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Corporate accountability in search of a treaty? Some insights from foreign direct liability

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Definitions of the terms 'corporate citizenship' and 'corporate social responsibility' differ significantly. One dividing line is between those who consider that the 'corporate social responsibility' or 'corporate citizenship' agenda needs to encompass consideration of legally binding approaches, and those who consider that it should be limited to consideration of voluntary approaches such as codes of conduct. Either way, the practice of corporate citizenship means minimizing negative social, environmental and human rights impacts of corporate activities and influence while enhancing the societal benefits that companies can bring.

To a greater or lesser extent, today's corporate citizenship agenda is a product of the ongoing debate about the consequences of economic globalization. A key question is whether that agenda, coupled with our contemporary understanding of economic globalization, demands new approaches to securing corporate accountability. The run-up to the 2002 World Summit on Sustainable Development has seen increasing calls from non-governmental organizations (NGOs) for negotiation of a new international convention on corporate accountability.[1] Discussion on the role of intergovernmental cooperation in the corporate citizenship agenda is set to gather pace.

[1] See, for example, Friends of the Earth International, *Towards a Corporate Accountability Convention*, Briefing, and Friends of the Earth International, 'Towards Binding Corporate Accountability', Draft FoEI position paper for Prepcom 2 of the WSSD, January 2002, available online at *http://www.foei.org/campaigns/Rio_10/prepcom.html*, last visited 20 January 2002 ('Towards Binding Corporate Accountability' hereafter).

Introduction

This Briefing Paper looks at two sets of legal actions that attempted to secure transnational corporate accountability. The cases are examples of increasing efforts to establish 'foreign direct liability' – holding parent companies accountable in home country courts to people affected by their environmental, social or human rights impacts in other countries. Foreign direct liability is an important testing ground for transnational corporate accountability.

The two sets of foreign direct liability claims considered here are both legal actions brought by South African citizens in the courts of England and Wales. Both sets of cases have now been settled out of court. One was brought by South African workers against the privately owned British chemical multinational Thor Chemicals. The second was brought by former South African workers and affected community members against the English plc Cape, at one time the world's largest asbestos producer.

Both cases raise important policy questions. In the Thor case the South African claimants suggested that Thor had relocated harmful technologies and working practices from the UK to South Africa. Should home countries play a greater role in curbing relocation that takes advantage of weaker regulatory capacity in developing countries? In the Cape case, the South African claimants and the Republic of South Africa focused on the parent company's role in coordinating a transnational, integrated chain of production, from asbestos mine to final product. Should home countries play a greater role in governing the negative impacts of this kind of economic network? Could a new international convention on corporate accountability provide a way forward?

Looking at the English litigation alone will not answer these questions. The cases also need to be considered in their South African context.

Thor Chemicals

The English claims against Thor Chemicals and its chairman, Desmond Cowley, were brought by a total of 41 former workers at a site owned and operated by its South African subsidiary, Thor Chemicals South Africa. The Thor claimants sued for compensation for mercury poisoning that they said they had suffered while working at Thor's facilities at Cato Ridge in the province now called KwaZulu Natal (formerly Natal). The cases were ultimately settled out of court. Yet even today, the site that was the source of all of this controversy houses over 3,500 tonnes of mercury-containing wastes.

Thor Chemicals' headquarters in Margate on the southeast coast of England made a range of mercury-based products, principally for use in the paint industry. In the late 1970s and 1980s official inspections revealed high airborne levels of mercury as well as high levels of mercury in workers' urine. Chronic exposure to mercury can result in behavioural changes, psychosis, tremors, and a variety of other problems including numbness, gum bleeding, hearing difficulties and hallucinations. Severe exposure can result in death.

In 1987, the Health and Safety Executive issued Thor with an ultimatum: clean up or face court action.[2] Thor discontinued its UK mercury operations, but it seems that around the same time, mercury-based operations in South Africa intensified. Through their lawyers, Leigh, Day and Co, the claimants went further, arguing that Thor had relocated its mercury operations, including key personnel and plant, 'lock, stock and barrel' to South Africa after criticism from the HSE. They argued that the same deficiencies that had been highlighted by the HSE in England were replicated in South Africa – with terrible health consequences.

From around 1981 Thor Chemicals South Africa (Thor) was based at Cato Ridge. Among other operations, the company produced a range of mercury-based products. It signed contracts for the supply of mercury-containing products and the subsequent take-back of mercury-containing wastes with customers as far afield as the US, Brazil, Italy and the UK. The company planned to develop a system to process the wastes so that some of the mercury they contained could be recovered. Thor tested the ability of regulators in both South Africa and the US to arrive at clear distinctions between 'hazardous waste' that should not be traded and secondary raw materials for recovery or recycling. A pilot plant started operating in 1984. But wastes (or 'raw materials' for recovery) accumulated on the site beyond the plant's capacity to process it. A larger recovery plant completed in 1992 was also incapable of effectively removing mercury from the waste when operating in line with conditions set by South African regulators.

In August 1990 the then Minister of Environmental Affairs announced that 'South Africa will under no circumstances allow that other countries export their hazardous waste to South Africa'. But two months later, in a letter to the Managing Director of Thor Chemicals South Africa, the Minister wrote '[P]rovided your company does not accept spent chemicals for recycling, other than those originating from your company or remaining within the said production cycle, the ban placed on the importation of hazardous waste does not apply in this case'.[3]

[2] Mark Butler, 'Lessons from Thor Chemicals: The links between health, safety and environmental protection', in Lael Bethlehem and Michael Goldblatt, eds, *The Bottom Line, Industry and the Environment in South Africa*, University of Cape Town Press, Cape Town, 1997, 194 at p. 195.
[3] Thor Commission of Inquiry Report, at para 2.2.7.7.10.

