

RESEARCH PAPER

Growing industrialization and our damaged planet The extraterritorial application of developed countries' domestic environmental laws to transnational corporations abroad

Tetsuya Morimoto*

Introduction

Trade liberalization and worldwide economic integration have brought not only an increase in wealth but also in transnational threats. Environmental devastation caused by commercial activities of transnational corporations (TNCs) is one of such threats. While almost all countries have environmental laws designed to protect air, water, land, and flora and fauna from pollution, the rules differ per country. In particular, there is a significant difference between the rules of the developed countries in which most of the TNCs are headquartered and the rules of developing countries where a number of TNCs are engaged in pollution-intensive industries. Generally, the rules of developed countries are much stricter than those of developing countries. Over the past two decades, it has been persistently alleged that TNCs conduct their operations in developing host countries in accordance with much lower environmental standards than those adopted in their home countries or developed host countries. As long as the TNCs comply with the environmental regulations of their developing host countries, they cannot be held liable for environmental damage caused by their operations, even when such damage could have been avoided or minimized by the application of the higher environmental standards in place in their home countries. However, damage to the environment is not only a matter of the directly harmed country (*i.e.*, the host country) but also a matter of global concern. Given the rapid increase of pollution-intensive industries in developing countries, there seems to be an urgent need to require TNCs to employ stringent environmental standards in developing host countries as well. This objective may be achieved through the extraterritorial application of environmental regulations by the TNCs' home countries. Some ten years ago, Alan Neff, then an assistant professor at the Stuart School of Business at the Illinois Institute of Technology, proposed that the United States legislate a Foreign Environmental Practices Act compelling US corporations to comply with US

* Attorney admitted in Japan and the State of New York, US; Associate, Harumi Sogo Law Offices (Tokyo), morimoto@harumisogo-law.com

environmental regulations in their operations outside the US.¹ This article seeks to assess the need for such legislation and examines under what conditions it could be considered appropriate, effective and feasible in the light of the international community's current political, economical and legal climate.

1. Activities of TNCs in developing countries

Generally, a transnational corporation (TNC) can be defined as an incorporated enterprise comprising a parent company and its foreign affiliates.² Foreign affiliates may include a foreign branch,³ a foreign subsidiary,⁴ and a foreign associate enterprise.⁵ In this article, the country under whose law a TNC's parent company is incorporated is referred to as the 'home country,' and the foreign country in which the TNC operates is referred to as the 'host country.'

According to the *World Investment Report 2004*, it is estimated that there are approximately 61,000 TNCs in the world.⁶ In 2003, the foreign direct investment (FDI) outflow, which is a measure of the productive capacity of TNCs, amounted to \$ 612 billion.⁷ The number of foreign affiliates is approximately 900,000 and these affiliates account for an estimated one-tenth of the world gross domestic product (GDP) and one-third of the world exports.⁸ While more than 60% of foreign affiliates are located in developing countries, more than 70% of parent companies are headquartered in developed countries.⁹ The bulk of international production is undertaken by a relatively small number of TNCs: the top 100 TNCs (less than 0.2% of the total number of TNCs worldwide) accounted for 14% of the sales of foreign affiliates worldwide, 12% of their assets, and 13% of their employment in 2002.¹⁰ Almost 90% of the top 100 TNCs are headquartered in the Member States of the European Union (EU), in the US and in Japan.¹¹ 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.¹²

TNCs operate in a wide range of pollution-intensive manufacturing industries whose products or processes may harm the environment. FDI stock in the manufacturing sector rose nearly threefold during the period of 1990-2002.¹³ Even though developed countries attracted several times as much FDI in the manufacturing sector as developing countries, the gap is shrinking:

1 A. Neff, 'Not in Their Backyards, either: A Proposal for a Foreign Environmental Practices Act', 1990 *Ecology Law Quarterly*, pp. 477-537. See S. Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?'', 2004 *Melbourne Journal of International Law*, no.1, pp.37-65; M. Gibney et al., 'The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards', 1996 *Temple International and Comparative Law Journal*, no. 1, pp.123-145.

2 See UN Conference on Trade and Development, *World Investment Report 2004: the Shift towards Services*, UN Sales no. E.04.II.D.33 (2004), p. 345 [hereinafter *World Investment Report 2004*].

3 *Ibid.* *World Investment Report 2004* defines a 'foreign branch' as a wholly or jointly owned unincorporated enterprise in the host country.

4 *Ibid.* *World Investment Report 2004* defines a 'foreign subsidiary' as an incorporated enterprise in the host country in which another entity directly owns more than a half of the shareholders' voting power, and has the right to appoint or remove a majority of the members of the administrative, management or supervisory body.

5 *Ibid.* *World Investment Report 2004* defines a 'foreign associate' as an incorporated enterprise in the host country in which an investor owns a total of at least 10%, but not more than half, of the shareholders' voting power.

6 *Ibid.*, p. 8.

7 *Ibid.*, p. 9, 'Table I.3. Selected Indicators of FDI and International Production, 1982-2003.'

8 *Ibid.*, pp. 8-9.

9 *Ibid.*, pp. 273-274, 'Annex Table A.I.2. Number of Parent Corporations and Foreign Affiliates, by Region and Economy Latest Available Year.'

10 *Ibid.*, p. 9.

11 *Ibid.*, p. 11, 'Box I.1. Developments in the World's 100 Largest TNCs in 2002.'

12 *Top 200: The Rise of Global Corporate Power*, <http://www.globalpolicy.org/soecon/tncs/top200.htm>, 25 November 2005.

13 *World Investment Report 2004*, *supra* note 2, p. 302, 'Annex Table A.I.18. Estimated World Inward FDI Stock, by Sector and Industry, 1990, 2002'; *ibid.*, p. 303, 'Annex Table A.I.19. Estimated World Outward FDI Stock, by Sector and Industry, 1990, 2002.'

while in 1990 the manufacturing sector's inward FDI stock in developing countries was approximately one-fifth of that in developed countries, it was half in 2002.¹⁴

TNCs are also engaged in primary industries such as agribusiness and mining, which may negatively affect environmentally sensitive areas. FDI stock in the primary sector more than doubled during the period of 1990-2002.¹⁵ In 1990, developed countries accounted for approximately 90% of inward FDI stock in the primary sector.¹⁶ However, during the period of 1990-2002, the developing countries' share increased dramatically: in 2002, developing countries attracted more than 30% of FDI in the primary sector.¹⁷

Recently, the services sector has been attracting more FDI than the manufacturing and primary sectors: while in 1990 the services sector accounted for 49% of inward FDI stock worldwide, in 2002 this had risen to 60%.¹⁸ This recent trend is also true for developing countries. In 2002, the services sector's share of inward FDI stock was the largest ever in developing countries: the services sector accounted for 55%, the manufacturing sector for 38%, and the primary sector for 7%.¹⁹ However, this fact does not necessarily mean that the environmental risk that may be caused by TNCs' activities in developing countries has decreased. As stated above, the amount of FDI stock in the manufacturing and primary sectors has increased dramatically and the developing countries' share of inward FDI stock in such sectors has also risen significantly. These facts clearly show that TNCs are actively engaging in the manufacturing and primary industries in developing countries. This justifies serious concerns over the environmental consequences of the commercial activities of TNCs in developing countries.

2. TNCs' environmental practices and environmental damage caused by them in developing countries

2.1. *The Stockholm Declaration and environmental law making*

On 16 June 1972, the United Nations Conference on the Human Environment, which was held in Stockholm, Sweden, adopted twenty-six principles regarding environmental protection (Stockholm Declaration).²⁰ Since the Stockholm Declaration, the international community has witnessed an unprecedented period of environmental law making. Nowadays, almost all countries have environmental laws designed to protect air, water, land, and flora and fauna from pollution and devastation. In addition to such national laws, there are hundreds of international instruments dedicated to the protection of the environment.²¹ While there have been a number of legally binding international agreements for environmental protection, the 'soft law'²² approach is more common in this field of international law.

Environmental laws set forth various standards which can be divided into product standards and process standards.²³ The process standards may include ambient standards, emission or discharge

14 *Ibid.*, p. 302, 'Annex Table A.I.18. Estimated World Inward FDI Stock, by Sector and Industry, 1990, 2002.'

15 *Ibid.*, p. 303, 'Annex Table A.I.19. Estimated World Outward FDI Stock, by Sector and Industry, 1990, 2002.'

16 *Ibid.*, p. 302, 'Annex Table A.I.18. Estimated World Inward FDI Stock, by Sector and Industry, 1990, 2002.'

17 *Ibid.*

18 *Ibid.*, p. 30, 'Figure I.18. Sectoral Distribution of FDI Stock in the World, Developed and Developing Countries and CEE, 1990, 2002.'

19 *Ibid.*

20 Stockholm Declaration of the UN Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev 1 (1972).

21 R. Ramlogan, 'The Environment and International Law: Rethinking the Traditional Approach', 2002 *Res Communes: Vermont's Journal of the Environment*, pp.11-12.

22 Even though 'soft law' instruments impose no legal obligations on signatories, they may offer a basis for incorporation into domestic law and eventually achieve the status of customary international law through subsequent changes in state practices and expressed intent. R. Fowler, 'International Environmental Standards for Transnational Corporations', 1995 *Environmental Law*, no. 1, p. 24.

23 R. Stewart, 'Environmental Regulation and International Competitiveness', 1993 *Yale Law Journal*, pp. 2042-2045.

standards, and safety and risk standards.²⁴ In the following discussion, the term ‘environmental standards’ will be used to refer to process standards.

