REGULATING TRANSNATIONAL CORPORATION FOR ENVIRONMENTAL DAMAGE

by

SONAL SAHU

(Under the Direction of Professor DANIEL BODANSKY)

ABSTRACT

There is growing international concern about the growing power of transnational corporations ("TNCs") and the consequences of corporate practices and globalization for the environment, labor, and human rights. There has been a significant expansion, over the last decade, of international mechanisms to define and enforce economic rules that promote and protect global markets, and secure and advance the rights and economic interests of TNCs. But efforts by governments to articulate and enforce norms to protect the environment, labor and human rights have lagged. I am going to look at some of the ways employed by United States (U.S.) to regulate TNC’s activities to prevent environmental damage and the impediments involved in this process.

INDEX WORDS: Environment, Transnational Corporation (TNC), Externalities, Extraterritorial application of law, Alien Torts Claims Act (ATCA), International environmental law.
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DEDICATION

My parents and my brother.
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CHAPTER I
INTRODUCTION

Transnational Corporations (TNCs) have great influence in the world today. As Professor Thomas Donaldson concluded, “(W)ith the exception of a handful of nation-states,- multinationals are alone in possessing the size, technology, and economic reach necessary to influence human affairs on a global basis.”¹ The following figures illustrate TNCs global influence. General Electric, Vodafone and Ford Motor head the list of the ‘World’s top 100 non-financial TNCs, ranked by foreign assets’. These three TNCs have about $877 billion in foreign assets, corresponding to nearly 19% of the total foreign assets of the top 100 TNCs.² Even the total sales of TNCS like General motors, British petroleum, Exxon mobil is an indication of the financial power of TNC’s³ since they clearly exceeds the GDP of nations like Nigeria, Norway and Israel.⁴ According to estimates by UNCTAD, the universe of TNCs now spans some 77,000 parent companies with over 770,000 foreign affiliates.⁵ In 2005, these foreign affiliates generated an estimated $4.5 trillion in value added, employed some 62 million workers and exported

¹ Robert J. Fowler, International Environmental Standards For Transnational Corporations, 25 Envtl. L. 1, 1, (1995) (This Article discusses methods to ensure that TNCs meet environmental protection goals in the emerging climate of Globalization. In particular, it focuses on the possibility of developing some consistent or uniform standards to guide TNC activities wherever they occur.).
² These figures are available on: http://www.unctad.org/en/docs/wir2006_en.pdf  (This figure is from page 63 of World Investment report 2006)[ Hereinafter WIR]
³ Available on http://www.unctad.org/sections/dite_dir/docs/wir2006top100_en.pdf (Sales of General Motors is $193. 527, British Petroleum is $ 285.089 and Exxon Mobil is $291.252)
⁴ Available at: https://www.cia.gov/library/publications/the-world-factbook/print/no.html ( Nigeria is $191.4 , Norway is $213.6 and Israel is $170.3 )
⁵ WIR on page 12
goods and services valued at more than $4 trillion. The TNC universe continues to be
dominated by firms from the Triad – the EU, Japan and the United States – home to 85 of
the world’s top 100 TNCs in 2004. Five countries (France, Germany, Japan, United
Kingdom and United States) accounted for 73 of the top 100 firms, while 53 were from
the EU. The power of such top TNCs can be illustrated by the fact that out of the 100
largest economies in the world, 51 are TNCs and only 49 are countries.

From the legal perspective, a TNC is a group of separate national companies established
under the laws of different countries so it is subject to the laws of a host of different
jurisdictions. Consequently, it may be answerable in part to many different authorities,
but when regarded as a whole it extends beyond the controlling capacity of individual
national legal system. There is no final law the international community can point to
that regulates this actor as a whole i.e. parent company and all its subsidiaries. Thus, it is
alleged that TNC’s operate in a legal vacuum under international law and their practices
and general ethics have come under close scrutiny. For TNCs operating in Global South
only four sources exist for those standards- Host state, Home state, International
standards and Self Regulation. This paper is going to discuss the various approaches for

6 Id.
7 Id.
8 WIR on page 13
9 Top 200: The Rise of Global Corporate Power by Sarah Anderson and John Cavanagh, , Available at
http://www.globalpolicy.org/socecon/tnacs/top200.htm
10 See Peter Hansen & Victoria Aranda, An Emerging International Framework For Transnational
Corporations,14 Fordham Int'l L.J. 881, 882, (1991) (This article discusses the existing global instruments
for regulating FDI and the emergence of a global instrument enumerating standards applicable to TNC’s
which is adopted within a worldwide organization).
11 But see CYNTHIA DAY WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE, 33 (Martinus
Nijhoff Publishers 1983) 1983 (The author argues that in reality the states hosting TNC activities are only
concerned with the particular unit of enterprise operating within its territory and its parent Corporation to
the degree which the parent’s decisions affect the local affiliate so in reality TNC don’t escape the control
of any legal system).
12 See HUNTER, SALZMAN, ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 1485 (Foundation
regulating TNC activities adopted by United States (US) which is home to the highest number of TNC’s.\textsuperscript{13}

The first part of the paper will give the background of TNC’s. The second part will discuss the reasons for lack of regulation by host states. The third part will discuss three methods by which the US could regulate TNCs – Extraterritorial application of US environmental laws, Application of the Alien Tort Claims Act to activities by US companies in other countries, and Application of principles of International environmental law. I will be discussing the problems which are confronted in the use of these methods and suggest some solutions to strengthen these laws to regulate TNC’s. I will conclude by suggesting that international standards for TNC’s provide the best solution in view of the problems confronted in regulating TNCs for environmental damage.

\textsuperscript{13} According to UNCTAD Investment Brief on November 5, 2006, U.S. accounted for highest number of TNC’s with 25 entries in the top 100 list. Available at: http://www.waipa.org/pdf/InvestmentBriefs/Brief%205-06.pdf
CHAPTER II
BACKGROUND

II.I) DEFINITION

The difficulty confronted in trying to define a TNC exemplifies the complex structure of a TNC. The first definition was given by David E. Lilienthal who defined them as “Corporations……… which have their home in one country but which live and operate under the laws and customs of other countries”. The major drawback of this definition was that being US centric in its approach it overlooked firms of multiple national origin represented by Unilever and Shell which are Anglo –Dutch Corporations.

The economic definition distinguishes between direct investment and portfolio investment by defining TNC as “any corporation which owns (in whole or part), controls and manages income generating assets in more than one country”. This definition is applicable only to direct investment as only direct investment gives the investing enterprise both a financial stake and managerial control in the foreign venture while the latter confines participation of investing companies only to having a financial stake in the foreign venture. Foreign investment involves the transfer of tangible and intangible from one country into another for the purpose for use in that country to generate wealth under the total or partial control of the owner of the assets whereas in portfolio management there is movement of money for the purpose of buying shares in a company.

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15 Id.
16 Id.
formed or functioning in another country.  

The defining feature of the latter is that there is a divorce between management, control and share ownership in it.

United Nations (U.N.) has made a distinction between the terms- ‘Transnational’ Corporation and ‘Multinational’ Corporation. U.N. defined TNC as enterprise that owns or controls production or service facilities outside the countries in which they are based.

During the 57th meeting of ECOSOC in 1974 the term ‘Transnational’ was favored over ‘Multinational’ as the delegates thought it better expressed the essential feature of operations across national borders. It was felt the term ‘Multinational’ should be reserved for enterprises which were jointly owned and controlled by entities from several countries.

According to the OECD definition the ability to of one company to control the activities of another company located in another country make it a Multinational enterprise. A distinction is also drawn between the term-Corporation and Enterprise, as the former only denotes incorporated business entities and corporate groups based on parent subsidiary relation thus restricting the scope of the term. The term ‘Corporation’ does not take into account controlled contractual relations like distribution or production agreements which are a legal form of multinational enterprise but do not require setting up an owned subsidiary in host state.

For the purpose of this paper I have chosen the term Transnational Corporation and the definition provided by the Draft norms on the responsibilities of Transnational

18 Id.
19 See MUCHLINSKI, Supra note 14, at 13.
20 Id.
21 Id.
22 Id.
Corporations and other business enterprises with regard to Human Rights. Accordingly, the term Transnational Corporation (TNC) refers to an “(E)conomic entity operating in more than one country or a cluster of economic entities operating in two or more countries –whatever their legal form whether in their home country or country of activity and whether taken individually or collectively”.23

II.II) HISTORY

It is difficult to state the exact date when TNCs first emerged. Some authors argue that the origin of TNCs can be traced to pre nineteenth century trading companies like the British and Dutch East India companies, whose sole aim was to bridge the gap between sources of raw materials and their markets.24

The emergence of present day TNC can be divided into three phases.25

1. 1850-1914: The first phase which saw the development of companies which were incorporated in Britain but had no operation or assets located in Britain. All their operating assets were located overseas particularly in USA, Canada, Australia and Argentina. The primary reason for incorporating in Britain was to have access to the London capital markets as a source of financing overseas projects. Thus the structure of these companies differed considerably from modern day TNC.

It was in 1890’s that European MNE’s began to appear. Though British companies were the first to engage in market oriented foreign investments German, Swedish and Dutch companies also acquired MNC status. Germany’s Ciba, Hoechst, Bayer and Agfa,

25 See Muchlinski , Supra note 14, at 20-33
Sweden’s Noble and SKF and Holland’s Phillips were all part of the early TNC’s from Europe. The pre 1914 period saw the growth of first US TNC’s. ‘Singer’ Sewing Machine Company was the first American MNE which was followed by others such as Edison, Parke Davis and Ford.

2. 1918-1939: This period continued to see development in TNC’s but at a slower rate than the late nineteenth and early twentieth centuries. The Bolshevik revolution in Russia, rise of fascism in Italy and Germany, the great depression all combined to hinder the growth of MNE’s.

3. 1945 onwards: This phase can be subdivided into categories. The first phase was characterized by the rapid growth of American MNE’s from the end of Second World War to 1960 which was fuelled by a number of factors. Firstly, the Second World War had devastated the European industries. Secondly, direct investment opportunities opened up for US firms with the introduction of Marshall Aid which provided capital basis for restructuring European Economy. Thirdly, the supremacy of US Currency was assured when IMF, World Bank and ensured it was used for international transactions. GATT took IMF and World Bank’s initiative a step further by facilitating increase in international transactions through gradual liberalization of international economy achieved by removal of tariff barriers. Fourthly, tax concessions were given to companies investing abroad. Finally the Europeans were enthusiastic recipients of US investment with the hope of encouraging fuller employment and higher standards of living.

The second phase saw the revival of European MNE’s and also marked the entry of new players in the field in the from of Japanese MNE’s.26

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26 *Id.* (Japanese investment grew due to rapid government liberalization and removal of export of barriers to export of capital which led to Japanese firms investing in Asia and other industrialized countries. European
II. III) FACTORS DRIVING RELOCATION

One of the defining characteristic of a TNC is its mobility. As discussed earlier estimates by UNCTAD, the universe of TNCs now spans some 77,000 parent companies with over 770,000 foreign affiliates. 27

There are various factors that drive TNC relocation and the importance of each factor depends on the sector. For instance, in the case of the manufacturing sector, resource availability, labor availability, the cost of labor, taxation, exchange rates, infrastructure, and political stability are some of the important factors that corporations take into account when making investment decisions. 28 Similarly, in the case of the service sector, the determining criterion is the availability of skilled man power in the service offered by the Corporation, while in case of primary sectors like the petroleum industry, TNC’s move where the resource is located.

Despite the ease with which TNC’s can relocate, the trend toward production through foreign subsidiaries is rife in some industries while not in others. The reason for this difference among industries in the rate of relocation is the presence or absence of regulatory differentials that affect the incentive to relocate. 29 Regulatory differentials are of particular importance to the environment if they form a substantial part of a

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29 See Debora Spar & David Yoffie, Multinational Enterprises and the Prospects for Justice, 52 J. Int’l Aff. 557, 564-68 (1999) (This paper discusses situations when race to the bottom takes place due to TNC relocation and when corporate expansion can actually enhance prospects for global governance and international justice. Firms that manufacture homogeneous products will be more inclined to leap for any advantages that location-hopping might bring. Similarly, transaction and sunk costs refer to stickiness of investment. It is bound to slow the pace of relocation. Most firms cannot switch plant locations at will as most will incur substantial costs from any move across borders. The higher these costs, the stickier existing investments will prove to be--and stickier investments will decrease the momentum for any race to the bottom)
Corporation’s production cost. A highly polluting company will have a greater incentive to escape the stringent regulations of its home country since compliance with environmental regulations forms a major part of its production costs. For instance, a Paper manufacturing company -- which is a more pollution intensive industry compared to a Toy manufacturer -- will be more likely to shift its production to another country. Many hazardous industries, which are subject to strict regulation in developed countries, have relocated to Asia, Africa and Eastern Europe. Many textiles, petrochemicals, mining and smelting industries of Europe have exported production. However, for relocation to make sense, the benefit from the regulatory differential should exceed the costs involved in relocation.

II.IV) TNC AND ENVIRONMENT

There have been numerous incidents involving environmental damage caused by TNC activities in developing nations. The Bhopal Gas incident is a leading case in this regard, which arose on 2nd of December 1984 in an Indian city called Bhopal. The tragedy resulted from the leakage of a deadly and toxic substance, Methyl isocyanate, from a pesticide plant owned by Union Carbide of India Ltd which in turn, was a subsidiary of Union Carbide Corporation based in the U.S. The aftermath of the incident continues to this day, with residents suffering from birth defects, impaired or destroyed reproductive

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30 Id.
32 See Edwards, Supra note 22, at 184
33 See Daniel Barstow Magraw, The Bhopal Disaster: Structuring a Solution, 57 U. Colo. L. Rev. 835, 835(1986) (This article discusses the legal issues involved in the Bhopal Gas tragedy and proposes a structure to settle the incident).
systems, lung problems and blindness. Similarly Sequihua, Aguinda and Jota are the names of three separate but related class actions for environmental damage bought in US courts by indigenous people of Ecuador and Peru. In all three suits environmental damage to the local environment was alleged by the residents of the region. In all three suits plaintiffs claimed that thirty billion gallons of toxic waste was dumped into their environment by Texpet Corporation -- a subsidiary of a US oil company -- while extracting oil from the Ecuadorian Amazon during the period from 1964-1992. Furthermore, world wide accepted practices of re-injecting the production water into the ground was openly flouted by Texpet and large amounts of petroleum leaked into the local environment from the Trans Ecuadorian pipeline it constructed.