Eventually, in 1994, the South African Department of National Health closed Thor's recovery plant after tests revealed unacceptable levels of mercury in emissions from the incinerator. Imports of mercury-containing wastes to the Cato Ridge plant ceased in the same year.

The Cato Ridge site lies on the brow of a hill. About 200m below the site is a spring which feeds a stream and a river. From 1000m below the site, these waters were a potential source of drinking water and recreation for local people and their livestock. In 1988, the local river board picked up levels of mercury that far exceeded recommended drinking water levels set by the World Health Organization (WHO). The most likely source of the contamination appeared to be the spring below the Thor Chemicals site.

Reports were by this time emerging that workers at the Cato Ridge site were 'going mad'. April 1990 saw protests at the Cato Ridge site and simultaneously in the US, the source of some of the wastes in the Thor stockpile. The Thor workers' trade union began to work with doctors who examined the results of Thor's mercury in urine testing programme. On the basis of 1991 data for 36 workers, 87% were above the WHO 'safe' limit.

In early 1992 three casual workers at the Cato Ridge plant were hospitalized with symptoms of severe mercury poisoning. The mercuric acetate plant was closed. Two of the three men subsequently went into comas and, much later, died. A formal Department of Manpower inquiry revealed gross negligence leading to the poisoning of at least 29 workers.

The South African criminal prosecution

In August 1993 Thor Chemicals South Africa and three of its management team were charged with culpable homicide over the deaths of two Thor workers from mercury poisoning, together with a total of 42 charges under the Machinery and Occupational Safety Act. The magistrates court trial began in May 1994.

The defendants suggested that the three workers admitted to hospital in early 1992 had suffered acute, not chronic, mercury exposure – possibly the result of an act of sabotage in which air lines to workers' protective hoods had been contaminated with mercury. Thor's evidence aimed to show that other workers had disregarded company health and safety procedures, that they were fabricating symptoms of mercury poisoning, or that symptoms of other illnesses had been confused with mercury poisoning.

In line with notices issued by the Department of Manpower, Thor generally applied a mercury in urine threshold of 200 parts per billion – not the WHO guide level of 50 parts per billion. When urine tests revealed mercury levels above 200 parts per billion, workers were typically put to work in less hazardous parts of the plant,[4] or told to stop work for one or two weeks. The company's policy was to return workers to mercury-related duties once their mercury levels were below 100 parts per billion. Some workers with persistently high mercury levels were dismissed. It appeared that workers in the more hazardous areas of the plant were largely casual labourers.

The trial revealed weaknesses in the regulators' approach to the Cato Ridge site. One inspector testified that his department did not have the capacity to analyse mercury samples, forcing reliance on Thor South Africa's own analysis.[5] Twenty-six counts were dropped on technical grounds. Then it emerged that a key Department of Manpower inspection of the mercuric acetate plant was flawed. Finally, a pathologist who had carried out post mortems on the bodies of the two deceased Thor workers retracted findings that had indicated that the likely cause of death was mercury poisoning.

The prosecution succeeded in having the case adjourned to allow time to bring over an international mercury expert. But three days later, the Attorney General of Natal announced a plea bargain – the reasons for which remain unclear. The defendants pleaded guilty to a single charge, admitting leaving open the door of the compressor room which supplied fresh air to the breathing masks of workers in the mercurials plant. The company's sabotage theory was left intact.

The magistrate imposed a fine of a total of R13,500 – about US$3,700 at the time. That same week, Engelbert Ngcobo, one of the three workers who had been hospitalized early in 1992 died after lying in a coma for three years.[6]

The Commission of Inquiry into Thor Chemicals

In 1995, the regional Department of Water Affairs and Forestry took formal samples with a view to bringing a prosecution against the company in respect of the water contamination below the Cato Ridge site.[7] But its preparations were subsequently dropped as President Mandela appointed a Commission of Inquiry into Thor Chemicals.

The inquiry was to take place in two Phases. Phase I, which reported in 1997,[8] aimed to investigate the history and background to the acquisition of mercury waste by Thor Chemicals, and to recommend the 'best

4 Fred Kockott, 'Wasted Lives: Mercury Waste Recycling at Thor Chemicals', *Waste Trade Study* No. 4, Earthlife Africa and Greenpeace International, March 1994, at p. 25.

5 Evidence of Greg Woolley, Criminal Prosecution Transcript, at p. 914.

6 Prakash Naidoo, 'Shut down Thor!', *Tribune*, 19 February 1995.

7 Eddie Koch, 'Minister Moves on Thor', *Weekly Mail and Guardian*, 10 March 1995.

8 Thor Commission of Inquiry Report.

practical environmental option' for dealing with the remaining stockpile. A second phase, agreed on in 1996, was to have reported on regulation and enforcement relating to the monitoring and control of mercury processing and to 'recommend steps which could contribute to the minimization of risk and to the protection of workers and the environment'.[9] That phase of the inquiry never took place.

The Commission's short Phase I report reached a number of damning conclusions. Two stood out: first, that over a period of fifteen years there had been 'a total absence of coordination between the relevant government departments responsible for the environment, broadly defined;[10] and, second, that the patchwork nature of existing applicable legislation contributed to the lack of coordinated supervision.

