INTERNATIONAL TORTS
A LATIN AMERICAN POINT OF VIEW

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"*More than **3,000 people were killed** and **200,000 others were injured** in Bhopal on Dec. 3, 1984, when 40 tons of [chemical gases] were released from the Union Carbide pesticide plant after an explosion. Many more have died since of gas-related illnesses. […] Over 95% of the claimants who received payment have been given about **$ 600 in the case of injuries** or about **$ 3,000 in the case of death**. More than half the money has yet to be dispersed.*" (New York Times, 3/5/00, page 5).

It is common today to talk about a global economy, instantaneous communication and other developments that make borders redundant. This universalist movement imposes modern structures that surface in law as well as in other cultural expressions. The opposite trend, which we could call regionalism, consists in upholding traditional attitudes.

The interaction between universalism and regionalism can be studied from several points of view, one of which is that of international torts[1]. Looking at Latin America we can see that torts within a big sector are propelled by universalism. A global economy, for instance, together with all its benefits, also carries goods and industrial procedures of extreme risk, capable of causing catastrophic accidents.

At the same time, Latin American law that protects against such international torts, is ruled not by universalism but by regionalism. This is so since, as it will be later shown, Latin American legal systems have been left behind by technology. The situation can be summarized like this: in Latin America international torts are committed with techniques of the XXI century, while the local legal systems obey to structures created in the XIX century. Said differently: in Latin America torts that are facilitated by universalism are fought with a regionalist legal system.

Obviously, in a confrontation of the new versus the old, the former is likely to win. It is then desirable to modernize the Latin American approach to international tort law. Perhaps in several countries rather than "modernize" we should say "present for the first time" the need for a legislative policy concerning international torts. The present situation in Latin America is that torts caused by modern means are controlled by archaic ways. Naturally, the injury will always be greater than the damages. Worse still, the more the subject lags behind in Latin American law, the greater the incentive for more international torts to be committed in this

[1] The term "torts" is used in the classical sense, as a source of obligations, or as a synonym for "civil extracontractual liability".

region[2].

This essay purports to explain some of the changes that could be made in: a) procedural law, b) conflict of laws and c) substantive law, in order to protect the citizens and the state from international torts. In order to clarify ideas, each issue ends with a draft article. In some cases, the source is indicated at the end of each proposed article.

It is a necessary task. Glancing at Latin America we can see that her systems of international tort law are still undeveloped. The weakest link in this chain is procedural law.

Several are the reasons for a legal vulnerability of such magnitude. First, Latin Americans with an international legal background usually work for corporations, in matters related to business law. International organizations for the public good deal with issues of labor relations, human rights, etc… The remaining international organizations are business oriented, focusing on topics such as intellectual piracy, the convention of the international sale of goods and the like.

There is no organized movement to protect the victims of international accidents. However, many of these accidents would be quite avoidable if Latin American legal systems would discourage them through modern and effective legislation.

Some sectors, as Latin American chambers of commerce, think that tough laws against international torts will slow business and diminish foreign investment. Experience shows otherwise. The USA, with one of the toughest tort systems of all, is an undisputed leader in economic development. It then follows that the proposed legislative change will not cause the loss of business. To the contrary, it would be a factor of economic development.

Many of the proposals made here are already incorporated in the various legal systems of the region. But the rules are disperse and poorly articulated. This whole legal branch would develop better with a clear and explicit statute.

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[2] Mere economic determinism dictates that a weak tort system renders international torts profitable. For instance, a pesticide that caused sterility to the workers using it was exported to Central America (see *Delgado v. Shell Oil Co*., 890 F. Supp., S.D. Tex. 1995). Another example is pollution caused in Ecuador by a foreign enterprise (see *Maria Aguinda y Otros v. Texaco*, Inc. US District Court, Southern District of NY, 93 CIV 7527). The responsible corporations do not commit similar acts in their countries of origin (USA) where tort law is effective and strong. But they do so in Latin America, where legal consequences of such acts do not inspire a similar respect.

