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UNSETTLING: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster†

*Hanson Hosein**

PROLOGUE

Bhopal is no longer merely the name of a town in central India. It is now a convenient one-word description that evokes many disconcerting thoughts in the collective memory of the developed world: the liability of a transnational corporation, the transfer of hazardous technology to a developing country, and the jurisdiction of national courts with regards to an issue that defies borders. More poignantly, with the possible exception of "Chernobyl," "Bhopal" speaks of the worst single-incident industrial catastrophe in history.¹ "Bhopal" speaks of human misery, suffering and death. "Bhopal" also connotes an inability—of governments, of corporations, and of legal systems—to deal with a disaster that most undoubtedly will occur again.

INTRODUCTION

*[A] quick and fair settlement of the claims of all victims would serve their needs far better than prolonged and expensive litigation.*²

On the night of December 2, 1984, a large quantity of methyl isocyanate gas (MIC) escaped from a pesticide plant in Bhopal, in

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¹ Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal*, 29 OSGOODE HALL L.J. 1, 2 (1991).

² UNION CARBIDE CORP., 1984 ANNUAL REPORT.

the state of Madhya Pradesh, India.³ Carried by a breeze, the leaked gas eventually made its way from the plant into the adjacent homes of the residents of the town. Having been told that the gas would make a person sick but could not kill, those who awoke did not panic immediately. It was only when throats began to constrict and breathing became labored that the residents realized what was happening. When the cloud cleared, the dangerous gas that the plant authorities previously had represented as being carbon dioxide to the Indian government⁴ had killed 2,000 people and injured 200,000. The official death toll would ultimately reach more than 3,800.⁵

The plant was owned and operated by Union Carbide India Limited (UCIL). The company was a subsidiary of Union Carbide Corporation (UCC) of Danbury, Connecticut. UCC owned a 50.9 percent stake in UCIL—enough for majority control of the subsidiary.⁶ Indian governmental institutions owned 22 percent of the stock and the rest was held by Indian citizens.⁷

In the years following the incident, UCC would acknowledge that the leak was due to the presence of a large amount of water in an MIC storage tank, which started a toxic reaction.⁸ As experts knew, and as the victims of Bhopal found out, MIC does not have the relatively benign effects of carbon dioxide, but rather “is extremely volatile and highly toxic. Its effects on human beings are horribly diverse and include lung damage, blindness, emphysema, tuberculosis, spleen and liver damage, nervous and psychological disorders, gynecological damage and birth defects.”⁹

Although the story of the victims’ immediate suffering is horrific in itself, this Article will focus on the actions of certain key parties that eventually exacerbated the plight of the survivors. More specifically, this Article uses the Bhopal catastrophe as a case study in international dispute resolution of an incident involving a transnational corporation, a host state’s government, and multiple judicial systems—both foreign and domestic. Bhopal provides a unique con-

³ For detailed accounts of the Bhopal incident, see generally DAN KURZMAN, *A KILLING WIND* (1987); WARD MOREHOUSE & M. ARUN SUBRAMANIAM, *THE BHOPAL TRAGEDY* (1986); ALFRED DE GRAZIA, *A CLOUD OVER BHOPAL* (1985); SIDNEY C. SUFRIN, *BHOPAL* (1985).

⁴ KURZMAN, *supra* note 3, at 28.

⁵ This is the official count as of December 1990. Tim Covell, *The Bhopal Disaster Litigation: It's Not Over Yet*, 16 N.C.J. INT'L L. & COM. REG. 279, 279 (1991).

⁶ *Id.* at 280.

⁷ *Id.*

⁸ *Id.* at 281.

⁹ Cassels, *supra* note 1, at 3.

text. It has several aspects that both set it apart from "traditional" international disputes and render it all the more complex.¹⁰ The antagonist is a transnational corporation, acting through its partly-owned subsidiary. *Prima facie*, the protagonist is the Indian government, acting on behalf of its citizens.¹¹ The primary location is a developing country, necessarily involving the social, economic, and political baggage with which such a setting is bound to be laden. In an attempt to resolve the dispute, the laws, procedures, and idiosyncrasies of two different legal systems are encountered. Perhaps most importantly, Bhopal is about a human-made environmental disaster—an attribute that has its own unusual consequences.

Although the facts of the Bhopal incident are unique, the occurrence of industrial accidents such as those in Seveso, Italy; Basel, Switzerland; and Chernobyl of the former Soviet Union¹² indicate that these incidents are happening more frequently, and are bound to happen again. The dire consequences of these accidents mandate improved preparation for international disputes regarding these accidents. Regardless of its seemingly atypical nature, Bhopal serves as an example of how such a dispute should not be settled. Part I of this Article will attempt to reveal the settlement processes that were used in the Bhopal incident. The measure of success of the outcome of Bhopal will then be evaluated against whether it met the priorities that should ideally dominate an international dispute involving an environmental disaster. Part II will highlight the various difficult considerations that must be made when choosing a dispute resolution mechanism in this type of dispute. These considerations include the conflict in legal culture, political and economic consequences, enforcement difficulties, and the role of the transnational corporation in international law. Part III assesses various dispute settlement mechanisms. This Article concludes that a strict liability insurance fund mechanism would best achieve the fast and just compensation of victims—the highest priority in this type of dispute resolution—while adequately taking into account other competing factors.

¹⁰ If indeed it is possible for any international dispute to be seen as having characteristics similar to previous disputes allowing for neat and painless categorization.

¹¹ As we shall see, Bhopal has the interesting attribute of being a potential situation that may involve all three possible scenarios in an international dispute: a dispute between a state (India) and a private party (UCC/UCIL); between private parties (the victims and UCC/UCIL); between states (the United States and India).

¹² See, e.g., Cassels, *supra* note 1, at 8.

I. AN EVALUATION OF THE BHOPAL SETTLEMENT

A. *International Dispute Resolution in the Case of an Environmental Disaster: Characteristics and Priorities*

Before examining the events leading up to the Bhopal settlement, it is first necessary to examine more generally the particularities of an international dispute created by an industrial accident. Specifically, several issues should be addressed: the definition of such a dispute, the nature of an environmental accident and the subsequent dispute that distinguishes it from all other types of disputes, and the priorities in resolving the dispute. This Article addresses these issues in light of the dispute settlement process used in Bhopal.

1. Definition and Attributes

An international environmental dispute exists "*whenever there is a conflict of interest between two or more states (or persons within those states) concerning the alteration and condition . . . of the physical environment.*"¹³ In a mass disaster context, this definition should include the phrase "*and where there is a large number of victims.*"

It is the characteristics of a human-made environmental problem that render an environmental dispute very complex and uncertain. Due to the use of elaborate technology, dangerous processes, and toxic materials, the facts are difficult to determine.¹⁴ Because of the potential long-term effects of the incident, as well as the large number of victims, medical causation is also difficult to ascertain.¹⁵ Thus, any attempt to measure damages becomes difficult. Moreover, in order for an industrial disaster to occur, a great amount of resources is initially required to create and implement the technology which, in turn, necessarily involves multiple actors. This makes the allocation of fault in a traditional legal process all the more difficult, making it easier to shift blame "from shoulder to shoulder indefinitely."¹⁶

Finally, in the situation of a mass disaster, the potential liability of the antagonist is enormous. But, where the incident involves a trans-

¹³ Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, 24 CAN. Y.B. INT'L L. 247, 249 (1986) (emphasis added).

¹⁴ Cassels, *supra* note 1, at 8.

¹⁵ *Id.*

¹⁶ *Id.* at 9.

national's subsidiary, it is difficult to obtain full recovery against the transnational parent, as the principles of limited liability and corporate veil are implicated. This is particularly frustrating to the victims when the subsidiary is a thinly-capitalized operation. In other words, it is more beneficial to go after the parent corporation to secure full compensation. The notions of incorporation, as well as the complication caused by the international aspects, may severely limit this course of action.¹⁷

2. Goals and Priorities in Settling the Dispute

As the above discussion indicates, there is a great deal of complexity and uncertainty surrounding an international dispute involving an environmental disaster. Given these circumstances, it is clear that any comprehensive attempt to resolve the dispute will take time. Time, however, is something that innocent victims, particularly those living in a developing country with limited resources, do not have. Therefore, the overriding priority in this context is to employ a dispute settlement mechanism that will provide "the most effective, equitable and expeditious way to get compensation to [the victims] at an appropriate level and in the shortest period of time."¹⁸

A quick solution is also in the best interests of the other parties. For the transnational corporation, its damaged reputation and the business uncertainty of the yet unascertained settlement are particularly detrimental. For the host developing state and its government, the consequences of the possible political fallout and the drain on its already limited means can be catastrophic.

In addition to this preeminent concern for a rapid dispute resolution, Professor Daniel MacGraw identifies five additional characteristics that a good settlement must have.¹⁹ First, the solution must avoid unnecessary transaction costs, such as excessive legal fees and expenses involved in complicated procedural issues.²⁰ Second, the solution should resolve all outstanding claims so that a quick and easy settlement may be achieved.²¹ A settlement that is not completely accepted by both parties will pose serious problems when one

¹⁷ *Id.* at 9-10; Günther Handl, *Environmental Protection and Development in Third World Countries: Common Destiny—Common Responsibility*, 20 N.Y.U. J. INT'L L. & POL. 603, 623 (1988).

