

Transnational Corporations and Environmental Damage: Is Tort Law the Answer?

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I. INTRODUCTION

It is now commonplace to observe that the causes and consequences of global environmental change cannot be addressed through the exercise of national jurisdiction alone. While the international community has made important advances in developing new global treaty regimes, their topical coverage is still patchy and the implementation of international law in national systems is generally poor.¹ Most environmental regulation – and the enforcement of environmental law — still takes place at the national level. Yet national systems are poorly equipped to deal with the realities of cross-border environmental issues. The problem is not only that pollution and resource degradation cross national borders, but also that decision-making in one country can affect the environment in another country. At the same time, our growing understanding of complex systems underscores that ecological consequences of human activity are both subtle and far-reaching.

In these circumstances, there is an acute need to develop legal devices that can represent legitimate interests across national boundaries. One of the earliest, and most frequently cited, examples of cross-border legal interest is the *Trail Smelter*² case involving the U.S. and Canada. It was a relatively straightforward tort case that became difficult, slow, and expensive to resolve purely because of its international dimensions. Sulphur dioxide emanating from a copper smelter in the town of Trail, British Columbia, was carried by prevailing winds into Washington State where it did damage to crops, timber, and personal property. The affected parties could not find legal redress in the courts of either the U.S. or Canada due to the international nature of the tort, so the matter was resolved by international tribunal. The case has become paradigmatic for international environmental lawyers, and like all paradigmatic cases, it is relatively straightforward in illustrating the issues at stake. Other instances of cross-border harm are often more complex. For example, it is now clear that emissions of

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1. INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS (Michael Anderson & Paolo Galizzi eds., 2002).

2. *United States v. Canada*, 3 U.N. Rep. Int'l. Arbitration Awards 1907 (1941) (Trail Smelter arbitration), reprinted in 35 AM. J. INT'L L. 684 (1941).

carbon dioxide and other greenhouse gases in the U.S. may contribute to climate change in a way that will indirectly affect villagers living at sea level in Nauru or Bangladesh. To complicate matters further, decisions taken by parent companies in the U.S. may have direct implications for environmental management practices of companies operated within Bangladesh.

In these circumstances, the activities of multinational groups of companies have come under particular scrutiny for their cross-border activities that may have contributed to environmental change. As multinationals account for an ever-growing percentage of world economic activity, the challenge for the enforcement of effective environmental standards is in part to mobilize national law to address the trans-national activities of corporate groups.

II. THE PROBLEM OF ENVIRONMENTAL DAMAGE BY MULTINATIONAL CORPORATIONS

A. *The Regulatory Challenge Posed by MNCs*

It is difficult to write about the growth of multinational corporations (MNCs)³ without yielding to stereotype. On the one hand, there is the image of the modern business enterprise, staffed by highly competent managers, working at the cutting edge of technology to overcome logistical challenges and bring improvements to human life. On the other hand is the increasingly pervasive picture of the transnational corporation as the behemoth of modern life — large and powerful enough to control governments while engaging in big brother social control of consumers and unchecked exploitation of people in developing countries. Both stereotypes invoke the large size and important economic impact of MNCs. It is regularly noted that MNCs rival nation-states as units of economic organization, since a comparison of corporate sales and country gross domestic products (GDPs) shows that of the 100 largest economies in the world, fifty-one are corporations and forty-nine are states.⁴ Since the largest 200 corporations are estimated to account for 27.5% of world economic activity,⁵ it is not surprising that they are seen to symbolize both the creative and destructive sides of global capitalism.

3. The term “multinational corporation” is used here rather than “multinational enterprise,” even though many authors prefer the latter term. While the term “multinational corporation” is technically inaccurate, referring to a single corporation rather than the multiple corporations making up a group, it does convey a sense of singularity and integrated control that typically characterizes such groups.

4. SARAH ANDERSON & JOHN CAVANAGH, TOP 200: THE RISE OF CORPORATE GLOBAL POWER 9 (2000), at <http://www.ips-dc.org/reports/top200.htm>.

5. *Id.* at 5.

In relation to the environment, similar stark stereotypes prevail. Some argue that MNCs are responsible for major technological innovations beneficial to the environment, and have, in any case, an environmental track record superior to smaller local firms. Others see MNCs as the main vehicles for large-scale environmental degradation, particularly in developing countries where they are mainly unaccountable for their activities.

Such stereotypes impede sensible legal analysis, and can do much to mask rather than clarify the complexity of multinational corporate groups. For environmental lawyers and policy-makers, MNCs pose singular problems of regulation and accountability that will not be solved without close attention to the actual circumstances in which MNCs operate.

The distinctive regulatory problem posed by MNCs is their ability to operate an integrated command and control system through two dis-aggregated institutional structures. The first of these structures is the collection of discrete corporate units — parent, subsidiary, sister, and cousin companies — that make up the MNC group.⁶ The second dis-aggregated structure housing the MNC is the global system of separate nation-states in which those corporations are registered and do business. Thus, although decision-making within a MNC often occurs within a vertically integrated command structure, that same degree of integration is not available to regulators. Since the parent and subsidiary companies are legally distinct, they must be subject to separate and independent systems of inspection and regulation. Nor are the companies subject to the discipline of shared liability, since in most instances the parent company is not liable for the activities of the subsidiary following the principle in *Salomon v. Salomon*.⁷ A legal command to the subsidiary is effective against neither the parent nor against sister companies in the same group. So too, the various subsidiaries within the MNC operate in a variety of sovereign jurisdictions and are subject to differing legal regimes. In theory, there is no court anywhere in the world that exercises jurisdiction over all the components of a MNC doing business on three or four continents.

6. This analysis presumes a parent-subsidiary relationship based on equity holding, but the general problem is even more complicated when one realizes that multinational businesses may be linked by other means as well — by contractual obligations, joint ventures between distinct firms, mixtures of public and privately held companies, and informal alliances. The Japanese *keiretsu* structure poses even greater regulatory dilemmas, being based on systems of managerial co-ordination and cross-shareholding rather than an outright pyramid structure. See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 57-89 (1995).

7. [1897] A.C. 22 (Eng.). The separation of parent and subsidiary liability was achieved in some jurisdictions, such as the U.S., by way of statute. The House of Lords decision in *Salomon* has been followed in most common law jurisdictions. See the observation in *Briggs v. James Hardie & Co.* (1989) 16 N.S.W.L.R. 549, 577 (Austl.) (In practice the law “pays scant regard to the commercial reality that every holding company has the potential [to] and, more often than not, in fact, does, exercise complete control over the subsidiary.”).

Yet many MNCs can and do operate their many parts with a coherence of intent and implementation that resembles a single entity — an entity that is controlled neither by international law⁸ nor the legal norms of any single state. This state of affairs has given rise to considerable anxiety among some commentators, since MNCs appear to call into question one of the most fundamental axioms of the global legal order — that at any given time each actor is subject to the jurisdiction of at least one effective court. It is on the basis of this axiom that the principle of territorial sovereignty makes sense, and with it, the idea that each nation-state enjoys a “reserved domain” of domestic jurisdiction in which other states may not intervene.⁹ In many instances, then, we are left with a seeming anomaly in the international system: the “home” state where the parent company is based lacks the territorial jurisdiction to regulate the activities of subsidiaries located abroad, while the “host” states in which the subsidiaries are located lack jurisdiction over the parent company where many of the crucial decisions are made. In these circumstances, the MNC enjoys a degree of autonomy from national jurisdiction that is unique in the global legal order.

B. *MNCs and Environmental Damage*

The problem of regulating MNCs takes on an urgent and practical character when real cases of environmental damage are examined. Perhaps because decision-making is based at “home” in the parent company, and environmentally degrading activity often takes place in a foreign land, the structures for legal and public accountability are often lacking.