2.2. Double standards

Today, virtually every country in the world has enacted environmental laws, but these laws differ per country. It has been recognized that a significant gap exists between the environmental laws of developed countries and those of developing countries, with the former being much more stringent than the latter.²⁵ This is partly due to the fact that developed countries have more resources to commit to environmental protection, while developing countries lack such resources and must direct their limited resources toward basic necessities. 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.²⁶

Under this dichotomy between environmental regulations, TNCs operating in developing countries have been accused of adopting lower environmental standards than those adopted in their home countries or developed host countries even though they have the capability to implement the higher standards.²⁷ The existence of this double standards practice was confirmed by at least two UN studies conducted jointly by the Economic and Social Commission for Asia and the Pacific (ESCAP) and the UN Centre on Transnational Corporations (UNCTC).²⁸ The first study, which was conducted in 1987, found that TNCs adopted lower environmental standards in the surveyed developing countries than those adopted in developed countries. This finding was reinforced by the second study which found, for example, that only 25% of the surveyed TNCs in Thailand’s pesticide industry had adopted ‘global’ environmental standards, while over 50% admitted that only local standards were applied in relation to environmental management.²⁹ A fairly recent study conducted by researchers from the Copenhagen Business School collaborating with the UN Conference on Trade and Development (UNCTAD) also pointed out that most of the surveyed TNCs had adopted an environmental strategy focusing more on local standards than on uniform standards.³⁰

The following may illustrate the double standards practice of TNCs. The Royal/Dutch Shell oil company (hereinafter: Shell) in Nigeria laid several high-pressure pipelines above ground that ran through villages and criss-cross over land that was once used for agricultural purposes, rendering it economically useless. No consultation had taken place whatsoever, either before or during the pipe laying. Conversely, in the case of Shell’s pipeline running from Stanlow in Cheshire to Moss Moran in Scotland, some seventeen environmental surveys had been commissioned before a single turf was cut. Shell explains: ‘A painstakingly detailed Environmental Impact Assessment covered every metre of the route, and each hedge, wall and fence was

24 Fowler, *supra* note 22, p. 18.

25 See UN Centre on Transnational Corporations & Economic and Social Commission for Asia and the Pacific, ‘Environmental Aspects of Transnational Corporation Activities in Pollution-Intensive Industries in Selected Asian and Pacific Developing Countries’, *ESCAP/UNCTC Publications Series B*, no. 15 (1990), pp. 40, 56 [hereinafter *ESCAP/UNCTC 1990*].

26 *Ibid.*, p. 56.

27 This allegation was initially raised in 1978. Fowler, *supra* note 22, p. 11.

28 UN Centre on Transnational Corporations & Economic and Social Commission for Asia and the Pacific, ‘Transnational Corporations and Environmental Management in Selected Asian and Pacific Developing Countries’, *ESCAP/UNCTC Publications Series B*, no. 13 (1988) [hereinafter *ESCAP/UNCTC 1988*]; *ESCAP/UNCTC 1990*, *supra* note 25.

29 *ESCAP/UNCTC 1990*, *supra* note 25, p. 61.

30 UN Conference on Trade and Development, *Managing the Environment across Borders*, UNCTAD/ITE/IPC/MISC. 12 (2002), p. 14 [hereinafter *Managing the Environment across Borders*].

catalogued and ultimately replaced or rebuilt exactly as it had been before Shell arrived. Elaborate measures were taken to avoid lasting disfiguration and the route was diverted in several places to accommodate environmental concerns (...).³¹

Recently, leading TNCs have started to employ a more uniform approach to environmental issues.³² For example, DuPont, a US-based chemical company, has declared its global commitment to adhere to the highest standards for the safe operation of facilities and the protection of the environment.³³ Toyota, a Japan-based automobile manufacturer, has professed that it is 'implementing environmental responses at the highest levels in all regions around the world and in all areas.'³⁴ Generally, these foresighted TNCs have established internal environmental standards that meet or exceed the standards of all major locations and have required all facilities around the world to comply with these internal standards.³⁵ However, the number of TNCs adopting such universal environmental standards is small and the double standards practice seems to be dominant still.³⁶

Studies showing the TNCs' double standards practice also indicate, however, that TNCs still generally have a better record regarding the management of environmental concerns than local enterprises in developing host countries.³⁷ This does not mean, however, that TNCs can be absolved from the accusation of applying double standards, because their abundant resources, advanced technologies, and managerial and organizational techniques all enable them to implement higher standards such as the ones which they apply at home or in developed host countries.³⁸

2.3. Examples of environmental damage caused by TNCs in developing countries

2.3.1. Bhopal, India (fertiliser manufacturing)

On 2 December 1984, in the city of Bhopal, India, Methyl Isocyanate was released from the storage tank of a fertiliser plant owned and operated by Union Carbide India (UCI). The poisonous gas killed 1,800 people instantly and affected over 200,000 people; the death toll from this tragedy amounted to 4,200.³⁹

UCI is a subsidiary of the Union Carbide Corporation (UCC), which later became a wholly owned subsidiary of the Dow Chemical Company. UCC held 50.9% of the total stock of UCI, and Indian government-owned corporations held 22% of the stock.⁴⁰ While UCC claimed that the leakage was caused by sabotage, the investigation revealed that a variety of operating errors, design flaws, maintenance failures, and training deficiencies had all contributed to the tragic incident.⁴¹

31 A. Rowell, *Shell-Shocked: the Environmental and Social Costs of Living with Shell in Nigeria*, <http://archive.greenpeace.org/comms/ken/hell.html>, 25 November 2005.

32 *Managing the Environment across Borders*, *supra* note 30, pp. 13-14.

33 *The DuPont Commitment*, http://www2.dupont.com/Social_Commitment/en_US/SHE/usa/us2.html, 25 November 2005.

34 *Earth Charter/Action Plan*, <http://www.toyota.co.jp/en/environment/plan/index.html>, 25 November 2005.

35 *Managing the Environment across Borders*, *supra* note 30, p. 5.

36 J. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', 1997 *Boston University International Law Journal*, p. 275; *Managing the Environment across Borders*, *supra* note 30, pp. 13-14.

37 *ESCAP/UNCTC 1988*, *supra* note 28, p. 229; *ESCAP/UNCTC 1990*, *supra* note 25, pp. 69-72.

38 Fowler, *supra* note 22, p. 14. See *ESCAP/UNCTC 1990*, *supra* note 25, pp. 69, 70, 72.

39 S. Chopra, 'Multinational Corporations in the Aftermath of Bhopal: the Need for a New Comprehensive Global Regime for Transnational Corporate Activity', 1994 *Valparaiso University Law Review*, p. 236.

40 *Ibid.*, p. 241.

41 S. Diamond, 'Carbide Gives Details on Its Sabotage Claim', *New York Times*, 18 November 1986, D1.

Immediately following the disaster, numerous lawsuits were filed against UCC in various US federal courts.⁴² These cases were all joined and assigned to the US District Court for the Southern District of New York.⁴³ In 1986, the Court dismissed the consolidated action on *forum non conveniens*⁴⁴ grounds in favour of an Indian forum.⁴⁵ The Indian government⁴⁶ subsequently lodged a \$ 3.3 billion claim against UCC in the Bhopal District Court on behalf of the aggrieved people.⁴⁷ In 1989, UCC settled all relevant claims for \$ 470 million.⁴⁸ However, in 1992, an Indian court issued an arrest warrant for the former chairman of UCC, who was charged with homicide, but failed to appear in court.⁴⁹ In 2003, the Indian government asked the US to extradite the former chairman,⁵⁰ but in 2004, this request was denied by the US State Department on technical grounds.⁵¹

2.3.2. Bukit Merah, Malaysia (monazite processing)

In 1982, Asian Rare Earth Sdn. Bhd (ARE) started monazite processing in Bukit Merah, Malaysia.⁵² The extracted rare earth was shipped to Japan, while the radioactive and toxic wastes were left in Malaysia.⁵³ ARE was established in 1979 as a joint venture of Mitsubishi Kasei Corp. (currently Mitsubishi Chemical Corp.), a Japanese chemical producer, and 14 Malaysian companies.⁵⁴ Mitsubishi Kasei held 35% of the shares and Malaysian companies held the remaining shares.⁵⁵

It is reported that ARE maintained its operations in Bukit Merah for four years without performing an environmental impact assessment or even holding the proper licence for the generation, handling and storage of radioactive effluents.⁵⁶ The production of rare earth from 1982 to 1985

42 US District Court for the Southern District of New York, *In re Union Carbide*, Federal Supplement, vol. 634, 1986, p. 844 [hereinafter *In re Union Carbide*].

43 *Ibid.*

44 The doctrine of *forum non conveniens* is recognized in common law countries. Under this doctrine, a competent forum may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought. B. Garner, (ed.), *Black's Law Dictionary*, 1999, p. 665. The doctrine of *forum non conveniens* has been routinely used by US corporations as a defence against tort claims filed in US courts by foreign plaintiffs seeking redress for personal injuries and/or environmental damage suffered abroad. M. Rogge, 'Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda', 2001 *Texas International Law Journal*, p. 299. UK companies have also used the doctrine in a similar way. In Australia, however, the High Court has insisted on a more globally responsible approach, enabling Australian companies to be sued in Australia. Department of Parliamentary Services, Parliament of Australia, Bhopal 20 Years on: *Forum Non Conveniens and Corporate Responsibility*, <http://www.aph.gov.au/library/pubs/RN/2004-05/05rn26.pdf>, 25 November 2005. Generally, the doctrine of *forum non conveniens* does not exist in civil law countries. Rather than looking for a more appropriate forum, civil law countries tend to emphasize predictability and apply a '*lis pendens*' rule. Under this rule, any court other than the court where the case was first filed have to stay the proceedings until the jurisdiction of the court first seized is established and must decline the case once this has been done. For a detailed discussion, see R. Brand, 'Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments', 2002 *Texas International Law Journal*, pp. 467-498.

45 *In re Union Carbide*, *supra* note 42, p. 867. The dismissal was affirmed by the appellate court. US Court of Appeals for the Second Circuit, *In re Union Carbide*, Federal Reporter Second, vol. 809, 1987, pp. 195-206.

46 In 1985, the Indian government enacted the Bhopal Gas Leak Disaster Act providing that the government of India has the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with the tragedy. *In re Union Carbide*, *supra* note 42, p. 844.

47 S. Hazarika, 'Bhopal Payments Set at \$470 Million For Union Carbide', *New York Times*, 15 February 1988, A1.

48 *Ibid.*; S. Rai, 'Bhopal Victims Not Fully Paid, Rights Group Says', *New York Times*, 30 November 2004, W1.

49 'Extradition Bid on Bhopal', *New York Times*, 28 March 1992.

