedings in an American forum would entail huge costs involved in the production of hundreds of witnesses, translation of testimonials and documents written in many Indian languages; iv. American courts will have to undertake Herculean labour to get expert evidence on the nature of the catastrophe and causes of it and the aftermath, v. the litigation would be a massive imposition on the time, energy and resources of an American forum, vi. The litigation would require of American courts a total understanding of foreign law; vii. the litigation would also necessitates a realistic understanding of how impoverished Indian life is in the Indian condition and under the Indian law and the cost involved in treatment and rehabilitation of victims.

effort to dispose of suits on preliminary points.[25] It was also argued that India's legal system had not sufficiently emerged from its "colonial origin" to handle this litigation.[26] It was said that the Indian Legal systems as comprised of a "lack of broad-based legislative activity, inaccessibility of legal information and legal services, burdensome court filing fees and limited innovativeness with reference to legal practice and education."[27]

UCC's expert responded by citing some instances of creative treatment of complex legal issues. The court decided that the Indian legal system was sufficiently developed to handle the Bhopal litigation.[28]

The court pointed out that delays also plague United States courts . It said that legislation such as the Bhopal Act would provide for speedy treatment of cases in the Indian Judicial System. The court also noted specific instances in which the Indian Supreme Court has directed a speedy resolution of cases.[29] Union of India also asserted that certain factors limited the ability of the Indian bar to handle this litigation. Indian lawyers emphasize oral rather than written skills and lack specialization and practical

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25 Ibid.

26 Bhopal 1, at 847.

27 Ibid.

28 Ibid p. at 848.

29 Ibid.

investigative techniques. In addition, Indian law prevents them from forming partnerships of more than twenty lawyers.[30] In reply UCC countered with cases handled by Indian lawyers dealing with complex technology transfers and the use of experts when necessary. The court noted that the Central Bureau of Investigation of the Indian government was capable of handling the investigation. The court was not convinced that the size of a law firm was necessarily correlated with the quality of its work and noted that, if necessary, the legislature could lift its statutory limitations on the size of law firms. In any event, because Indian government claimed to represent all the plaintiffs, the court did not find the argument about limitations of the Indian bar persuasive.[31]

Indian government also submitted that the substantive tort law of India was not sufficiently developed to handle the Bhopal litigation.[32] India lack codified tort law and there is little reported tort cases to serve as a precedent .Moreover, it completely lacked the tort law dealing with high technology or complex

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30 Ibid.

31 Ibid.

32 For an overview of the Indian court system, see generally Dhavan, for whom and for what? Reflections on the Legal Aftermath of Bhopal, 20 *Texas International Law Journals*, 295 1985 pp.

manufacturing processes.[33] The court responded by pointing out that the basic concepts of tort are present in India and that British case law is also available as precedent.[34]

Indian government also argued that because of various procedural limitations, the Indian forum was inadequate. The court treating the Union of India's argument that inadequate pre-trial discovery rendered India an inadequate forum to be persuasive. It directed UCC to submit to discovery under the rules of the United States Federal Rules of Civil Procedure rules in the Indian courts.[35]

New York District Court Judge Keenan delivered his opinion on 12 May 1986.[36] He based his decision to dismiss the case on the

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[33] In re Union Carbide, 634 F. Supp. at 849. Galanter, "Legal Torpor: Why so little has happened in India after the Bhopal Tragedy, 20 Texas International Law Journal, 273 (1985). He observed that a survey of All India Reports from 1914 to 1965 found only 613, tort cases reported. Ratna Kapur in "From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations," *Boston College Third World Law Journal*, Vol.10: 1, 1990, p.8 observes. These cases involved neither injury related to industrial processes, nor the use of any hazardous chemical substances, nor complex technology.

[34] Ibid. The court added that, while filing fees may have inhibited the development of tort law by reducing the number of claims filed, that fact was irrelevant because court fees had been waived for the Bhopal litigants.