In recent years, MNCs have increasingly been accused of engaging in polluting or environmentally degrading activities through their subsidiaries, particularly in developing countries.¹⁰ Human rights groups and local communities have done much to highlight instances of pollution or illegal resource depletion, and often allege that these activities are linked to MNC collaboration in violating human rights.¹¹

8. MNCs possess very limited legal personality under public international law, and are generally not subject to obligations under either treaty law nor customary international law. As private legal persons, MNCs are subject to international rules only indirectly, through the mediating structures of the state. Yet since no state controls all parts of a MNC, there is no entity charged with supervising the totality of its behavior.

9. The “reserved domain” principle is reflected in Article 2(7) of the Charter of the United Nations, which prevents the United Nations Organization from intervening “in matters which are essentially within the domestic jurisdiction of any state.” U.N. CHARTER art. 2, para. 7.

10. MICHEL CHUSSODOVSKY, *THE GLOBALIZATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* (1997); MARK HERTSGAARD, *EARTH ODYSSEY* (1999); JOSHUA KARLINER, *THE CORPORATE PLANET: ECOLOGY AND POLITICS IN THE AGE OF GLOBALIZATION* (1997); DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (1995).

11. *See, e.g.*, HUMAN RIGHTS WATCH, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES* (1999).

While it is certainly true that MNCs often employ environmental technologies and management practices that are superior to those used by smaller local companies, the sheer size of many MNC operations and their relative lack of accountability means that many of the most egregious instances of large-scale environmental damage result from MNC activities. There are a number of factors that contribute to this pattern: decisions are taken at home but the effects are felt abroad; environmentally sound plans made on paper are not translated into practice; and host country governments may fail to supervise environmental effects. Despite these contributory factors, it must also be recognized that MNCs have in some cases made explicit decisions to cut costs and improve profits by opting for activities and processes that do not conform to good environmental practice. In other cases, hazardous and polluting activities have been exported from home countries to lesser-developed countries precisely to avoid strict regulation at home.¹²

The regulatory response to environmental damage by MNCs has been largely ineffective. International environmental treaties bind state parties, but do not place obligations directly upon companies. There have been some scholarly exploration of holding the “home” state liable for the activities of MNCs headquartered within its jurisdiction,¹³ but this approach has largely failed due to both political opposition as well as the problems in jurisdiction and company law mentioned above. There have been a number of “soft” initiatives to regulate MNCs by establishing guidelines and codes of conduct, including the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,¹⁴ the recently revised Organization for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises,¹⁵ and the United Nations Global Compact.¹⁶ Each of these

12. For example, after the UK-based Thor Chemicals Company came under criticism from the UK Health and Safety Executive for exposing workers to mercury, it exported its processes and machinery to South Africa to carry on the same hazardous production while avoiding UK regulation. See *Sithole & Others v. Thor Chem. Holdings Ltd.*, (1999) 96(9) L.S.G. 32. See generally *THE EXPORT OF HAZARD* (Jane H. Ives ed., 1985).

13. See Michael R. Anderson, *State Obligations in a Transnational Dispute: The Bhopal Case*, in *CONTROL OVER COMPLIANCE WITH INTERNATIONAL LAW* 83 (W.E. Butler ed., 1991); Francesco Francioni, *Exporting Environmental Hazard Through Multinational Enterprises: Can the State of Origin Be Held Responsible?*, in *INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM* 275 (Francesco Francioni & Tullio Scovazzi eds., 1991).

14. *Tripartite Declaration of Principles Concerning Multinational Enterprises and Special Policy*, 17 INT'L LEGAL MATERIALS 422 (1978), at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm>.

15. Organization for Economic Co-operation & Development (OECD), *The OECD Guidelines for Multinational Enterprises*, 40 INT'L LEGAL MATERIALS 236 (2001). See Stephen Tully, *The 2000 Review of the OECD Guidelines for Multinational Enterprises*, 50 INT'L & COMP. L.Q. 394 (2001).

16. The U.N. Global Compact was launched by U.N. Secretary General Kofi Annan in January 1999. U.N. Secretary General Kofi A. Annan, Address at the World Economic Forum

aims at voluntary compliance with international standards, including general obligations to protect human health and the environment. The U.N. Sub-Commission on the Promotion and Protection of Human Rights began consideration of the Draft of Fundamental Human Rights Principles for Business Enterprises in 2000, but it has not yet been adopted, and is unlikely to add significantly to the existing soft law instruments.¹⁷ Similarly, there have been guidelines established by non-governmental entities such as the Global Sullivan Principles on Corporate Social Responsibility¹⁸ and the Permanent Peoples' Tribunal Charter on Industrial Hazards and Human Rights.¹⁹ So too there has been an effort to mobilize both investor pressure through ethical investing practices and consumer pressure through eco-labelling organized by entities such as the Forest Stewardship Council²⁰ and the Marine Stewardship Council.²¹ While these multiple informal pressures have started to show some effect on corporate governance and activities, and may offer a real way forward in addressing environmental concerns, they are not a substitute for effective legal remedies against MNCs that persist in environmentally destructive activities. As Ong notes, there has been a real failure to address corporate environmental behavior in either international law or comparative company law, leaving the bulk of the regulatory burden to be borne by national systems of civil and criminal liability.²²

C. *Environmental Litigation Against MNCs*

It has thus fallen mainly to the national law of civil liability to address grievances against MNC activities. Affected workers and communities have brought a number of high-profile cases involving the oil, mining, and chemical industries in all corners of the globe. As Newell notes, the considerable growth in such suits in recent years is a symptom of the failure of other regulatory systems, leaving plaintiffs

(Jan. 31, 1999), at <http://www.unglobalcompact.org>. It sets out nine principles which international businesses are "asked" to implement. *Id.* The principles include: "Principle 7 — support a precautionary approach to environmental challenges; Principle 8 — undertake initiatives to promote greater environmental responsibility; and Principle 9 — encourage the development and diffusion of environmentally friendly technologies." *Id.* The Global Compact has no enforcement mechanism, although participating companies are asked to submit annual reports indicating examples of best practice. *Id.*

17. *Draft of Fundamental Human Rights Principles for Business Entities*, U.N. Sub-Commission on the Promotion and Protection of Human Rights, 54th Sess., U.N. Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 (2000), revised by U.N. Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 (2002).

18. See <http://globalsullivanprinciples.org/principles.htm>; Christopher McCrudden, *Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?*, 19 OXFORD J. LEGAL STUD. 167 (1999).

19. See <http://www.globalpolicy.org/socecon/envronmt/charter.htm>.

20. See <http://fscus.org/html/index.html>.

21. See <http://www.msc.org/>.

22. David M. Ong, *The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives*, 12 EUR. J. INT'L LAW 685 (2001).

with little scope for effective redress other than tort law.²³ Affected workers and communities have forged alliances with international non-governmental organizations (NGOs) and public interest lawyers to redress what is often perceived as a “governance deficit” in the regulation of MNCs. It is often hoped that through such suits local communities will not only press their own claims for environmental justice, but may also shape the public perception of MNCs and the environment at a global level. Some of the cases that have captured public attention in recent years include:

- In 1984 a leak of methyl isocyanate gas from a pesticide plant owned by Union Carbide in Bhopal, India, resulted in the loss of over 3,500 lives and the exposure of an estimated 521,000 individuals to the gas that can result in chronic effects, including depression of immune response. Plaintiffs failed in their attempt to sue in the U.S., and following much-delayed litigation in India the case was settled for \$470 million.²⁴
- In 1990, Costa Rican banana plantation workers won the right to sue Dow Chemical in Texas courts for injury and sterility resulting from exposure to Dow-manufactured chemicals in Costa Rica.²⁵
- From 1982 to 1994, the village of Bukit Merah in Malaysia was exposed to radioactive tailings from the activities of the Asian Rare Earth corporation — a Japanese/Malaysian joint venture owned in part by Mitsubishi. Although exposed residents were denied redress under Malaysian tort law,²⁶ the publicity surrounding the case resulted in the closure of the installation.²⁷
- In 1993 a group of Ecuadorian indigenous people from the Oriente region of the Ecuadorian Amazon brought an action in the U.S. against Texaco for deforestation and environmental degradation.²⁸
- In 1994 individuals living near the Ok Tedi River in Papua New Guinea brought a suit against Broken Hill Proprietary, an Australian company, for damages following the collapse of a tailings dam from a copper mine.²⁹

23. Peter Newell, *Managing Multinationals: The Governance of Investment for the Environment*, 13 J. INT'L DEV. 907, 908 (2001).

