



Translating Torts

A Justice Framework for Transnational Corporate Harm

Benedict Semple Wray

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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ABSTRACT

The struggle of defining transnational business actors and articulating their interaction with regulatory structures is a familiar one in many fields of study. Although the company is a creature of law, its legal personality is rarely congruent with the economic reality, and the extent to which it is bound by legal rules varies enormously. This thesis re-examines that struggle from a legal perspective. It surveys legal regulation of business actors at the domestic, international and transnational levels, and highlights the challenges globalization presents to the existing models, traditional and emerging alike. The picture which emerges is unsettling: by its very nature, transnational business destabilizes the equilibrium of the traditional legal structures. Legal rules developed based on the axiom of each legal person as a distinct legal unit, bound to the legal system in which it resides, struggle to meet their compensatory and regulatory aims when confronted with the diversification of modern business structures and the loss of single State control. Likewise, continuing development of international and transnational regulation risks perpetuating such problems by artificially restricting which areas of law apply in particular transnational spaces.

Based on those observations, it is argued that a restatement of the law as it applies to transnational business is required. First, without denying the utility of specific legal definitions of the company or corporation in specific circumstances, it is proposed that transnational business be reconceptualized as a field, or vector, for normative conflict rather than as a monolithic entity. This recognizes the need and utility of specialized systems of regulation in particular spaces, while allowing for interaction with other rules which have a bearing on a given situation *in concreto*. Second, through an analysis of the interaction of law and global justice, it provides for a cosmopolitan re-centring of legal obligations between business actors and victims of corporate harm beyond a single nation-state. Third, this allows for the tentative sketching of a redefined, transnational conflict-of-norms framework to co-ordinate the competing justice aims in question while maintaining legal equilibrium on the transnational plane.

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For my grandfather,

Sir Richard O'Brien

General Introduction

It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice bless'd;
It blesseth him that gives and him that takes:
[...] Therefore, ...,
Though justice be thy plea, consider this,
That in the course of justice none of us
Should see salvation: we do pray for mercy,
And that same prayer doth teach us all to render
The deeds of mercy.

Shakespeare, *The Merchant of Venice*, Act IV Sc. I

By the late 1400s, the Florentine, or *florin*, had become a standard currency all over Europe, used and trusted well beyond the merchant classes, from London in the north to Constantinople in the east. This was largely due to the extraordinary success of the Medici bank, which had branches in most major European cities, and was the preferred bank of the Holy See. The rise of the Medici family to a dominant position in Italian and European politics built on the accomplishment of their banking activities and their extensive network of international contacts.¹

In Tudor England, Queen Elizabeth I granted *letters of marque* to Francis Drake, thereby effectively casting him as a licensed brigand, able to attack and plunder the ships of States which were at war with England. However, Francis (later knighted for his bloodthirsty deeds, and elevated to semi-heroic status in English history, while in Spain, *El Draque* was branded ‘the pirate’) did not act alone. In order to pursue his mission, he needed resources: boats, armaments and skilled sailors. His most famous voyage, that of the *Golden Hind*, was financed by an investment consortium which included a number of English noblemen organized as a joint venture company.²

In the 18th and 19th Centuries, the Dutch and British East India Companies created extensive and impressive trading networks which spanned the globe. This led to a close involvement in home and local politics, and the effects of their activities for local populations in the places where they established a presence were often tremendous. As late as the 1770s Edmund Burke complained

¹ See, e.g. Raymond de Roover, *The Medici Bank: Its Organization, Management, Operations, and Decline* (OUP, 1948)

² Hans P. Kraus, *Sir Francis Drake: A Pictorial Biography* (Amsterdam: N. Israel, 1970), available in abridged form online at <http://www.loc.gov/rr/rarebook/catalog/drake/drake-home.html> (accessed 31 January 2014). The investors reportedly received a return of 100%: Harry Kelsey, *Sir Francis Drake: The Queen's Pirate*, (Yale Nota Bene, 2000), 215

that the East India Company ‘did not seem to be merely a Company formed for the extension of the British commerce, but in reality a delegation of the whole power and sovereignty of this kingdom sent into the East.’³

What these examples show is that far from being a recent issue, transnational corporate action, based on the interdependence of trade and investment between States, is something that goes back centuries. The problem of how to regulate business affairs, and the corresponding difficulty in defining what the company, corporation or transnational corporation really is, is one that has dogged legal thinking since the earliest days of corporate personhood. The closely related question of how best to regulate companies when they operate outwith the constraints of geographical boundaries, is hardly more recent. However, this is not a historical study. The aim of my research is not to draw parallels in the present-day manifestation of corporate personhood and business action with the forms and enterprises which have existed throughout history. There are undoubtedly lessons to be learnt, but the subject which I seek to investigate is the nature and effectiveness, in legal terms, of extant systems which regulate business in the current global context. What are the visible and hidden assumptions which underlie those systems and to what extent do they achieve both their original aims and the needs of a globalized world?

Today, globalization continues apace, despite events such as the 2008 global economic crisis and unfolding destabilization of regional financial systems such as the Euro. Indeed, it is often argued that globalization is a phenomenon which has now spread to spheres beyond the economic, with the rise of global networked activism, global networked terrorism, global academic discourse, global media and global governance structures. Networking of business activity into increasingly diversified transnational structures is similarly complex. But it is the sheer scale of the shift in power which makes the issue of how best to regulate business actors in the post-modern age preponderant. At the turn of the 20th Century, all of the world’s 100 biggest economies were States. By 1998, 51 of the top 100 were companies.⁴ In 2011 Shell, the Anglo-Dutch energy company, had a turnover greater than Norway’s GDP, while many smaller corporations have turnovers which nonetheless exceed the gross national product of many developing nations.⁵ Coupled with the entrenchment of doctrines of limited liability, the rise of corporate groups and networks, and

³ Richard Ford, ‘Law’s Territory (A History of Jurisdiction)’, (1999) 97 *Mich L.R.* 843, 883, citing Griffiths.

⁴ Sarah Anderson and John Cavanagh, ‘Top 200: The Rise of Global Corporate Power’ *Institute for Policy Studies*, 4 December 2000, cited in Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart, 2004) 1

⁵ Shell’s total revenue was U.S. \$470 billion, while Norway’s GDP was U.S. \$ 421 billion: <http://reports.shell.com/annual-report/2014/strategic-report/results/selected-financial-data.php?cat=b> (accessed 10 March 2015); <http://www.tradingeconomics.com/norway/gdp> (accessed 10 March 2015)

the liberalization of trade (to take but a few examples), business actors currently enjoy a degree of *arbitrage* hitherto unforeseen. Barriers to capital flows may in some cases be all but non-existent, markets are global, supply and demand are transnational, and supranational legal structures such as economic unions and international investment arbitration, have put many companies in a position to engage with national regulatory structures in unprecedented ways. They even generate their own regulatory spaces. In late 2014 Facebook, the social media giant, had 1.35 billion monthly active users, a little under one-fifth of the world's population.⁶ Its users are subject to its terms of service, by an electronic contract which includes an exclusive jurisdiction clause in favour of Californian courts and an applicable law clause subjecting it to Californian State law.⁷ Controversy has arisen over, for instance, its removal of photographs claimed to be in some way morally repugnant or scandalous.⁸ Questions as to the essential 'private' character of a virtual space frequented by more people than the entire population of any single nation-state except China or the legitimacy of Facebook's unilateral actions, nicely demonstrate the problems at the heart of the subject.

Even in modern times, the debate surrounding transnational business responsibility is not new; the fact that the world's largest corporations are more powerful than many States 'has been a cliché since the 1960s'.⁹ Within the European Union, the European Commission expressed the view as far back as 1973 that adequate protection of workers' rights was an important consideration in regulating transnational corporations.¹⁰ The problem of supply-chain governance has been widely studied, and great strides have been made in the scholarship surrounding corporate social responsibility ('CSR').¹¹ Some firms have voluntarily adopted codes of conduct based on

⁶ <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (accessed 18 March 2015)

⁷ Facebook, 'Statement of Rights and Responsibilities', clause 15, <https://www.facebook.com/legal/terms> (accessed 18 March 2015)

⁸ See, e.g. Caitlin Dewey, 'Facebook is embroiled in yet another breastfeeding photo controversy', The Washington Post, 26 February 2015, <http://www.washingtonpost.com/news/the-intersect/wp/2015/02/26/facebook-is-embroiled-in-yet-another-breastfeeding-photo-controversy/> (accessed 18 March 2015)

⁹ M. T. Kamminga & S. Zia-Zarifi, 'Introduction and Overview' in: Kamminga & Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (Kluwer, 2000)

¹⁰ Commission Communication to the Council: 'Multinational Undertakings and the Community' (8 Nov. 1973) Bulletin of the European Communities, Supplement 15/73

¹¹ Cf. *inter alia*, Marie-Ange Moreau & Francesco Francioni (eds.), *La dimension pluridisciplinaire de la RSE* (Aix-Marseille 2007); Tineke E. Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR* (Kluwer 2010); Halina Ward, 'Legal Issues in Corporate Citizenship', International Institute for Environment and Development, February 2003; Karin Buhmann (ed.), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan, 2011); Ramon Mullerat (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer, 2010); Christine Parker, 'Meta-regulation: legal accountability for corporate social responsibility' in: David Kinley (ed.), *Human Rights and Corporations* (Ashgate, 2009).

international human rights norms,¹² and at the level of international organizations various sets of guidelines and frameworks exist to regulate transnational corporate conduct.¹³

At the international law level, the scholarship is divided over the question of direct human rights obligations and direct accountability of transnational corporations. The orthodoxy still cleaves to the view that corporations as such are not subjects of international law, or at least cannot be brought before international courts.¹⁴ This view is not without its critics, who point to provisions which impose obligations on individuals,¹⁵ and those who advocate for the active participation of non-state actors including companies in international human rights adjudication.¹⁶ There are also those who argue for greater indirect accountability by the inclusion of human rights in world trade and investment disputes.¹⁷ There do exist alternatives for implicating victims in international law procedure, such as *amicus curiae* briefs, but all suffer from the institutional drawback of the need for State involvement and a lack of direct individual access.¹⁸

At the level of private international law there are corresponding difficulties in conceptualizing the substantive (transnational) obligations business organizations owe, coupled with the difficult question of forum and jurisdiction. Traditional approaches to private international law may seem ill-adapted to deal with the problem of abuse, with their emphasis on the *lex loci delicti* or the *lex loci damni* as the proper law in cases of tort violations and a preference for the jurisdiction of the *forum loci* or of the domicile of the defendant.¹⁹ At a deeper level, traditional private law struggles to

¹² Business and Human Rights Resource Centre, Company Policies on Human Rights, <http://www.business-humanrights.org/Documents/Policies>.

¹³ See e.g. the OECD Guidelines for Multinational Enterprises, www.oecd.org/daf/investment/guideleines/.

¹⁴ It is interesting to note in this respect that legal persons were excluded from the Rome Statute of the International Criminal Court (A/CONF.183/9, article 25(1)).

¹⁵ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (OUP, 2006) 78 – 79; Nicola Jägers, , *Corporate Human Rights Obligations: In Search of Accountability*, (Intersentia 2002)

¹⁶ Martin Scheinin, 'International Corporations and Transnational Corporations at a World Court of Human Rights' (2012) 3 Global Policy 488; Julia Kozma, Manfred Nowak & Martin Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010); Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7 HRLR 251

¹⁷ Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2002) 3 J. Int'l Econ. L. 19; 'Introduction and Summary: "Administration of Justice" in International Investment Law and Adjudication' in: Dupuy, Francioni & Petersmann, *Human Rights in International Investment Law and Arbitration* (OUP, 2009)

¹⁸ Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' in P.M. Dupuy F. Francioni, & E.U. Petersmann (eds), *Human Rights in International Law and Arbitration* (OUP 2009)

¹⁹ For example, in the EU context the Brussels I Regulation (Regulation 44/2001/EC) provides that the courts of the place where the tort or delict took place (art. 5-3) or of the domicile of the defendant (art. 2) have jurisdiction in civil matters. These rules have been preserved in the new restatement, known as the Brussels I recast regulation: Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

understand the concept of human rights violations *per se* or abuses of power by corporations generally.²⁰ However, some authors assert that a failure to exercise jurisdiction may in some circumstances constitute the international delict of denial of justice.²¹

However, one can observe that several ‘zones of evolution’ have begun to develop in relation to corporate or business liability,²² not least the burgeoning jurisprudence which has developed in the USA, centred on the *Alien Tort Statute* (‘ATS’).²³ This statute grants jurisdiction to U.S. courts for tort actions brought by foreign nationals (‘aliens’), including those committed abroad, inasmuch as they constitute breaches of international law. It has been used in a number of contexts, including claims against individuals and corporations, either for torts committed directly, or for complicity in State action. Muir Watt labels this approach to jurisdiction (and applicable law) the ‘universal vocation’ of the American judge, while Pia Acconci calls the ATS a ‘significant deterrent’ in making business actors more accountable for human rights violations in the countries in which they operate. Nonetheless, there are difficult questions of legitimacy in making the U.S. judge the global adjudicator in such disputes. Many cases involve complicity in abuses that, at least in part, involve highly politically-charged issues, such as the Holocaust litigations in the U.S. or the *Titan* cases²⁴ concerning the privatization of military action. In other jurisdictions, while jurisprudence has been more sporadic than the USA, it does nonetheless exist. This may lead to an undesirable politicization of private litigation,²⁵ and conversely to the ‘privatization of human rights law’.²⁶ It must be considered whether it is appropriate to subject such questions to a single country’s particular conception of international law: there may be a risk of ‘rights imperialism’²⁷ or hegemonic expansion of legal regimes.

²⁰ Horatia Muir Watt, *Aspects économiques du droit international privé* (2004) 307 RCADI 25

²¹ Francioni (n 18)

²² For an overview, see Katia Sontag, ‘La justiciabilité des droits de l’homme à l’égard des sociétés transnationales’ in Boy, Racine & Siirainen (eds.) *Droit économique et droits de l’Homme* (Larcier 2009) 569 – 669

²³ 28 U.S.C. §1350, a.k.a the ‘Alien Tort Claims Act’

²⁴ *Saleh v Titan*, consolidated with *Ibrahim v Titan*, (D.C Cir, Nos. 08-7008 and 08-7009)

²⁵ Horatia Muir Watt, ‘Privatisation du Contentieux des Droits de l’Homme et Vocation Universelle du Juge Américain : Réflexions à Partir des Actions en Justice des Victimes de l’Holocauste Devant les Tribunaux Américains’, (2003) 55(4) *Revue internationale de droit comparé* 883

²⁶ Ruti Teitel, ‘The alien tort and the global rule of law’ (2005) 57 *International Social Science Journal* 551

²⁷ Andrew Williams, ‘The (Im)possibility of the European Union as a Global Human Rights Regime’ in R. Brownsword (eds.) *Global Governance and the Quest for Justice: Volume 4 Human Rights* (Oxford: Hart, 2004) 77 – 79

Research Question: a cross-cutting approach?

How best to conceive of the legal relationship between a transnational enterprise, undertaking or business and others? This is what lies at the heart of all research on the subject. It is a question at once simple and complex, begging as it does the input of a number of different disciplines. It is true to state, as Deva does, that

‘Lawyers are not often accredited with inventions. But the corporation is arguably one of those inventions that has changed the face of humanity’.²⁸

Nonetheless, the realities of commerce and the interweaving of relationships between business and the rest of humanity can be approached from a number of different perspectives, be they economic, political, social, historical, or management.²⁹

In law, as in the other disciplines mentioned, the traditional view of business has been of a private actor. However, as the summary above highlights, this assumption may be open to question. While it is often highlighted in international law that States can act as private actors, the reverse may be also true of business, in that it may be impossible to characterise enterprises as purely private. It is already clear that the actions of businesses have repercussions in both private and public international law, which may demand a reconsideration of the public/private divide and the nature of transnational and international regulation.

The fundamental question this thesis poses is ‘how is transnational enterprise most effectively regulated with respect to victims or affected communities from a legal standpoint?’ This entails a double perspective: one of *accountability* (to the victim or affected community) for harm, and a regulatory one of *prescription* or prevention of future harm. This in turn evokes a number of supplementary questions which guide the enquiry:

- (i) What is the object of inquiry: does it correspond to the traditional idea of the company or corporation, or something larger; is it unination, multinational, transnational or anational?
- (ii) To what extent do existing regimes provide effective regulation and accountability?
- (iii) To what extent does the regulation of transnational enterprise depend upon State structures, and to what extent do business actors operate ‘beyond the State’?

²⁸ Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012)

²⁹ See, for example: Francioni & Moreau (n 11); Buhmann (n 11)

- (iv) To the extent that shortcomings do exist, as revealed by the first two questions, what possibilities exist within the law or inspired by other disciplines in order to fill the accountability and regulatory gaps?

Methodology

The thesis is conceived of in two parts. Part I will trace the developments and ‘zones of evolution’ that have emerged through litigation against businesses for wrongful harm or abuse of rights, and test the second and third questions from the list above against the extant regulatory structures, through an overview of the jurisprudence in four legal spaces: the territorial jurisdiction of the host-state; the extraterritorial jurisdiction of home-state and third-states; at the level of international law; and in the transnational space. This, in common with most studies in the subject, will inevitably spend a certain amount of time going over old ground.

The primary focus of part I will be on primary sources – legislation, case law and corporate policies (where available) – and relevant doctrine. Case selection will be limited in a number of important ways. First, this is not a comparative law study of a limited number of legal systems. It is not my aim to follow a classic comparative methodology in comparing specific provisions in one legal system directly to its counterpart(s) in another. Thus there is no intention to comprehensively examine certain countries. Second, the selection of relevant cases will necessarily be limited by the author’s linguistic and material shortcomings. Regrettably, this will limit primary sources to those available in English and French, primarily, and to a more limited extent Spanish and Italian. It is of course possible (and probable) that interesting cases for discussion will have occurred in areas of the world where another language is the primary mode of communication but these will unavoidably be omitted. Thirdly, case accessibility is a factor: while global in scope the primary method of data collection for case law is electronic sources. Some European or North American reports may be accessible in hard copy but there will be no opportunity to travel to access other potential sources of case law in areas with fewer online archives.

Self-evidently, the above limitations in data selection and collection will lead to some selection bias. Case law from developed countries is likely to be over-represented. This is likely to be exacerbated by the fact that historically, much foreign investment has tended to flow North to South. While this trend has changed significantly since the turn of the millennium,³⁰ the historical jurisprudence will have been slow to catch up, depending on often slow-moving legal procedures to reach a conclusion. However, it is to be hoped that the particular issues identified by the cases

³⁰ See UNCTAD World Investment Report, 2015

discussed will be capable of generalization. Although some issues may be more relevant to developing countries and others to developed ones, there is no reason in principle why these should not be neutral to the origin of a transnational business actor. To put it another way – a host-, home- or other interested State may be either a developed or a developing country; I am primarily interested in this thesis in those issues which are of general application. It is hoped that in this way, the effect of the selection bias may be balanced out to enable general conclusions to be drawn about the global situation.

In Part II, the analysis will then move to examine the opportunities and limits of the practice identified in Part I from a systemic perspective, considering whether, and to what extent, such practices necessitate a reconsideration of the nature of legal regulation of business and theories of the transformation of law through globalization. Consideration of the most appropriate theoretical basis for such a reconsideration will be examined, in an attempt to elucidate a framework for future regulation and adjudication. Finally, the structural dimensions of this restatement will be considered.

It will be appreciated from the outset that the nature of business organization is bound up with the normative and theoretical underpinnings of the subject. Even the adoption of the epithet ‘transnational’ implies a loosening of State control or genesis for the object of study. Prior to sketching the jurisprudential practice of Part I, therefore, a preliminary chapter attempts to identify and provide a working definition for the business organization which is the object of this research. It will be necessary to revisit this in Part II, to consider whether legal regulation of transnational business in fact responds to an identifiable ‘entity’ or whether the reality is more nebulous.

Because of the interconnectedness of the legal person – the company or corporation – to extralegal concepts of business organization, perspectives from other disciplines are highly relevant throughout this dissertation. Likewise insights from other disciplines – moral philosophy and economics in particular, as well as sociology of law – are essential in examining to what extent the *effectiveness* of extant systems is a myth. However, this remains a legal thesis and not a truly interdisciplinary one. Other disciplinary approaches are discussed only to the extent necessary to (i) evaluate the extent to which the legal framework achieves its real-world aims, and (ii) provide insight into the interaction of the corporate form (a legal invention) with real-world situations. It would be wrong to assume as axiomatic either that the legal form was created merely to facilitate or reflect an existing situation, or that its influence is one-way.

Similarly, the thread of human rights is one that is intertwined with the project, and provide an important standard of reference for several reasons. Firstly, the study of human rights is of itself a cross-cutting legal discipline, which interacts with and influences other legal fields significantly. Second, human rights are themselves interdisciplinary, providing at once legal rights which can be adjudicated upon, and standards of international political discourse against which other legal rights can be judged as a benchmark. Finally, they provide one regime to which business organizations are subject – to a greater or lesser extent – and merit examination in their own right alongside other legal regimes such as civil, criminal and administrative responsibility. Thus, while the thesis does not explicitly adopt a human rights approach, it is nonetheless about human rights, and will necessarily examine human rights in its three aspects: in interaction with other legal rules, as an accountability regime, and as an articulation of standards of behaviour.

For these reasons, the dominant analytical framework will be as follows. I shall evaluate the effectiveness of legal regimes from two related but non-congruent perspectives that I term the ‘redress’ (or reparative) perspective and the regulatory (or prescriptive) perspective. The precise content of these two perspectives will need to be discussed in the context of the legal systems under study, but broadly speaking the first considers the extent to which victims or communities affected by business action find redress for the harm suffered. This is not to be confused with compensation, since redress may take various forms and may indeed go beyond compensation in some legal contexts. The regulatory perspective is concerned with the effectiveness of a legal measure in preventing harmful action through the way it operates on TNE decision-making and behaviour. While an important component in this may be deterrence of future harmful conduct, there may be other factors to consider in evaluating whether a measure achieves its regulatory aim.

Central to the above analysis is the notion of injustice. In determining whether a particular reparative or regulatory aim is met *in concreto* I shall use the following tripartite working definition of injustice, which is partially dependent on the concept of human rights as standards of behaviour. I shall call a ‘manifest injustice’ one which is incompatible with customary norms of international law, a ‘serious injustice’ something incompatible with relevant international human rights norms in force, and a ‘comparative injustice’ anything which would otherwise be actionable under the threshold requirements in another legal system. These are not supposed to be definitive categories, but rather a guide to discussion or hypotheses about gaps in the regulation of enterprises. However it should be noted that they are not drawn at random; rather they are intended as a rough-and-ready hierarchy from absolute (in the sense of being truly global, or universal) injustice (i.e. the ‘manifest’ injustice) down through varying degrees of relativity. I have labelled human rights

‘serious’ for the time being but not manifest because the status of certain rights is unclear in different States and regions and the universal nature or lack thereof of human rights norms is not necessary to establish injustice on a case-by-case basis for present purposes. The inclusion of comparative injustices which are neither violations of customary international law nor of international human rights law means that torts and other wrongful conduct which may not be a human rights violation is not omitted (take, for example, the asbestosis cases, which without more are unlikely to meet the threshold for, say, inhuman or degrading treatment).³¹

³¹ E.g. *Lubbe v Cape plc*, [2000] 1 WLR 1545 (HL), discussed extensively below.