The environmental damage and atrocities committed against the local population of Nigeria by several Transnational Oil Corporations are well publicized and furnish further proof of the detrimental effects of TNC activities. The Nigerian oil industry is dominated by six joint-venture operations managed by TNCs: Shell (Netherlands/U.K.), Mobil (US), Chevron-Texaco (US), AGIP (Italy), and Elf-Aquitaine (France). The Nigerian Constitution provides that all oil is the property of Nigeria’s federal government.

34 See Sukanya Pillay, Absence of Justice: Lessons From The Bhopal Union Carbide Disaster For Latin America, 14 Mich. St. J’l L 479, 484 (2006) (The paper discusses some of the existing rules under internal law which can be used to address the grievance of victims of TNC activity)
36 Aguindo v. Texaco, 303 F.3d 470(2nd Cir. 2003)
37 Jota v. Texaco, 157 F. 3d 153 (2nd Cir. 1998) (It is a consolidation of appeals from Aguinda and Ashanga class action suits that had been dismissed by New York district court)
38 See Peggy Rodgers Kalas, The Implications of Jota v. Texaco and The Accountability of Transnational Corporation, 12 Pace Int’l L. Rev. 47, 51(2000) (This article examines the detrimental effects of oil exploration in Ecuador and the problems faced by victims in litigating against the TNC in its home country. It focuses on the Court of appeals analysis of grounds of dismissal and reasons why it remanded the case).
39 See Alison Lindsay Shinsato, Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria, 4 Nw. U. J'’l Hum. Rts. 186, 191 (2005) (This paper discusses Nigeria as a specific example of environmental destruction and concomitant human rights violations caused by oil TNCs. It outlines the development of environmental human rights and current legal mechanisms available to address violations of these rights).
Therefore, the above TNCs are in partnership with the Nigerian Government’s Nigerian National Petroleum Company ("NNPC").\textsuperscript{40} The Nigerian oil industry, dominated by Shell, has constructed over 100 oil wells, a petro-chemical complex, two oil refineries, and seven gas flares which burn twenty-four hours a day.\textsuperscript{41} The oil TNCs in Nigeria flare gas because it is cheaper to dispose of the gas by burning it than it is to collect it for use or to re-inject it into the subsoil.\textsuperscript{42} Some flares have burned continuously for the past forty years. A report funded by the International Union for the Conservation of Nature and Natural Resources ("IUCN") and produced by Environmental Rights Action on the Niger Delta states that Nigeria flares 75% of its gas, which far exceeds any other country’s allowable flaring limits.\textsuperscript{43} According to the report, in the year 2000, 95% of extracted natural gas was flared in Ogoniland as compared to the 0.4% flared in the entire US.\textsuperscript{44}

The oil industry has "criss-crossed the land with pipelines and divided it with canals but pipelines which transport crude oil from the wells to the refineries are so poorly maintained that they regularly spill large quantities of oil into the environment. Besides uncontrolled release of oil from wells compound the problem.\textsuperscript{45} But the most important hazard is posed by oil spills that contaminate the water and destroy plants and animals.

\textsuperscript{40} Id.
\textsuperscript{41} Id at 192
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.

\textsuperscript{45} See Joshua P. Eaton, The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Right To A Healthy Environment, 15 B.U. Int'l L.J. 261, 268, (This paper discusses the tragic events in Nigeria caused by Oil Corporations operating there. It further argues that international human rights should recognize right to a healthy environment and discusses mechanisms for international adjudication and enforcement of international environmental law and the right to a healthy environment against TNCs and states).
Major spills are recorded on average three times a month; between 1976 and 1996 alone, 4,835 oil spills were recorded.  

Overall, oil exploration has devastated the air, water and soil to an extent that it is no longer fit for human habitation or carrying on any productive activity.

In 1995, Bangladesh government awarded three important blocks to Occidental, Inc, a U.S. oil company under PSCs with Petro Bangla, The national Oil Company of Bangladesh. When Occidental started drilling its first well a massive blowout took place on 15 June 1997. Valuable trees, herbs, plants and animals of different types were destroyed. Environmentalists confirm that region faces a very serious loss of green cover and extinction of wildlife species. An enquiry Commission submitted a report which stated that the accident was the consequence of utter negligence of and inefficiency of Occidental Bangladesh.

All these incidents clearly reflect the environmental harm that TNC’s can cause in developing or least developed countries which make regulating TNC’s both a necessity and a priority.

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46 See Shinsato, Supra note 39, at 192
47 See Eaton, Supra note 45, at 267
CHAPTER III

HOST STATE

Despite being best placed to regulate TNCs operating within their territory host states are generally either not capable of or willing to regulate TNC’s. Ideally, host states are the best source of regulating TNC activities taking place within their territory because they have territorial jurisdiction. The territoriality principle is the primary principle of jurisdiction with all other bases of jurisdiction coming after it in the hierarchy. Despite this for various reasons discussed below host nations are not doing a satisfactory job of regulating TNC activities to prevent environmental harm.

III.I) EXTERNALITIES

Externalities occur when “production or consumption inflicts involuntary costs or benefits on others yet are not paid for by those who impose or receive them.” More precisely, an externality is an effect of one economic agent's behavior on another's well-being, where that effect is not reflected in the cost of the product. An externality can be positive or negative. An example of a positive externality is any new invention that will benefit not only the inventor but others in the society as well. However, when the air

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49 See SORNARAJAH, Supra note 17, at 152
50 See Matthew Tuchband, The Systemic Environmental Externalities of Free Trade: A Call for Wiser Trade Decision making, 83 Geo. L.J. 2099, 2105( 1995)(This article discusses the relationship between externalities and trade demonstrating how certain externalities do not enter the costs of trading activities).
51 Id.
52 See Brett M. Frischmann & Mark A. Lemley, Spillovers, 107 Colum. L. Rev. 257, 259-60( 2007)(This article argues that, in case of intellectual property, spillovers are good for society and in many different contexts the law is actually designed to encourage certain externality-producing activities. On this page it discusses that spillover benefits aren't intentionally provided. It may appear to be insignificant to us but spillovers turn out to be enormously significant to society. We are all incidental beneficiaries, each and every day. The social importance of spillovers is most significant in the context of innovation. A particular
pollution from a nation's plastics facility settles hundreds of miles away in another nation's lakes, destroying the local fishing economy, it represents a negative externality. But it is important to remember that, unless government intervenes, the plastic product will not incorporate the cost of cleaning up the lake. As a result, externalities are not factored into a person’s decision to engage in an activity.

Unfortunately, the externality arising from TNC activity in the form of harm to the global environment is a negative externality. Negative externalities act as an additional disincentive for a host state to regulate TNC activities because they realize that the costs of more stringent standards will be borne by them, whereas a significant portion of the benefits will go to those in other countries. For instance, Britain did not control sulfur emissions from its power plants for a long time because most of the adverse effects were experienced in Scandinavia and elsewhere. Similarly, some nations may allow destruction of their tropical rain forests because most of their own citizens do not care greatly about preserving them, even though many people in other countries are extremely

Invention may make some money for the inventor but it will likely make money for other people as well. These spillovers come in a variety of forms. Some are temporal. Alexander Graham Bell got some benefit from his invention of the telephone, but he doesn't anymore. The companies he founded continue to make money from the telephone, but they also have competitors who make money from the invention as well, and users of the telephone benefit in countless ways for which they do not fully pay. Other spillovers are geographic, in several different senses. An innovation contributes to a local economy, employing people who spend their money locally. Geographic spillovers may also occur in a very different sense: Population density is strongly positively related to local innovation--people are more inventive when they are around other inventive people).

53 See Tuchband, Supra note 50, at 2105
54 See Richard B. Stewart, Environmental Regulation and International Competitiveness, 102 Yale L.J. 2039, 2054 (1993) (This Article argues that a nation's imposition of stringent environmental regulation and liability rules may harm US international competitiveness but focusing solely on competitiveness, however, is myopic. The contributions that a cleaner environment and resource conservation makes to well-being must also be taken into account since ultimately the broad overall performance of the economy, including the environmental and health benefits generated by governmental programs for environmental protection matters. In order to combat this loss of competitiveness US should engage in a combination of domestic policy changes to eliminate unnecessary regulatory and liability burdens and international efforts to move toward partial harmonization of national environmental measures).
55 Id.
distressed by the disappearance of rare species and ecosystems.\textsuperscript{56} The only way to prevent externalities from acting as a disincentive for environmental regulation is to devise a way to internalize them.\textsuperscript{57} This would require host nations to impose rules that would force the TNC’s to internalize the externalities, for example through pollution charges (often referred to as Pigovian taxes).

Nations may not have any incentive to adopt measures to compel internalizing of externalities due to the mobility of TNC’s.\textsuperscript{58} They fear that the resulting regulation will drive away TNC’s and environmental gains from regulations will be more than offset by movement of capital to other areas with lower standards.\textsuperscript{59} By adopting regulations they will bear the externalities of production in another country when the same activity is carried on in the other country. No nation wants to exclusively bear the externalities without any benefit to its economy.\textsuperscript{60}

\textbf{III.II) RACE TO THE BOTTOM AND CHILLING EFFECT}

The ability of a TNC to relocate leads to fierce competition among developing nations to attract investment which proves to be a major impediment in its regulation. In order to attract and retain industry, a nation may lower its environmental standards, only to evoke similar responses from other nations. The result is a ‘Race to the Bottom’ in which jurisdictions compete by progressively lowering their environmental standards in order to attract investment. It leads to the movement of capital and technology from countries with relatively high levels of wages, taxation and regulation to countries with relatively

\begin{itemize}
\item \textsuperscript{56} Id.
\item \textsuperscript{57} See Frischmann & Lemley, \textit{Supra} note 52, at 262
\item \textsuperscript{58} See Henry N. Butler & Jonathan R. Macey, Externalities and The Matching Principle: The Case For Reallocating Environmental Regulatory Authority, 14 Yale J. on Reg. 23, 44 (1996) ( The author discusses the trend of race to the bottom due to difference in environmental regulations among the states in US)
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id.
\end{itemize}
lower levels.\textsuperscript{61} Since all nations fear that TNC will relocate their activity to another country if environmental regulations are imposed on them, nations try to outdo each other in trying to adopt lower standards of environment thus engaging a race to the bottom.\textsuperscript{62} This race can be curtailed if states don’t lower their standards to attract investment or TNC’s co-operate and hold to a common standard.\textsuperscript{63} However, Companies are rarely ever able to form this kind of collective endeavor as is evident from the premature demise of cartels.\textsuperscript{64} States are better placed to halt this race to the bottom by setting environmental standards and refusing to lower them. However, they are unable to do so due to Prisoner’s dilemma. It is a non co-operative game which can be explained by taking the example of two prisoners who are locked up separately.\textsuperscript{65} The rules for both the prisoners are\textsuperscript{66} - if neither confesses each will receive a short sentence for a lesser offense and spend a year in prison. If one prisoner confesses and turns state's witness, however, that prisoner will be released, and the other will receive a particularly heavy term of ten years. If both prisoners confess, each will receive a five year sentence.

The most reasonable course of action is that neither should confess but this course of action is not possible.\textsuperscript{67} For self protection or to try and promote their respective self

\begin{footnotesize}
\begin{itemize}
\item[61] See Scuttles, Jr., Supra note 31, at 5
\item[62] Id.
\item[63] See Edwards, Supra note 28, at 186-87
\item[64] See Peter P. Swire, The Race to Laxity and The Race To Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law, 14 Yale L. & Pol’y Rev. 67, 89 (1996) (The author discusses prisoner's dilemma model, in which US states, acting strategically, lower their environmental standards to a suboptimal level in an effort to attract industry. In the article author discusses the problems with Prof. Revesz model); But See Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking The “Race-To-The-Bottom” Rationale For Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, (1992) (In this article Prof. Revesz argues that Competition does not lead to race to bottom but, like in other areas, it leads to increased efficiency so federal regulation of environmental issues to deal with so called race to bottom is not desirable).
\item[66] Id.
\item[67] Id.
\end{itemize}
\end{footnotesize}
interests each will end up confessing.\textsuperscript{68} Thus each prisoner’s decision to confess is individually rational, since not doing so might result in his serving 10 years or letting go off an opportunity to be released, but when these two decisions are taken together it turns out to be irrational as neither is better off compared to the first situation. \textsuperscript{69}

In case of environmental regulation the situation is analogous to above example. If all nations adhere to a agreed upon environment standard then all are better off in terms of better quality of environment. However, in order to promote their interest (which means attract investment) or protect their interest (which means fear of losing investment to nations with lower standards) they lower their standards. Thus, the decision of each nation to lower environment standards may seem rational individually but collectively it is irrational as it translates into lower environmental quality than would have been the case if all had adhered to the set standard.