[35] Ibid. at 850. The court stated under the doctrine of forum non-convenient a federal court has the power to condition transfer on a defendant corporation's agreement to provide evidence required for a fair adjudication. The condition imposed on UCC was deleted on appeal, however

[36] Opinion and Order of John F. Keenam, US District Judge, *In Re: Union Carbide Corporation Gas Leak Disaster at Bhopal, India,* December 1984,dated 12 May 1986, New York.

grounds of *forum non conveniens* upon the United States Supreme Courts' decisions in *Gilbert*[37] and *Piper Aircraft.*[38] The court also found that the private interests under *Reyno case* analysis strongly favored dismissal of the case.[39]

The court found that most of the documents relating to liability were located in India except the original design of the plant and the training of certain employees at the UCC plant in West Virginia.[40] The court, while accepting UCC's assertion that it was only involved in providing the basic process design packages, held its subsidiary in India, Union Carbide India Limited, responsible for the detailed design, erection, and commission of the plant.[41] Further, the court recognized UCC's argument that all of the evidence relating to damages was located in India as well. The Court, considering the implication of allowing the number of victims to affect directly, held that the forum non-conveniens determination was that "the more people hurt, the less likely a suit in this country would be."[42]

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37 *Gulf Oil Corporation V. Gilbert* 330 U.S. 501 (1947)

38 *Piper Aircraft Company Vs Reyno* 454 U.S. 235 (1981).

39 Ibid. at 852-53.

40 Ibid. at 858.

41 Ibid. at 853-59.

42 Ibid at 858 n.20.

The court found that the Indian government was highly involved in safety, licensing and other matters relating to liability, and that this evidence was located in India.[43] Moreover, suit in the United States would require translation of documents from Hindi to English, while the converse problem would not exist since Indian courts were fluent in English.[44]

The Court also held that private interest factor of access to witness also strongly favored UCC, because potential witness in India included hundred of engineers; contractors and employees.[45] Many of these potential witnesses were not parties to the suit and the court did not have power to compel the attendance of state and local officials as witness. Whereas, most of the witnesses in the United States were employees of Union Carbide. As such, they would probably be subject to compulsory process in India as parties to the lawsuit.[46] The court, considering the possibility of a view of the premises, noted in its decision that because the site of the

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[43] Ibid at 858-59.

[44] Ibid at 858-59.

[45] Ibid at 859.

[46] Ibid at 859-60.

disaster had been sealed after the lack, the present condition of the plant might be relevant.[47]

New York district court considered public interest factors as the last step of the *forum non-conveniens* analysis. Under the Public interest test, the court weighed the interests of the southern District of New York and the District Court in Bhopal.

In this regard, the court pointed out that it was already overburdened with a full docket and that bearing the administrative burdens of the Bhopal litigation was unjustified, since another adequate forum existed had almost all events relevant to the accident had occurred in India.[48] The court also mentioned about its inability to force American citizens to bear the costs of jury service and court expenses when they had little connection to the subject matter of the case.[49] The court, while considering the interests of India and the United States, conceded that certain business conducted in New York or in UCC's corporate headquarters in Danbury, Connecticut may have been directly

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47 Ibid at 860.

48 Ibid at 861.

49 Ibid. 638 F. Supp. at 862. (Even when plaintiff and defendant's private interests are equally weighted, a court may dismiss an action on grounds of forum non-conveniens, when retention of jurisdiction would be unduly burdensome to the community, see pg., 637 f. 2d at 784-85.).

related to the development or operation of the Bhopal plant.[50] The court held in its conclusion that the Bhopal District should bear the "substantial administrative weight" of the case, since most of the relevant events leading to and following the event occurred there.[51] The burden of jury duty, especially when translation problems are factored in, also weighed against retention of the case.[52]

The Court also assessed the relative interests of India and the United States in this lawsuit and held that Indian public interest outweighed any United States interest.

Appeal in U.S. Court

Indian government opposed the dismissal of the suit on the ground of *forum non-conveniens*. Union Carbide also opposed because certain conditions were imposed The Court of Appeal held that

"The *forum non convenient* determination is committed to the sound discretion of the trial court. It may be reversed only where there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors and where its balancing of these factors is reasonable, its decision deserves substantial deference."[53]

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[50] Ibid. at 861.