Preliminary Chapter – The Blind Men and the Elephant: Describing the Transnational Enterprise

It was six men of Indostan
To learning much inclined,
Who went to see the Elephant
(Though all of them were blind),
That each by observation
Might satisfy his mind

John Godfrey Saxe,
‘The Blind Men and the Elephant’

The corporation is a creature of law: ‘Law dictates what their directors and managers can do, and what they cannot do, and what they must do’.¹ And yet what it is depends drastically upon the disciplinary standpoint adopted: Economics sees a nexus of contracts, law an artificial legal ‘person’, sociology an organization that is greater than the sum of its parts. Even the language of description varies: firm, business, company, corporation, enterprise, undertaking. Likewise, as the Union Carbide corporation argued before the Supreme Court of India, ‘there is no concept known to law as a multinational corporation,’ rather Union Carbide was a New York company with its principal office in Connecticut, legally distinct from Union Carbide India Ltd.²

Nailing down what is meant by the company or enterprise from a legal perspective is not straightforward, and is further complicated in the case of multinational or transnational business. This chapter therefore attempts to identify – in the briefest outline – the business actor(s) which are the object of this research project (I) and to provide elements of a workable definition (II).

I. Identifying the Corporation: Multidisciplinary & Legal perspectives

Arguably, business actors’ primary function is economic, thus it is natural that any understanding of them must at the very least acknowledge economic realities and the basic understanding of the firm. Failure to do so by legal scholars may be seen as myopic, since law is the primary regulatory tool when it comes to business activity, and the possibility of independent legal action and legal

¹ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable, 2004) 35

² Upendra Baxi, Upendra Baxi, ‘Mass Torts, Multinational Enterprise Liability and Private International Law’, (1999) 276 RCADI 317 at 416

personality in its various forms depends upon legal normativity. Clearly, the converse is also true: economic understandings of the firm depend upon the legal paradigms in which they operate. Without limited liability, for example, the balance of power within the firm, as well as between firm and external stakeholders, would look very different.³ I would argue that the legal and economic theories are, to a certain extent at least, co-dependent, and it is therefore first to these understandings of business actors that I turn. However, there are also consequences of the legal and institutional personality of business entities which entails important consequences from other perspectives. Not least of which is the autonomy granted by legal personality which potentially opens up the possibility for moral responsibility, while the institutional personality, if it can be called that, of business actors gives it an inescapable political presence. These are not things which can be ignored by legal scholarship either, since the latter, in particular, has consequences for the effectiveness of legal regulation of companies at the international level.

1. Definitions from Outside the Law

(i) The Firm: the Enterprise as an Economic Actor

Possibly the most generally accepted theory today is the ‘nexus of contracts’ theory, brought to prominence by Jensen and Meckling, who argued that the corporation or company ‘is simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organisation’.⁴ Perhaps most strikingly, the nexus-of contracts theory ‘refuses to recognize a meaningful corporate entity distinct from the components that form the corporation’.⁵ It sees the firm as a specialized exchange economy which sets operational parameters for exchange and provides for management and control (corporate governance) to cope with situations that arise and oversee the exchange. Externally to the firm, the allocation of resources is done through pricing in the relevant market. It is also important to note the importance of economic agency theory in all of this. Jensen and Meckling treat shareholders as the principal and management as the agent, leading them to emphasise the need for shareholder power to control management and

³ This is not the place for a detailed exploration of alternatives, but I shall content myself to pointing to one example, that of the common law idea of the trust, which provides for a form of discrete patrimony administered by trustees who have unlimited personal and proprietary liability for the integrity of the fund. For an introduction, see Hayton & Marshall, *Commentary & Cases on the Law of Trusts & Equitable Remedies* (12th Ed.) (Sweet & Maxwell, 2005)

⁴ Michael C. Jensen & Meckling, “Theory of the Firm: Managerial Behaviour, Agency Costs, and Capital Structure” (1976) 3 J. Fin. Econ. 305 at 310 – 311. See further Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure Of Corporate Law* (1991) Chapter 1

⁵ Michael J Phillips, ‘Reappraising the Real Entity Theory of the Corporation’ (1994) 21 Fla. St. U.L.R. 1061

ensure the firm's interests align to their own. The converse of this is that the principal duty of managers becomes to increase value to shareholders.

The nexus-of-contracts model has been criticized for being overly individualistic, perhaps excessively so. It ignores the separate legal personality of the company and the fact that people – as agents – behave differently depending upon the type of agency relationship or institution they find themselves in.⁶ Indeed, Bakan has forcefully pointed out that the psychology of company directors *qua* directors is very different from their personal psychology.⁷

Another economic theory that has gained currency is the 'Team Production' model. This holds that 'productivity does not create its reward at zero cost,' making it 'imperative to monitor activities of input providers to avoid shirking'.⁸ It has the advantage of emphasizing the role of management (the monitors), while retaining a residual role for shareholders (who watch the watchers) to keep control over membership of the board and over major structural decisions.⁹

The economic view of the firm sees it as an alternative form of organization to a pure marketplace, or as an internalization of the market. It is thus rather different to the legal view of the corporate form. It is also important to realise the impact of economic theories of the firm on legislative design. In the common law world, at least, the nexus-of-contracts theory remains very much in firm control, and most recent laws have tended to emphasise shareholder power. This may have important effects (and not only economic ones) in terms of trammelling the firm's external behaviour and setting the limits of its institutional behaviour.

(ii) The New Leviathan: The Corporation as a Moral and Political Actor

Many lawyers tend to gloss over the question of the enterprise – or corporation's – moral and philosophical foundations as a candidate for obligation and agency, content to point to the fact we have granted the company a legal personality (at least in domestic law) in order to justify imposing all sorts of obligations upon it. I would argue, however, that an understanding of the decision-making processes of corporate actors and their candidacy for moral agency is vital to understand

⁶ See, e.g. Simon Deakin, 'What Directors Do (and Fail to Do): Some Comparative Notes on Board Structure and Corporate Governance' (2010) 55 N.Y. L. Sch. L.R. 525

⁷ Bakan (n 1), 33 – 42 and 50. See also, in respect of the arms trade, A. Sampson, *The Arms Bazaar in the Nineties* (1991, Hodder & Stoughton)

⁸ Ige Omotayo Bolodeoku, 'Economic theories of the corporation and corporate governance: a critique' (2002) J. Bus. L. 411 at 415

⁹ *ibid*, at 416

how and why legal rules affect them, as well as to decide whether to ascribe to them particular types of legal obligation or to propose them for legal personality beyond the domestic arena.

Legal scholars tend to approach the company like an individual (presumably on the basis that it is a 'private' actor and not an emanation of the State). This also tends to be the approach of private law, such as tort. Yet this masks the complexity of how a corporate actor works behind the screen of legal personality. At this juncture it is appropriate to introduce another concept, that of collective or large-scale harm, euphemistically termed 'mass torts' in modern transatlantic usage. It is rare that an individual has the means to cause this type of damage, although not impossible: imagine the case of a 'lone-wolf' terrorist armed with a weapon of mass destruction – this would cause large-scale harm of a similar nature to a large number of people simultaneously or sequentially. Nonetheless, this type of occurrence is rare, and since the internal decision-making process which controls the outcome is that of an individual with autonomy of thought and action, traditional forms of liability such as tort and crime are equipped to deal with it. Now compare this to the case of a corporate actor which decides to break a rule. Management will weigh up the potential cost of breaking the rule (likely to be a function of likely damages multiplied by probably number of lawsuits) against the cost of compliance. If the latter outweighs the former, then breaking the rule may be the dominant rational choice.¹⁰ Yet note the difference with a wrongful act by an individual: in the case of the corporation, the violation is *systematic*; it will occur for as long as the policy endures on each product or service it attaches to and will likely translate itself into a statistically predictable number of losses on the part of those for whom the risk materialises (i.e. the victims).

There is therefore a dark conjunction of institutionalized decision-making and collective harm in cases of corporate mass torts. In fact, this type of decision-making bears most resemblance to the type of decision-making which occurs in public and regulatory bodies. The only real difference is that public bodies are supposed to consider the benefits and disadvantages to society as a whole, whereas corporate decision-makers only consider what is beneficial or disadvantageous for the corporation (or even, at the highest level, for the controlling company). Otherwise, there are significant similarities: both corporations and public authorities are constrained to act within the limits of their mission; both operate pyramidal hierarchies or network structures within which subordinate units must obey dictates from superior ones; and, both take external decisions which will collectively affect large numbers of people. This similarity, I argue, is more than skin-deep, especially in today's world where outsourcing, privatization and subcontracting often grants

¹⁰ Discussed in Chapter 1, p.59

corporate actors a large amount of *de facto* regulatory authority. It implies that corporations can act in similar ways to public authorities in so far as their actions interfere with others' rights.

An example of this is provided by cases of press interference with people's privacy.¹¹ Privacy is not typically considered to form part of the law of tort; rather it is a ubiquitously public law concept. One classic formulation of the rule of law holds that although private individuals may do anything not prohibited by the law, the State may only act in ways positively prescribed by law.¹² The acceptance that a newspaper can interfere with a person's privacy, a splendidly vague concept, would seem to run counter to this first idea. It also has as its necessary corollary the equally public law idea of balancing; the newspaper's right to publish, and the 'public interest' in having the article published,¹³ must be balanced against the interference with privacy that publishing entails. Such reasoning takes us a long way from the legal fiction of corporations as individual private actors committing torts and crimes towards other individuals in the way described above. However, I would argue that this admission, that corporate actors and companies may in certain circumstances exercise *de facto* or *de jure* regulatory authority, or simply affect large numbers of people in a similar fashion with a single decision, necessitates a reappraisal of their exclusively private character.

A useful analogy which supports this conclusion is provided by the approach of the Court of Justice of the European Union ('CJEU') to the direct effect of primary European Union law. The economic freedoms, contained in what is now the *Treaty on the Functioning of the European Union*, were initially intended to be addressed to public authorities, since they aimed at the removal of obstacles to the free movement of goods, services, persons, and capital imposed by Member States. However, in a consistent line of case law culminating in the recent *Viking*¹⁴ and *Laval*¹⁵ judgments, the CJEU has held that '[the free movement provisions] do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services'.¹⁶ It relied on this to hold that collective action by a trade union fell within the scope of free movement rules. In a broad sense,

¹¹ There is a burgeoning jurisprudence on this point in the U.K.. See *Douglas v Hello!* [2001] 2 All ER 289; *Campbell v MGN* [2004] 2 All ER 995.

¹² Generally ascribed to A.V. Dicey. On the U.K. constitutional tradition, see: Bradley & Ewing, *Constitutional and Administrative Law*, (13th Ed) (Longman 2002).

¹³ See, e.g. *Campbell v MGN* [2004] 2 AC 457

¹⁴ Case C-438/05. *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (CJEU)

¹⁵ Case C-341/05. *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (CJEU)

¹⁶ *Viking*, *supra* n.14, §33.

corporate decisions, such as that to manufacture a product without a particular safety feature,¹⁷ or that of a newspaper to publish damaging stories of a personal nature about a public figure, have a very similar collective effect.

It is also illuminating to consider the corporation from the perspective of moral philosophy as it is sharply at odds with the ‘legal fiction’ view central to the nexus-of-contracts model predominant in economic scholarship. For one thing, it suggests the law should refrain from blindly following the prevailing economic trend, since if its decision-making processes and legal personhood make it a character for moral agency, it clearly has an autonomous existence that is greater than the sum of its (contractual) parts.

2. *Lex societatis*: The Corporation as a Legal Actor

Lord Hoffman, while a judge in the U.K. House of Lords, defined as corporation as ‘an association of persons for an economic purpose ... The terms of the association are contained in the articles of association and sometimes in a collateral agreement between the shareholders’.¹⁸ Joel Bakan, on the other hand, notes that ‘corporations are created by law and imbued with purpose by law’.¹⁹ I now turn to that eponymous legal characterization of the enterprise: the corporation or company. As I already mentioned above, the corporation is not treated equally by all legal fields. I shall therefore start out with legal theories of the corporation from company law, before turning to private and criminal law respectively.

Company law

Early definitions of the company in the common law world included the so-called concession theory – that the corporation is a ‘privilege granted by the state and therefore its affairs are justifiably regulated by law’.²⁰ This lost ground with the retreat of the State from these formalities through the creation of mechanical procedures for incorporation.²¹ It soon gave way to the aggregate theory, *viz.* that the corporation was ‘an aggregate formed by private contracting among

¹⁷ See below, Chapter 1, p.59

¹⁸ *O’Neil & Ann. v. Phillips & Ann.* [1999] 2 All E.R. 961 at 966 (UKHL)

¹⁹ Bakan (n 1) at 35

²⁰ Shirley Quo, Corporate social responsibility and corporate groups: the James Hardie case’, (2011) 32 Comp. Law. 249

²¹ Phillips (n 5) at 1065

its human parts'.²² This shares a feature with the economic nexus-of-contracts model, in that it treats the corporate person as a pure fiction and attaches no importance to it.

Towards the end of the nineteenth century, the aggregate theory was largely overtaken by the 'real entity' theory which went to the other extreme, explicitly recognizing the separate personality and autonomy of the corporation itself. It maintains that the corporation is 'a being with attributes not found among the humans who are its components ... [it] is a real thing'.²³ Today, the real entity theory has largely been displaced by the legal translation of the nexus-of-contracts, which could be seen as the modern restatement of the aggregate theory. On this view the corporation is a collection of *connected* contracts.

The civil law world has seen a similar progression, vacillating between contractarian and more organizational perspectives. In France, for example, the organizational and contractual approaches vied for supremacy and resulted for most of the twentieth century in a marked ambivalence on the part of the legislator and a casuistic, pragmatic bent to the case law.²⁴ Recently, however, two recent schools of thought have been making themselves heard: the collective act theory and the 'organization of the enterprise' theory. The first of these is centred around the collective interest of the corporation *itself*, which has various advantages since it easily admits majority decisions and the removal of shareholders, and also allows for the introduction of aims and interests of the company that are not necessarily those of the shareholders (to wit the maintenance and maximization of share value). The second is far more vague, and draws more on economic reality than legal or economic theory. It holds that the enterprise is an economic and human organization, of which the corporation provides a means of satisfying the needs of the enterprise juridically.²⁵ Of all the theories presented here, it perhaps the least monolithic in a view of the corporation as a single indivisible entity.

'Individual' Responsibility: Private Law & Criminal Law

As I noted above, private law, for instance the law of torts, tends to treat the corporation as any other legal person. Despite appearing to be rather a crude legal fiction it has its uses, since it enables the simple resolution of disputes and facilitates compensating the victim in a tort suit rather than wasting time seeking to pin down precise individual responsibility in one or several persons. This

²² *ibid*, at 1065, citing Bratton

²³ *ibid*, at 1068

²⁴ Paul Le Cannu, *Droit des Sociétés*, (2e éd, 2003, Montchrestien), 65 - 71

²⁵ *ibid*, at 74-76.

is rather at odds with criminal law, which often struggles to ascribe *mens rea* to legal persons such as companies. Historically, criminal law in common law systems has focused on the idea of ‘organizational’ liability, involving a search for the ‘controlling mind’ of the company. This makes it extremely difficult to inculcate decisions taken at a senior level of management or assign blame to controlling shareholders.²⁶ Paradoxically, under such a system it becomes much easier to find guilt in a small company with few operatives than in a large one where responsibility is more diffuse.

II. Defining the Transnational Corporation

1. Terminological difficulties

Before turning to the question of the place of business actors in the global legal context, and with the particular problems it raises for the legal scholar, it is necessary to discuss briefly the somewhat confusing nomenclature that has grown up in this area. People talk variously of the ‘transnational corporation’,²⁷ the ‘multinational corporation’,²⁸ the ‘multinational enterprise’ (see, for instance, the OECD Guidelines on Multinational Enterprises, OECD 2010), while others prefer to simply refer to ‘business’²⁹ or ‘the corporation’ more generally.³⁰ Although the issue may seem trivial, since these have all become accepted terms in the various debates that surround the accountability of what I will term in the most general sense ‘globalized corporate actors’, I would argue that in fact the issue is an important one, since the terms set the stage for what entities, or groups of entities fall to be considered, and, more importantly in my view, *how* they are to be considered. The approach of the former UN Special Representative on Business and Human Rights, John Ruggie, is explicitly stated to apply to *all* business entities irrespective of size or transnationality, whereas an approach targeting multinational corporations only would clearly have a more reduced scope.

Likewise, there is a tension between the concept of ‘corporation’ – a tightly defined legal term implying separate legal personality – and ‘business’, ‘enterprise’ or ‘undertaking’ which may not. Adopting a particular term may restrict the approaches available subsequently: if one is to talk

²⁶ See Chapter 1, p.51

²⁷ See e.g. Olivier De Schutter, ‘The Challenges of Imposing Human Rights Norms on Corporate Actors’ in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights*, (Oxford: Hart, 2006)

²⁸ See e.g. Peter T. Muchlinski, *Multinational Enterprises and the Law* (2nd Ed.)(OUP, 2007) 5 – 8

²⁹ See the various reports of the U.N. Special Representative on Business and Human Rights, John Ruggie, cited in Chapter 4.

³⁰ Bakan (n 1)

exclusively of 'corporations' in their legal sense, it becomes difficult to properly conceptualize networks and groups, or to see beyond a diffusion of liability firewalls.

(i) 'Multinationals' or Non-Nationals?

As Muchlinski states, the term multinational corporation was coined in the 1960s and was initially orientated towards U.S. firms and excluded firms of multiple national origins such as Unilever.³¹ However, it is debatable whether it is helpful to speak of multinationality at all in this context; when speaking of legal persons such as companies, whose national is a multinational? The concept of multiple nationality of natural persons has historically been fraught. The traditional solution to questions of nationality concerning natural persons is expressed by the dominant nationality and genuine links tests, as evinced by the 1955 *Nottebohm* decision of the ICJ and what followed, in particular the practice of the Iran - U.S. Claims Tribunal.³² In short, the Court in *Nottebohm* held that in order to determine whether a person was a national of a State for the purposes of that State exercising diplomatic protection on their behalf, there needed to be a 'genuine connection' between the person and the State.³³ This is an important departure from reliance upon mere formalistic criteria for the purposes of identifying nationals, and it is important to note that it essentially establishes a rule of priority in cases where a person has various links to different States where merely querying whether a State had granted formal nationality to an individual would not provide a solution.

Applying these principles to globalized corporate actors is both difficult and artificial. Firstly, as Acconci recognizes,³⁴ there is a multitude of differing factors linking a company to a particular State including – but by no means limited to: incorporation; residency for tax purposes; the place where the company issues shares, bonds or letters of credit; the territory in which it carries out its activities. Second, as Acconci explicitly notes, the rise of the corporate group as a dominant foreign investor challenged the idea of an approach based upon formal criteria. While the possibility of multiple (formal or genuine/substantive) links is by no means impossible in the case of natural persons,³⁵ the very nature of corporate groups is even more problematic since the separate legal personality of each component company fragments the problem of what nationality should be

³¹ Muchlinski (n 18), 5

³² Pia Acconci, 'Determining the Internationally Relevant Link between a State and a Corporate Investor: Recent Trends concerning the Application of the "Genuine Link" Test (2004) 5 J. World. Invest. & Trade 139

³³ *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ 4 (ICJ)

³⁴ Acconci (n 32) 141

³⁵ Olivier Vonk, 'Dual Nationality in the European Union: A study on changing norms in public and private international law and in the municipal laws of four EU member state' (Florence, EUI Thesis, 2012)

ascribed to the enterprise as a whole. This is unfortunately borne out by the current approach of international law to the question of corporate nationality, which tends to formalism, eschewing (at least generally) the substantivist or genuine links approach flowing from *Nottebohm*. Although doctrine is divided as to whether *Nottebohm* has wider implications for the international law of nationality of natural persons,³⁶ the ICJ explicitly rejected the applicability of *Nottebohm* in cases involving the nationality of companies in the infamous *Barcelona Traction* case.³⁷

Scholars have doubted the continuing authority of *Barcelona Traction* as a mode of assessing the nationality of companies,³⁸ seeking to utilize the principles of *Nottebohm* and genuine links in order to allow States to extend jurisdiction to other entities within the corporate group such as parent companies. Acconci, basing herself on recent practice in international investment law, and the practice of various arbitral tribunals and international organizations, has argued for a control-based approach to deal with corporate group activity in international law.³⁹ However, a 'one-size-fits-all' solution – be it based on substantive rather than formal criteria – may not be the best way to deal with the vast array of legal facts in which a company may find itself. To take an example, while it may be appropriate to deal locally with debts issued and owing in the country of operation, as in *Barcelona Traction*, the same may not be true where a company causes diffuse environmental damage across borders. At any rate, whether Acconci's approach is laudable or not it has two formidable obstacles to overcome.

The first is the recent reaffirmation of *Barcelona Traction* by the ICJ itself in the case of *A. S. Diallo*.⁴⁰ The second obstacle is the increasing predominance of network-based, rather than equity-based forms of corporate ownership and control, which applies more generally to any approach to regulation which bases itself on traditional ideas of nationality. This mirrors the rise of global supply-chains and the use of network contracts and framework agreements to delimit, define and regulate corporate relations. In many cases, the traditional hierarchical or pyramidal corporate

³⁶ In particular, it is disputed whether the genuine links test applies only to cases of diplomatic protection, *viz.* where one state seeks to assert a right of diplomatic protection on behalf of its national. See Albrecht Randelzhofer, 'Nationality', (1997) 3 *Encyclopaedia of Public International Law (EPIL)* 501-510. But compare Vonk (n 35); Michel Verwilghen, 'Conflits de nationalités: plurinationalité et apatridie' (2000) 277 RCADI 9.

³⁷ *Barcelona Traction, Light and Power Company Limited*, Judgment, [1970] ICJ Rep 3. See discussion below, Chapter 3, p.137

³⁸ Acconci (n 32) *passim*

³⁹ Something which finds an echo in the work of the *Institut de Droit International*, in its 1994 resolution on the Obligations of Multinational Enterprises and their Member Companies (Institut de Droit International, Lisbon, 1 September 1995)

⁴⁰ *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Preliminary Objections [2007] ICJ Rep 582

model has been supplanted by these network entities, linked by contract and subcontract rather than by shareholding, a form of organization which grants them a large degree of independence from a traditional juridical standpoint.⁴¹ Furthermore, it may be difficult in the extreme to identify more than one nationality for any company which controls its supply-chain in such a manner; they may indeed be a unination company that ‘just happens’ to operate significantly, or source its products, across borders.

An even more radical version of this objection can also be formed. Ralf Michaels noted as long ago as 2004 that ‘[c]orporations are artificial persons which are not physically present anywhere’.⁴² Furthermore, not only is there a degree of artificiality in construing any corporation as a territorial presence, but the perceived nationality of a given corporate actor is largely a matter of convenience and choice, a theme which will pervade my subsequent arguments in this thesis. This is recognized in the concept of *arbitrage* discussed in the doctrine and highlighted in particular by Muir Watt, who has stated that ‘we see, therefore, that the *arbitrage* or power of citizens and enterprises, expressed through their decisions as to where to implant themselves geographically, is central to the dynamic of [inter-legislative or regulatory] competition’, which results, in the case of conflict of laws ‘in the liberalization of constraints affecting enterprise mobility and the factors of production, enabling the former to freely choose their place of implantation’.⁴³

I will return to the question of the competing organizational models for doing business across borders later; suffice it to say for the present that clearly the ‘new wave’ of non-equity-based corporate organizing presents additional hurdles to any approach to the regulation of globalized corporate actors that bases itself on nationality. To return to where we began, the whole term ‘multinational’ is problematic due to two axiomatic limits. First, it presupposes multiple legal persons established in different countries, something which no longer holds true of all globalized corporate actors. Second it implies a classic technical-legal methodology for regulation which relies

⁴¹ See André Sobczak, *Réseaux de sociétés et codes de conduit: un nouveau mode de régulation des relations de travail pour les entreprises européennes* (L.G.D.J., 2002) 18; Gunther Teubner, G., ‘The Many-Headed Hydra: Networks as Higher-Order Collective Actors’ in McCahery, Picciotto & Scott (eds.), *Corporate Control and Accountability* (Clarendon Press, 1993) 41 – 60; but note Philip I. Blumberg, ‘The Transformation of Modern Corporation Law: The Law of Corporate Groups’, (2005) 37 Conn. LR 605, 613-4, arguing that such relationships are characterized by exactly the same degree of subservience and control that marks the equity-based model

⁴² Ralf Michaels, ‘Territorial Jurisdiction after Territoriality’, in: Slot & Bulterman (eds), *Globalisation and Jurisdiction*, 105-130 (Leiden: Kluwer Law International, 2004).

