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Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options

BY HALINA WARD*

Introduction

A majority of the papers in this volume consider the direct responsibilities of corporations under international law, for example at domestic level through liability under the U.S. Alien Tort Claims Act, or at international level in human rights tribunals. This paper takes a different starting point, namely the increasing trend for parent companies of multinational corporate groups to face litigation in developed country courts over environmental, social and human rights impacts in developing countries.

Not every case in this new wave of legal actions raises issues about the scope of corporate responsibilities under principles of international law. But in each, questions are raised about the contribution of existing legal frameworks and the adequacy of existing legal principles, at the domestic level, as a vehicle for determining the complex issues of transnational corporate accountability that lie at the heart of the contemporary “corporate citizenship” agenda.

The term “corporate citizenship” runs the risk of being all things

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1. The terms “corporate citizenship” and “corporate social responsibility” or even “corporate responsibility” are often used interchangeably. Here, the term “corporate citizenship” is used throughout, particularly to underline that the kind of
to all people. But in essence corporate citizenship embodies a call to understand business as part of society, contributing directly to the welfare of society, rather than somehow separate from it. Corporate citizenship invites companies to make strategic choices based on an understanding of the total impact of their business in society.²

Placing centre stage the question of corporate citizenship and the role of law and litigation in securing it invites a broader perspective than a focus on the application of international law to corporations. It reveals many more obstacles to tailored policy change for the future, whilst indicating some possible directions for policy initiatives at a variety of levels.

I. Globalization, Corporate Responsibility and the New Challenges of Corporate Governance

The corporate citizenship agenda itself is closely linked to the globalization debate. Understanding the context for the new wave of transnational litigation points first to consideration of that link.

Economic globalization—the linked processes of trade and investment liberalization, privatization and deregulation—has brought huge increases in movements of capital, goods and services. Multinational corporations are the vehicles for much of this globalized economic activity, and in turn, foreign direct investment by multinational corporations accounts for an increasing proportion of global economic activity. UNCTAD's 1999 World Investment Report³ estimated the total number of parent corporations worldwide at almost 60,000, with over half a million foreign affiliates. The question of how best to manage the environmental and social impacts of foreign direct investment by these multinational, transnationally coordinated economic networks is becoming ever more pressing.

The overall relationship between foreign direct investment and environmental protection and human development is not easy to assess. Multinational corporations have the option of deliberately

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² HALINA WARD, ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS CONFERENCE REPORT, CORPORATE CITIZENSHIP: INTERNATIONAL PERSPECTIVES ON THE INTERNATIONAL AGENDA, (2000) [hereinafter INTERNATIONAL PERSPECTIVES].

taking advantage of lower environmental or social standards or weak systems of governance in developing countries. But they can also export "best practice" and bring badly needed jobs and development. On the environment side, the only clear overall message from empirical work to date is that foreign direct investment can have both negative and positive impacts. From a sectoral human development perspective, evidence is emerging that in a number of poor but oil-rich developing countries, UNDP Human Development Index rankings have fallen as oil revenues have increased.

Globalization has given rise to new demands on corporations to exercise their power responsibly. Critics of economic globalization charge that economic power brings political power and that the world is witnessing increasing power imbalances between multinational corporations—particularly large ones—and nations. Some international NGOs have focused in on this, demanding that companies investing in politically unstable economies, such as the Sudan, should use their influence to encourage host country governments to respect human rights and to spend the revenue that their investments generate for social benefit—not to wage wars or line the pockets of political elites.

Some proponents of corporate citizenship in the North see it as a way of countering the ongoing backlash against globalization; a way to reinvigorate the notion that trade and investment can bring overall social and environmental welfare gains. Encouraging global corporate responsibility then becomes part of efforts to put "a human face on the global economy." Globalization, it has been suggested, exerts a transformative effect on corporate responsibility—turning it from a choice into an imperative.

However one views the links between the economic might of corporations and political power, it is certainly the case that the

8. INTERNATIONAL PERSPECTIVES, supra note 2, at 2 (quoting Bennett Freeman, U.S. State Department).
governance challenge that is now presented by multinational corporations is global. In a world struggling to find new ways of achieving global cooperation, the mechanisms of national policy and intergovernmental cooperation are poorly suited to governing multinationals in a way that matches the reality of transnationally coordinated economic networks. National governments are tied to domestic policy constituents and constrained by the need not to impinge on other countries’ sovereignty.

One expression of the new dilemmas of global governance can be found in a call, expressed through transnational litigation, for home countries to accept increased responsibility for regulating the negative extraterritorial impacts of multinational corporate groups. That this should happen is not surprising—it is in itself a reflection of the globalization process.

II. The Contemporary Foreign Direct Liability Agenda

Courts in the United Kingdom, United States, Canada, and Australia have been asked to deal with a new wave of claims that aim to hold parent companies legally accountable for negative environmental, health and safety, labour, or human rights impacts associated with the operations of members of their corporate family in developing countries. These claims represent the flip side of foreign direct investment—"foreign direct liability." The foreign direct liability cases complement campaigners’ calls for minimum standards for multinational corporations by testing the boundaries of existing legal principles.