[51] Ibid. at 861.

[52] Ibid. at 862.

[53] *In Re Union Carbide* United States Court of Appeals for the Second Circuit, 14 January 1987, p.16.

As far the UCC challenge to the conditions imposed by Judge Keenan, the court of Appeals endorsed the first condition on limitation. It rejected the contention of UCC to monitor Indian court proceedings, considering the proposed remedy both as impracticable and abysmal ignorance of basic jurisdiction principles. The court considered the concept of shared jurisdiction as illusory and unrealistic, and viewed that a judgment of a foreign country that is final, conclusive and enforceable must be recognized and enforced in the United States under Article 53 of the civil practice Rules on Recognition of Foreign country money judgments.[54] The court ruled that both sides need to be treated equally, with each having equal access to the evidence in the possession or under the control of the other. Thus, subject to these modifications, the Appellate court upheld the order of dismissal of judge Keenan on the ground of forum non-conveniences.

The Case Back in India

(a) *Bhopal District Court*

Although the Bhopal court focused initially on the cases that were filed in the United States by the American lawyers, about 800 individuals suits for damages were initially filed by individual plaintiffs in the Bhopal District Court, claiming damages totaling

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[54] See Desai at note 1,p.167

1,620 million rupees. Pursuant to the Bhopal Act, the government of India assumed the exclusive right to represent the victims and impleaded itself as plaintiffs in all the suits filed in India. All earlier suits were stayed pending further proceedings and the Union of India filed a fresh case before the District Court of Bhopal on 9 September 1986.[55]

Initially the District Judge of Bhopal made a proposal to parties for substantial reconciliatory interim relief. Judge Deo, guided by the need for paramount justice in the case, made a *suo moto* proposal for grant of interim relief.[56] The defendant Union Carbide opposed the proposal.[57] The court explained that it has inherent power to make order necessary for the ends of justice. The judge based his decision on the exercise of the courts jurisdiction under section 151 of the Code of Civil Procedure,[58] taken together with section 94 (e) of the Code.[59] The use of these provisions was justified by Judge Deo by the paramount need for the justice in the

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55 *Union of India Vs Union Carbide Corporation*, in the court of the district judge. Bhopal Gas Claim Case No. 113 of 1986.

56 See Desai at note 1 p.168.

57 See Order in *Union of India Vs. Union Carbide Corporation* by District Judge, Bhopal, M.W. Deo, dated 17 December 1987, p.2.

58 S. 151 of the Code of Civil Procedure 1976 says that nothing in the code shall be deemed to limit or otherwise affect the inherent powers of the court to make orders necessary for the ends of justice.

59 S. 94 CPC provides for making such interlocutory order as may be just and convenient.

case. He questioned the very basis of the forensic praxis whether the gas victims can survive until the tangible data with meticulous exactitude is collected and proved and adjudicated in fine forensic style for working out the final amount of compensation with precision of quality and whether it is not be prudent to order payment of a relative sum bearing in mind all the progress in the case, the facts and figures, which have come on record and the material furnished during settlement efforts made by Judge Keenan?''[60] Judge Deo clarified that the inherent powers under section 151 of C.P.C. have not been conferred upon the courts, but it is the power inherent in the court by virtue of its duty to do justice between the parties before it. He followed the law laid down by the Supreme Court in *Manohar Lal* on this aspect and went further in adding that inherent powers are born with the creation of the court, like the pulsating life coming with a child born into this world. Without inherent powers, the court would be like a still-born child. The powers invested in the court after its creation are like many other acquisitions of faculties which the child acquires after birth during its life."[61]

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[60] See Order in *Union of India Vs Union Carbide Corporation* by District Judge Bhopal, M.W.Deo dated 17 December 1987, p. 2

[61] Ibid.