Moreover, TNC’s use their structural power and threat of relocation to encourage governments in the country of operation to loosen regulations or to not enforce rules in the books thus encouraging what is commonly referred to as a regulatory chill. \textsuperscript{70}

\textbf{III.III) DIFFERENCE IN WEALTH OF NATIONS}

Experience shows that societies treat environmental quality as a "luxury"; they demand relatively more of it as income rises and needs for housing, food, and other "basics" are satisfied. \textsuperscript{71} Today developed societies have a much cleaner, much healthier environment than undeveloped ones.\textsuperscript{72} The environment of former is in far better shape, by any measure one might select, than a hundred, or even fifty years ago: Cleaner air, cleaner

\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} See Stewart, Supra note 54, at 2053
\textsuperscript{72} See Alex Kozinski, Gore Wars, 100 Mich. L. Rev. 1742, 1762, (2002)
water, improved sanitation, less disease and fewer calamities characterize the environment of developed nations. The situation in poorer countries is dismal which are still struggling to feed their people. Clearly, they cannot afford to worry about clean air and similar environmental luxuries. If basic necessities are in short supply, environmental protection may not be a national priority. In countries under severe economic pressures, the push to develop their economies can override environmental concerns.

For example, many LDC's encourage industrial development in an effort to grow out of their poverty, reasoning that some environmental degradation may be the necessary price for economic development. Finally, countries saddled with massive national debts loads--as many LDC's are--may have no alternative but to pursue environmentally costly development strategies and may not be able to pay for environmental protection, even if they so desire.

Only societies that have put behind them the struggle for survival have the incentives to demand better quality of environment. Now, developing societies are making precisely the same trade-off that developed societies made during their development process and as wealth increases, population growth slows down, and technology helps solve environmental problems, they will emulate the developed world in cleaning up their environment.

Wealthier nations are more likely to choose to devote a higher percentage

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73 Id.
74 Id.
75 See Alan Neff, Not In Their Backyards, Either: A Proposal For A Foreign Environmental Practices Act, 17 Ecology L.Q. 477, 486, (1990) (The author suggests that U.S. should draft a foreign Environmental Practices Act to regulate US corporations and individuals behavior to prevent them from committing environmental harm abroad.).
76 Id.
77 Id.
78 See Kozinski, Supra note 72 , at 1762
79 Id.

of their resources to environmental protection. Consequently, wealth and associated educational levels affect nations' abilities to develop strong, capable administrative authorities to devise, implement, and enforce effective environmental protection measures. This is also evidenced by the environmental Kuznets Curve (EKC). The EKC is an inverted-U relationship between pollution and income, which demonstrates the way environmental quality changes as a country makes the transition from poverty to relative affluence. The EKC predicts that pollution will first increase, but subsequently decline if income growth proceeds far enough. Growth will eventually lead to greening over time even if it does not appear to do so immediately. The connection seems to have been demonstrated for the first time in a 1992 World Bank study finding that particle and sulfur dioxide pollution in 48 cities around the world peaked at income levels around $5,000 to $8,000 per capita and subsequently declined at higher income levels. This gave reason to believe that economic growth by itself will provide the necessary catalyst to invest in environmental quality and environmental problems can be ameliorated only through economic growth. It induced one observer to declare that “the surest way to improve your environment is to become rich.”

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80 See Stewart, Supra note 54, at 2053
81 Id.
82 But See Douglas A. Kysar, Some Realism About Environmental Skepticism: The Implications of Bjorn Lomborg's The Skeptical Environmentalist for Environmental Law and Policy, 30 Ecology L.Q. 223, 249, (2003) (The author is actually questioning the accuracy of the conclusion of the EKC. According to him a variety of factors render reliance on the EKC alone problematic as a solution to pollution, deforestation, and other unsustainable environmental conditions in the developing world).
83 Robert T. Deacon & Catherine S. Norman, Does the Environmental Kuznets Curve Describe How Individual Countries Behave? , Available at http://www.econ.ucsb.edu/papers/wp05-04.pdf (The authors study has revealed that wealthy democracies controlled their SO2 pollution (but not smoke and particulates) as their incomes increased, which is consistent with the EKC hypothesis. The remaining EKC predictions, i.e., pollution increasing monotonically with income in poor countries, middle income countries following an inverted-U path and rich countries reducing smoke and particulate pollution, are not observed with any greater frequency than chance would dictate.).
84 See Kysar, Supra note 82, at 249
85 See Deacon & Norman, Supra note 83
agree well with the experience of environmental progress in some of the world’s wealthier nations over the last 50 years.\textsuperscript{86} Casual empiricism indicates that environmental quality initially worsened in these countries as their economies grew following World War II, but then improved when environmental cleanup began in earnest in during the 1970s.\textsuperscript{87}

Developing nations often lack the institutional capacity and enforcement mechanisms to regulate TNC behavior for environment.\textsuperscript{88} Developed countries have more resources to commit to environmental protection, while developing countries lack such resources and must direct their limited resources towards meeting the basic necessities of their people.\textsuperscript{89} Moreover, companies in developing countries usually do not have advanced ‘clean’ technologies at their disposal, which causes the national governments to adjust environmental standards to locally available technologies in order not to place domestic companies at a competitive disadvantage.\textsuperscript{90} If they were to impose different environmental standards on TNC’s and local industries they will be accused of violating national treatment.\textsuperscript{91}

The pressure on developing nations to value environment more than economic benefits is not legitimate since each sovereign nation has a right to determine its policy. Clearly, this

\textsuperscript{86}Id.
\textsuperscript{87}Id.
\textsuperscript{88}Tetsuya Morimoto, Growing industrialization and our damaged planet, The extraterritorial application of developed countries’ domestic environmental laws to transnational corporations abroad, Utrecht. L. Rev.,134, 137 (2005) Available at http://www.utrechtlawreview.org/publish/articles/000014/article.pdf
\textsuperscript{89}Id.
\textsuperscript{90}Id.
\textsuperscript{91}Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITS Really Work: An Evaluation of Bilateral Investment Treaties and Their grand Bargain, 46 Harv. Int'l L.J. 67, 84, (2005)(National treatment is one of the provisions of bilateral investment treaties. It means that foreign Corporations will be accorded treatment no less favorable than that accorded to national Corporations).
difference in wealth of nation is another impediment in host state’s desirability to regulate TNC activities.

III.IV) LACK OF ENFORCEMENT MECHANISM

Even if regulations are enhanced by host states they will always need to be enforced through the host countries’ systems.92 Even though most individuals and corporations strive to abide by environmental laws, some part of the public evades legal duties. Regular enforcement is crucial to detect such evasion and prevent further evasion.93 Since environmental laws are generally enforced through the administrative process, the effectiveness of environmental law enforcement can be gauged by the strength and integrity of the administrative law regime.94 In this respect, many of the developing host countries even lack the institutional and legal frameworks in their administrative branches that are needed to enforce the existing environmental regulations. This is the reason for many international environmental treaties providing for technological help to developing nations who are parties to the agreement.95 Generally, there are three major factors that impede the effective enforcement of environmental regulations in developing host countries.96 The first impediment is the lack of incentive since host states fear they will lose out on foreign investment. The second obstacle is the lack of experienced enforcement personnel. Governments may not have the financial resources or the pool of trained civil servants to effectively manage and protect their natural resources. Many developing host countries do not have sufficient resources and ‘knowhow’ to provide the regulatory agencies’ officers to enforce environmental regulations. Finally, public

\[\text{92 See Morimoto, Supra note 88, at 144}\]
\[\text{93 Id.}\]
\[\text{94 Id at 145}\]
\[\text{95 See Article 16 of the Rotterdam Convention. Available at http://www.pic.int/home.php?type=t&id=170}\]
\[\text{96 See Morimoto, supra note 88, at 145}\]
corruption prevalent in developing host countries also seems to prevent effective enforcement. There are instances when the government may be willing to regulate TNC’s but the legal system of the host country is not adequately equipped to handle cases involving the detrimental effects of TNC activities on environment. This is especially true in the case of developing nations. In *Bhopal Gas* case\(^97\) the Indian government unsuccessfullly attempted to litigate the case in US. One of the reasons cited by India was the limitation of the Indian judicial system to deal with such a case. Delays inherent in the Indian legal system, lack of procedural practical capability to handle the litigation meant justice would be better served in US courts.\(^98\)

In *Sequihua* and *Aguinda* the same problems can be spotted. Under the Ecuadoran Civil code the only way to make Texaco liable for damages was to prove that it had been negligent or malicious and that the damage or threatened harm existed in accordance with the principles under the Civil Code.\(^99\) The procedural barriers included prohibition of parties from calling their witness unless opposing parties agree; discovery limited to questioning conducted by judge, no oral, direct or cross examination of witnesses is allowed no provision for class action suits. Besides, substantive and procedural drawback the host state’s legal system in all these cases did not provide for imposition of compensation which would act as deterrence to current or potential violators.\(^100\) Even though the host country could change its laws to address these deficiencies it does not

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\(^97\) *In re Union Carbide Corp. Gas Plant Disaster*, 634 F.Supp. 842, 842(S.D.N.Y. 1986)  
\(^98\) *See* Hanson Hosein, *Unsettling: Bhopal And The Resolution Of International Disputes Involving An Environmental Disaster*, 16 B.C. Int'l & Comp. L. Rev. 285, 293 (1993) (This article uses the Bhopal tragedy as a case study to discuss the international dispute resolution of an incident involving a TNC , a host state’s government and multiple judicial system both foreign and domestic)  
\(^99\) *See* Kalas, *Supra* note 38, at 61  
\(^100\) *Id.*
happen in most of the cases for various reasons. First reason is the rampant corruption prevalent in developing countries. Second and more importantly, the local government is in cahoots with the TNC which prevents it from imposing stricter regulations on TNC’s. For instance in case of Ecuador the military is the real authority which in turn is funded exclusively by oil revenues.\textsuperscript{101} There are other cases discussed in the following section which provide evidence of local government’s collusion with TNC’s.

\textsuperscript{101} \textit{Id} at 63 -64
CHAPTER IV

HOME STATE

Home states actively encourage their Corporations to make foreign investment. The assured supply of natural resources, repatriation of profits and spread of political influence are reasons behind the home state’s encouragement. The most common argument forwarded for regulation by home states of TNC activities with respect to environment is the higher environmental standard existing in home countries. However, a developed home country would be reluctant to adopt extraterritorial regulations unilaterally, because such unilateral action would inevitably place its TNCs at a competitive disadvantage in the global market by denying them a level playing field. 102 Moreover, their pollution would be replaced by their competitor’s pollution leaving the environment no better 103

TNC’s would legitimately expect that such actions are multilateral in nature and are taken by other nations as well so that their competitors are placed on the same footing. Similarly, nations would not want that TNCs whose home countries have less stringent environmental regulations have a competitive advantage in the global market over their home corporations who are subjected to more stringent environmental regulations.

Second, problem with home countries regulation is that TNCs may incorporate in another country to avoid the regulation which was the case in U.S. asbestos industry. 104

102 See Neff, Supra note 75 , at 527, (1990)
103 Id.
104 See Scuttles, Supra note 31, at
Finally, when developed home countries investigate TNCs’ possible violations of their extraterritorial regulations they will need the cooperation of developing host countries. In this respect, there is a critical concern that developing host countries will not be willing to cooperate with developed home countries due to fears of TNC relocation. Second, in most cases where the host government is colluding with the TNC in question it would logically want to shield the TNC.

IV.1) EXTRATERRITORIAL APPLICATION OF LAW

There are two ways in which Home country environmental law can be made applicable to TNC’s operating in other countries:

1.) Application by Host State: Host country can pass legislation which requires TNC’s to follow home country standards in the host country. This would mean that US TNC’s are bound by US environmental standards wherever they operate in the world. This would be a desirable course of action since the host country is regulating activity taking place on its own territory without outside interference.

However, there are numerous problems in its implementation. First, if home country standards are applied to TNC’s it will be difficult for host states to understand and administer differing standards for various TNC facilities. Secondly, it will be contrary to ‘national treatment’ to subject TNC’s to differing and stricter standards than local industries.

2.) Application by Home State: Environmentalists and Commentators have urged states with strong environmental regimes such as the United States, to extend the reach of their

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105 See Morimoto, supra note 88, at 152
106 Id.
107 See Fowler, Supra note 1, at 26
legal systems to govern TNC’s environmental conduct in other countries.  

This approach has various advantages. First, it diminishes the dependency on states with weak environmental standards or weak enforcement to pass legislation ensuring application of adequate environmental standards to TNC’s operating in their territory. Second, it will halt ‘Race to bottom’ as host states will not achieve anything by having lax regulations since TNC’s would have to comply with home state standards irrespective of their place of operation. Third, extraterritorial application of home countries’ regulations may also facilitate the transfer of advanced environmental technologies to developing host countries and boost the development of environmental training programme for employees in those countries. This would address the problem of lack of institutional capacity in developing countries to supervise TNC activity. Finally, the brunt of the enforcement costs would be borne by the governments of developed home countries, which generally have sufficient financial and legal resources. This means that developing countries are not asked to divert their resources from development activities to environmental enforcement activities.

In order to understand extraterritoriality it is imperative to understand the concept of jurisdiction under international law which is a prerequisite to extraterritorial application of law. In international law jurisdiction means exercise of power over persons and property and control over events that affects its peace order and good government. Prescriptive jurisdiction can be broadly defined as a state’s authority to regulate “the

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108 See Extraterritorial Environmental Regulation, 104 Harv. L. Rev. 1609, 1611(1991)
109 Id.
110 See SORNARAJAH, Supra note 17, at 151
conduct, relations, status or interests of persons or things, whether by legislation, executive act or order, or administrative rule or regulation”.

There are three basic principles of applying prescriptive jurisdiction under international law- Territoriality principle, Nationality principle and Universality principle.

The territoriality principle is the most obvious and oldest principle under which the states have the right to exercise legislative, adjudicatory and enforcement powers within its territory.