I. PROCEDURAL LAW

1. Service abroad

Latin American law usually has a cumbersome system for service abroad[3]. It is common to require the involvement of the Supreme Court, of the Ministry of Foreign Relations and of the national Consulate in the country in question. Now-a-days all that is Kafkaesque[4]. Why could not the Latin American judge just order service abroad through certified mail and/or through a private courier system? American judges use simple and direct methods for international service, without this jeopardizing the integrity of proceedings.

The archaic notification systems, still alive in our codes of civil procedure, are no longer justified. Besides, their weight easily adds one year to the case. These legal niceties are a strong incentive for foreign corporations to commit torts in Latin America. Without exaggerating it could be said that a good half of international lawsuits that are not filed, or that are prematurely abandoned, is caused by the obstacle of service of process.

It is true that the Inter-American Convention on Letters Rogatory[5] facilitates service abroad. However, it still provides a bureaucratic and a slow answer to this question.

The proposed article empowers the district court judge, providing her with a practical instrument needed to perform effectively: the possibility of serving abroad in a direct, quick and economic way.

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[3] For instance, the Code of Civil Procedure of **Costa Rica** determines in article 180: *"If service has to be made abroad, a rogatory letter shall be issued, with the signatures that authorize it duly authenticated by the Secretary of the Supreme Court and the Ministry of Foreign Relations, addressed to the Costa Rican consulate of the place where the rogatory letter is directed; if there is no such consulate, the rogatory letter shall be addressed to the consulate of a friendly nation."* See also the **Bustamante Code**, arts. 388-393.

[4] Literally speaking, Latin American nations would have been better served if their legislators had followed Machiavelli sooner than Kafka.

[5] Signed in Panama on January 30, 1975 and its Additional Protocol, signed in Montevideo on May 8, 1979. Both texts and a list of signatory countries can be consulted in www.oas.org

The proposed rule states as follows:

> ***Service abroad. Service of process to be performed abroad, including summons, may be carried out by certified mail and/or through private courier services.***

2. Statute of limitations

This is a point ideally suited to be legislated with clarity and certainty. Paradoxically, the international statute of limitations appears in practice as a rather confusing issue. For instance, in present Guatemalan law it is not well determined if the statute of limitations belongs to substantive or to procedural law. Believers of the former point out that according to article 1501 of the Civil Code, the statute of limitations "extinguishes the obligation". Supporters of the latter note that, according to article 1504, payment of a time-barred debt cannot be rescinded since it counts as the payment of a natural obligation. And this would indicate that what is time-barred is the action, not the right[6].

If the state legislate the topic adequately, it is convenient to classify it as a procedural issue. This would allow the state to apply such rule always, as *lex fori*. A ten-year term seems prudent. Since some torts are not readily evident, it is important to clarify since when the term starts running. The proposed rule uses two criteria: a) when the injury becomes apparent and b) when the injury becomes worse. The first paragraph of the proposed article is a direct translation of the French Civil Code.

Many times the tort is also a crime. In those cases the proposed article extends the rules applicable rule to the crime as well. The purpose is to allow the State to keep its power to punish crimes committed against its citizens[7].

Concerning personal actions, the Bustamante Code subjects the statute of limitations to the *lex causae*[8]. Such rule may cause exceedingly short terms that

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[6] As many other issues of Latin American law, this is a point that was already polemic in French law. It was debated by the great masters: Pothier, Baudry-Lacantinerie and Planiol. It is puzzling that these issues have not been solved long ago.

[7] The penal ramifications of torts are not uncommon. In the Bhopal case, for instance: "*The Indian government, following criminal proceedings against [Warren M. Anderson, president of Union Carbide Corporation in 1984] and the company, has issued an arrest warrant for Mr. Anderson and notified Interpol that he is a fugitive. He is charged with "culpable homicide" – the legal equivalent of manslaughter."* (The New York Times, 5/3/00, page 5.)

[8] Article 229.

would weaken the tort victim's claim.

The proposed rule states as follows:

> ***Statute of limitations. Actions for international torts are limited after ten years from the time the injury manifests itself, o from the time the injury becomes worse***. (France)[9].
>
> ***Without prejudice to more severe rules, established in other statues, when an international tort also constitutes a crime, the statute of limitations applicable to the latter will be the same as expressed above***.