¹⁸ Robert E. Stein, *The Settlement of Environmental Disputes: Towards A System of Flexible Dispute Settlement*, 12 SYRACUSE J. INT'L L. & COM. 283, 293 (1985).

¹⁹ Daniel Barstow MacGraw, *The Bhopal Disaster: Structuring a Solution*, 57 U. COLO. L. REV. 835, 841-43 (1986).

²⁰ *Id.* at 842.

²¹ *Id.*

party attempts to enforce the decision in the other party's jurisdiction.²² Third, individual claims should be fairly and reasonably determined.²³ As will be discussed later, this is particularly difficult in a situation where there is great disparity, both economically and culturally, between the victims and the arbiters of the dispute.²⁴ Fourth, the compensation should be fair and adequate.²⁵ This is also complicated by economics and culture because it must be determined whether the standard of compensation should reflect the victims' economic and cultural circumstances, or whether it should correspond to the norms of the system of resolution being used.²⁶ In other words, should the award be what an American or Canadian would get in a similar domestic tort case?²⁷ If it should, the award would probably be a windfall to a plaintiff in a developing country.²⁸ This result may ultimately increase the risks of doing business in that country and thus reduce the incentive for foreign investment.²⁹ Finally, the importance of providing a conduct-guidance effect must be determined.³⁰ Put another way, should the system provide incentives or deterrence to the various actors in order to enforce a certain type of behavior?³¹ Several commentators believe that, in the environmental context, it should.³²

With the benefit of hindsight, the author suggests that two other elements be included. These may be derivative of what Professor MacGraw outlined; however, they bear emphasizing. First, in order to ensure resolution of all claims, it is crucial that the dispute settlement mechanism be accessible to the victims. Second, in order to alleviate the effects of a slower-than-desired process, provision should be made for emergency and interim assistance while final compensation is being determined.³³ All of these aspects should be

²² *Id.*

²³ *Id.* at 842-43.

²⁴ *Id.* at 843.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See, e.g., Cassels, *supra* note 1, at 7; Richard B. Bilder, *The Settlement of Disputes in the Field of the International Law of the Environment*, 1 HAGUE RECUEIL DES COURS [HAGUE R.C.] 139, 162 (1975); Covell, *supra* note 5, at 299.

³³ Cassels, *supra* note 1, at 7.

borne in mind, as we trace the events leading up to the settlement of the Bhopal dispute.

B. *The Bhopal Solution*

The Bhopal story is replete with ironies and contradictions. The sovereign state of India, proud of its hard won independence from colonial rule, resorts to the courts of a foreign nation to obtain justice for its citizens. A major multinational corporation, whose policy is to maintain 'centralized integrated corporate strategic planning, direction and control' argues that it had no responsibility for its subsidiary. And the courts of a country that is 'among the foremost exporters of effective liberal legal ideologies for the ex-colonial nations of the Third World,' concludes that the American legal system is incapable of even assuming jurisdiction over an American-based corporation, much less providing a remedy to the victims of the disaster.³⁴

1. The Actors' Behavior

a. *The Road to Adjudication*

After the leak of December 2, 1984, events moved quickly. The resort to adjudication was reflexive. The Indian government facilitated the legal aid process, which resulted in over 2000 claims being filed in the Bhopal District Court.³⁵ By the end of the month, the government was threatening to file a suit in the United States against UCC on behalf of the victims.³⁶ U.S. attorneys soon arrived in Bhopal, signing up clients on a contingent fee basis in anticipation of actions to be filed in U.S. courts.³⁷ As one commentator noted, the desire to use the United States as a forum was based on the Indian people's conviction that their legal system was in a virtual state of

³⁴ *Id.* at 49.

³⁵ Mark Galanter, *Legal Torpor: Why So Little Has Happened in India after the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 284 (1985).

³⁶ *Id.*

³⁷ Richard Shwadron, *The Bhopal Incident: How the Courts Have Faced Complex International Litigation*, 5 B.U. INT'L L.J. 445, 446 (1987). It was reported that some of the lawyers were "paying for signatures, misinforming clients, contracting for extremely high contingency fees, and taking full authority to settle." At the end of the recruitment campaign, fifty lawsuits had been filed in the United States, claiming over \$250 million and eighty lawyers were involved, claiming to represent over 400,000 victims. *Id.*

“breakdown.”³⁸ Such belief “about the legal possibilities in India often co-exists with untroubled faith in the American legal system—with anticipation of enormous recoveries.”³⁹

In 1985, the Indian government passed the Bhopal Gas Leak Disaster (Processing of Claims) Act (Bhopal Act).⁴⁰ An indirect response to the U.S. attorneys’ campaign, the legislation had the effect of authorizing the Indian government to represent exclusively the Bhopal victims, thus consolidating the 6,500 claims that, by then, had been filed in India.⁴¹ The Bhopal Act applied retroactively, but did allow the victims to retain counsel. It provided for the establishment of a Claims Scheme, and gave *parens patriae* authority to the government.⁴² And, “of more immediate importance, it allowed the Indian government to take over the litigation already commenced in the United States, to dictate strategy, and to scuttle ongoing settlement negotiations.”⁴³

Before ultimately resorting to adjudication, the parties attempted settlement. At the outset, UCC indicated its desire to negotiate.⁴⁴ India also had an interest in settling, as such an outcome would allow the government to avoid becoming a formal party, and thus escape exposing itself to claims by other plaintiffs.⁴⁵ During the settlement process, the jockeying between the parties involved UCC’s attempt to blame the incident on local management and the Indian government.⁴⁶ In April 1985, Prime Minister Gandhi rejected UCC’s offer of \$200 million,⁴⁷ claiming that it was insufficient.⁴⁸ Three days after rejecting the offer, India filed suit in the United States.⁴⁹

³⁸ Galanter, *supra* note 35, at 287. In fact, even some members of the Indian legal community professed this sentiment. *Id.*

³⁹ *Id.*

⁴⁰ No. 26 of 1985 (29 March 1985), *cited in* Cassels, *supra* note 1, at 12.

⁴¹ Covell, *supra* note 5, at 283.

⁴² Cassels, *supra* note 1, at 13.

⁴³ *Id.*

⁴⁴ Stein, *supra* note 18, at 294. The author also added, “Of course they [UCC] want to negotiate. Negotiation is faster, fosters better public relations and will enable them to continue to produce their goods.” *Id.*

⁴⁵ Galanter, *supra* note 35, at 285.

⁴⁶ In fact, up to this date, UCC still maintains that the leak was caused by the sabotage of a disgruntled employee. *See* Cassels, *supra* note 1, at 4.

⁴⁷ Note that all figures, unless otherwise indicated, are in U.S. dollar amounts.

⁴⁸ Galanter, *supra* note 35, at 285. It was noted by some that UCC’s offer was equivalent to the insurance coverage reportedly carried by the company. *Id.*

⁴⁹ *Id.* at 285–86.

b. *The U.S. Forum*

By the time suit was filed, claims totalling \$250 billion had been instituted in various U.S. courts.⁵⁰ These claims were consolidated for the showdown that would occur in the New York District Court.⁵¹ Given the legal separation between parent and subsidiary, India had a difficult argument to make for the imposition of liability on UCC for the acts of UCIL.⁵² The "multinational enterprise liability" theory that India advanced was controversial.⁵³ It held that a transnational corporation, with a controlling majority interest in a hazardous activity abroad, is deemed to have a non-delegable, absolute duty to assure that the activity does not cause any danger or damage to the people or the state.⁵⁴

India did not get a chance, however, to advance any substantive arguments because in July 1985, UCC brought a preliminary motion to dismiss on the grounds of *forum non conveniens*: "Union Carbide, anxious to avoid American tort doctrine, American damage awards, and American juries argued that the United States was not the proper forum and began to paint the picture of an innovative, sophisticated, and vigorous Indian legal system, well up to the task at hand."⁵⁵

Attempting to counter this position, India argued that justice would be better served in the United States than in India.⁵⁶ India contended that delays inherent in the Indian court system would lead to an unconscionable delay in the resolution of the case.⁵⁷ Furthermore, it alleged that India's system lacked the procedural and prac-

⁵⁰ Cassels, *supra* note 1, at 16.

⁵¹ *Id.*

⁵² *Id.* at 27.

⁵³ *Id.*

⁵⁴ *Union of India's Complaint*, in MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE 4-5 (The Indian Law Institute 1986) [hereinafter INDIAN LAW INSTITUTE]; see also Günther Handl & Robert E. Lutz, *An International Policy Perspective on the Trade of Hazardous Materials and Technologies*, 30 HARV. INT'L L.J. 351, 371 (1989). This theory was premised on the Indian Supreme Court case of *M.C. Metha v. Union of India*, [1987] A.I.R. (S.C.) 1086, cited in Covell, *supra* note 5, at 283-84.