An overview of a selection of the key cases is included in Box 1.

Typically, actions are brought by foreign workers or residents of communities harmed by mining, oil or gas extraction, or chemicals manufacturing. On occasion, litigation has been initiated by host country governments on behalf of their injured citizens. Sometimes, the cases involve host country state-owned enterprises acting through joint ventures with foreign investors, but the litigation is not intergovernmental as such. Even in cases where the impacts under consideration include transboundary environmental harm, foreign direct liability potentially offers a way to apportion responsibility among private actors, rather than between governments on the basis of their international legal responsibilities.

With the exception of one action brought in Quebec against a
Canadian corporation registered in Montreal,9 all of the claims so far have been brought in common law jurisdictions. The established legal cultural links between Anglo-Saxon lawyers and procedural rules, such as those that determine what defendants have to disclose in litigation, may be contributory factors. But for the longer term it is not unlikely, as legal practitioners’ understanding of the relevant principles of law evolves, that cases will emerge in the civil law systems of European Union (EU) member states such as the Netherlands or France.

There are two main types of legal action:

• The first focuses on corporate compliance with norms of international law. The locus is the United States, and the Alien Tort Claims Act of 1789 (ATCA). The ATCA gives district courts power to hear civil claims by foreign citizens for injuries that are caused by actions “in violation of the law of nations or a treaty of the United States.” Before the 1980s, courts had restricted the uses of the statute, so that foreigners were prevented from bringing actions against their own officials in U.S. courts. But by 1997, the case law had clearly established that the statute could potentially cover not only foreign officials but also claims against private individuals for injuries resulting from atrocities committed in pursuit of genocide or war crimes. And, in 1997, the plaintiff in an action against Freeport-McMoran over the impacts of its copper, gold, and silver mine in Irian Jaya succeeded in establishing that corporations could be liable under the Alien Tort Claims Act.10 Shortly afterwards, in a separate action against Unocal Corp.,11 a U.S. district court held that the


11. Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997). In September 2000, the same district court granted Unocal’s application to reject the Alien Tort Claims Act claim on the basis that it disclosed no cause of action. Nonetheless, the court’s order noted that the evidence suggested Unocal knew that forced labour was being used and that the joint venturers benefited from the practice. The decision was appealed. At the time of writing a decision is still awaited. However, on March 5, 2001, the court ordered that separate claims initiated in September 2000 under state law could continue. For information on the case, see http://www.laborrights.org (last updated Aug. 31, 2001).
statute potentially covered litigation against oil companies which were said to have conspired or acted in partnership with the Myanmar government to violate international law, including through the use of forced labour to build a gas pipeline. That action is still being pursued.  

- A second kind of litigation has been seen in Canada, England and Australia, as well as the United States. Rather than focusing on corporate compliance with fundamental human rights, it relates more closely to an NGO campaign call for parent companies of multinational corporate groups to ensure that their behaviour as direct investors in other countries matches standards of care that would be expected at home. U.S. courts hosted unsuccessful litigation against Union Carbide following the 1984 Bhopal disaster. In Canada, Quebec mining company Cambior faced litigation over pollution from its gold mine in Guyana; in Australia the company BHP faces claims arising out of pollution in Papua New Guinea. In England, actions have been brought against Rio Tinto (at the time still known as RTZ) arising out of working conditions at its Rossing Uranium Mine in Namibia; against former asbestos mining company Cape in respect of its operations in South Africa; and against Thor Chemicals over mercury poisoning suffered by workers at its South African mercury recycling plant. The facts presented by the Thor Chemicals case are summarized in Box 2. They are particularly striking in that they closely match NGO concerns about corporate exploitation of weak governance or lower penalties in developing countries.

Box 1: Overview of Selected Actions

<table>
<thead>
<tr>
<th>United States</th>
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<td>- The Indian government’s attempt to sue Union Carbide in the United States following the Bhopal disaster failed on the grounds that the action should have been brought in India, not the United</td>
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12. A series of actions has also been brought by Holocaust survivors against Japanese, Austrian, German, and U.S. corporations accused of using slave labour during the Second World War. These actions, which have little direct linkage to the contemporary corporate citizenship agenda, are not considered further here.

States.

- A series of actions under the Alien Tort Claims Act of 1789 against U.S.-domiciled parent companies is under way. Some actions focus squarely on alleged corporate involvement in human rights abuses (e.g. Unocal in Myanmar, or Chevron in Nigeria). Others have a strong environmental dimension (e.g. Texaco in Ecuador).

- A distinct set of actions has been brought against non-U.S. parent companies. A key issue in these cases is whether they have sufficient business presence in the United States for a U.S. court to exercise jurisdiction over them. Examples include ongoing actions against Shell (over operations in Nigeria), Total (over operations in Myanmar) and Rio Tinto (over operations in Bougainville).