It subsumes under it:

a.) Objective territoriality principle- Permits jurisdiction where any essential element of the crime is committed on state territory,

b.) Effects doctrine-Vests jurisdiction in a state over acts committed abroad but having effects within its jurisdiction

c.) Protective principle – It provides jurisdiction over acts which affects the security of the state.

Nationality principle relies on residence and other connections as evidence of allegiance owed by aliens. Universality principle allows jurisdiction over acts of non-nationals

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111 See Jonathan Turley, When in Rome”: Multinational Misconduct and The Presumption Against Extraterritoriality, 84 NW. U. L. Rev. 598, 635, (1990)

112 Id at 152-53 (Human societies generally have a territorial basis. The emergence of government within that territory and the keeping of order required exercise of power by some centralized authority saw the application of this principle. Convenience also dictated that jurisdiction over events be territorial. This concept is an extension of the concept of sovereignty which constituted the idea that a sovereign state should not exercise jurisdiction over another sovereign state. Each state was free to pursue its domestic governance without interference from others).

113 Id at 152

114 See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 301-2, (Oxford University Press 1966) 2003 (There is a possibility of creation of parallel jurisdiction due to nationality and territorial jurisdiction and incidents of dual nationality so states place limitation on nationality principle).
where the circumstances, including the nature of the crime, justify the repression of some types of crimes as a matter of international public policy.\textsuperscript{115}

It is clear from the preceding discussion that the nationality principle is the most obvious choice to prescribe law that extends the application of domestic environmental regulations to the foreign operations of TNC’s. The problem is that nationality principle can be used to regulate foreign branches\textsuperscript{116} but not the activities of TNC subsidiaries which are incorporated in the host state since such subsidiaries are nationals of the host state and unfortunately most TNC’s operate through subsidiaries. However, two legal basis- Effects doctrine and Control doctrine- allow U.S. to exercise jurisdiction over subsidiaries incorporated and operating in another country.\textsuperscript{117} Para. 414 (2) of the Restatement (Third) of Foreign Relations Law of the US provides that, for limited purposes, a state may regulate the activities of Corporations organized under the law of a foreign state on the basis that they are owned or controlled by nationals of the regulating state.\textsuperscript{118} Under certain circumstances, it might be reasonable for a state to treat as its nationals any entity, including Corporations that are owned or significantly controlled by its true nationals. US has exercised extraterritorial jurisdiction over foreign subsidiaries on the basis of ‘Control’ principle although it is resented by other nations.\textsuperscript{119} For instance, the Cuban Assets Control Regulation (CACR) of U.S. was made applicable to entities owned or controlled by U.S. persons wherever organized or doing business. In pursuance of this U.S. prohibited Walmart’s subsidiary incorporated in Canada from

\textsuperscript{115}Id at 303 (Universal jurisdiction can be applied over crimes like slave trade, drug trafficking and piracy).

\textsuperscript{116}World Investment Report 2004 defines a foreign branch’ as a wholly or jointly owned unincorporated enterprise in the host country. Available at

\textsuperscript{117}See Morimoto, \textit{supra} note 88, at 148

\textsuperscript{118}Restatement

selling Cuban Pyjamas which led to a diplomatic row with Canada. Similarly, effects principle, discussed in next section, has been used to make antitrust statutes applicable to foreign subsidiaries of U.S. corporations.

Such exercise of jurisdiction is highly unpopular and vehemently opposed by other nations but that does not deter U.S. from applying its statute extraterritorially so the same principles can be used for extraterritorial application of environmental statutes.

IV.I. A) EXTRATERRITORIALITY OF U.S. ENVIRONMENTAL LAW

The following section will discuss the position in U.S. with respect to extraterritorial application of U.S. environmental law. The first step is to determine whether statute is applicable to conduct taking place outside the United States according to U.S. law. There are cases like ARC ecology, where the nationality principle allowed exercise of jurisdiction under international law because the defendants were Americans but the statute did not provide for extraterritorial application.¹²⁰

1. History

The 1804 Murray v. The Schooner Charming Betsy case was the first to discuss the extraterritorial application of US Statute in which it was held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains".¹²¹ There is a presumption against extraterritorial application of US

¹²¹ 6 U.S. (2 Cranch) 64, 118 (1804) (The U.S. Navy seized the ship, Charming betsy, on the high seas because it suspected the ship of engaging in trade with Guadaloupe in violation of the Nonintercourse Act of 1800. The Act prohibited trade "between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof." Before being seized, the ship had been sold by its American owner to a resident of St. Thomas, Jared Shattuck. Shattuck was born in the United States, but had moved to St. Thomas, a Danish island, and had become a Danish citizen. He had not, however, expressly renounced his American citizenship. The court refused to apply the Act to him since doing so would violate Rights of neutrality under international law). See generally Roger P. Alford, Foreign Relations As a Matter of Interpretation: The Use and Abuse of Charming Betsy, 67 Ohio St. L.J. 1339, (2006) (The author argues
law which stipulates that absent explicit Congressional authorization a US statute may not apply extraterritorially to enforce laws against anyone, be it individual, business entity or government actor.\textsuperscript{122}

In order to determine Congressional intent to extend the applicability of a Statute beyond US territory courts look at the following three indicators\textsuperscript{123}: a) the language of the statute in question b) the legislative history and c) the pertinent administrative interpretations of the statute, if they exist.

However, due to the ambiguity involving congressional intention regarding extraterritorial applicability of a Statute Courts often turn to the reasons behind the presumption against extraterritorial application of a statute in order to determine whether a statute extends beyond the domestic territory.\textsuperscript{124}

2. Reasons behind the presumption

There are two reasons behind the presumption. First reason is the avoidance of conflict with laws of other sovereigns. This objective was the reason behind the birth of the presumption which was first articulated in \textit{American banana Co. V. United fruits Co.}\textsuperscript{125}

In this case the Supreme Court declined to apply the Sherman Antitrust Act to two
American corporations operating in South America stating that lawfulness of the act must be determined wholly by the laws of the country where the act takes place.

Second, the presumption rests on the principle that Congress legislates to primarily address domestic concerns. In *Foley bros. v. Filardo* the Supreme Court furthered this view by holding that “based on the assumption that Congress is primarily concerned with domestic conditions, legislation of congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”.\(^{126}\)

In summary it is clear that courts will first look at the intent of Congress regarding extraterritorial application which in turn is dependent on the three factors stated above. Absent clear intent Courts determine extraterritorial applicability by assessing whether extraterritorial application would contravene the principles behind the presumption.\(^ {127}\)

3. Environmental cases involving extraterritorial application of law

*ARC ecology v. United States Department of the Air Force*\(^ {128}\) illustrates that courts first narrowly read the congressional intent and then cite conflict with the reasons underlying the presumption as a ground for refusing extraterritorial application of the Statute.\(^ {129}\) In order to determine intent it used the tests developed in *Foley bros* case.

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\(^{126}\) 336 U.S. 281, 285, (1949) (The case involved U.S. wage and hour laws. Supreme Court denied relief to an American who sought overtime pay for work performed outside of the United States for an American employer. The Court concluded that the U.S. wage and hour laws did not extend to work performed on foreign soil); See also Blackmer v. United States, 284 U.S.421, 437,(1932)

\(^{127}\) See Stasch, *Supra* note 122, at 1073

\(^{128}\) ARC ecology 411 F.3d at 1092 (In December 2002, the appellants, Filipino citizens and environmental organizations, commenced this CERCLA citizens' suit, alleging that they have been or are likely to be exposed to contamination at Clark and Subic created during the prior American occupation of those facilities. The United States began its operation of Clark and Subic in the early Twentieth Century when it had control of the Philippines. In 1947, after the Philippines attained independence, the United States and the Philippine government entered into an agreement that allowed the United States to continue operating Clark and Subic. The United States maintained the bases until 1992 after which it withdrew its military personnel and turned the bases over to the Philippine government).

\(^{129}\) See Stasch, *Supra* note 122, 1078
a.) Language of the Statute: The court reviewed the substance of CERCLA, which expressly authorizes some actions by a narrow class of foreign claimants. However according to the court the appellants did not qualify as foreign claimants because they failed to meet the requisite conditions. First the military base in question did not release hazardous substances into the navigable waters, territorial sea, or adjacent shoreline of a foreign country which were prerequisite conditions before a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim under CERCLA. Second, their suit was not authorized by a treaty or an executive agreement between the U.S. and the Philippines which was another requirement that needed to be fulfilled before they could be treated as foreign claimant.

b.) Legislative History: Furthermore, the court concluded that there is nothing in CERCLA's legislative history that suggests CERCLA applies to wastes located in a foreign country. Rather, the legislative history indicates that Congress intended a domestic focus. For example, a House committee report noted, just prior to CERCLA's re-authorization, that “there may be as many as 10,000 sites across the Nation,” and provision requiring the President to “consult with the affected State or States” before determining appropriate remedial action whereas absence of any analogous provision requiring consultation with foreign authorities are all indicators that it only governs US territory. Thus, the court reasoned that since the congressional record is silent as to any

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130 See ARC ecology, 411 F. 3d at 1099 (To support their argument, appellants pointed to CERCLA's definition of the “United States,” which includes “the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the [U.S.] Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction. Consequently they argued, it should include Clark and Subic. However court refused to rule on this point).

131 Id.

132 Id at 1100
extraterritorial application of CERCLA, it is unlikely that Congress intended for CERCLA to provide relief to the appellants.

*Okinawa Dugong v. Rumsfeld* provides an opportunity to analyze an environmental provision with both straightforward languages of extraterritoriality and statutory characteristic that ease extraterritorial application of U.S. environmental statute.¹³³ The case involved Section 470a-2 of the National Historic Preservation Act [NHPA]¹³⁴. The purpose, language and legislative history of the Section all explicitly facilitate the extraterritorial reach of the section.¹³⁵ In response to the defendant’s argument that case be dismissed on grounds of subject matter jurisdiction the court clearly stated that plaintiff's complaint did not seek to thrust it into issues of foreign affairs; rather, it drew the court's attention to matters under the control of the United States Department of Defense and not Japanese authorities.¹³⁶

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¹³³No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005) (Plaintiffs, consisting of the Okinawa dugong, American and Japanese environmental groups, and three individual Japanese citizens, brought this action against defendants Donald H. Rumsfeld, Secretary of Defense, and the United States Department of Defense, alleging that defendants failed to comply with the requirements of the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470a-2. The United States has maintained military bases on Okinawa since 1945. The dugong is an herbivorous marine mammal that inhabits tropical and subtropical coastal and island waters in the Indo-Pacific from East Africa to Vanuatu According to a 2002 United The case involved the construction of a military base near Henoko which could “destroy some of the most important known remaining dugong habitat in Japan,” with “potentially serious” repercussions for such a small population).

¹³⁴16 U.S.C. § 470a-2

¹³⁵Okinawa Dugong, 2005 WL 522106, at 8-10(Language supports extraterritorial application because the word “property” in the provision was interpreted to include dugong. Legislative history supports because the section was enacted to provide “legislative implementation for United States participation in the [UNESCO-sponsored] Convention Concerning the Protection of the World Cultural and Natural Heritage. Congress acknowledged that the Convention, “leaves it to each participating nation to identify and delineate the meritorious heritage properties situated in its own territory.” In light of these considerations, the definition of “historic property” set out in the NHPA cannot be controlling. Accordingly, plaintiffs need only prove that the dugong is a “property.”).

¹³⁶Id at 19(Defendants argued that extraterritorial application will thrust the court into the midst of sensitive issues of foreign affairs and therefore court should dismiss it on basis of lacking subject matter jurisdiction). See Generally
NHPA provision has the following three characteristics that minimize the chances of undermining the objective behind the presumption.  

a.) NHPA provision and guidelines address federal undertakings: A statute that imposes obligations uniquely on US agencies may be easier to apply in an extraterritorial context because the statutes cannot impose direct obligations on non-US actors.

b.) Impose consultative requirements: The requirement of consultation with host country’s authorities minimizes the chances of conflict with the law of other sovereign nations. In other words U.S. acts as a facilitative agent which aids in the implementation of another country’s environmental objective instead of unilaterally trying to regulate environmental issues in another country’s territory.

c.) Requires compliance before allowing action: Its preemptive nature softens the blow of extraterritorial application by taking steps to prevent the harm from occurring rather than assessing and remediing past and indeterminate harms. It is more difficult to remedy harmful acts after they take place since that will entail infringing directly on another country’s sovereignty whereas regulating decision making that takes place within a nation’s own territory is easier to achieve.

Thus any provision possessing these characteristics can overcome the presumption and makes extraterritorial application possible.

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137 See Stasch, Supra note 122, at 1081
138 See 16 U.S.C. § 470a-2 (2000) (The Act requires head of federal agency to take into account prior to the approval of any undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the National Register)
4. Difference between extraterritoriality of Market and Non-Market Statutes

The presumption has been eroded in extraterritorial application of Securities and Antitrust law by employing the Effects and Conduct test. The application of these tests can be extended to environmental cases to overcome the presumption against extraterritorial application of environmental statutes. Under the effects test courts refuse to apply presumption when failure to apply the law extraterritorially will result in adverse effects within US. International law recognizes effects as a basis of jurisdiction. Under the Conduct test the presumption does not apply when conduct that contributes to a statutory violation occurs within the US.

Before proceeding further it is important to analyze why these tests are readily applied to Market statutes but not Non-Market Statutes. It has to do with the perceived differences between Market and Non-Market statutes which are not correct and compel a rethink of the whole approach towards extraterritorial application of environmental law.

a.) Effects distinction: First reason for this distinction is that violation of market statutes are seen to have a more direct effect on US than violation of non market statutes.