The report concluded that 'the only viable option is to treat the mercury waste in an environmentally friendly manner by recycling via incineration or roasting'. This was essentially the process that Thor had been attempting to put in place. The report's key financial recommendation indicated joint culpability: that Thor South Africa and the South African government should bear joint responsibility for meeting the cost of incinerating the remaining wastes.[11] Environment NGOs opposed the incineration option, favouring returning the remaining 'foreign' wastes at Cato Ridge to their senders.

Enter foreign direct liability

The first and second of three English actions were begun in October 1994 against the English parent company, Thor Chemical Holdings (TCH), along with its Chairman. A total of 17 workers, as well as representatives of three workers who had by now died, claimed compensation. They applied successfully for legal aid from public funds in the UK.

The claimants argued that the UK operation, predominantly through its chairman, was responsible for the design of the technology and operating systems at Cato Ridge. They argued that the English parent company should be held accountable because of its negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process and for failure to take steps to protect Cato Ridge workers against the foreseeable risk of mercury poisoning.

TCH and its chairman argued (under the so-called *forum non conveniens* principle[12]) that South Africa was a more appropriate forum for trying the case. But the English courts did not agree, and in April 1997, Thor settled the case out of court for a total of £1.3 million. A third English action was brought in February 1998 by a further group of 21 Cato Ridge workers. TCH argued again that the case should be heard in South Africa. Once more that argument failed.

By now, suing Thor Chemical Holdings was potentially a waste of time. Following a 1997 demerger of the Thor Group, all but three subsidiaries of the old Thor Chemicals Holdings (TCH) had been transferred to a new parent company. TCH was left with three companies, of which only Thor South Africa is still trading. Now renamed Guernica SA, its holding company is itself renamed Guernica Holdings.

In September 2000, the Court of Appeal in London took the view that the 1997 demerger may well have been motivated by a desire to put the group's assets beyond the reach of future claimants after the first two South African actions had settled.[13] In essence, the result of the demerger was that TCH had been 'deliberately isolated from the resources of the majority of companies within the group to the tune of a sum in excess of £20,000,000'. TCH was ordered to disclose documents relating to the restructuring and to pay £400,000 into court if it wanted to continue to defend the action. In October, the third action was settled out of court for £240,000.

Next steps for Cato Ridge

Back in South Africa, a steering committee established to assist with implementation of the Phase I inquiry recommendations was disbanded. Thor South Africa itself began to put pressure on government agencies to accelerate a decision on disposal and remediation. The Department of Environmental Affairs and Tourism hired consultants to assess options for dealing with the remaining wastes. The US Environmental Protection Agency gave technical assistance. The German government agreed to place 'special emphasis' on the 'Thor Chemicals contaminated site' in the context of its bilateral cooperation with the South African government.[14]

New environmental legislation in South Africa allows public authorities to oversee a clean-up of the Cato Ridge site and then claim back the cost.[15] But the legislation is untested and it seems that Guernica has

9 Ibid., para 1.3.1.

10 Ibid., para. 2.2.8.1.

11 Ibid., para 3.3.4.2.

12 In essence, the doctrine allows a court to refuse to hear a case where there is some other available legal forum 'in which the case may be tried more suitably for the interests of all the parties and for the ends of justice' – Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460. In English law, this test will not be met where 'substantial justice will not be done in an alternative forum'.

13 Court of Appeal Judgment, *Sithole et al v Thor Chemicals Holdings Ltd et al*, 28 September 2000 (Smith Bernal Reporting Transcript) at para 62.

14 Joint Communiqué of the Third Session of the South African–German Binational Commission in July 2001, *http://www.dfa.gov.za/docs/bnc.htm*, 3 July 2001, last visited 7 October 2001.

15 Section 28, National Environmental Management Act 107 of 1998.

insufficient assets to bear the cost of upgrading its long-disused and rusting incinerator to implement the Commission of Inquiry's recommendation on 'joint responsibility'. The Cato Ridge site still houses over 3,500 tonnes of mercury wastes. The South African government – only partially culpable – may end up footing most of the bill.

Cape plc

The litigation against Cape plc focused on the impacts of an investor that had left South Africa before the end of apartheid; a company whose impacts were generated under apartheid, not one that maintains a presence in South Africa today. The parent company is publicly listed, and this enables campaigners around the litigation to employ a variety of tactics, such as pressure on institutional investors, that would be more difficult to bring to bear on a private company like Thor. Moreover, the litigation focused on the health impacts of a dying industry: asbestos mining.

The health effects of exposure to asbestos can take from 10 to 40 years to develop. Asbestos fibres lodge in the lungs, causing inflammation, irreversible scarring and a progressive thickening of the lung associated with shortness of breath, coughing and weight loss. Asbestos exposure is also linked to lung cancer and the deadly cancer mesothelioma.

Health concerns over exposure to asbestos dust and fibres first emerged in the 1920s. Asbestos regulations were introduced in the UK in 1931. In South Africa, regulation lagged many years behind, and was further hampered by lack of resources and the remote location of many asbestos mines. But alarm bells were beginning to ring by the early 1930s.