24. See P. T. Muchlinski, *The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors*, 50 MOD. L. REV. 545, 545 (1987); Michael R. Anderson, *Public Interest Perspectives on the Bhopal Case: Tort, Crime or Violation of Human Rights?*, in PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW 154 (John Dunkley & David Robinson eds., 1995).

25. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 679 (Tex. 1990).

26. Woon Tan Kan v. Asian Rare Earth, [1992] 4 C.L.J. 2207 (Malay.).

27. Mika Ichihara & Andrew Harding, *Human Rights, the Environment and Radioactive Waste: A Study of the Asian Rare Earth Case in Malaysia*, 4 REV. EUR. COMMUNITY & INT'L ENVTL. L. 1 (1995).

28. Aquinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). For background, and an account of actions taken in Ecuador and the Inter-American Commission of Human Rights, see Adriana Fabra, *Indigenous Peoples, Environmental Degradation, and Human Rights: A Case Study*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 245 (Alan E. Boyle & Michael R. Anderson eds., 1996).

29. Dagi v. Broken Hill Proprietary Co. Properties and OK Tedi Mining Limited [No. 2] (1995) 1 V.R. 428.

- In 1998 a suit was brought against the Canadian mining company Cambior following a leak of 3.2 billion litres of cyanide-polluted water at the Omai mine in Guyana.³⁰
- Ken Wiwa and others from the Ogoni region in Nigeria brought suit in New York for the alleged collusion of Royal Dutch/Shell with the Nigerian Government in imprisonment, torture, and killing of environmental activists opposed to Shell's oil exploration activities.³¹
- In 1997 and 2000, South African workers exposed to mercury secured out of court settlements after suing the parent company in the UK.³²
- After a long legal battle, over 4,000 South Africans won the right in July 2000 to sue Cape Industries in the UK for asbestosis and mesothelioma resulting from exposure to asbestos in South Africa.³³

This representative list is far from exhaustive, and highlights only some of those cases that have received the most publicity. In most cases, the MNCs have been accused of violating local laws and collaborating in human rights abuses as well as conducting activities leading to environmental degradation. Also, none of these cases have been purely about environmental damage since they have all involved claims relating to death, personal injury, or human rights violations as well.

Although most of the suits have simply been brought against the parent company under the existing law of tort or delict, a significant fraction of the cases have been brought in the U.S. under the auspices of the Alien Tort Claims Act (ATCA).³⁴ The ATCA provides for federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."³⁵ The provision is unusual in that it requires plaintiffs to found their cause of action in international law rather than the national law of either the U.S. or the state where the injury occurred. In practice, this means that the grounds for bringing a tort under ATCA are very narrow, and have been restricted mainly to serious violations

30. An account is available at *The Ugly Canadian*, THE NAT'L FEATURES, available at <http://www.tv.cbc.ca/national/pgminfo/ugly/guyana.html>.

31. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).

32. See HALINA WARD, GOVERNING MULTINATIONALS: THE ROLE OF FOREIGN DIRECT LIABILITY 3 (Feb. 2001) (Royal Institute of International Affairs Briefing Paper, New Series No. 18), available at http://www.riia.org/pdf/briefing_papers/governing_multinationals.pdf; Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*, 148 NEW L.J. 1686, 1706 (1998).

33. *Lubbe v. Cape Plc. Afrika*, [2000] 2 Lloyd's Rep. 383. For discussion of the case, see Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases*, 50 INT'L & COMP. L.Q. 1 (2001), and Richard Meeran, *The Unveiling of Transnational Corporations: A Direct Approach*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 161 (Michael K. Addo ed., 1999).

34. 28 U.S.C. § 1350 (1994).

35. *Id.*

of human rights.³⁶ Nevertheless, following the path-breaking *Filartiga v. Pena-Irala*³⁷ decision of the Second Circuit Court of Appeals, there followed a string of cases in which foreign litigants have successfully brought suit in U.S. courts for tortious acts committed abroad.³⁸ The majority of the cases deal with human rights rather than environmental issues, but in several cases the suits have involved either direct environmental harm³⁹ or human rights violations in the context of environmental conflicts between MNCs and local communities.⁴⁰ In many of the decisions, particularly in the Ninth Circuit Court of Appeals, it has been held that a suit can be brought against a private actor, such as a corporation, only where the activities occurred “under the color of law” — involving joint action or a symbiotic relationship between the private entity and the state. There is nevertheless evidence for the opposite trend in holding private entities directly accountable for violations of international law.⁴¹

The ATCA litigation has drawn considerable attention from activists, and is seen as an attractive option in part because it provides access to U.S. courts. Yet there are significant procedural hurdles to be overcome in bringing ATCA cases — including not only *forum non conveniens* (discussed below), but also arguments regarding the Act of State doctrine and sovereign immunity.⁴² Similar problems may arise in other jurisdictions, such as the UK, which do not have an equivalent of the Alien Tort statute, but may apply the Act of State doctrine and sovereign immunity.⁴³

For these reasons, foreign plaintiffs seeking damages from parent companies may find traditional tort law an equally attractive option, as the recent spate of cases in the UK, Australia, and Canada suggest.⁴⁴ Although there has been a tendency for the litigation in common law countries to receive more attention, there is no reason why such cases could not be brought in civil law countries such as the Netherlands where jurisdictional hurdles are lower and where a full

36. Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145 (1999).

37. 630 F.2d 876 (2d Cir. 1980).

38. The most comprehensive survey of the relevant case law is BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (1996).

39. See, e.g., *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

40. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied* 532 U.S. 941 (2001).

41. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), see also *Nat'l Coalition Gov't Burma v. Unocal Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997), as discussed in Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is UNOCAL the Answer?*, 42 WM. & MARY L. REV. 619 (2000).

42. These are well summarised in Rosencranz & Campbell, *supra* note 36.

43. The very limited prospects for ATCA-type tort litigation in the UK are assessed in respect of human rights claims in ILA Human Rights Committee (British Branch), *Report on Civil Actions in English Courts for Serious Human Rights Violations Abroad*, 2 EUR. H.R. L. REV. 129 (2001).

44. WARD, *supra* note 32.

range of remedies — including damages, injunctions, and declaratory relief — are available against parent companies.⁴⁵

The increase in cases of this kind suggests not only that there are environmental grievances against MNCs, but also such groups perceive that cross-border tort litigation as an attractive way — or perhaps the only way — to seek redress for perceived wrongs. Given the seriousness and urgency of the claims that often stand behind these suits, and the very considerable expenditure of time and resources on their conduct, it is appropriate to ask if such tort actions are actually effective. Is tort law the best way to hold multinationals accountable? Is it the best approach for securing compensation for the human victims and remediation for environmental damage? And finally, are such tort actions likely to modify corporate behavior in a way that will prevent future injury and environmental harm?

