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### GOVERNING MULTINATIONALS: THE ROLE OF FOREIGN DIRECT LIABILITY

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**The business of global governance is set to become one of the key international policy issues of the twenty-first century. The governance of global business is one of the most difficult action points in this agenda. New issues are still emerging, not least among them a discussion on whether there is a need for tougher transnational regulation of multinational corporations. This Briefing Paper outlines the implications of one way of enforcing corporate environmental, social and human rights standards across borders: 'foreign direct liability'.**

#### Globalization and the new challenges of corporate governance

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 Report*<sup>1</sup> 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 now 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 taking advantage of lower environment 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 mounting that in a number of poor but oil-rich developing countries, UNDP Human Development Index rankings have fallen as oil revenues have increased.<sup>2</sup>

Critics of 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, with governance mechanisms at every level struggling to keep up.<sup>3</sup> The governance challenge that multinationals now present is global, in a world working 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.

The starting point for this Briefing Paper is just one of the new dilemmas of global governance: a call, expressed through legal action, 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.

#### The new foreign direct liability agenda

A new wave of legal actions in the UK, US, Canada and Australia aims to hold parent companies legally accountable in developed country courts 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 'foreign direct liability' claims represent the flip side of foreign direct investment. They complement campaigners' calls for minimum standards for multinational corporations by testing the boundaries of existing legal principles, rather than by calling for new regulation. 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 manufacture. On occasion, litigation has been initiated by host country governments on behalf of their injured citizens. 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.

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 EU member states such as the Netherlands or France.

There are two main types of legal action:

(1) The first focuses on corporate compliance with norms of international law. The locus is the US, and the 1789 Alien Tort Claims Act (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

<sup>1</sup> 'Foreign Direct Investment and the Challenge of Development', United Nations, New York and Geneva, 1999.

<sup>2</sup> E.g. ECON Centre for Economic Analysis and Fridtjof Nansen Institute, *Petro-states – Predatory or Developmental?*, ECON-Report no. 62/2000, FNI Report no. 11/2000, October 2000.

<sup>3</sup> See in particular Joshua Karliner's book, *The Corporate Planet: Ecology and Politics in the Age of Globalization*, Sierra Club Books, San Francisco, 1997.

that foreigners were prevented from bringing actions against their own officials in the US courts. But by 1997, the case law had extended the scope of the statute to cover not only foreign officials but also claims against private individuals for injuries resulting from atrocities committed in pursuit of genocide or war crimes. In 1997, in a landmark decision in an action against Unocal Corporation,<sup>4</sup> a US District Court held that the statute did potentially cover 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. Other examples of this kind of litigation include actions against Texaco over impacts in Ecuador and Peru, and against Freeport McMoran over the impacts of its gold and copper mine in Irian Jaya. A series of actions has also been brought by Holocaust survivors against Japanese, Austrian, German and US 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.

2) A second kind of litigation has so far been seen in Canada, England and Australia. It addresses a 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. 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 arising out of 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 closely match NGO concerns about corporate exploitation of poor environmental or social governance

<sup>4</sup> *Doe v Unocal Corp.*, 963 F.Supp.880 (C.D. Cal 1997). More recently, in August 2000, the same District Court granted Unocal's application to reject the 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 is under appeal.

### Box 1: Overview of selected actions

#### United States

- The Indian government's attempt to sue Union Carbide in the US following the Bhopal disaster failed on the grounds that it should have been brought in India, not the US.
- A series of actions under the Alien Tort Claims Act of 1789 against US-domiciled parent companies is still 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.
- A distinct set of actions is being brought against non-US parent companies. A key issue in these cases is whether they have sufficient US business presence for a US 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 chemicals company Thor Chemicals by former workers at a South African mercury recycling plant were ultimately settled out of court in 1997 and 2000 respectively.

#### 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 claiming 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.

in developing countries.

Leaving aside the special situation offered by the US ATCA, 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 company law to hold a parent company responsible for acts or omissions of a subsidiary. In the words of one Australian judgment:

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.<sup>5</sup>

A second major point of controversy is that since 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 US by Ecuadorian indigenous people living in a remote area of the Ecuadorian Amazon, the then Ecuadorian Ambassador to the US lodged a diplomatic protest. He claimed that the action was an

<sup>5</sup> *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, at 577.

## 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.<sup>a</sup> Subsequently, in about 1986, the parent company relocated these processes – 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 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 reduced.<sup>b</sup> A successful criminal prosecution in South Africa following the deaths of three workers led to a £3000-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.<sup>c</sup>

The first and second of the actions, involving a total of 20 workers, were ultimately settled out of court in April 1997 for £1.3 million. A third, which was begun in 1998 on behalf of a further 21 workers, settled out of court early in October 2000 for £270,000.<sup>d</sup>

<sup>a</sup> 'Accountability of transnationals for human rights abuses – 1', *New Law Journal*, 13 November 1998.