Government inspectors battled to persuade the asbestos companies to improve conditions, but faced an uphill battle against child labour, the squalid living conditions of many workers and their families, and occupational exposure to harmful dust. With no penalty for bad practice, there was little economic incentive for asbestos mining companies to adopt better practices. Even by 2001, no employer had ever been prosecuted for excessive dust levels.[16]

Assessing the overall burden of asbestos-related disease in South Africa today is difficult. Discrimination under apartheid meant that much of the official data is racially skewed.[17] But in 1965, post mortem findings on the lungs of 64 black Penge miners who had died while working in the asbestos mines (of injury, pneumonia or other infections) revealed an asbestosis rate of 80%. A second study, in 1970, found a rate of 60%.[18]

Legislative discrimination under apartheid was coupled with a recruiting system that extended beyond South Africa into neighbouring countries. In the past 50 years just two studies have been conducted on the health of migrant mineworkers once they have returned to the rural labour-sending areas.[19] Both reveal uncompensated lung disease of epidemic proportions, suggesting that there might be as many as 480,000 cases of lung disease among former miners who are still alive.[20]

Asbestos mining in South Africa has also left a huge legacy of abandoned mines and asbestos dumps. The risks of environmental exposure to asbestos (as distinct from occupational exposure) were highlighted in South Africa as early as 1962.[21] In 1987, researchers documenting ambient asbestos levels and the prevalence of asbestos-related disease in Mafefe in the Northern Province wrote that

> The people of Mafefe plastered the walls of their houses blue or white, with a mixture of asbestos and cowdung … Asbestos from the dumps was … spread on playing fields and roads, brought back to homesteads by livestock … [and] in the rocky terrain the fine-textured dumps were informal playgrounds for children.[22]

A random sample of 665 Mafefe residents indicated that one in two of occupationally exposed adults, and one in three of environmentally exposed adults, were suffering from asbestos-related pleural disease.

South African workers' compensation legislation

Workers' compensation legislation in apartheid South Africa was racially discriminatory. Even today, levels of

[16] Richard Spoor, 'The Cape Asbestos Claims', paper to a Colloquium on *Mining Methods and Occupational Hygiene for the new Millennium*, South African Institute of Mining and Metallurgy, February 2001 ('The Cape Asbestos Claims' hereafter).

[17] Dr Jaine Roberts, 'What is the Price of 80 kgs? The failure of the detection of, and compensation for, asbestos-related disease: social exclusion in Sekhukhuneland' ('What is the Price?' hereafter), MSc dissertation, December 2000, on file with the author.

[18] Sluis-Cremer, G.K. (1965), 'Asbestosis in South Africa – Certain Geographical and Environmental Considerations', *Ann N Y Acad Sc* 132:215–34; and Sluis-Cremer, G.K. (1970), 'Asbestosis in South African Miners', *Environmental Research*, 3: 310–19, cited in 'What is the Price?', at p. 44.

[19] Steen et al. (1997), 'Prevalence of occupational lung disease among Botswana men formerly employed in the South African mining industry', *Occu Environ Med*, 54: 19–26; and Trapido et al. (1998), 'Prevalence of occupational lung disease in a random sample of former mineworkers, Libode district, Eastern Cape Province, South Africa', *Am J Ind Med*, 34: 305–13, cited in 'What is the Price?', at pp. 4 and 5.

[20] Dr David Rees of the National Centre on Occupational Health, by extrapolation from the Steen and Libode studies. Cited in 'The Cape Asbestos Claims'.

[21] Laurie Flynn, *Studded with Diamonds and Paved with Gold*, Bloomsbury, London, 1992, at p. 198.

[22] Marianne Felix (1997), 'Environmental Asbestos and Respiratory Disease in South Africa', doctoral thesis, Faculty of Medicine, University of the Witwatersrand, cited in 'What is the Price?', p. 46. Section 35.

compensation remain woefully inadequate to meet the full costs of occupational injury. The South African statutory workers' compensation schemes form an important backdrop to the Cape litigation.

Two principal statutory schemes provide workers with compensation on a 'no-fault' basis. One – the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 (COIDA) – effectively removes the scope for separate civil liability claims against employers alongside claims under the Act.[23] Workers falling within the scope of the Act have no hope of bringing separate civil law actions against their employers to obtain higher rates of compensation.

For mineworkers, the main statutory scheme is the Occupational Diseases and Mines and Works Act 1973 (ODMWA). Levies paid by the mining companies are the principal source of funding for the scheme. But the rates at which contributions are levied are not connected to the health and safety record of contributing companies, so the compensation system provides no incentives for companies to improve.

ODMWA does not prevent separate civil law claims against employers. It sets compensation levels in two bands. Lump sum payments are calculated according to a formula which links earnings to the banding system. The lower the wage, the lower the compensation. The maximum payable is R70,008.[24] No allowance is made for dependents, for future medical costs, or for pain and suffering.

There are also practical obstacles in accessing compensation. Many workers struggle to access the medical benefit examinations that are the start of the process of claiming compensation.[25] Requirements to furnish documentary proof of employment also present difficulties.[26]

It has been suggested that the mismatch between official statistics on compensation and the evidence on likely rates of disease indicate that the total amount of unpaid compensation is in the region of R2.8 billion, or roughly £204.7 million at today's rates.[27] If the full costs of illness among former mineworkers are taken as a starting point, the figures become even more startling. One calculation concludes that the figure may be in the region of R50 billion – £3.8 billion.[28] This does not include any element for pain and suffering or the social costs incurred when relatives care full-time for a sick ex-mineworker. No matter how one examines the assumptions on which these calculations are based, the total uncompensated costs are enormous.

People injured as a result of environmental exposure to hazardous substances or falling completely outside the scope of the statutory schemes (e.g. because they were employed as children under the age of sixteen) could in theory bring a legal claim for compensation under ordinary principles of civil law. But in practice such actions are rare in South Africa.