**England and Wales**

- The House of Lords decided in 1997 that Edward Connelly, formerly a worker at the Rossing Uranium Mine in Namibia, a Rio Tinto subsidiary, could sue in England for damages for personal injuries. The action later failed on the basis that it had been initiated outside the limitation period allowed by law.

- The House of Lords decided in July 2000 that some 3,000 South African citizens suffering from asbestosis and mesothelioma could continue to bring an action in England against Cape PLC, an England-based company formerly with South African asbestos mining interests.

- Three separate actions against English chemical company Thor Chemicals by former workers at a South African mercury recycling plant were ultimately settled out of court. Two were settled in 1997 and the third was settled in 2000.

**Quebec**

- An action against Canadian gold mining company Cambior arising out of environmental pollution following the collapse of a tailings dam in Guyana failed in 1998 on the basis that Guyana was a more appropriate legal forum.

**Australia**

- Litigation was started in 1994 against Broken Hill Proprietary by people living around the Ok Tedi River in Papua New Guinea. They claimed damages for pollution as a result of the collapse of a tailings dam from a copper mine. An out-of-court settlement was ultimately reached, but new litigation was initiated in Australia in
2000 based on claims that pollution was continuing and that the settlement had been breached.

- A 1998 court judgment refused to hold an Australian parent company, James Hardie, liable for asbestosis suffered by an employee at its New Zealand subsidiary, on the basis that the parent's separate legal identity prevented the imposition of a duty of care under the law of negligence.

**Box 2: The Thor Chemicals Litigation**

Thor Chemicals manufactured and reprocessed mercury-based chemicals in England until its business in Margate came under criticism, over a considerable period, from the Health and Safety Executive, in the 1980s. The claimants' case was based on the suggestion that subsequently, around 1986, the parent company relocated the reprocessing plant—including some of the machinery—to South Africa, establishing a plant in Natal as a wholly-owned subsidiary. The chairman of the parent company was employed by the South African subsidiary to design and set up the infrastructure of the new reprocessing plant.

Workers with high levels of mercury in their blood and urine were apparently laid off or sent to work in the gardens until their mercury levels had decreased. A successful criminal prosecution in South Africa following the deaths of three workers led to a US$3700-equivalent fine.

In 1994, the first of a series of actions was begun against the company and its chairman (now the only director) in the English High Court. The plaintiffs argued that the parent company and its chairman should be held liable because they were directly responsible for setting up and maintaining factories in South Africa which they knew, or ought to have known, would be unsafe for the people who worked in them.

The first and second of the actions, involving a total of twenty workers, were ultimately settled out of court in April 1997 for £1.3 million. A third, which was begun in 1998 on behalf of an additional twenty-one workers, settled out of court in October 2000 for £270,000.

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d. Meeran, *supra* note b.
Leaving aside the special situation offered by the ATCA in the United States, plaintiffs’ lawyers have to choose carefully how to frame their case. In simple terms, the risks of liability are likely to increase the closer a parent company gets to day-to-day control of associated companies or subsidiaries. But the cases are legally controversial for many reasons, not least because they go against the grain of the idea that different companies in the same multinational group must be treated as separate legal entities—a principle that makes it difficult as a matter of law to hold a parent company responsible for acts or omissions of a subsidiary. An Australian judgment presents the stark reality particularly clearly: “The law pays scant regard to the commercial reality that every holding company has the potential [to] and, more often than not, in fact, does, exercise complete control over the subsidiary.”

A second major point of controversy is that because courts are public rather than private actors, foreign direct liability can generate foreign policy tensions. The fundamental principle of territorial sovereignty underpins the right of host countries to regulate impacts and activities in their territory and prevents other states from interfering. When in 1993 an ATCA case was brought against Texaco in the United States by Ecuadorian indigenous people living in a remote area of the Ecuadorian Amazon, the then Ecuadorian Ambassador to the United States lodged a diplomatic protest. He claimed that the action was an affront to Ecuador’s national sovereignty, that Ecuador had a paramount interest in formulating its own environmental and industrial policies, and that Ecuador’s courts were open to adjudicate such disputes. From a business perspective, too, there is opposition on the basis that the cases amount to politically motivated attempts to shut down natural resource development, using the courts to bypass traditional political and economic structures. In contrast, in the Cape litigation, the South

15. See Judith Kimerling, Oil, Lawlessness and Indigenous Struggles in Ecuador’s Oriente, in Green Guerillas: Environmental Conflicts and Initiatives in Latin America and the Caribbean 61 (Helen Collinson ed., 1996). This position was subsequently reversed with a change of government.
African government intervened on the side of the plaintiffs, with its lawyers arguing explicitly that "the Republic of South Africa sees no South African public interest in requiring its courts to adjudicate in a dispute which arises from alleged acts of an English company under the laws of the old South Africa."\textsuperscript{17}

Plaintiffs' lawyers often seek to reduce the potential for company law or foreign policy tensions by focusing on decisions or actions of the parent company itself, not the scope of parents' responsibilities for the acts or omissions of their subsidiaries.\textsuperscript{18} The key to resolving both these potential tensions of foreign direct liability claims \textit{within the existing legal framework} lies in recognizing that most of the cases concern the responsibilities of parent companies themselves. The English cases against Cape and Thor Chemicals, for example, have effectively been based on an argument that the parent company's involvement in the day-to-day management of the relevant overseas facility was such that it should be directly responsible and liable under the law of negligence for injuries sustained as a consequence of operations technically carried on by another company in the group. But where the cases stray too close to consideration of host country policies, they can force courts into making difficult, highly politicized judgments.