The judge, relying upon the law declared by the Supreme Court in the *M.C. Mehta case* for the limited principle that "in action for tortuous liability of a grant of interim compensation is permissible."[62] The Judge Deo did not find any need to get into the legal point of "lifting corporate veil in dealing with the matter at an interlocutory level .The judge, accepting the submission of the Union of India that the admitted fact of UCC owning 50.9 percent of the UCIL shares was enough to show that UCC always had the power and the capacity to control the working of UCIL, ordered that the defendant UCC would deposit in the court a sum of 350,000,000 million rupees (about US$270 million) for payment of substantial interim compensation and welfare measures for the gas victims.[63]

(b) Madhya Pradesh High Court

The Union carbide filed a civil revision petition before the Madhya Pradesh High Court.[64] On 4 April 1988, the Court allowed the revision and reduced the amount of interim compensation to US$ 192 million. However, the High court fixed the liability of UCC to pay interim compensation, holding that more than a *prime*

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62 M C Mehta Vs Union of India. *AIR* 1987, SC 965

63 Union of India Vs Union Carbide Corporation 17 December 1987.

64 Union Carbide Corporation Vs Union of India in Madhya Pradesh High Court. Jabalpur, Civil Revision No. 26 of 1988.

facie case had been made out in favour of Indian government to receive such payments from the parent UCC.[65]

The High Court lifted the corporate veil in order to hold the parent company, UCC liable. The court was of the opinion that the UCC had real control over the enterprise, which was engaged in carrying on a hazardous and inherently dangerous industry at the Bhopal plant. This was inferred by the Court as 'more than *prima facie* established" and hence UCC was held to be absolutely liable (without any exceptions) to the victims.[66]

(c) *Indian Supreme Court*

Union Carbide appealed against the judgment of Madhya Pradesh High Court before the supreme court of India. Even as the hearing was taking place, the apex court on 14 February 1989 suddenly made an order for settlement between union carbide and the union of India in the case. The Five judge Bench of the court ordered.

1. "The Union Carbide Corporation shall pay a sum of US Dollars 470 million to the Union of India in full settlement of all claims,

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[65] Ibid. see. Order by Justice S.R. Seth dated 4 April 1988, p.155.

[66] See Supra note 85 at p.93.

rights and liabilities related to an arising out of the Bhopal Gas disaster.

2. The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31 March 1989.

3. To enable the effectuation of the settlement, all civil proceedings related to and arising out of the Bhopal gas disaster shall hereby stand transferred to this court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these must be pending."[67]

The terms of settlement were sweeping in nature, exonerating the UCC completely from the clutches of the law.[68] "This settlement shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings (of any nature whatsoever pending) by all Indian citizens and all public and private entities with respect to all past, present and future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever... all such civil proceedings in India are hereby transferred to this court and

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[67] *Union Carbide Corporation Vs Union of India and Others* in C.A. Nos. 3187 and 3188 of 1988 with SLP No.13080 of 1988; AIR 1990 SC, p.275.

[68] See Desai, at note I ,p174.

are dismissed with prejudice, and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted. [69]

(d) ***Review Petition against the Settlement in Supreme Court***

The 1989 settlement was challenged and the order was sought to be reviewed mainly on grounds: that the amount was inadequate, and the court had no power to quash the criminal proceedings. The Supreme Court ordered that both UCC and the Union of India would continue to be subject to the jurisdiction of the courts in India until further order.[70] On 4 May 1989 the Court gave the reasoning for its orders of 14 and 15 February 1989, reiterating the compelling duty, both judicial and humane, to secure immediate relief to the victims.[71] The Court observed that "the compulsions of the need for immediate relief to tens of thousands of suffering victims could not, in our opinion, wait till these questions, vital though they may be, are resolved in the course of judicial proceedings".[72] The Court set aside the quashing of the criminal proceedings, rejecting, the earlier contention of the court. The

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[69] AIR 1990 SC 276.

[70] 2 SCC 544, 1989

[71] 3 SCC 38, 1989

[72] Ibid

Court stating that "the Court was empowered under Article 142 of Indian constitution to quash criminal proceedings in any matter to do justice, the judges, however, pointed out that withdrawal of criminal cases must be justified on proper and relevant grounds. But the settlement bench did not indicate any grounds justifying the withdrawal of the prosecution.