Cape plc in South Africa

The Cape Asbestos Company Ltd was established in 1893. Its South African mining interests initially focused on blue asbestos mines around Koegas and a mill at Prieska, both in the province now called the Northern Cape. In 1925, Cape extended its asbestos mining interests into what is now called the Northern Province when it acquired two companies, Egnep Ltd and Amosa Ltd, with rights to exploit a deposit of brown asbestos in Penge.

Until 1948, Cape directly controlled operations in South Africa from its London headquarters. But in that year the group restructured. The Koegas and Prieska properties were transferred to a new company, Cape Blue Mines. The shares in this company, as well as those in Egnep and Amosa, were in turn transferred to a new South African holding company, Cape Asbestos South Africa Ltd. A manager was sent out from London to take up a permanent appointment controlling the whole of Cape's South African asbestos operations. He retained his seat on the board of Cape in London.

The South African businesses continued to be run through this structure until 1979, when the shares in Cape Blue Mines, Egnep and Amosa were sold. Two years later, they were sold on again to a South African mining company, Gefco. Since 1989, Cape has had no presence in South Africa.

By 1894, Cape had acquired a factory in Italy to experiment with the manufacture of products from Prieska and Koegas – the beginnings of a transnationally coordinated integrated chain of production. Lawyers for the South African claimants in England litigation put forward evidence to suggest that when Cape closed its principal UK factory in Barking in 1968, concerns about asbestosis played a part. Hundreds of Cape's British workers were eventually paid compensation of £30 million in an out-

23 Section 35.

24 'What is the Price?', p. 74.

25 'What is the Price?', p. 65.

26 Prof Tony Davies, 'A Report on the Maandagshoek Project – Second Programme, April–September 1998', February 1999, extracts on file with the author.

27 'The Cape Asbestos Claims'.

28 Richard Spoor, 'Workman's Compensation and the Prevalence of Occupational Injuries and Disease in South Africa', presentation at a Department of Health inter-provincial conference on environment, compensation and disability, White River, July 2001. The assumptions are: 500,000 mineworkers suffering from silicosis in Southern Africa; average age 50; 30 years' service on average; a loss of 10 years' productive employment at R12,000 per year; average compensation paid of R35,000; the state spends R1500 per year on each sick medical care and welfare costs for 10 years only.

of-court settlement.[29]

The conditions that prevailed in the South African asbestos industry generally seem to have been reflected on Cape's sites. In June 1941, a senior assistant health officer from the Department for Public Health visited Cape's mines in and around Koegas and Kuruman.[30] The health officer wrote that 'no housing is provided by the company to the labourers except in the case of a few boss-boys … Most of the huts consist of sacking placed over branches; the sacks are provided by the company free.' There was no sanitation, medical facilities were minimal and water supplies in some cases were unsatisfactory.

In January 1948, the Director of Native Labour expressed concern that despite periodic visits, no progress had been made in respect of living conditions at the mines of the Cape Asbestos Company Limited:

> It seems to be a constant idea that the life of the mine is limited and thus it is not economical for the Company to provide even reasonably suitable quarters. I was advised that the estimated life is now 7 to 10 years. It has been in existence for over 50 years already.[31]

Only in the 1950s were government regulators empowered to prohibit the employment of children in surface-based mining jobs. Cape Blue Mines asked for permission to employ juveniles. They wrote that their 'under age natives' were 'employed on very light work, such as sorting fibre … It would be most uneconomical for us to employ fully grown men to do the work done by these minors.'[32] But dust surveys indicated that people sorting fibre were exposed to harmful concentrations of dust.[33]

Enter foreign direct liability

In 1997, Leigh, Day & Co issued two writs in the London High Court against Cape's parent company Cape plc on behalf of five legally aided claimants. Three of the five had been exposed to asbestos dust and fibre through living near Cape's mines or mills. Two had worked at the Penge mine.

The claimants argued that the South African operations were in fact controlled by Cape in London, that the parent company knew that its operations involved risks to the health of workers and people in the surrounding community, and that it owed them a duty of care. Cape argued that the day-to-day management was entirely in the hands of local management.

Cape argued from the start that the action should be brought in South Africa and that, though the company had no presence in South Africa, it would be willing to make itself available to be sued there. In England the case was governed by English and Welsh law on award of damages, which would result in awards considerably higher than those payable in South Africa. For three years, the claimants fought to bring their action in England. It was July 2000 before the House of Lords agreed that they were right to do so.

Initially, the Court of Appeal refused to rule in favour of South Africa as the proper legal forum. In 1999 further writs were issued, bringing the total number of claimants to over 1,500. Once more, Cape argued that the cases would be more appropriately brought in South Africa. When the *forum non conveniens* issues reached the Court of Appeal once more, the court decided that South Africa was the proper forum.[34]

In England, the claimants were legally aided. In South Africa, personal injury and compensation claims had been excluded from the South African legal aid scheme as from 1 November 1999, following a financial crisis in the South African Legal Aid Board. Although a new system of 'contingency fee' payments for litigation had been in place since April 1999, the claimants presented evidence that there was no reasonable prospect of finding lawyers prepared to act on this basis in such a complex case. Nonetheless, the Court of Appeal held that this was not a case where the possible lack of financial assistance in South Africa would prevent 'substantial justice' from being done.

By the time the case reached the House of Lords for a final decision on the forum issue there were over 3,000 claimants. More than 100 claimants had already died before the House of Lords gave its judgment.[35]

Meanwhile, Cape had proactively sought to bring the theoretical possibility of an action in South Africa into reality. Cape's lawyers had approached the Director of the Centre for Applied Legal Studies at Wits University in Johannesburg. They asked whether the Centre would be able to coordinate litigation in South Africa on behalf of the claimants and suggested that

[29] Reported in David Pallister, 'SA mine victims may sue in Britain', *Guardian*, 21 July 2000.