For additional commentary on the issue of liability of a transnational corporation for the acts of its subsidiary, see Walter Kolvenbach, *European Reflections on Bhopal and the Consequences for Transnational Corporations*, 14 INT'L BUS. LAW. 357(6) (Nov. 1986) and Charles C. Hileman, *Multinational Enterprise Liability for Ultrahazardous Activities*, 15 INT'L BUS. LAW. 66(5) (Feb. 1987).

⁵⁵ Cassels, *supra* note 1, at 16-17.

⁵⁶ *Id.* The Indian media, bench, and bar were reportedly outraged and/or resigned to this argument. *Id.*

⁵⁷ See *id.*

tical capability to handle the litigation.⁵⁸ The New York District Court agreed with UCC.⁵⁹

Judge Keenan reasoned that India's system offered an adequate alternative forum and that both private and public interests favored India as the appropriate jurisdiction.⁶⁰ The parent, UCC, had little involvement in the Indian operation, and the victims, witnesses, and documentary evidence were located primarily in India.⁶¹ Additionally, the plant was regulated by Indian law.⁶² Consequently, it would be paternalistic to apply those laws in a U.S. court or to impose U.S. standards of health and safety.⁶³ For Judge Keenan, "to retain the litigation [in the United States] would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation."⁶⁴

c. *The Indian Forum*

In September 1986, the Indian government filed suit for damages worth over \$3 billion in the Bhopal District Court.⁶⁵ A series of adjournments, on-and-off negotiations, and changes in judges, however, delayed the court decision.⁶⁶ At one point during the negotiations in 1987, India was about to accept UCC's offer of \$500 million.⁶⁷ Talks collapsed, however, after activist groups, demanding a settlement of at least \$3 billion, organized a protest campaign.⁶⁸

In December 1987, the Bhopal District Court ordered UCC to pay \$270 million in interim relief.⁶⁹ On appeal by UCC, the state High Court reduced payment to \$190 million, reasoning that the District Court had failed to find the company liable before proclaiming the

⁵⁸ As stated in India's *Memorandum of Law in Opposition to Union Carbide Corporation's Motion to Dismiss these Actions on the Grounds of Forum Non Conveniens*, in INDIAN LAW INSTITUTE, *supra* note 54, at 87-90.

⁵⁹ *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 842 (S.D.N.Y. 1986).

⁶⁰ *Id.* at 852-66.

⁶¹ *Id.* at 852-60.

⁶² *Id.*

⁶³ See Cassels, *supra* note 1, at 17.

⁶⁴ In *Re: Union Carbide Corporation Gas Leak Disaster at Bhopal, India* in December 1984, 601 F. Supp. 1035, in INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE 69 (The Indian Law Institute 1986).

⁶⁵ Sanjoy Hazarika, *Bhopal Payments by Union Carbide Set at \$470 million*, N.Y. TIMES, Feb. 15, 1989, at A1; see also *Union of India v. Union Carbide Corp.*, No. 1113 (D. Bhopal, India 1986).

⁶⁶ Hazarika, *supra* note 65, at A1. One judge who was hearing the case was later removed when it was discovered that he was one of the 500,000 claimants. *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

award.⁷⁰ UCC appealed the decision again in the Indian Supreme Court.⁷¹

2. Settlement

a. *The Indian Supreme Court: "Placing the Government on a Strong Wicket"*

On February 14, 1989, fifty months, two countries and three courts after the disaster at Bhopal, the parties settled for \$470 million—the largest settlement for an industrial accident ever.⁷² It was based on a ruling by Chief Justice Pathak of the Indian Supreme Court.⁷³ After four months of preparation and oral argument, the Chief Justice interrupted counsel's argument and ordered the "settlement."⁷⁴ Both parties promptly agreed to the deal.⁷⁵

The Court did not address who was to blame, or any other legal issues. It dismissed all criminal charges and civil suits in India against UCC and the former chairperson of UCC.⁷⁶ The Court simply ordered the award to be paid in a lump sum by March 31, 1989. As the Chief Justice stated, "[t]he case is pre-eminently fit for an overall settlement between the parties covering all litigations, claims, rights and liabilities related and arising out of the litigation."⁷⁷

As one commentator observed, it is unlikely that the settlement was "imposed."⁷⁸ The Indian government and UCC had been secretly engaged in negotiations in the weeks leading up to the hearing.⁷⁹ Quite possibly, the intervention by Chief Justice Pathak was a formality, designed to protect the Indian government from criticism.⁸⁰ The Supreme Court commands a great deal of respect in India. Accordingly, its intervention would make the settlement look less like a "sell-out" on the part of the Indian government.⁸¹ Additionally, by refraining from insisting on its original demand for \$3.3 billion, the government avoided having its country labelled as an

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Cassels, *supra* note 1, at 37.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Hazarika, *supra* note 65, at A1.

“unreliable” and “uncooperative” developing country in which to invest.⁸² As one lawyer remarked, “[w]e feel that once the Supreme Court says it’s fair, the government will be on a strong wicket.”⁸³

b. *Aftermath of the Settlement*

At the time of the settlement, 500,000 claims had been filed, and the Indian government had spent more than \$70 million on health care and relief for the victims.⁸⁴ There remained the question of distribution of the settlement award. No scheme for how to distribute the lump sum among the victims had been devised.

Distribution was further delayed by petitions that were filed to overturn the Supreme Court settlement on grounds such as the constitutionality of the Bhopal Act, the inadequacy of the settlement, and the resurrection of criminal charges against UCC officials.⁸⁵ The Indian Supreme Court postponed the distribution until all of the petitions were resolved.⁸⁶ By the middle of 1990, 400,000 eligible claimants had received nothing, although it was agreed that \$210 million could be distributed.⁸⁷ Then various lobby groups backed by the new Indian government challenged the judgment, claiming that the settlement was too low.⁸⁸ In October 1991, the Indian Supreme Court upheld the settlement, but withdrew the criminal immunity previously granted to UCC officials.⁸⁹ As late as 1992, Indian authorities were threatening the seizure of UCIL property unless UCC officials appeared in India to face criminal charges.⁹⁰

3. Problems with the Bhopal Solution

a. *Speed*

The Bhopal settlement flagrantly violated a primary principle of dispute resolution: speed. From the date of the catastrophe to the

⁸² David Bergman, *The Long Wait for Justice*, NEW L.J. 1747, 1747 (Dec. 14, 1990).

⁸³ Cassels, *supra* note 1, at 37.

⁸⁴ Hazarika, *supra* note 65, at A1.

⁸⁵ Cassels, *supra* note 1, at 42.

⁸⁶ Covell, *supra* note 5, at 280.

⁸⁷ Sanjoy Hazarika, *Payments in Bhopal Are Going Slowly*, N.Y. TIMES, July 23, 1990, at A2.

⁸⁸ *Id.*

⁸⁹ Edward A. Gargan, *Settlement on Bhopal is Accepted*, N.Y. TIMES, Oct. 4, 1991, at D4.

⁹⁰ *Carbide Seizure Vowed*, THE GLOBE AND MAIL, Feb. 3, 1992.

settlement, four years elapsed. The delay, in and of itself, was a disaster.

i. The Legalization of the Dispute

One of the reasons for the delay was the legalization of the dispute. The early participation of the U.S. lawyers in Bhopal may have alerted the victims to their rights of redress. With the presence of U.S. attorneys, the help of the Indian government through its facilitation of legal aid, and the prospect of a hefty recovery from a rich U.S. corporation, Bhopal was almost immediately "legalized." This limited any possibility of a quick non-traditional solution: "Settlement negotiations were begun by one group and rejected by another. The hopes of the victims were raised impossibly high, while behind closed doors, they were being used simply as bargaining chips by lawyers jockeying for control of the litigation."⁹¹

In addition to the behavior of the lawyers, the inherent limitations of the applicable law further impeded the process. Not only did the motion for *forum non conveniens* have a dilatory effect, but the ability to establish a negligence claim under traditional tort law also would have been virtually impossible. Essentially, "it would have to be demonstrated that UCC had a duty to oversee its Bhopal operation; that it breached that duty by failing to use reasonable care; that this failure caused the gas leak; and that the gas caused the damage suffered by each individual victim."⁹² Had settlement not been reached in 1989, Bhopal could still be in the courts. Even with India's theory of transnational liability, it is highly unlikely that UCC would have acquiesced to an unacceptable Indian judicial decision. The ensuing enforcement battle in the U.S. courts would have taken years to conclude.

ii. The Politicization of the Dispute

Politicization of the affair further exacerbated the retardation in reaching a settlement. The Indian government's prompt involvement in the matter on behalf of the victims ensured that a quick and easy settlement would be a political liability. This observation is reinforced by the elaborate façade that had to be developed in order to show that the settlement was engineered by the Indian Supreme

⁹¹ Cassels, *supra* note 1, at 11.

⁹² *Id.* at 24.