Interestingly, the settlement was without jurisdiction because the courts' power to withdraw cases to itself were exhausted by Article139 (a) of the Indian Constitution. It declines with the transfers of certain cases. The proceedings before the court being interlocutory in nature, the main appeals could not be disposed off through the settlement. Secondly, since the criminal proceedings were not relatable to the Bhopal Act, these could not be quashed. The Court had held that Article 139(a) of the Constitution does not exhaust the power of transfer and withdrawal. The sweep of two other articles, the power to entertain special leave and to transfer cases or withdraw to itself could not be circumscribed by Article 139 (a). The power to withdraw a criminal case could not be questioned but whether particular decision was sound was another matter. The criminal prosecutions were improperly quashed and have been set aside. The Court has rejected the contention that the

settlement and the orders of the court on it are void as opposed to public policy and as amounting to a stifling of criminal proceedings.[73]

The supreme court of India on 22 December 1989 upheld the constitutional validity of the Bhopal Act. It observed, "The Act, as we have construed, requires notice, to be given in what form and in what manner, it need not be spelled out, before entering into any settlement... It further appears that type of notices, which is required to be given, had not been given. The question, therefore, is what is to be done and what is the consequence? The Act would be bad if it is not construed in the light that notice before any settlement under section 4 of the Act was required to be given.[74]

Though the apex court did admit that 'entering into a settlement without the required notice is wrong", yet it rationalized its view by declaring, "To do a great right" after all, it is permissible sometimes "to do a little wrong."[75]

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[73] S.Sahay 'What Have The Gas Victims Got' *News Times*, Hyederabad 15 October 1991.

[74] 1 SCC 703

[75] Ibid.

Conclusion

National Convention on Bhopal Gas Leak Disaster and Its Aftermath questioned how the court arrived at the sum of $ 470 million for an overall settlement when the estimated approximate value of total claims filed was $ 3000 million. What was the rationale for reducing the minimum claims by a whopping 83.4 percent? Why were the victims not consulted on the matter? How did the court consider this sum as "just equitable and reasonable without even evaluating the registered claims of nearly Rs. six lakhs people? Out of these Rs. six lakhs the court arbitrarily decided that the number of cases of physically injured were only Rs. one lakh.[76]

Despite the Court observed that the settlement is the best thing that could have happened to the Bhopal victims, the sad story is that because of the government and the apex court a great opportunity has been missed to lay new standards of law and compensation for the damage caused by dangerous industries. The issue of criminal liability took back seat primarily because the government felt that the civil liability should be tackled first. Only after the review of the settlement by the Supreme Court that the

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[76] The Times of India, New Delhi, 9 April 1991.

criminal proceedings were restarted. Central Bureau of Investigation started pursuing the attendance of Warren Anderson and UCC in the criminal case. He has been declared absconder and order was passed to confiscate his property. They are absconding from court for 11 years. Following relentless campaigns by survivor organizations and their supporters in 2003 Indian government sent a formal request to the US government for extradition of prime accused Warren Anderson. The US government has yet to respond to this request.

CHAPTER - V

Conclusion

The study reveals that there is fundamental problem between the pace of development and security of environment. The laws regarding multinational corporations (MNCs) activities at international level and national level as well as are not well developed and there is lacunae in existing legal framework. The factors of negligence and inefficiency are endemic in corporate functioning. It is a myth that privately owned companies tend to be free of inefficiency. Union Carbide Corporation showed us how inefficiency can strike and negligence create havoc in the plants of one of the most successful multinational companies. Generally, international law has not been concerned with liability which takes place within states on the grounds that it falls outside it province. It has generally been concerned with liability for transfrontier pollution. Environmental law has typically used liabilities in the context of regulation of a "command-and-control' variety. Contrast to that domestic regimes have been bolder in their attempts. The provision of strict civil and criminal liability that pierces the corporate veil to the extent that both directors and even (corporate) shareholders may be held liable for corporate environmental