III. TORT LAW AS AN ALTERNATIVE TO REGULATION FOR MNCs

A. *The Attractions of Tort*

To rehearse a now-familiar argument, the rationale for using tort law to address environmental damage is compelling. In theory, tort law should allow an injured party to bring an action against a tortfeasor who has caused damage to the environment so that the costs of the degradation can be quantified and reflected in an award of monetary compensation.⁴⁶ Other remedies — such as declaratory relief and injunctions — may also be available, but it is the promise of monetary compensation that offers the strongest attraction from an economist's point of view. If the compensation is properly assessed and awarded, then the following benefits should accrue. First, the injured party is compensated directly for injury while funds can be made available for environmental remediation. Second, the tortfeasor is forced to make payment for the environmentally degrading activities, thereby incorporating negative externalities directly into the costs of conducting the polluting or degrading activity. Third, the award of damages should send out what are effectively price signals to deter or discourage similar polluting or degrading activities by other actors in the market. This last benefit offers the prospect of a systemic effect

45. See Gerrit Betlem, *Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 283 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); GARRIT BETLEM, *CIVIL LIABILITY FOR TRANSFRONTIER POLLUTION: DUTCH ENVIRONMENTAL TORT LAW IN INTERNATIONAL CASES IN THE LIGHT OF COMMUNITY LAW* (1993) [hereinafter *CIVIL LIABILITY*].

46. The validity of this argument is often simply assumed on the basis of economic theory. For a more balanced assessment in the context of actual legal institutions, see A. I. Ogus & G. M. Richardson, *Economics and the Environment: A Study of Private Nuisance*, 36 *CAMBRIDGE L.J.* 284 (1977).

that should help to protect the environment by fulfilling the same function as regulation.

The particular advantage of using tort law in an environmental case is not just that it offers to restore a welfare-maximizing economic rationality, but also that it relies upon private parties to initiate legal action that will have a regulatory effect. Private actors may have better information about environmental damage, and be able to bring pressure to bear in cases of state failure. For this reason, many environmental policy analysts have emphasized an enhanced role for individuals and community groups in bringing legal claims, including tort claims, precisely to make environmental management systems both more flexible and more effective.⁴⁷ In this way, private litigators contribute to larger regulatory system, thereby producing a public good while pursuing their private aims.

This argument takes on an important significance in the transnational context since there is likely to be a state regulatory failure at both the home state and host state locations. The home state is unlikely to regulate the parent company because the environmental damage is not on its territory, even though any accrual of profits to the parent will occur on its territory. On the other hand the host state is frequently unwilling or unable to exercise effective regulation due to low administrative capacity, fear of driving away foreign investment, or collusion with the MNC. Where these conditions pertain, action by the affected community may be the only legal recourse available. Unfortunately, legal action in the local courts is often ineffective, suffering from the defects of an inadequate liability regime, procedural obstacles, or a judiciary unwilling to rule against a powerful multinational. In these circumstances, a tort action in the home country may be the only effective avenue for pursuing the private actions so favored by policy-makers.

B. *General Problems with Tort Approaches*

Critics of tort approaches to environmental protection have contended that tort litigation can be slow, costly to mount, and organized in a fragmented, case-by-case basis that undermines the rationality of a consistent regulatory framework. Moreover, in case of diffuse environmental damage, there is often not a single injured party who possesses the economic incentives or the legal standing to bring a complicated environmental tort. Even if such an injured party is ready to pursue the case, it may be difficult to establish causation and

47. See, for example, the stimulating discussion in SHAKEB AFSAH ET AL., *CONTROLLING INDUSTRIAL POLLUTION: A NEW PARADIGM* (1996) (World Bank Policy Research Paper #1672), available at http://www.worldbank.org/nipr/work_paper/1672/.

responsibility in an ecologically complex system. Finally, even if all other elements are present, there is the question of how to assess, evaluate, and quantify the extent of environmental harm. Existing civil liability regimes are reasonably good at awarding compensation for personal injury and damage to property, are somewhat sclerotic and inflexible in making awards for pure economic loss, but are downright clumsy and inflexible in making awards for environmental goods and processes outside the market.⁴⁸ Since tort law is geared to the protection of persons and property, it is particularly ill equipped to provide compensation where the damaged natural resources are unowned.⁴⁹ For these reasons, and for others, there is good reason to be cautious about the prospects of using tort law as a substitute for environmental regulation.

In addition to these general concerns, there are particular problems that arise in cross-border torts relating to access to courts and applicable law.

IV. PROBLEMS OF ACCESS

It was noted earlier that no single court exercises jurisdiction over all of the constituent corporations in an MNC. In the absence of a single global court, the next best available remedy for potential litigants is to gain access to the court that is best able to hold the corporate group accountable.⁵⁰ In most, but not all cases, this will be a court located in a country where the parent company is incorporated. The chief attraction of such courts is that they are likely to wield jurisdiction over the corporation with access to the largest fraction of the group's assets. Equally important, however, is that the parent company is where control of group activities is almost invariably located. There is also a widespread belief, which is probably well founded, that the courts of capital-exporting countries are likely to be faster, more technically competent, and more generous in awarding damages.

It should be emphasized that seeking recourse to a single national court — even when it is located in the same state as the parent company — remains a second-best strategy in circumstances where no

48. HARM TO THE ENVIRONMENT: THE RIGHT TO COMPENSATION AND THE ASSESSMENT OF DAMAGES (Peter Wetterstein ed., 1997).

49. As for example in the *Amoco Cadiz* oil spill of 1978, where damage to some 120 miles of French coastline ecosystem went largely uncompensated since the U.S. court held that there was no person or entity capable of lodging a claim on behalf of the ecosystem. In re Oil Spill by the "Amoco Cadiz" off the Coast of France on March 16, 1978, 1988 U.S. Dist. Lexis 16832 (N.D. Ill. Jan. 11, 1988), cited in EDWARD H.P. BRANS, LIABILITY FOR DAMAGE TO PUBLIC NATURAL RESOURCES: STANDING, DAMAGE AND DAMAGE ASSESSMENT 1, 324, 330 (2001).

50. The option of litigating against each subsidiary in every jurisdiction where the MNC does business is not attractive due to delay, high transaction costs, and the additional problems of proving that a cousin company bears responsibility for the actions of the tortfeasor.

court has jurisdiction over the entire group. The problem is further compounded by difficulties in accessing such courts.

A classic problem of the private international law of torts is to decide the proper forum for a suit when the plaintiff and the defendant are in different jurisdictions.⁵¹ A quick survey of global practice shows several major approaches. The dominant European approach⁵², also reflecting the practice of most civil law countries, is to locate the forum in the place of the domicile of the defendant. This preference for the *forum rei* is codified in Article 2 of the Brussels Convention that governs jurisdiction in civil and commercial matters in the European Union.⁵³ This rule is obviously beneficial to plaintiffs seeking to bring an action against a multinational parent company in the home state, since the domicile of a company is normally taken to be the place of its incorporation. A second approach, reflected in one of the special rules of jurisdiction in the Brussels Convention,⁵⁴ is to allow the plaintiff in a tort action to select the *forum delicti* — “the place where the harmful event occurred”⁵⁵ rather than the place of the defendant’s domicile. This rule can give rise to difficulties where the “harmful event” occurs in more than one country — for example in the French Potassium Mines case⁵⁶ where a leak of salt into the Rhine river occurred in France but the damage to agricultural irrigation took place downstream in the Netherlands. In that case, the place of the damage pointed to a suit in the Netherlands while the principles of effective accountability pointed to France. The case went to the European Court of Justice, where it was held that the plaintiffs could bring their actions in either France or the Netherlands, since both conduct and injury were both necessary components of the harmful event. In addition to the dominant *forum rei* and *forum delicti* approaches, here are several supplementary forms of jurisdiction that are specific to particular jurisdictions, but do not represent major forms of jurisdiction on the global stage. In Europe, some of these “exorbitant”

51. The problem arises in all areas of transnational tort, including personal injury, defamation, and product liability, as well as environmental damage. See the excellent essays in *TRANSNATIONAL TORT LITIGATION: JURISDICTIONAL PRINCIPLES* (Campbell McLachlan & Peter Nygh eds., 1996).