A variety of legal hurdles need to be overcome if a foreign plaintiff is to bring a successful foreign direct liability claim against a parent company on account of environment or health and safety impacts or involvement in human rights abuses in other countries. Before plaintiffs can get into the substantive issues, they are likely to face claims by the defendant parent company to the effect that the action has been brought in the wrong forum—in other words, that the country where the injuries occurred is the more appropriate place to bring the action. The legal doctrine that is applied to arrive at a legal answer to these sorts of claims in the United States, United Kingdom, Canada, and Australia is called \textit{forum non conveniens}. In essence, the doctrine allows a court to refuse to hear a case where there is another legal forum available "in which the case may be tried more suitably for the interests of all the parties and the ends of justice."\textsuperscript{19}

\textsuperscript{18} Zia-Zarifi, \textit{supra} note 10, at 121.
Under English case law, this test will not be met where "substantial justice cannot be done in the appropriate forum," a determination that can take courts into politically sensitive decisions about administration of justice in host countries.

In the United Kingdom, access to justice has been impeded by uncertainty over the proper boundaries of the *forum non conveniens* principle—uncertainty that has proved a distraction from the real issues of substance in foreign direct liability cases, namely the extent of parent company responsibility.

In the EU, a coordinated system for deciding issues of jurisdiction already exists under the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. It establishes a general principle that defendants can be sued in the courts of the EU member state in which they are domiciled. In the past, English courts have chosen not to apply the principle when the alternative court is in a non-EU country. The reason for doing so, however, is particularly weak in cases where the substance of a plaintiff's claim is that the parent company itself, by its own direct acts or omissions, should be responsible for injuries suffered in another country. But following a ruling of the European Court of Justice in July 2000, just one week before the House of Lords judgment in the Cape litigation, it seems clear that this English approach has been wrong as a matter of European law. In *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)*, a reinsurance case referred to the European Court of Justice by a French Court of Appeal, the Court ruled that the general principle on jurisdiction

is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of that convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State.

The case spells the death of the *forum non conveniens* principle in foreign direct liability cases involving defendant companies domiciled

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in England and Wales.

In environmental cases brought under the Alien Tort Claims Act, a further complication arises in that there is little consensus over the legal status of key international environmental law principles, or specifically "environmental" human rights, such as the right to a healthy environment. Scholars and judges differ in their views on the extent to which these relatively new principles may have acquired the acceptance necessary to crystallize into principles of customary international law, let alone whether they amount to norms of the kind envisaged under the Alien Tort Claims Act. So far, none of the cases has succeeded in persuading a U.S. court that environmental damage can form the basis of a claim under the ATCA. This particular difficulty does not arise in ATCA cases based on abuses of established human rights such as torture or forced labour. But even then, no clear conclusions can be drawn on which international legal obligations do not require state action to found a claim under the ATCA or, where other international legal obligations are at stake, on precisely what kinds of corporate acts or omissions fall within the "colour of law" doctrine under which private actors may nonetheless be held accountable for the purposes of the ATCA.

Further hurdles arise at the stages at which courts are invited to consider the substantive issues and have to decide which country's law applies to the substance of the case and the size of any eventual damages award. It is possible for the law of the host country to be applied to the substantive issues, and the law of the home country to decide procedural questions or levels of damages.

So far, not one of the major foreign direct liability cases has resulted in a clear win for the plaintiffs on the substantive issues, though some cases (those against Thor Chemicals in the United Kingdom) have been settled out of court.

III. Why is Foreign Direct Liability Happening?

If establishing responsibility is such a lottery, why are the foreign direct liability claims being brought?

Governance deficits in host countries, substantive differences between legal systems, the possibility of higher damages awards being awarded in home rather than host countries, and innovative strategies on the part of plaintiffs' lawyers all play a role in the emergence of foreign direct liability cases. The point of principle where an action is brought in a parent company's place of domicile is that since the case
concerns the acts or omissions of the parent itself, it should be possible to bring the action against the parent in its home country, rather than where the impacts occurred. In any event, the company may no longer have any presence in the host country where the impacts are felt. Cape PLC, for example, had ceased to have any South African interests at all by 1989, so there was no prospect of pursuing an action in South Africa before the company had indicated that it was prepared to make itself available there.\(^{22}\)

Most of the foreign direct liability cases raise issues about governance in host countries. In some, a risk of persecution or of human rights abuses make it impossible for plaintiffs to seek redress at home. There may, as in the litigation against Texaco Inc. arising out of its operations in Ecuador,\(^{23}\) be real concerns about corruption, or that host country courts could not be impartial, particularly when host country government agencies are themselves directly involved in the relevant operations as business partners. In other cases, a lack of financial or legal resources in host countries makes pursuit of a host country action a theoretical possibility only. This was effectively the conclusion of the House of Lords in separate actions in the United Kingdom against Rio Tinto and Cape PLC.