damage. The liability for environmental damage by multinational corporation can be attained in the place where these disasters took place. It is generally insufficient either because of the lack of sophistication of the local legal system or the subsidiary responsible for the harm did not have sufficient funds to pay damages. Suing the parent company in its home state also becomes difficult because of doctrine like forum non conveniens which require that the litigation should be brought before the court in the more convenient jurisdiction where the incident took place and where the witnesses are available. This brings more problems to the environmental victims, because most of the people who are suffering and claiming class suits against multinational corporations are poor and marginalized people of developing countries. They have little or no access to political or legal representation.

They may be unable to bring the suit in the alternative forum because of various practical reasons. This may amount to denial of justice to them. A survey conducted found that out of 85 cases sent back to other forum on the forum non conveniens, eighteen cases were not pursued in the other forum, twenty-two settled for less than half the estimated value, in twelve cases US attorneys lost

track of the outcome. Most importantly, none, of the reported cases proceeded to a courtroom victory.

In regard to the further development of making multinational corporations more liable to the damages they incur, these recommendation could be taken into consideration.

1. Multiplicity of Authorities

Several organizations like UN Commission on sustainable Development, United Nations Environmental Programme, the Food and Agricultural organization, (FAO), the World Health Organization, the International Labour Organization, the United Nations Commission on Transnational Corporations (UNCTAD) and others share the responsibilities to preserve the environment on various occasions, there are overlapping and conflict in regulatory measures. Moreover the issue of liability is not adequately discussed by these organization. The precautionary approach is taken, the aftermath result of the damages are not taken into consideration.

2. Transfer of Technology

The United Nations Code of Conduct on the Transnational Corporations requires multinational corporations to apply adequate technologies to protect the environment. It requires disclosure of

dangerous processes to the local government but unfortunately this draft was not accepted. Some mechanisms should be developed so that the outdated, inadequate and dangerous technology should not be transferred to the least developed countries.

3. MNCs and Insurance

Many subsidiary corporations are not able to provide the amount demanded by the plaintiffs because of in availability of resources. Insurance companies fear to give insurance to the industrial plant. Multinational corporations should take advance insurance which can provide assurance to recovery in the case of accident.

4. International Disaster Fund

An International Disaster Fund on the pattern of the 1971 convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage can be established. It will avoid delay in distribution of compensation and provide measures for clean-up activities. The comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and subsequent measures in United States establish liability in the law for recovery of clean up costs from responsible parties. The

growing body of case law on the liability established by the superfund Act suggests that it is becoming increasing difficult for corporate officials and employees to avoid responsible for illegal disposal of hazardous substances.

5. Environmental Harm and International Crime

The imposition of criminal liability on domestic corporations under domestic law for environmental harm is now well recognized. Novel theories have been adopted for imposing such responsibility on parent corporations for environmental harm caused by subsidiaries under domestic law. The proposition is that similar principles are evoiving in international law and that this process should be accelerated. The organsation of African Unity in its Resolution on the Dumping of Nuclear and Industrial Waste in Africa declared such dumping to be a crime against the African people and required multinational corporations responsible for such dumping to clean up the affected areas.

6. Duty on the courts which have jurisdiction over the parent corporation

The legal authority of the state does not end at its borders, each state processes a measure of extraterritorial perspective legal authority over its own nationals. A state performing with due

diligence should logically be required to exercise such jurisdiction to proscribe for its national extraterritorial conduct which, if the state were the actor, would violate international law. It is only through the enforcement of such extraterritorial prescription that the state may fulfill the complementary due diligence obligation of punishment.

7. Environmental Charter of Workers Right

The permanent people's Tribunal on Industrial Hazards and Human Rights convened four sessions in New Haven, Bangkok, Bhopal and London since 1991 to receive testimony and deliberate on issues relating to the right to life, occupational health and safety environment protection, risk management, and damage reduction in the wider global context of hazardous producted issued a charter of Rights Against Industrial Hazards. It recognizes the inherent limitations of national and international law, and accepts the vital role of community organizations and peoples movements in preventing and ameliorating industrial hazards. The charter should be accepted universally, the charter confirms workers right to adequate training, informations sharing, right to participate in environmental decision making and right to protection against health hazards and others.