52. See the useful discussion in *CIVIL LIABILITY*, *supra* note 45, at 23-166.

53. 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968 (revised and consolidated version published in 1998 O. J. (C 27/1)) [hereinafter Brussels Convention]. For all member states except for Denmark, the Convention has been replaced by *Council Regulation (EC) No. 44/2001* (2001 O. J. (L 12/1)). For commentary, see *The Brussels I Regulation*, 50 *INT’L & COMP. L.Q.* 725 (Wendy Kennett ed., 2001).

54. Rules of special jurisdiction may take precedence over rules of general jurisdiction — *lex specialis derogat legi generali*.

55. Brussels Convention, *supra* note 53, at C 27/5.

56. Case 21/76, *Handelskwekerij G. J. Bier BV v. Mines de potasse d’Alsace SA*, 1976 E.C.R. 1735.

bases of jurisdiction have been de-activated among parties to the Brussels convention,⁵⁷ and are in decline.

The third major approach, adopted by most common-law countries, is that the plaintiff has the right to choose the jurisdiction of the court, with a preference for the *forum delicti*, but that the defendant may invoke the doctrine of *forum non conveniens* to stay the proceedings. The doctrine, which originated in Scots law but has been all but completely transformed by subsequent judicial reasoning,⁵⁸ allows the court to stay the proceedings where an adequate alternate forum exists and where certain other criteria are met. It has been subject to different interpretations in the various common-law jurisdictions, with quite important divergences in reasoning and approach emerging in recent years.⁵⁹ The version of the doctrine that operates in U.S. federal courts provides that a defendant wishing to stay proceedings must show both that an adequate alternate forum exists and that the balance of public and private interests favors shifting the suit to the alternate forum.

Forum non conveniens was originally invoked to protect the defendant from being harassed by a plaintiff choosing a genuinely inconvenient or inappropriate forum. Despite this intent, it has become in many instances a device for parent companies to escape liability for tortious acts committed abroad. This is particularly true in U.S. courts, where the choice of forum by a foreign plaintiff deserves less deference than the choice of a U.S. plaintiff.⁶⁰ In perhaps the most notorious instance of declining jurisdiction, the U.S. federal courts stayed proceedings in the Bhopal gas leak litigation against Union Carbide Corporation, forcing the Indian litigants to pursue their tort claims in Indian courts. The case has attracted considerable comment,⁶¹ and does not bear full recounting here, but it should be noted

57. Examples include the *forum actoris* jurisdiction in the Netherlands that allows a plaintiff resident there to bring an action against any defendant, and the nationality jurisdiction in France under Article 14 of the Civil Code, that allows a French national to bring an action in France against any defendant in the world. These forms of jurisdiction are prohibited as exorbitant under Article 3 of the Brussels Convention. See Brussels Convention, *supra* note 53, at C 27/4.

58. David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398 (1987).

59. See, e.g., Peter Prince, *Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach is Better*, 47 INT'L & COMP. L.Q. 573 (1998).

60. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

61. For the essential legal documentation with commentary, see MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE (Upendra Baxi & Thomas Paul eds., 1986); INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE (Upendra Baxi ed., 1986); and VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE (Upendra Baxi & Amita Dhanda eds., 1990). Most recently further U.S. litigation in respect of environmental claims has commenced. *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001). For commentary on the Bhopal litigation, see Muchlinski, *supra* note 24; Michael R. Anderson, *State Obligations in a Transnational Dispute: The Bhopal Case*, in CONTROL OVER COMPLIANCE WITH INTERNATIONAL LAW (W.E. Butler ed., 1991); and Jamie Cassells, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* (1993).

that the case provides a clear example of how existing systems of private international law can deny litigants access to justice.

Although *forum non conveniens* is not the only method of declining jurisdiction in private international law,⁶² it has attracted the most criticism. One line of criticism is that the doctrine is simply not adequate to the claims that arise in modern transnational patterns of business. A critique of the *forum non conveniens* doctrine was offered by Judge Lloyd Doggett in *Dow Chemical Co. v. Castro Alfaro*:

The doctrine of forum non conveniens is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet [It] enables corporations to evade legal control merely because they are transnational In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed to repeat itself for decades to come. As a matter of law and of public policy, the doctrine of forum non conveniens should be abolished.⁶³

In essence, this critique emphasizes that the doctrine operates to prevent parent companies from being held accountable.

A second critique, closely related to the first, relates to the human right to accessible justice. Under the European Convention on Human Rights (ECHR), for example, it is now settled law that the rights to civil justice under Article 6 include the right to “effective access” of national courts in respect of civil claims. This principle was articulated by the European Court of Human Rights in *Golder v. United Kingdom*,⁶⁴ in which it was held that the right to institute proceedings in respect of civil matters is a universally recognized principle of law, and that the denial of this right constitutes a denial of justice.⁶⁵ This human rights argument has received considerable support among lawyers in European civil law systems, for whom the doctrine of *forum non conveniens* often appears to be arbitrary and unjust.⁶⁶

In the UK the law on declining jurisdiction appears to be moving in a direction that will comport with UK obligations under the Euro-

62. See the essays in J. J. FAWCETT, *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW: REPORTS TO THE XIVTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW* (1995). More recently courts have started to develop pre-emptive approaches that prevent suits even before filing. See PETER R. BARNETT, *RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW* (2001).

63. 786 S.W.2d 674, 689 (Tex. 1990).

64. 1 EUR. H.R. REP. 524 (1975).

65. Jeremy McBride, *Access to Justice and Human Rights Treaties*, 17 CIV. JUST. Q. 235 (1998).

66. Indeed, the tension between common law and civil law traditions over forum non conveniens has been one of the major obstacles in reaching agreement on a global judgments convention within the Hague Conference on Private International Law. See Hague Conference on Private International Law, available at <http://www.hech.net/e/workprog/jdgm.html>.

pean Convention. The UK approach to *forum non conveniens* has never mirrored the U.S. approach precisely,⁶⁷ and recent cases have emphasized the importance of substantive justice for the plaintiff, taking into account the importance of legal aid⁶⁸ as well as the general need to ensure that *forum non conveniens* does not result in a denial of access to justice.⁶⁹ With the Human Rights Act 1998 now in force, there is an enhanced possibility that the ECHR Article 6 requirements on access to justice may begin to shape the application of private international law rules more directly. Yet those rules have been framed over a period of many years without much reference to outside norms such as human rights, and have acquired their own kind of autonomy and self-referential processes of internal validation. It is not likely, therefore, that the doctrine of *forum non conveniens* will be discarded quickly, particularly in the U.S. where it has come to play such a prominent role in transnational litigation.

There is an argument that states are bound to provide private remedies for transfrontier environmental harm not only under human rights treaties, but also under a general obligation in international law. This obligation, however, must be regarded as an area of "soft" law rather than clearly consolidated legal principle:⁷⁰ there is no comprehensive global treaty on the matter, and the existing regional treaties are not well developed in this area.⁷¹ The international law principles of equal access and non-discrimination are probably most helpful,⁷² and have been developed in non-binding Organisation for Economic Co-operation and Development (OECD) Recommendations,⁷³ but must be given much more precise definition and legal impact if they are to have much effect on the practice of courts in declining jurisdiction over the claims of foreign plaintiffs.