[30] B.M. Clark, Senior Assistant Health Officer, report to Secretary of Public Health, Pretoria, 11 July 1941.

[31] Letter from P.G.Candwell, Chief Native Commissioner, to the Director of Native Labour, 29 January 1948.

[32] Letter from the Secretary of Cape Blue Mines Ltd to the Native Commissioner, Vryburg, quoted in a letter from the Native Commissioner to the Director of Native Labour, Johannesburg, 24 November 1953.

[33] For example, letter from Director of Native Labour to the Chief Native Commissioner, 4 February 1954.

[34] *Rachel Lubbe et.al. v Cape plc*, Lloyd's Law Reports (2000) Vol. 1, p. 139.

[35] Sizwe Samayende, 'British Company Considers Settling out of Court', African Eye News Service, 23 May 2001, available via *http://allafrica.com/*, last visited 6 July 2001. As at 6 November 2001 the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) reported that more than 300 had died. See *Cape plc Opens Talks with South African Asbestos Victims, http://www.icem.org/update/upd2001/upd01-84.html*, 6 November 2001, last visited 17 November 2001.

Cape might be willing to make money available so that claimants could pursue their claim in South Africa.[36] The approach was rejected.

Despite the potential embarrassment of the evidence on the availability of legal aid in South Africa, the South African government intervened in the case in favour of the claimants, arguing that it saw no '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'.[37]

In July 2000, the House of Lords rejected Cape's arguments. The action could continue in England. The House of Lords considered that in South Africa in all probability the claimants would not be able to obtain the professional representation and the expert evidence that would be essential to justice in the case.

The trial date was set for April 2002. On 21 December 2001 the (by now) 7,500 claimants agreed on the terms of a settlement with Cape. Cape agreed to pay a total of £21 million into a trust fund which will make payments to people who can show that they have suffered from asbestos-related disease as a result of working at, or living in the vicinity of, one of Cape's former mining, milling or manufacturing operations in South Africa – and this is not limited to those involved in the English litigation.[38] The settlement is to be paid over a total period of 10 years. Awards of around £5,250 maximum in respect of mesothelioma and £3,250 in respect of asbestosis are likely. This is less than would have been awarded through a successful, but effectively unenforceable, judgment in favour of the claimants. But progress is dependent on meeting a number of preconditions, including the approval of Cape's shareholders and the company's ability to raise the necessary finance.

The South African government's support for the Cape case sends a message that it does not welcome foreign investment that is exploitative of workers or vulnerable communities. But it may also have the effect of channelling blame away from areas that fall within the government's own direct sphere of responsibility. As South African lawyer Richard Spoor puts it: 'The state cannot applaud our efforts to secure proper compensation in England and then defend the immunity that precludes us from getting adequate compensation here.'[39]

A multi-stakeholder 'asbestos summit' was held in 1998, initiated by the South African Parliamentary Portfolio Committee on Environment and Tourism. Its conclusions called for a review of the compensation system through the establishment of a national commission of enquiry. Follow-up on the initial summit recommendations has been slow. But other initiatives have continued. The Department of Minerals and Energy is pursuing the rehabilitation programme for asbestos mine sites which was in place before the summit and receives significant state funding. Asbestos regulations, introduced in 1987, were revised in 2001.

The contemporary access to justice agenda in South Africa

It remains to be seen whether the Cape and Thor litigation opens the way to further cases against UK-based multinationals. One untested area is the potential for foreign direct liability claims brought by host country governments. The cost of ongoing work to rehabilitate former Cape sites (R40 million) has been borne by the South African government.[40] The Department of Minerals and Energy considered the possibility of bringing an English action against Cape for this cost.[41] But one condition of the Cape settlement – still to be met – is that the South African government should confirm that it will not fund future legal claims against Cape.[42] The consequence of the South African government's support for the Cape claims may prove to be an acceptance that environmental damage will remain uncompensated.

Bringing foreign direct liability claims in home countries does not develop the framework or the capacity to bring actions on a similar scale in host countries themselves (assuming that defendant companies are available to be sued there). Even so, such actions can provide inspiration to host country lawyers. A wave of South African litigation against the mining industry over occupational health and safety issues may be imminent. Richard Spoor, a South African public interest lawyer whose firm worked with Leigh, Day & Co in the Cape asbestos litigation, has issued what could be the first of a series of writs against Gefco.[43] He is working with a successful South African

36 Letter from Professor David Unterhalter to Richard Meeran, 23 November 1999.

37 *Lubbe et al v Cape plc*, 'Statement of Case on Behalf of the Republic of South Africa', 26 May 2000.

38 Leigh, Day & Co Press Release, *Justice at Last for Asbestos Victims as Epic London Legal Battle Ends: The Settlement*, 21 December 2001, available via *www.leighday.co.uk/current.html*, last visited 13 January 2001.

39 'The Cape Asbestos Claims'.

40 Fax to Richard Meeran from Hendrik Naude, Department of Minerals and Energy, 29 May 1997.

41 'Government may sue Cape plc for environmental damage', *SAPA*, July 20 2000, reporting SA Justice Minister Penuell Maduna as saying that the Department of Minerals and Energy should consider whether the government could sue Cape plc for the rehabilitation of the environment, adding that 'the question should be asked why our government should be saddled with the consequences of the actions of another company,' available via *www.saep.org/subject/law_policy/asbestos*, last visited 11 July 2001.