8. Indian laws have not developed according to the economic development over the years. The adequate legal mechanism is married with multiplicity of authorities, controls and enforcement. There are lots of overlapping of various legislations like Factories Act, Explosive Act, Boiler Act and Industrial Dispute Act. Which are contractive in nature. This multiplicity of legislation should be done away with and instead a single centralized act something similar to occupational and safety Act be enacted so that the implementation and compliance will be more effective.

9. State Intervention

The interests of society at a large need to be guarded. There is mismatch between individuals and corporate entities. Financial & political clouts ensures multinational corporations to get away easily. So state intervention is the logical remedy to this impasse. Had Indian Government acted strictly keeping victims welfare in mind the Bhopal case result should have been different.

10. The Government of India should declare a national policy on norms and standards to be followed before granting permission for the establishment of any industry or investment in any industry. As suggested by the Supreme Court in *Charan Lal Sahu Vs. Union of India* (AIR 1990 SC 1490) the establishment

of a Disaster Relief Fund should be made a prerequisite for the granting of a license.

11. Tort laws

There have been not any significant doctrinal development in tort law in India. The requirements of evidence are less rigid and compensation is determined according to the degree of injury caused. Disasters victims must be provided direct access to a court of law. They should be provided with mandatory legal aid. The traditional doctrine of "piercing corporate veil" should be resorted. Directors of the multinationals corporations should be personally liable.

12. MNC as State actors

MNCs should be considered as state actors, as they constitute the nuclear of the international business world. Their function as economic agencies and the allocations of economic benefits parallel what are regarded as traditional state functions. Their public nature is further enhanced by their of organizational structure which transcends national boundaries and thus blurs the line distinguishing them from public actors. So they should be considered as quasi-sovereign actors and thus they ought to be subject to international law.

13. Strict Liability

The Supreme Court in M.C. Mehta Vs. Union of India (AIR 1987 SC 1086) provided for absolute liability for an enterprise engaged in a hazardous or inherently dangerous activity. But section 6 of the Environmental (Protection) Act provides that a person in change of a company shall not be liable under the Act, if he exercised all "due diligence" to prevent the commission of such offences. Subsequently according to section 16, the person in charge of a company is not liable if the offence was committed "without his knowledge". These statutes are counter to the strict liability requirement.

14. Community Approach

A community is – within limits – the master of its own environment and economy. There is little real corporate accountability for decisions that affect local communities, citizen groups, civil society should come out to combat some of the detrimental effects of exploitive industrial practices. Good neighbour agreement as done in US can be a vehicle for community organization to recognize and formalize their roles within a locality. Good neighbour agreements defines sustainable industry as operations that are clean, stable and fair. Various types of conditions have been negotiated, some of key terms are as follows

– (i) community access to information (ii) right to inspect the facility, (right to accompany government inspectors and for a union to have its own inspection capacities), accident preparedness, pollution prevention and others corporate environmental management.

15 Corporate Governance

Corporate strategies must integrate environmental considerations as well as implement environmental principles at all stages of innovation, raw material extraction, product fabrication, distribution, marketing transportation and disposal. Corporate governance can be decisive means to bring corporate environmental protection because latter can be fully achieved until it is successfully internalized within corporate governance regime. The rise of corporate environmental management systems is a direct result of the imposition of environmental legislation and environmental quality legislation and environmental quality standards upon companies. The recent OECD guidelines for Multinational Enterprises for example, enterprises to establish and maintain a system of environmental management appropriate to the enterprise that includes, collecting data on its environmental impact, setting objectives and targets, and monitoring progress

towards these. The trends in corporate environmental liability and corporate environmental management systems have already made an impact on corporate governance first, by imposing environmental liability directly upon company directions, senior management personnel and even corporate shareholders.

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