⁴³ Horatia Muir Watt, *Aspects économiques du droit international privé: réflexions sur l’impact de la globalisation économique sur les fondements des conflits de lois et de juridictions* (2004) 307 RCADI, 63, author’s own translation

upon easily establishing nationality, despite the myriad difficulties in such an approach when applied to companies and corporations.

(ii) All Business?

If the concept of the multinationality of corporate actors presents difficulties, is it better to embrace an all-encompassing approach, as is apparent in the work of the U.N special representative on business and human rights – now enshrined in the U.N. Guiding Principles on Business and Human Rights⁴⁴ – or authors such as Bakan?⁴⁵ There is one significant advantage to this type of approach and two principal drawbacks. Perhaps the main disadvantages – which I shall elaborate on shortly – are a risk of pronounced over-simplification of the issues involved, and a failure to take account of the specificity of the transnational business environment both in terms of transnational business *as actors* and in terms of the specific rules and regulations in place. Because of these drawbacks, while I applaud the holism inherent in the Ruggie approach and its close relatives, I argue that it is in need of significant refinement before it can be used effectively as a tool for the regulation of transnational business in particular.

The obvious advantage of the Ruggie and similar approaches lies in their inclusiveness; the refusal to specify a particular corporate target – such as the multinational – allows them to confront problems common to all business enterprises head-on, and utilize direct comparisons between different businesses, be they national or transnational or international. Although Ruggie stated in his 2009 report that the corporate responsibility to protect ‘reaches not only Western multinationals, which have long experienced its effects, but also emerging economy companies operating abroad, and even large national firms’,⁴⁶ the language and design of the framework is much wider in scope and claims to extend to all business. As the special representative himself acknowledged in an earlier report, the tension between business and human rights

⁴⁴ ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, included in Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 21 March 2011, A/HRC/17/31 and endorsed by UN Human Rights Council Resolution 17/4 of 6 July 2011, A/HRC/RES/17/4.

⁴⁵ See Bakan (n 1)

⁴⁶ UNCHR ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (22 April 2009) UN Doc A/HRC/11/13, 14

‘is hardly limited to transnational corporations. To attract investments and promote exports, governments may exempt national firms from certain legal and regulatory requirements or fail to adopt such standards in the first place’.⁴⁷

The Guiding Principles are stated to apply ‘to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure’.⁴⁸

I will elaborate further upon the problems common to all businesses in the course of argument, but they include: the bottom line & the cost-benefit problem; the decision-making processes & pathology of business enterprises; and the suitability and applicability of various types of legal remedy to moral or legal persons. Just as equity-based corporate groups operating in a single country may closely resemble their multinational counterparts in terms of corporate decision-making and management, so the primary driving force of business is to maximise profit with the consequences that that entails for legal compliance and avoidance. The real strength in the Ruggie framework is that it does not presuppose any particular or given business structure, nor indeed any specific legal environment, and allows for maximum flexibility when solving problems as well as a multilevel implementation structure.⁴⁹

Another advantage of an ‘all business’ approach is that its multilevel universality mirrors similar holistic regimes such as international human rights law. Just as the Guiding Principles apply to all business, so human rights instruments from the UDHR down proclaim themselves to be applicable to ‘every individual and *every organ of society*, ... [who] shall strive ... to promote respect for these rights and freedoms and ... to secure their universal and effective recognition and observance’ (UDHR preamble, emphasis added). It thus avoids having to draw fine distinctions between the norms applicable to large or transnational business actors, and those smaller and/or uninternational ones.

However, this last advantage could also be said to be the ‘all business’ approach’s greatest weakness, in the sense that it fails to take account of the specificity of several significant aspects of transnational business. First, it fails to take account of transnational business entities *as actors*; given the transnational nature of their operations, capital flows and organization, there is necessarily a denationalizing effect, or a limited decoupling of transnational business actors from

⁴⁷ Ruggie, J., ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’ (7 April 2008) UN Doc A/HRC/8/5, 6

⁴⁸ Ruggie, J., ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, (21 March 2011) UN Doc A/HRC/17/31, Preamble / General Principles

⁴⁹ *ibid*, 5

State oversight and control. This is something I will deal with in detail at a later point, but clearly the potential alone for extraterritorial decision-making and investment brings different interests into play than in the case of a purely domestic business. With the galloping pace that globalization has attained in recent decades the interconnected and interdependent networks arising between the economies of different States, involving transnational business entities by design, have changed the nature of the relationship between business actors and their stakeholders, as well as creating a host of different players on both sides.⁵⁰ In short, the ‘one-size-fits-all’ methodology, which an ‘all business’ approach implies, risks missing specific issues related to the interplay between State and private power when business goes transnational.

This leads to the second, related, issue which is that an ‘all business’ approach may fail to properly take into account the specific legal environments – and indeed the multiplicity of them – in which transnational business actors operate. By assuming, implicitly or explicitly, that the same rules can apply to all business actors irrespective of size and national, supranational or transnational provenance, there is a risk both that rules peculiar to a particular legal environment will be missed entirely, and that the articulation of differentiated legal norms is inexistent or deficient in some way. By way of illustration, it is common to see scholars and lawyers falling within what may be broadly described as the activist view of human rights to advocate a holistic approach to a given problem. However, this holism is necessarily circumscribed by the human rights lexicon upon which it is based. Although laudable in the sense that it promotes the protection of the rights in question by varying means, it often misses other related norms and methods which may substantially achieve the same goal. Similarly, in the case of an ‘all business’ approach, which would seem to be axiomatically confined to issues common to all business actors, the particular nature of the transnational legal environment as it applies to cross-border business may be overlooked. In the case of national companies, normative conflict – if it exists at all – is generally between competing strands of national legislation or occasionally between national, international and supranational norms. Conflict resolution is (usually) determinable *ex ante* by the national constitution or *ex post* by the judiciary.⁵¹ When it comes to transnational business, neither the

⁵⁰ For three mundane examples, consider the ever-increasing involvement of NGOs, international – or global – trade union confederations, and international organizations.

⁵¹ An example of the former is to be found in article 56 of the French Constitution, which provides that treaties and EU law is hierarchically superior to French legislation. The latter is illustrated by the jurisprudence of the English courts to the interpretation of the European Convention on Human Rights, which is often used to restrict, expand or alter the scope of pre-existing common and statute law rules.

appropriate forum nor the method for conflict resolution are obvious. State interests, jurisdiction and authority to regulate are all at stake in a way which is rarely the case in national cases.

In summary then, an ‘all business’ approach, while alluring in its simplicity, risks glossing over the specificities of the legal environment in which transnational business operates, as well as the nature of the actors themselves. It may be that the Ruggie approach alleviates this risk to some degree through the differentiated *implementation* argued for by the later Reports and in the Guiding Principles. This issue is discussed more fully later, in Chapter 4. For now, suffice it to say that a methodological approach which purports to apply to all business is insufficient to fully describe or examine the particular problems raised by the transnational legal environment insofar as it applies to business actors.

(iii) Corporations or Enterprises?

Anglophone legal scholars are, on the whole, enamoured of the term ‘corporation’, and common lawyers even more so. It is easy to define, it evokes a monolithic entity which is simple to understand, regulate and pin down. It is also a word that is understood by much of the English-speaking public.⁵² But it is almost entirely unhelpful as an explanatory concept for legal scholarship. It is also without an analogue outside of the English-speaking literature; French and Italian scholars, for example, speak instead of ‘enterprises’. And even in English it is an unhelpful term. According to the Oxford English Dictionary, ‘corporation’ means only a legal person, or a collection of entities incorporated into a single body for some purpose:

‘corporation, *n.*

1. The action of incorporating; the condition of being incorporated.
2. A number of persons united, or regarded as united, in one body; a body of persons.
3. **a.** *Law.* A body corporate legally authorized to act as a single individual; an artificial person created by royal charter, prescription, or act of the legislature, and having authority to preserve certain rights in perpetual succession.
- b.** Frequently used in the titles of incorporated companies, e.g. the *London Assurance Corporation, Irish Land C., Oriental Bank C., Peruvian C.,* etc.’ (Oxford English Dictionary online, accessed 17 May 2012)

⁵² Although note that in the U.K., the emphasis has shifted from corporations to ‘companies’ in modern legislation and parlance. However Australia, Canada and the USA all predominantly use corporations.

Thus the whole idea of a transnational ‘corporation’ is misleading; the whole problem of transnational business is the lack of a single readily identifiable entity, and a multiplicity of different legal persons incorporated across several jurisdictions. The Chambers 21st Century English Dictionary is even clearer:

‘**corporation noun 1** a body of people acting jointly, e.g. for administration or business purposes and who are recognized by law as acting as an individual. **2** the council of a town or city. **3...**’⁵³

Clearly, transnational business actors are anything but a single corporation. Adopting this terminology is therefore, I would argue, not only misleading but also myopic. At best, it generates confusion in what the term corporation actually represents, and at worst it encourages a legal approach which remains wedded to the separation of distinct legal persons from one another and to a focus on form rather than substance. It is precisely this type of approach which is embodied in the *Barcelona Traction* decision discussed previously, and which has found its way both into the work of the International Law Institute⁵⁴ and which presents such difficulties to the study of transnational business from a legal perspective.

There is a further risk of confusion given the historical genesis of the term ‘corporation’. Originally, the corporation was a public law creation,⁵⁵ created by the monarch through the issuance of letters patent. The earliest corporations were municipal or ecclesiastical,⁵⁶ and in England the municipal corporation underwent a significant evolution of its own alongside the development of companies formed by royal charter. Many such corporations exist today: the Corporation of the City of London is perhaps the most famous example, but most cities were historically corporations well into the twentieth century and many still are.⁵⁷ Perhaps to claim this leads to confusion is to stray too far into pedantry; however it remains the case that the historic evolution of municipal corporations – the original use of the term in the common law – has differed from business organizations.

Even ignoring the strict dictionary definition of corporation, the word generally is taken to imply a corporate group or shareholder equity-based structure, something that presents its own

⁵³ Chambers 21st Century Dictionary online (accessed 17 May 2012)

⁵⁴ Institut de Droit International, Session of Lisbonne – 1995, Obligations of Multinational Enterprises and their Member Companies

⁵⁵ Nick Robins, ‘The Corporation That Changed the World’ (Pluto Press, 2006)

⁵⁶ See: Harold J. Laski, ‘The Early History of the Corporation in England’ (1917) 30 Harv. L.R. 561 at 568 – 578

⁵⁷ It is interesting to note that this evolution appears to be happening in reverse in parts of U.S., where municipal units are increasing choosing to incorporate, using the forms of private companies with limited liability.

difficulties. Indeed, that is precisely the model considered by Joel Bakan's study, *The Corporation*.⁵⁸ However, as noted previously, the equity-based family of corporate structuring sits alongside several alternatives, not least of which are the contract or network-based model,⁵⁹ and public-private forms of ordering such as the Japanese *keiretsu*.⁶⁰ The obvious problem with adopting an approach which relies on the equity-based model is that it is out of touch with many contemporary situations,⁶¹ and even assuming a particular line of regulation or inquiry to be successful in imposing particular obligations upon equity-based businesses, the norms or conclusions in question would be wholly vulnerable to large-scale corporate restructuring as an avoidance tactic.

Some authors, among them Muchlinski and Blumberg, have instead adopted the term 'enterprise',⁶² although neither of them really explain why,⁶³ while the solution of the euro-linguists in Brussels has been to adopt the even more vague 'undertaking' for EU legislation.⁶⁴ Both have their attractions, although at the potential loss of a good deal of legal certainty. The Oxford is of less help when it comes to 'enterprise':

'enterprise, n.

1. **a.** A design of which the execution is attempted; a piece of work taken in hand, an undertaking; *chiefly*, and now exclusively, a bold, arduous, or momentous undertaking.
- b.** *abstr.* Engagement in such undertakings.
2. Disposition or readiness to engage in undertakings of difficulty, risk, or danger; daring spirit.⁶⁵

⁵⁸ Bakan, (n 1)

⁵⁹ Sobczak (n 41)

⁶⁰ Peter T. Muchlinski, *Multinational Enterprises and the Law* (2nd Ed.)(OUP, 2007) 63 – 65

⁶¹ Probably the best example is the clothing and textile industry, which is almost wholly based upon a global supply-chain organizational model, with (often) uninational companies in one country entering into large network contracts and framework agreements with suppliers and producers elsewhere. This is discussed in greater detail in Chapter 4.

⁶² Muchlinski (n 60); Phillip I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2000) 24 *Hastings Int'l & Comp. LR* 297

⁶³ I am doing a slight injustice to Phillip Blumberg here. He does explain, at least, the concept of 'enterprise liability' and why he wants it applied to what he refers interchangeably as 'large multinational corporations' (ibid, 297) and 'multinational enterprises' (ibid, 318). On one reading – albeit an adventurous one – he could be seen as implying that the term corporation, being associated with 'traditional entity law' is out of date and needs to be replaced by a more flexible idea of the 'enterprise' (ibid, 299 et s; and see also Phillip I Blumberg, 'The Transformation of Modern Corporation Law The Law of Corporate Groups' (2005) 37 *Conn. L.R.* 605

⁶⁴ In the English language versions of all EU legislation, the term undertaking is invariably used while in the French version it is rendered as *entreprise* and in Italian as *impresa*. An example is provided by the posted workers Directive.

⁶⁵ Oxford English Dictionary online (accessed 17 May 2012)

Although draft additions in 1993 proposed the inclusion of ‘*c. spec.* A commercial or industrial undertaking, *esp.* one involving risk; a firm, company, or business’, this did not make it to the final text. The Chambers, however, is clearer:

‘**enterprise noun** 1. a project or undertaking. 2. a project that requires boldness and initiative. 3. boldness and initiative. 4. a business firm.’⁶⁶

In American English, while ‘corporation’ carries the same meaning as in international English,⁶⁷ ‘enterprise’ is more precisely defined as, *inter alia*, ‘a unit of economic organization or activity; *especially* : a business organization’.⁶⁸ This has a great deal of potential traction as a usable definition when it comes to transnational business; not only is it a more malleable term when it comes to confronting multiple legal personalities within a single corporate group, but it can also easily stretch to cover situations where business is organized along supply-chains or in horizontal and/or contractual networks. Thus it avoids the circularity of the concept of corporation, which can only be taken to signify, *de lege lata*, extant discrete legal personalities, or alternatively as a *de lege ferenda* aspiration to granting the transnational ‘corporation’ a new type of legal personhood, be it international legal personality or some other definition. It also closely mirrors the meaning of ‘*entreprise*’ in French, ‘*impresa*’ in Italian and ‘*empresa*’ in Spanish giving it a wider application and comprehensibility than Anglophone courts and scholars.

(iv) Interim Conclusions – Moving Beyond Nationality and Single Legal Personality

Much of the foregoing discussion seems like pedantry, and might be dismissed by some scholars as unnecessary to the rest of the argument. I would disagree, however. As lawyers, we know that words do matter, and the choice of nomenclature for a study of this type has an important bearing on its overall methodology; the linguistic terms of reference constitute a meta methodology, if you will. Words like corporation and multinational contain implicit assumptions (assuming those using them are using them properly) about the type of organization and legal environment being studied. It is no answer to say that ‘corporation’ is in general parlance to be understood as “big company” because any regulatory framework which relies upon it is susceptible to corporate (re-)structuring

⁶⁶ Chambers 21st Century Dictionary online (accessed 17 May 2012)

⁶⁷ According to the Merriam Webster Dictionary, ‘**CORPORATION, n.** 1. **a** : a group of merchants or traders united in a trade guild **b** : the municipal authorities of a town or city 2. a body formed and authorized by law to act as a single person although constituted by one or more persons and legally endowed with various rights and duties including the capacity of succession’.

⁶⁸ The full entry in the Merriam-Webster is as follows: ‘**ENTERPRISE n.** 1. a project or undertaking that is especially difficult, complicated, or risky 2: readiness to engage in daring or difficult action : **initiative** 3. **a** : a unit of economic organization or activity; *especially* : a business organization **b** : a systematic purposeful activity’.

designed precisely to avoid attracting the label ‘corporation’ and thereby circumventing the relevant legal obligations which attach to that framework.

With some notable exceptions, scholars in the field are generally lax about definition, and so a degree of interchangeableness must be accepted when discussing the literature, especially given that some authors often use the different terms synonymously. However, for the reason that practitioners are generally *not* so lax, and because the ultimate aim of this study is to provide a practical framework for regulation, I adopt the term ‘transnational enterprise’ (‘TNE’) for three reasons:

Firstly, although ‘transnational’ still implies a link to nationality, despite the fact that business tends to arrange itself on functional, not national, lines, this is the most useful term which exists in the literature for distinguishing globalized business from uninational ones. It avoids trammelling the study to a single legal level or order, such as the international level, and ties in with the emerging field of transnational law which seeks to articulate the interaction between State and non-state norms in a globalized legal space.

Second, ‘enterprise’ has broader use as an explanatory concept, shedding the straitjacket of single legal personality whilst retaining the essential element of for-profit business operations in a cohesive economic structure. It is also more widely used and understood throughout the academic world (and not just the common legal world) than ‘corporation’ or ‘undertaking’. Finally, it has a more transversal appeal across different legal fields as it is already used and discussed in, for example, antitrust/competition law.

Finally, despite the attraction of posing questions and seeking solutions that apply to all businesses great and small, the aim of this study is to articulate the particular problems which beset globalized business and to find ways of resolving those problems from a legal perspective. As such, I only discuss ‘all business’ issues insofar as they are relevant to transnational business enterprises. Clearly, some of these features will have a broader relevance and the potential for wider application, but for the purposes of this thesis I will limit myself to the transnational issues and merely flag up wider questions for further study where appropriate without examining them in detail. The next section discusses further the similarities and differences between transnational and domestic business actors.

That said, throughout the thesis I will continue to use ‘company’, ‘business actor’, ‘enterprise’ and ‘undertaking’ respectively. ‘Company’ is intended to be understood as referring to a specific entity

with legal personality. The remaining terms are intentionally vague, and will be used to refer to business organizations which either (i) do not have self-evident legal personality, or (ii) consist of larger forms of organizations which may or may not contain companies (as subsidiaries, branches, contractual partners or otherwise).

2. TNEs vs. companies & domestic corps.

Thus far, we have identified several limitations in terms of the terminology which is employed to describe globalized business within the legal literature. Important though this is to the meta-methodological framework of the present study, we have yet to pinpoint the precise characteristics that distinguish the transnational business enterprise from the domestic. Muchlinski has this to say about the differences:

‘[TNEs] differ in their capacity to locate productive facilities across national borders, to exploit local factor inputs thereby, to trade across frontiers in factor inputs between affiliates, to exploit their know-how in foreign markets without losing control over it, and to organize their managerial structure globally according to the most suitable mix of divisional lines of authority’⁶⁹

As Muchlinski himself acknowledges, this is highly similar to the structure of many large national enterprises, where economies of scale allow for the manipulation of internal market forces within the corporate group and to locate managerial power in the most suitable loci. For Muchlinski, therefore, it is merely the fact that the production, internal trade and lines of authority are separated by national borders that distinguishes what he terms the ‘multinational enterprise’ from the domestic. I would question, however, whether this is still sufficient as a distinguishing factor in today’s post-national, globalized world to make it worthy of study in isolation.

The problem again comes down to one of characterization and definition. Muchlinski’s choice of difference principle – national (territorial) borders – implies a two-dimensional view of the international legal landscape with regulation wholly or largely congruent with territorial sovereignty. In this world, *de facto* capital, production and other business flows are restricted only to the extent that they pass through a given territorial jurisdiction or are directly regulated by international law. When a dispute arises in relation to anything which crosses borders, the law of jurisdiction (for both general and private international law) enables the court seized to establish whether they can hear the dispute and conflict of laws rules⁷⁰ determine which State’s legal regime applies to the facts. This is irrevocably tied up with the issue of the corporate veil, as State

⁶⁹ Peter T. Muchlinski, *Multinational Enterprises & the Law* (2nd Ed.)(OUP, 2007), p.8

⁷⁰ Whether contained within a treaty or emanating from classic private international law.

jurisdiction and ability to regulate will be largely affected by the precise entity being sued, its place of incorporation and/or business.

Even leaving aside the axiomatic paradoxes that such a view is riddled with, but which have been debated within the private international world for centuries,⁷¹ and assuming that it held true (enough) for a period in time, I would argue that today it is no longer capable of dealing with the complexities of the modern globalized world. Essentially, my argument is functionalist: along the lines of what is sometimes termed ‘regulatory authority’⁷² – which in the case of States may be seen as roughly congruent to the legal concept of sovereignty – depend greatly on type and sector of activity, regional and global organization, and multilevel actors of different types. There are two facets to this. First, States – as domestic regulators – no longer have a monopoly on regulation and enforcement as was true in the past, meaning that the use of cross-border operations alone as a distinguishing point between TNEs and (large) national enterprises has become less pertinent. The second facet is that transnational business is characterized less by fragmented operations in distinct national territories and more by global, regional or sector-level forms of organizing in which the dominant regulators may in some instances be States but may also include a mix of transnational private regulators, international organizations, supranational bodies such as the EU or MERCOSUR institutions, NGOs, international or confederated business and trade associations, international trade union federations (‘ITUs’), and of course the various business actors themselves. Thus I submit that the real difference between transnational and non-transnational forms of enterprise is not national borders alone but rather *the conduct and production of operations across regulatory spaces, including but not limited to national legislators or regulators.*

Taking each of Muchlinski’s original categories in turn, I shall attempt a rough refinement of each for the purposes of a broad definition. First, let us turn to ‘TNEs’ productive capacities and ability to exploit local factor inputs. TNEs differ from domestic enterprises in their ability to locate productive capacities across geographical *and jurisdictional* borders. Domestic companies (or the entities forming a unination enterprise) are primarily subject to the laws of the State in which they are incorporated, and secondarily to any differentiated legal regimes to which they are subscribed or which are incorporated by treaty or other agreement into the domestic legal system. By contrast, TNEs are subject to both State and non-State legal and regulatory systems and may – as in the case of international investment arbitration pursuant to a Bilateral Investment Treaty

⁷¹ For a historical summary, see Alex Mills, *The Confluence of Public and Private International Law* (Cambridge UP, 2009) 26 – 73

⁷² *ibid*, 3 – 10

(‘BIT’) – be directly subject to international legal regimes.⁷³ The TNE *as a whole* then, is subject to both jurisdictional and normative conflict beyond a single State. It differs from domestic enterprises in its ability to select the most advantageous combination of normative and jurisdictional regimes available within its sector(s) or market(s) by locating its productive capacities in areas and jurisdictional spaces which present the most favourable factor inputs or the normative regime that is perceived to be most favourable to the TNE.⁷⁴

Second, I turn to the free movement of factor inputs within the TNE, which Muchlinski describes as the ability to conduct cross-border trade in factor inputs trade between affiliates of the same enterprise. Again, the crucial issue here is of regulatory space more than national borders. TNEs can organize their production and distribution channels globally in order to ensure the internally most efficient⁷⁵ allocation of resources whereas domestic enterprises are limited to a single regulatory space.⁷⁶ In some cases, this equates to the classic situation whereby a subsidiary or affiliate is able to move capital or resources in or out of its (national) zone of operation, presumably profiting from cost-effective factor inputs such as cheap labour or raw materials, and thereby transfer those savings to its parent or sister companies.