<sup>b</sup> Richard Meeran, 'Thor workers accept offer of settlement', 12 October 2000, [www.labournet.net/world/0010/thor2.html](http://www.labournet.net/world/0010/thor2.html), verified 16 January 2001.

<sup>c</sup> *Sithole & others v Thor Chemicals Holdings Ltd & Others*, Court of Appeal, 3 February 1999, official transcript.

<sup>d</sup> Richard Meeran, 'Thor workers accept offer of settlement'.

sorts of claims in the US, UK, Canada and Australia is called *forum non conveniens*. 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'.<sup>8</sup> In English law, this test will not be met where 'substantial justice will not be done in the alternative forum', a determination that can take courts into politically sensitive decisions about administration of justice in host countries.

In environmental cases brought under the Alien Tort Claims Act, a further complication arises in that there is so far little consensus over the legal status of key international environmental law principles such as the precautionary principle. 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. 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, open questions include whether the company must itself have committed the abuse, or whether conspiracy or partnership or even 'complicity' with a host country government's human rights abuses (such as use of forced labour to clear a proposed oil pipeline route) are sufficient.

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 deciding the substance of the case and the size of any eventual damages award. 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 UK) have been settled out of court.

### Why is foreign direct liability happening?

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

Substantive differences between legal systems, the possibility of higher damages awards being awarded in home than in 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 the

<sup>8</sup> *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460.

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.<sup>6</sup> 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.<sup>7</sup>

The key to resolving both the company law and the foreign policy tensions of foreign direct liability lies in recognizing that most of the cases concern the responsibilities of the parent itself. The plaintiffs' lawyers focus on decisions or actions of the

parent, not the scope of parents' responsibilities for the acts or omissions of their subsidiaries. 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 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 take 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

<sup>6</sup> Judith Kimmerling, 'Oil, lawlessness and indigenous struggles in Ecuador's Oriente', in Helen Collinson (ed.), *Green Guerillas: Environmental Conflicts and Initiatives in Latin America and the Caribbean*, Latin America Bureau, London, 1996. This stance was subsequently reversed with a change of government.

<sup>7</sup> John C. Reynolds, *People v Development: Human Rights Mass Tort Litigation and International Resource Development*, American Bar Association, Section of Environment, Energy and Resources, 8th Section Fall Meeting, September 20–24 2000.

action is brought in the parent company's home jurisdiction 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.

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 be real concerns about corruption, or that host country courts would 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 UK House of Lords in separate actions against Rio Tinto and against Cape plc.

Simple lack of capacity in the administration of justice in host countries can present formidable obstacles too. The US litigation against Texaco originating in its activities in Ecuador potentially involves up to 30,000 plaintiffs. Ecuadorian law does not offer any special process for dealing with group actions of this kind.<sup>9</sup> The court in Ecuador where any case would be heard is in the Amazonian oil town of Lago Agrio. According to a 1994 affidavit filed in support of the plaintiffs' claim,<sup>10</sup> the court is ten hours' drive or a flight away from Quito. The one civil judge lives in Quito and works in Lago Agrio two to four days a week. The court room 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

<sup>9</sup> Affidavit of Alberto Wray in *Aguinda v Texaco*, cited in an unpublished workshop paper prepared by Norman Wray, CESR, Ecuador, December 2000.

<sup>10</sup> Affidavit of Steven Donzinger, 1994, via [www.texacorainforest.org](http://www.texacorainforest.org), verified 11 January 2001.

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.

### 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 20 July 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.<sup>11</sup>

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 they actually do. Unocal's website reporting on its 'ethics and values' includes a statement that the company will 'respect human rights in all its activities'. In the US action against Unocal alleging conspiracy or partnership in human rights abuses by the Myanmar military around the Yadana gas field, the evidence included a 1995 communication from an employee of Total (Unocal's joint venture partner and the project operator) to Unocal, saying '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.'<sup>12</sup> Many of the cases in the UK, US and Australia have received broad press attention, reinforcing the potential adverse reputational impacts of the judgments themselves.

Liability is a leveller – what really counts in court in foreign direct liability actions is real impacts on the ground, not what a company claims to be doing.

Linked closely to these considerations is the fact that the cases have strong links to

<sup>11</sup> Amy Musgrave and Mariette le Roux, 'South Africans applaud asbestos ruling', *Independent Online*, South Africa, July 20th 2000, via [www.iol.co.za](http://www.iol.co.za), verified 16 January 2001.

<sup>12</sup> *Doe et al v Unocal et al*, Order Granting Defendants' Motion for Summary Judgment, 1 September 2000. 2000 U.S. Dist. LEXIS 13327, (C.D. Cal. Aug. 31, 2000)

the broad civil society agenda on globalization and corporate responsibility. In the UK, for example, Action for Southern Africa and the World Development Movement have both campaigned around the litigation against Cape and Thor Chemicals. But it is also important to recognize that foreign direct liability claims are one way of pursuing corporate responsibility among many, 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 probably 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.