Court,⁹³ and thus would have to be complied with by the government. Also, the government probably backed itself into a corner, having promised a harsh resolution against UCC in the election immediately prior to the settlement.⁹⁴ At the very least, it was clear that Indian politicians were using the incident to bolster their chances at the polls.⁹⁵

Moreover, grassroots activism seeking aid for victims further complicated matters. Given the large number of activist groups involved, it was difficult to determine who spoke for the victims.⁹⁶ It was also obvious that, based on the relative strength of these groups, they would not suffer an unsatisfactory settlement passively.⁹⁷

b. *Conformity with Other Characteristics of a Good Settlement*

By circumventing the activity of the U.S. lawyers through the Bhopal Act, the Indian government was successful in preventing the potential payout of contingent fees by the victims.⁹⁸ Through its representation of the victims, India in effect created a class action.⁹⁹ The concept of a class action in this situation has its merits, especially when the victims had no other means of legal redress, or much power by themselves.¹⁰⁰ The consequences of the method employed by the Indian government, however, had the effect of producing unnecessary transaction costs, and may have been more detrimental than if the government had refrained from intervening.¹⁰¹

Although the Bhopal Act had been deemed constitutional by the Indian judiciary,¹⁰² had the litigation proceeded any further, it would have been exceedingly difficult to enforce the decision in the United

⁹³ See Covell, *supra* note 5, at 297.

⁹⁴ *Id.* at 297–98.

⁹⁵ *Id.*

⁹⁶ Cassels, *supra* note 1, at 11.

⁹⁷ See Bergman, *supra* note 82, at 1748.

⁹⁸ See Cassels, *supra* note 1, at 13. In *Dames & Moore v. Regan*, the U.S. Supreme Court held that, under U.S. constitutional law, it is acceptable for the government to suspend a plaintiff's claim based on the President's powers to change the substantive law and settle the claims of U.S. nationals against foreign governments. 453 U.S. 654, 684–86 (1981). The Court, however, qualified this point by stating that the President also provided an alternative forum (in that case, the Iran-U.S. Claims Tribunal) to allow nationals to settle their claims. *Id.* at 686–88. In the case of Bhopal, no alternative forum was provided to the victims by the Indian government.

⁹⁹ Cassels, *supra* note 1, at 12–13.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

States.¹⁰³ This is due to the questionable legality of the statute in its disregard for individual rights through the use of the *parens patriae* power.¹⁰⁴ In the United States, *parens patriae* can only be used by the state when it has an interest in the litigation, independent of that of its citizens.¹⁰⁵ It may not be exercised merely to collect damages for someone who is legally entitled to the claim.¹⁰⁶ Thus, the U.S. courts could have refused to enforce the claim on the basis of a lack of due process.¹⁰⁷

In addition, India arguably had a conflict of interest. Given its lax administration of health and safety requirements,¹⁰⁸ its partial ownership of UCIL, and the political liability of Bhopal, the government itself was a potential litigant.¹⁰⁹ Consequently, the government was incapable of fully looking after the best interests of the victims.¹¹⁰ This infirmity, along with the lack of an effective distribution scheme, impeded the fair determination of the victims' claims.

With regard to the adequacy of the settlement, given the government of India's initial claim of over \$3 billion,¹¹¹ the final amount of \$470 million¹¹² perhaps seems paltry. Indeed, the settlement was so much smaller than many had expected that on the day of the announcement, UCC stock rose by \$2.00.¹¹³ But, given the fact that the compensation each victim received constituted nearly fifty times India's GNP per capita, and was equivalent to \$1 million per person in the United States,¹¹⁴ the award hardly was inadequate. Nevertheless, on a comparative basis, the punitive effect of the settlement must be questioned. More precisely, transnational corporations arguably are provided with the incentive to establish their more dangerous operations in poor countries, "where compensation will be lower along with living standards."¹¹⁵

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Examples of poor governmental regulation include: placing the plant close to a densely populated area of the city; providing no information about the nature of the substances at the plant or the technological and environmental risks; providing no warning or emergency procedures; and, providing no proper medical facilities. Cassels, *supra* note 1, at 5.

¹⁰⁹ Cassels, *supra* note 1, at 14.

¹¹⁰ *See id.* at 15.

¹¹¹ Hazarika, *supra* note 65, at A1.

¹¹² *Id.*

¹¹³ *The Ghosts of Bhopal*, *ECONOMIST*, Feb. 18, 1989, at 70 [hereinafter *Ghosts*].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

4. Summary of the Bhopal Solution

Considering the attributes and priorities of the resolution of an international dispute in the case of a mass environmental disaster, the Bhopal solution is wholly inadequate. Unfortunately, criticizing the Bhopal process is much easier than providing a more effective alternative. This is due to various issues, mainly attributable to the nature of, and differences between, the two major players in the dispute: the transnational corporation and the host state. Using Bhopal as an example, these factors shall be studied in depth in the next part, with an eye towards an assessment of the assorted settlement mechanism possibilities applicable to this very difficult type of international dispute.

II. IMPORTANT VARIABLES TO CONSIDER WHEN SELECTING A DISPUTE SETTLEMENT MECHANISM

A. *Problems When Dealing with a Foreign State*

1. Variables in Legal Culture

a. *Expectations Based on Culture*

Before implementing a settlement solution, great care must be taken in considering how compatible the remedy will be with the victims' cultural context. Usually, the most obvious consideration is to avoid imposing Western values and expectations upon the victims. Injury that U.S. citizens may consider a violation of their personal rights might not be seen as much more than a vicissitude of life in another culture, to be absorbed into the "karmic fatalism"¹¹⁶ that characterizes that culture. In the Bhopal case, the differences in legal culture between the West and India can be quite distinct:

The Bhopal disaster is an enormous, dramatic event, but the slaughter of the innocent that goes on in India's roads, fields, mines, and factories is constant. There are little 'Bhopals' many times over every year—say in the harvest season when new kinds of machinery are brought into the fields to be used alongside labourers who are completely unfamiliar with such machinery. In case of injury, there may be a payment on the spot. But ordinarily there is no

¹¹⁶Cassels, *supra* note 1, at 22.

expectation of any legal remedy. . . . Disasters large and small in India typically have no legal consequences.¹¹⁷

Put more succinctly, an industrial disaster in the developing world does not usually give rise to compensatory litigation.¹¹⁸

For various reasons, however, Bhopal represented a marked departure from the traditional attitudes towards acquiring a legal remedy. Indeed, "[t]here was an immediate sense that compensation should and could be paid. For many, it was important that compensation be calculated at American levels."¹¹⁹ As was previously mentioned, the appearance of the U.S. lawyers on the scene quickly made the victims aware of what rights and remedies were open to them.¹²⁰ Furthermore, the fact that the antagonist in the disaster was a large U.S. transnational incited outrage and horror, both in India, which suddenly seemed indignant with a sense of colonial exploitation,¹²¹ and in the United States, where such behavior would not be tolerated without a massive litigation battle.¹²²

Learning from the Bhopal experience, there is no reason why any future industrial disaster elsewhere in the world involving a transnational would not provoke a similar shift in cultural expectations, producing an expectation of damages at relatively high Western levels. The method that the victims may choose to pursue compensation, however, given the valuable lessons learned from the torturous Bhopal litigation, may vary.

b. *The Legal System*

Perhaps a more difficult subject to be addressed is the adequacy of the host state's legal infrastructure to cope with efforts to settle the dispute, whether by adjudication or other means. In Bhopal, this was a core issue, particularly during the adjudication of the *forum non conveniens* motion in the United States.¹²³ In other words, could the legal system of the host state be applied to the dispute? Could the law of the host state be used to settle the dispute? Even if

¹¹⁷ Galanter, *supra* note 35, at 280.

¹¹⁸ Rajeev Dhavan, *For Whom? And For What? Reflections on the Legal Aftermath of Bhopal*, 20 TEX. INT'L L.J. 295, 295 (1985).

¹¹⁹ Galanter, *supra* note 35, at 280-81.

¹²⁰ R.S. Khare, *The Bhopal Puzzle: A Failure of Modern Technology Law and Values*, 41 INT'L Soc. Sci. J. 273, 276 (1989).

¹²¹ Galanter, *supra* note 35, at 281.

¹²² See Cassels, *supra* note 1, at 9-10.

¹²³ *Id.* at 16.

adjudication is not the dispute settlement method of choice, could the legal infrastructure adequately implement or enforce the settlement?

In India's case, the legal system is slow, inefficient, and often ineffective. Given the standard multiple-year delays in acquiring a remedy in a civil action, interlocutory relief is usually the final disposition of the case.¹²⁴ Depending on one's perspective, compensation under Indian law is likely to be inadequate, as "[t]he Indian law of torts follows the British, erring wherever on the side of meanness."¹²⁵ Nevertheless, with respect to the Bhopal incident, it was still shocking to see how readily leading Indian jurists acquiesced to the displacement of the legal action to the United States at the outset.¹²⁶

A more serious factor must be taken into account however, when considering the legal administrative regime in the host state: specifically, the civil status of the victims. Particularly in developing countries, where social welfare schemes are lacking, it is very difficult to determine who exactly are the victims. This was especially the case in Bhopal:

The problem of identifying the victims is deep-seated. India is a society in which about the top three percent of earners pay income tax. It is not an orderly, highly regulated society. . . . Few Indians have drivers licenses. There is no social security system or national health system. It is a society in which many people can go through life without leaving any definitive official record of their identity.¹²⁷

Such difficult conditions not only make the ascertainment of victims difficult, but also render the distribution of the settlement more problematic.