However, this transfer-in-savings model implies two things: first, a pyramidal structure in which the ultimate profit is realized by a parent company incorporated in a State where presumably the same cost savings could not be made or the same production opportunities do not exist. In extreme versions of this model, the ultimate holding company may be incorporated in a tax haven in order to afford maximum return to its investors. Ergo, in a ‘traditional’ TNE such as this, duties on production, operation, capital and profits are minimized to the greatest extent possible. Examples

⁷³ See discussion in Chapter 4.

⁷⁴ Of course, the question of what is favourable is a complex question and will be highly context-specific. Sector, industry and investment type are all likely to play a role: for instance, extractive industries are likely to invest abroad predominantly as a resource-seeking move. Their investment is also often characterized by high sunk costs and geographical limitations, which is likely to affect the relationship between investing TNE and host-state. See generally: Liesbeth Colen, Miet Maertens & Johann Swinnen, ‘Determinants of foreign direct investment flows to developing countries’, in De Schutter, Swinnen & Wouters (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge, 2013), 116 – 137, and discussion in Chapters 1 and 2.

⁷⁵ Note that I use the term ‘efficient’ rather loosely here. I *do not* mean the most efficient result from a macroeconomic perspective, such as Kaldor-Hicks or pareto-optimal efficiency. Rather I mean the most internally efficient use of resources within the enterprise depending upon its current aims. If, for example, the primary aim of the enterprise were considered to be profit maximization, then an internally efficient organization would emphasise cost-effective and revenue maximizing strategies. If, on the other hand, the aim is long-term control and market dominance, then efficiency would instead centre on maintaining and expanding input flows.

⁷⁶ Evidently this is an over-simplification since in states with a federal or differentiated constitutional structure, certain enterprises may be operating within 2 or more distinct regulatory spaces. However, this simplification is inconsequential for present purposes, I submit, as the regulatory conflicts which may arise are capable of being regulated directly by the central constitutional authority.

of this type of TNE may be found particularly in the extractive industries and refinement sectors. The second is a regulatory map drawn predominantly or exclusively by States, imbuing national borders with more than *de minimis* substance.

However, the topography of regulation is changing; States are increasingly legislating for situations which go further than their territorial borders, and non-state bodies which may in some instances be largely autonomous also seek to regulate particular geographic regions, sectors and industries with the role of national territorial borders playing a reduced role in such regulation. Whether (in the case of States and supranational bodies) this type of regulation is ‘extra-territorial’ or not is really beside the point; the important point to note is that the effects of measures which would once have been limited to a single State now extend widely. TNEs themselves may contribute to this extension through network contracts containing choice of law clauses, effectively bypassing local rules in certain situations. Thus, TNEs exploit not only cost variances across national borders but also regulatory differences and indeterminacy resulting from differentiated multilevel regulation. Indeed, in extreme versions of this model non-state norms or dispute resolution procedures may provide ways to avoid or hollow-out the application of State norms.⁷⁷

Third, in terms of TNEs’ ability to exploit their know-how while retaining control over it, the issue is not, I would argue, merely an issue of foreign markets but of global, regional and other operational zones. Everything that has so far been said carries equal force in this context: with increased openness of markets and information flows, TNEs increasingly use non-state norms emanating from international organizations such as the WTO to protect their know-how, the TRIPS agreement being just one prominent example.⁷⁸ Second, private regulation by price-setters or controlling entities enables TNEs to create extensive – and powerful – network contracts to regulate their activities and protect their know-how. Thus, once again, the rise of supply-chain and contractual models of organization as opposed to equity-based control and ownership represents a shift from more traditional methods. TNEs are placed to thus exploit their know-how in global, regional and national markets while retaining control over it.

⁷⁷ A good example is international investment arbitration, discussed in chapter 4.

⁷⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994) 33 ILM 1197

Part I

Business Actors in the Global Legal Context

The Limits of Extant Legal Regimes for TNE Accountability

Chapter 1

Territorial Regulation of Companies within the Nation-State

‘Of public ministers, some have charge committed to them of a general administration, either of the whole dominion, or of a part thereof... every subject is so far obliged to obedience, as the ordinances he shall make, and the commands he shall give be... not inconsistent with his sovereign power’¹

The company, the legal form of a business or enterprise, is a creature of law. More than that, it is the product of the legal system which gave it birth. Historically, it was given birth by an exercise of domestic sovereign power; examples from the Early Modern period are provided by the corporation by royal charter (in English law) and the *société en commandite* (in French law).² Indeed, as shall be discussed in greater detail in Chapter 2, domestic law continues to be the only source of the legal personality of the transnational enterprise. It is also States, through their exercise of sovereign power, that have the first claim to regulate matters which fall within their jurisdiction. Finally, it is at the domestic level that regulation is most developed and where the vast majority of legal rules are to be found. The first locus of business regulation which we shall examine is therefore the domestic legal system of the Westphalian nation-state.³

Two distinctions need to be noted at the outset which bear strongly upon the discussion. The first is between private and public. The above paraphrasing of Hobbes’ *Leviathan* nicely encapsulates this distinction; public entities are charged with administering some territory or function of the sovereign within the limits of the delegated power. Private citizens are bound by the edicts of public bodies, insofar as the edict is consistent with the power (i.e. not *ultra vires*). In a traditional conception, businesses (whether or not having legal personality) are private actors. This necessarily

¹ Thomas Hobbes, *Leviathan* (first published 1651, Touchstone 2008) 163 - 73

² Other earlier examples of chartered and contractual forms of company can of course be found, such as the *commenda* in Italy, and various forms of partnership sometimes with a strictly hierarchized group structure. Perhaps the most infamous example of the middle ages is the Medici bank founded by Giovanni di Bicci. Bank branches were separate partnerships but subject to strict control by a central partnership in Florence. Its structure has been compared to the modern holding company. See: Raymond A. de Roover, *The Rise & Decline of the Medici Bank 1397 – 1494*, (first published 1963, Beard Books 1999) 77 - 85

³ This is not an analysis of the history of statehood, or the benefits or otherwise of a particular constitution of sovereignty. I refer to the Westphalian nation-state because it is the dominant form of political organization in national and international affairs in the modern world. As well as providing the primary source for domestic and international laws and for supranational organizations, it is also the ultimate goal of an exercise of the right to ‘external’ or ‘full’ self-determination in international law. See: James Crawford, *Brownlie’s Principles of International Law* (8th edn, OUP 2012) 141 - 42

has effects on the possibility of subjecting companies and/or their members to different forms of regulation. There is also a similar – though not identical – distinction between ‘private international law’ and ‘public international law’ which presents its own problems and will be discussed in the following chapters.⁴ With the advent of privatization and globalization, the private character of enterprise (and particularly the transnational enterprise) is becoming increasingly unclear.

The second distinction is between territorial regulation and so-called ‘extraterritorial’ regulation. It is no understatement today to say that the ‘territoriality principle is the most basic principle of jurisdiction in international law’,⁵ or as Michaels claims, that territory ‘has long shaped our thinking about adjudicative jurisdiction of State and national courts’.⁶ The dichotomy of territorial and extraterritorial jurisdiction has been one of the most debated issues of the last decade. It affects not only adjudicative jurisdiction, as in the Michaels quote, but also jurisdiction to prescribe. In U.S. common law, for instance, there is a presumption *against* the extraterritorial scope of statutory law which came to prominence recently in the *Kiobel* case.⁷ I discuss this question, and extraterritoriality generally, in chapter 2.

However before approaching the question of extraterritoriality, it is necessary to examine the regulation of business actors operating inside a State’s territory. This will naturally include its own companies as well as foreign transnational enterprises. In the first part of this chapter, therefore, I discuss what could be regarded as the “pure” domestic situation: a unination enterprise operating in its State of origin without transnational considerations coming into play. In other words, the classic case of a sovereign State regulating behaviour of its citizens on its own territory. As will be

⁴ In passing, however, it is to be noted that definitions of the subject may differ even between *privatistes* and publicists. Most modern private international law scholars consider that the discipline extends to cover three separate areas: conflict of laws, the law of jurisdiction (or conflict of jurisdictions), and the law of recognition and enforcement of judgments (see, e.g. James Fawcett & Janeen M. Carruthers, *Private International Law*, (2008, OUP) 7; Bernad Audit, *Droit International Privé* (4th Ed), (Paris: Economica, 2006) 4 – 18). This may be contrasted with the publicist conception which considers private international law to be essentially concerned with determining (domestic) conflict of laws (and perhaps recognition and enforcement of foreign judgments), while the law of jurisdiction belongs, *stricto sensu* to international law proper (this view could be said to be axiomatic in Ryngaert’s treatise on jurisdiction: Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008). It is also notable in the common law approach to private litigation, which generally admits of a greater plasticity between the disciplines of international law and private international law that in the civil law tradition. The leading textbook in England, for instance, deals predominantly with conflict of laws (Prof. C. G. J. Morse, Prof. David McClean CBE QC & Lord Collins of Mapesbury, *Dicey, Morris & Collins on the Conflict of Laws* (15th Revised Ed)(Sweet & Maxwell, 2015). There is an interesting debate around who really owns the law of jurisdiction (see e.g., Patrick Wautelet, ‘International Private Law Achieved in Meeting the Challenges Posed by Globalisation?’ in Slot & Bulterman (eds.), *Globalisation and Jurisdiction* (Kluwer, 2004) 55 – 78). These differing viewpoints, to the extent that they are pertinent to the discussion, will be discussed in later chapters.

⁵ Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 42

⁶ Ralf Michaels, ‘Territorial Jurisdiction after Territoriality’ in Piet Jan Slot and Mielle Bulterman (eds), *Globalisation and Jurisdiction* (Kluwer Law International 2004)

⁷ *Kiobel v Royal Dutch Petroleum* 133 S. Ct. 1659, 569 US 12 (USSC, 2013)

seen, however, this is not necessarily immune to transnational influences of various sorts. In the second section I examine the typical ‘host-state’ scenario: regulation of a foreign company (or foreign group) on the State’s territory.

I. The Aims of Domestic Regulation

If there were only a single State in which everyone lived, regulation would be a simple affair. Unfortunately for lawyers and other devotees of ordered hierarchies, the world is considerably more complex. And yet, it is precisely this assumption that classical jurisprudence makes about the unlimited power of a sovereign State: the law is issued by edicts of the uncommanded commander.⁸ Even in modern positivism, the identification of ‘law’ and a ‘legal system’ assumes that the system is complete once its underlying conditions are met. For Kelsen, the legal system is a hierarchy deduced from the *grundnorm*, while for Hart and his interlocutors it is the existence of secondary rules, and the rule of recognition in particular, which characterizes it. But the common denominator in all of this is that a given legal system, once properly classified as such, is perfect.⁹ This is what legal pluralists call a State-centrist view, with the State having an ‘assumed monopoly on law-making’.¹⁰

The issue of interactions between systems is one to which I will return throughout the thesis. For the time being, however, let us ignore the existence of actors, systems and influences external to the single State, and examine what I will dub the “pure” domestic situation: an enterprise based and acting solely in a single State which has a monopoly on regulation. Within this paradigm, it is important to recognize that – although it may be unnecessary for the purposes of identifying them as such – laws do not exist in a vacuum. It is inherent in the role of the legislator that laws respond to a perceived desire or need to delimit or regulate particular behaviours. Arguably, those needs or desires may be moral or immoral; what follows should not be construed as an attack on legal positivism. It may be – as Kelsen would have it – that laws are neutral. Equally, the Dworkinian vision of law as dependent on morality could easily be made to fit my thesis by assuming that these needs or desires must needs be moral. For present purposes, the outcome of this important debate is irrelevant. What is important is that laws and rules are intended to *regulate*, and as such they have

⁸ Perhaps the best exponent of which is John Austin, although later famously criticized by H. L. A. Hart. See: John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (3rd edn, London 1869)

⁹ See H. L. A. Hart., *The Concept of Law* (3rd edn, OUP 2012) 117 - 23 System’ where Hart discusses the unbounded nature of sovereignty and its relationship to real-world facts.

¹⁰ Ralf Michaels, ‘Global Legal Pluralism’ (2009) *Annual Review of Law and Social Science* 243

both a subject and object. The object is the aim of the regulation in question and the subject is the person affected by it.

The common method of regulating wrongs in most legal systems is through criminal law, civil tortious or delictual responsibility, or administrative law, or some combination of the three. However the borders between these branches of law are not always clear-cut, and different legal systems often place the same norm in criminal law and administrative law.¹¹ In the first place, I therefore discuss these three types of liability, before looking secondly at some of the limits that may apply.

In sketching the above characterization of the legal law of wrongs I draw a distinction with public law proper, namely the law which regulates the behaviour of public actors. In the domestic context, the enterprise is traditionally seen as a purely private actor. It is rare – although not unheard-of – to find companies as the addressees of public law obligations. What is more, much victim-TNE litigation plays out in the mechanisms of private law (torts) and in the criminal courts. However, that does not avoid the fact that there are a number of features which enterprises have in common with public actors, not the possibility that exists for them to affect others' interests and rights in a similar way. I return to this theme in Chapters 4 and 5, but for now let us focus on the classic case of the enterprise *qua* private actor, whose behaviour is regulated through the civil, criminal and administrative law.

Staying at the current level of abstraction, it is also generally the case that in defining and regulating legal wrongs, the legislator usually responds to a perceived need for compensation, punishment, deterrence or prescription of the regulated behaviour. In the case of torts or civil wrongs, Postema has classified the main theories as falling into two broad camps, the “prescriptive” and “remedial” theories. The former take a systemic look at social interaction and see tort as shaping and structuring that interaction, ‘defin[ing] ground rules for players on the field of risk-creating social interaction’, while the latter are interested rather with ‘concrete situations, specific parties, and the misfortunes they suffer’.¹² The intricacies of this debate are for elsewhere, the important point for now is that rules of tort and criminal law respond to something.

¹¹ Taking the main Anglo-European legal systems as examples, it is generally the case that common-law systems (England, the U.S.A., and Canada to take three examples) treat minor infractions and breaches of administrative regimes by natural and legal persons as part of criminal law, while the civil legal systems (e.g. France, Italy, Spain, Germany, Québec) treat them as part of administrative law.

¹² Gerald J. Postema, ‘Search for an Explanatory Theory of Torts’ in Gerald J. Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press 2001)

1. Private Justice: The Aims of Private Law

Much ink has been spilled deciding what the something is to which private law responds. For now, let us briefly summarize three possibilities for the law of torts, from theories based on conceptions of justice or function. Looking at the English law of torts it may be argued that – with its stated compensatory aim to put the claimant back in the position he would have been in had the tort not occurred¹³ – it responds more or less to the Aristotelian idea of *corrective*¹⁴ *justice*.¹⁵ Likewise the French Civil Code.¹⁶ It is impossible to deal comprehensively with the extensive literature that surrounds this concept, but putting it in the briefest possible terms, the argument runs as follows. The balance, or equality, between defendant and claimant has been affected since the claimant has suffered harm – or loss – as a result of the defendant’s act; in order to redress the balance the claimant must be compensated in order to put him in the position he would have been in had the harm not occurred.

In other countries, there is sometimes a claim towards fair distribution of risk in society: a *distributive justice* model. Indeed for certain types of wrong, some countries have moved towards strict liability and a State-based insurance model for compensating what are still firmly considered torts elsewhere.¹⁷ Indeed, Stephen Perry has argued that tort law is in fact about choosing which person or persons ought to be liable for a given situation; and that the overall structure of tort rules which determine this are therefore distributive. Corrective justice, which intervenes in individual cases, is transparent to tort’s distributory aim.¹⁸

¹³ *Wells v Wells* [1999] 1 A.C. 345

¹⁴ Also called ‘commutative’ or, in some translations, ‘rectificatory’. The Ross translation of the Nicomachean Ethics gives the term properly as ‘rectificatory.’ See: W.D. Ross, *The Works of Aristotle translated into English* (rev edn, Oxford World Classics 2009) although most contemporary legal theorists prefer the term corrective justice. See: Ernest J. Weinrib, ‘Corrective Justice in a Nutshell’ (2002) *The University of Toronto Law Journal* 349. There is also the possibility for confusion with the term ‘commutative justice’ usually preferred by civil law scholars. Commutative justice is usually considered to be derived from Aristotle via Thomas Aquinas, and is considered to be the just state of affairs arising from a free and fair exchange and is often used synonymously. For the sake of clarity I adopt the term corrective justice throughout this thesis.

¹⁵ In particular the influential Toronto school of corrective justice and the prominent work of Ernest Weinrib. See: Ernest J. Weinrib, *The Idea of Private Law* (rev edn, OUP 2012); William Lucy, *Philosophy of Private Law* (OUP 2012) 268 - 326; Jules Coleman, ‘Corrective Justice and Wrongful gain’ (1982) *The Journal of Legal Studies* 421

¹⁶ French C.Civ, art 1385

¹⁷ In New Zealand, for example, medical malpractice all but went extinct in 1974 to be replaced by a state-funded compensation system. See: M. Bismarck & R. Paterson, ‘No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety’ (2006) *Health Affairs* 278. Compulsory insurance for road users often fulfils a similar role. See e.g. the French system laid down by: *Loi* n° 85-677 du 05 juillet 1985 tendant à l’amélioration de la situation des victimes d’accidents de la circulation et à l’accélération des procédures d’indemnisation.

¹⁸ Stephen Perry, ‘On the Relationship between Corrective and Distributive Justice’ in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (OUP 2000)

Against these two divergent theories loom the hulking figures of functionalist schools of thought, in particular economic-based theories, which found themselves upon efficiency, defined as wealth or well-being maximization.¹⁹ These tend to deny that tort law can be explained by normative theories, or at the very least are indifferent to questions of distribution and fairness.²⁰ In some legal solutions, the aggregate welfare of the parties may have been increased,²¹ but one party may be much worse off than the other.²² Thus theories of distribution may still have a part to play. However, there is a vast literature debating whether questions of justice (both corrective and distributive) should be subordinated to efficiency or aggregate welfare maximization or *vice versa*.²³

Skirting this developed and interesting debate, there are two remarks which can be made. The first is that the ‘fit’ of real-world systems of civil liability to the theories varies. In the U.S., for example, there is the interesting possibility for punitive damages as part of tort law, something unknown in most civil systems and extremely limited in England.²⁴ In strict compensation-based systems, there seems to be several factors that militate towards corrective justice and few which count against it. But in systems where punitive damages abound, or liability is strict, it is more difficult to decide between the justice models. In both cases it is difficult to exclude economic considerations entirely²⁵ and the debate as to whether or not one is logically prior to the other is essentially moot for present purposes.

Second, and more importantly, a general tendency to be prescriptive can, I submit, be discerned in most – if not all – cases.²⁶ In the case of fault-based compensatory liability, the retention of fault

¹⁹ Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, (Harvard University Press 2002) 4; R. H. Coase, ‘The Problem of Social Cost’ (1960) *JL & Econ* 1;

²⁰ Kaplow & Shavell (n 19) 93-5.

²¹ i.e. the solution is what is known as Kaldor-Hicks efficient.

²² As indeed in Coase’s paradigmatic discussion of injunctive relief in *Sturges v Bridgman* (1879) 11 Ch D 852, (EWHC); see Coase (n 19) 8 - 10

²³ See, *inter alia*, Kaplow & Shavell (n 19);

²⁴ Exemplary damages are available only for ‘oppressive’ or unconstitutional behaviour by agents of the state, thus giving them a peculiarly public law flavour and restricting them to a small subset of (public) defendants. See discussion in Deakin et al, *Markesinis & Deakin’s Tort Law* (5th Ed)(OUP, 2003), pp.786-792

²⁵ As legal practitioners know well, *inter partes* bargaining does not take place in a vacuum but takes account of the cost and benefit to each party, with transaction costs (such as legal costs of the litigation) assuming a very high significance. The economic concept of the ‘least-cost avoider’ implicit the Coase theorem may be crucial to achieving meaningful settlements. It is also clear that most settlements conducted competently will aim to achieve something approaching a Kaldor-Hicks efficient bargain.

²⁶ Certainly it is a commonly-held view among legal scholars. See *inter alia*: Nicola Jägers, ‘Corporate Human Rights Violations and the Feasibility of Civil Recourse in the Netherlands’ (2009) 33(3) *Brook J. Int’l Law* 836: ‘Tort law can serve a preventive function by discouraging certain unlawful behavior. In this sense, tort liability may act as a regulatory mechanism. Additionally, tort law offers redress for injuries suffered and therefore also serves a compensatory function.’

as a condition for liability, would seem to imply a desire to prescribe peoples' behaviour. Wherever a court pronounces a defendant to be at fault, an inherent stigma will be attached to that finding. If the intention behind a rule is to promote efficiency, for example by preventing negative externalities, then the aim of the legal rule will be to raise the costs of externalization so as to neutralize any benefit to the defendant.²⁷ Even where strict liability applies – but the defendant pays directly any damages – it could be argued that the aim is to deter risk-taking behaviour.²⁸ The only exception to this are pure State-based compensatory systems based on strict liability, such as medical law in New Zealand, where the preponderant aim is compensation of the victim and not prescription of the behaviour of the person who committed the act or omission causing injury.²⁹

The possibility – whether limited or not – for punitive damages as part of civil responsibility also raises important questions. It suggests that the distinction between tort and crime may not be as immutable as first appears despite its widespread use,³⁰ something to which I will return later. But it also reinforces the prescriptive, deterrent and punitive aims of tort. It goes beyond mere compensation (since it requires the defendant to pay more than the basic reparatory consequences of the wrong). And yet this “extra” element of damages does not go to benefit society at large, as in the case of a criminal or administrative fine. Instead it enriches the victim, putting him or her in a “better” position than had the wrong not occurred. Leaving all claims about the appropriateness of introducing a punitive element in private law, it is undoubtedly the case that it exists, and may even be fundamental to private regulation in some systems.

2. Public Justice:

(i) Aims of the Criminal Law

Compared to private law, whose *primary* aim is, in general, compensation of the victim, it may be said that Criminal law seeks primarily to punish the defendant for his wrongdoing. This may be linked to its prescriptive deterrent function: It has been suggested that ‘criminal law exists to impose punishments such as imprisonment in situations where tortious remedies are an

²⁷ This is evidently a gross oversimplification. The literature on how legal rules may be engineered to produce efficient outcomes is vast and there are myriad ways in which a legal rule may be designed or applied in order to attempt an efficient outcome.

²⁸ Or at least to strike a particular balancing of risk between stakeholders, as is the explicit aim of the EU system of product liability laid down by Directive 85/374/EC.

²⁹ Bismarck & Paterson (n 17)

³⁰ See: Paul H. Robinson., ‘The Criminal-Civil Distinction and the Utility of Desert’ (1996) Bost. Uni. L.R 201

insufficient deterrent'.³¹ However, Simester and Sullivan suggest it is the *inherency* of punishment and censure to the criminal law which makes it 'one function of the criminal law'. But it is also the specificity of the punishment, including the 'labelling of the accused as a criminal... The criminal law has a communicative function which the civil law does not, and its judgment have a symbolic significance that civil judgments lack'.³² Likewise, criminal law has the potential to send a 'stronger accountability signal' than mere tort.³³

Although criminal law may also intend to allow for rehabilitation of the offender once he has "paid his debt to society", it is the notion of a wrong having been committed against society *as a whole* which underlies the imposition of criminal liability. Sanctions for rule-breaking are therefore inherently punitive, albeit that in many modern systems of criminal liability there may also be a compensatory element to a sentence, such as community service or reparations to the victim of a theft. There is consequently a strong public interest element in criminal prosecution, a feature criminal law shares with public and administrative law, hence the need in both fields, that 'not only must justice be done; it must also be seen to be done'.³⁴ This ties in to the strong public interest element to criminal prosecution and process: as Allen states, "crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured".³⁵³⁶ The fact of prosecution by the State, the public character of pronouncements of guilt and punishment, all combine to put criminal law traditionally on the "public" side of the line in the public-private divide.³⁷

(ii) Administrative Justice? Administrative & Regulatory Liability

In their day-to-day existence, companies and enterprises come most often into contact with various administrative or regulatory agencies who impose upon them a number of legal burdens.