50 S. Rai, 'Bhopal Extradition Sought', *New York Times*, 3 July 2003, W1.

51 U.S. Rejects Request for Anderson's Extradition, Hindu (India), 21 July 2004.

52 'Board Monitoring Radioactive Waste Removal', *New Straits Times (Malaysia)*, 16 August 2004 [hereinafter *Board Monitoring Radioactive Waste Removal*]; R. Rasiah, *Transnational Corporations and the Environment: The Case of Malaysia*, 1999, p. 39, <http://ep.lib.cbs.dk/download/ISBN/x645125473.pdf>, 25 November 2005.

53 *Board Monitoring Radioactive Waste Removal*, *supra* note 52; Rasiah, *supra* note 52, p. 39.

54 'Mitsubishi Kasei's Venture in Malaysia to Close Down', *Daily Yomiuri (Tokyo)*, 19 January 1994, p. 8 [hereinafter *Mitsubishi Kasei's Venture in Malaysia to Close Down*].

55 *Ibid.*

56 Rasiah, *supra* note 52, p. 39.

was conducted under extremely unsafe conditions.⁵⁷ People in the region reported that they suffered from a bad smell, coughing, and tearing.⁵⁸ Moreover, they claimed that the inappropriate dumping of wastes had caused leukaemia, infant mortality, and congenital diseases.⁵⁹ In 1985, eight people sued ARE on behalf of themselves and residents of Bukit Merah, demanding the immediate closure of ARE.⁶⁰ In 1992, the Malaysian High Court ordered ARE to suspend its operation, but in 1993 the Supreme Court reversed the ruling and allowed ARE to continue its operations.⁶¹ Nevertheless, ARE closed down the plant in 1994.⁶²

2.3.3. Ogoniland, Nigeria (petroleum extraction)

Ogoniland, which is located in the Niger Delta region of south-eastern Nigeria, is an area inhabited by approximately 500,000 Ogoni people, who live by fishing and farming.⁶³ In 1958, Shell started to extract oil from the Niger Delta region.⁶⁴ Shell conducts its oil exploitation in Nigeria under the name of Shell Petroleum Development Company of Nigeria (SPDC), operating a joint venture on behalf of the state-owned Nigerian National Petroleum Corporation, Shell, and other European oil majors.⁶⁵

Through 35-year-long petroleum extraction, SPDC caused the devastation of water, air and land in Ogoniland, which caused a number of health problems for the Ogoni people.⁶⁶ This environmental devastation was caused by SPDC's lack of due care. Pipelines were improperly maintained and regularly spilled a large amount of oil into the environment.⁶⁷ As a result of 'blow-out,' which is uncontrolled release of oil from wells, volumes of crude oil polluted the region.⁶⁸ Such blow-outs resulted from inappropriate maintenance.⁶⁹ Numerous oil spills were simply left untouched and thus aggravated the pollution.⁷⁰

In 1993, protest movements against the environmental devastation intensified and led SPDC to suspend its operations in Ogoniland.⁷¹ In May 1994, nine persons who were leading the protest movements were arrested for inciting the murder of four pro-government Ogoni leaders during protests in Gokana.⁷² As a result of their flawed trial, all of them were convicted of murder.⁷³ Two days later, the Nigerian government executed the nine men.⁷⁴ In condemnation of the executions, the US, the United Kingdom (UK), and several other countries consequently withdrew their ambassadors from Nigeria.⁷⁵

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 'Malaysia Court Rejects Pollution Suit against ARE', *WISE News Communiqué*, 11 February 1994, <http://www.antenna.nl/wise/406/4018.html>, 25 November 2005.

62 *Mitsubishi Kasei's Venture in Malaysia to Close Down*, *supra* note 54.

63 M. Crow, 'The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria', 1995 *A Human Rights Watch Short Report*, no. 5, <http://hrw.org/reports/1995/Nigeria.htm>, 25 November 2005.

64 Eaton, *supra* note 36, p. 265.

65 *Shell Companies in Nigeria*, <http://www.shell.com/home/Framework?siteId=nigeria>, 25 November 2005.

66 Eaton, *supra* note 36, pp. 266-267.

67 *Ibid.*, p. 268.

68 Crow, *supra* note 63.

69 Eaton, *supra* note 36, p. 268.

70 Rowell, *supra* note 31.

71 Crow, *supra* note 63.

72 Eaton, *supra* note 36, p. 270.

73 P. Lewis, 'Nigeria Rulers Back Hanging of 9 Members of Opposition', *New York Times*, 9 November 1995, p. 9.

74 H. French, 'Nigeria Executes Critic of Regime; Nations Protest', *New York Times*, 11 November 1995, p. 1.

75 *Ibid.*

2.4. Uniform application of strict environmental standards

As stated in Section 2.2, TNCs more often than not apply less stringent environmental standards in developing host countries as opposed to the much higher standards which they apply in their home countries and in developed host countries. As long as the TNCs comply with the environmental regulations of developing host countries, the double standards practice cannot be regarded as legally blameworthy. However, it is apparent that the double standards practice has significantly contributed to environmental devastation in developing host countries.

Through the reduction of environmental protection costs, TNCs can maximize their short-term profit, and consumers, especially those in developed countries, can benefit from cheap products. However, it should not be forgotten that in the long run these short-term savings will be vastly exceeded by the cost of remedying the long-term detrimental effect on our planet. Moreover, as mentioned earlier, TNCs have sufficient capabilities to implement higher environmental standards. Not only do TNCs have access to clean technologies, which were developed in response to stringent environmental regulations in their home countries or developed host countries, but they also possess skills in the safe handling, transport, storage, use and disposal of toxic materials, and in the development of pollution abatement technologies. Such technological advantages may be reinforced by sophisticated management skills, which have also been refined by long experience with environmental management in countries with high environmental standards.

This is why TNCs should employ stringent uniform environmental standards and use the best available technologies irrespective of the location of their operations. Agenda 21, the global action plan for environmental management adopted at the UN Conference of Environment and Development in Rio de Janeiro in 1992 (aka Earth Summit) also suggests the application of uniform environmental standards where it encourages TNCs 'to introduce policies demonstrating the commitment (...) to adopt standards of operation *equivalent to or not less stringent than those existing in the country of origin* (emphasis added).'⁷⁶

3. Regulating TNCs' environmental practices

3.1. Necessity of a legal mechanism to force TNCs to adopt uniform standards

In order to strengthen the protection of the environment worldwide, it is necessary for TNCs to apply stringent environmental standards regardless of where they operate. As mentioned in Section 2, a growing number of leading TNCs have already established internal environmental standards that meet or exceed the standards of all major locations and have required all facilities around the world to comply with these internal standards. However, it seems unlikely, at least in the short run, that the majority of TNCs will follow suit. Since TNCs operate within a market system, they will not be predisposed towards incurring large environmental control costs unless they are legally required to do so. Apparently, the principal reason why leading TNCs have voluntarily established stringent internal standards is that they consider such self-regulation to contribute to their ultimate objective, *i.e.*, profit maximization. A uniform approach may, for example, minimize the risk of litigation and serve as an effective public relations technique. There is no guarantee that other TNCs will act accordingly when presented with such incentives. It therefore seems necessary that a legal mechanism is developed that will force TNCs to adopt stringent environmental standards wherever they may operate.

⁷⁶ UN Conference on Environment and Development, Report of the UN Conference on Environment and Development, UN Doc. A/CONF.151/26 (1992), Annex II, Agenda 21, Chap. 19.52.(d) [hereinafter Agenda 21].

There are two legal methods by which the adoption of stringent uniform environmental standards by TNCs may be achieved.⁷⁷ The first method is the international harmonization of national environmental regulations so as to produce a ‘level playing field’ for TNCs. The second method is the direct regulation of TNCs through the application of the domestic environmental laws of their home countries to their foreign operations. This approach may take either one of two forms: (1) developing host countries could apply the developed home countries’ environmental regulations to TNCs operating in the host country, or (2) developed home countries could apply their domestic environmental regulations extraterritorially to TNCs operating in developing host countries. The second method will be discussed in Section 4.

3.2. Achieving uniform environmental regulations through international harmonization

3.2.1. Opposition to uniformity

Recently, there has been considerable support among the international community for the development of international environmental regulations.⁷⁸ However, there is a growing body of opinion that such international regulations should not be of a uniform nature. According to critics, uniform international regulations may impede sustainable development by imposing inappropriate priorities on developing countries.⁷⁹ For example, it is asserted that developing countries do not need ‘high levels of environmental protection against cancer (...) at the expense of basic human need[s] such as protection from high infant mortality and rampant malnutrition.’⁸⁰ In addition, differences in national environmental regulations may be justified by the fact that countries have distinct geographic, ecological, and demographic characteristics and that their capacity to assimilate pollution is therefore different as well.⁸¹ The Rio Declaration on Environment and Development (Rio Declaration),⁸² a product of the Earth Summit like Agenda 21, acknowledges the inappropriateness of the uniform international regulations. Principle 11 of the Rio Declaration stipulates that: ‘States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.’

From the economists’ perspectives, it may be reasonable for some countries to host pollution-intensive industries under less stringent environmental regulations for the purpose of achieving economic development.⁸³ However, such arguments fail to take account of the risk of long-term and irreparable damage to the environment: ‘No country should have the right to degrade the environment irreversibly for future generations in the name of national competitiveness.’⁸⁴

77 Fowler, *supra* note 22, p. 19. See Eaton, *supra* note 36, pp. 276-282.

78 Fowler, *supra* note 22), p. 19.

79 *Ibid.* See Eaton, *supra* note 36, p. 277.

80 Fowler, *supra* note 22, p. 19.

81 Stewart, *supra* note 23, p. 2052.

82 UN Conference on Environment and Development, Report of the UN Conference on Environment and Development, UN Doc. A/CONF.151/26 (1992), Annex I, Rio Declaration on Environment and Development [hereinafter Rio Declaration].

