the view that a developing country has a duty to regulate within its territory and take account of the fact that developing countries do regulate in certain areas, e.g., there exist, and arguably should exist, some developing-country controls on pollution, safety requirements, and requirements to train and employ local personnel.

The tension just described is illustrated by the Bhopal situation. It has been argued that India (including the central, state, and local governments) is involved in various ways in the tragedy. The subsidiary owning and operating the plant from which the leak occurred is 49-percent locally owned. Local authority allegedly allowed the eventual victims to occupy vacant land around the plant, in violation of Indian environmental laws. The possibilities have been raised that local governments did not conduct adequate inspections and that there was governmental pressure to appoint personnel more qualified by political affiliation than professional competence.

Returning to a broader perspective, a consideration that must be taken into account in evaluating the conflicting viewpoints regarding the role of developing countries is that allocation of liability may have a significant effect in discouraging the amount and changing the nature of foreign investment in and technology transfer to developing countries. For example, allocating liability to the state in which the parent corporation is headquartered (or incorporated) would presumably cause that state to regulate more strictly all foreign investment and technology export—a result that could easily lead to decreasing those types of activities and thus to hampering developing countries’ efforts to create employment opportunities, increase standards of living and decrease dependency on imports. Similarly, although on a different level, holding the parent corporation liable could be expected to decrease total foreign investment by increasing the risk of such investment. Such an allocation of liability might lead to exercise of greater care in supervising operations of foreign branches or subsidiaries, but it might also result in exporting only simpler or older and more thoroughly tested technology—a result that presumably would increase safety but that also could leave the developing countries’ products unable to compete in export markets—or to a restructuring of foreign activities, e.g., toward licensing instead of direct investment. These and other policy considerations affect the calculus of allocating liability.

There are significant difficulties in concluding that the Bhopal situation would result in U.S. liability as the Liability Topic has been developed thus far, but it is important to bear in mind that that topic is still evolving.

**Remarks by Günther Handl**

There is no denying that some of the most challenging legal issues that arise out of the accident at Bhopal are private law questions. Any suggestion that the “public” international legal implications of Bhopal are cut and dried, however, would be grossly misleading. Indeed, as indicated, the complexity of public international legal questions raised by the disaster is such that only a few select issues can be addressed here. I will merely comment on some questions which the preceding speakers have not, or at least have not fully, analyzed and which are important enough to warrant some exposition or more detailed consideration.

Professor Magraw has characterized eloquently the notion of “control” as an important criterion for allocating accidental transnational losses in situations where no violation of international law has occurred. I agree with his basic conclusion that there is no room now for the argument that under customary international law authorization of the export of a hazardous industrial facility to a developing country
might trigger the exporting state’s international liability for accidental damage resulting from operation of the plant. For all practical purposes “control” over the facility is deemed exercised by the importing state within whose boundaries, and thus subject to whose exclusive jurisdiction, the facility is being operated. Some members of the International Law Commission may view the exporting state implicated because, as a technologically advanced country, it has been willing to export a sophisticated though hazardous facility to a state lacking expertise to establish and enforce adequate regulatory standards. But there is no indication that the Commission as a whole might follow this line of thought and subscribe to the notion that as between exporting, developing and importing, developing countries “control” over the hazardous facility must be considered shared.

This is not to suggest, however, that there might not exist valid policy reasons for an expansive interpretation of “control” to assure the exporting country’s long-term interest in safe operation of the facility. In some cases, such as vessels in general and nuclear-powered ships in particular, activities are deemed to remain within the control of one state even though physically operated within the territory of another. This phenomenon is explained by the “host” state’s ineffective control over the activity concerned and the relevance of this fact to a fundamental goal of any legal system, including international law, the minimization of the costs of accidents. As contacts between vessel and port (or coastal) state usually will be of a fleeting nature, the latter’s control over the vessel as regards design, construction and equipment, etc. is limited both in fact and at law. This rationale for upholding flag-state control (and thus presumably also liability) over vessels in foreign waters might apply mutatis mutandis to states exporting hazardous industrial facilities to countries with patently inadequate technical or administrative resources to manage safely the risks involved. At least with regard to certain risks both the flag and the exporting state are in a position to act more effectively to prevent accidental damage than the coastal port or the importing states respectively.