2. Political and Economic Factors

When addressing the issue of an international dispute settlement in the case of an environmental disaster, a pervasive factor is whether the risks of doing business in the host state will be affected. In other words, how much will a long or inconvenient dispute settlement

¹²⁴ Dhavan, *supra* note 118, at 297.

¹²⁵ *Id.* at 301.

¹²⁶ Galanter, *supra* note 35, at 281.

¹²⁷ *Id.* at 282.

process, possibly accompanied by a relatively high award, provide a disincentive to a transnational corporation to invest in that particular state? In the case of labour markets, a transnational business shops for the most conducive forum for its operations, particularly when its operations involve hazardous technology and/or hazardous substances. Maintaining the "business-friendly" atmosphere of the country is therefore a major consideration.

Dispute settlement aside, a developing country can also be inclined to disregard the protection of the environment in its search for foreign investment. As a result, the state may not provide adequate environmental regulation to protect its interests and its citizens.¹²⁸ In India, the dilemma is particularly acute. It is deeply in debt to the International Monetary Fund, and the Soviet economy no longer supports it.¹²⁹ As a consequence, India is trying to sell itself to the business élite.¹³⁰

In the future, India will continue to look for a considerable amount of high technology foreign investment. It has to decide whether it should allow this investment to take place on the basis of low environmental safeguards with the understanding that it will ultimately be the poor who will pay the price of the unregulated progress. When environmental disasters occur, the victims of these disasters, perhaps led by their foreign lawyers, may be inclined to go forum shopping in their desperate bids for compensatory justice. It is quite clear that the price of a life or suffering varies from jurisdiction to jurisdiction.¹³¹

To effectively counter India's dilemma, and in effect, the dilemma of the entire developing world, any dispute settlement mechanism should be accompanied, to some extent, by international environmental standards. If these standards are applied uniformly and comprehensively, neither the transnational corporation nor the developing country need consider whether a more "business-friendly"¹³²

¹²⁸ Handl & Lutz, *supra* note 54, at 355 (pointing out that there is a prevalence of differing risk sensitivities among nations).

¹²⁹ *India: Trade Without the Flag*, *ECONOMIST*, Feb. 8, 1992, at 34.

¹³⁰ *Id.* In fact, some of India's newest investors in the past year include General Motors, General Electric, IBM, Coca-Cola, Kelloggs, BMW, and Ford. Among some of the industries represented are: telecommunications, petrochemicals, power generation, and cellular telephones. *Id.*

¹³¹ Dhavan, *supra* note 118, at 306.

¹³² And thus possibly, "environmentally-unfriendly."

state is available. By comforting both parties in this way, the host state will be able to protect its citizens better. Furthermore, the use of international environmental standards will help alleviate the arguably unfair loss of employment in the developed world when a transnational corporation sets up operations in a developing country in search of higher profits.¹³³

Unfortunately, even uniformly-applied international standards cannot fully assuage the concerns of a developing country. First, the hazardous substances and technologies that the developing country imports and sometimes even manufactures are crucial to the industrial and agricultural well-being of that country.¹³⁴ Second, although strict regulation may create a more even playing field with respect to attracting foreign investment, it does nothing to encourage the development of domestic industry which may be unable to afford the luxuries of environmental safeguards.¹³⁵ Thus, any notion of international environmental policies when considering methods of dispute settlement has a downside because it could ultimately exacerbate ideological differences concerning demands for a new international economic order.¹³⁶

3. Enforcement of the Settlement

The final consideration, which most acutely highlights the effect that the international factor has on this type of dispute, is how the remedy of the selected mechanism will be enforced. Typically, if the host government is advocating on behalf of the victims as it did in Bhopal, it would have to go to the court in the jurisdiction of the transnational to enforce the award after settlement. This type of outcome, of course, assumes that the transnational corporation refuses to pay voluntarily the ordered compensation.

Enforcement is clearly the linchpin in the effectiveness of any dispute settlement mechanism. In Bhopal, “[h]ad an Indian court found Union Carbide liable and forced a huge settlement, the company, in the interests of the shareholders, would have refused to pay up—even though it had earlier agreed to abide by Indian law.”¹³⁷ As discussed earlier, UCC could have a strong case in the U.S.

¹³³ Clarence J. Dias, *International Cooperation for Survival: Lessons from Bhopal*, 15 CAN. COUNCIL INT’L L. 152, 172 (1986).

¹³⁴ Handl & Lutz, *supra* note 54, at 352.

¹³⁵ Bilder, *supra* note 32, at 147.

¹³⁶ *Ghosts*, *supra* note 113, at 70.

¹³⁷ *Id.*

courts by arguing that due process was not respected when the Indian government represented the victims.¹³⁸

For UCC, or any transnational, the issue of enforcement can be a powerful bargaining chip when attempting to reach an advantageous settlement. India, or any developing country, cannot necessarily expect that a seizure of the company's assets within its borders will easily satisfy the corporation's debt, or provide any substantial threat that will force the transnational to pay up.¹³⁹ Likewise, the prospect of an enforcement battle in the courts of another jurisdiction is a sure recipe for several more years of delay in getting relief to the victims.¹⁴⁰

To preempt such a fatal result, quick and certain enforcement must be realized. But as will become apparent in the attempt to evaluate the more effective methods of enforcing a settlement involving parties from two different states, problems of international law necessarily arise. Use of the law that "governs relations between . . . states"¹⁴¹ in a situation involving a private party, namely the transnational corporation, begs the question: who are the appropriate parties to such a dispute?

B. *The Role of International Law and the Determination of the Actors*

1. National Law Revisited

At this point, discussion of a dispute resolution in an environmental disaster context can go in two directions. The first is to suggest that any dispute settlement mechanism involving an environmental disaster should stay within the realm of national law. Such an approach, however, may result in a solution similar to the one attempted in Bhopal where the national courts of the United States and India referred to private international law and domestic rules of procedural and substantive law. As with Bhopal, however, this type of "domestic" solution can be a failure.

Notwithstanding Bhopal, there may be ways of providing an adequate domestic legal regime with which to handle international

¹³⁸ *But see supra* note 98 and accompanying text (regarding *Dames & Moore v. Regan*, 453 U.S. 654 (1981)).

¹³⁹ *Ghosts, supra* note 113. Nor can a country expect to force corporate directors to appear to face criminal charges, as the Indian authorities have attempted to do. *Union Carbide's Ex-Chairman is Target of Arrest Warrant in India*, WALL ST. J., Mar. 30, 1992, at B15.

¹⁴⁰ *Ghosts, supra* note 113.

¹⁴¹ *The Steamship Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 18.

disputes. This would include having the host state adopt and implement comprehensive national legislation that applies to existing and future industries within the state.¹⁴² Such legislation could remedy problems like those in Bhopal, such as jurisdiction, consolidation of claims, interim relief, liability, procedure, and distribution of compensation.¹⁴³ Nevertheless, there are several problems with such a regime.

The most obvious problem is enforcement. The transnational corporation would still be operating through a subsidiary. As previously discussed, this creates difficulties.¹⁴⁴ First, there may be difficulty in securing full payment because it is likely that only the parent corporation, headquartered in a developed country, will have sufficient resources to pay the award.¹⁴⁵ Moreover, the existence of local government regulation can actually work against the host state.¹⁴⁶ A defendant corporation could conceivably avoid legal liability by showing that even though the host state had regulated hazardous substances and technology, the state itself failed to police adequately the rules it imposed.¹⁴⁷ Thus, the disaster could be attributed to the fault of the subsidiary which, with respect to operations, could be completely autonomous from the parent.¹⁴⁸ Contributory fault on the part of the state for failure to enforce its own laws could additionally be asserted.¹⁴⁹ In this way, the parent corporation could escape liability.¹⁵⁰

Even if the state's legislation makes provision for enforcement through some type of insurance fund, similar to a U.S.-type "Superfund,"¹⁵¹ where contributions are made regularly by the industry, the

¹⁴² Covell, *supra* note 5, at 304-05.

¹⁴³ *Id.*

¹⁴⁴ *Ghosts, supra* note 113.

¹⁴⁵ *See generally* Cassels, *supra* note 1, at 26-36.

¹⁴⁶ *See generally id.*

¹⁴⁷ *See generally id.*

¹⁴⁸ *See generally id.*

¹⁴⁹ *See generally id.*

¹⁵⁰ *Id.* at 20.

¹⁵¹ The "Superfund" is a domestic \$1.6 billion hazardous substances spill and waste disposal site cleanup program. Funds come from taxes on crude oil and chemical feedstock and by general revenues. This regime allows the federal government to respond immediately to a hazardous spill or site by using the fund, and then later shift the cost of the cleanup to the responsible parties. Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261; *see also* RICHARD H. GASKINS, ENVIRONMENTAL ACCIDENTS 230 (1988).

state could encounter the contention that its obsession with regulation of business is tantamount to nationalization.¹⁵² A developing country must be very sensitive to the degree with which it regulates business if it wants to attract foreign capital.¹⁵³

Because of these two very important considerations—enforcement and the factors involved in doing business in the developing world—a national regime of dispute resolution is arguably still inadequate. This leads to the second manner of approaching a dispute resolution: international law.