83 Fowler, *supra* note 22, p. 20.

84 E. Weiss, ‘Environmentally Sustainable Competitiveness: A Comment’, 1993 *Yale Law Journal*, p. 2127.

3.2.2. Recent developments toward uniform environmental regulations

Even critics of uniform international regulations agree to such a mechanism in relation to transboundary pollution.⁸⁵ Recent developments in international environmental law reflect the international community's recognition of the fact that uniform international regulations are necessary in some areas. For example, in 1987, the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) was adopted in Montreal, Canada.⁸⁶ The Montreal Protocol sets out the time schedule to freeze and reduce the consumption of ozone depleting substances. Another example is the Kyoto Protocol to the UN Framework Convention on Climate Change, which was adopted in Kyoto, Japan, in 1997.⁸⁷ The Kyoto Protocol requires industrialized countries to reduce their greenhouse gas emission from 1990 levels by at least 5% over the period 2008-2012.

However, it should be noted that even these two successful international agreements do not prescribe uniform standards in the strict sense: the Montreal Protocol offers a grace period to developing countries before phase-out measures apply to them, while the Kyoto Protocol does not impose a duty on developing countries to reduce their greenhouse gas emission. Thus, the current reality is that the prescription of uniform environmental regulations through legally binding international agreements appears to be unlikely.

3.3. Developing host countries' difficulties in regulating TNCs' environmental practices

3.3.1. Enhancing environmental regulations on developing host countries' own initiative

As stated above, the international harmonization of national environmental regulations through international agreements seems unlikely. This means that the international community needs to rely on states' own initiatives to strengthen their environmental regulations, as envisaged by the Rio Declaration. The Rio Declaration requests every nation to 'enact effective environmental legislation'⁸⁸ and to 'develop national law regarding liability and compensation for the victims of pollution and other environmental damage.'⁸⁹

However, first of all, it seems highly unlikely that developing countries will voluntarily strengthen their environmental laws to the same level as those enacted by developed countries. This is partly because a number of developing countries fear that strict environmental regulations would discourage TNCs from locating their operations in those countries.⁹⁰ In addition, the enhancement of environmental regulations would jeopardize the development of domestic companies, which lack the advanced and effective pollution control technologies required to satisfy such strengthened regulations.⁹¹ Many developing countries still regard environmental quality as a 'luxury' that they are willing to forgo in favour of further economic development and increased wealth.⁹²

Nevertheless, recognizing that the conservation of the environment is essential for their long-term growth or responding to the increasing pressure from the international community, developing

85 Stewart, *supra* note 23, p. 2099.

86 Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987 (entered into force 1 January 1989). The Montreal Protocol has been adjusted and/or amended in 1990, 1992, 1995, 1997, and 1999.

87 Kyoto Protocol to the UN Framework Convention on Climate Change, UN Doc. FCCC/CP/1997/7/Add.2, 10.12.1997 (entered into force 16 February 2005).

88 Rio Declaration, *supra* note 82, Principle 11.

89 *Ibid.*, Principle 13.

90 Eaton, *supra* note 36, p. 277; *ESCAP/UNCTC 1990*, *supra* note 25, p. 59.

91 *ESCAP/UNCTC 1990*, *supra* note 25, p. 56.

92 Eaton, *supra* note 36, p. 277.

countries may enhance existing environmental regulations to some extent.⁹³ Moreover, developing countries may enact laws enabling them to apply to the TNCs operating within their respective territories the environmental regulations in force in these TNCs' home countries. Unfortunately, however, such legislation would face various difficulties in relation to its enforcement, as will be explained later.

3.3.2. Developing host countries applying developed home countries' environmental regulations to TNCs

As mentioned above, instead of allowing TNCs to operate entirely under the developing host countries' environmental laws, developing host countries could enact legislation that requires TNCs to comply with their home countries' rules in the territory of their host countries.⁹⁴ This approach has a significant advantage in that local companies in the developing host countries remain subject to only the local standards which means that the development of local industries will not be jeopardized. The report on the outcome of the joint survey conducted by the ESCAP and the UNCTC mentioned the following concerning this approach:

'Governments should look into the possibility of revising policies and regulations so that TNCs are bound to adopt the environmental standards of their home countries, while at the same time allowing local firms to be regulated on the basis of local standards (...) [L]ocal standards should be gradually upgraded on the basis of a schedule to give local firms time to adjust their operations according to the new standards required and for them to have time to plan out such changes.'⁹⁵

However, practical difficulties are anticipated in the enforcement process: environmental authorities of developing host countries would inevitably be required to identify, understand, and administer different standards for the various TNCs from different home countries.⁹⁶ Moreover, free trade advocates have criticized the fact that such an approach is contrary to the principle of national treatment⁹⁷ insofar as TNCs are subject to stricter standards than those applied to local or state-owned industries.⁹⁸ It is argued that whether such measures can be considered bona fide environmental regulations rather than protectionist measures is quite doubtful.⁹⁹

3.3.3. Lack of effective enforcement mechanisms

Regardless of whether environmental regulations of developing host countries are enhanced as a result of international agreements or at their own initiative, such regulations will always need to be enforced through the host countries' legal systems.¹⁰⁰ The enforcement of environmental regulations must be routine, reasonably resourced and predictable. Even though most individuals

93 *Managing the Environment across Borders*, *supra* note 30, p. 9.

94 Fowler, *supra* note 22, p. 26.

95 *ESCAP/UNCTC 1990*, *supra* note 25, pp. 75-76.

96 Fowler, *supra* note 22, p. 26; Eaton, *supra* note 36, p. 278.

97 Under the principle of national treatment, non-nationals should be given the same treatment as nationals.

98 UN Department of Economic and Social Development, *World Investment Report 1992: Transnational Corporations as Engines of Growth*, UN Sales no. E.92.II.A.19 (1992), p. 237. See I. Madalena, 'Foreign Direct Investment and the Protection of the Environment; the Border between National Environmental Regulation and Expropriation', 2003 *European Environmental Law Review*, p. 77.

99 Fowler, *supra* note 22, p. 26.

100 Currently, there is no such international regulatory organization for environmental protection or an international tribunal to adjudicate on environmental issues. See A. Postiglione, 'A More Efficient International Law on the Environment and Setting up an International Court for the Environment within the United Nations', 1990 *Environmental Law*, pp.321-328.

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.

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. 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.¹⁰¹

Even where developing host countries have established legal frameworks for the purpose of environmental law enforcement, realities peculiar to these countries seem to prevent appropriate enforcement action.¹⁰² Generally, there are three major factors that impede the effective enforcement of environmental regulations in developing host countries. The first impediment is the lack of incentive. Since national revenues of developing host countries largely depend on the activities of TNCs, regulatory agencies of those countries tend to avoid strict enforcement against TNCs. Developing host countries fear that, by undertaking enforcement action against TNCs, they might place billions of dollars in jeopardy.¹⁰³ The second obstacle is the lack of experienced enforcement personnel. Many developing host countries do not have sufficient resources and 'know-how' to provide the regulatory agencies' officers and the judiciary with the training needed to enforce environmental regulations.¹⁰⁴ Finally, public corruption has been prevalent in developing host countries and this also seems to prevent effective enforcement.¹⁰⁵

As mentioned above, developing host countries may face various difficulties in regulating the environmental practices of TNCs. The problems caused by the lack of experienced enforcement personnel may in future be resolved to some extent through international cooperation with the aim of helping developing countries to enhance their enforcement capabilities. The prevalence of corruption may also be mitigated by the developed countries' stringent enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as established by (mainly) the member states of the Organization for Economic Cooperation and Development (OECD) (OECD Anti-bribery Convention);¹⁰⁶ moreover, it is expected that not only developed countries but also developing countries would strive to suppress corruption once the UN Convention against Corruption enters into force.¹⁰⁷ However, it will undoubtedly take considerable time for those improvements to be made.

101 *Managing the Environment across Borders*, *supra* note 30, p. 5. See Eaton, *supra* note 36, p. 287.

102 *ESCAP/UNCTC 1990*, *supra* note 25, pp. 60, 74. See Ramlogan, *supra* note 21, p. 2.

103 Eaton, *supra* note 36, pp. 289, 291.

104 *Ibid.*, p. 290.

105 World Resources Institute, *World Resources 2002-2004: Decisions for the Earth: Balance, Voice and Power*, p. 36-38, http://pdf.wri.org/wr2002fulltxt_023-046_chap02.pdf, 25 November 2005. See N. Robinson, 'Enforcing Environmental Norms: Diplomatic and Judicial Approaches', 2003 *Hastings International and Comparative Law Review*, p. 389.

106 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997 [hereinafter OECD Anti-bribery Convention].

107 In 2003, the UN opened for signature the UN Convention against Corruption. The Convention comes into force on 14 December 2005. UNODC, United Nations Convention against Corruption, http://www.unodc.org/unodc/en/crime_signatures_corruption.html, 25 November 2005.

4. Developed home countries extraterritorially applying domestic environmental regulations to TNCs

4.1. *The significant advantages of extraterritorial regulation*

As was discussed above, it seems unlikely that developing host countries will be able to regulate TNCs' environmental practices effectively. The remaining solution, therefore, would be the extraterritorial application of developed home countries' environmental legislation to national TNCs operating abroad in developing countries.

Extraterritorial regulation by the home countries of TNCs has the distinct advantage that such rules are able to oblige TNCs to comply with stringent environmental regulations without having to rely on possible legislative action by the host countries. Of course, when in place, TNCs have to comply with the host countries' environmental regulations as well, which requires them to abide by stricter regulations still. In addition, extraterritorial regulation may induce developing host countries to improve their own regulations without jeopardizing the development of domestic industries, because developing host countries would no longer need to maintain weak environmental regulations in order to attract foreign investment. 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 programmes for employees in those countries. In addition, the brunt of the enforcement costs would be borne by the governments of developed home countries, which generally have sufficient financial and legal resources.

4.2. *Legal basis for extraterritorial prescriptive jurisdiction*

If developed home countries wish to apply their own domestic environmental regulations to TNCs' foreign operations, they need to give extraterritorial effect to their existing environmental laws. It must first be examined, however, whether this is in fact in keeping with the requirements of international law.