67. In the leading case, *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, the reasoning departed significantly from the U.S. jurisprudence, with the House of Lords adopting neither the public interest factors nor the explicit discrimination against foreign litigants.

68. *Connelly v. RTZ Corp. Plc.* (No. 2), [1998] A.C. 854.

69. *Lubbe v. Cape Plc. Afrika*, [2000] 2 Lloyd's Rep. 383.

70. Stephen C. McCaffrey, *Liability for Transfrontier Environmental Harm: The Relationship between Public and Private International Law*, in *INTERNATIONALES UMWELTHAFTUNGSRECHT I: AUF DEM WEGE ZU EINER KONVENTION ÜBER FRAGEN DES INTERNATIONALEN UMWELTHAFTUNGSRECHTS* 81 (Christian von Bar ed., 1995).

71. See, e.g., *Denmark-Finland-Norway-Sweden: Convention on the Protection of the Environment*, 13 INT'L LEGAL MATERIALS 591 (1974); *United Nations: Convention on Environmental Impact Assessment in a Transboundary Context*, 30 INT'L LEGAL MATERIALS 800 (1991).

72. See the discussion in PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 197-200 (1992).

73. OECD Council Recommendations C(74)244; C(76)55; and C(77)28; reprinted in *OECD AND THE ENVIRONMENT* 142-53 (1986).

V. THE QUESTION OF APPLICABLE LAW

A. *Single Enterprise and Multiple Laws*

Even if the hurdles of jurisdiction are surmounted, the potential plaintiff against a parent company in its home state is faced with the task of establishing the applicable law. In short, the question is this: which national law should govern the activities of an enterprise doing business in many different nation-states? A formalistic response — which holds that each of the individual corporations that make up the MNC group is subject to the law of its own domicile — does not respond to the real issues. Nor does it address the critical ethical and policy question of which environmental standards should apply in cross-border torts. If tort law is to be effective in holding MNCs accountable, it is essential that the applicable law is well-matched to the power of the company under scrutiny. The applicable law must allow for heads of damages that are appropriate to environmental damage, including pure economic loss and the costs of remediation; it must have robust concepts of causation and fault; and finally, it must allow for the pursuit of environmental claims by affected parties within a reasonable time period.

There remains the more difficult question of whether the MNC should be subject to a uniform regulatory structure or whether it should be subject to different laws covering its various activities in many countries. It may be argued that where the MNC has a private administrative structure capable of integrated command and control, it should be subject to a single regulatory scheme, applying a uniform and consistent set of incentives and disincentives. On the other hand, this type of uniform regulation, even if it could be achieved, would be accused of hindering investment and infringing the sovereignty of host states. Uneven regulation seems inevitable. In the area of tort law, this lack of uniformity is manifest in the rules governing applicable law.

B. *Applicable Law: Tyranny of the Place of Injury*

National systems of liability and compensation rely upon national laws to provide standards of liability, assign standards of proof, determine causation, and quantify damages. Genuinely transnational torts involving activities and harms in more than one country raise the question of which law should govern such matters. While courts have traditionally applied the law of the forum to questions of procedure, the applicable rules for the substantive law is open to a variety of approaches. Rules of private international law normally seek to apply the law of the place where the wrong occurred (*lex loci delicti*).

With transnational environmental damage, however, it may be impossible to identify a single place of the wrong. As Betlem notes, this can be for three reasons: 1) the “tortious activit[y] [has] taken place in several . . . countries,” 2) the activity causing the harm and the actual manifestation of the harm may be in different countries, 3) the legal effects of the tortious act may pertain to a country other than that of the tortfeasor.⁷⁴ To these reasons we may add two additional reasons: 4) that the manifestation of harm may take place in several countries, and 5) either the tortious act or the resulting harm may take place in an area beyond national jurisdiction (e.g., the high seas).

In the case of the Sandoz chemical leak, for example, the spill occurred in Basel, Switzerland, with the chemicals spreading down the Rhine and causing damage in Germany and France. In the French Potassium Mines case, the leak of salt originated in France, passed through German waters, and caused damage in the Netherlands. It is not difficult to imagine a chemical leak in the Rhine resulting in pollution of the North Sea, and even in the high seas of the Atlantic. In the case of a highly toxic and persistent chemical, it is not inconceivable that environmental damage may occur in the high seas – in the area beyond the jurisdiction of the a single state. In those circumstances, it is not clear who could bring a tort action on behalf of the high seas, and even if such an action could be brought, which law would be deemed to be applicable.

Similarly, it may be difficult to identify a single location as the *locus actus*. Consider, for instance, the case of the Bhopal gas leak. In that case, the plaintiffs alleged that a contributory cause of the leak was the decision to shut off the refrigeration unit on the ill-fated tank of methyl-isocyanate, thus allowing the gas to warm from 0° Celsius to the more volatile ambient temperature. The documentation showed that the cost-saving decision to shut down the refrigeration unit was taken in the parent company headquarters in Danbury, Connecticut, and communicated by letter to the management of the Indian subsidiary plant located in Bhopal. Although these allegations were never adjudicated, they could form the basis of at least contributory negligence or even strict liability if found to be true. If such actions were found to be tortious, then where is the *locus actus*? In the U.S. where the decision was taken? Or in India where the decision was implemented? One may be tempted to answer that the wrongful act occurred in both India and the U.S., but this does not solve the problem of which set of legal rules will actually govern the litigation.

In choosing between the *locus actus* and the *locus damni*, few countries provide clear statutory guidance, leaving the decision to the

74. CIVIL LIABILITY, *supra* note 45, at 171.

courts. There are at least three arguments in favour of adopting the *lex loci actus*. First, the tortfeasor should be subject to a known and local legal framework rather than foreign legal rules that may be both unknown and unforeseen. Second, the *lex loci actus* plays a role in deterring similar actions in the future and must be crafted so as to meet the ends of justice. Third, in the context of transnational companies, the argument is advanced that the law of the parent company should apply simply due to the structure of the enterprise: a single policy decision taken at the headquarters of the parent company could result in environmental damage in a number of countries in which subsidiaries are located.⁷⁵ It can be argued that the law of the parent company jurisdiction regulates the “mind” of the entire transnational enterprise.

On the other hand, arguments given in favour of the *lex loci damni* include the idea that the injured party should be subject to the same framework of rights and obligations, regardless of the location of the tortfeasor. What is relevant, on this argument, is the nature of the injury and the set of legal expectations that the injured party had immediately prior to the injury. The location and nationality of the tortfeasor, it is argued, should have no bearing on the injured party's rights within a localized system of rights and obligations.

It is of course possible that the parties may choose an applicable law on the basis of mutual agreement, but this is unlikely due to divergent interests. In most cases involving MNCs, the MNC will strenuously seek to apply the local law of the host state, while the plaintiffs will tend to seek to apply the law of the capital-exporting state. Experience also shows that counsel for the parent company will seek to emphasize the primacy of the *locus damni*, and assert that the *locus actus* is identical. This concentrates attention on the acts of the subsidiary, and diverts attention from the role that the parent company may have had in the injury or environmental damage. This author has been unable to find any reported cases in which the *locus actus* has been located, even in part, with the parent company when the *locus damni* is that of the subsidiary.

Where the tortious act is deemed to have taken place in the same jurisdiction as the injury, a single *locus delicti* can be identified. For this reason, foreign plaintiffs are almost certain to find themselves subject to the laws of the state in which the injury occurred, even if that law is applied by a court of the “parent” state.