2. International Law

The previous critique of applying national law begs the question: why was international law not considered initially in Bhopal? The answer lies in the nature of the dispute. International environmental law is still in an initial stage of development. At this point in time, judicial dispute resolution in this context is not adequately equipped to deal with the transfer and effects of hazardous technology.¹⁵⁴ Indeed, the lack of international environmental norms and institutions is precisely why parties have had to rely on national law and courts.¹⁵⁵ Bhopal effectively highlights the weaknesses of a national law solution, more than other incidents, such as the one in Seveso, Italy.¹⁵⁶ In Seveso, the transnational corporation accepted responsibility at an early stage, thus making the level of compensation the issue in dispute.¹⁵⁷ In Bhopal, however, given the considerably higher level of damage, there was an understandable reticence on the part of UCC to accept liability, thus making UCC's fault the focus of the dispute. This factor made dispute settlement considerably more contentious and consequently more protracted.

Accordingly, international law must play a part in dispute settlements of environmental disasters—be it through treaties, principles, or institutions. Thus, one must understand the idiosyncrasies of

¹⁵² See Covell, *supra* note 5, at 304.

¹⁵³ *Id.*

¹⁵⁴ See Milton R. Wessel, *Alternative Dispute Resolution for the Socioscientific Dispute*, 1 J.L. & TECH. 1, 3-6 (1986).

¹⁵⁵ *Id.* at 18.

¹⁵⁶ This accident involved an explosion in a Hoffman-Laroche (a Swiss company) chemical plant. Dioxin, which was released into the air, caused skin disease among the inhabitants of the region, damage to produce and livestock, and economic disruption. *Id.* at 3-5.

¹⁵⁷ *Id.*

international law before examining the types of mechanisms available. Focus is given on the role a transnational corporation plays in international law. Simply put, the problem is as follows:

Because international law lacks a central lawmaking authority and a comprehensive enforcement mechanism, its effectiveness depends upon the willingness of its participants to cooperate in developing laws and to comply with those laws. The participants, with limited exceptions, are states. A corporation, as a private actor, is not a subject of international law.¹⁵⁸

Although corporations are not international legal persons in the technical sense, a transnational corporation is a significant actor on the international scene.¹⁵⁹ Specifically, there are two ways that a corporation can be involved in a dispute involving international law: indirectly through the doctrine of state responsibility,¹⁶⁰ and directly through the use of voluntary codes of conduct.¹⁶¹

a. *State Responsibility: Indirect Transnational Participation*

i. A Traditional Understanding

Essentially, the doctrine of state responsibility defines one state's right of redress against another state that has breached an international law.¹⁶² Under this doctrine, the United States would be subrogated to UCC's place against the Indian government because UCC is not a subject under international law. State responsibility, however, does not extend to the acts or omissions of business corporations or state-owned enterprises, if they are not exercising de facto power and authority of the state.¹⁶³ As a result, it is technically impossible for the United States to be held liable for the acts or omissions of UCC.

¹⁵⁸ Douglas T. Hamilton, *Regulation of Corporations under International Environmental Law*, reprinted in the Proceedings of the 1989 Conference of the Canadian Council on International Law, *Preserving the Global Environment* [unpublished version, also available in 93 CAN. COUNCIL INT'L L. 3 (1989)].

¹⁵⁹ Stephen C. McCaffrey, *The Work of the International Law Commission Relating to Trans-frontier Environmental Harm*, 20 N.Y.U. J. INT'L L. & POL. 715, 728 (1988).

¹⁶⁰ See *infra* notes 162-75 and accompanying text.

¹⁶¹ See *infra* notes 176-78.

¹⁶² Hamilton, *supra* note 158, at 4.

¹⁶³ *Id.*

ii. A New Theory of State Responsibility

Nevertheless, some commentators have suggested that the corporation's home state can be held liable under international law if the dispute involves environmental issues.¹⁶⁴ According to the *Barcelona Traction, Light and Power Co. Case*, a corporation adopts the nationality of the state in which it is incorporated and in whose territory its head office is located.¹⁶⁵ The issue then arises whether the state is responsible for regulating the foreign activities and conduct of the transnational enterprise incorporated within its jurisdiction.¹⁶⁶ Those who espouse a theory of state responsibility analogize to a transfrontier pollution situation:¹⁶⁷

[A] state in which a multinational corporation (MNC) is incorporated or headquartered or from which hazardous technology is exported . . . should be liable for injurious consequences in another state . . . caused by the operation there of a plant by a subsidiary of the MNC, or by the imported technology. In this scenario, the "transfrontier" element would consist not of pollution crossing a border, but of the export of hazardous substances or technology.¹⁶⁸

Conversely, doctrinal objections to this theory are based in part on the "paternalistic overtones" this approach would have in a developing country.¹⁶⁹ Further, the developing country ultimately could be harmed, as the exporting state discourages transnational corporations from exporting technology to, and investing in, a developing country.¹⁷⁰ Additionally, developing countries generally have less bargaining power and might be subject to unfavorable liability provisions in bilateral or multilateral investment treaties designed by the capital and technology exporting states.¹⁷¹

The theory, however, does have its merits. Since the United States exports hazardous products and technologies to developing countries, and its transnational corporations engage in practices abroad

¹⁶⁴ McCaffrey, *supra* note 159, at 723.

¹⁶⁵ [1970] I.C.J. Rep. 3.

¹⁶⁶ Hamilton, *supra* note 158, at 12.

¹⁶⁷ *Id.* at 14; Handl, *supra* note 17, at 625; Dias, *supra* note 133, at 175.

¹⁶⁸ Hamilton, *supra* note 158, at 14.

¹⁶⁹ McCaffrey, *supra* note 159, at 724.

¹⁷⁰ *Id.* at 725.

¹⁷¹ See Jay Lawrence Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L.J. 321, 325-26 (1985).

that would not be tolerated in this country, the United States should play a supervisory role.¹⁷² Extraterritorial legislation has been used by countries such as the United States when it is convenient.¹⁷³ Similarly, the European Community Parliament has initiated procedures to ensure that European firms maintain comparable levels of safety in their subsidiaries abroad.¹⁷⁴

Despite the merits of this theory, the doctrine of state responsibility does not conform to the characteristics of a good settlement. An international claim of this type concerning a mass environmental disaster would probably be a long and expensive process, involving diplomatic representation and culminating years later in arbitration or international adjudication.¹⁷⁵

Because such a dispute between two states would not lend itself to a quick resolution, only solutions between private parties or between a state and a private party will be considered in evaluating alternative dispute resolution techniques. Nonetheless, the indirect participation of both states is necessary when the creation of international treaties or institutions is required to deal with the dispute.

b. *International Codes of Conduct: Direct Transnational Participation*

As is evident, special international rules and regulations are required to deal with international disputes involving environmental disasters. The premise of such an assertion is: "[T]ransnational actors who are in a position to exercise effective control over the transboundary transfer must be deemed to owe a commensurate international obligation to prevent, mitigate and possibly even to repair harm which results from a transfer of hazardous substances or technologies."¹⁷⁶ Using international law, however, is problematic

¹⁷² See Cassels, *supra* note 1, at 19.

¹⁷³ *Id.*

¹⁷⁴ See Hamilton, *supra* note 158, at 15 (citing 28 J.J. Eur. Comm. (no. C12) 84 (1985)).

¹⁷⁵ *Id.* at 11. Principle 22 of the *Stockholm Declaration* was one form of response to these inadequacies:

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction of control of such states to areas beyond their jurisdiction.

United Nations Conference on the Human Environment (Stockholm Conference), U.N. Doc. A/CN.48/14 (1972).

¹⁷⁶ Handl, *supra* note 17, at 612.

because a corporation is not subject to international law. As a result, there can be no effective enforcement of these rules. In the end, international law amounts to "soft" regulations, that is, non-binding guidelines and voluntary codes of conduct promulgated by international organizations.¹⁷⁷ To give teeth to these voluntary guidelines, it is thus necessary to combine them with principles of state responsibility.¹⁷⁸

III. CREATIVE DISPUTE SETTLEMENT MECHANISMS

A. *Parameters of the Discussion*

International disputes involving environmental disasters would be best resolved through the application of international law. Of course, rather than focusing on ex post facto dispute settlements, efforts should ideally concentrate on methods of dispute avoidance.¹⁷⁹ Unfortunately, given the undeveloped state of international environmental law, this Article will only address dispute settlement techniques. Further, given the quantum of damages at stake, the

¹⁷⁷ Cassels, *supra* note 1, at 6. Examples of such codes include the United Nations Draft Code of Conduct on Transnational Corporations, 23 I.L.M. 602 (1984) (which resorts to the judicial process) and the OECD Guidelines for Multinational Enterprises, 15 I.L.M. 967 (1976). The Clarification of Environmental Concerns in OECD Guidelines for Multinational Enterprises states with regards to Paragraphs 1 and 2 of the General Policies Chapter of the Guidelines that the Committee on International Investment and Multinational Enterprises (CIME),

believes that the clear intent of this provision is that enterprises, whether they are domestic or multinational, should, within the framework of laws, regulations and administrative practices in each of the countries in which they operate, take due account of the need to protect the environment and to avoid creating environmentally-related health problems.