³¹ A. P. Simester & G. R. Sullivan, *Criminal Law, Theory & Doctrine* (2nd edn, Oxford: Hart 2003), 4, citing: Richard A. Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Col. L.R. 1193

³² *ibid*, 4 - 5

³³ Cedric M. J. Ryngaert, & Jan Wouters, 'Litigation for Overseas Corporate Human Rights Abuses in the EU: The Challenge of Jurisdiction', (2009) 40 *George Washington International Law Review* 939 at 971

³⁴ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 (EWHC)

³⁵ Carleton Kemp Allen, *Legal duties and other essays in jurisprudence* (1931, Oxford: Clarendon Press) 233-4

³⁶ I have deliberately omitted discussion of the notion that criminal law seeks to prohibit acts which are morally wrong in and of themselves, the *mala in se*. Most modern criminal systems also include 'prohibitions which are only wrong because they are illegal (*mala prohibata*): Simester & Sullivan (n 31) 5

³⁷ Cf. Cedric Ryngaert, 'Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) 9(1) *Int'l Crim LR* 187

It is likely therefore that the most common form of liability which affects enterprises of all types is administrative.³⁸ Administrative liability regimes may be seen as being regulatory in the strict sense, in that they are generally intended to regulate and prescribe conduct in a specific domain. Liability is often strict rather than fault-based, although a due diligence defence may be available to in some countries to defend an administrative breach.³⁹ Often, the sanction for non-compliance may be punitive in nature, such as a fine. To the extent that this is so, administrative liability shares many features with criminal law: both aim to prescribe or deter conduct, and the sanction is punitive.

Where administrative liability becomes interesting, however, is where alternative sanctions are provided for, which may act as absolute barriers to corporate conduct. These may be divided into two categories: *ex ante* measures, which are hardly sanctions at all, and *ex post*. In the first category are purely administrative procedures which are a necessary step towards conducting a particular business activity. A good example is the requirement for prior approval of new medical devices before they can be marketed to patients. In the EU this is governed by the somewhat opaque system under the Medical Devices Directive.⁴⁰ In the U.S., market authorization is administered by the Food & Drug Administration. However in both cases there is an absolute prohibition on marketing and distributing a device that has not been approved.

Even the procedure for incorporating a new company could be seen as a form of *ex ante* administrative measure. It is clear that this conditionality on e.g. market access is not really a sanction per se. It is possible to imagine business being carried on illegitimately, without the necessary authorization, and sanction would then be a matter for *ex post* administrative or criminal liability.⁴¹ However, conditional market or territorial access, limitations on the ability to contract and do business without prior authorization or without supervision, it is clear, are all potentially powerful tools in requiring businesses to act in a particular way. One common restriction which

³⁸ There is a difference in terminology between common law and civil law systems here, in part because administrative liability is not conceived of separately to criminal or civil liability. I use the term “administrative” in this context to signify both administrative legal mechanisms in the strict sense – such as administrative tribunals regulating a profession, for example, or granting particular concessions – and “regulatory offences” which are intended to enforce particular regulatory regimes.

³⁹ As in Canada, where due diligence provides a general defence to all offences of strict liability. See Kent Roach, *Criminal Law* (5th ed)(Toronto: Irwin Law, 2012), 222 – 229.

⁴⁰ Council Directive 93/42/EEC concerning medical devices

⁴¹ A fairly common example is the illegal sale of arms, which in the UK is subject to a criminal regime that could be classified as part criminal in the strict sense and part administrative in that it provides for various forms of expropriation of impugned property and restrictions on future activity, including by companies. Cf Firearms Act 1968, s.3(1) and the Proceeds of Crime Act 2002, Sch. 2

applies even to domestic companies is a restriction on shareholding, requiring a minimum number of national shareholders to incorporate. Canada, for example, requires 25% of a company's directors to be Canadian resident for federally-incorporated companies.⁴²

Ex post measures and sanctions may conform to general repressive or compensatory paradigms, such as fines, or a requirement to pay for a remedial measure (such as clean-up and reinstatement of polluted land under environmental regulation). Equally, they may apply some prospective restriction on further activity, such as holding the natural or legal persons in breach of the measures to a higher standard of review than other market participants.⁴³

A highly specialized administrative regime – so much so that it is really an independent legal regime in and of itself – is competition law. In Europe the oversight and adjudication of anticompetitive behaviour is carried out by specialized administrative agencies subject to the supervision of the European Commission. Sanctions include fines subject only to the size of the enterprise,⁴⁴ as well as “directions” requiring the enterprise to do the actions specified in order to bring the infringement to an end. There are also wide interim measures powers.

II. “Own-state” Regulation: Prescription of Business Behaviour in the Single State

Let us now focus on the prescriptive element of both tort and crime. I argued above that most tort systems have at least some prescriptive element. In the case of criminal law, this much is obvious: the inherent punitive nature of sanctions is designed to discourage people from committing crimes by threatening them with retribution should they do so. Let us assume that the intention of most legislators in defining legal wrongs both civilly, in tort, and through criminal law, is to prescribe future behaviour and deter the wrongful conduct.

While the protagonists remain in our hypothetical pure domestic situation, effective deterrence should in theory be a simple affair. In the case of natural persons this is for two reasons: the first is the idea developed by H. L. A. Hart of the ‘internal’ aspect of legal rules which generates obligation in the subjects of law;⁴⁵ the second is the existence of effective enforcement mechanisms

⁴² *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s.105(3). See further: Peter T. Muchlinski, *Multinational Enterprises & the Law* (2nd Ed.)(OUP, 2007), 185 – 191.

⁴³ For example, although this is not the case in Europe or the U.S., medical product regulations could provide as a sanction that a company must go through a more detailed screening procedure for future products than it would otherwise be required to.

⁴⁴ See, inter alia, the UK Competition Act 1998 c.41, s.36, which provides that a fine passed by the national competition authority (Now the Competition & Markets Authority) may not exceed 10% of turnover.

⁴⁵ H. L. A. Hart, *The Concept of Law* (2nd edn, OUP 1994) 55 – 9.

to force defendants to comply with a ruling or effect punishment. While I do not dispute the fact that the existence or not of this second element has no effect upon whether a given rule constitutes law or not,⁴⁶ it may nonetheless have an effect on people's behaviour in deciding whether to comply with a rule.⁴⁷ Because in our hypothetical scenario the State and perpetrator are in a closed loop, there is no way to escape the consequences of enforcement.

In the case of corporate entities, the situation is not so clear-cut. In the first case it is difficult to talk of 'internal' perception of rules and obligations on the part of a company or corporate group. This, I argue, is because the internal processes of corporate decision-making are conditioned by external pressures. Some of these are legal, such as the primary duty, at least in common law systems, of company directors to seek to maximise profits.⁴⁸ Others are economic, such as the cost of taking a particular action. Those responsible for corporate actions are not free to decide in the same way that an individual is, and it is absurd to pretend that the company itself can have any intention similar to that of an individual. As Phillip Blumberg puts it, 'when the small corporation is ... conceived as a separate juridical entity ... [the] theoretical foundation is sorely strained; and when it is applied to the complex corporate structure of the large multinational enterprise, it breaks down'.⁴⁹ With that in mind, I shall discuss four broad categories of obstacles to the effective prescription of corporate behaviour.

1. Legal Obstacles to Regulation: The Corporate Veil

The first issue we discuss is a uniquely legal one: the so-called 'corporate veil'. In a traditional, equity-ownership corporate structure, enterprises can divert capital to the controlling entity and avoid the effects of liability by depriving its subsidiaries of assets. They do so by creating a network of different legal personalities, all separated from each other and protected from each other's debts by the mechanism of limited liability, but with a controlling entity which sets the agenda for those below it. It has been described by one author as creating a 'fundamental barrier to the imposition of liability ... upon parent and affiliates for the activities of a subsidiary of the group'.⁵⁰ In essence,

⁴⁶ In other words, I fully accept Hart's criticism of Austin's command theory, that the mere enforceability of a rule neither necessary nor sufficient to qualify the rule as law. Cf. *ibid.* This is an important distinction to draw, as it is this very lack of enforceability which is frequently invoked to challenge the claim of 'international law' to be law. As will be seen, this will become relevant in the thesis when discussing the obligations which TNCs owe.

⁴⁷ A view challenged by some. See: Tom R. Tyler, *Why People Obey the Law* (Princeton University Press 2006).

⁴⁸ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable 2004) 28 – 59.

⁴⁹ Phillip I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2004) 24 *Hastings Int'l & Comp. LR* 297

⁵⁰ *ibid.*, 304.

it means that the separate legal personality that is the parent company is not liable for any of the actions of its subsidiary.

As Scovazzi points out, providing a 'precise definition of the corporate veil' is difficult,⁵¹ because it varies across legal systems. At its most basic it is the principle that a company's legal personality is separate from those of its shareholders, and the company is only liable to the extent of its assets; shareholders are not personally liable for acts of the company. It has been described as the 'bedrock' of modern company law all over the world and, allowing for greater or lesser variations in different legal systems, this appears to be broadly true.⁵² In the developed world, one of the legal systems which clings most rigidly to the concept of the veil is England. In one of the most significant cases of recent times, *Adams v Cape Industries plc*,⁵³ the Court of Appeal held that a court is not entitled to lift the veil:

'against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company.'⁵⁴

Adams v Cape involved one instance of Cape plc's global asbestos mining and refining business. Cape, a British company, mined asbestos (principally in South Africa) and shipped it nonexclusively to Texas, USA, where they sold it through a marketing subsidiary, N.A.A.C, and later through a closely connected Illinois company, C.P.C., which acted as agent of another company, A.M.C. (incorporated in Lichtenstein and wholly-owned by Cape). Asbestos was stored at a facility in Texas where a number of persons developed asbestosis as a result of exposure to asbestos fibres. They sued N.A.A.C., Cape and Capasco, another Cape subsidiary, in Texas.

⁵¹ Tullio Scovazzi, 'Industrial Accidents and the Veil of Transnational Corporations', in Tullio Scovazzi & Francesco Francioni (eds), *International Responsibility for Environmental Harm* (Graham & Trotman 1991)

⁵² Lucas Bergkamp & Wan-Q Pak, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts' (2001) 8 Maastricht J Eur. & Comp. L 167; Anil Hargovan & Jason Harris 'Piercing the Corporate Veil in Canada: A Comparative Analysis' (2007) 28(2) Comp. Law. 58; Philip I. Blumberg, 'Asserting HR against MNCs in U.S. law: Conceptual and Procedural problems' (2002) 50 Am. J. Comp. L. 493; Philip I. Blumberg, 'Accountability of MNCs: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2000) 24 Hastings Int'l & Comp. L. Rev. 297; Philip I. Blumberg, 'The American Law of Corporate Groups' in McCahery et al, *Corporate Control & Accountability: Changing Structures and the Dynamics of Regulation* (Oxford: Clarendon Press, 1992), pp305-342; Philip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups* (2005) 37 Conn. L. Rev. 605; E. J. Cohn & C. Simitis, "'Lifting the Veil" in the Company Laws of the European Continent' (1963) 12 ICLQ 189; Sneha Mohanty & Vrinda Bhandari, 'The evolution of the separate legal personality doctrine and its exceptions: a comparative analysis' (2011) 32(7) Comp. Law. 194; Richard Meeran, 'The Unveiling of TNCs: A Direct Approach' in Michael K. Addo (ed), *Human rights standards and the responsibility of transnational corporations* (Kluwer Law International 1999) (2004);

⁵³ *Adams v Cape Industries plc* [1990] Ch 433 (CA)

⁵⁴ *ibid*

Judgment was awarded against Cape and Capasco despite Cape's attempt to resist being joined as party on the basis of a lack of jurisdiction and they sought to enforce the judgment in England. It was argued, *inter alia*, that the English courts should lift the veil between C.P.C, A.M.C and Cape in order to hold that Cape was 'present' in Texas and could therefore have the judgment enforced against it in England.

The general thrust of English law on veil-piercing has been similarly uncompromising. A recent decision of the Privy Council reviewed both the English law and conducted a comparative analysis of U.S., French and Commonwealth decisions. It concluded that veil-piercing was a high standard: on the facts, the questions was whether, looking at all the circumstances, the company's –

‘juridical personality and its apparently separate commercial assets and business were so far lacking in substance and reality as to justify assimilating [it] and the state [its parent entity] for all purposes’.⁵⁵

Leaving aside for a moment the transnational implications, it is clear that the rigid principle as articulated by the English courts leaves little room for lifting the veil (even within a single State) except in circumstances where a company has been set up to evade some pre-existing obligation, or as a fraud or sham. In the U.S., veil-lifting is a little more developed, including for instance undercapitalization of a subsidiary as a basis for piercing,⁵⁶ while in some continental European countries, it appears that domination, total control or ownership can provide limited grounds for lifting the veil.^{57,58} This is not intended as a comprehensive overview of the comparative law of veil-piercing; rather it is to be noted merely that although some broader grounds and exceptions exist, lifting the veil nonetheless provides a significant hurdle to those seeking to act against an enterprise consisting of more than one legal person.

Several scholars have pointed out that the theoretical basis for limited liability and the veil is very weak. As Phillip Blumberg puts it: ‘when the small corporation is ... conceived as a separate juridical entity ... [the] theoretical foundation is sorely strained; and when it is applied to the

⁵⁵ *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2013] 1 All ER 409 at 441g (PC)

⁵⁶ John H. Matheson, ‘The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context’ (2009) 87 N.C. L. Rev. 1091

⁵⁷ In Germany, the combination of de facto domination with a specific external interest may in certain circumstances lead to veil-piercing: Carsten Alting, ‘Piercing the Corporate Veil in American and German Law – Liability of Individuals and Entities: A Comparative View’ (1995) 2 Tulsa. J Comp. & Int'l L 187; Alexander Daehnert, ‘Lifting the corporate veil: English and German perspectives on group liability’ (2007) 18 I.C.C.L.R 393-403

⁵⁸ In Italy, until 2003, art. 2362 C.Civile provided that in the case of a company with a single shareholder, the shareholder had unlimited liability upon the company's insolvency. There is now a more limited framework laid down by arts. 2497 – 2497-septies where a company is under the ‘guidance and coordination’ other companies or entities. See *inter alia*: Vittoria Allavena & Elisabetta Varni, ‘Report from Italy’ (2008) 5 *European Company Law* 247-250.

complex corporate structure of the large multinational enterprise, it breaks down'.⁵⁹ Bakan has also attacked limited liability and its effect on corporate responsibility,⁶⁰ while others have questioned 'whether the *raison d'être* of limited liability justifies its application to [TNEs]'.⁶¹ However, it is still very much alive and kicking. In fact, when courts *do* 'lift the corporate veil' by imposing liability upon a shareholder, empirical studies show that – in the U.S. at least – they are half as likely to lift the veil in the case of a corporate shareholder, and are three times less likely to lift in a tort as opposed to a contract case.⁶² What does this mean for harm perpetrated by a corporate enterprise? In short, in the ordinary tort context and outside of fraud and breach of fiduciary duty, victims may find it very difficult to hold a parent company vicariously liable for the acts of its subsidiary.

In England, the control test has had more success. In *Chandler v Cape plc*,⁶³ the claimant was the former employee of a Cape subsidiary in the U.K. who had contracted asbestosis as a result, unsurprisingly, of unsafe conditions leading to escape of asbestos dust in the factory. The subsidiary, Cape Building Products Ltd., had by the time of the claim ceased to exist and Mr. Chandler sued the parent company, Cape plc in England. The Court of Appeal, affirming the first instance judge, held that Cape had assumed responsibility for the health and safety policy of the entire group (including Cape Building Products) and thus owed a direct duty of care to Mr. Chandler.⁶⁴ *Chandler v Cape* is a case to which I shall return later, as it presents several interesting features for our purposes. However, it is worth noting here that it has an inherent limitation. As the Court of Appeal was at pains to emphasize, the finding of an assumption of responsibility did *not* mean they had in some roundabout way pierced the veil between Cape and its subsidiary. In the words of the court, the parent and subsidiary companies remained 'separate entities... [t]here is no imposition or assumption of responsibility by reason only that a company is the parent company of another company'.⁶⁵ This has the important corollary that provided a company takes

⁵⁹ P.I. Blumberg, 'Accountability of MNCs...' (2000) (n 52) at 300

⁶⁰ Bakan, (n 48) 11-13, 74

⁶¹ Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004) 131

⁶² John H. Matheson, 'The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context' (2009) 87 N.Carolina LR 1091

⁶³ *Chandler v Cape plc* [2012] 1 W.L.R. 3111 (EWCA)

⁶⁴ In the U.S., there are also some cases which begin to suggest a similar approach in the parent-subsubsidiary context. In *Levine v. Reader's Digest Ass'n, Inc.*, 2007 WL 4241925 (S.D.N.Y. 2007) a case brought by the employee of a Swiss subsidiary against the U.S. parent corporation, the court refused to dismiss a case on the basis that the plaintiff had shown a triable issue of fact that, *inter alia*, the parent's code of conduct raised the possibility a centralized system of labour relations existed over which the parent exerted the requisite control for liability. Against: *Younker v. Eastern Associated Coal Corp.*, 214 W.Va. 696, 591 S.E.2d 254 (W.Va., 2003), which found that language in a code of conduct was insufficient to be contractual.

⁶⁵ *Chandler* (n 63) at [69]

steps to ensure its involvement with a subsidiary stops short of overall responsibility or control over a particular area – as in *Wal Mart* – it is unlikely to be found directly liable, and the veil remains in place as an effective barrier to vicarious liability.

2. Economic & Political Obstacles to Regulation

(i) Legal Underdevelopment

Let us return to the discussion of criminal liability begun in section I. Considerations such the difficulty in categorizing intention and the problem of Hart's 'internal aspect' have traditionally made the imposition of criminal liability on corporations – at least for crimes which carry a *mens rea* element (as opposed to strict liability crimes⁶⁶) – a controversial subject.⁶⁷ In England, for much of twentieth century the debate focused on the 'identification doctrine' which looks for the 'controlling' or 'directing mind' of the company,⁶⁸ usually one or more of its senior executives. Actions lower down the hierarchy were unlikely to lead to liability; thus in *Tesco Supermarkets Ltd v Nattras*⁶⁹ a store manager was not sufficiently senior in the company as a whole to justify corporate liability. A supermarket was prosecuted for a false advertising offence. The manager of the store in question had failed to check or supervise the posting of the advertisement, but it was held that there was no culpability on the part of the 'central direction' of the company.⁷⁰ Alternative attempts, such as the 'aggregation theory' whereby 'the fragmented knowledge of a number of individuals is fitted together to make one culpable one'.⁷¹ This doctrine was rejected by the English House of Lords, however, in *Armstrong v Strain*.⁷² Although recent attempts have been made by the

⁶⁶ In England, corporate liability for strict liability crimes has been established since at least 1842: *R. v Birmingham and Gloucester Railway Co.* (1842) 3 QB 233; 114 ER 492 (EWHC)

⁶⁷ For example, in France, the general criminal responsibility of legal persons was only admitted into law on 1 January 2006 by the entry into force of art. 121-2 *Code Pénal*: 'Les personnes morales, à l'exclusion de l'Etat, sont responsables pénalement, ... des infractions commises, pour leur compte, par leurs organes ou représentants.'

⁶⁸ See *Director for Public Prosecutions v Kent & Sussex Contractors* [1944] KB 146 (EWHC); *R v ICR Haulage Ltd* [1944] KB 551 (EWHC). See also, in respect of Canadian law: Don Stuart, *Canadian Criminal Law: A Treatise* (3rd edn, Carswell 1995) 576 *et seq.*; Kent Roach, *Criminal Law* (5th ed., Toronto: Irwin Law, 2012), 230 - 244

⁶⁹ [1972] A.C. 153, (HL)

⁷⁰ This is to be contrasted with Canadian Jurisprudence, where provided that the act is 'performed by the manager within the sector of corporation operation assigned to him by the corporation', the act is imputable to the company: *Canadian Dredge & Dock Co v The Queen* (1985) 1 SCR 662 (CSC). See also: Joris Larik, "Corporate International Criminal Responsibility: Oxymoron or an Effective Tool for 21st Century Governance?" in Jana Hertwig et al. (eds.), *Global Risks: Constructing World Order through Law Politics & Economics* (2010, Frankfurt: Peter Lang) 119 *et seq.*

⁷¹ Celia Wells, *Corporations & Criminal Responsibility* (Oxford 2001) 156; Larik (n 70) 127

⁷² [1952] 1 KB 232

British Parliament to enlarge corporate criminal liability by statute,⁷³ the extent to which the conception of ‘organizational liability’ adopted ameliorates the identification doctrine are limited.⁷⁴

A limited number of jurisdictions have a developed notion of corporate criminal liability. In addition to the English model already mentioned, it is worth highlighting a few others. Canada passed statutes reforming the common law to provide for corporate liability wherever a ‘senior office’ of the company is at fault.⁷⁵ Australia has adopted the so-called ‘holistic theory’ which has been called the ‘most progressive’⁷⁶ approach which is ‘a broader conception... than any other common-law models’.⁷⁷ The U.S. has a model based on *respondeat superior*,⁷⁸ while the Dutch Criminal Code, for instance, makes no distinction between natural and legal persons. However, although there are ‘workable conceptual approaches available to determine the criminal intent of a corporation’,⁷⁹ it remains the case that many jurisdictions have no concept of corporate criminal responsibility.⁸⁰ Thus, the partial or total exclusion of companies from criminal liability presents one possible barrier to regulation at the domestic level, as it leaves them to be regulated exclusively by private law.

It is not difficult to imagine situations whereby no-one would be culpable for an obviously criminal act: an employee because his state of mind was insufficient of itself to justify liability and the company because it was immune from criminal responsibility. Such a situation came about in England with the cases arising from the *Herald of Free Enterprise* disaster.⁸¹ On 6th March 1987 the *Herald of Free Enterprise*, a “roll-on/roll-off” car ferry capsized as it left Zeebrugge for England. Nearly 200 lives were lost, both passengers and crew. At a public inquiry shortly afterward it was found that the vessel had sailed with her bow doors open and nose down, causing swift intake of water. The inquiry was followed by an inquest and then by the criminal prosecution of P & O

⁷³ See: Corporate Manslaughter and Corporate Homicide Act 2007

⁷⁴ James Gobert, “The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?” (2008) 71(3) MLR 413

⁷⁵ Roach (n 51), 233 – 244.

⁷⁶ Larik (n 70)

⁷⁷ Wells (n 71)

⁷⁸ Larik (n 70) 125

⁷⁹ *ibid* 128-9

⁸⁰ Although they may still have administrative / strict liability for certain infractions.

⁸¹ *R v HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr App R 10 (CA); *R. v P & O Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (CA).

Ferries, the company which owned and operated the vessel. The inquiry found that the issues which led to the sinking were endemic throughout the company:

‘At first sight the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant bosun, and also the failure by Captain Kirby to issue and enforce clear orders. But a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? The Directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the HERALD ought to have been organised for the Dover/Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.’⁸²

However, at the inquest the coroner ruled that a company could not commit manslaughter and ruled out the consequent verdict of unlawful killing.⁸³ His ruling was upheld by the Divisional Court on an application for judicial review. In the subsequent prosecution, although it was held that in theory a company could be guilty of manslaughter,⁸⁴ in the event it proved impossible to identify someone with sufficient direct knowledge to fit the identification doctrine discussed previously.⁸⁵

In essence, the controversy over corporate criminal responsibility is an example of a wider problem, namely the non-availability or underdevelopment of legal rules. Where legal rules are underdeveloped or do not exist, there can be no enforcement, no punishment, and no reparation for the victims of a harmful act. Some care must be taken here to describe exactly what I mean by underdevelopment. By definition any example of an impunity gap, a lack of protection for relevant stakeholders, or a failure to sufficiently regulate (say, the lack of punitive damages leading to a breakdown in deterrence as described earlier) could be seen as an underdevelopment of legal rules (albeit on a rather circular argument). So how best to evaluate underdevelopment? The tripartite

⁸² *R v HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr App R 10 at 12 (CA).