However, now it is clear that environmental damage taking place anywhere in the world...
may have a stronger and more direct effect on global environment and consequently US environment which, in turn, is a part of Global environment.\textsuperscript{143} Hence violation of non-market statutes also entails direct effect on US territory. Thus, extraterritorial application of environmental legislation could also be based upon effects doctrine in cases involving loss of biodiversity like Aguindo and Sequihua.

b.) Intrusiveness distinction: Courts reason that since environmental regulations are generally considered matters of local concern, extraterritorial application of regulations in these areas would be deemed highly intrusive. On the other hand, Stock and securities trading is viewed as more a part of an international marketplace, so regulation in this sphere is less intrusive or disruptive to the sovereign affairs of foreign powers.\textsuperscript{144} Accordingly it is concluded that market statutes being less intrusive (and more reasonable), Congress is more likely to have intended these regulations to be given extraterritorial application.\textsuperscript{145} This makes it easier for market statutes to satisfy the intent test.

However, this explanation for the discriminatory approach is difficult to understand and highly questionable. Many foreign courts and academicians resent the extraterritorial application of American Market statutes and consider it more, not less, intrusive than Non-market statutes.\textsuperscript{146} American employment and environmental standards share many

\textsuperscript{143}See KARL M. MEESEN, EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, 123, (Kluwer law international 1996) 1996 (Ozone layer, Global warming and loss of biodiversity have negative global externalities. Loss of biodiversity and pollution of natural resources caused by oil exploration has global ramifications).

\textsuperscript{144}See Turley, Supra note 111, at 645-46

\textsuperscript{145}Id

\textsuperscript{146}See U.S. v. Aluminum Co. of America, 148 F. 2d 416(1945); See also U.S. v. Watchmakers of Switzerland Information Center Inc.,133 F. Supp. 40 (1955) ( In both cases Foreign courts have denounced extraterritorial extensions of antitrust laws as highly invasive and violative of international principles). See also BROWNLIE, Supra note 98 , at 307( Discussing how extraterritorial application of market statutes has invoked strong reaction from foreign governments)
similarities with existing international agreements and foreign laws so the possibility of conflict is remote while American market statutes are highly distinct, and highly controversial, among market statutes worldwide.\textsuperscript{147} Thus, in the latter case the possibility of opposition in case of extraterritorial application is stronger.

c.) Differing interests: Today the circumstances are not unlike the one in the early-twentieth century that forced US courts to redefine their view of world markets. While environmental disputes might have been local in character at the time of Foley Bros., no such categorical claim can be made today.\textsuperscript{148} Under the changed circumstances force US courts need to rethink their approach towards environmental cases.

Finally traditionally the rules regarding TNC operation do not strengthen the case for extraterritorial application of environmental law but reinforce the underlying reason for extraterritorial application of market laws. Individual nations as well as international community have traditionally advocated the rights of TNC’s such as the need of TNC’s to compete in the international market, right to be free of multiple jurisdictions at any one time, or the principle of international comity.\textsuperscript{149} When environmental goals or a worker’s rights are articulated, they are usually in juxtaposed against these general principles. On the other hand market cases often start with a structuring principle that is largely identical to the interests of the plaintiff, such as the preservation of a fair market, and the strong

\textsuperscript{147}See Turley, Supra note 111, at 645-46 (There are various environmental treaties which set standards for environmental regulation at the international level. This leads to harmonization and uniformity in the objective of environmental laws which minimizes chances of conflict).

\textsuperscript{148}Id at 649-50 (In the late-nineteenth and the early-twentieth century, there were still few multinationals and the strict territorial view of prescriptive jurisdiction held sway in the courts. However, the early part of this century saw the growth and rising significance of international business transactions which forced courts to rebut the presumption in accordance with changing times. Likewise, while the environmental record of American multinationals was appalling in many countries, those environmental problems were confined to local areas. The large industrial production facilities and potent pollutants so common today were only in limited use in the early part of this century.\textsuperscript{148} For instance in case of Bhopal gas tragedy the ramifications were localized which had no impact on US interest but now the circumstances have changed).

\textsuperscript{149}Id at 652
national interest in preserving the free market.\textsuperscript{150} As a result pro extraterritoriality is encouraged by the latter.

*Pakootas v. Teck Cominco Metals* applies effects doctrine to environmental statute and demonstrates how the “effects” doctrine has crept into environmental law realm to allow for extraterritorial application of environmental provision even if the provision has a domestic focus.\textsuperscript{151}

The dispute involved Teck Cominco Metals, Ltd. (TCM), a Canadian corporation, which owns and operates one of the world's largest zinc and lead refining and smelting complexes in Trail, British Columbia, Canada. TCM is located on the Columbia River, approximately 10 miles from the United States-Canada border, north of Lake Roosevelt, in Washington State. The smelter discharged hazardous substances into the Columbia River in Canada for several decades. Those substances allegedly flowed downstream into the United States, and allegedly polluted the Upper Columbia River and Lake Roosevelt in Washington State. The EPA estimated that TCM discharged approximately 12 million tons of "slag,"\textsuperscript{152} into the Columbia River from 1940 through 1994. Pursuant to a petition lodged by Colville tribe to conduct a preliminary assessment of the health and environmental hazards posed by hazardous waste at the site, EPA determined by Oct 2002 that the area qualified for potential listing under CERCLA, which is reserved for the country's most polluted sites. The court in deciding the case stated that CERCLA can extend into Canada to deal with impacts resulting within the United States. The court

\begin{footnotesize}
\textsuperscript{150} Id.
\textsuperscript{151} 452 F.3d 1066, 1071 (2006)
\textsuperscript{152} Id (Slag means a "black, glassy material which contains copper, lead, and zinc" as well as other heavy metals)
\end{footnotesize}
reasoned that environmental impacts to the site in the United States would not be remedied unless EPA's order could reach TCM in Canada.

Thus even if the provision has a domestic focus it can still be applied extraterritorially if the act has adverse effects in US. The advantage of employing effects doctrine is that it will limit the number of environmental cases being litigated in United States instead of opening U.S. courts to all environmental cases involving U.S. TNC’s.

In *Environmental Defense Fund v. Massey* the statute occurs principally in the United States then the presumption does not apply.

Thus, the conducts test along with the effects test can be used to make environmental statutes applicable to TNC’s incorporated in US but operating in other countries, if the TNCs engage in conduct within the US or their activities have effects on the US.

**IV.II) ALIEN TORTS CLAIMS ACT (ATCA)**

This is another important statute that could provide recourse for victims of environmental abuse by TNC’s.

1. **History and Scope**

The Alien Torts Claim Act (ATCA) grants federal district courts jurisdiction to hear 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. ATCA was originally enacted by the First Congress as part of the Judiciary Act of 1789, but was invoked by the Second Circuit in *Filartiga v. Pena-Irala* in 1980. In *Filartiga*, the family of Joelito Filartiga, a Paraguayan tortured to death in Paraguay by a local police officer, sued the officer in US federal court after

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153 Id.
154 See *Environmental Defense Fund*, 986 F.2d 528
156 See 630 F.2d 876 (2d Cir. 1980)
learning he was living in Brooklyn. The district court dismissed the case; concluding that international law did not govern states' treatment of their own citizens and that as a result, no violation of the laws of nations had occurred and thus no jurisdiction existed under ATCA.

On appeal, the Second Circuit reversed. It held that torture clearly violates the laws of nations. Since the Filartigas were aliens alleging a tort in violation of the laws of nations, the court concluded that subject matter jurisdiction was proper, even though the case involved foreign plaintiffs suing a foreign defendant for a foreign act. A suit under ATCA provides a basis of jurisdiction.\footnote{See Sarah M. Hall, Multinational Corporations' Post-Unocal Liabilities For Violations of International Law, 34 Geo. Wash. Int'l L. Rev. 401, 412, (2002) (Despite the fact that both the language and legislative history of the ATCA are sparse at best, courts have uniformly held that the ATCA overrides the inherent presumption in U.S. law against the extraterritorial application of U.S. laws. In other words it authorizes prescriptive jurisdiction. There are two categories of subject matter jurisdiction--jurisdiction to adjudicate and jurisdiction to enforce); Lyndsy Rutherford, Redressing U.S. Corporate Environmental Harms Abroad Through Transnational Public Law Litigation: Generating a Global Discourse On The International Definition of Environmental Justice 14 Geo. Int'l Env'tl. L. Rev. 807, 817, (2002) (The author is discussing subject matter jurisdiction under ATCA. The federal judiciary is generally unwilling to recognize new norms of transnational law, outside those required by the Constitution, without political direction. However, Congress provided just such approval for certain transnational public law litigation through ATCA. Judges should be less skeptical of separation of powers concerns in ATCA claims because of the statutory directive to hear the most shockingly egregious tort claims, even if brought by a foreign plaintiff, against a foreign defendant, alleging crimes committed in a foreign country. Thus, Federal courts have the authority to hear ATCA claims, even if they ultimately do not find a violation of the law of nations). But See Jason Jarvis, Comment, A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle, 30 PEPP. L. REV. 671, (2003) (The author is arguing in this article that ATCA was never intended to be applied extraterritorially. Courts note the massive widespread violation of law of nations and then apply the domestic statute (the ATS) extraterritorially, even though there is no United States nexus, without pausing to consider the presumption against it, precisely because the alleged violation is universally hated. The author states this is in complete contravention to the context in which the ATS was originally passed).} ATCA provides a basis of jurisdiction for cases alleging torts in violation of international law.\footnote{See Sarah M. Hall, Multinational Corporations' Post-Unocal Liabilities For Violations of International Law, 34 Geo. Wash. Int'l L. Rev. 401, 412, (2002) (Despite the fact that both the language and legislative history of the ATCA are sparse at best, courts have uniformly held that the ATCA overrides the inherent presumption in U.S. law against the extraterritorial application of U.S. laws. In other words it authorizes prescriptive jurisdiction. There are two categories of subject matter jurisdiction--jurisdiction to adjudicate and jurisdiction to enforce); Lyndsy Rutherford, Redressing U.S. Corporate Environmental Harms Abroad Through Transnational Public Law Litigation: Generating a Global Discourse On The International Definition of Environmental Justice 14 Geo. Int'l Env'tl. L. Rev. 807, 817, (2002) (The author is discussing subject matter jurisdiction under ATCA. The federal judiciary is generally unwilling to recognize new norms of transnational law, outside those required by the Constitution, without political direction. However, Congress provided just such approval for certain transnational public law litigation through ATCA. Judges should be less skeptical of separation of powers concerns in ATCA claims because of the statutory directive to hear the most shockingly egregious tort claims, even if brought by a foreign plaintiff, against a foreign defendant, alleging crimes committed in a foreign country. Thus, Federal courts have the authority to hear ATCA claims, even if they ultimately do not find a violation of the law of nations). But See Jason Jarvis, Comment, A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle, 30 PEPP. L. REV. 671, (2003) (The author is arguing in this article that ATCA was never intended to be applied extraterritorially. Courts note the massive widespread violation of law of nations and then apply the domestic statute (the ATS) extraterritorially, even though there is no United States nexus, without pausing to consider the presumption against it, precisely because the alleged violation is universally hated. The author states this is in complete contravention to the context in which the ATS was originally passed).}
for cases alleging torts in violation of international law. Viewed from the perspective of international jurisdiction ATCA is an assertion of Universal jurisdiction. With respect to granting a cause of action two views have been forwarded. One view states that norms of transnational law, outside those required by the Constitution, without political direction. However, Congress provided just such approval for certain transnational public law litigation through ATCA. Judges should be less skeptical of separation of powers concerns in ATCA claims because of the statutory directive to hear the most shockingly egregious tort claims, even if brought by a foreign plaintiff, against a foreign defendant, alleging crimes committed in a foreign country. Thus, Federal courts have the authority to hear ATCA claims, even if they ultimately do not find a violation of the law of nations. But See Jason Jarvis, Comment, A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle, 30 PEPP. L. REV. 671, (2003) (The author is arguing in this article that ATCA was never intended to be applied extraterritorially. Courts note the massive widespread violation of law of nations and then apply the domestic statute (the ATS) extraterritorially, even though there is no United States nexus, without pausing to consider the presumption against it, precisely because the alleged violation is universally hated. The author states this is in complete contravention to the context in which the ATS was originally passed).