Persuasive as the idea of shared control may be from the viewpoint of minimizing accident costs, it is quite unlikely to evolve as a customary international legal concept. Naturally, exporting states will be reluctant to increase their exposure to international liability; in any event, they will be unwilling to accept the notion of shared control unless—as a minimum—they gain a significant say in the construction and operation of the exported facility. Given the sensitivity of issues bearing on national sovereignty, particularly among less developed countries, a legally significant understanding as to joint control will come about only on an ad hoc basis and as a result of specific agreements setting up cooperative ventures with joint control expressly provided for. Such ventures between governments are, however, rare and are likely to remain so despite the probability that after Bhopal developing countries may find such arrangements more attractive than in the past. The notion of shared liability—because of shared control—is therefore likely to play at best a secondary role in any international reallocation of losses due to accidents involving foreign-origin hazardous industrial facilities in developing countries.

A second issue of major concern in the present debate is whether the exporting country might or should be required to undertake an environmental impact analysis (EIA) before authorizing export of a hazardous facility to a developing country. There can be little doubt that today states must be considered to be under a customary international legal obligation to perform an EIA when activities are carried on within national jurisdiction and pose a risk of transnational environmental effects. The same is true for activities that are being carried on in an area of international jurisdiction.
Multilateral treaties, e.g. the Law of the Sea Convention; bilateral agreements, e.g. the 1983 U.S.-Mexican Environmental Cooperation Agreement; OECD recommendations and decisions; pertinent UNEP documents, e.g. the Principles of Co-operation in the Field of the Environment concerning Natural Resources Shared by Two or More States; the EEC Directive on Environmental Impact Assessment; and domestic statutes calling for transnational EIA all reflect a simple fact, that transnational EIA is an essential procedural aspect of the customary international legal obligation of states not to cause harm to the environment beyond national jurisdiction or control.

Existence of such a duty to perform an EIA, however, does not answer the question whether a state is under a similar obligation when the injurious activity is being carried on within foreign territory. In the former situation EIA is merely complementary to the well-established duty to avoid significant transnational harm. In the latter case, where the exporting state is only tenuously linked to the transnational harm by way of its export authorization, there is no corresponding principal obligation in relation to which the EIA might be an incidental though necessary obligation.

While there may be no basis for the argument then that an EIA would be required of the exporting state as a matter of present-day customary international law, there are good policy reasons why the law should develop in this direction. When exports to less developed countries are involved, importing governments frequently have only a very limited ability to perform an EIA, be that because of financial restraints, technical resource problems or an inadequate regulatory framework. In such a situation EIA by the exporting country might be essential to minimize undue social, economic and environmental costs of unsound or unsafe industrial or other development projects. Opponents of such a requirement have argued persistently that analysis of the local environmental impact of a hazardous facility to be sited abroad would invariably entail an infringement of the importing country’s sovereignty even though this analysis is intrinsic to the decision on whether or not to export, and the decision itself is generally recognized to come within the ambit of the exporting country’s sovereignty. Such deference to foreign sovereignty is excessive, indeed not required by international law.

In any event, Bhopal is likely to persuade developing countries that more rather than less EIA is called for before importing hazardous technology and that exporting countries have not just a right but a responsibility to assist importing states in taking proper investment decisions. This is a view that is not only reflected in the lending practice of international financial institutions, such as the World Bank, but has been expressly commended to individual member states in the proposed OECD Guideline on Bilateral Development Assistance Agencies, and most recently, in response specifically to the tragedy at Bhopal, in a resolution of the European Parliament.

A fundamental question, suggested by Professor Nanda, is whether, and if so, in what circumstances, states might be responsible internationally for conduct abroad of “their” transnational corporations (TNCs). Leaving aside legitimate questions about implications of the increasing multinationalization of TNCs, it is clear that as a general rule, a TNC’s conduct will not be attributable to the national state: TNCs neither act as organs of their national states nor do they act on behalf of the state when they engage in commercial activities abroad. This negative finding does not dispose of the issue. The question that remains is whether states themselves are not under an international legal obligation to restrain TNCs from engaging in injurious activities abroad.

International law does not recognize responsibility of the territorially organized collective for any one of its members abroad acting in a private capacity. Except for a very limited number of cases, such conduct has not been the subject matter of interna-
tional law itself. But with concern increasing over the impact potential and amenability to host-state control of private foreign actors, a change has been taking place. Conduct of such actors of transnational significance is being circumscribed progressively by international legislation. This is particularly true for TNCs and their operations in host countries. Thus compliance with applicable health, safety and environmental standards is one such standard that makes up the core of codes of conduct that have been promulgated or are being considered by international organizations to control multinational corporations. Examples include the U.N. Draft Code of Conduct on Transnational Corporations, the 1976 ILO Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, and OECD documents, such as the draft Environmental Guidelines for Multinational Corporations. None of these documents, however, provides for the home state’s international responsibility in case of noncompliance by the TNC. A provision that comes close to espousing the notion of home-state responsibility is a stipulation in the ILO Tripartite Declaration to the effect that “governments should ensure that . . . multinational enterprises provide adequate safety and health standards for their employees.” But this provision, as the declaration as a whole, evidently is couched in terms of a recommendation. The only passage on the issue of state responsibility in the U.N. draft code of conduct, and at that one that remains highly controversial, relates to the national state’s duty to prevent the TNC from engaging in political activities within the host state.