⁸³ The purpose of a coroner’s inquest in England & Wales is to ascertain the circumstances of a suspicious death and to make conclusions of fact. It is not primarily concerned with attributing responsibility or finding fault, although a few verdicts, such as unlawful killing or neglect, do go in this direction. See generally: Paul Matthews, *Jervis on Coroners* (12th edn, Sweet & Maxwell 2011)

⁸⁴ See the judgment of Turner J in: *R. v P & O Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (CA).

⁸⁵ See: Rosemary Craig, ‘Thou shall do no murder: a discussion paper on the Corporate Manslaughter and Corporate Homicide Act 2007’ (2009) 30(1) *Company Lawyer* 17

conception of injustice laid out in the introduction is relevant: manifest and serious injustices are clearest, since they will exist wherever a national standard fails to meet the international standard in question. Comparative injustice will also be important, since they identify situations where there is a difference in treatment between countries, something that may – depending on context – call for further justification.

Thus, what I am interested in is underdevelopment causing injustice, in the sense of a lack of developed legal rules such that the machinery for remedying the extant injustice is not available. This includes, in the pure domestic scenario, at least two separate facets. The first is where a rule – such as the basis of a tortious duty arising from an assumption of responsibility – does not exist, preventing any sort of action being brought, or where the rule exists but is too rudimentary to have a reasonable prospect of success (as in the *Herald of Free Enterprise*).

It is reasonably clear that in the case of tort liability, underdevelopment will operate in a substantially similar way to criminal law. With administrative liability, however, it risks – if anything – being even more problematic. Administrative liability depends upon a statutory regime being put in place, and usually upon specialized administrative agencies empowered to implement it. The U.S. environmental protection regime is a good example: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which is administered by the Environmental Protection Agency which investigates and enforces breaches of the legislation. Absent, at a minimum, the creation of an appropriate regulatory agency, enforcement of harm will fall back on the general law to the extent that rules exist.

The second facet is where liability may theoretically exist but the lack of sufficient procedural rules prevent it from being properly pursued (e.g. a lack of rules to allow for proper expert evidence, or to investigate and sequester key evidence). To illustrate this let us consider a case involving the Cape Corporation, *Lubbe v Cape plc*.⁸⁶ At the time of most of the claims Cape was engaged in asbestos mining in South Africa through a network of subsidiaries. There were over 3000 plaintiffs, who brought an action claiming damages in tort for asbestos-related deaths and injuries allegedly caused by Cape's mining and related activities. The case was brought in the English courts, and Cape promptly applied to have it remitted to South Africa. The plaintiffs resisted, arguing that the procedural rules in South Africa, to wit the legal aid or contingency fee funding and procedures for handling group litigation, were not sufficiently developed to enable justice to be achieved. It should be noted that in terms of legal underdevelopment, it could be argued that *Cape* was not a

⁸⁶ *Lubbe v Cape plc*, [2000] 1 WLR 1545 (HL)

wonderful illustration. In fact, contingency fee legislation had recently been passed which might have enabled the plaintiffs to obtain funding,⁸⁷ and, as one judge in the Court of Appeal stated, there was nothing to suggest that the South Africa courts would not 'be able to devise and adopt suitable procedures for the efficient despatch of business such as this'.⁸⁸ I shall return to this case in the course of later discussion; suffice it to say for the moment that procedural underdevelopment, even where it is as flimsy as in *Lubbe v Cape*, may, as the House of Lords judgement acknowledges, nonetheless present a barrier to access to justice for victims since it the uncertainty generated could 'contribute to delay, uncertainty and cost' and 'act as a further disincentive to any person or body considering whether or not to finance the proceedings'.⁸⁹

Why does legal underdevelopment occur? In the purely domestic situation, I would submit there are three main contributing factors. The first is what might be termed 'pure' underdevelopment, resulting from more generalized socio-economic underdevelopment. Indeed, this almost goes without saying – it is a general problem in the developing world that the legal infrastructure is often not equipped to deal with cases like the two above due to the low level of general development in the country. The second is corruption. Something highlighted by Paul Collier is that for the leaders of corrupt or undemocratic States, it often 'pays to keep their citizens uneducated and ill-informed'.⁹⁰ One effect of this is that those with economic power may have a far greater say in legal and legislative processes and may be able to prevent rules being passed (or enforced) which adversely affect them, or to have rules passed which benefit them. The third reason, which may be related to the second, is direct internal political influence which may be brought to bear by corporate actors or special interest groups, epitomized by the practice of lobbying.

Lobbying is interesting because it affects developed States as much as (if not more than) developing ones. Up to now we have mainly been considering the role of what most term the 'host-state' of investment / operations. However, the home-state suffers from the same problems which plague the host-state. Legislative bargaining can still take place as companies can still often wield vast amounts of power through practices such as lobbying. Widespread in the U.S.⁹¹ and growing

⁸⁷ *ibid* 1558

⁸⁸ [2000] 1 Lloyd's Rep 139 at 162.

⁸⁹ *Lubbe*, (n 86) 1560, *per* Lord Bingham.

⁹⁰ Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (2008 OUP) 66

⁹¹ Raquel Meyer Alexander, Stephen W. Mazza & Susan Scholz, 'Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations' (2009) 25 JL Pol 401

in Europe,⁹² lobbying may provide an important way for TNEs to use their economic power to influence policy making.

Measuring whether lobbying does influence the legislative process is difficult, not least because company accounts and tax returns that might show the results of a particular measure being adopted (or scrapped) are not necessarily public, and in the case of non-pecuniary policies (e.g. education) benefit can be difficult to quantify. However one recent study of tax breaks in the U.S. where relevant data was for once in the public domain put the rate of return on lobbying expenditure for certain companies of the tax legislation in question at 220:1.⁹³ That this figure is so high in relation to a single measure suggests that lobbying can certainly be profitable for the enterprises who engage in it, and also highly successful (even if not all attempts at lobbying succeed, a few with ratios like that would be enough to justify significant investment). I am not claiming that lobbying is inherently problematic, (although many see a need for regulation and oversight to prevent outright rent-seeking by the corporate lobbies).⁹⁴ All that is important for the purposes of the present research is that lobbying *can* be effective, and lobbyists and their clients have the opportunity to bring significant influence to bear on the legislative process which can result in particular regulations being adopted, adapted (strengthened or weakened⁹⁵), repealed, retained or abandoned. Because lobbyists naturally serve the self-interest of their clients (in this case TNEs), it is clear that it can lead to stagnation or regression of legal rules from the point of view of regulating corporate harm. In short, whatever the precise mechanism for wielding it, political influence remains a problem, both in developed societies, but particularly in countries where the population and civil society have few possibilities for participation in legislating or litigating.

Underdevelopment can thus be seen as both an economic and political phenomenon. Overall levels of economic development may impede the creation of specialized systems and rules, and malign political influence may maintain the stagnancy of an underdeveloped system or even contribute to its decline.

⁹² Yves Dezalay & Bryant G. Garth, 'Corporate Law Firms, NGOs, and Issues of Legitimacy for a Global Legal Order' (2012) 80 Fordham LR 2309

⁹³ Alexander, Mazza & Scholz (n 91)

⁹⁴ See, e.g. Richard L. Hasen, 'Lobbying, Rent Seeking, and the Constitution' (2012) 64 Stan LR 191; Michele Simon, 'Can Food Companies be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children's Health' (2006) 39 Loy. L.A. LR 169

⁹⁵ Simon (n 94)

(ii) Underenforcement

Often seen as a corollary of underdevelopment, the second problem that plagues the domestic level is a failure on the part of the State, be that its executive or judicial branches, to adequately enforce rules that are exist or maintain the infrastructure necessary to ensure they are effective. As with underdevelopment, this may result from the level of socioeconomic underdevelopment of the State in question, and a lack the resources and infrastructure necessary to see that rules are enforced. It also, again as with underdevelopment, has a darker side resulting from political influence being brought to bear to see that rules go unenforced or from exploiting the corruptibility of public officials.

Consider an example for illustration. This is a case which has almost become a talisman of transnational enterprise and transnational torts studies: Bhopal. Unsurprisingly, it will recur throughout this dissertation, but since this is its first appearance it is worth recounting the main facts.⁹⁶ On 3rd December 1984, methyl isocyanate gas, a toxic gas, along with other poisonous gases was released from a facility owned and managed by a subsidiary of the Union Carbide Corporation at Bhopal in India, which resulted in the exposure of over half a million people to the toxin, killing nearly 3000 people in the immediate aftermath, with government estimates of deaths related to the disaster in the time that followed as high as 15,000. A case was brought against the parent company, Union Carbide, in the United States,⁹⁷ who promptly sought to have the case stayed under the doctrine of *forum non conveniens*, on the basis that India was a more appropriate place for litigation. The U.S. judge agreed,⁹⁸ remitting the case to India as the more ‘convenient’ forum.⁹⁹ Following the verdict several civil and criminal cases were brought in India, some of which are still ongoing,¹⁰⁰ with many of the thousands of victims still having received little or no compensation. I shall return to the transnational elements and the U.S. litigation later, for now what interests us is the fact that, as India itself accepted, its administrative inspection and enforcement architecture was blatantly underequipped to cope with an industry of the Bhopal plant’s complexity, both in terms of the rules in place and a lack of personnel. As Cassels states, ‘[t]he relevant government departments

⁹⁶ This summary is adapted from: Claire Staath & Benedict S. Wray, ‘Corporations and Social Environmental Justice: The Role of Private International Law’ in Marie-Ange Moreau. & Antoine Duval (eds), *Towards Social Environmental Justice* (EUI WP LAW 2012) 85 – 104

⁹⁷ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal in India*, 1984 809 F. 2d 195 (2d Cir).

⁹⁸ *ibid*

⁹⁹ Upendra Baxi. ‘Mass Torts, Multinational Enterprise Liability and Private International Law’ (1999) 276 RCADI 297

¹⁰⁰ *C.B.I v Keshub Mahindra et al.* (2011) 6 SCC 216 (Indian S.C). See the Order of the Indian Supreme Court dated 11 May 2011, Curative Petition (CRL.) Nos. 39-42 of 2010 in Criminal Appeal Nos. 1672-1675 of 1996

were underfunded and understaffed, and the inspection system was vastly inadequate to police the hazards'.¹⁰¹ Indeed, as the Indian Law Institute stated –

“In the absence of effective political will to enforce them, the laws merely create illusions and mystifications. The laws create an image of social progress which is constantly belied by the everyday reality of non-enforcement.”¹⁰²

This observation is particularly relevant to administrative liability. As noted above, before a meaningful regime of administrative regulation can function it requires the creation of appropriate organizations to oversee, adjudicate and enforce it. Where such organizations do exist, however, they are perhaps particularly susceptible to issues of underenforcement, howsoever arising. One example of underenforcement in the administrative context is provided by the Blackwater case, discussed in Chapter 2.¹⁰³

Underenforcement is very much a political phenomenon, although as the Bhopal case shows it may also be in part a corollary of economic underdevelopment where resources simply do not exist. Nonetheless that does not take it outside the scope of the present study. On the one hand, law may have a place – even within our hypothetical single State – to impose secondary obligations on enforcers. It also remains relevant when considering the transnational level, which we shall come to.

(iii) Externalization

Assuming rules exist and there are resources and political will to enforce them, are there other ways in which corporate actors may escape liability, or in which liability is ineffective in that fails to achieve its prescriptive function? The question is important. It has been argued that:

‘the rationale for using tort law to address environmental damage is compelling. In theory, tort law should allow an injured party to bring an action against a tortfeasor who has caused damage to the environment so that the costs of the degradation can be quantified and reflected in an award of monetary compensation...the tortfeasor is forced to make payment for the environmentally degrading activities, thereby incorporating negative externalities directly into the costs of conducting the polluting or degrading activity. Third, the award of damages should send out what are effectively

¹⁰¹ Jamie Cassels, ‘Outlaws: Multinational Corporations and Catastrophic Law’ (2000) 31 *Cumberland LR* 311

¹⁰² Indian Law Institute, *The Environmental protection Act: An Agenda for Implementation*, (Bombay, N.M. Tripathi 1987) cited in: Cassels (n 101)

¹⁰³ See below, p.**Error! Bookmark not defined.**

price signals to deter or discourage similar polluting or degrading activities by other actors in the market...'¹⁰⁴

The author of the above passage relies on a well-known law and economics analysis of the private law of nuisance.¹⁰⁵ However the difficulty in both the study cited (which in turn draws heavily from the Coase theorem)¹⁰⁶ and the passage above is that they only consider the individual case rather than the generalized scenario. Consider the now-infamous car safety cases in the U.S..¹⁰⁷ In *Anderson v General Motors*, the defendant company undertook a cost-benefit analysis of the cost of installing certain safety features, set against the likely cost of damages it would pay out on fatalities if the feature was not installed. It calculated the cost of compliance as being \$8.59 per car. The cost of non-compliance, on the other hand, was calculated as being:

$$(500 \text{ deaths} \times \$200,000) / 41,000,000 \text{ cars} = \$2.40 \text{ per car}$$

General Motors accordingly did not install the safety features, but the memo which contained these calculations emerged at a later trial for a fatality caused by the lack of the safety feature.¹⁰⁸ In systems where no principle of punitive or exemplary damages exists, or fines are set at a level (much) lower than the cost of non-compliance, there is thus a direct incentive for enterprises to deliberately fail to comply with rules in many cases, wherever cost of compensation falls short of the benefit of non-compliance.

It is true that, in the context of purely domestic companies, there are limits to this. First, such savings may be to a certain extent dependent on economies of scale in order to exploit the discrepancy between cost of compliance and low incidence of risk. That much is obvious from the General Motors example; were it not for the scale of production and the relatively low probability of fatalities arising from the nonexistence of the safety feature, such a saving would have been impossible or else much reduced. It will therefore tend to be larger domestic companies which are in a position to take advantage of such strategies. Of course, extrapolating to TNEs, it may be that

¹⁰⁴ Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 Wash L.J. 399. See further: Claire Bright, 'L'accès à la justice civile en cas de violations des droits de l'homme par des entreprises multinationales' (PhD thesis, EUI 2013) 43

¹⁰⁵ A. I. Ogus & G. M. Richardson, 'Economics and the Environment: A Study of Private Nuisance' (1977) 36 CLJ 284

¹⁰⁶ Coase (n 19)

¹⁰⁷ *Grimshaw v Ford Motor Co*, 174 Cal. Reporter 348 (Cal. Ct. App, 1981): See: Michael J. Sandel, *Justice: What's the Right Thing to Do?* (Penguin 2010); *Patricia Anderson v General Motors*. Cf. Bakan (n 48) 61 – 65

¹⁰⁸ Bakan, *ibid*

many TNEs will be in a position to benefit from economies of scale given their size.¹⁰⁹ Second, if criminal liability is a realistic prospect, it may be (i) that fines are uncapped if a company is found liable¹¹⁰ or (ii) that individual managers and directors may risk custodial sentences which may be a far more effective deterrent than pecuniary sanctions.

Thirdly, the State clearly has the power to pre-empt such externalizing by increasing the costs of rule breaking by changing the level of damages or increasing the possibilities for criminal prosecution. In fact, this is more or less what took place in the General Motors trial at first instance, as the jury awarded massive punitive damages of \$4.8 billion, aimed to offset the effects of the externalization.¹¹¹ Awards such as this, or equivalent legislation setting sanctions which operate to negate the benefit of externalizing, have a direct effect on company behaviour, since it is no longer in the company's interest to break the rule.¹¹² Even in the least altruistic of corporate structures, where profit becomes the overriding imperative at board level, it is no longer worthwhile to fail to comply with a legal rule since it generates no gain for the company and is likely to generate a negative response from the markets;¹¹³ the cost of compliance is pre-emptively re-internalized in the internal corporate decision-making process. As already noted, however, punitive damages of this sort are rare.¹¹⁴

Clearly therefore, there may be limits to the effectiveness of legal regulation by economic factors. And where transaction costs of litigation are high, this type of cost-benefit analysis means that negative externalization can continue; the majority of the social cost of non-compliance (in the above cases, a certain number of explosions, personal injuries and fatalities) continue to be borne by society at large and not by the business.

¹⁰⁹ After all, a large part of the world's largest economies are TNEs: UNCTAD, World Investment Report 2009, p. 223

¹¹⁰ Although in France the maximum fine is capped to the same amount as for natural persons, €1m. It will come as no surprise that where a sufficient economy of scale is involved this is a paltry sum set against the potential cost-savings of non-compliance.

¹¹¹ It is true that on appeal this award was reduced, however the jury award is illustrative of the measures that may be taken by the state to negate the profit accrued to the company by the externality.

¹¹² See: Michael Legg, 'Economic Guidelines for Awarding Exemplary Damages' (2004) 30 Monash ULR 303

¹¹³ It has been shown, for example, that adverse judicial decisions may often have a negative effect on share price. See: Halina Ward, 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 Hastings Int'l & Comp. LR 451

¹¹⁴ See: John Y. Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) Colum. J Transnat'l L 391: Although the U.S. is the most high-profile example Australia and New Zealand do admit punitive damage in exceptional cases (Although Australia's system is less generous than that of the U.S: Michael Tilbury & Harold Luntz., 'Punitive Damages in Australian Law' (1995) 17 Loy L.A Int'l & Comparative LR 769. Canada also makes widespread use of punitive damages. Civil law countries, on the other hand, tend to disallow punitive damages in private actions.

Of course, many do not see this type of cost/benefit analysis as a problem at all;¹¹⁵ Viscusi calls this a ‘major puzzle’. ‘In those cases’ he says:

‘jurors chose to award punitive damages even though thorough internal risk analyses led the defendants to conclude that no additional safety improvements were warranted. This result is the opposite of what would occur if the legal system fostered better corporate risk behaviour. More rational thinking about risk and a conscientious effort to achieve risk-cost balancing in line with society's valuation of safety should signal corporate responsibility rather than trigger corporate punishment.’¹¹⁶

Viscusi’s criticism is powerful. Yet in my view he misses a crucial point in the debate around risk analysis. In *Anderson v General Motors* there have been suggestions that the choice for General Motors was not the pure cost-benefit analysis of introducing a new system or not,¹¹⁷ but between complying with federal safety standards and not complying.¹¹⁸ The problem, where damages, fines or punishment are not unlimited, is that cost of legal compliance becomes just another factor in risk-analysis. It commodifies the legal rule itself by attaching a price to it. There is also a second, more subtle, point which should also not be overlooked: that combined with duties to shareholders, this creates pressure on company executives to opt for the least-cost option. In this sense, wherever it is cheaper to avoid rather than comply with a rule, it might be said that there is a legal and economic mandate to break the rule. This not only weakens any internal rule-appreciation (as per Hart’s jurisprudence, discussed above), it all but inverts it in certain situations. It is as if, internally, an enterprise has a modified rule of recognition all its own: the only rules it will recognize as binding are those which it is cheaper to keep than to break.

¹¹⁵ See the Chamber of Commerce submission to the California Court of Appeals, quoted in: Bakan (n 48) 65

¹¹⁶ W. Kip Viscusi, ‘Corporate Risk Analysis: A Reckless Act?’ (2000) 52 *Stan. LR* 547

¹¹⁷ Although it is also worth noting that – even where cost/benefit is not concerned about compliance with a legal rule *per se*, the comparative law of product liability shows a very varied reaction to cost-benefit analysis of this type. For instance, under the European system of product liability instituted by Directive 85/374/EEC, risk-benefit has been said to be excluded from consideration (*A v National Blood Authority* [2001] Lloyd’s Rep 187 at [35(i)] (EWHC)). Cf. decisions in Germany & France holding that for drugs and vaccines the risk-benefit profile of the pharmaceutical product is admissible evidence which is relevant to assessing safety (French C. Cass., 26/9/2012 N° 11-17738, *Consorts X*; German OLG Hamm, *NJW-RR 2003*, 1382 (18/6/2003)).

¹¹⁸ See: Bakan (n 48) 62: the failure to introduce the safety feature “put GM in breach of applicable laws”. See also: Public Citizen, ‘Profits Over Lives -- Long-Hidden Documents Reveal GM Cost-Benefit Analyses Led to Severe Burn Injuries; Disregard for Safety Spurred Large Verdict’ <http://www.citizen.org/congress/article_redirect.cfm?ID=570> accessed 1 Sept. 2014: “A May 1972 memo reveals how General Motors estimated the cost of potential lawsuits from rear-end crashes when deciding what safety measures should be adopted. The memo stated that 75 percent of lawsuits could be avoided by adopting a proposed government safety standard. However, GM decided it was cheaper to pay the lawsuit damages than to fix the gas tank defect.”

III. Host-State Regulation: Foreign Enterprises and Investors

So much for the single State. But what happens when, as in the real world, foreign companies operate on the territory of a State? This is the familiar concept of ‘host-state’ regulation for foreign enterprises or investors. We are now firmly within the realm of the transnational enterprise. The question which arises is: are the limits which apply to TNE liability in this scenario the same or different as the corporation in the single State? Where we encounter a liability, or impunity gap, I shall use the same concepts of injustice mentioned before as appropriate.

1. Legal Obstacles to Host-State Regulation

(i) Private International Law

We are also now at a crossroads between substantive regulation of the kind just discussed in the previous section, and the rules of private international law. It is no longer the case that a single State potentially has jurisdiction over the actions of these enterprises. In the language of private international law, these cases now involve at least one ‘foreign element’;¹¹⁹ the enterprise under regulation has ties to a foreign State. There may also be other factors, such as whether the enterprise is selling products or services abroad, has its headquarters elsewhere, or simply operates in several countries simultaneously, all of which will have a potential interest in regulating its behaviour.

Of course, the extent of this conflict will vary. It will vary based not only on the enterprise’s type and geographical extent of operations but also on its corporate structure. There are at least three principal ways in which a transnational enterprise may operate on the territory of a host-state. Firstly, it may operate directly, applying its assets and resources to conduct operations while directing matters from afar. This may be by opening a branch, or by simply directing physical or intangible assets or products towards the host territory. One example of the latter of particular relevance today is the dissemination of published works electronically, or the use of internet resources through membership agreements (as with, e.g. Facebook). The way it chooses to organize may to some extent be dependent on its dominant reason for investing (see above).

Arias v DynCorp provides another example.¹²⁰ Under the joint U.S.-Colombian *Plan Colombia* DynCorp was hired to spray cocaine and heroin poppy plantations in Colombia. It proceeded to spray aerial fumigants over Colombian drug farms. However the fumigants also drifted over farms

¹¹⁹ In French private international law, the term is ‘*élément d’extranéité*’ or extraneous element.

¹²⁰ *Aris v DynCorp* 856 F.Supp.2d 46 (D.D.C. 2012)

in Ecuador causing crop damage. The Ecuadorian farmers sued Dyncorp in the U.S..¹²¹ This case is interesting for all sorts of reasons, but it principally illustrates two different ways in which transnational business activity may affect a State on its territory. Suppose, first of all, that instead of the plaintiffs being Ecuadorian citizens they had been Colombian farmers claiming that their *legitimate* crops had been affected by the indiscriminate fumigation. Dyncorp had no subsidiary or branch in Colombia, but sent its planes into the territory directly. Yet its place of incorporation, its directors and even its employees all remained in the U.S. This is one of the starkest examples that might exist of operating directly on the territory of the host-state.