See Sarah M. Hall, Multinational Corporations' Post-Unocal Liabilities For Violations of International Law., 34 Geo. Wash. Int'l L. Rev. 401, 412, (2002) (Despite the fact that both the language and legislative history of the ATCA are sparse at best, courts have uniformly held that the ATCA overrides the inherent presumption in U.S. law against the extraterritorial application of U.S. laws. In other words it authorizes prescriptive jurisdiction. There are two categories of subject matter jurisdiction--jurisdiction to adjudicate and jurisdiction to enforce); Lyndsy Rutherford, Redressing U.S. Corporate Environmental Harms Abroad Through Transnational Public Law Litigation: Generating a Global Discourse On The International Definition of Environmental Justice 14 Geo. Int'l Envtl. L. Rev. 807,817, (2002) (The author is discussing subject matter jurisdiction under ATCA. The federal judiciary is generally unwilling to recognize new norms of transnational law, outside those required by the Constitution, without political direction. However, Congress provided just such approval for certain transnational public law litigation through ATCA. Judges should be less skeptical of separation of powers concerns in ATCA claims because of the statutory directive to hear the most shockingly egregious tort claims, even if brought by a foreign plaintiff, against a foreign defendant, alleging crimes committed in a foreign country. Thus, Federal courts have the authority to hear ATCA claims, even if they ultimately do not find a violation of the law of nations. But See Jason Jarvis, Comment, A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle, 30 PEPP. L. REV. 671, (2003) (The author is arguing in this article that ATCA was never intended to be applied extraterritorially. Courts note the massive widespread violation of law of nations and then apply the domestic statute (the ATS) extraterritorially, even though there is no United States nexus, without pausing to consider the presumption against it, precisely because the alleged violation is universally hated. The author states this is in complete contravention to the context in which the ATS was originally passed).
this can be concluded from the developments that took place post Filartiga case. Post Filartiga Congress passed the Torture Victim Protection Act (TVPA) in 1992 by which it expressly intended both to codify and to extend to U.S. citizens the Second Circuit's holding in Filartiga. However, the accompanying legislative history to the TVPA made clear that by its passage Congress did not intend to limit the application of the ATCA to other offenses. This is evidenced from the house report which states that Section 1350 has other important uses and should not be replaced. Courts have refused, thus far, to view the explicit grant of a cause of action in the case of torture and extra-judicial killings as a reason to require such explicit grants in other cases not concerning torture and extra-judicial killings. The other view is that ATCA did vest federal courts with the power to hear violations of the law of nations and that law is incorporated into federal common law, thereby providing the cause of action in ATCA litigation. Supreme Court’s decision in Sosa v. Alvarez-Machain, helps to clear the controversy regarding ‘Cause of Action ‘under ATCA. In this case the Supreme Court held that, “while the ATS is a jurisdictional statute that does not create any causes of action, the common law gives rise

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162 Id at 153
164 See Joel slawotsky, Doing Business Around the World: Corporate Liability Under The Alien Tort Claims Act, 2005 Mich. St. L. Rev 1065, 1076, (2005) (To be constitutional, the ATS's grant of jurisdiction had to fall within one of the categories of federal judicial power set forth in Article III but Filartiga did not satisfy any of the basis for jurisdiction under Article III. For instance, the parties were not diverse, and the case did not arise under either a treaty or a federal statute which are the basis of jurisdiction. The only remaining basis for extending federal jurisdiction is if the case arises under federal common law. Asserting that “the law of nations . . . has always been part of the federal common law,” the court in Filartiga concluded that the plaintiffs' customary international law claim arose under federal law for purposes of Article III). Contra Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815, 831-34 (1997) (Professors Bradley and Goldsmith conclude that, in the absence of authorization by the federal political branches, customary international law should not have the status of federal law). Curtis A. Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 590, (2002) (The author argues that Congress did not intend in the Alien Tort Statute to create a federal statutory cause of action nor did it believe that the “Laws of the United States” in Article III encompassed the law of nations).
to certain causes of action via the incorporation of a “modest number” of international legal norms with “a potential for personal liability”. The decision, however, failed to define the factors or characteristics which could be readily applied by courts in determining which customary international legal norms have been incorporated into the federal common law.

2. Elements of ATCA

In order to determine whether ATCA can play a pivotal role in holding TNC’s accountable for environmental damage committed by them it is important to understand the main elements/features of ATCA which need to be satisfied in order to successfully plead a case.

a.) Customary international law: In order to prove a violation under ATCA plaintiff has to prove a violation of a customary international law or violation of a treaty of US. Customary international law results from a general and consistent practice of states but states must observe the practice from a sense of legal obligation” or opinio juris. Although a state that did not participate in the formation of a norm is bound via implied consent, a state that persistently objects to a customary norm during its formation is not bound. Works of jurists, academicians and other commentators, as well as international

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165 124 S. Ct. 2739, 2761 (2004). (Alvarez was abducted from Mexico by Sosa at the behest of United States Drug Enforcement Administration (“DEA”) to face trial in US for the murder of DEA’s special agent. DEA suspected him of assisting in the murder. Alvarez was acquitted and brought a civil action against Sosa, Mexican citizen and DEA operative Antonio Garate-Bustamante, five unnamed Mexican nationals, four DEA agents, and the United States. Alvarez sought damages from the United States under the Federal Tort Claims Act (“FTCA”) for false arrest, and from Sosa under the ATS for a violation of the law of nations).


167 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987)

168 See BROWNLIE, Supra note 114, at 11. See also Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (In sarai case after surveying U.S. case law interpreting UNCLOS, the Restatement of Foreign Relations, and a law review article, the court concluded that UNCLOS reflected customary international law and plaintiffs could therefore base an ATCA claim upon it even though US had not ratified it).
treaties and conventions are looked to in order to ascertain an universally accepted international norm.\textsuperscript{169}

Courts have evolved a three step criterion test upon fulfillment of which a norm can be defined as customary international law. They have defined customary norms as "definable, universal and obligatory".

i.) Universal and Obligatory: In 1789 wisdom, correct reasoning, and natural law were the underlying principles of the law of nations and environmental protection would certainly be covered under it.\textsuperscript{170} But, in the modern sense of customary international law, a norm crystallizes into custom from state practice. The "universal, obligatory and definable" standard arose in 1981 during the analysis of the Filartiga opinion according to which a norm will fall within the law of nations if the tort alleged is definable, obligatory (rather than hortatory) and universally condemned.\textsuperscript{171} "Universally condemned" is an onerous burden to discharge which does not allow for exceptions, while “Widely accepted” tends to refer to the widespread recognition of a norm, applicable to a majority of states and is easier to prove. However, these standards became a broadly used part of jurisprudence and were used in later cases.\textsuperscript{172} But in \textit{Sosa} the Supreme Court established that ‘courts should require any claim based on the present day law of nations to rest on a

\textsuperscript{169}See Londis, \textit{Supra} note 160, at 166


\textsuperscript{171}Id.

norm of international character accepted by the civilized world.” Thus, Sosa has established the “widely accepted” test.

ii.) Specificity: Specificity or definability is not an international prerequisite for recognition of a norm as customary but is rather a matter of ATCA jurisprudence. A norm is “specific” or “definable” if adequate criteria exist by which a court can determine whether an act violates it. Demonstrating consensus regarding a norm's exact parameters may be difficult so a plaintiff is not required to show that sufficient criteria exist regarding every aspect of the norm. Rather, a plaintiff meets the definability requirement by demonstrating Universal consensus that the specific conduct alleged violates international law, even if some ambiguity remains regarding other aspects of the norm.

Hence it is clear that it will be difficult to prove environmental harms constitute Customary international law. This is evidenced from the decision in *Flores v. Southern Peru Copper Corp.* case. The court held in this case that: (1) rights to health and life were insufficiently definite to be binding rules of customary international law that could form basis for subject matter jurisdiction under ATCA, and (2) existence of rule of customary international law against intranational pollution was not established so as to provide basis for jurisdiction under ATCA. Similarly, in *Beanal* the plaintiffs relied on principles of international environmental law to support their environmental claims--namely, the Polluter Pays Principle; the Precautionary Principle; the Proximity Principle; the good-

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174 See Herz, Supra note 165, at 558
175 Id.
176 Id.
177 Id.
178 343 F.3d 140 (2d Cir. 2003)
neighborliness principle, Principle 21 / Principle 2 from the Stockholm and Rio
Declarations which were rejected by courts on the ground that none of then rose to the
level of international tort.\textsuperscript{179} *Amlon* is another case where another principle of
international environmental law was rejected and reason cited was that it lacked the three
characteristics, universal, obligatory and definable, required to relegate it to the level of
customary international law. Despite the fact that both Principle 21 of Stockholm and the
Restatement were directly on point in *Amlon*, the court found that both sources failed to
reflect binding sources of international law.\textsuperscript{180}

b.) State action: If a violation does not rise to the level of a jus cogens violation, a private
actor will be liable for other law of nations violations only when state action exists.\textsuperscript{181}
Thus, any suit alleging something less than jus cogens violations must fulfill the state
action requirement to survive.\textsuperscript{182} *Kadic v. Karadzic* was the first ATCA case to hold that,

suit under the Alien Tort Statute and the Torture Victim Protection Act (TVPA) against American
corporations who owned subsidiary which operated open pit copper, gold and silver mine in Indonesia,
alleging environmental torts, human rights abuses, and cultural genocide).

\textsuperscript{180} Amlon Metals, inc., v. FMC Corporation, 775 F.Supp. 668, 671,(1991) (Amlon filed a complaint against
FMC alleging that FMC misrepresented the composition and characteristics of the copper residue and
failed to disclose the presence and concentrations of organic chemicals in the material. Court held that
Plaintiffs' reliance on the Stockholm Principles is misplaced, since those Principles do not set forth any
specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that
activities within their jurisdiction do not cause damage to the environment beyond their borders. Nor does
the Restatement of Foreign Relations law constitute a statement of universally recognized principles of
international law but states the existing *U.S.* view of the law of nations regarding global environmental
protection).

\textsuperscript{181} See *Kadic v. Karadzic*, 70 F.3d 232, 239, (2d Cir. 1995) (Court held that certain forms of conduct
violate the law of nations whether undertaken by those acting under the auspices of a state or only as
private individuals. An early example of the application of the law of nations to the acts of private
individuals is the prohibition against piracy); See also The Restatement (Third) of the Foreign Relations
Law of the United States (1986) ("Individuals may be held liable for offenses against international law,
such as piracy, war crimes, and genocide"), Brownlie, Supra note at 488-89 (According to professor
Brownlie prohibition of the use of force, the law of genocide, principle of racial non discrimination,
crimes against humanity and the rules prohibiting trade in slaves and piracy are some of the least
controversial examples of Jus Cogens.) ;See also Londis, *Supra* note 143, 166-67

(The Vienna Convention on the Law of Treaties defines a jus cogens norm as a "norm accepted and
recognized by the international community of States as a whole as a norm from which no derogation is
in the context of the ATCA, international law is not always confined in its reach to actions performed by a state or state actors, but can be applicable to individuals' independent actions.\textsuperscript{183} \textit{Doe v. Unocal Corp} was the first case where plaintiffs bought a claim against a Corporation under ATCA.\textsuperscript{184} The Ninth Circuit Court made corporate liability possible by following \textit{Kadic} and allowed private actors to be held liable for instances of jus cogens violations of international law.

The Supreme Court has articulated four relevant tests to determine whether there was collusion between the state and private actor in order to hold that conduct constituted state action.\textsuperscript{185}

i.) Nexus state: Substantial cooperation between the private actor and the state in the challenged activity would satisfy nexus test. Subsidization, approval or acquiescence, or regulation alone does not satisfy this test.

ii.) Symbiotic relationship: The state and the private party may have entered into such a profoundly interdependent relationship as to become symbiotic, such that the state must be recognized as a joint participant in the challenged activity. If the activity is part of a

\textsuperscript{183}70 F.3d 232, 245, (2d Cir. 1995) (Two groups of victims from Bosnia-Herzegovina brought actions against self-proclaimed president of unrecognized Bosnian-Serb entity under, inter alia, Alien Tort Claims Act for violations of international law).

\textsuperscript{184}395 F.3d 932, 945-46, (9th Cir. 2002) (In Unocal, the plaintiffs alleged that the corporation had subjected a group of Burmese villagers to "death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property" when a subsidiary of the Unocal Corporation was constructing a gas pipeline and taken the aid of Myanmar security force in committing these atrocities).

\textsuperscript{185}See Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995) (The case has extracted these four tests from a line of Supreme Court cases), Tom Beanal v. Freeport-McMoRan, Inc., 969 F.Supp. 362, 377-380, (1997); See also Gregory G.A. Tzeutschler, Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad, 30 Colum. Hum. Rts. L. Rev. 359, 390-93,(1999) (These tests have been developed for the purpose of section 1983 but also provide a guidance for ATCA cases)
project on government property and maintained through public funds, however, then the government's involvement is sufficient to qualify the conduct as a public action.\textsuperscript{186}

iii.) Public function test: A private actor may be found to have engaged in state action where the actor has taken on a public function usually reserved to the government, regardless of whether the state assists the actor in this function or not. For example, where a Corporation owns and operates state instrumentalities, such as transportation, sanitation, educational or health facilities.

Though \textit{Sarei v. Rio Tinto PLC}\textsuperscript{187} does not involve US TNC’s but it does demonstrate Court’s analysis in trying to establish whether or not TNC was acting under the “Color of law”. Rio Tinto argued it did not act jointly with Papua New Guinea (PNG) to commit the atrocities.

The court disagreed with Rio Tinto on following grounds:

(1) BCL's Chief Executive Officer threatened to withdraw if the PNG government did not take care of the disturbances on Bouganville, knowing “that its wishes were taken as commands by the PNG government and Rio intended that its comments would spur the PNG forces into action”; (2) Rio knew it had “a great deal of control over the situation” and had Rio insisted that military action \textit{not} be taken, the PNG government would have complied; (3) Certain meetings occurred in which Rio's agents encouraged imposition and continuation of the blockade, and at all times PNG understood Rio's “encouragement” to be a command; (4) The PNG government and its soldiers acted as

\textsuperscript{186}Id (Again, the state's mere regulation of the activity does not suffice to transform it into state action, nor does partial state ownership of the facility or investment with the private actor, or activity on land leased or conceded by the government. This theory would seem to apply to a corporate defendant which is a contractor in a government-led project, or to a partner in a joint venture with the government to exploit a natural resource or develop a manufacturing or processing facility).

\textsuperscript{187} 221 F. Supp. 2d 1116, 1148-49, (C.D. Cal. 2002)

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The mine was a joint venture between Rio Tinto and PNG. Thus this case satisfies both the nexus and symbiotic test.

c.) International comity: Courts have to bear in mind rules of international comity while deciding cases under ATCA. The Supreme Court originally defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws". Comity only applies if a court in the situs state has already heard claims arising from the same facts, given the plaintiffs due process, and found against them.

However, assurances from the situs state that it would give the plaintiffs an adequate judicial audience should be regarded with suspicion where: the government has a history of mistreating citizens similarly situated to the plaintiffs; judicial remedies in the situs state have been shown to be nonexistent or generally inadequate or the defendant's corporate activities are a major source of revenues and foreign investment for the government or there is other evidence of close ties between the defendant and the government.

Thus, in most extraction industries where the local government is in cahoots with the TNC international comity should not act as a barrier in litigating claims under ATCA.