42 For commentary on the settlement from a South African government official, see Ronnie Morris, 'Government may abandon environmental case against Cape plc', *Business Report*, 17 January 2002, available online via *http://www.busrep.co.za*, last visited 25 February 2002.

43 See Ronnie Morris, 'Asbestos: Gefco faces potential lawsuit landslide', *Business Report*, 14 January 2002, available at *www.labournet.net/world/0201/gefco1.html*, last visited 25 February 2002.

law firm which is funding the case.[44] Gefco's former parent company, Gencor, which is not subject to the COIDA immunity, has also been added as a defendant in the action.[45]

The overall challenge of providing effective access to legal advice in South Africa is huge. There is already a strong history of South African legal activism. But from an apartheid focus on civil and political rights, the new dispensation has given rise to a shift in public interest litigation towards economic and social rights and poverty alleviation. Public interest lawyers are rethinking their roles.

Environmental litigation has been slow to take off. There are very few examples of successful prosecutions of companies over environmental impacts, even though full compliance with environmental legislation is probably rare. Health and safety litigation is also at an early stage. A change in mind-set among lawyers may be necessary.

Within the Legal Aid Board a special litigation fund has been established to create capacity for occasional multi-party personal injury actions in so-called 'impact cases' (essentially lawsuits that are designed to achieve a significant result for a broad class of people). But it remains to be seen whether the Legal Aid Board will fund impact cases that address large-scale negative impacts of irresponsible businesses. South Africa faces a pressing need to attract new inward investment and the South African business sector is now voluntarily engaged in a wide variety of corporate social responsibility initiatives. Foreign direct liability cases in home countries do not present the same dilemmas.

Liability in a corporate accountability convention

The stories behind the Cape and Thor cases show how the prospect of foreign direct liability emerged as the best bet for compensation for a limited group of individuals. But litigation is a blunt tool. The Cape and Thor cases have drawbacks that are common to much litigation – drawbacks that any corporate accountability convention should seek to transcend to the greatest extent possible.

1. The views and perceptions of witnesses may only be 'useful' insofar as they can be made to fit with established legal frameworks – for example the need to produce 'valid' evidence of employment. Those frameworks may not be connected to the way in which people actually order their lives.
2. There is a real prospect that a successful foreign direct liability case could become a source of local conflict. Facts that distinguish legally between the injury suffered by a Cape worker and the injury suffered by a Gefco worker may be irrelevant between neighbours when one receives compensation and the other does not for lack of access to remedies.
3. Personal injury actions, rooted in individual rights, cannot provide community-level remedies.
4. Personal injury claims may not allocate the resources that defendant companies have at their disposal to meet claims in the most efficient way. The Cape settlement will only help people who can show that their asbestosis is related to Cape's activities. Without considerable outreach work, compensation is unlikely to reach unidentified foreign migrant workers from other African countries such as Malawi and Mozambique who worked at Cape's sites.

Both the Thor and the Cape cases amply demonstrate how the *forum non conveniens* principle can hold back speedy resolution of disputes, keeping claimants locked into a process that focuses on determining the proper forum for the action, rather than the principles under which parent company liability might be established. The principle is also applied, with some variations, in other common law jurisdictions, including in the United States and Australia. Elsewhere, the idea of bringing an action against a parent company in the jurisdiction where it is registered or domiciled is not subject to the same determinations on the proper forum.

Current proposals for a corporate accountability convention incorporate a call to guarantee a right of access for affected people anywhere in the world to pursue litigation where parent corporations are domiciled or listed, coupled with the establishment of a legal aid mechanism to provide public funds to support such challenges. For companies headquartered in the EU, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters establishes a general principle that defendants can be sued in the courts of the Brussels Convention member state where they are domiciled. But English courts have chosen to continue to apply *forum non conveniens* when the alternative court is in a country that is not a party to the Brussels Convention.[46] A judgment of the European Court of Justice just one week before the July 2000 House of Lords judgment may mark the end of this interpretation.[47] But it does not affect the application of f*orum non conveniens* in non-party jurisdictions and it is here that the proposed right of access to home country courts would really bite.

What the convention proposals do not do is clarify the legal uncertainty over when parent companies could be held accountable[48] or tackle the possibility

44 Richard Spoor, personal communication, August 2001.

45 Ronnie Morris, 'Ghosts of Gefco come back to haunt Gencor', *Business Report*, 20 January 2002, available online via *http://www.busrep.co.za*, last visited 25 February 2002.

46 *Re Harrods (Buenos Aires) Ltd*, [1991] 4 All ER 334.

47 *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)*, Case C-412/98, Judgment, 13 July 2000, available via *http://europa.eu.int/cj/en/act/0022en.htm*, visited 22 March 2001.

48 'Towards Binding Corporate Accountability', at p. 4.

that new liabilities could simply lead to clever corporate restructurings. Parent company liability may to an extent reduce the incentive for multinational companies to lobby against higher compensation standards in host countries. But to some extent, ensuring long-term benefits (in terms of social and environmental impacts) from each of the possible bases for liability depends on a wide range of external actors – consumers, insurers, lenders, investors – using their influence to ensure that the response to foreign direct liability is management by 'best practice', not by restructuring.