4.2.1. *Principles of prescriptive jurisdiction*

International law recognizes territoriality as a basis for prescriptive jurisdiction; that is, a state has jurisdiction to prescribe law with respect to conduct that takes place within its territory.¹⁰⁸ The territoriality principle is the most fundamental basis for the exercise of prescriptive jurisdiction.¹⁰⁹ Even though the territoriality principle does not require that all aspects of the conduct to be regulated occur within the territory of the state seeking jurisdiction over that conduct,¹¹⁰ it cannot cover wholly extraterritorial conduct either. There are four principles under international law according to which a state is allowed to exercise jurisdiction over wholly extraterritorial acts: (1) the nationality principle, (2) the protective principle, (3) the passive personality principle, and (4) the universality principle.¹¹¹

108 M. Evans, *International Law*, 2003, p. 336; Restatement (Third) of the Foreign Relations Law of the United States, The American Law Institute, Philadelphia, 1987, Para. 402(1)(a) [hereinafter Restatement (Third)].

109 Permanent Court of International Justice, *The Case of the S.S. 'Lotus' (Fr. v. Turk.)*, Judgment of 7 September 1927, 1927 P.C.I.J. Series A, no. 10, p. 20; Restatement (Third), *supra* note 108, Para. 402 cmt.(c).

110 C. Blakesley, 'Extraterritorial Jurisdiction', in M. Bassiouni (ed.), *International Criminal Law II*, 1999, p. 48; Restatement (Third), *supra* note 108, Para. 402(1)(a). See Evans, *supra* note 108, p. 338.

111 Restatement (Third), *supra* note 108, Para. § 402, 404.

Under the nationality principle, a state may prescribe law regarding activities of its nationals no matter where such activities occur.¹¹² Under the protective principle, a state is allowed to regulate extraterritorial conduct directed against the security of the state or against a limited class of other national interests, regardless of the perpetrator's nationality.¹¹³ For example, a state may criminalize espionage or counterfeiting of its currency committed outside the territory by non-nationals.¹¹⁴ Under the passive personality principle, a state may prescribe law concerning extraterritorial conduct directed against its nationals regardless of the perpetrator's nationality.¹¹⁵ Finally, under the universality principle, a state is allowed to define and punish certain criminal offences recognized by the international community to be of universal concern, such as piracy, slave trade, genocide, and terrorism, even if none of the above legal bases is present.¹¹⁶

4.2.2. Reliance on the nationality principle

The nationality principle is widely accepted as a basis for prescriptive jurisdiction over extraterritorial conduct. For instance, the OECD Anti-bribery Convention, which seeks to criminalize the bribery of foreign officials, requires the signatory states to exercise its jurisdiction over transnational bribery if they exercise such jurisdiction over other extraterritorial crimes.¹¹⁷ In practice, most of the signatory states have indeed extended their national jurisdiction over bribery of foreign officials¹¹⁸ even though a number of states have established additional conditions, including dual criminality, for prosecution. The nationality principle could thus be used to prescribe law that extends the application of domestic environmental regulations to the foreign operations of their TNCs.

This is not the case for the remaining three principles. The application of the protective principle is limited to conduct directed against the security of a particular country or threatening the integrity of governmental functions. Even though the destruction of the environment certainly has a detrimental effect on countries, it cannot be characterized as conduct threatening the security or governmental functions of a particular country. Similarly, environmental wrongdoings in one country cannot be considered as acts directed against nationals of another country, even though large-scale environmental destruction in one country may have a devastating impact on nationals living in other countries, particularly in neighbouring countries. The destruction of the environment is generally condemned by the international community and there are several international agreements that regulate certain types of environmental destruction, but as yet no universal standard has been established that defines condemnable environmental destruction in general. Therefore, the universality principle would not be an appropriate basis for extending the application of domestic environmental law to TNCs' foreign operations.

4.2.3. Nationality of corporations & prescriptive jurisdiction over foreign subsidiaries

As stated above, a state may rely on the nationality principle to prescribe the application of domestic environmental regulations to TNCs' foreign operations. In order to enforce such law effectively, legal mandates need to cover not only natural persons who are acting on behalf of

112 Evans, *supra* note 108, p. 339; Restatement (Third), *supra* note 108, Para. 402(2).

113 Evans, *supra* note 108, p. 342; Restatement (Third), *supra* note 108, Para. 402(3).

114 Restatement (Third), *supra* note 108, Para. 402 cmt.(f).

115 *Ibid.*, Para. § 402 cmt.(g).

116 Evans, *supra* note 108, pp. 343, 344; Restatement (Third), *supra* note 108, Para. 404.

117 OECD Anti-bribery Convention, *supra* note 106, Art. 4(2).

118 *Country Reports on the Implementation of the Convention and the 1997 Revised Recommendation*, http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html, 25 November 2005.

legal persons, but also the legal persons themselves. In this respect, the nationality principle is applicable to legal persons as well as to natural persons.¹¹⁹ Corporations generally have the nationality of the country where they are incorporated.¹²⁰ With respect to TNCs, however, the situation seems rather more complex as they can be nationals of more than one state and their activities are not limited to any one state's territory. A TNC is a group of corporations, each of which is established under the law of different states and all of which are linked by common managerial and financial control and pursue integrated policies. Even though TNCs are an established feature of the international economy, the TNC has not yet acquired any special status in international law or in national legal systems.

If the nationality of an affiliate corporation belonging to a TNC is determined only on the basis of its place of incorporation, this means that a foreign affiliate corporation cannot be regarded as a national of the TNC's home country. In such cases, the nationality principle does not enable the TNC's home country to exercise extraterritorial jurisdiction over these foreign affiliate corporations. Consequently, the reach of the home country's extraterritorial jurisdiction would not extend to foreign operations conducted by a foreign branch.

However, under certain circumstances, it might be reasonable for a state to treat as nationals of any entities, including corporations, that are owned or significantly controlled by its true nationals. 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.'¹²¹ Relying on this extended version of the nationality principle, the US has exercised extraterritorial jurisdiction over foreign subsidiaries and other foreign affiliate corporations primarily to enforce economic sanctions against hostile countries.¹²² The European Community (EC) has fiercely challenged this approach.¹²³

In other matters, the US has however refrained from resorting to this extensive interpretation of the nationality principle. For example, the US Congress did not rely on it when it enacted and amended the Foreign Corrupt Practices Act (FCPA), which criminalizes the bribery of foreign officials. Under the FCPA, extraterritorial jurisdiction can be exercised over the conduct of US nationals and US-based corporations only.¹²⁴ The US Congress may have been concerned about possible infringements of foreign countries' sovereignty. The same concern may affect the exercise of jurisdiction over foreign subsidiaries and other foreign affiliate corporations for the purpose of applying environmental regulations.¹²⁵ In 2000, a Bill for a Corporate Code of Conduct Act was introduced in the US House of Representatives.¹²⁶ Although the Act aims to

119 Restatement (Third), *supra* note 108, Para. 402 cmt.(e).

120 *Ibid.*, Para. 213. Some civil law countries confer their nationality not on the basis of the place of incorporation but rather on the basis of the place where the company has the seat of its management. Evans, *supra* note 108, p. 340.

121 A corporation is presumed to have control over another corporation if (1) it owns a majority of the voting shares of that corporation; (2) it owns a substantial portion of the voting shares of that corporation and no other person, or group of persons acting in concert, owns a portion of comparable size; or (3) it is the principal creditor of the other corporation and exercises significant decision-making authority over its affairs. Restatement (Third), *supra* note 108, Para. 414 cmt.(e).

122 J. Boscarol, 'An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States', 1999 *Law and Policy in International Business*, pp. 449-450.

123 M. Shaw, *International Law*, 2003, pp. 617-618.

124 US Code, title 15, Paras. 78dd-1(g)(1), 78dd-2(i)(1).

125 The Restatement (Third) of Foreign Relations Law of the US states that jurisdiction may not generally be exercised over activities of foreign subsidiaries and other foreign affiliates if the purpose is to regulate 'predominately local activities, such as industrial and labor relations, health and safety practices, or conduct related to preservation or control of the local environment.' Restatement (Third), *supra* note 108, Para. 414 cmt.(c).

126 Corporate Code of Conduct Act, H.R. 4596, 106th Cong. 2000.

regulate TNCs' conduct in foreign countries, its legal mandate extends only to US nationals and US-based corporations.¹²⁷

4.3. The sovereignty concern

The idea of extraterritorial application of developed home countries' domestic environmental regulations has been criticized mainly on the grounds that it would intrude too far into the internal affairs of developing host countries and might amount to a new form of 'cultural imperialism.'¹²⁸ It is generally accepted that every sovereign state has a right to decide what constitutes a safe and risk-free activity, what the standards of health of its citizens should be, and what level of pollution should be considered legal within its boundaries.¹²⁹ However, in the long run, any sort of environmental destruction may have universal ramifications and no nation can afford to ignore it simply because it initially occurs beyond its borders. Developing host countries often advance the argument of their sovereign rights in defending their lax environmental regulations. However, given the interdependence of the global society and the transnational effects of environmental destruction, the exercise of sovereign rights in this respect will ultimately lose its legitimacy and the argument will no longer be persuasive.¹³⁰

Moreover, it is highly questionable whether, under contemporary international law, states may challenge another country's exercise of extraterritorial jurisdiction by claiming their sovereign rights even when such claim would jeopardize the health and safety of their citizens.¹³¹ In this respect, it is crucial to note that the international community is gradually beginning to recognize the human right to a healthy environment¹³² even though this right is not established under binding international agreements or by customary international law.¹³³ Like other fundamental rights, the right to live in a sound environment is assumed by many countries to be a 'given': nearly one-third of the world's constitutions recognize the human right to a healthy environment and nearly all recently adopted constitutions include environmental rights.¹³⁴

4.4. Indirect extraterritorial regulation

Considering the rapid increase of transnational commercial activities and the consequent result of widespread damage to the environment, any exercise of the sovereign rights of developing host countries' that may impede environmental protection should be restricted. However, even in the age of globalization and interdependence, sovereignty is still the most fundamental concept of the international order and has to be respected as much as possible. Therefore, to apply the extensive interpretation of the nationality principle which allows the exercise of extraterritorial jurisdiction over foreign subsidiaries and other foreign affiliate corporations based on their ownership or control by nationals of developed home countries would not be a sound idea.¹³⁵

127 *Ibid.*, Para. 3.