3. Foreign evidence in local lawsuits

Means of evidence vary a great deal according to each legal system. American law uses depositions, requests for admission and other means that do not correspond exactly with Latin American notions of evidence. Depositions, for instance, could be set on a par with a *declaración testimonial.* However, the former are normally performed outside the judge's presence. Latin American law has not focused with certainty –much less solved- the issue of what value should be attributed to a foreign deposition.

Another question is if one should take into account, and in what measure, testimony –now taken in the presence of the foreign judge- but when the witness is a party to the case. Latin American law generally prevents such testimony[10], which is reflected in the adage "nobody can be a witness in his own case". One could reasonable argue in favor of all extremes: a) that such "party testimony" is completely illegal in Latin America, b) that it is admissible, not a testimony but as a party's admission, or c) that it is entirely valid since the *lex loci* is applied.

This is a topic that should be clarified by statute[11]. A flexibility seems

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9 Civil Code, art, 2270-1.

10 The Code of Civil Procedure of **Brazil** prevents the parties from offering testimony (art. 405, II). The Judicial Code of **Panama** classifies as "suspected of not telling the truth" everyone who has "a direct or indirect interest in the result of the lawsuit." (art 806, para. 10). The Code of Civil Procedure of **Ecuador** considers that "Due to lack of impartiality, the following are not proper witnesses … 5) Someone interested in the case or in a similar case."

11 The Bustamante Code establishes that means of evidence that "are not authorized" by the *lex fori* remain excluded. Still, it could be argued that a party's testimony in a foreign proceeding could be taken into account in Latin America as an admission or as the beginning of proof.

advisable, giving the judge authority to evaluate the foreign evidence freely.

As a practical matter the problem of voluminous foreign documents, with the cost and the complication of the corresponding translations should be anticipated. For reasons of judicial economy, the party should be allowed to introduce only the relevant sections of the foreign documents.

The proposed rule states as follows:

> ***Evidence. Relevant evidence, produced in foreign lawsuits, shall be admissible and it will be subject to the national court can assess it freely.***
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> ***The proponent of foreign documents may offer just the relevant part of them, including the section that identifies them***.

4. Local evidence in foreign lawsuits

One aspect that Latin American codes of civil procedure do not take into account is how to help, from an evidentiary point of view, the citizens who are litigating abroad. Many times the plaintiff or defendant, Chilean for instance, must prove the content of his national law before a court in England, Greece, etc… If the party were an official entity, presumably it would have little trouble in obtaining the necessary official documents. For a private litigant the alternative would be to hire an expert, e.g. a law professor, to render a legal opinion. This procedure could be very expensive or it could lack the desired strength.

There is no reason why the Attorney General's Office, or a similar body, could not help its nationals when they are a party to foreign litigation by rendering opinions of the content of its national law. After all, these same citizens who require help deserve the support of their authorities. Besides, for the jurists working at the Attorney General's Office it would not be too difficult to issue reports about their own legal system.

The possibility of obtaining such an opinion is of great practical importance. In some legal systems the Attorney General's opinion about his own laws is conclusive, with a value close to irrebuttable presumptions[12].

[12] Such is the case in American law: *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 522(1942), precedente que fue seguido en by *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280 (D. Del. 1976), aff'd without opinion, 564 F. 2d 89 (3d Cir. 1977), cert. denied 434 U.S. 1035, 98, S.Ct. 770 (1978).

It is true that the Inter-American Convention of Proof and Information of Foreign Law[13] does help. However, it has only been ratified by Latin American countries, all of which have legal systems and cultures easily understandable among themselves, even without such Convention. The interesting test is proving the content national law when it is not largely accessible in a foreign lawsuit.