Secondly, *Arias v Dyncorp* highlights an important feature of certain types of transnational behaviour; it may spread or produce effects in other States, who have nothing else to do with the primary host-state or the enterprise itself. This was the case for the Ecuadorian farmers who brought the action. Environmental torts often provide the clearest example of this: two similar cases are provided by the *Trail Smelter* arbitration¹²² and by the *Mines de Potasse d'Alsace* case before the CJEU.¹²³ In the former, smoke from Canadian smelting works drifted across the border with the U.S. and was alleged to have caused significant crop damage there. In the latter, the defendant company was alleged to discharge more than 10,000 tonnes of industrial waste into the Rhine in Germany. It was sued by two Dutch organizations who alleged this was causing damage in the Netherlands, the waste having flowed downstream. Aside from these so-called 'complex' torts, there are other ways in which actions in one State produce direct and indirect effects in another, to which I shall return in Chapters 5 and 6.

The second way a transnational enterprise may operate in a host-state is as part of a traditional equity-based group structure through subsidiaries or other related companies.¹²⁴ This is the form which has received the most attention doctrinally, and which presents the problems of the corporate veil discussed previously.¹²⁵ It is also common to operate as part of a consortium or joint-venture with other companies or the local State, whereby each partner will have a part

¹²¹ The initial case was dismissed on 15 Feb 2013 in an order for summary judgment after it was held that the claimants' could not establish causation (see Doc. 395 in case 1:01-cv-01908-RMR, DCC). There has been some indication however that the Claimants are appealing: see: Drew Singer, 'Ecuadoreans Take DynCorp Chemical Suit To DC Circ.' (*Law360*, August 30, 2013) <<http://www.law360.com/articles/468989/ecuadoreans-take-dyncorp-chemical-suit-to-dc-circ>> accessed 10 Oct. 2014

¹²² *United States v Canada (Trail Smelter Case)*, (1941) III U.N. Rep. Int'l Arbitration Awards 1905

¹²³ Case 21/76, *Bier BV v Mines de Potasse D'Alsace SA* [1976] ECR 1735 (CJEU)

¹²⁴ In more complex examples, where major subsidiaries are held by an offshore holding company, the actions of one subsidiary may be directed by another.

¹²⁵ See above (n 52)

ownership of the local company.¹²⁶ The Bhopal case provides an example of this: the plant which released the gas was run by Union Carbide India Ltd, a majority-owned subsidiary of the Union Carbide Corporation in the U.S.¹²⁷ In this case, the interests of the host-state are in the fact that the behaviour it seeks to regulate takes place on its territory, and that one of the juridical entities involved is incorporated there (in a similar way to our single State scenario). The home-state has an interest through the actions of the parent company, being the State in which it is incorporated and which is directly interested in regulating its behaviour.

The third way is through a network-based enterprise, using supply-chain management and intra and inter-firm contracts and subcontracts to define control and responsibilities.¹²⁸ This may give the enterprise a greater degree of independence from a traditional juridical standpoint, rendering it more difficult to both identify and hold to account the controlling entity.¹²⁹ This tends to be common in the textiles¹³⁰ and food¹³¹ industries. There may be a number of States involved here with the potential to be interested in regulation: the home-states of any identified entities within the network, the host-state of the behaviour in question, and potentially third States such as those designated by an international contract as being the place of adjudication and regulation (through jurisdiction and applicable law clauses), the places of conclusion of any intervening agreements, and so on.

¹²⁶ Examples include Texaco/Chevron's operations in Ecuador and Peru, Unocal and Tortal in Myanmar, and Talisman Energy in the Sudan. See: *Aquinda v Texaco* 945 F. Supp. 625 (S.D.N.Y. 1996); *Doe v Unocal* 248 F.3d 915 (9th Cir. 2001); *Roe v Unocal* 70 F. Supp.2d 1073 (1999); *Presbyterian Church of Sudan v. Talisman Energy Inc* (2d Cir. 2009); *A.M.Z et autres c. Total*, French C. Cass., 28 March 2007 (N° de pourvoi 04-12315)

¹²⁷ The other shareholders were the Indian state (22%) and private stockholders in India: P. T. Muchlinski, 'The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken By Foreign Investors' (1987) 50(5) MLR 545

¹²⁸ See Gunther Teubner., 'The Many-Headed Hydra : Networks as Higher-Order Collective Actors' in McCahery & Scott, (n52) pp.41-60; John Scott, 'Corporate Groups & Network Structures' in McCahery & Scott, *ibid* pp.291-305; André Sobczak, *Réseaux de sociétés et codes de conduit: un nouveau mode de régulation des relations de travail pour les entreprises européennes*, (L.G.D.J., 2002); Pierre Verge & Sophie Dufour, *Configuration diversifiée de l'entreprise et droit du travail*, (Les Presses de l'Université Laval, 2003)

¹²⁹ Although note: Phillip I. Blumberg, "The Transformation of Modern Corporation Law: The Law of Corporate Groups", (2005) 37 Conn. LR 605, arguing that network relationships are characterized by exactly the same degree of subservience and control that marks the equity-based model.

¹³⁰ Andrea Talarico, 'Codes de conduite et droit d'association : Une étude exploratoire du secteur du textile' (LLM Thesis, Université de Montréal 2012), <<http://hdl.handle.net/1866/4792>> accessed 1 January 2015

¹³¹ *Doe v Wal Mart Stores, Inc.* 572 F.3d 677 (9th Cir., 2009)

Given this ‘complex matrix of overlapping local, national, regional and international legal regimes’,¹³² are there situations in which a host-state might actually decline its jurisdiction or refuse to apply its own law? In general, the answer is no. I will examine, briefly, each category in turn.

Applicable law

The most common conflict of laws rules for torts are the law of the place where the harmful event occurred (*lex loci delicti*) and the law of the place where damage was sustained (*lex loci damni*). Where such rules of liability exist, a local court will not usually for legal reasons disapply those rules in favour of another State or decline its jurisdiction. However, there are exceptions to this.

Firstly, as I noted above in the case of a TNE there are potentially a number of different States which may have an *interest* in applying their law to the scenario. The American conflict of laws underwent a revolution in the latter part of the twentieth century, thanks in part to the ‘Governmental Interest’ analysis of Brainerd Currie.¹³³ The essence of his theory was that it is necessary to analyse the laws potentially in conflict and see whether they had an ‘interest’ in being applied. Only those which did would be in ‘true conflict’; anything else was a ‘false conflict’. In his theory, the analysis stopped once the *lex fori* had an interest in applying itself – at that point the applicable law was the *lex fori*.¹³⁴ The full version of Currie’s theory was never adopted, perhaps in part because ‘applying the law of the forum, without more, to a true conflict is, in truth, an abandonment of the internationalism of private international law’.¹³⁵ However the method of analysing the connections with the laws in conflict to discover which had the closest connection did make it into practice. In the seminal case of *Babcock v Jackson*,¹³⁶ a New Yorker was driving in Ontario, Canada. His passenger was also from New York, and the car was registered and insured there. There was an accident and the passenger sued the driver before the New York courts. Rather than applying the law of place where the harmful event occurred (*lex loci delicti*), the court instead applied New York law, on the basis that it had the greatest interest in being applied.

Babcock was brought in New York, but had it instead been brought in Ontario, and assuming that the Ontarian courts had used a similar interest analysis to determine applicable law, there is no reason why they should not have reached the same conclusion. Of course, as the New York court

¹³² Dan Danielsen, ‘How Corporations Govern’ (2005) 46 Harv. ILJ 411

¹³³ See Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke UP 1963)

¹³⁴ *ibid*, esp. Ch. 4 & 12

¹³⁵ James Fawcett & Janeen M. Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008)

¹³⁶ 12 N.Y.2d 473 (N.Y. 1963)

noted, the facts were somewhat extreme: ‘the question has never been presented in so stark a manner as in the case before us with a statute so unique as Ontario’s’.¹³⁷ However, it is not difficult to imagine a TNE equivalent. Take the Dyncorp case, for example. It is clear that U.S. law would have an important interest in regulating the behaviour of Dyncorp, and it is likely that Dyncorp would be insured for civil liability by a U.S. insurer. The nationality of the victims – Ecuadorian – is all but incidental. Applying an interest analysis could lead to the conclusion that the closest connection was with U.S. (or Colombian) law rather than Ecuadorian.

This type of analysis has also found its way into European conflict of laws. The Rome II Regulation, which regulates conflict of laws for extracontractual responsibility in EU Member States,¹³⁸ provides that the usual rule (*lex loci delicti*) may be displaced ‘where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a [different] country’.¹³⁹ Although there is as yet no case law on the operation of this rule, such a situation might, I submit, be satisfied where, for example, it is alleged that the direct actions or decisions of a parent company set in motion the events leading to the harm. Bhopal offers yet again an illustration of this. It was alleged that a contributing cause of the toxic leak was the decision to shut off a refrigeration on the tank which failed. The decision, on the disclosed documentation, was taken at the U.S. parent company headquarters in Connecticut on cost-saving grounds.¹⁴⁰ Of course, where there is greater scope for liability under the law of the home-state, this may not be an issue from the victims’ point of view. However, it is not difficult to imagine circumstances where the home-state (or another State with some connection to the case) does not have appropriate rules for deciding liability, leading to a comparative injustice at best and a serious or manifest injustice at worst.

Jurisdiction

What of jurisdictional challenges? In a case such as this, it might be argued by a TNE seeking to remove the litigation from the host-state forum, that there is a closer connection with the home-state of incorporation or another State, and that the litigation ought to be heard there rather than

¹³⁷ *ibid* at 484

¹³⁸ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)

¹³⁹ Regulation (EC) No 864/2007, art. 4(3). A similar ‘escape clause’ existed in German and Swiss private international law previously. See: Fawcett & Carruthers (n 135) 799

¹⁴⁰ Anderson, (n 104) 416

in the host-state. There are three potential situations in which a host-state might decline its jurisdiction of interest.

The first of these concerns the level of non-resident defendants and the threshold at which jurisdiction may be asserted. The bases of jurisdiction are discussed in greater detail in Chapter 2, but suffice it to say for now that where the primary grounds of jurisdiction (such as nationality, residence or territorial presence) are absent, it may be difficult for States to justify asserting their jurisdiction. In the U.S., under the aegis of the doctrine of effects, there is a general requirement that a defendant have ‘minimum contacts’ with the jurisdiction to justify the imposition of liability. Thus in another car safety case, *World-Wide Volkswagen v. Woodson*,¹⁴¹ the wholesaler and retailer of the car, who conducted no activities in Oklahoma where the action was brought, did not satisfy the minimum contacts requirement. However, in *Licci v. Lebanese Canadian Bank*, the mere fact of maintaining a dollar-nominated AmEx account in New York by a foreign defendant was sufficient to satisfy the minimum contacts requirement.¹⁴²

In the second situation, where a State follows the civil tradition of *lis alibi pendens*, then where a case is already being heard elsewhere it may decline its jurisdiction in favour of the court first seized.¹⁴³ This allows so-called ‘torpedo actions’ to derail proceedings in a State which would otherwise have jurisdiction. Where a party in bad faith wishes to stall or minimize its liability, it may pre-emptively bring an action in another State which has an exceptionally long, expensive or challenging judicial process (usually one which will end up by declining its jurisdiction). It then applies to the court in the first State to decline or stay its jurisdiction due to the other, prior, action.¹⁴⁴ This can have the effect of putting litigation on hold for many years and of increasing cost, decreasing the probative value of evidence and many other disadvantages.¹⁴⁵

It is not difficult to imagine how this might play out in the case of a TNE seeking to avoid or minimize liability for harm caused in one of its host-states. Imagine a U.S. corporation accused of

¹⁴¹ *World-Wide Volkswagen Corporation et al. v. Woodson et al.*, 444 U.S. 286, (Sup. Ct., 1980), and see *International Shoe Co v Washington*, 326 U.S. 310 (Sup. Ct., 1945) (USSC).

¹⁴² *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2nd Cir, 2013)

¹⁴³ For an example from EU private international law, see arts. 27 – 30 Brussels I Regulation (Regulation (EC) No. 44/2001 of 22 Dec 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)

¹⁴⁴ Case C-116/02 *Erich Gasser v Misat Srl* [2003] ECR I-4207, (CJEU)

¹⁴⁵ See: Vincenzo Jandoli, ‘The “Italian torpedo”’ (2000) 31(7-8) Int’l R IP & Comp. L 783; Christopher Stothers, Mark Gardner and Sue Hinchliffe, ‘Forum shopping and “Italian torpedoes” in competition litigation in the English courts’ (2011) 67 GCLR; Andrej Štanko, ‘Cross-Border “Torpedo” Litigation’ (2009) 10 Common LR 20

causing a mass disaster in a developing country A. Country A has a *lis pendens* rule. The corporation quickly begins an action in country B. Country B will, eventually, decline its jurisdiction because, under Brussels I, it has no general jurisdiction (as the Corporation is not domiciled and does not do business in the EU) and special jurisdiction would point to the courts of country A. But it may take an ‘excessively long’ time to reach this verdict.¹⁴⁶ During that time, memories fade and evidence becomes dated. The victims may also need to spend money defending the action in country B. Although it has generally been used in commercial and intellectual property cases to force favourable settlement, there is no reason why the torpedo action should not be equally effective in a large group tort claim.¹⁴⁷

The third situation is rarer but perhaps more troubling. Rules exist, such as in international aviation cases, which give a choice of forum to the claimant.¹⁴⁸ In the *West Caribbean Airways* case, the French *Cour de Cassation* held that the interpretation of the Montreal Convention precludes a court other than that chosen by the claimant from asserting its jurisdiction. France could be called the host-state in this case, since the claim involved a flight going from Martinique (a French overseas *département*) to Panama. The plane crashed in Venezuela. Certain claimants then brought an action in Florida. The U.S. court promptly sent the litigation back to France on the basis of *forum non conveniens*.¹⁴⁹ However, the French courts then rendered a series of decisions culminating in an *arrêt* of the *Cour de Cassation* declining jurisdiction.¹⁵⁰ Sadly, for the claimants, when they returned to the U.S. to attempt to reinstate proceedings, they were met with a vehement denial by the Florida court who upheld their earlier decision to refuse jurisdiction.¹⁵¹ Similar results almost came to pass in other aviation cases.¹⁵² The practical result of this clash of national decisions is a *déni de justice*, a situation where no forum is available to hear the case, something which presents not only a barrier to effective home-state regulation but also to regulation in other States such as the home-state.

¹⁴⁶ *Gasser* (n 144) 57

¹⁴⁷ I note that the possibilities for torpedo actions have been reduced under the new Brussels I recast regulation, discussed below, Chapter 2, p.98

¹⁴⁸ See the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, the ‘Montreal Convention’, arts. 33, 46

¹⁴⁹ *Bapte v. West Caribbean Airways*, 370 F. App'x 71, 73 (11th Cir.2010).

¹⁵⁰ French C. Cass. 1^{ère} Civ, 7 Dec 2011 (N° de pourvoi: 10-30919) French Court of Cassation

¹⁵¹ See *In re West Caribbean Airways* 2012 WL 1884684 (S.D.Fla., 2012)

¹⁵² See the *Flash Airlines* case: *Gambra et al. v International Lease Finance Corporation et al.* 377 F Supp 2d. 810 (2005 CD Cal) (the U.S. case) and Paris, 1^{ère} Ch. Civ., 6 March 2008, JDI 2009, 171; C. Cass Civ 2^{ème}, 30 April 2009, Bull civ II n° 107 French Court of Cassation (the French decisions).

Recognition & Enforcement of Judgments

Something noted by Joseph is that assets necessary to satisfy liability may not be within the jurisdiction of the host-state.¹⁵³ Indeed, this may be deliberate on the part of the TNE: two examples, *Adams v Cape* and Bhopal, are discussed below in relation to the practice of undercapitalization. However, where direct enforcement with the jurisdiction of the host-state is impossible in whole or in part, it will be necessary for claimants to seek enforcement in those States where assets are held. As it does not directly bear upon the interest of the host-state itself, I discuss the issues relevant to recognition and enforcement further in Chapter 2.

(ii) The Corporate Veil

In the second part of the chapter we examined the problem of the corporate veil in the single-state scenario. Let us now turn to the case of a TNE. As *Adams*¹⁵⁴ shows, where that enterprise is a TNE, the issue of the veil may be insurmountable and may operate to frustrate the ordinary operation of legal rules within a given State: had Cape been a U.S. company it seems highly likely it would have been liable for the claims brought against it in the Texas court. Interestingly, the Court of Appeal appeared to accept that ‘the purpose of the operation [setting up C.P.C. and A.M.C.] was in substance that Cape would have the practical benefit of the group's asbestos trade in the U.S., without the risks of tortious liability’, and even cast circumspect doubt on its moral desirability although holding it valid in law.¹⁵⁵ Clearly, this is as clear-cut example of injustice to the victims of a corporate act (resulting in asbestos exposure) as may be had and, in spite of various subsequent developments,¹⁵⁶ it is still valid law at the time of writing.¹⁵⁷

What of the situation where the TNE is organized as a network-based enterprise? An illustrative example is given in the case of *Doe v Wal Mart*.¹⁵⁸ In 1992 Wal-Mart developed a code of conduct for its suppliers, incorporated into its supply contracts, which contained *inter alia* a ‘right of inspection’ giving Wal-Mart the right to inspect and monitor the standards set out in the code,

¹⁵³ Joseph (n 61), 149

¹⁵⁴ *Adams* (n 53)

¹⁵⁵ *Ibid*, at 544

¹⁵⁶ See further, Chapter 3

¹⁵⁷ It should be noted that private international rules on jurisdiction and conflict of laws may further complicate matters regarding the veil. There is the problem, for example, of deciding under which law the question of veil-piercing is to be determined; the law of incorporation of the subsidiary or the law of incorporation of the parent. Then there is the practical problem of proving the requisite level of control, something which may depend on the procedural rules and availability of enforcement of a given legal order. As Sarah Joseph has pointed out, this ‘judicial architecture’ tends to be something limited to developed states. See: Joseph (n 61) 74

¹⁵⁸ *Doe v Wal Mart Stores, Inc.* 572 F.3d 677 (9th Cir, 2009).

including labour standards. The provision was backed up by the threat of cancellation of outstanding orders and termination of the business relationship. In 2005, foreign employees of Wal-Mart's suppliers in various countries (including China, Bangladesh, Indonesia, Swaziland and Nicaragua) brought a class action lawsuit for damages against Wal-Mart for failing to ensure that the labour standards referred to in the code of conduct had been met.

Not being direct employees of Wal-Mart, the plaintiffs alleged that (i) they were third-party beneficiaries of the code of conduct; (ii) that Wal-Mart was their joint employer; or that (iii) Wal-Mart had negligently breached a duty to monitor and protect their working conditions. In 2009, the U.S. Court of Appeals for the ninth circuit dismissed the plaintiffs' appeal finding that none of the theories of liability had been made out. Essentially, the dismissal of (i) and was based upon the fact that Wal-Mart had merely '*reserved the right* to inspect the suppliers, but *did not adopt a duty* to inspect them' (emphasis added). Consequently the plaintiffs did not have an enforceable right against Wal-Mart. In respect of (ii), the joint employment argument, the Court held that Wal-Mart did not have the requisite level of control over the plaintiffs for an employment relationship to exist. For present purposes, however, it is worth noting that any attempt to hold Wal Mart vicariously liable for the actions of the suppliers was conspicuously absent from the claim. Irrespective of *de facto* and contractual control exercised by Wal Mart over the suppliers, it is unlikely that they would be held liable for acts of the supplier company due to the clear separation of legal personalities, even more so (on a traditional analysis) than in the case of a parent-subsidary or equity-based group structure.

Although *Doe v Wal-Mart* did not help the plaintiffs establish the liability of Wal-Mart, that is not to say that the contractual route is closed for cases of this type. *Doe v Wal-Mart* is a case that ultimately turned on its facts, in particular the language employed in drafting the contract and the level of oversight Wal-Mart retained in respect of suppliers' factories. It is debatable whether a more modern code of conduct would fail this test. Take Coca-Cola's various policies, for example: in its human rights statement it states that 'we [Coca-Cola] work with our direct suppliers to *ensure* that they uphold laws and regulations in the workplace and conduct their business ethically and responsibly'. In the Supplier Guiding Principles, incorporated into supply contracts, the language is similar. It also states in the 'implementation guide', that "'Coca-Cola" is held accountable for anything occurring under the trademark, whether it occurs at an independent bottler, a company-owned facility, a supplier of materials used in our products or product packaging, a supplier of promotional merchandise, or any other type of supplier'. In common law countries, the common intention of the parties is cardinal in deciding how to construe contractual provisions, and it is

arguable that in light of numerous CSR commitments and shifts in the contractual language of accountability that many codes of conduct now contain, the third-party beneficiary argument may be more likely to succeed in future.

The veil and the *Wal Mart*-type scenario are not the end of the story. Possibilities may – and do – exist to sue a parent (or contractually dominant) company directly, rather than vicariously for the acts of its subsidiaries, where there is a sufficient degree of control being exercised. First, in the case of *Wal Mart* the reasoning of the Court of Appeals would suggest that had Wal Mart in fact adopted a duty to inspect their suppliers, there is a strong likelihood they would have been liable. Similarly it is easy to see scope for the application of the *Chandler* case, discussed above, in the TNE context.¹⁵⁹ Supposing the subsidiary had been incorporated abroad – as in *Lubbe*¹⁶⁰ – there is no reason to suppose the reasoning would have necessarily been any different.

2. Economic & Political Limits on Host-State Regulation

In the first part of this chapter, I presented several extra-legal limiting factors which may affect to regulation of business actors even within a single-state scenario. How do these play out in cases of foreign companies or TNEs? Clearly, the externalization problem, underdevelopment and failure to enforce will all present similar barriers to regulation. However, the reasons for these differ; in the case of transnational enterprises they translate to inequality of bargaining power, complicity, and interjurisdictional competition which are in turn linked to the reasons for investing. As we shall see, while the first two of these may point to direct involvement of the TNE itself, the latter is much more a systemic effect of globalization which may operate quite independently of the actions of a single enterprise where the conditions are right. Secondly, there is the question of the potential involvement of the host-state itself in wrongdoing.

(i) TNE Power: Bargaining, Regulatory Competition and Undercapitalization

Reasons to Invest

In general, there are four primary reasons TNEs may opt for foreign direct investment (FDI), according to UNCTAD: resource-seeking; market-seeking; efficiency-seeking; and strategic asset-seeking.¹⁶¹ The first of these, resource-seeking, will often be sector-specific, and indeed it

¹⁵⁹ *Chandler*, above (n 63)

¹⁶⁰ See above, p.54

¹⁶¹ Liesbeth Colen, Miet Maertens & Johan Swinnen, 'Foreign direct investment as an engine for economic growth and human development: a review of the arguments and empirical evidence', in De Schutter, Swinnen & Wouters (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge, 2013), 70 – 115

‘corresponds mainly to investment in extractive industries’.¹⁶² By contrast, market-seeking and efficiency-seeking investments tend to be more prevalent in the manufacturing and services sectors.¹⁶³ Strategic asset-seeking tends to be concentrated in developed countries, and countries at a more advanced stage of development where specialized skills and other infrastructure is available.¹⁶⁴ Each of these carries its own particular *enjeux*, thus considerations will vary by sector and by investment-type. One thing that is clear, according to Colen et al, is that national policies which *restrict* investment have a strong deterrent effect.¹⁶⁵ On the other hand, policies intended to promote investment are in and of themselves neutral – whether they actually encourage greater investment will depend on other considerations, such as sector, business climate, and other factors.