128 Fowler, *supra* note 22, p. 27. See Eaton, *supra* note 36, p. 281.

129 Chopra, *supra* note 39, p. 256. See Eaton, *supra* note 36, p. 280.

130 See F. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, 2000, p. 342; Ramlogan, *supra* note 21, p. 49.

131 See Deva, *supra* note 1, p. 48.

132 For example, Principle 1 of the Rio Declaration states: 'Human beings (...) are entitled to a healthy and productive life in harmony with nature.'

133 Eaton, *supra* note 36, pp. 276, 298.

134 D. Shelton, 'Human Rights, Environmental Rights, and the Right to Environment', 1991 *Stanford Journal of International Law*, p. 128.

135 Restatement (Third) of Foreign Relations Law of the US noted that 'orders issued directly to a foreign corporation are regarded as particularly intrusive and can be justified only by a clear showing of necessity in light of factors such as those listed in Subsection (2)(b).' Restatement (Third), *supra* note 108, Para. 414 cmt.(c).

As mentioned earlier, the reach of the nationality principle proper is very limited with respect to prescriptive jurisdiction over corporations. Since foreign affiliate corporations cannot be regarded as nationals of TNCs' home countries, the nationality principle makes it impossible for these countries to exercise extraterritorial jurisdiction over such corporations. Consequently, the reach of extraterritorial jurisdiction is limited to foreign branches which are not distinct legal entities of a host country. Considering the fact that it is more common for TNCs to engage in foreign operations through foreign subsidiaries or other foreign affiliate corporations rather than through foreign branches, the nationality principle does not offer a sufficient basis for prescriptive jurisdiction over TNCs' foreign operations.

For this reason, rather than trying to exert direct control over TNCs' foreign operations on the basis of the nationality principle, it would be more appropriate for TNCs' home countries to exert indirect control over the activities of foreign affiliate corporations by regulating the behaviour of their parent companies.¹³⁶ For example, TNCs' home countries could legislate as follows:

It shall be unlawful for any person who owns or controls (either directly or indirectly) an industrial facility in a foreign country, or any officer, director, employee, or agent thereof, to direct, authorize, support or condone the operation or abandonment of such a foreign facility if he/she knows or has reason to know that such operation or abandonment does not meet or will not meet domestic environmental standards.

The above-mentioned 'domestic environmental standards' do not necessarily have to include every single environmental standard in force in the TNC's home country. In order to avoid confusion among TNCs and the overburdening of home countries' administrative authorities, the applicable regulations should be confined to core standards.

Under this proposed provision, the legal mandate only extends to the domestic corporation, *i.e.*, the parent company of a TNC, and its officers, directors, employees, or agents, while the activities of foreign affiliates are still regulated indirectly. However, only the parent company and its directors, officers, employees, or agents may be punished for violations. This approach would be less controversial in terms of concerns over loss of sovereignty. This type of provision strictly speaking does not constitute the exercise of extraterritorial jurisdiction, because substantial parts of the illegal conduct, such as authorizing or condoning environmental wrongdoings in foreign countries would occur within the territory of a TNC's home country. However, the objective of the proposed legislation is clearly to control TNCs' activities in foreign countries. Therefore, it may be characterized as the indirect exercise of extraterritorial jurisdiction.

Under the proposed law, foreign affiliate corporations themselves have no legal obligation to comply with developed home countries' environmental standards. In practice, however, foreign affiliates, particularly foreign subsidiaries, would be forced to do so because they need to manage their operations in accordance with their parent companies' decisions or policies.¹³⁷

¹³⁶ See Neff, *supra* note 1, pp. 532-533.

¹³⁷ See *Managing the Environment across Borders*, *supra* note 30, p. 13.

4.5. Issue of competitiveness

4.5.1. Necessity of a multilateral legal framework

In addition to the issue of sovereignty, the extraterritorial application of a developed home country's environmental regulations may raise another issue. It might be that 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.¹³⁸ This issue was in fact raised in the US, where the business community fiercely criticized the Foreign Corrupt Practices Act (FCPA) claiming that the FCPA granted superior bargaining power to non-US competitors in international markets because they were unconstrained by the laws criminalizing transnational bribery.¹³⁹ This criticism led to the 1988 Amendments to the FCPA,¹⁴⁰ which directed the President to pursue an agreement among the OECD members on criminalizing bribery of foreign officials.¹⁴¹ Eventually, the US efforts toward the multilateral criminalization of transnational bribery resulted in the adoption of the OECD Anti-bribery Convention. This is one example of the significance of multilateral action in the extraterritorial implementation of regulations that affect international commercial activities.

4.5.2. Differences in environmental regulations among developed home countries

Even if multilateral action of this nature were taken, it may still be argued that TNCs whose home countries have less stringent environmental regulations would have a competitive advantage in the global market over TNCs whose home countries have more stringent environmental regulations.¹⁴² Supposing that some home countries were interested in protecting the competitive position of their TNCs abroad, those countries might have less incentive to strengthen their domestic environmental regulations. However, in developed countries where most TNCs have their homes, there has been a strong public call for more stringent environmental regulations, making it unlikely that governments would refrain from enhancing environmental control only because lower standards would be advantageous to their TNCs. Moreover, the TNCs themselves cannot openly object to the strengthening of domestic environmental regulations, as they would then lose the public's trust. Moreover, an overwhelming majority of TNCs have their headquarters in either Western European countries, the US or Japan, including almost 90% of the top 100 TNCs.¹⁴³ In these countries the level of environmental standards does not differ so significantly as to place TNCs from one country at a competitive disadvantage compared to TNCs from another country. This is particularly true within the EU, where legislation regarding nature conservation, water pollution, air pollution and waste disposal has been harmonized through a number of Directives.¹⁴⁴ Furthermore, since environmental regulations are sooner or later expected to be strengthened even in developing countries, in the long term TNCs would benefit from introducing and maintaining a uniform environmental management system satisfying stringent standards.¹⁴⁵

138 Neff, *supra* note 1, p. 527.

139 J. Taylor, 'Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?', 2001 *Louisiana Law Review*, pp. 868-870.

140 B. Earle, 'The United States' Foreign Corrupt Practices Act and the OECD Anti-bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument', 1996 *Dickinson Journal of International Law*, p. 208.

141 *Ibid.*, p. 208.

142 Eaton, *supra* note 36, pp.276, 281-282.

143 *World Investment Report 2004*, *supra* note 2, p. 11, 'Box I.1. Developments in the World's 100 Largest TNCs in 2002.'

144 Robinson, *supra* note 105, p. 411.

145 *Managing the Environment across Borders*, *supra* note 30, pp. 5, 9.

4.6. Difficulties with enforcement

4.6.1 Technical problems in gathering evidence located abroad

Some may claim that the extraterritorial application of developed home countries' environmental regulations would be impracticable because there are substantial difficulties involved in the enforcement of domestic laws in foreign countries.¹⁴⁶ Developed home countries would inevitably need to gather evidence located in developing host countries to enforce extraterritorial regulations. Under international law, however, a state is not allowed to conduct investigative activities within the territory of another state without its consent. In other words, enforcement jurisdiction is in principle limited to the territory of the regulating state¹⁴⁷ regardless of whether the regulating state has legitimate prescriptive jurisdiction over extraterritorial conduct. Therefore, 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 because they fear that TNCs may leave their countries if they offer enforcement assistance to the developed home countries.

Once developed home countries implement the extraterritorial regulation scheme, TNCs must comply with their home countries' environmental regulations wherever they operate. However, the mere enactment of such extraterritorial regulations may not necessarily prevent TNCs from relocating their operations in order to reduce their pollution control costs. TNCs may move their pollution-intensive operations from developing host countries that are cooperative in respect of the enforcement of the home countries' extraterritorial regulations to developing countries that are less cooperative. Thus, what is needed is a mechanism to induce developing host countries to cooperate with developed home countries for the purpose of the gathering of evidence under extraterritorial environmental regulations. A possible mechanism would be an enforcement assistance agreement under which first of all the developed home country agrees to provide the developing host country with the necessary financial aid and investigative 'know-how' to improve the developing country's own environmental legislation and secondly the developing host country promises to provide legal assistance in the enforcement of the developed home country's extraterritorial regulations. Such an agreement could be incorporated in an investment or trade treaty between the developed home country and the developing host country.¹⁴⁸

The above mechanism for cooperation would be impossible to implement when developing host countries regard the extraterritorial regulation by developed home countries as an infringement of their sovereign rights. However, under the legislative provision proposed above only a parent company that is a national of the home country, and its directors, officers, or employees may be punished for environmental violations. It seems unlikely that developing host countries will regard such indirect extraterritorial regulations as a serious intrusion into their sovereignty.

In addition to the bilateral cooperation agreement discussed above, a multilateral mechanism for extraterritorial regulation may provide for a legal assistance system between TNC home countries which would enable them to share valuable information for enforcement action. Furthermore, the increased activities of environmental NGOs around the globe may mitigate difficulties in obtaining relevant information in developing host countries.

146 Fowler, *supra* note 22, p. 27; Eaton, *supra* note 36, p. 281.

147 Evans, *supra* note 108, p. 351.

148 See J. Garvey, 'A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards through Extraterritorial Regulation', 2000 *UCLA Journal of International Law and Foreign Affairs*, pp. 35-36.

4.6.2. The logistical and financial burden on the developed home countries

Even if technical problems concerning the gathering of evidence located abroad could be resolved, another problem remains, namely that the monitoring and investigating of environmental practices of TNCs worldwide would impose a tremendous logistical and financial burden on developed home countries.¹⁴⁹ However, it is argued here that developed home countries will have to tolerate this burden given the extent to which they benefit by the activities of TNCs and because they have sufficient resources. Moreover, it should be noted that these developed countries are initially and primarily responsible for the current environmental problems as it was they who significantly destroyed the environment through their industrialization process and are still harming it, even though they strive to minimize the damage, at least within their own territories. The developed home countries' burden may be eased by limiting the range of applicable environmental regulations to only core regulations and by making extraterritorial regulations inapplicable to TNC foreign operations in developed host countries.