The proposed rule states as follows:

> ***Evidence in foreign lawsuits. At the request of national litigants who are parties in foreign lawsuits, the Attorney General's Office may issue opinions explaining issues of national law.***

II. CONFLICT OF LAWS

1. Governmental Interest

American conflict of laws[14] knows the theory of governmental interest. When two legal systems are potentially applicable to a case, this theory leads to the choice that coincides more closely with the state's interest, which normally favors the protection of its citizens. In Latin America it could be called the social interest theory. It would consist in using the notion of social interest as one more factor to decide whether local of foreign law should be applied.

Since all Latin American Constitutions say that it is the State's duty to protect its inhabitants, there is no reason why the Legislative and the Judiciary Power could not use governmental interest as one of the elements to determine the choice of law. Concerning international torts, governmental interest could be expressed in the following way: "*"It is national policy to protect as much as possible citizens and the environment from international torts. Accordingly, where two or more legal systems are potentially applicable to a case, the court shall apply the one most favorable to the victim and that results more conducive to prevent similar situations from recurring."*

It is certainly not a question of imposing an unfair standard just because it happens to be more favorable to the national interest. It is not either a conduit to release a wave of legal xenophobia. That is not at all the meaning of this theory.

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[13] The text can be consulted in www.oas.org

[14] Legal writing usually forgets, unjustly, that the best promoter of this theory was the great Napoleon. See, for instance, how article 14 of the French Civil Code protects citizens, establishing the plaintiff's French nationality as a jurisdictional base.

It is simply the recognition that certain cases can be solved by applying one legal system or another. And, if that is so, why not apply the system that would be more likely to prevent future similar cases? Normally the most dissuasive system for the future tortfeasor is the one that turns out to be "more expensive" for the present tortfeasor.

This is not an opportunistic nor an underhanded theory. Here one simply applies to international torts what has already been tried in other legal branches. For instance, in criminal law, taxation, etc… the behavior one tries to decrease or suppress are made more costly. Conversely, the behavior one wants to increase is rewarded.

The same mechanism of incentives and deterrents propels the theory of governmental interest. The proposed system does not command, it just clarifies, that the judge "may" consider the governmental interest as one more factor to select the legal system applicable to the case.

The proposed rule states as follows:

> ***Governmental interest. The State has the obligation to protect the health and the wellbeing of its citizens, as well as the purity of the environment. When two or more legal systems become applicable, the court may apply the system that better protects the governmental interest.***

2. Applicable law

All civil codes of the region include the principle of full recovery (*reparación integral*). It is explained with the expression "who causes a wrong must redress it"[15].

[15] In France, the Civil Code establishes that *"Any human act that causes injury to another obligates the party responsible for such injury to redress it."* (art. 1382). This rule was exported to all of Latin America. For instance, in **Brazil** it is included in art. 159 of the Civil Code: "*Whoever violates a right or causes injury to another, by a voluntary action or omission, negligence or imprudence, is liable to redress such injury.*" In **Ecuador** art. 2241 of the Civil Code establishes that: "*Whoever commits a crime or a tort causing injury to another, is obligated to indemnify; without prejudice to the punishment imposed by law to the crime or the tort*." In **Costa Rica** art. 1045 of the Civil Code states that: "*Whoever causes injury to another through malice, fault, negligence or imprudence, is obligated to redress the injury and all damage suffered by it*." Art. 1645 of the Civil Code of **Guatemala** states that: *"Anyone causing injury to another, whether intentionally, negligently or imprudently, is obligated to redress that injury, except if able to show that the latter was caused by the victim's inexcusable guilt or negligence*."

International torts are typically susceptible to be ruled by more than one legal system. For instance: a) the law of the place where the act was planned; b) the place where the consequences were felt; c) the defendant's domicile; etc… Each one of these connecting factors has its advantages and its drawbacks. It cannot be said, in abstract, that one is superior to the other. Accordingly, it would be proper to allow the victim the choice of which of the pertinent systems should be applied[16]. The choice would certainly include the measure for damages.

The advantage of this formula is that the victim would normally choose the most favorable system. This would cause a stronger deterrence, preventing a greater number of international torts from being committed.

In El Salvador, for instance, damages for physical injury and for death are usually very low. However, in international torts, nothing prevents a judgment where damages are calculated at a higher level, by application of the foreign law connected to the case. The Bustamante Code, for instance, applies the *lex causae* to torts[17].