From the perspective of using tort to secure environmental regulation, this result presents real difficulties. The applicable law in the

75. Union Carbide, for instance, had subsidiaries operating in thirty-eight different countries at the time of the Bhopal gas leak.

state of the parent company is much more likely to benefit the plaintiffs than the law of the subsidiary. Generally speaking, parent companies are located in economically developed states that have had the opportunity to develop more sophisticated and generous rules for compensation. Their longer history of environmental degradation, the higher incomes, and the greater freedom to develop complex rules tend to endow them with substantive tort rules better adapted to deal with environmental claims. One of the issues that was raised in the Bhopal case, for instance, was the relative paucity of tort jurisprudence in India, including in particular a real shortage of case law dealing with complex environmental or toxic torts.⁷⁶ In most cases the tort principles in developing countries will not have been as fully elaborated through judicial decisions as the tort law in industrialized countries. Moreover, many government bodies possess immunity from tort suits⁷⁷ while in some instances specific statutes have been passed to endow large companies with immunity where their activities are considered essential to the economy.

C. *Discriminating Against Environments of the Poor*

The combined effect of declining jurisdiction in the North and selecting applicable law from the South is that plaintiffs seeking redress for environmental damage caused by subsidiary companies are likely to meet with frustration. There is a further problem, which is that the quantum of damages is likely to be lower in developing countries. This is true for four reasons. First, wages are lower, so compensation for lost wages will be lower as well. Second, the costs of medical care and environmental remediation are likely to be lower, although they may also be higher where scarce technologies are required. Third, awards of punitive or exemplary damages are rare in most developing countries while awards for non-pecuniary loss such as pain and suffering are either low or non-existent. And finally, courts in developing countries are often ill-equipped to apply complex methods of environmental valuation in order to establish remediation awards.

76. See *Affidavit of Marc S. Galanter, December 5th 1985, reprinted in MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE* 161 (Upendra Baxi & Thomas Paul eds., 1986). It should be noted, however, that the Indian courts were engaged in a large number of environmental cases in the years following the Bhopal gas leak, and in *M.C. Mehta v. Union of India*, A.I.R. 1987 SC 1086 developed a new standard of environmental liability – the rule of “absolute” immunity that is even stricter than the strict liability standard under *Rylands v. Fletcher*, L.R. 3 HL 330 (1868). The impact of the Indian decision on tort standards is discussed in Michael Anderson & A. Ahmed, *Assessing Environmental Damage under Indian Law*, 5 REV. EUR. COMMUNITY & INT’L ENVTL. L. 207 (1996).

77. Many Commonwealth countries have not passed an equivalent of the 1947 Crown Proceedings Act in the UK, so it is impossible to implead government agencies as respondents to tort claims.

If tort law is likely to result in lower awards for environmental damage in developing countries, then it is fully in keeping with certain versions of neo-classical economics, which argue that environmental damage is economically more efficient in poorer countries. This view was put forward in 1991 in its starkest and most controversial form by Dr. Lawrence Summers, then Chief Economist for the World Bank. The Summers argument was contained in a confidential memo for use in the Bank while the preparations were underway for the United Nations Conference on Environment and Development, held at Rio de Janeiro in June 1992. Although the Summers Memo was written partly tongue-in-cheek and was not intended for public consumption, it is worth quoting at length because it summarizes in a lean and concise fashion the logic of an unbridled market approach to environmental damage in developing countries.

The Memo argued rhetorically that the World Bank should be “encouraging MORE migration of the dirty industries” to Less Developed Countries (LDCs).⁷⁸ To support this proposition, Summers offered three arguments. The first argument was essentially that the cost of human life is lower in LDCs:

The measurements of the costs of health impairing pollution depends on the foregone earnings from increased morbidity and mortality. From this point of view a given amount of health impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that.⁷⁹

This reasoning is entirely consistent with tort law approaches in which the value of lost wages is one of the main determinants of the quantum of damages. Without a tort law system that paid less for injury and death in developing countries, Summers’ argument would be theoretical rather than based on actual practice.

The second argument is based on the idea that poor people who live in relatively unpolluted environments will be less affected by new pollution:

The costs of pollution are likely to be non-linear as the initial increments of pollution probably have very low cost. I’ve always thought that under-populated countries in Africa are vastly UNDER-polluted, their air quality is probably vastly inefficiently low compared to Los Angeles or Mexico City. Only the lamentable facts that so much pollution is generated by non-tradable industries (transport, electrical generation) and that the unit transport costs of solid waste

78. Lawrence Summers, *The Memo* (1991), available at www.whirledbank.org/ourwords/summers.html. The Memo was leaked to the press in December 1991.

79. *Id.* at www.whirledbank.org/ourwords/summers.html.

are so high prevent world welfare enhancing trade in air pollution and waste.⁸⁰

Unlike the first argument, this second line of reasoning does not rely directly upon tort principles. It is consistent, however, with an important pattern of litigation behavior whereby individuals and communities are likely to tolerate a fair amount of pollution or resource degradation before going to court. An important dimension that Summers does not capture in his analysis is that the disinclination to go to court will be even greater if the court is in another country and guarded by the doctrine of *forum non conveniens*.

The third argument invoked by Summers was based on the notion that environmental protection is more highly valued by the rich than the poor:

The demand for a clean environment for aesthetic and health reasons is likely to have very high income elasticity. The concern over an agent that causes a one in a million change in the odds of prostate cancer is obviously going to be much higher in a country where people survive to get prostate cancer than in a country where 5 mortality is is [sic] 200 per thousand. Also, much of the concern over industrial atmosphere discharge is about visibility impairing particulates. These discharges may have very little direct health impact. Clearly trade in goods that embody aesthetic pollution concerns could be welfare enhancing. While production is mobile the consumption of pretty air is a non-tradable.⁸¹

The high income elasticity of aesthetic pleasure and good health is not at odds with a torts system in which poor people are less likely to be able to sue for damages due to their lack of financial resources and lower institutional skills.⁸² This factor is compounded by the transnational dimension: a shortage of money and unfamiliarity with the system are likely to be even more acute problems when seeking to sue a parent company in a foreign court.

In sum, the arguments that Summers delineates are broadly consistent with the system of cross-border torts that operates within the framework of private international law. That his Memo gave rise to serious ethical and policy concerns among environmental managers should give pause for reflection when considering the value of tort law in enforcing environmental standards.

There are at least three main objections to the Summers position that must be taken into account. The first objection is based on policy and enforcement theory. The value of tort law in an environmental management system is two-fold: first, it serves a restorative function

80. *Id.* at www.whirledbank.org/ourwords/summers.html.

81. *Id.* at www.whirledbank.org/ourwords/summers.html.

82. Galanter's classic analysis of the use of law by the poor applies equally in a transnational context. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974-75).

insofar as it is able to compensate humans for injury and remediate damaged environments, and second, it serves as a deterrent for other actors who may be considering similar activities. Tort law has traditionally emphasized compensation over deterrence, but the deterrent function is particularly important in transnational torts against multinationals precisely because there are few other policy instruments to provide deterrence. The problem with both the Summers argument and existing cross-border tort regimes is that they under-deter. There is consensus that certain environmentally degrading activities are detrimental to global ecological processes, and should be discouraged and deterred as a matter of global environmental policy, no matter how low the wages of the local community. For example, activities that destroy large tracts of rainforest, or which endanger biological diversity have global implications that go beyond the preferences of the local community. In such cases, tort law driven by low local wages will fail to take account of the damage that such environmental harm does to the larger international community.