4.7. Relevant legislative attempts in the US, Australia and the UK

Recently, three major developed countries have attempted to enact legislation designed to regulate TNCs' foreign operations with a view to protecting human rights and the environment. In June 2000, a Bill for a Corporate Code of Conduct Act (hereinafter: the US Bill) was introduced in the US House of Representatives.¹⁵⁰ The US Bill requires US nationals (including US-based corporations) employing more than twenty persons in a foreign country, either directly or through foreign affiliates, to implement the Corporate Code of Conduct covering a wide range of standards for protecting human rights in the foreign country.¹⁵¹ Regarding environmental protection, the Corporate Code of Conduct requires compliance with internationally recognized environmental standards and with US federal environmental laws that would be applicable if the operations were conducted in the US.¹⁵² The US Bill was referred to three congressional committees on the day of its introduction and was subsequently referred to subcommittees of each committee.¹⁵³ After the election of 2000, the Bill was reintroduced in identical form in August 2001¹⁵⁴ and again referred to various committees.¹⁵⁵ However, none of the congressional committees took final action on the Bill.¹⁵⁶

In September 2000, in response to the Baia Mare accident,¹⁵⁷ the Australian Democrats introduced a Corporate Code of Conduct Bill 2000 (hereinafter: the Australian Bill) in the Australian Senate.¹⁵⁸ The Bill seeks to regulate activities of Australian corporations or their subsidiaries that employ more than 100 persons in a foreign country.¹⁵⁹ Regarding environmental protection, targeted corporations are required to take all reasonable measures to prevent any material adverse

149 Eaton, *supra* note 36, p. 281.

150 Corporate Code of Conduct Act, H.R. 4596, 106th Cong., 2000.

151 *Ibid.*, Para. 3.

152 *Ibid.*, Para. 3(b)(5).

153 <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR04596:@@L&summ2=m&>, 25 November 2005.

154 Corporate Code of Conduct Act, H.R. 2782, 107th Cong., 2001.

155 <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02782:@@L&summ2=m&>, 25 November 2005.

156 *Ibid.*

157 In January 2000, as a result of a breach in the tailings dam of the Romanian gold processing company, the Aurul S.A. Baia Mare Company, which was jointly owned by the Romanian government and the Australian company, a large amount of cyanide was released into rivers. *Tailings Spill Accident in Baia Mare, Romania*, 30 January 2000, <http://www.mineralresourcesforum.org/incidents/BaiaMare/summary.htm>, 25 November 2005.

158 Corporate Code of Conduct Bill 2000, <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/oldBills/Linked/12110412.pdf>, 25 November 2005 [hereinafter Corporate Code of Conduct Bill 2000].

159 *Ibid.*, Paras. 3, 4.

effect on the environment in foreign countries where they operate.¹⁶⁰ In contrast to the US Bill, the Australian Bill does not require targeted corporations to comply with Australian environmental regulations in foreign countries.¹⁶¹ However, unlike the US Bill, the Australian Bill explicitly obliges targeted corporations to employ the precautionary principle¹⁶² in carrying out required environmental measures.¹⁶³ Unfortunately, the Australian Bill was not supported by the major Australian political parties.¹⁶⁴ However, the Australian Bill is expected to be reintroduced with some amendments.¹⁶⁵ Under the amended Bill, targeted corporations are required to comply with certain domestic environmental regulations in foreign countries.

A Corporate Responsibility Bill (hereinafter: the UK Bill) was introduced in the British House of Commons in 2003.¹⁶⁶ The UK Bill obliges corporations incorporated in the UK whose annual turnover is £ 5 million or more to carry out their activities in accordance with international standards as well as the laws of host countries with respect to environmental protection, public health and safety, employment and human rights.¹⁶⁷ Moreover, the UK Bill requires directors of targeted corporations to take all reasonable steps to minimize any negative environmental, social and economic impacts of their operations or proposed operations.¹⁶⁸ Even though an Early Day Motion expressing support for the Bill attracted 282 signatures,¹⁶⁹ the Bill lapsed in November 2003 after it did not reach a second reading during the time allocated for debate.¹⁷⁰

Although none of the above legislative attempts have so far succeeded, this does not necessarily mean that the extraterritorial control scheme itself is defective. The US, Australian and UK legislators may simply have feared that unilateral extraterritorial regulation would place their TNCs at a competitive disadvantage. It is therefore again urged here that any extraterritorial regulations scheme be implemented by multilateral action.

5. Multilateral legal framework

If multilateral action by TNCs' home countries is indispensable, the OECD may provide a suitable forum.

5.1. Objectives of the OECD

The OECD currently consists of thirty industrialized countries that share a commitment to the market economy and pluralistic democracy.¹⁷¹ The OECD is regarded as a group of rich countries, because its members produce 60% of the world's goods and services.¹⁷² The OECD serves as a unique forum where the governments of the member states work together to address the

160 *Ibid.*, Para. 7.

161 A. McBeth, 'A Look at Corporate Code of Conduct Legislation', 2004 *Common Law World Review*, p. 233.

162 The 'precautionary principle' means that a lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage. Corporate Code of Conduct Bill 2000, *supra* note 158, Para. 6.

163 *Ibid.*, Para. 7(2)(g).

164 See *Report on the Corporate Code of Conduct Bill 2000*, June 2001, Paras. 4.44-4.46, http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf, 25 November 2005.

165 Exposure Draft, <http://natashastottdespoja.democrats.org.au/pdfs/CorpCode.pdf>, 25 November 2005.

166 Bill no. 129 of 2003.

167 *Ibid.*, Para. 2, 12(1).

168 *Ibid.*, Para. 7.

169 The House of Commons consists of 659 members.

170 McBeth, *supra* note 161, pp. 225-226.

171 OECD, p. 8, <http://www.oecd.org/dataoecd/15/33/34011915.pdf>, 25 November 2005.

172 *Ibid.*

economic, social, environmental and governance challenges of the world economy.¹⁷³ The OECD has committed itself to ensuring that: ‘*economic and social development are not achieved at the expense of rampant environmental degradation* (emphasis added).’¹⁷⁴

Considering the commonalities between the member states and the fact that an overwhelming majority of TNCs are headquartered in the member states,¹⁷⁵ it seems logical and reasonable for the OECD to be used as a forum to discuss and implement a multilateral mechanism for extraterritorial environmental regulation.

5.2. Precedents for multilateral action to implement extraterritorial regulation

5.2.1. Background of the OECD Anti-bribery Convention

In the wake of the Watergate scandal, pursuant to the self-disclosure programme of the US Securities Exchange Commission, more than 400 US companies disclosed questionable or illegal payments made to bribe foreign officials.¹⁷⁶ Fearing that these corrupt business practices might have a detrimental effect not only on the integrity of American business but also on its foreign relations, the US Congress in 1977 enacted the Foreign Corrupt Practices Act (FCPA) with a view to suppressing corrupt behaviour of US corporations abroad.¹⁷⁷

Since the enactment of the FCPA, the US has worked vigorously to persuade other countries, especially the OECD member states, to criminalize the bribery of foreign officials.¹⁷⁸ Under pressure from the US therefore and due to growing worldwide awareness of the increased costs associated with corruption, the international community started to turn against transnational bribery. As part of this global trend toward the condemnation of transnational corruption, the then twenty-nine member states of the OECD and five (at the time) non-member states¹⁷⁹ signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-bribery Convention) on 17 December 1997.

The OECD has a distinct interest in building a level playing field for international businesses, as one of its major roles is to preserve and protect the market economy. Moreover, about 75% of cases raising allegations of corrupt business practice involve TNCs that are based in the OECD member states.¹⁸⁰

5.2.2. Framework of the OECD Anti-bribery Convention

According to Article 1 (1) of the OECD Anti-bribery Convention, the signatory states must criminally prohibit any person from intentionally offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign official in order to obtain or retain business or other improper advantage in the conduct of international

¹⁷³ *Ibid.*, p. 7.

¹⁷⁴ *Ibid.*

¹⁷⁵ See *World Investment Report 2004*, *supra* note 2, pp. 276-278, ‘Annex Table A.I.3. The World’s Top 100 Non-Financial TNCs, Ranked by Foreign Assets, 2002.’

¹⁷⁶ H. Brown, ‘Extraterritorial Jurisdiction under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed Its Grasp?’, 2001 *North Carolina Journal of International Law and Commercial Regulation*, p. 244.

¹⁷⁷ R. Tronnes, ‘Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’, 2000 *George Washington International Law Review*, p. 100.

¹⁷⁸ US Department of Commerce, *Addressing the Challenges of International Bribery and Fair Competition 2003*, 2003, p. 2.

¹⁷⁹ The five non-member signatory countries were Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic. In 2000, the Slovak Republic became a member state. Slovenia and Estonia acceded to the OECD Anti-bribery Convention in 2001 and 2004 respectively. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 24 November 2005, <http://www.oecd.org/dataoecd/59/13/1898632.pdf>, 25 November 2005.

¹⁸⁰ G. Simpson, ‘Foreign Deals Rely on Bribes, U.S. Contends’, *Wall Street Journal*, 23 February 1999, A3.

business. The Convention does not require uniformity or changes in fundamental legal principles of the signatory states. Rather, the Convention seeks to assure functional equivalence among the measures taken by the signatory states to punish bribery of foreign officials.¹⁸¹ For example, while countries whose legal systems lack the concept of corporate criminal liability are not required to criminally punish legal entities, they must provide for equivalent non-criminal sanctions.¹⁸² In addition to the criminalization of transnational bribery, the Convention provides for the facilitation of mutual legal assistance in the investigation and prosecution of transnational bribery cases.¹⁸³

5.2.3. *Commonalities between corruption and environmental devastation*

The bribery of foreign officials and environmental devastation seem to have several things in common. Firstly, TNCs have been substantially involved in both. TNCs pay bribes to foreign officials in order to obtain favourable treatment in respect of, for example, licensing decisions and the awarding of government procurement contracts, and, after having gained business opportunities, TNCs cause damage to the environment and to human health in the host countries. Secondly, both transnational bribery and environmental devastation as committed by TNCs is more widespread in developing countries than in developed countries. Developing countries lack incentives and appropriate countermeasures to handle these issues. In developing countries, bribery is often deeply rooted in society and is considered a necessary lubricant for the wheels of society to turn¹⁸⁴ and while developing countries have recently become aware of the need to prevent pollution caused by TNCs, the pressure to develop economically and the lack of regulatory mechanisms act as obstacles to stricter regulation by them of TNCs' environmental practices. Most significantly, both transnational bribery and environmental devastation challenge global values. Corruption harms markets and resource allocation by distorting economic incentives and the regulatory role of the government.¹⁸⁵ Corruption may also inspire domestic unrest.¹⁸⁶ Environmental devastation may not only directly harm the life or health of human beings, animals and plants in the region, but also affects the entire planet for generations to come.