The proposed rule states as follows:

> ***Damages. In cases of international tort liability, the national court may, at the plaintiff's request, apply to damages and to the pecuniary sanctions related to such damages, the relevant standards and amounts of the pertinent foreign law.*** (PARLATINO[18]).

3. Judgment: additional measures

There is no reason why the court could only impose economic measures. In extreme situations moral sanctions would be justified, like presenting an apology or the publication through the media of the facts in question.

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[16] This position coincides with the document presented by the Delegation from **Uruguay** (OEA/Ser.K/XXI REG/CIDIP-VI/doc.5.00 7 febrero 2000).

[17] Articles 167 and 168.

[18] Model Law on International Jurisdiction and Applicable Law to Tort Liability, approved by the Permanent Forum of Regional Parliaments for the Environment and for a Sustainable Development, on 1.27/98.

The proposed rule states as follows:

> ***Additional measures. Without prejudice to the previous paragraph, the Court is hereby empowered to make any order it considers appropriate in the circumstances, including:***
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> ***that an apology be made by the defendant to the plaintiff;***
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> ***publication of the facts about the defendant's products in the newspapers, health magazines and journals in Dominica and abroad;***
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> ***the placing of advertisements and warnings about the defendant's products; and***
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> **the publication of the health, environmental, and economic consequences of the wrongful act of the defendant. *(Dominica[19]).***

4. Bond

Many times the foreign defendant prefers to litigate, not in her country, but before a Latin American court. For that purpose she submits to local jurisdiction. What usually is not known is that such a submission could prove to be illusory[20] since, in some countries, a foreign final judgment can still be attacked, even though the defendant had submitted to such jurisdiction[21].

The bond corrects the anomaly of having a party who has submitted to the court's jurisdiction and who can still challenge *res judicata*. The solution of a bond is supported by certain precedents in the region[22]. It should be remembered that Anglo-Saxon courts would not hesitate to impose similar measures, or stronger, if they saw that their power over the parties might be diminished.

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19 Transnational Causes of Action (Product Liability) Act, 1997, art. 10.

20 See, for instance, OEA/Ser.Q, CIJ/doc. 29/99, page 10.

21 In **USA**, the party who submitted to a foreign jurisdiction may challenge the enforcement of the ensuing judgment on grounds of American law, such as: fraud, lack of due process, insufficient notice, bill of attainder or retroactive legislation (Case *Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F 2d. 195, 205 (2d Cir. 1987). See also *Gerardo Dennis Patrickson et Al v. Dole Food Company, Inc. et Al*, pending before the Federal District Court for the District of Hawaii.

22 See, for instance, OEA/Ser. Q, CIJ/doc 2/00,page 30. See also, in **Guatemala**, Ley de Defensa de Derechos Procesales de Nacionales y Residentes, of 5/14/97, art. 3. In the Caribbean, see **Dominica**, Transnational Causes of Action (Product Liability) Act, 1997. The codes of civil procedure of some countries are sufficiently flexible as to allow such a measure, without the need of a special law: **Brazil**, art. 798, **Costa Rica**, art. 242, **Guatemala**, art. 530, **Panama**, art. 558, etc…

The proposed rule states as follows:

> ***Bond. The foreign defendant who has submitted to the national jurisdiction is assimilated to a national litigant. When the personal law of such defendant allows her to attack a final judgment resulting from such submission, the court may impose a bond of one hundred percent of the claimed amount, to warrant the payment of the eventual final judgment against such party.***

III. SUBSTANTIVE LAW

1. Strict liability

American law know the theory of strict liability. This theory is part of many aspects of Latin American law. However, sometimes it is presented in a diffuse or disperse way. It would be convenient to synthesize it clearly.

The objective is to protect the consumer, or a third party, from injuries that "the normal use of consumption" of the product may cause. The manufacturer or distributor is not responsible if the product causes injuries because it was used in an irrational way.