25 I.L.M. 494 (1986). An additional example is I.L.O Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 423 (1978).

¹⁷⁸ Note also that corporate policies of transnationals are beginning to reflect a change in focus in that they are more aware of hazards and methods to prevent them. See generally Wessel, *supra* note 154.

A good representation of this new attitude is the *Valdez Principles* [copy available from the author]. This is a model shareholder meeting resolution that was drawn up by a range of institutional investors and environmentalists in 1989, and is applicable to all types of commercial corporations. The resolution deals with the protection of the biosphere, sustainable use of natural resources, and other topics. Of particular relevance is Principle 7 which reads: "[to] [t]ake responsibility for harm we cause to the environment by making every effort to fully restore the environment and compensate persons adversely affected." See generally *id.*

¹⁷⁹ Such as domestic and international rules pertaining to monitoring, assessment and notice. See, e.g., Bilder, *supra* note 32, at 159-60; Cooper, *supra* note 13, at 285; Stein, *supra* note 18, at 285.

nature of the identities of the principal players, and the difficulty with the enforcement of a possibly unpalatable award from the perspective of the transnational corporation, dispute settlement methods such as negotiation, mediation/conciliation, and conventional arbitration as they are traditionally perceived will not be directly discussed.¹⁸⁰

Instead, focus will be on the initial participation of states in a process that ironically excludes their immediate presence. The three suggested approaches to resolving a dispute over an environmental disaster share the following features. First, states are involved in implementing the suggested dispute settlement mechanism. Through international treaties, two or more states are to agree to the establishment of a regime whereby the victims' claims can be determined and administered, and the conduct of the transnational corporation can be assessed. Second, after establishing a regime, the states themselves are to enforce the settlement.

The suggested mechanisms differ with respect to the degree of participation of the victims' state during the settlement of the dispute. Ideally, the mechanism would limit the participation of the state espousing the claims of the victims. As previously discussed, the state's "cross-cutting interests and competing responsibilities,"¹⁸¹ as well as its own possible liability for having failed to regulate the perpetrator of the disaster, undermine the state's objectivity.

B. *The Mechanisms*

1. International Institutional Arbitration: ICSID

The International Centre for Settlement of Investment Disputes (ICSID), an international institution, allows for the settlement of

¹⁸⁰As we saw in the case of Bhopal, there was far too much at stake, from UCC's refusal to admit fault where such a large amount of damage was created, to the politicization of the process. Given these circumstances, with the exception of protracted negotiation hidden behind the cloud of adjudication that eventually led to the Bhopal settlement, it is doubtful whether any of these traditional methods would properly address the priority of quick resolution.

If the reader wishes to explore these alternatives more generally, however, the following may be referred to: for negotiation, Stein, *supra* note 18, at 293 and J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 9, 17, 21 (1991); for mediation, Cooper, *supra* note 13, at 285, Stein, *supra* note 18, at 298 and MERRILLS, *supra*, at 3; for conciliation, MERRILLS, *supra*, at 59-67; for arbitration, CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 5-58 (1987) and MERRILLS, *supra*, at 80-106.

¹⁸¹Galanter, *supra* note 35, at 293. For example, one such cross-cutting interest is the state's responsibility for the welfare of its citizens versus the state's responsibility to ensure the economic viability of the country, possibly by encouraging investment.

disputes between a foreign private investor and the state.¹⁸² It is an institution that was created through an international convention,¹⁸³ and has been proven to be one of the most popular multilateral arbitration regimes in terms of the number of ratifications received.¹⁸⁴ ICSID's mandate involves disputes "arising directly out of an investment."¹⁸⁵

The greatest advantage of ICSID is that it initially removes jurisdiction of the dispute from municipal courts, but later employs the courts to enforce the decision.¹⁸⁶ Use of this mechanism requires the contracting states to enforce the decision of the Centre.¹⁸⁷ The award is to be recognized by the parties to the Convention as if it were the final judgment of a court in that state.¹⁸⁸ Failure to enforce the decision would be a violation of an international treaty, and thus would allow direct recourse to international law remedies.¹⁸⁹

Using ICSID would require the host state to agree with the transnational corporation that all investment disputes would be referred to ICSID at the outset of the transnational's investment in the country.¹⁹⁰ ICSID is only available to contracting states and investors having the nationality of a contracting state.¹⁹¹

Although ICSID has some attractive qualities, such as more certain enforcement of the award and lower costs and more efficiency compared to litigation,¹⁹² its mandate is not suitably tailored to the context of an industrial disaster. First, it is uncertain whether addressing compensation and reparation issues in the context of an accident is indeed an "investment dispute."¹⁹³ Second, because the

¹⁸² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug. 25, 1965, 4 I.L.M. 524 (1965) [hereinafter ICSID Convention].

¹⁸³ STEPHEN J. TOOPE, *MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS* 253 (1990).

¹⁸⁴ *Id.*

¹⁸⁵ ICSID Convention, *supra* note 182, art. 25(1).

¹⁸⁶ *Id.*

¹⁸⁷ And contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a municipal court cannot refuse to enforce the award on grounds of public policy, thus avoiding any discussion of the validity of the *parens patriae* power by India in the Bhopal incident. *See* June 10, 1958, 7 I.L.M. 1046 (entered into force June 7, 1959).

¹⁸⁸ ICSID Convention, *supra* note 182, art. 54(1).

¹⁸⁹ Charles Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA. J. INT'L & COMP. L., 343, 360 (1974).

¹⁹⁰ ICSID Convention, *supra* note 182, art. 25(1).

¹⁹¹ *Id.* As of June 1989, 98 states have signed the Convention, and 91 have ratified. TOOPE, *supra* note 183, at 253.

¹⁹² TOOPE, *supra* note 183, at 256. It takes an average of two and a half to three years to complete an ICSID arbitration. *Id.*

¹⁹³ *See* ICSID Convention, *supra* note 182, art. 25(1).

consent of the parties to refer to ICSID is required at the outset of the investment, disputes involving other transnational corporations already established within the host state, who did not enter into such agreements, are not included. Third, the process may still be too slow.¹⁹⁴ Fourth, it remains questionable how well ICSID, a "Western" institution, using whatever chosen substantive law, would respond to the expectations of the victims with regards to the amount of the award.

Finally, the greatest disadvantage in using an international institutional arbitration process is that, besides the transnational corporation, the host state is the only capable party to the dispute. Consequently, the host state must espouse the individual claims of the victims. Thus far, the assumption has been that an international dispute involving an environmental disaster is a mixed one: the parties being the transnational corporation and the state. Technically, however, it is principally a dispute between private parties: the transnational corporation and the victims.¹⁹⁵ As has been emphasized, however, limiting the participation of the host state in the dispute is very desirable. Given its inherent parameters, it does not seem that a mixed international institutional arbitration is the best way to settle a dispute.

2. A Claims Settlement Tribunal: The Iran-U.S. Analogy

A second possible mechanism employs the Claims Tribunal regime that was used in the settlement of disputes between Iran and the United States (and its nationals) in the early 1980s. Through this method, the victims' state would agree with the transnational corporation's home state that the amount of every claim be determined expeditiously by a claims settlement tribunal.¹⁹⁶ The cost would be equally shared, and reflect not only the countries' interest in the resolution of the dispute, but would also result in a cost savings by avoiding the use of their respective judicial systems as a forum.¹⁹⁷ In addition, the process would occur in the host state, thus making it more accessible to the victims.

Similar to the Iran-U.S. Claims Tribunal, an equal number of

¹⁹⁴ Two and a half to three years is hardly a desirable amount of time in which to compensate the victims of an environmental disaster. *See id.*

¹⁹⁵ Although the state may have a claim in damages due to the amount of resources it expended in treating the victims and cleaning up the site.

¹⁹⁶ *See MacGraw, supra* note 19, at 846.