Simple lack of capacity in the administration of justice in host countries can present formidable obstacles too. The U.S. litigation against Texaco, originating in its activities in Ecuador, potentially

\(^{22}\) By the time the Cape litigation came before the United Kingdom House of Lords on the issue of \textit{forum non conveniens}, Cape had given an undertaking that it would make itself available to be sued in South Africa, and that it would not argue against South Africa as the choice of legal forum if the action were pursued there. \textit{See} Lubbe, 1 W.L.R. 1545, \textit{available at} http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-l.htm (July 20, 2000).

\(^{23}\) In January 2000, the United States District Court for the Southern District of New York ordered that the parties and the Government of Ecuador should have a renewed opportunity to make submissions on whether the courts of Ecuador and Peru "might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being refiled in one or both of those forums." Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Jan. 31, 2000) (mem. order), \textit{available at} http://www.texaco.com/shared/position/docs/aquind-jota.doc (last visited Aug. 31, 2001). The order followed what the court described as a "military coup" in Ecuador on January 21, 2000, when the president was replaced by the elected vice president. \textit{Id.} The judge consulted the latest available U.S. State Department Country Report on Human Rights Practices for Ecuador, published in February 1999. \textit{Id.} He cited a primary conclusion of that report that "[t]he most fundamental human rights abuse [in Ecuador] stems from shortcomings in [its] politicized, inefficient, and corrupt legal and judicial system," and emphasized that the statements in the report were made before the January 2000 coup. \textit{Id.}
involves up to 30,000 plaintiffs. Ecuadorian law does not offer any special process for dealing with group actions of this kind. The court in Ecuador, where any case would be heard, is located in the Amazonian oil town of Lago Agrio. According to a 1994 affidavit filed in support of the plaintiffs’ claim, the court is ten hours’ drive from Quito. The one civil judge lives in Quito and works in Lago Agrio two to four days a week. The courtroom is an office fifteen feet by ten feet and doubles as the judge’s chambers.

The role of public interest lawyers undoubtedly also plays a part in driving foreign direct liability. Many of the plaintiffs’ lawyers are employed by charitable organizations that receive support for their work from major foundations and see their work as part of broader efforts to strengthen the accountability of multinational corporate groups. Others work for profit-making law firms that take on cases with a strong public interest element, often on a “no win no fee” basis, working to establish remedies for plaintiffs who would otherwise not be compensated for their injuries.

IV. Why Do the Cases Deserve Attention?

If so little has happened in the foreign direct liability cases so far, why should the relative handful of actions be of any concern, and to whom?

The bottom line for companies is that share prices respond even to the threat of liability. Following the House of Lords judgment in the Cape litigation on July 20, 2000, Cape’s shares dropped sharply on the London Stock Exchange. By mid-afternoon on the day of the judgment, they were trading at £0.405, compared to a £0.550 close on the previous day.

Many of the cases in the United Kingdom, United States and Australia have received broad press attention, reinforcing the


27. These cases have received attention not only in broadsheet newspapers, but also other media, including the United Kingdom’s satirical magazine Private Eye,
potential adverse reputational impacts of the judgments themselves.

Liability is a leveller—not only because it can reach companies that do not have highly visible brands, but also because what really counts in court in foreign direct liability actions is real impacts on the ground, not what a company claims to be doing. Litigation can flush out revealing internal company documents that can trigger public censure, even if not legal accountability. The foreign direct liability cases can uncover embarrassing mismatches between what companies choose to say they aspire to, and what the legal evidence suggests actually happens on the ground.

In reporting on its "ethics and values," Unocal's website includes a statement that the company will "respect human rights in all its activities." But the reality of the company's minority investment in the Yadana gas field in Myanmar suggests, at the very least, that the company's vision of what is necessitated by this aspiration is quite different from the expectations of many civil society actors. In the ongoing Alien Tort Claims Act litigation against Unocal Corp. alleging conspiracy or partnership in human rights abuses by the Myanmar military around the Yadana gas field, the evidence included, a 1996 communication from an employee of Total (one of Unocal's joint venture partners and the project operator) to Unocal, which stated "About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a grey zone."29

Linked closely to these considerations is the fact that the cases have direct links to the broad civil society agenda on globalization and corporate responsibility. In the United Kingdom for example, the NGOs Action for Southern Africa (ACTSA) and the World Development Movement have both campaigned around the litigation against Cape and Thor Chemicals, and ACTSA has brought plaintiffs in the Cape litigation to the United Kingdom to speak at public meetings, and to meet company shareholders and directors.30 But it is which in March 2001 carried a piece reporting the emergence of documents said to reveal Cape's knowledge of the risks that its mines posed to workers and residents. See PRIVATE EYE, Mar. 9-22, 2001.

also important to recognize that foreign direct liability claims are one way among many of pursuing corporate responsibility, including social and environmental auditing, stock exchange listing and disclosure requirements, minority shareholder resolutions by concerned individuals or organizations, or pressure on investment funds to withdraw support for recalcitrant companies. Non-governmental organizations are active in all these areas.