The proposed rule states as follows:

> ***Strict liability. Any person, whether a national of or domiciled, resident or incorporated in a foreign country, or otherwise carrying on business abroad, who manufactures, produces, distributes or otherwise puts any product or substance into the stream of commerce shall be strictly liable for any and all injury, damage or loss, caused as a result of the normal use or consumption of that product or substance.*** (Dominica[23]).

2. Protection of the environment

The objective is, whenever possible, to return things to their previous state, at the expense of the person who caused the damage. The action would not only belong to the State, but also to individuals.

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[23] Transnational Causes of Action (Product Liability) Act, 1997, art. 8.

It is important that individuals have a clear cause of action. Many times it is citizens who litigate with greater energy sin they suffer a direct detriment.

The subject helps to illuminate the interdependence between procedural and substantive law. Environmental laws, no matter how well intended, are quite helpless without a modern procedural system. Notice how the threat of action for damages lacks persuasion when it is known beforehand that the mere service of process will take more than one year. (See topic I.1).

The proposed rule states as follows:

> ***Protection of the environment. Without prejudice to other sanctions established by law, any action or omission of environmental rules, constituting a crime or an administrative violation, gives the State and individuals, an action for damages for the injury caused to the environment and to natural resources.***
>
> ***The perpetrator of such damage is obligated to replace or to return things and objects to their natural state and composition.*** (Honduras[24]).

3. Torts against children

There are several international treaties dealing with the rights of children which apply to international tortious liability. Some of these rights are the following:

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law … the best interests of the child shall be a primary consideration*[25].

2. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental … injury …, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*[26].

3. *States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the*

[24] Ley General del Ambiente, Decreto Nr. 104-93, art. 87 (g).

[25] Convention on the Rights of the Child, General Assembly of the United Nations, 1998, art. 3.

[26] Art. 19 (1).

community[27].

4. *States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health … States Parties shall take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children … State Parties undertake to promote and encourage international cooperation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries*[28].

5. *States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children form the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties …*[29]

6. *Consular functions consist in … safeguarding … the interests of minors and other persons lacking full capacity …*[30]

7. *… all children have the right to special protection, care and aid*[31].

These rights should not be taken as theoretical. They embody some very practical consequences as, for instance: the application of the relevant legal system that would yield the highest compensatory damages, and the imposition of severe punitive damages. This approach has a double justification. In the first place, it would prove a deterrent likely to protect other children from potential tortfeasors. Secondly, it is the natural consequence of the principle "in the child's best interest". Said principle is not challenged in theory. It should then be applied in practice, where it counts, in the imposition of damages: both compensatory and punitive.

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27 Art. 23 (1).

28 Art. 24 (1), (3) and (4).

29 Art. 33.

30 Vienna Convention on Consular Relations, art. 5 (h).

31 American Declaration of Rights and Duties of Man. OAS. Off. Rec. OEA/Ser.L./V.II.23/Doc. 21 Rev. 6 (1979).

The proposed rule states as follows:

> ***<u>Rights of Children</u>. Children enjoy special protection, care and aid. Their best interest is to be taken into account in redressing all forms of mental or physical injury they might have suffered, including the amount of compensatory and punitive damages ordered in their favor, as well as the rules likely to be a stronger deterrent in preventing similar situations from happening again.***

CONCLUSION

Generally speaking, Latin American legal systems are not updated as to international torts. The present structures are weak and ineffective, creating a true incentive for some unscrupulous enterprises to commit acts in the region that they would never perform in their own countries. This state of affairs is not only bad for the population and for the environment, but it also penalizes[32] those enterprises dealing with techniques and products that are safe.

The topics approached are just a sample of what could be done to combat international torts from a legal point of view. There are several other issues that could be treated as well as, for instance, the role of the State as *parens patriae*, class actions, protection of open access to foreign courts with jurisdiction, etc…

It is convenient to update and to democratize international law. That is, to make it accessible to the average citizen. In the same way that family law serves the rich and the poor, international lawsuits should be available as a practical solution to Latin American victims of international torts. There is no reason for international law to remain the exclusive area of the State or of powerful enterprises.

[32] Obviously, the enterprise that introduces dangerous goods and techniques has lower costs than a responsible competitor whose products are safe.