¹⁹⁷ *Id.*

tribunal members would be appointed by each state.¹⁹⁸ Those members would then appoint a third group of members.¹⁹⁹ Of this group, one would be the President of the Tribunal.²⁰⁰

Unlike ICSID, a claims settlement tribunal has the flexibility to allow both parties to be private. The home state of the transnational corporation and the state of the victims would create the tribunal through the enabling instrument of a treaty. The parties that would appear before the members of the tribunal, however, would be the transnational corporation and the victims.²⁰¹

The claims settlement tribunal method responds well to the priorities of the settlement of a dispute concerning an environmental disaster. Depending on the time in which the tribunal is established, it can be relatively efficient. By having both states represented by members of the tribunal, considerations such as legal and cultural diversity, as well as economic concerns, are not disregarded. It is also relatively accessible to the victims if it is situated in the state where the disaster occurred and if the victims are encouraged to bring claims before it. Through the accord establishing the tribunal, all existing or future legal proceedings can be terminated.²⁰²

Enforcement of the awards, however, may be difficult. Once the awards are determined, the transnational corporation can object to paying them.²⁰³ Absent the participation of any state espousing the victims' claims, there are no obvious grounds for a conflict of interest, or any abuse of the *parens patriae* power to deter enforcement in the municipal courts of the transnational's home state.²⁰⁴ Depending on the facts at issue, the corporation can still object to enforcement based on public policy grounds or lack of jurisdiction.²⁰⁵ Re-

¹⁹⁸ See MERRILLS, *supra* note 180, at 84. In the Iran-U.S. instance, three members were appointed by each state. The six members then got together and appointed another three members who were not from either state. *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ The victims could be represented by a privately organized class action, or could appear individually. Alternatively, the government could involve itself indirectly by agreeing to establish and fund a public advocacy group that would represent the victims, without having the government directly participate in the proceedings, thus avoiding any conflict of interest problems.

²⁰² In the Iran-U.S. situation, the U.S. nationals' agreement to drop all claims that were filed in the courts represented the *quid pro quo* for the creation of the Security Account. See TOOPE, *supra* note 183, at 361.

²⁰³ *Id.* at 280.

²⁰⁴ *Id.* at 362.

²⁰⁵ *Id.*

ardless of its merits, any opposition to enforcement would ultimately delay the distribution of the compensation to the victims.

To address these potential enforcement problems, the claims settlement tribunal could use, as did the Iran-U.S. tribunal, one of the most certain means of enforcement: a security account.²⁰⁶ This device would provide for the payment by the transnational corporation of a lump sum into an interest-bearing account.²⁰⁷ The money would "secure the payment of, and pay claims against . . . [the transnational] . . . in accordance with the claims settlement agreement."²⁰⁸ A minimum balance would have to be maintained, with reimbursements made periodically in order to maintain that balance. As was remarked in the Iran-U.S. context:

[n]ot only does it provide remarkable ease of enforcement, its existence undoubtedly encouraged many claimants to come to the Tribunal in the first place. In this regard, it is important to recall that, although there were only a few hundred suits filed in US courts against Iran when the Claims Settlement was being negotiated, by the time the deadline for Tribunal claims passed, no less than 3,836 cases had been lodged, only ninety of which were state-to-state claims or interpretational cases.²⁰⁹

Yet, despite the attractiveness of the concept of a security account, it has serious deficiencies when applied to a dispute in which a transnational corporation is the antagonist. First, by paying the lump sum in advance, the transnational corporation in effect could be making an admission of guilt, a position a corporation is unlikely to assume. Second, tying up a large sum of money for a long period of time in the security account is not particularly attractive to a corporation, as it affects the transnational's financial viability. Therefore, based on the potential enforcement problems that a claims settlement tribunal might have, it might not address all possible concerns when attempting to resolve a dispute involving an industrial disaster.

3. An International Institutional Body

A third approach to dispute resolution of environmental disasters involves the use of a multilateral treaty, which creates a regime of strict liability, and is accompanied by an international insurance

²⁰⁶ *Id.* at 363.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 280.

²⁰⁹ *Id.* at 281.

fund. This differs from the first two approaches in that it institutes a process of avoiding disputes and resolves problems that arise *before* environmental damage occurs. Inspiration for this mechanism comes from two international oil pollution treaties: the International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention)²¹⁰ and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (International Fund Convention).²¹¹

Applying the Civil Liability Convention to the case at hand, the transnational corporation is liable once it is proven that the environmental disaster was a product of the transnational's operations in the host state.²¹² Liability would only be avoided if *force majeure* could be proven.²¹³ Also, the transnational corporation could limit its liability by depositing a sum representing its maximum liability into a fund with the court of one of the contracting states. The fund would then be distributed among the claimants.²¹⁴ The benefits of making a prompt contribution to the fund would be that once the fund was created, no one else could make a claim against the transnational's other assets.²¹⁵ Finally, the regime would also provide for prescription.²¹⁶

The drawback of such a mechanism is that compensation to the victims is limited if liability is limited—a prospect to be avoided. In response to this prospect, the International Fund Convention was established in the oil pollution context for victims unable to obtain full and adequate compensation from the civil liability method.²¹⁷ Contributions to the fund would be made by transnational corporations involved in the international trade of hazardous products and technologies.²¹⁸ The undercompensated victim could then bring an action against the fund before the appropriate jurisdiction.

²¹⁰ 9 I.L.M. 45 (1970) [hereinafter Civil Liability Convention].

²¹¹ 11 I.L.M. 284 (1972) [hereinafter Compensation Fund Convention].

²¹² Civil Liability Convention, *supra* note 210, art. II. This notion of strict liability is also central to the Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, art. 3, 956 U.N.T.S. 251. Article 3 establishes that the operator of a nuclear installation shall be liable upon the occurrence of a nuclear accident. *Id.* art. 3. To compensate for this strict liability, however, a maximum liability of a certain amount is established. *Id.* art. 7.

²¹³ Convention on Third Party Liability in the Field of Nuclear Energy, *supra* note 212, art. 3.

²¹⁴ Civil Liability Convention, *supra* note 210, art. V.

²¹⁵ *Id.* art. VI.

²¹⁶ In the oil pollution context, the claimant has, depending on the circumstances, three to six years to register a claim.

²¹⁷ Compensation Fund Convention, *supra* note 211, arts. 2, 4.

²¹⁸ *Id.* art. 10. Contributions would be made by any person who had received a certain amount of oil within a calendar year. *Id.*

There are several advantages to such a mechanism. First, litigation on the issue of fault is avoided. Although adjudication in the national courts is used, it solely determines the extent of the claim of a particular victim, and subsequently distributes the award. As a result, compensation is paid almost immediately. Second, no states are directly involved, thus reducing the amount of politicization that could occur in such a situation. Third, as it is a multilateral regime, no transnational corporation could escape it by forum shopping, unless it could find a state that was not party to the treaty. Fourth, as the national courts of the contracting state are involved, the distribution of the remedy may be made in accordance with the legal culture of the place of the accident. Fifth, because this regime would be the compulsory jurisdiction for environmental disaster disputes, all outstanding claims could be resolved. Finally, because the award in a developing country may be less than the award given in a developed country, some fear that this mechanism fails to provide guidance for the transnational's conduct. This fear could be alleviated, however, by the knowledge that the mere existence of a multilateral treaty addressing the concern could affect the operations of a transnational.

CONCLUSION

On December 2, 1984, a large quantity of methyl isocyanate gas escaped from a pesticide plant in Bhopal, India, resulting in one of the worst human-made environmental disasters. Thousands of people died and hundreds of thousands more were injured. Although the direct physical injuries were horrific in themselves, human suffering was greatly exacerbated by the absolute inadequacies of the dispute settlement process in the years to follow. Because an environmental disaster involving a transnational corporation's activity in another country is likely to happen again, it is necessary to devise a dispute resolution technique that attempts to contain the catastrophe to the immediate effects of the incident on the victims. In the absence of such a technique, the effects of the incident may be amplified to the extent that the effects of the ensuing dispute become more tragic than the event itself.

Attempting to resolve an international dispute involving an environmental disaster is a very delicate and intricate undertaking. This is due to two things: the nature of the disaster, and the nature of the parties involved in the dispute. In trying to balance the priorities that should be addressed in this type of dispute against the consid-

erations that must necessarily be made, it is difficult to derive the optimum dispute settlement mechanism.

Even with the solution this article proposes—a strict liability insurance mechanism that initially requires states to establish it, with subsequent exclusive participation of the transnational corporation and the victims—there are still some outstanding concerns. For although adjudication was shown to be a failure in Bhopal, many believe that litigation between parties will always have merits that no other mechanism could possess.

Besides avoiding institutionalizing the problem, the factual complexities of this type of dispute are still not properly addressed in any of the suggested mechanisms. For example, with the strict liability insurance fund, it could be discovered ten years after compensation is paid out that the long-term effects of the accident are very grave and that the initial compensation was not sufficient. On this basis, some sort of fact-finding regime is required as well. Additionally, compulsory jurisdiction immediately precludes any alternatives, thus limiting creativity in attempting to resolve the dispute more effectively.

Nevertheless, regardless of the merits of each form of dispute settlement, it is crucial that parties have a choice of dispute settlement mechanisms. The disputing parties, therefore, could select a dispute mechanism appropriate to their conflict, and they would realize that the pursuit of a remedy in a national court may not always be the best solution. As the Bhopal experience demonstrated, the welfare of the victims depends on the efficacy and comprehensiveness of the process selected—and it is the victims' plight that must come first.

An environmental disaster involving a transnational corporation's activity in another country will happen again. Indeed, although this article focused attention on states such as India, disasters of this nature may occur in developed countries. The question remains whether to contain the catastrophe to the immediate effects of the incident on the victims or to risk amplifying it to the extent that the effects of the ensuing dispute become more tragic than the event itself.