The threat of liability has the potential to be a powerful motivator of business change. A single successful foreign direct liability case would likely trigger a raft of risk management thinking not only among internal company managers, but also within the insurance industry, lenders and investors. Just one or two successful cases could lead to a wave of copycat litigation. Law, so long as its content is sufficiently clear, can be a more effective driver of change than voluntary initiatives that rely on strong peer group pressure from within individual industry sectors to bring laggards on board.

V. What Could Change as a Result of Foreign Direct Liability?

All this said, it remains unclear exactly how foreign direct liability might change business behaviour. Could it, for example, lead to multinationals relocating their legal base or their senior management teams to countries with less onerous legal accountability mechanisms? This seems unlikely. But the threat of relocation is a potent political force. In 1998, the Lord Chancellor’s Department (the government department responsible for the administration of justice in England and Wales) argued in a restricted consultation letter that exposing multinational companies to actions in the English courts, which would more appropriately be conducted abroad, could as a result make them more reluctant to have a presence in England.31

From a corporate responsibility standpoint, at first glance the most appropriate response to the risk of foreign direct liability is to ensure that the best possible standards are applied globally – so that there are no gaps between home and overseas practices to cause problems in courts at home. But the relationship between emerging notions of “good” or “best practice” in the corporate citizenship agenda and the dictates of legal risk management are also challenging ones for multinational corporate groups to work through. There are

some potential conflicts. For example, while the corporate citizenship agenda calls for companies to report openly and transparently on their impacts, a legal risk management approach to foreign direct liability may indicate that silence is the safest option. Even so, codes of conduct and voluntary public reporting on environmental or social impacts can act as useful internal risk management tools.

Working through the detailed implications of the tension between legal and corporate responsibility-driven approaches to managing risk may prove to be one of the most significant challenges faced by corporate citizenship "campaigners," both within and outside companies, as the prospect of foreign direct liability begins to exercise real commercial impact. For corporate internal management, the key message may be a procedural one: people responsible for reporting, human rights, and external stakeholder engagement may need to spend more time with in-house lawyers, as well as company secretaries and government relations advisers, to find an appropriate way forward and to integrate better the different corporate functions.

Identifying "best practice" can in any case be difficult. There is currently little civil society consensus on where to draw the "corporate responsibility" line between direct corporate involvement in abuses of human rights and complicity in abuses by governments, let alone the "legal responsibility" line.

"Best practice" should certainly mean ensuring that subsidiaries are properly capitalized so that they can invest in equipment and systems which ensure that workers and environments are not put to risks that would be considered unacceptable at home. But defining the content of "best practice" in terms that also amount to a baseline for foreign direct liability is more difficult to justify when differing environmental or social standards are the result of deliberate social

choices on the part of democratically elected host country
governments, rather than a reflection of a need to build better
governance capacity.

The simple claim that multinationals should "apply best practice"
wherever they operate fails to communicate the complexity of the
necessary balances between home and host country priorities and
civil society preoccupations. Asking home country courts to
contribute to much-needed discussion on the proper balance through
foreign direct liability claims may stretch their capacity since it invites
politically charged decisions, but it also offers the promise of making
an important contribution to what remains a difficult task: defining
the boundaries of corporate accountability.

VI. Policy Options for the Future

If foreign direct liability is understood as a way of "joining up"
multinational corporate responsibility across territorial boundaries
and improving corporate environmental and social performance in
developing countries, does it tell us anything about possible public
policy interventions for the future?

One argument is that the cases reveal nothing new about the
governance challenges of administering justice in developing
countries, or the behaviour of a handful of multinational
corporations—behaviour that often fails to match up to today's
notions of "best practice" anyway. In any event, the boundaries of
foreign direct liability are currently by no means clear, and the best
thing for policy-makers to do is to wait and see what emerges from
the current wave of actions.

But this is almost certainly rather too narrow an approach. For
example, the foreign direct liability cases could inform donor policy,
providing new arguments in favour of governance programmes that
target access to justice or strengthen civil society in developing
countries. Plaintiffs should not be forced to litigate in home countries
for lack of access to justice in host countries.