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188 *Hilton v. Guyot*, 159 U.S. 113, 163-4, (1895)
189 See Gregory G.A. Tzeutschler, Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad, 30 Colum. Hum. Rts. L. Rev. 359, 368-69, (1999) (These tests have been developed for the purpose of section 1983 but also provide a guidance for ATCA cases)
190 *Id* at 372
3. Solutions for Problems under ATCA

a.) Human Rights and Environment

Although the ultimate goal is recognition of ‘Right to a healthy environment’ as a universal, obligatory and definable right which rises to the status of Customary international law till this is achieved claims should be brought intertwined with human rights violations. The reason for linking environmental claims with human rights is because ATCA has evolved into a viable cause of action for human rights abuses committed abroad. Sosa decision heralded victory for human rights advocates because it affirmed a private enforcement mechanism to encourage the observance of human rights overseas and upheld the existence of a forum for victims to confront their abusers.

i.) Universal: Traditionally theories of human rights did not take ecology into account and were concerned with theorizing various aspects of human relationships: individuals vs.

191 Natalie L. Bridgeman, Human Rights Litigation Under the ATCA As a Proxy for Environmental Claims, 6 Yale Hum. Rts. & Dev. L.J. 1,2, (2003) (In this article author is discussing four methods-ATCA, extraterritorial application of US law, claims under international law and application of foreign law in US courts- by which TNC’s can be made accountable for environmental damage in other countries. Here she is saying how the ATCA may be used as a successful proxy for the environmental claims where human rights abuses and environmental wrongs overlap). But cf. Prudence E. Taylor, From Environmental to Eecological Human Rights: A New Dynamic in International Law,10 Geo. Int'l Envtl. L. Rev. 309,330-34, (1998) (The author argues even though right to healthy environment may be read as part an inextricable part of human rights there are some inherent conflicts between the two. Article 1 of ICCPR and ICESCR both go on to say that people may, for their own need, freely dispose of their natural wealth and resources. By 1986, developing states had managed to push adoption of the Declaration of the Right to Development through the United Nations General Assembly. The problem with these rights is that they appear to be in direct conflict with ecological protection. Developing states in pursuit of economic prosperity may well exploit natural resources at the expense of their populace, particularly indigenous peoples, and of the environment itself. When states suffer from weak, dependent, single product economies, poor, uneducated and often starving citizens then they are desperately looking to break free from these impediments. It comes as no surprise that economic development is given the highest priority. Under these circumstances the question arises how to reconcile these two interests. Should ecological limitations be placed upon the right to development? This would be possible only if developed nations are willing to make a genuine effort to assist poorer states with their development, rather than contribute to third world repression and exploitation).

192 See, Supra note 143, at 290

193 Id.
individuals, individuals vs. the state, and individuals in their relationship with society.\textsuperscript{194} People were concerned with more fundamental issues of human society and nature was viewed with fear, which had to be conquered or seen as a storehouse of natural resources.\textsuperscript{195} However, now there is a growing recognition of the relation between human rights and environment. In fact one of the arguments forwarded in the context of human rights norms and environmental protection is the view that customary international law already recognizes a human right to a decent, healthy or sustainable environment.\textsuperscript{196} In 1972 Stockholm Declaration was the first international instrument to explicitly recognize the link between the environment and human rights. Stockholm Declaration grants the “fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and imposes responsibility to protect and improve the environment for present and future generations."\textsuperscript{197} Third, the Rio Declaration’s Principle 4 states that environmental protection cannot be considered in isolation from the development process.\textsuperscript{198} Fourth, the Draft Declaration of the Rights of Indigenous Peoples recognizes “distinctive and


\textsuperscript{195}Id.

\textsuperscript{196}Id at 345


profound relationship with their lands” and includes “the prevention and redress for . . . dispossesson of their lands, territories, or resources”199

Fifth, the Hague Declaration recognizes “the right to live in dignity in a viable global environment.”200 Finally, Article 24 of the Convention on the Rights of the Child expressly links environmental quality to the right to health.201 However there are a number of issues which surround environmental human right which need to be resolved before it can gain recognition as a substantive right.

There is a consistent practice of states recognizing and legally binding themselves to practices whereby “the procedural bases for enforcing the right to a satisfactory environment are becoming more firmly established and the validity of complaints of human rights violations based on ecological considerations is being considered.”. States have adopted some 350 multilateral treaties and 1,000 bilateral treaties protecting the environment. State domestic practice is also consistent.202 Virtually almost all nations have legal provisions safeguarding their citizens from at least some types of environmental harm. Moreover, ninety-nine states have enshrined a right to a healthy environment and/or a state or private obligation to protect the environment in their constitutions.203 These vast bodies of international and domestic law unambiguously demonstrate states' consistent practice of assuming legal obligations prohibiting them and

201 Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 45th Sess., 61st plen. mtg., U.N. Doc. A/RES/44/25 (Nov. 20, 1989). See also Taylor, Supra note 186, at 347-48 (The author provides further evidence of the link between human rights and right to environment. For instance, Article 24 of the 1981 African Charter provides one of the clearest expressions of this right by stating that: “all peoples shall have the right to a general satisfactory environment favorable to their development).
202 See Herz, Supra note 165, at 586
203 Id.
their citizens from destroying the environment. Most importantly, this makes it abundantly clear that almost all nations recognize the importance of a healthy environment and take steps to ensure its protection.

ii.) Obligatory nature: Numerous sources demonstrate that the right to a healthy environment is obligatory. The fact that it has been enumerated in the constitution of various states is prima facie example of its obligatory nature and enforceability. Common Article 1 of the ICCPR and the ICESCR explicitly recognizes that a subset of the right to a healthy environment, the right of a person not to be deprived of its own means of subsistence, is non-derogable and places limits on environmental harm. International tribunals have recognized causes of action based upon the effects of serious environmental harm. Customary international law recognizes that some emergencies, such as war, may justify restricting certain rights. But even during war certain protections provided by international law cannot be suspended because they are so minimum that deviation from them cannot be withstood. The obligation not to violate the right to a healthy environment is one such right, which applies even during war since it is as an obligation derived from customary international humanitarian law and is an example of one such minimum right.

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204 Id at 588
205 Id at 590 (In addition, 148 states are parties to the Protocol Additional (I) to the Geneva Conventions of August 12, 1949 which bans means of warfare that “may be expected to cause widespread, long-term and severe damage to the natural environment and thereby to prejudice the health or survival of the population.” Considering wartime protections are usually international minimums, the fact that Geneva Convention imposes an obligation on nations to respect their enemies' environments during war also is strong evidence that the right to a healthy environment is obligatory during times of peace).
iii.) Definable Right

The right to a healthy environment actually has two independent, universally agreed upon cores of prohibited behavior: 206

- causing widespread, long-term and severe environmental damage
- depriving a people of means of subsistence.

It is clear from the above discussion that fulfilling the requirement of proving customary international law poses the biggest challenge to litigants. Customary international law is difficult to prove if one considers the methodology used to establish the existence of customary international environmental norms. According to the traditional account, one would need to undertake a systematic survey of state behavior to determine whether a norm is part of customary law. 207 The requirements of universality, obligatory and specificity are difficult to meet for international law in general and international environmental law in particular since the latter is relatively recent in origin. 208 Principles of International Environmental law like Precautionary, Polluter Pays principles fail to meet these criterions for various reasons. First, though states may verbally agree to them there is little evidence that most states actually adhere to them. 209 Secondly, it is difficult to determine how many states need to follow the principle and for how long before it is considered Universal. For instance Indian Courts have already held precautionary

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206 Id at 591
207 See Daniel Bodansky, Customary (And Not So Customary) International Environmental Law, 3 Ind. J. Global Legal Stud. 105, 112, (1995) (In this article Prof. Bodansky is arguing that currently the principles of international environmental law is discursive rather than behavioral in orientation. International environmental norms reflect not how states regularly behave, but how states speak to one another. They represent the evaluative standards used by states to justify their actions and to criticize the actions of others. These norms would best be described as declarative rather than customary.).
208 See PHILLIPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 3, (Cambridge University press 1995)2005 ( It was in mid 1980’s that international law started addressing the issue of conservation of natural resources.)
209 See Bodansky, Supra note 206, at 111-12
principle and Sustainable development as part of customary international law but U.S. courts refuse to do hold the same principle as customary international law. 210

b.) Remove State Action Requirement

State action is a prerequisite to hold private actors like TNC’s accountable under ATCA because individual (corporate) accountability is still dependent upon the basic component of nation-states. This in turn is because the existence and power of nation-states is what makes the international system make sense and which exists primarily to regulate nation states. International law under this theory functions on the premise that organized state actors are the only cognizable players in the international system. 211 TNC’s also benefit from their international ‘non status’ since it immunizes them from direct responsibility under international legal norms and permits them to use sympathetic national governments to resist outside efforts to mold their behavior. 212 This lack of status works to their advantage even in litigations under ATCA. International law should move towards the imposition of obligations directly on non-state actors. 213 In Kadic, the court emphasized that the appropriate inquiry was into whether the defendant exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists. 214 In the next section I am going to argue that TNC’s should be recognized as subjects of international law. I would like to make it clear at the outset that

210 See People’s Union For Civil Liberties in India v. Union Of India (1997) 1 SCC 310 at 312
211 See Londis, Supra note 160, at 148-49
212 See Jonathan I. Charney, Transnational; Corporations and Developing Public International Law, Duke L. J. 748, 767, (1983). (The author is arguing that granting international legal personality will further TNC participation in international law making which is a desirable goal).
213 See Lillian Aponte Miranda, The Hybrid State-Corporate Enterprise and Violations of Indigenous land Rights: Theorizing Corporate Responsibility and Accountability Under International Law, 11 Lewis & Clark L. Rev. 135, 176, (2007) (The author is giving evidence where international system has shown a movement towards imposing obligations on TNC’s. International system implicitly recognizes anti-corruption obligations on corporate actors through the Convention on Combating Bribery of Public Officials in International Business Transactions and there is growing pressure to hold them responsible for human rights violation under international law
214 See Kadic, 70 F.3d, at 245
I am not advocating granting them full subject hood at par with Nations but a more dilated form of subject hood wherein they are directly amenable to international law.\textsuperscript{215}

Even after subject hood is conferred on TNC’S the duty to ensure their compliance with international law is still retained by nation states. This approach will continue to preserve the traditional nation state leverage over non state entities and diminish the fear of systematic erosion of state power.

\section*{IV.III) INTERNATIONAL ENVIRONMENTAL LAW}

U.S. can also regulate TNC’s by holding them responsible for violation of principles of international environmental law which are applicable to TNC’s. However, before that it is important to discuss the status of TNC’s under international law.

\subsection*{1. History of International law}

The formative year of modern international law coincided with the rise of modern national state.\textsuperscript{216} It was aimed at governing international relations between nations. The theories of Bodin, Hobbes and others gave unquestionable supremacy to the modern sovereign over other groups such as churches, guilds, and merchants association.\textsuperscript{217}

Hence, with the decline of the autonomy of these groups internally and emergence of the concept of national state and consolidation of the power of the sovereign, international relations became diplomatically and legally the exclusive preserve of states which to this

\begin{footnotesize}
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\item \textsuperscript{215}See Charney, \textit{Supra} note 211, at 786 (The author advocates the development of a hybrid system where law enforcement is nation state responsibility but making law development open to TNC participation will allow nation states to retain their power and influence but allow international law to not lose touch with reality. In this article the author also suggests ways in which TNC participation might be achieved while ensuring that disadvantages of such participation are minimized). \textit{See also} Dadvid Kinley and Junko Tadaki, From Walk to Talk: The Emergence of Human Rights Responsibilities For Corporations At International Law, 44 Va. J. Int’l L. 931, 946, (2004) (The authors are of the view that it is not desirable to confer full legal personality on TNC’s at par with nation states. In Reparations f injury case the ICJ has held that subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.).
\item \textsuperscript{216}See Wolfgang Friedmann, \textit{The Changing Structure of International Law}, 4, (Columbia University Press, 1964) 1964
\item Id at 5
\end{enumerate}
\end{footnotesize}
day remain the only full subjects of international law. This explains how private actors came to be excluded from Public international law. As a result international law binds only nation states and treats them as subjects of international law.

2. Current developments

Though traditionally business was kept out of the domain of international law changes underway in the last century dictate that TNC’s should be relegated to the status of “subjects” of international law. Unfortunately there is little agreement upon the essential elements of legal personality. Broadly, a subject of international law is capable of maintaining rights and duties and having the capacity to maintain these rights by bringing international claims. Three essential elements that are considered conditio sine qua non before an entity can properly be regarded as subject of a legal system are: 

- It should possess duties and also responsibilities for violating those duties,
- It should have the capacity to benefit from legal rights as direct claimants and not as a mere beneficiary
- It should be able to enter into contractual or other legal relations with other subjects of the system.

Going by these criteria there is evidence that TNC’s have had international legal personality for a long time now.

a) Possessor of Duties and Responsibilities:

Some principles of international law have become so widely accepted that they have become binding on the TNC’s international activities. They range from Jus Cogens

\[219 Id.\]
\[219 See BROWNlie, Supra note 114, at 57, See also Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11).\]
\[220 See EMEKA A. DURUIGBO, MULTINATIONAL CORPORATION AND INTERNATIONAL LAW ACCOUNTABILITY AND COMPLIANCE ISSUES IN PETROLEUM INDUSTRY, 195, (Transnational Publishers 2003) 2003\]
principles such as prohibition of slavery and forced labor, genocide, torture, extrajudicial murder, piracy, apartheid to Human rights and Labor principles such as right of employees to free association, a decent pay, and prohibition of child labor. 221

Conventions such as International Convention on Civil Liability for Oil Pollution Damage and MARPOL which directly impose liability on legal persons which includes Corporations. 222

b.) Enforcement of rights:

They have been given rights under foreign investment law relating to expropriation, compensation and non discriminatory national treatment relative to domestic firms. They participate in dispute settlement forum established either by a treaty or a intergovernmental organization to enforce these rights. For instance under NAFTA a large number of cases have been bought by TNC’s against national governments. 