### 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 the imposition of foreign direct liability 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 UK Lord Chancellor's department argued in a restricted consultation letter that exposing multinational companies to actions in the English courts that would more appropriately be conducted abroad could as a result make them more reluctant to have a presence in England.

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.

Identifying best practice can in any case be a difficult job. 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 or 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, not 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,<sup>13</sup> but it also offers the promise of making an important contribution to what remains a difficult task: defining the boundaries of corporate accountability.

### **New regulation for multinationals?**

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

<sup>13</sup> Anne-Marie Slaughter and David Bosco, Plaintiff's Diplomacy, *Foreign Affairs*, September/October 2000.

anything about possible public policy interventions for the future?

One argument is that foreign direct liability reveals nothing new about the governance problems 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 best thing for governments 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 policy arguments in favour of governance programmes that target access to justice in developing countries. Plaintiffs should not be forced to litigate in home countries for lack of access to justice in host countries.

Access to justice is currently impeded by uncertainty over the proper boundaries of the *forum non conveniens* principle.

The uncertainty needs to be resolved quickly since it is a distraction from the real issues of substance in the 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 where they are domiciled. But English courts have chosen not to apply the principle when the alternative court is in a non-EU country. There is some legal doubt over whether they are right to do this. In cases where the substance of a plaintiff's case is that the parent company itself, by its own direct acts or omissions, should be responsible for injuries suffered in another country, the case for maintaining the status quo is particularly weak.

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 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, currently going through the Australian parliamentary committee process, does just this. Her Corporate

Code of Conduct Bill 2000 seeks to impose minimum environment, employment, health and safety and human rights standards on the conduct of Australian corporations employing more than 20 persons in a foreign country.<sup>14</sup>

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 an obstacle in efforts to establish principles of group enterprise liability which 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 period when this fundamental principle became established, corporations were not allowed to acquire and hold shares of other corporations.<sup>15</sup>

Since multinational corporations, by their very nature, are able to coordinate above and beyond the boundaries of territorial sovereignty, 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. June 2000 saw the adoption of the OECD Guidelines for Multinational Enterprises (which, despite its name, is not limited to multinational enterprises). These codes, alongside non-governmental initiatives such as the Permanent Peoples' Tribunal,<sup>16</sup> can help to build consensus around expect-

<sup>14</sup> Draft Corporate Code of Conduct Bill 2000, a Bill for an Act to impose standards on the conduct of Australian corporations which undertake business activities in other countries, and for related purposes

<sup>15</sup> Phillip I. Blumberg *The Multinational Challenge to Corporation Law*, Oxford University Press, Oxford, 1993.

<sup>16</sup> The Permanent Peoples' Tribunal was established in 1979 as a forum for work in the field of the 'law for the rights of peoples'. The Tribunal holds inquiries before members of a jury who apply 'law' based on 'the requirements and

tations of corporate behaviour and its possible connection with legal norms.

But 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. International criminal law is likely to evolve rapidly once proposed international criminal court is established. Though the court's statute does not allow for corporate liability, this could still evolve at national level. During the Nuremberg trials after the Second World War, a number of German company officers and directors were prosecuted and found guilty of war crimes resulting from the criminal wartime activities of the corporations to which they belonged. The Nuremberg trials open the possibility that over time national courts could be asked to hold corporations criminally accountable under principles of international criminal law.

A dedicated global foreign direct liability convention could reduce the 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

<sup>16</sup> (continued) exigencies of peoples', and issue judgments. Work includes an inquiry into the relationship between global corporations and human wrongs. See further <http://www.grisnet.it/filb/tribu%20eng.html>.

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 a difficult task. What is needed is a contemporary understanding of home and host country responsibilities. Traditional notions of territorial sovereignty are not up to the job because they fail to recognize the economic reality of multinational corporations in the globalized economy. A huge range of international agreements is now in place that is 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.

It is important in any suggestions for change 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. 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 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. 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 corpora-

tions, 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. 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 new regulation to multinational corporations. Even a 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'.

This year, preparations are beginning to intensify for a major international conference to mark the tenth anniversary of the 1992 Rio Earth Summit (the UN Conference on Environment and Development – UNCED). A search for new ideas and initiatives is under way. But there is also a real fear, exacerbated by the failure of the recent climate change talks, that Rio + 10 could be a damp squib.

One of the documents adopted at UNCED was Agenda 21,<sup>17</sup> a non-binding policy document setting a blueprint for action to achieve sustainable development. Agenda 21 called for business and industry to play a strengthened role in pursuing sustainable development. But its concrete recommendations on promoting cleaner production and responsible entrepreneurship now look outdated and environmentally biased. Among all of the other demands on its agenda, Rio + 10 will need to capture the best of the last decade's developments in corporate responsibility and the new body of thinking and action on globalization. There would be worse places to start than some of the questions posed by foreign direct liability.

<sup>17</sup> 'Agenda 21: A Programme of Action for Sustainable Development', United Nations, 1992. Available on-line at <http://www.un.org/esa/sust-dev/agenda21text.htm>, verified 18 January 2001.

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