The foreign direct liability cases so far have been based on long-
standing legal principles. But an alternative approach would be to
start from scratch to create a tailor-made regime of national "foreign
direct liability” legislation that reflects the state of the art in

33. Anne-Marie Slaughter & David Bosco, Plaintiff's Diplomacy, FOREIGN AFF.,
contemporary thinking on corporate responsibility and the role of multinational corporations in the globalized economy. Australian Democrat Senator Vicki Bourne's private member's bill, which passed through the Australian parliamentary committee process prior to its rejection, aimed to do just this. Her Corporate Code of Conduct Bill 2000 sought to impose minimum environment, employment, health and safety and human rights standards on the conduct of Australian corporations employing more than twenty persons in a foreign country. Elsewhere, too, there is interest in this kind of legislation. In March 2001, a minister in the Dutch Ministry of Economic Affairs indicated that his Ministry was interested in exploring the scope of legislation to hold Dutch companies accountable for environmental crimes in other countries, as a logical next step following on from existing legislation on bribery of foreign officials.

A deeper approach would mean tackling some fundamental principles of company law. This could mean looking again at the legal fiction that each company in a corporate group is to be treated as a separate legal entity, and that the liability of shareholders (including parent companies) is limited to the amount of unpaid share capital on their shares. The existence of the doctrine, and the unwillingness of courts to "raise the veil" of separate legal identity, are obstacles in efforts to establish principles of group enterprise liability that recognize the management coordination that exists within different entities of the same corporate group. So prevalent is the doctrine that it comes as a surprise to learn that in the United States, during the period when this fundamental principle became established, corporations were generally not allowed to acquire and hold shares of other corporations. The notion of limited liability

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36. See generally PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO
evolved in the mid-nineteenth century largely as a means of fostering the capital investment that was increasingly needed to sustain technological innovation. But evidence from Massachusetts and Rhode Island during the 1820s (the American states with the most intense manufacturing activity at the time when the notion of limited liability was taking hold elsewhere) appears to counter the suggestion that limited liability is essential to foster commercial activity.\(^3\)

Limited liability forces plaintiffs in "foreign direct liability" cases to focus on acts or omissions of parent companies, rather than seeking to "raise the corporate veil." But this emphasis on parent companies effectively limits the potential for legal accountability to those corporate groups that operate under a vertically hierarchical management structure. In more complex management structures, including effectively polycentric corporations, it is even more difficult to match existing legal principles of negligence to the reality of control. It remains to be seen, even in the international law-focused Alien Tort Claims Act cases, just what boundaries courts will set on the extent of parent company acts or omissions, or the knowledge necessary to secure legal responsibility for injuries suffered by workers.

Because multinational corporations, by their very nature, are able to coordinate above and beyond the boundaries of territorial sovereignty, it is tempting to argue that an internationally coordinated approach may be the most appropriate way to ensure that regulation, whether "soft" or "hard," is capable of providing an effective normative framework for multinational corporate activity. Intergovernmental agencies have recently been active in developing voluntary codes of conduct for companies, not limited to multinationals. In January 1999, Kofi Annan launched the United Nations Global Compact, based on nine very general "universal" principles for business.\(^3\) June 2000 saw the adoption of the OECD Guidelines for Multinational Enterprises (which, despite its name, is not limited to multinational enterprises).\(^3\) These codes, alongside non-governmental initiatives such as the Permanent Peoples’

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37. Id. at 13.


Tribunal,\textsuperscript{40} can help to build consensus around expectations of corporate behaviour and its possible connection with legal norms. But they do not currently provide a framework for allocating compensation to injured workers or impacted communities, and their general principles fall far short of what would be required of a comprehensive legal risk management toolkit.\textsuperscript{41}

Today's corporate citizenship campaign agenda also incorporates a potent call to develop globally applicable, legally enforceable, minimum standards for multinational corporations. Codes of conduct may themselves be understood as an evolutionary step along the way to legally binding standards that carry the support of a responsible majority while ensuring censure and accountability of wrongdoing companies, which are not susceptible to the potential force of naming and shaming initiatives that do not carry the force of law. For example, in relation to the U.N. Global Compact, Kenneth Roth, Executive Director of the NGO Human Rights Watch, stated to U.N. Secretary-General Kofi Annan in July 2000 that:

We ... hope that the Compact is seen not as an end in itself but as a first step toward promoting a binding legal regime for corporate conduct, and that this regime is backed by an effective enforcement mechanism. Developing such binding standards and enforcement mechanisms would be consistent with a role that the UN traditionally has played in other areas.\textsuperscript{42}

International criminal law is likely to evolve rapidly once the new international criminal court has been established. Though the court's statute does not allow for corporate liability,\textsuperscript{43} this could still evolve at

\textsuperscript{40} The Permanent Peoples' Tribunal was established in 1979 as a forum for work in the field of the "law for the rights of peoples." Lelio Basso Int'l Found. for the Rights and Liberation of Peoples, Permanent Peoples' Tribunal, \textit{available at} http://www.grisnet.it/filb/tribu\%20eng.html (last visited Aug. 31, 2001). The Tribunal holds inquiries before members of a jury who apply "law" based on "the requirements and exigencies of peoples," and issue judgments. \textit{Id.} Work includes inquiries into the Bhopal disaster and the relationship between global corporations and human wrongs. \textit{Id.}

\textsuperscript{41} Even the \textit{Voluntary Principles on Security and Human Rights} (which specifically address risk assessment and corporate relations with state and private security forces – issues that are at stake in many of the foreign direct liability cases) fall far short of offering guidelines that could reasonably be understood as a \textit{legal} risk management tool. \textit{See supra} note 32.