The Thor case also shows the shortcomings of foreign direct liability in the face of corporate restructurings that put assets beyond the reach of future claimants. South African officials seeking to deal with the remaining mercury wastes in South Africa are forced to work with the legacy of the restructuring. The transnational implications of restructurings designed to minimize the risks of liability to involuntary creditors who may not even be aware of the possibility of redress also deserve to be a key consideration in discussions on a corporate accountability convention.

Making links to the good governance agenda

The Thor and Cape cases are strongly connected with a hotch-potch of public governance failures. There is a risk that foreign direct liability invites us to hold multinational corporations accountable for the failings of host country governments beyond any justification offered by considerations of the political influence of multinationals. It is important to get the right balance between initiatives to build better governance in host countries and home countries taking on new responsibilities.

In North America and Europe, home country governments have accepted a degree of responsibility for the activities of their multinationals in other countries: promoting voluntary initiatives, reinforcing the message that responsible business is good business, disseminating examples of good practice, occasionally providing political articulation of civil society concerns about the negative impacts of some multinational companies. But even clear foreign direct liability precedents may prove insufficient to tackle some host country citizens' expectations of home country responsibilities when foreign direct investment has harmed workers or the environment.

Working through the roles and responsibilities of different actors in the corporate citizenship agenda presents new challenges to governments to guarantee good governance by public institutions. Few governments have recognized that this is their unique contribution to corporate citizenship. A balance between home and host country responsibilities should allow a place for parent company liability enforced by home country courts alongside a range of voluntary initiatives and market-based incentives for improvements in the behaviour of foreign investors.

Multinational corporations worried by litigation in home countries that carries a higher price tag than litigation in host countries also have a strong interest in supporting the development of effective remedies and access to justice in the countries in which they invest. In short, foreign direct liability underscores the need for shared responsibility towards good governance. For governments, this means that a corporate accountability convention is an opportunity to strengthen intergovernmental cooperation towards better implementation and enforcement of minimum standards in host countries.

There is value in going further too. Where there is trade in hazardous products, the notion of shared governmental responsibility has already been recognized and a number of international agreements have been concluded to deal with the risks that hazardous trade presents to the people and environments of developing countries. Where the 'export' is of damaging investment, rather than trade, intergovernmentally agreed initiatives lag behind. There are no international agreements that deal specifically with information sharing or notification by home country governments in cases where companies that have been the subject of investigations or prosecutions relocate or establish operations in other countries. An initiative along these lines from major home countries could tackle concerns about the negative impacts of harmful foreign direct investment while helping to build the capacity of host country governments to guarantee effective governance.[49]

Conclusion

The efforts to secure Thor and Cape's accountability to people harmed by their activities in South Africa reveal the drawbacks of a deeply fragmented legal framework for multinational corporate accountability. Each actor is vulnerable in this fragmented system: the South African government to trade-offs that mean that compensation for personal injuries may be secured at the expense of damages in respect of environmental remediation costs; Cape's former workers to the trade-offs implicit in South African workers' compensation legislation; the Cape and Thor claimants as a whole to the uncertainties of *forum non conveniens* – whose continued application to foreign direct liability cases has now formally been placed in doubt; and the Thor claimants and the unrepresented South African

[49] This idea builds on a suggestion made by Richard Meeram.

authorities and members of the community around Cato Ridge to the difficulties of challenging corporate restructurings. In such a system there are few win-win options. Even the potential to generate clear signals for improved corporate behaviour is minimized by a lack of legal precedents on the substantive issues.

So far, the political processes associated with the corporate citizenship agenda have failed to deliver a contemporary understanding of home and host country responsibilities. Proposals for a corporate accountability convention need to transcend these limitations by ensuring that any new liability provisions consider environmental, human rights and health and safety issues in an integrated way without perpetuating the trade-offs that are demonstrated by the Thor and Cape litigation. Substantive liability provisions should be accompanied by new channels for intergovernmental cooperation for good environmental and social governance and for access to justice in host countries so that their effect is not simply to channel responsibility for public governance failures in host countries to parent companies of multinational corporate groups.

Business support will be important for progress in the intergovernmental corporate accountability agenda. The challenge is to recognize the value of engaging in serious discussion on how to eradicate the most exploitative forms of business behaviour from the global economy.

Halina Ward is Director of Corporate Responsibility for Environment and Development with the International Institute for Environment and Development. This Briefing Paper builds on research carried out while she was a Senior Research Fellow with the Royal Institute of International Affairs and in particular during two visits to South Africa from July to September 2001. Sincere thanks to Richard Meeran of Leigh, Day and Co, and to all the people from government, NGOs, companies, trade associations, trade unions and academic organizations in South Africa and the UK who helped to bring this work to fruition. Thanks too to the project sponsors, the Foreign and Commonwealth Office, BP, and WWF-UK.

Further Reading on Corporate Responsibility from the Sustainable Development Programme

Briefing Papers

- *Towards Global Corporate Social Responsibility* by Malcolm Keay (April 2002) Sustainable Development Programme Briefing Paper No. 3
- *Burma: Companies, NGOs and the New Diplomacy* by John Bray (October 2001) RIIA Briefing Paper New Series No.24
- *Corporate Citizenship: Exploring the New Responsibilities* by Halina Ward (July 2001) Conference Report
- *Governing Multinationals: The Role of Foreign Direct Liability* by Halina Ward (February 2001) RIIA Briefing Paper New Series No.18
- *Corporate Citizenship: International Perspectives on the Emerging Agenda* by Halina Ward (June 2000) Conference Report

Books

- *Companies in a World of Conflict: NGOs, Sanctions and Corporate Responsibility* edited by John Mitchell (1998) RIIA/Earthscan

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