_Metalclad Corporation v. Mexico_ 223 is one of the leading cases. The case involved construction of a hazardous waste site in Mexico. The Construction was started by COTERIN, a Mexican company, which was later taken over by, Metalclad, a US based Corporation. COTERIN had received federal permits for construction of hazardous waste landfill at the site, 2 federal environmental impact authorizations in respect of

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221 MENNO T. KAMMINGA & SAMAN ZIA-ZAFRI , LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, 8-9, ( Kluwer Law publishers 2000) 2000. See also Kinley and Tadaki, Supra note 176, at 931 (In article authors are discussing that TNC’s international legal personality to bear international duties. In fact the under international law TNC’s already have some human rights duties. However, they concede that international human rights obligations of states should be narrower than that of nations).

222 See _DURUIGBO, Supra note 219, at 7-9, (ILPOL required ships registered in the territory of contracting states to be fitted with certain pollution prevention facilities. MARPOL required ships to carry an oil discharge and monitoring control system, fitted with a recording device to provide a continuous record of discharges in liters per nautical mile and total quantity discharged.)

223 See e.g. Metalclad Corporation v. Mexico, Award, 25 August 2000, 40 I.L.M. 36 (2001)
construction and operation of landfill and a land use permit issued by state where the site was located. However, the Municipality refused to give ‘construction permit’ whose authority extended to appropriate construction considerations. This led to NAFTA arbitral proceedings in which the tribunal held that federal authority’s jurisdiction was controlling and awarded US $16.685 as damages to Metalclad for the resulting unpredictability for Metalclad emanating from the different approach of Municipality and Federal government.

Cases have also been brought under bilateral investment treaties. One such case is Companiadel Desarrollo de Santa Elena SA v. Costa Rica. The arbitral tribunal granted compensation for expropriation of investor’s property in Costa Rica though it was undisputed that expropriation was for public and peaceful purposes namely protection of biodiversity.

c.) Capacity to enter into legal relationship

They can enter into contracts with nation- states and public international law is applicable to these contracts. In Libya-Oil Company arbitration the arbitrator observed that international law would be applicable in a dispute between a state and private oil company.

These characteristics reveal that TNC’s undoubtedly possess some of the important characteristics of legal personality. However the most compelling reason for holding them directly responsible under international law is the fact that they play an important

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225 See Charney, Supra note 211, at 762,
226 See DURUIGBO, Supra note 219, at 196 (Serbian loans case, Abu-Dhabi Oil arbitration , Ruler of Qatar arbitration, BP v. Libya arbitration are all instances of where a contract was entered into between a state and a Corporation).
role in the development of international environmental law through their national
government. They lobby their national governments who are the direct participants in
international law making. In the 1954 Convention on the Prevention of Pollution of the
Sea by Oil and MARPOL TNC’s were heavily involved.\textsuperscript{227} Initially the oil and shipping
industries had paid little attention to the issue of pollution of the sea caused due to the
operational discharges by tankers and non-tankers. However, when they realized that an
international agreement was in the offing, which would require them to make some
expensive alterations they started, taking an interest in the problem. Their response was
Load on Top (LOT), which was practical and cheaper to solve the problem. After Shell
had established the technological feasibility of the system it won the support of British
Petroleum and together they managed to get US Oil Corporation Exxon on board.
However, it was the co-operation of independent tank owners in Europe which was a
necessary condition for the success of the program. To convince them the major Oil
corporations agreed to reimburse them for the direct expenses incurred for adopting LOT.
After this, LOT was so successful that British and Swedish government could bring a
description of the development and wide acceptance of the system to IMCO. In 1969 the
IMCO assembly adopted LOT system. An important point about LOT was that it was
done independently of government and in a very short time.
Similarly, the negotiations of the Montreal protocol succeeded in large parts because the
major CFC producer in US like Du Pont supported the protocol.\textsuperscript{228} Initially though U.S.
CFC producers strongly opposed any phasing out of CFC’s on grounds of lack of
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\item[\textsuperscript{227}] Michael M’Gonigle and Mark Zacher, Pollution, Politics and International Law: Tankers At Sea, 91(University of California Press 1979) 1979
\item[\textsuperscript{228}] Barbara A. Boczar, Avenues For Direct Participation Of Transnational Corporations In International Environmental Negotiations, 3 N.Y.U. Envtl. L. J. 1, 22-26, (1994)
\end{itemize}
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scientific evidence establishing CFC link to ozone depletion. Unilateral ban by U.S. of CFC products saw more vehement opposition by CFC producers who attempted to pursue an international regulatory regime for the production and use of CFC’s. However, throughout this period of opposition DuPont continued its efforts to develop CFC substitute. But finally when the original parties signed the Montreal Protocol in 1987 most affected U.S. industries seemed to accept the need to regulate CFC. Representatives of the CFC industry, which is valued at $2.2 billion, were observers and informal participants in the various meetings during the negotiation process. The explanation for this sudden change of stand is simple. The U.S. CFC industry preferred a uniform playing field for CFC producers all across the globe instead of suffering a blow to their international competitiveness by being at the receiving end of unilateral national actions. Moreover, they wanted to ensure that their CFC substitute found market, which was not possible if others continued to use CFC. But, whatever the reasons might have been for their action it certainly made a positive contribution to the Protocol since the success of the agreement depended on the CFC industry that had to discover a substitute for CFC.

The real work of developing a substitute for CFC was carried out by fourteen of the largest chemical companies from the U.S. Europe, Japan and South Korea who joined with other companies to establish a multimillion dollar co-operative program designed to test CFC substitutes for toxicity.

Thus there is no reason to allow TNC’s the right, albeit indirectly, to make international rules but shirk responsibility for the violation of those rules by perpetuating the concept of their lack of international personality under international law.
Since international law treats only States as its subject the model of international environmental lawmaking is also one of state-to-state contracting.\textsuperscript{229} States are the fundamental actors in the evolution and progress of IEL due to their authority to enter into international agreements. IEL focuses upon "establishing the responsibility" of states, rather than being "concerned directly with the conduct of individual polluters."\textsuperscript{230} Thus, international environmental law imposes obligations on states and is applicable to States. It is the State that has to regulate the behavior of non-State actors within their territory to meet treaty obligations.

However, efforts are being made to make some principles of IEL applicable to TNC’s. The following developments have marked some nascent efforts to make principles of IEL directly applicable to TNC’s. In 2000 United Nations (U.N.) established a Global compact as a Voluntary corporate citizenship initiative’ intended to provide a contextual framework to encourage innovation, creative solutions and good practices among participants.\textsuperscript{231} The global compact commits its corporate participants to adhere to nine principles three of which relate to environment which are as follows:\textsuperscript{232}

- Support a precautionary approach to business
- Undertake initiatives to promote greater environmental responsibility
- Encourage the development and diffusion of environmentally friendly technology


\textsuperscript{230}Id.

\textsuperscript{231}Available at: www.unglobalcompact.org/portal/.

\textsuperscript{232}Id.
Similarly, the OECD guidelines were introduced in 1976 as the first internationally agreed framework for co-operation in the field of international direct investment and multinational enterprises and updated in 2000. Part V of the 2000 Guidelines provides “[E]nterprise should within the framework of laws, regulations and administrative practices in the countries in which they operate and in consideration of relevant international agreements, principles, objectives and standards take due account of the need to protect the environment, public health and safety and generally to conduct their activities in a manner contributing to the wider goal of sustainable development”.

WSSD plan of implementation commits states to enhance corporate environmental and social responsibility and accountability in accordance with Principle 11 of Rio Declaration.

The next important question is to determine whether U.S. courts apply these principles of IEL to non state actors in resolving environmental disputes. Before that it is important to learn about the status of international law in U.S. As such, the United States appears to be a monist state. However, in practice, the United States has tended to adopt implementing legislation at the same time that it becomes party to an international agreement. Thus, while the U.S. Constitution indicates a monist system, practice suggests a modified system with certain characteristics of a dualist system.

_Tom Beanal v. Freeport-McMoRan_ is the name of a suit bought by Indonesian citizen against American corporations who owned subsidiary which operated open pit copper,

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233 See Sands, Supra note 207, at 116-17
234 Para 17(a) On the Global Reporting Initiative, Available at www.globalreporting.org
236 Id.
237 See Tom Beanal, 969 F.Supp. at 383-84
gold and silver mine in Indonesia, alleging environmental torts, human rights abuses, and cultural genocide.

Plaintiff based their allegations on three international environmental law principles: (1) the Polluter Pays Principle; (2) the Precautionary Principle; and (3) the Proximity Principle. Court refused to apply these principles to the TNC in question on the grounds that they do not rise to international customary legal obligation. More to the point, the court held that these principles apply to “members of the international community rather than non-state corporations. A non-state corporation could be bound to such principles by treaty, but not as a matter of international customary law”. Thus, if the principles had been enumerated in a treaty to which U.S. was a party the court would have applied these principles to the defendant corporation. However, as discussed earlier the Global compact statement makes precautionary principle applicable to TNC’s.

In *Amlon* 238 plaintiffs had filed a complaint against FMC alleging that FMC misrepresented the composition and characteristics of the copper residue and failed to disclose the presence and concentrations of organic chemicals in the material shipped to it in U.K. They argued that the defendant corporation’s conduct is violative of the Stockholm Principles, United Nations Conference on the Human Environment, to which the U.S. is a signatory. Court held that “plaintiffs’ reliance on the Stockholm Principles is misplaced, since those Principles do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders. Nor does the Restatement of Foreign Relations law constitute a statement of universally recognized principles of international law but states the existing U.S. view of the law of nations

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238 See Amlon 775 F.Supp. at 671
regarding global environmental protection.” Clearly, this case provides no guidance regarding the applicability of IEL principles to TNCs.

*Rio Tinto case*\(^{239}\) also involved a class action bought by Papua New Guinea (PNG) residents against an international mining group alleging that group's mining operations destroyed their island's environment, harmed the health of its people, and incited a ten-year civil war. Plaintiff’s again alleged violation of Principle 2 of Rio Declaration and Stockholm Declaration. Court held that they failed to show environmental torts violated a “specific, universal, and obligatory” norm of international law. The Court also enumerated its view on Sustainable Development. It held that it is too broad a concept to be legally meaningful and it was not possible to identify the parameters of the right created by the principle of sustainable development. Unfortunately this case also does not reveal much about the applicability of principles of IEL to TNC’s. In this case, like its predecessors, the court focused on the international status of IEL principles rather than its applicability to TNCs.

A study carried out by Prof. Bodansky has revealed that numbers of cases involving international environmental law in U.S. national courts is small.\(^{240}\) According to this study U.S. courts have either sidestepped the issue of international law or the international environmental law argument relied upon were considered to be non–self-executing.\(^{241}\) One of the reasons for this reluctance to address international environmental issue is the uncertain status of the rules in question and lack of familiarity with these

\(^{239}\) See Sarei, 221 F. Supp. 2d at 1160-61

\(^{240}\) See Daniel Bodansky & Jutta Brunnee, Supra note 235, at 88-90

\(^{241}\) Id.
rules. For instance, Global compact is a soft law and principles like Polluter Pays and Precautionary principles are not considered customary international law. 242

Second, some principles of IEL have not been applied to TNC’s on the ground that they are applicable to members of international community rather than non state actors as was evident in Beanal case. 243 Third, even when courts in other countries have used IEL they have not articulated whether it has been regarded as rules of decisions, interpretive aid or principles simply drawn from national sources. 244

It can be concluded from the above discussion that principles of IEL are rarely applied to non-State actors in U.S. courts and, at present, does not offer a strong means to regulate TNC’s.

242 Id.
243 Id.
244 Id.
CHAPTER V

CONCLUSION

It is clear that regulating TNC behavior to prevent environmental damage presents some unique challenges. The host state has strong incentives for non regulation though it is best placed to regulate TNC’s operating on its soil. On the other hand regulation by home state presents its share of difficulties. Any effort to regulate TNC should be devised in a way that it does not impede developing nation’s efforts for economic development but at the same time ensure TNC activities are not blatantly abusing the environment. One possibility appears to be setting minimum environmental standards at the international level for TNCs which has to be observed by them in their operations anywhere in the world. Standard setting should be done by an international agreement. International standards will prevent race to bottom since no matter where TNCs operate their conduct will be governed by these rules so their decision to relocate will not be based upon weak environmental regulations. Another advantage will be that host nation’s local industries will not be subject to similar standards since these standards will be applicable only to TNC’s and this feature should further aid in achieving developing nations co-operation. Standard setting has to be followed by effective monitoring to ensure compliance.

However, host states may have incentives to engage in weak monitoring and enforcement. Clearly, as discussed lack of better environmental practices in developing nations is not always due to lack of better environmental law. Thus under the international agreement an independent body should be set up which should engage in
monitoring TNC activities. Developing nations would prefer this arrangement because
they do not have to divert any resources towards monitoring activities. Enforcement can
be done at national level but by home countries since their judicial system is better
equipped to deal with such cases and most importantly they have little incentive to
engage in lax enforcement. Once again host states will not have any objection to this
arrangement because they do not have to devote any resources towards enforcement but
in the end get to enjoy better environment quality.

Given the characteristics of a TNC, standard setting at international level provides the
best solution to the environmental problems posed by it. Most importantly the fear of
punishment instead of actual punishment will ensure compliance and deter willful
violation. Hence, hopefully one will not witness any rampant flouting of the
environmental standards.
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