\textsuperscript{42} Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Kofi Annan, Secretary General, United Nations (July 28, 2000), \textit{available at} http://www.hrw.org/advocacy/corporations/index.htm (last visited Aug. 31, 2001).

the national level. As Professor Clapham argues, the Nuremberg trials opened the possibility that over time, national courts could be asked to hold corporations criminally accountable under principles of international criminal law.44

A dedicated "global foreign direct liability convention" could reduce the potential economically driven incentive for countries to legislate against the emergence of foreign direct liability under common law principles. It could also avoid the foreign policy tensions that can arise when courts stretch existing legal principles to meet new demands. Specific international civil liability regimes already exist in some areas where the potential for transboundary impacts (and therefore state liability under international law) is high, such as pollution by oil or radioactivity. A separate regime exists for damage caused by space objects. Each has the effect of channelling liability to private actors, avoiding the need for inter-state litigation.

Building the political will for a global foreign direct liability convention would be no easy task. What is needed essentially is a contemporary understanding of home and host country responsibilities. Traditional notions of territorial sovereignty, rigidly adhered to, are inadequate because they fail to recognize the economic reality of multinational corporations in the globalized economy.

A huge range of international agreements are now in place that are motivated by a concern to tackle issues of moral concern to humankind. It would be a relatively small step conceptually to join the environmental liability conventions to the body of human rights and labour law by seeking to recognize the justification for international action and internationally coordinated liability in cases of egregious transnational corporate abuse of people or environments in developing countries.

In any suggestions for change, it is important that means and ends are matched. A focus on developing the best possible means of securing access to justice for ordinary citizens of developing countries may not lead to foreign direct liability as a first best solution.45 If the

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45. See, e.g., Peter Newell, Access to Environmental Justice? Litigation against TNCs in the South, in MAKING LAW MATTER: RULES, RIGHTS AND SECURITY AND THE LIVES OF THE POOR, 32 I.D.S. BULL. 83 (Richard Crook & Peter Houtzager eds., 2001). Newell points out that transnational litigation is not a sustainable and realistic
principal aim is to ensure that the economic rights of multinationals are matched by new responsibilities, that may suggest a different course of action—for example, ensuring that human rights and social and environmental considerations are explicitly integrated within future efforts to liberalise investment. If the aim is to view multinational corporations as one actor among others in overall efforts to secure the global public good of sustainable development, that may again produce a different set of results. Even if all businesses entities all around the world were to adopt "best practice," the result would not be sustainable development or universal compliance with human rights. It is important at this stage in the evolution of the corporate responsibility agenda not to lose sight of that fact amid escalating expectations of voluntary corporate responsibility.

What of the increasing number of multinational corporations operating in sensitive sectors such as forestry or mining that are headquartered in developing rather than developed countries? If new laws are intended to respond to perceptions of the enhanced power of the multinationals themselves, then they should ultimately address all multinational corporations, not only those headquartered in developed countries. The implication of any legislation targeted specifically at multinationals could be that foreign direct investors should adhere to higher standards of practice than domestic companies—something inherently at odds with the notion of "national treatment" that lies at the heart of most trade and investment liberalisation. But if the concern is to ensure that companies respect fundamental human rights, there is little justification (other than as a matter of strategy) for limiting any new approaches to multinational corporations. Even a policy starting point that views the problem to be resolved as the political power of multinationals could lead to more sophisticated dividing lines than "multinational" or "domestic."

Analysis of the evolutionary development of principles of international law and their application to companies is just one entry point among many for efforts to understand how to secure corporate accountability and responsible corporate behaviour—corporate citizenship—in ways that reflect the contemporary reality of relations between governance, economic activity, and social and environmental

strategy for many communities, and that it does nothing to build up the capacity of legal systems in the South.
impacts. Taking “foreign direct liability” as an entry point reveals many of the existing obstacles to securing this goal through home country courts. The legal issues divide between “home” and “host” countries, between “state” and “private” actors, between “multinational” and “domestic” companies, and between “parent” and “subsidiary.”

The twenty-first century corporate citizenship agenda needs to develop in a way that offers space to begin some serious discussions on whether some of today’s dividing lines should continue to be accorded the legal significance that they have acquired thus far. Responsible corporate behaviour should be rewarded. But real changes are also required to ensure that the most egregious violations of human rights and gross environmental pollution are ultimately capable of being addressed through effective, accessible, legally binding mechanisms that offer meaningful compensation and effective disincentives to recurrence.