Considering the nature and circumstances of environmental destruction caused by poorly regulated TNCs' activities in developing host countries, it seems necessary and appropriate for the OECD members to take a leadership role in international environmental protection by adopting a convention that obliges them to enact laws stipulating that their TNCs must comply not only with the environmental regulations of the host countries, but also with those of their home countries. This could be done by adopting an 'OECD Convention on Combating Environmental Devastation Resulting from Transnational Business Activities' patterned after the OECD Anti-bribery Convention.

181 *Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions*, Para. 2, http://www.oecd.org/document/1/0,2340,en_2649_34855_2048129_1_1_1_1,00.html, 25 November 2005.

182 OECD Anti-bribery Convention, *supra* note 106, Art. 3(2).

183 *Ibid.*, Art. 9, 10.

184 R. Dale, 'Crisis Stills Apologists for Corruption Thinking Ahead', *International Herald Tribune*, 29 September 1998, p. 13.

185 *Ibid.*

186 Tronnes, *supra* note 177, p. 106.

6. Protection of the environment through criminal sanctions

Finally, it needs to be examined how the proposed extraterritorial regulations should be enforced. In other words, the issue to be addressed here is what kind of sanctions should be imposed on wrongdoers who violate the extraterritorial environmental regulations.

With respect to environmental regulations in general, civil law monetary sanctions are the most typical enforcement measures. However, the deterrent effect of the civil monetary sanction is generally limited, as such a penalty is regarded by many corporations as just another business cost which is cheaper to bear than the costs of installing and maintaining effective clean technologies.¹⁸⁷ Thus, in addition to civil monetary sanctions, many jurisdictions use administrative sanctions, such as closing down businesses and cancelling permits. However, in the case of the proposed extraterritorial regulations, such administrative sanctions will not be available because the administrative authorities of developed home countries are not competent to close down foreign facilities or revoke their operation permits. More importantly, breaches of the proposed extraterritorial regulations carry a much lower risk of detection than breaches of ordinary domestic regulations. Thus, a powerful enforcement measure is crucial for making it effective. In this respect, criminal sanctions may have distinct advantages to deter environmental wrongdoings.¹⁸⁸ For example, the possibility of a prison sentence will probably have a considerable deterrent effect on the behaviour of corporate officers and employees.¹⁸⁹ Moreover, corporations would not wish to be branded criminals in the eyes of their environmentally sensitive clientele.¹⁹⁰

Recognizing the deterrent effect of criminal sanctions, many developed countries enforce environmental laws not only through civil sanctions, but also through criminal sanctions.¹⁹¹ Recently, at the international level, there seems to have been a significant shift toward the protection of the environment through criminal law. For example, in 1990, the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba) adopted a resolution on '[t]he role of criminal law in the protection of nature and the environment,' which, *inter alia*, called upon the member states to 'recognize the need to modify or enact, where necessary, and to enforce national criminal laws designed to protect nature and the environment, as well as people threatened by their deterioration.'¹⁹² The role of criminal law in the protection of the environment was also underlined in UN Economic and Social Council (ECOSOC) resolutions nos. 1993/28 and 1994/15.¹⁹³

In Europe, the shift mentioned above has already resulted in the adoption of legal instruments. In 1998, the Council of Europe opened for signature the Convention on the Protection of the Environment through Criminal Law. This is the first international convention to criminalize

187 S. Calcote, 'Criminal Intent in Federal Environmental Statutes: What Corporate Officers and Employees Should "Know"', 1993 *American Journal of Criminal Law*, p. 361.

188 *Environmental Protection at National and International Levels: Potential and Limits of Criminal Justice* (UN Interregional Crime and Justice @Research Institute Research Workshop @Paper), 1997, p. 25, http://www.iuscrim.mpg.de/verlag/online/Band_S68/4_overview.pdf, 25 November 2005.

189 *Ibid.*

190 *Report of the International Meeting of Experts on the Use of Criminal Sanctions in the Protection of the Environment; Internationally, Domestically and Regionally*, 1994, p. 11, <http://www.icclr.law.ubc.ca/Publications/Reports/Portland2.PDF>, 25 November 2005.

191 See J. Bradford, 'Environmental Crimes', 2003 *South Texas Law Review*, pp. 5-21; *Criminal Enforcement of Environmental Law in the European Union*, 2000, <http://europa.eu.int/comm/environment/impel/pdf/criminal.pdf>, 25 November 2005.

192 Resolution on The Role of Criminal Law in the Protection of Nature and the Environment, 1990, http://www.iuscrim.mpg.de/verlag/online/Band_S68/17_annex.pdf, 25 November 2005.

193 *The Role of Criminal Law in the Protection of the Environment*, <http://www.un.org/documents/ecosoc/res/1994/eres1994-15.htm>, 25 November 2005.

conduct that would cause or be likely to cause environmental damage even though it has not yet entered into force. As of April 2005, the Convention was signed by thirteen member states, only one of which had also ratified it.¹⁹⁴ Further, in 2001, the Commission of the European Communities submitted a proposal for a Directive on the protection of the environment through criminal law,¹⁹⁵ which was however later rejected by the EU Council which claimed that the Community lacked competence to legislate such a Directive. The draft Directive was the result of critical concern that the Community environmental laws were not fully observed due to a lack of effective sanctions.¹⁹⁶ In 2003, instead of accepting the Commission's proposal, the Council adopted a Framework Decision on the protection of the environment through criminal law under the Third Pillar of the EU. The Commission then started a procedure against the Council Framework Decision before the European Court of Justice, claiming that the issue should be dealt with under the First Pillar. In September 2005, the Court found in favour of the Commission and annulled the Framework Decision.¹⁹⁷ The Commission is now considering resubmitting the draft Directive or an adapted version thereof to the Council.

Considering the shift towards criminal law penalties for violations of environmental standards, it would seem logical and reasonable to enforce the proposed extraterritorial regulations through criminal sanctions besides civil sanctions as well. As has already been remarked, violations of these rules regulation run an inherently low risk of detection and should therefore be backed by dissuasive penalties. With respect to the issue of imposing criminal sanctions on corporations, it should be recalled that several European countries, including Germany, Italy, Sweden, and Spain, do not recognize corporate criminal liability. In these countries, administrative or quasi-criminal fines could be imposed on corporations for violations of the proposed rules.

7. Conclusion

By nature, economic development and environmental protection are conflicting concepts, which may however be reconciled to a considerable degree through innovative technologies and due care. TNCs have demonstrated that they are capable of minimizing environmental harm at home. Nevertheless, a majority of TNCs have failed to utilize such capabilities in developing host countries with lax environmental regulations because they are not prepared to pay for what is not legally required. This double standards practice cannot be tolerated from the point of view of the social responsibility of TNCs.

Recognizing their responsibility to society and to future generations, foresighted TNCs have however increasingly adopted strict uniform environmental standards. However, it seems unlikely that the majority of TNCs will follow suit in the near future. This means that there is an acute need to develop a legal device that can force TNCs to employ uniform environmental standards regardless of their operational locations. Given the realities that the international community and developing countries are currently facing, the extraterritorial application of TNCs' developed

194 *Chart of Signatures and Ratifications*, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=172&CM=8&DF=4/20/05&CL=ENG>, 25 November 2005.

195 The draft Directive obliges the Member States to criminalize intentional or grossly negligent violations of Community environmental laws that would cause or be likely to cause significant deterioration of or substantial damage to the environment. *Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law*, 2001, p. 4, http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0139.pdf, 25 November 2005.

196 *Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law*, *supra* note 195, pp. 2, 6. See F. Comte, 'Criminal Environmental Law and Community Competence', 2003 *European Environmental Law Review*, p.149.

197 Case C-176/03 *Commission of the European Communities v. Council of the European Union* [2005] (not yet reported), Para. 55.

home countries' environmental regulations would be the only available means to force TNCs to adopt uniform environmental standards and avoid or minimize environmental harm in developing host countries.

Such extraterritorial application of domestic legislation would likely be fiercely challenged on the basis of traditional sovereignty claims. However, under contemporary international law, sovereignty is no longer an impenetrable defence. In fact, sovereignty claims may be overcome by using indirect extraterritorial regulation. It would be less controversial if TNCs' developed home countries exerted only indirect control over the activities of TNCs' foreign affiliate corporations by means of the regulation of the behaviour of their parent companies.

It is not expected that developed home countries will implement the extraterritorial regulations for fear that their TNCs would be placed at a competitive disadvantage in the world market. It is therefore crucial that such extraterritorial regulations be implemented through a multilateral treaty, for example, among the OECD members. In this, the TNCs' developed home countries can expect to encounter various challenges in respect of enforcement, not least attempting to obtain evidence located abroad. These problems, however, do not seem insurmountable.

If a multilateral mechanism for extraterritorial regulation by TNCs home countries were to be established, the environment could be effectively protected from unnecessary harm and the people of developing host countries could benefit fully from the social and economic development that TNCs might help to engender. Of course, developed countries must continue to make efforts to convince developing countries of the need to enhance and enforce their own domestic environmental regulations. However, as an interim effort, TNCs home countries should strive to create a mechanism making extraterritorial regulation possible, so as not to allow TNCs to remain out of the reach of stringent environmental regulations by operating in developing countries.