Thus, on the one hand, there is no real evidence of a trend toward recognition of state responsibility for a TNC’s noncompliance with safety, health or environmental standards. If a TNC behaves like an environmental rogue elephant in the host state, the latter does not seem to have international legal recourse against the corporation’s national state. On the other hand, once it is established that from an international perspective certain private conduct is undesirable, indeed illegal, expectations will arise that the state is required to prevent its nationals from engaging in such conduct. As social welfare concepts are increasingly gaining currency in international relations, we experience something of a shift in the burden of proof with regard to a state’s duty to take preventive action. As Professor Christenson put it in *International Law of State Responsibility for Injuries to Aliens*: “The legitimacy of neglect is placed squarely in question when a country does nothing to share its wealth or technology that might reduce the evils of poverty or other deprivations,” including, one might add, perceived abuses of power by TNCs. The implications of this train of thought for the issue of state responsibility for TNCs are evident, particularly when the ICJ decision in the *Barcelona Traction* case is taken into account. *Barcelona Traction* suggests that a state might have a duty to control corporate activity at the risk of losing the right to protect its national diplomatically. From this it is only a small step to asserting the national state’s affirmative duty to ensure that the TNC complies with internationally approved standards of conduct and that failure to do so exposes the delinquent state to the full range of legal consequences attaching to a violation of an international legal obligation.

It is true that in the somewhat analogous case of a flag state’s duty to ensure the vessel’s compliance with applicable international rules and standards on vessel safety, etc., flag-state responsibility has remained largely an inoperative concept. Nonetheless, host states can be expected to attempt to use increasingly the link of nationality between home state and TNC as a basis for a state responsibility claim if the TNC fails to live up to internationally agreed upon minimum standards of conduct. It is equally true that host states cannot have it both ways; they will not be able to deny a national
state’s right to protect its TNC while at the same time they stress the national state’s responsibility for the corporation’s conduct. Although it is too early to tell which way practice will develop in the short run, it is quite plausible that the concept of nationality will eventually be considered meaningless in relation to TNCs, that the notion that a particular state might be responsible internationally for the conduct of a TNC accordingly will become untenable and that TNCs will acquire the status of actors directly subject to and entitled through “international” law in their own right, i.e. without prejudice to states’ rights and obligations.

It is worth reiterating that international procedures for exchange of information and consultation bearing on transnationally hazardous exports should be strengthened; that transnational EIA should extend to effects expected to occur solely within the importing state; that close international cooperation both bilaterally, between exporting and importing states, and multilaterally may be necessary to avoid repetition of the kind of disaster that befell Bhopal and to minimize the injurious effects of accidents which may occur despite adoption of all reasonable precautionary measures. For this purpose it might be advisable to establish a worldwide inventory of hazardous facilities, to organize a competent international inspection service provided for under UNEP auspices or, if need be, under those of a specially created international agency, and to set up an international chemical response and information center.

DISCUSSION

The CHAIRMAN then made concluding remarks, and the ensuing discussion centered around the Stockholm Principles, international responsibility of multinational corporations, dispute resolution procedures for transnational disasters and the effects of such restrictions on international trade.

SHELLY P. BATTRAM*  
Reporter

ANNUAL DINNER

Friday, April 26, 1986, at 7:30 p.m.

David G. Gill, President of the American Society of International Law, introduced the program. He noted that many distinguished guests were present, including Judge Stephen M. Schwebel of the International Court of Justice. He thanked Anthony A. D’Amato, Program Chairman, for an outstanding program, and he particularly thanked the staff of the Society for its year-round hard work and devotion.

Mr. Gill then noted the retirement of Seymour J. Rubin, effective May 1, 1985, after 10 years of service as Executive Director. Mr. Rubin had had a long and distinguished career in government, academia, and private practice; his many publications were especially noteworthy. As a remembrance of his work for the Society, Mr. Gill, on the Society’s behalf, presented Mr. Rubin with a sculpture in Tennessee marble by the American artist, Aaron Levine.

Mr. Gill then read the following message from the White House:

The 79th Annual Meeting of the American Society of International Law provides me with a welcome opportunity to extend my greetings to all of you and, in

*Of the Michigan, New York and Ontario Bars.