The second objection to the Summers Memo is an ethical one and relates to the treatment of human life. As Summers rightly points out, the direct cost to industry of morbidity and mortality resulting from environmental damage is lower in those countries where wages are lower. Life is literally cheaper in Africa. This is consistent with tort-based approaches to valuation. Where the cost of human injury and life is treated in this way as a cost of production, it can be included in corporate accounts and affects the structure of incentives and disincentives that shape corporate behavior. The problem with this approach is that our ethical understanding of human life is not purely market-based. There is another legal principle at work, which is based on the sanctity of human life and the idea that each human being is entitled to an equal measure of dignity and respect, regardless of sex, age, nationality, race, or other status. This is the principle that motivates the Charter on Industrial Hazards and Human Rights⁸³ drafted by the Permanent Peoples' Tribunal. The Charter builds on existing principles of human rights law to delineate certain substantive and procedural rights for workers and communities affected by industrial hazards. The central tenet of the Charter is one of non-discrimination (Article 1), setting out the principle that all individuals affected by industrial hazards are equally entitled to information (Articles 9 & 18), health care (Article 5), access to justice (Articles 28-36), as well as "fair and adequate monetary compensation" (Article 24(2)). While the Charter is a non-binding instrument produced by a non-govern-

83. See Charter on Industrial Hazards and Human Rights, available at <http://www.globalpolicy.org/socecon/envronmt/charter.htm>

mental body, it conveys in a concise form the moral and policy objection that may be made against both Summers and transnational torts on the basis of equal dignity of humans.

A third objection to the Summers argument — closely related to the first and second — is that the valuation of certain types of environmental damage should be based on a principle of universal and equal respect for the environment rather than transient market preferences. On this line of reasoning, the value of a set of natural resources and ecological processes is dependent wholly upon the properties of that particular ecosystem, and not upon the historical accident that the humans who live in the area happen to earn lower wages. The valuation of environmental damage should be determined by factors other than the wages of local residents or their propensity to litigate. The Summers approach privileges the economic circumstances of the local population living in the present day without paying sufficient attention to the interests of the global population or future generations.

To endorse these three counter-arguments is not to dismiss the Summers argument entirely. Despite the moral outrage that the Memo provoked, it does encapsulate important principles of present-day tort law, and reflects in a stark form the basis of much environmental policy. Yet it is clear that his argument does not command universal support, and that other important policy principles must be taken into account. So too, the current system of transnational torts against MNCs, which implicitly rests on the Summers logic, fails to take into account important policy considerations regarding human dignity and environmental protection.

D. *Toward non-discrimination*

If transnational torts discriminate against people living in the jurisdiction of subsidiary companies, what legal response is appropriate? One straightforward answer is to amend the rules of private international law, particularly in the U.S., that discriminate against foreign litigants. The key problem is one of access to courts, although related problems of applicable law, the enforcement of judgments, inequalities in pre-trial discovery, and so on, also need to be addressed. The movement toward a global judgments convention in the Hague Conference on Private International Law⁸⁴ may provide part of the answer here, but even if that effort results in a viable treaty that is widely ratified by states, it may still contain room for the application of the *forum non conveniens* doctrine.

84. See *supra* note 66.

A second response is to rely more heavily on human rights standards, including in particular the idea of a universal right of access to justice that contains a cross-border component. This is essentially the approach of the Charter on Industrial Hazards and Human Rights, which sets out in Article 29(1) a human right to choice of forum.⁸⁵ This is complemented by a human right to be free from legal rules restricting effective access to justice, as set out in Article 29(2).⁸⁶ While the approach of the Charter may well be criticized for emphasizing the rights of the plaintiff while making no provision for the legitimate rights of defendant companies, it does provide an aspirational guide that may help provide a moral counter to the Summers argument.

A third response to the inadequacies in transnational tort law is to move from a regime based largely on regulation and tort toward a regime that does more to emphasize the criminal liability of corporations for environmental harm. This approach has gained considerable support in recent years, particularly in respect of death and injuries at work,⁸⁷ and has started to attract more attention on the environmental front.⁸⁸ The main attraction of treating egregious environmental damage as a crime is that it stigmatizes offenders in a way that a tort cannot.⁸⁹ This may help contribute to deterrence and sends a strong symbolic statement of disapproval, regardless of the wage levels of local communities. This is consonant with the principle of equal respect for human dignity as well as equal respect for environmental goods. There are of course important practical and jurisdictional difficulties in devising and applying a cross-border environmental crime: few common law countries endorse the principle of extra-territorial jurisdiction, for example, so it would be difficult to mount prosecutions in the home state for environmental crimes committed abroad.

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

86. Article 29(2) provides: "All states shall ensure that in the specific case of any legal claims arising from the effects of hazardous activities, any legal rule otherwise impeding the pursuit of such claims, including legislative measures and judicial doctrines, shall not prevent affected persons from bringing suit for full and effective remedies. In particular, states shall review and remove where necessary, legal restrictions relating to inconvenient forum, statutory limitations, limited liability of parent corporations, enforcement of foreign money judgements and excessive fees for civil suits." *Id.*

87. Within the UK, for example, see the research, advocacy, and legal representation activities undertaken by the Centre for Corporate Accountability, at <http://www.corporateaccountability.org/>.

88. Much of the literature on the U.S. debate is covered in Kathleen F. Brickey, *Environmental Crime at the Crossroads: the Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487 (1996).

89. DAVID BERGMAN, *THE CASE FOR CORPORATE RESPONSIBILITY: CORPORATE VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM* (2000).

Yet the principle of criminal liability could be further developed in the context of an international treaty regime, and could in any case provide an analytical corrective to the purely market-based approach adopted in tort law.

VI. THE ROLE OF TORT LAW IN ENFORCING ENVIRONMENTAL STANDARDS

Coming back to the original question — whether tort law serves as an effective means to enforce environmental standards in a cross-border context — one is forced to admit that it plays an important role in the absence of other means. The considerable growth in transnational environmental tort cases is likely to continue simply because affected communities and environmental activists find this to be the only legal tool at their disposal. Yet problems of corporate structure, access to courts, and applicable law continue to pose real obstacles to the application of effective environmental standards through tort litigation. Civil liability has an important but inevitably limited role to play in environmental management.⁹⁰ That its profile is much higher in the transnational context is simply testimony to the lack of other accountability mechanisms.

While civil liability may provide a partial means for holding MNCs accountable, it is clear that under existing arrangements it will not provide the whole answer. The global legal community has not yet evolved legal techniques that are effective in regulating MNCs, in part because MNCs defy our most fundamental assumptions about the mapping of legal persons to territorial jurisdiction. In such circumstances, it is not surprising that many observers have been attracted to the idea of holding MNCs accountable to global norms based on international human rights standards. The proposal has stimulated much debate and legal analysis,⁹¹ including proposals for new standards.⁹² The idea of a human rights solution is attractive for at least three reasons: it privileges the individual in the context of disputes with large organizations, it offers the prospect of universal global standards, and it provides a superior norm that can “trump” the obstacles presented by procedural technicalities. Yet it is unlikely that the language of

90. See the classic analysis on the limits of civil liability presented in Ogus & Richardson, *supra* note 46.

91. See, e.g., HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., 1999); Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETHERLANDS INT'L L. REV. 171 (1999); Menno Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC, in THE EU AND HUMAN RIGHTS* (Philip Alston et al. eds., 1999).

92. See for example, AMNESTY INTERNATIONAL, HUMAN RIGHTS PRINCIPLES FOR COMPANIES (1998), available at <http://web.amnesty.org/802568F7005C4453/0/146776B997069171802569A500718B79?Open>, as well as the many resources set out at <http://www.business-humanrights.org/>.

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human rights will be able to provide the detailed environmental regulation that the international community will increasingly need in the twenty-first century. Nor can it perform the welfare-maximizing economic function of civil liability. There is surely an argument to inject the language of rights — particularly access to justice — into the arcane legalisms of private international law, but in the long run the language of rights will provide no more of a panacea than the language of tort. What the global community will need to develop is a robust and flexible environmental management system to meet the challenge posed by MNCs — a system that can draw on taxation, regulation, and criminal sanctions, as well as civil liability. In such a system, tort law will play an important contributory role in environmental management, but will not be forced to bear the regulatory expectations placed on it in present circumstances.