State – TNE Bargaining

Inequality of bargaining power is a feature of economic globalization, and one which it is easy to see at work in TNE cases. In the *Saipan* litigation,¹⁶⁶ a number of clothing manufacturers were accused in the U.S. of involuntary servitude, peonage, forced labour and violations of fundamental human rights. Although a U.S. territory, Saipan had legislative autonomy to decide its own labour and immigration laws, laws which were extremely lax in this regard. The victims in the case were unable to act against the clothing manufacturers in Saipan, due to the lack of concrete legal obligations in local legislation. The combined effect of this lax legislation and the unique export benefits of Saipan attracted a large amount of investment (including, in the 1980s, around 20 of the largest clothing manufacturers in the USA).¹⁶⁷ Once this investment was in place, any Saipanese legislator would have to think very carefully before upping the level of labour law protection, for fear that the companies would depart taking with them a huge portion of the islands’ economy. Indeed, it would even appear that the motivation behind the negotiation of Saipan’s Charter was to create a lax, migrant-based labour market in order to attract investment.¹⁶⁸ The inequality of bargaining power between the TNEs (acting collectively or alone) is obvious in such a scenario,

¹⁶² *ibid*, 77

¹⁶³ *ibid*

¹⁶⁴ *ibid*, 78

¹⁶⁵ Liesbeth Colen, Miet Maertens & Johann Swinnen, ‘Determinants of foreign direct investment flows to developing countries’, in De Schutter, Swinnen & Wouters (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge, 2013), 116 – 137

¹⁶⁶ See judgments in *Doe et al v The Gap et al; Union of Needletrades v The Gap et al*.

¹⁶⁷ A list that included: Brooks Brothers, Brylcreem (part of Pinault Printemps-Redoute), Calvin Klein (part of Phillips-Van Heusen), Cutter & Buck, Donna Karan, Dress Barn, The Gap, Gymboree, J.Crew, Jones Apparel, Levi Strauss, Nordstrom, Oshkosh B’Gosh, Phillips-Van Heusen, Polo Ralph Lauren, Sears, Tommy Hilfiger, Warnaco, Woolrich.

¹⁶⁸ See Farrah-Marisa Chua Short, ‘An Experiment in Protecting Workers’ Rights: The Garment Industry of the U.S. Commonwealth of the Northern Mariana Islands’, (2005) 7 U. Pa. J. Lab. & Emp. L. 971 at 973 – 975.

and is linked to the mobility of TNEs brought about through economic globalization. Whether acting directly, as was the case in Saipan, or through subsidiaries, as in much foreign direct investment, it is clear that TNEs have easy opportunities for creating effective exit strategies, so that if they are not pursuable outside of the host-state, victims are left with little, if any, effective redress.¹⁶⁹

This economic inequality can on occasion lead to extreme injustice. In Papua New Guinea, legislation was passed making it a criminal offence to seek compensation in foreign courts, enabling corporations to pass on the costs of their activity to the local population without fear of reprisals. The Guinean law was passed in response to investment by the Australian mining company BHP in the Ok Tedi mine, whose ‘lawyers apparently drafted the legislation’.¹⁷⁰ BHP subsequently released toxic substances from their mining operations into the Fly River System.¹⁷¹

While the extent of the inequality of bargaining power may depend on sector and context, and the dominant reason for investing according to the typology above, it is none the less clear that it operates particularly in certain sectors. Mining and extractive industries, where the primary investment type is likely to be resource-seeking, is one of these. As Seck points out, in the Ok Tedi case, the country was ‘dependant upon the mining industry for future development’, creating strong pressures on the government to maintain good relations with the company.¹⁷²

Another good example of such bargaining (albeit with the apparent assistance of the United States Government) is the immunity from suit granted to the Blackwater Corporation¹⁷³ covering its operations in Iraq during the occupation, which, with breath-taking generality, provided that ‘Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto’.¹⁷⁴ Although in this instance the Coalition Provisional Authority arguably had a large interest in protecting

¹⁶⁹ See *infra* re undercapitalization. It is true that where a parent company disowns its subsidiary, leaving an orphan undertaking, some redress may still be obtained from the latter, but if profit maximisation is the strategy, it is likely that the local subsidiary will be left asset-poor, while the parent escapes relatively unscathed.

¹⁷⁰ Michael J. Whincop & Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Aldershot: Ashgate/Dartmouth Publishing, 2001)

¹⁷¹ See *Dagi v B.H.P (No. 2)* [1997] 1 V.R. 428 (Australia).

¹⁷² Sara L. Seck, ‘Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law’ (1999) 37 Can. Y.B. Int’l L. 139 at 191

¹⁷³ The now-infamous American private military company (now Xe Services LLC) which played a key role in the Bush administration’s occupation of Iraq post-2003.

¹⁷⁴ The original immunity granted to Blackwater was by Paul Bremner, the head of the Coalition Provisional Authority following the occupation of Iraq until elections were held in 2005; Coalition Provisional Authority Order Number 17 (Revised), *Status Of The Coalition Provisional Authority, Mnf - Iraq, Certain Missions And Personnel In Iraq*.

Blackwater and the other Contractors it invited to Iraq, it is not difficult to imagine scenarios in which a State *stricto sensu* might have a direct interest in granting immunities. Imagine for example a State wishing to fight an insurrection or use force on its own population, for whatever reason, and decides to use a contractor such as Blackwater for its purposes; again the same type of direct interest in attracting the “investment” exists as it did for the Coalition Authority in Iraq.

Direct legislative bargaining such as this – with or without the assistance of sympathetic home-states – is all too common. It operates as a constraint on the legislative freedom of the host-state to regulate as it sees fit, and may present a direct barrier to the effectiveness of host-state regulation.¹⁷⁵ Of course, the relative bargaining strength of the State and TNE parties will vary according to level of development, economic sector, and a number of other factors.

Competition between States seeking Inward Investment

Interjurisdictional competition, potentially the most problematic cause of underdevelopment and a failure to regulate, is the systemic aspect to the coercion of legislative will which applies in the situation of State-investor bargaining just discussed. As Professor Muir Watt has argued, applying the principles borrowed from game theory, the effect of TNE mobility in an increasingly globalized world is to put legislators against one another in a ‘race to the bottom’ as they compete for corporate favour.¹⁷⁶ In effect, although the *collective* interest of all States in a given grouping is to adopt higher standards, levelling the playing field at a high level of minimum protection, their *individual* interest lies in deviating from this strategy, unilaterally adopting lax standards and thereby becoming the most attractive regime for investment opportunities. Thus no single State has a rational interest in unilaterally adopting higher standards.

The paradigms for such hothouses of direct legislative or interjurisdictional competition have historically been the United States and the European Union, being federal or free-trade systems with high levels of free movement of capital, persons, goods and services, and a liberal freedom of incorporation.¹⁷⁷ An important limiting factor in these models, however, is the possibility of

¹⁷⁵ Bright, (n 104) 32 - 3

¹⁷⁶ Horatia Muir-Watt, Muir Watt, *Aspects économiques du droit international privé* (2004) 307 RCADI.; ‘Reshaping Private International Law in a Changing World’ (*ConflictofLaws.net*, Guest editorial 2008) <<http://conflictoflaws.net/2008/guest-editorial-muir-watt-on-reshaping-private-international-law-in-a-changing-world/>> accessed 4 March 2015; Bright, (n 104) 32 - 4; Wolfgang Kerber, ‘Interjurisdictional Competition Within the European Union’ (1999) 23 Fordham Int’l LJ 217; Anthony Ogus, ‘Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law’ (1999) 48 ICLQ 405

¹⁷⁷ Made more liberal in the EU by the uncompromising jurisprudence of the CJEU, which tends to defend the freedom of incorporation to such a degree that it threatens the legislative diversity and pluralism of the Member States. See Cases C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459; Case 208/00 *Überseering BV v Nordic*

substantive harmonization of laws, providing for either a pre-emptive, precluding variability in the methods to be adopted by Member States, or a ‘floor-of-rights’ approach, thereby preventing the downward spiral of legislative standards in the name of economic competitiveness. The difficulty of increasing globalization consists in the fact that while economic mobility becomes global, with the economies of scale which some TNEs represent able to easily set up and close down at will, effortlessly diverting capital across national borders, substantive harmonization appears a far-off concept. As noted by UNCTAD:

‘Greater capital mobility has made it harder to tax some, often the largest, firms. In addition, it has reduced the bargaining power of labour and increased the State’s reliance on regressive taxes and bond markets, and further amplified the adverse distributive impact of unregulated financial activity.’¹⁷⁸

Up to now, I have avoided using the term ‘regulatory competition’. The reason for this is because although regulatory competition is used as a model for legal rulemaking in certain fields,¹⁷⁹ as in the federal model developed in the U.S., private international law (and private law generally) has traditionally been excluded from the model, a point noted by Muir Watt which will become important during the later discussion.¹⁸⁰ For the present, it should be noted that from the point of view of TNE action in host-states, procedural and substantive rules of liability, whether private law rules or otherwise, can have an effect on the competitive attractiveness of the State as a forum for investment. In other words, legislative bargaining and competition enable the creation of externalities by investors, by ensuring that there is no legislation in place which would negate the benefit to be gained by externalizing as discussed above.¹⁸¹

As with pure legislative bargaining, whether or not the need (or desire) to attract investment leads to a race to the bottom is likely to be highly dependent on sector and industry, and upon the investment type in question. The question of whether FDI as a general rule leads to a race to the bottom or a ‘climb to the top’ is a vexed one in law and economics. Colen et al conclude that in general, empirical studies tend to show an overall climb to the top. However, they do not rule out

Construction Company Baumangement GmbH (NCC)[2002] ECR I-09919; *C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd* [2003] ECR I-10155.

¹⁷⁸ UNCTAD, Trade & Development Report 2014, p.43

¹⁷⁹ Simon Deakin, ‘Social Rights in a Globalised Economy’ in Philip Alston (ed), *Labour Rights as Human Rights* (OUP 2005)

¹⁸⁰ Muir Watt (n 176), 79 et seq.

¹⁸¹ *ibid*

that in specific sectors interjurisdictional competition may not cause a race to the bottom,¹⁸² nor that wage competition may lead to negative spillovers.¹⁸³ Thus, where investments are efficiency-seeking in sectors such as textiles where efficiency of labour is likely to be the main factor, there is again a risk of negative interjurisdictional competition. Recent UNCTAD reports also support the view that a race to the bottom may occur in early stages of industrialization.¹⁸⁴ Furthermore the development of supply-chain ‘into a comprehensively planned and coordinated activity’ contributes to a risk that developing countries become ‘locked into low-value-added activities’.¹⁸⁵

Underdevelopment of legal rules is thus a problem that is not going to disappear, at least not overnight. Legislative bargaining (irrespective of regulatory competition) may occur in all States, from the most developed to the least developed, and the practical concern which was raised in passing of undemocratic States where victims have little possibility of a voice in political processes,¹⁸⁶ remains a very real difficulty. This is particularly the case for resource-seeking investments, where there is a risk of the ‘resource curse’ whereby powerful elites in governance-weak countries exploit the situation in order to accrue personal wealth from resource exploitation.¹⁸⁷ Both economic and political factors may thus contribute to bargaining inequality.

Nonetheless, the problems of competition and inequality of bargaining power are not only practical but also conceptual, since unless a way can be found to level the playing field it may be difficult for legislators and States – in those sectors or situations where it is a particular problem – to escape the pressures brought to bear by economic globalization. The sheer scale of some TNEs as actors puts them in many instances on a *de facto* equal or superior level to many States. The effect for TNE to victim justice from the point of view of domestic liability is terrible; the consequence of perpetuating underdevelopment of legal rules is that rules which would prevent cost externalization or provide for effective redress do not exist for those who need them and TNEs can act with impunity wherever that is so.

¹⁸² Colen et al (n 161), 108 – 114

¹⁸³ *ibid*, 103

¹⁸⁴ UNCTAD, Trade & Development Report 2014, pp.x, 79

¹⁸⁵ *ibid*, 104

¹⁸⁶ See: Collier, (n 90)

¹⁸⁷ Olivier De Schutter, ‘The host state: Improving the monitoring of international investment agreements at the national level’, in De Schutter, Swinnen & Wouters (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge, 2013), 157 – 188 at 158

(ii) Externalization & Undercapitalization

We saw earlier that negative externalization can present a real barrier to effective regulation even in the single State scenario. Difficult though this problem is the case of domestic enterprises, it is only made more acute where TNEs are concerned, for three reasons. First and foremost, the ability of TNEs to move capital out of a jurisdiction where it may be at risk (say, in a typical corporate structure by reducing a subsidiary to minimum levels of capitalization) means that punitive damages or unlimited fines – where they do exist – have their teeth drawn. Secondly, if the criminal responsibility of a director or manager is sought, it may be difficult – if not impossible – to pursue them successfully if they are not within the jurisdiction of the domestic court.¹⁸⁸ Thus, while the cost-benefit barrier may not be insurmountable in the case of domestic companies (although most States do not have provisions in place capable of dealing with it), it becomes rapidly more complicated at the transnational level due to the mobility of assets and senior personnel which a TNE enjoys.

However, perhaps the most striking power that a transnational enterprise has compared to a domestic one is the opportunity to organize itself across jurisdictional boundaries so as to minimize potential liabilities. Consider the *Adams v Cape*¹⁸⁹ case once more. As Slade LJ accepted when delivering the court's judgment, the arrangement of trading Cape asbestos at a remove had the effect of granting Cape the 'practical benefit of the group's asbestos trade in the U.S., without the risks of tortious liability'.¹⁹⁰ In other words, its capital was mobile and profits perceived from sale of asbestos products could be siphoned out of U.S. jurisdiction safe to Britain. But this capital mobility grants the TNE a very significant amount of power vis-à-vis its stakeholders. It means that it is open to it to incorporate subsidiaries (or screens of other subordinate enterprises) at minimum levels of capitalization, which, in most cases, are unlikely to be enough to satisfy most large-scale liabilities, thereby frustrating or reducing future claims against it.

Adams may be regarded as the extreme of this, since the veil operated as an effectively opaque screen against all liability. It is reasonable to assume, however, that the assets of the U.S. based companies associated or owned by Cape were insufficient to meet the liabilities arising, making suing the parent company necessary in the first place. The other high-profile example is, of course,

¹⁸⁸ Although as mentioned previously some countries, such as Australia and Canada, required that companies incorporated under their laws have a certain minimum number of resident directors, which is one way of mitigating this problem. See, e.g. *Canada Business Corporations Act* R.S.C. 1985, c. C-44, s.105(3).

¹⁸⁹ *Adams* (n 53)

¹⁹⁰ *ibid*

Bhopal. One of the reasons why it was decided to sue Union Carbide, the parent corporation, in New York was that the Indian subsidiary which ran the plant, Union Carbide India Ltd. (UCIL), had assets estimated at around U.S.\$39 million, unlikely to be sufficient to meet any likely award, while Union Carbide was estimated to have around U.S.\$700 million in available capital, a much deeper pocket upon which to draw.¹⁹¹ Indeed, on one account Union Carbide was seeking a way out from its Bhopal operation, which was in fact making a loss, and UCIL had 'essentially been cut adrift by the parent company'.¹⁹² Famously, Union Carbide successfully applied to the U.S. Court to decline its jurisdiction and remit the case to India under the doctrine of *forum non conveniens*.¹⁹³ They were sued in India and eventually settled for a reported U.S.\$470 million, which may seem like a great deal of money but circa 2009 only U.S.\$330 had effectively been paid,¹⁹⁴ and in any event in terms of relief to individual victims it only gave 'about [U.S.] \$3000 to the most seriously injured, and nothing to most of the victims'.¹⁹⁵ In essence, capital mobility won out, with the assets necessary to meet liability having flown the jurisdiction of the Indian courts and a settlement reached that appeared to be largely on Union Carbide's terms.

As was mentioned earlier, in the United States at least, undercapitalization of a subsidiary is grounds for lifting the corporate veil. However, in an *Adams*- or Bhopal-type scenario the trans-jurisdictional element removes such a possibility and in effect frustrates the normal operation of domestic law over a situation that would in the usual course of things be regarded as within its purview. This creates a comparative injustice, leaving victims and stakeholders with formal redress only, assets having been diverted away which would normally be in place to meet any liability arising. To paraphrase Slade LJ, the TNE receives the benefit of foreign operations without the burden of meeting the costs of its own (actual or potential) wrongdoing.

(iii) State-TNE Collusion: Complicity and Corruption

We saw earlier that one reason for underdevelopment or lack of enforcement may be an ability to influence the political arena. Taking that one step further, there may be actual collusion between host-state authorities with a TNE against its own citizens. This may be due to corruption, or it may be simply a meeting of interests in a country where the State is at odds with all or parts of its

¹⁹¹ Simon Baughen, *Corporate Accountability and the Law of Tort: The Inconclusive Verdict of Bhopal* (University of Manchester, Faculty of Law, 1993)

¹⁹² Cassels, (n 101) 317

¹⁹³ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal in India*, 1984 809 F. 2d 195 (2d Cir).

¹⁹⁴ Katja Sontag, 'La justiciabilité des droits de l'homme à l'égard des sociétés transnationales' in Laurence Boy, Jean-Baptiste Racine & Fabrice Siirainen (eds), *Droit économique et droits de l'Homme* (Larcier 2009)

¹⁹⁵ Cassels, (n 101) 332

own population. This highlights a limit of the economic model of interjurisdictional competition; it assumes the rationally dominant strategy of States to be seeking investment. Certainly, in many circumstances, such as the *Saipan* case, it may become a pressure on legislative will so significant as to discount other competing concerns, but in other cases this is not so. States might be considered to owe a duty to their citizens,¹⁹⁶ a duty of which they may be more or less cognizant in each case. In some scenarios, a direct conflict between protecting the population and lowering standards to attract investment could arise.

This conflict was nicely brought to the fore in a case involving a joint-venture between Texaco and the State of Ecuador for oil production. A case was brought, initially in the United States, alleging that Texaco's operations had polluted rivers and rainforests in both Ecuador and Peru.¹⁹⁷ Initially, the pro-investment Ecuadorian government intervened against its citizens, arguing that the suit was an affront to their national sovereignty. Then later on, following an initial dismissal of the case (and an election), it intervened again, this time in support of the victims.¹⁹⁸ However many States, even when not considering potential investment, could not be classified as 'citizen-friendly',¹⁹⁹ and it may be that when investment is a dominant strategy for decision making,²⁰⁰ otherwise 'citizen-friendly' States cease to be so and begin demonstrating what I shall term 'investor-friendly' behaviour.²⁰¹ Thus, it may be that host-states are simply unwilling to intervene, either because they are in an investor-friendly phase, or conversely because they are not citizen-friendly and perceive no direct personal or State gain. The first intervention in the *Aguinda v Texaco* case²⁰² provides a demonstration. Explanations for investor-friendly inaction could obviously also include the same competitive pressures which were discussed in the preceding sections, bargaining or interjurisdictional competition.

¹⁹⁶ See my paraphrasing of Hobbes at the beginning of this Chapter.

¹⁹⁷ *Aguinda v Texaco*, 303 F.3d 470 (2d Cir., 2002).

¹⁹⁸ *ibid.* See also: Sontag, (n 194) 569

¹⁹⁹ Many developing countries struggle greatly to combat corruption, and many national executives may be far more motivated by wealth maximization than by emancipatory policies for their citizens. See: Collier, (n 90).

²⁰⁰ To use the language of game theory, a dominant strategy is one which is a better response for player P1 than an alternative to a given course of action by player P2. In this case, if an investor is interested in investing, the choice becomes between raising or lowering standards (or maintaining them at present levels), as compared to other similar legislations or as opposed to the investor's likelihood of investing in either scenario.

²⁰¹ For an analysis of the game theory of state action in relation to granting or refusing local jurisdiction by states, see: Whincop & Keyes, (n 170), 115 et seq.

²⁰² Above (n197)

This is an excellent introduction to the problem of complicity.²⁰³ Often, the host-state may itself be directly involved in the abuses taking place. Among the more prominent examples in recent times have been two cases involving the oil industry: the Yadana pipeline in Burma and Shell's extractive operations along the Niger Delta. The first of these is perhaps the more clear-cut of the two. It involved a joint venture between Total, Unocal and a State-owned Burmese company, the Myanmar Oil & Gas Enterprise (MOGE). A case was brought in the U.S. by Burmese villagers, who alleged that Unocal & Total were complicit in a series of serious human rights violations including torture, rape and murder. At the root of the claim was the issue of forced labour. According to the villagers, the Burmese military, ostensibly employed to guard the pipeline by MOGE, conscripted various among them to work in various capacities on the pipeline or related works. Where villagers complained or attempted to escape, there were killed or subjected to various degrees of torture, including rape and being thrown onto fires.²⁰⁴

Although the court declined its jurisdiction in the case against Total, it allowed the claims against Unocal to go forward. As part of the judgments on preliminary issues, the 9th Circuit Court of Appeals closely examined the concept of complicity. In so doing, it relied heavily on the criminal concept of aiding and abetting as understood by international criminal tribunals including the Nuremberg Military Tribunals and the ICTY and ICTR and also on principles of tort law, deciding that it could 'impose aiding and abetting liability for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime'.²⁰⁵ It then ruled that there were substantial issues of fact which would need to be decided at a full trial. Unsurprisingly, Unocal settled the case before it could get that far. Judging the extent of the oil companies' involvement in the abuse is difficult: undoubtedly, Burma was a repressive regime²⁰⁶ and could well have perpetrated such abuses alone. To what extent Unocal and Total were simply 'free riders' or actively sought to reduce their costs by commissioning forced labour may never be known, and the settlement makes it difficult to judge the extent of their knowledge. However the documents released during the litigation make it clear they had some knowledge.

The controversy surrounding Shell's operations in Nigeria offers a slightly different – and more intermediate – view of complicity. The facts were as follows: while conducting oil extraction in

²⁰³ See: Olivier De Schutter, 'Les affaires *Total et Unocal* : complicité et extraterritorialité dans l'imposition aux entreprises d'obligations en matière de droits de l'homme' (2006) 52 *Annuaire français de droit. int.* 55-101

²⁰⁴ See: *Doe et al v Unocal* 395 F.3d 932 (9th Cir. 2002) 939 – 942

²⁰⁵ *Doe*, (n 126) 951

²⁰⁶ *ibid*, 940

Nigeria in the 1990s, Shell was accused of complicity with the Nigerian military authorities in repressing the Movement for the Survival of the Ogoni People (MSOP), an activist group who campaigned for increased autonomy of the Ogoni people of the region and against the environmental damage caused by Shell's oil production.²⁰⁷ In 1994, members of the MSOP were illegally detained, held incommunicado and then tried by an *ad hoc* tribunal, which ordered them to be executed. It is widely acknowledged that the detention, trials and executions violated international law standards of due process.²⁰⁸ Whether or not the Nigerian military forces were handed over to Shell and its partners with a *carte blanche* to do as they pleased, or whether there was a direct agenda of the Nigerian State in suppressing the MSOP activists, it is clear that Nigeria's interests were bound up with those of Shell and the oil companies. Indeed, the African Commission appeared to accept that the military had been 'placed at the disposal of the oil companies'.²⁰⁹

Explaining complicity is a tricky matter. Clearly there may be cost benefits for the investor, especially in a case such as Ogoniland, while the State may have an interest in neutralizing opponents of the regime or consolidating its power. As for the aftermath, it may be that States have a direct interest in blaming their corporate partner in some circumstances, presenting themselves as the born-again defender of their citizens' interest, having moved from an investor-friendly to a citizen-friendly phase. However this could mask a darker reality which is that there may be a mutual interest in complicity cases, whereby both the corporate and State parties may seek to reduce their culpability by blaming the other party. The host-state thereby gains the profit of the investment, and potentially the infrastructure development provided by much large-scale investment, while the corporate partner flees with its profits, able to escape accountability by seeking to blame the complicit State. Wells and Elias also note that, particularly in sectors such as mining which are geographically fixed, there may be an impulse for corporations to collude with

²⁰⁷ In the subsequent case brought before the African Commission on Human and Peoples' Rights, it was alleged that the Nigerian Authorities had in effect placed 'the legal and military forces of the state at the disposal of the oil companies', see: Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights', (2003) 52(3) Int'l & Comp. LQ 749

²⁰⁸ See e.g. <http://business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa#c9306> (accessed 6 Jan 2015)

²⁰⁹ 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 27 May 2002, ACHPR/COMM/A044/1 (ACHPR)

repressive regimes.²¹⁰ Complicity may even culminate in a situation whereby power is redistributed in favour of the executive branch of unscrupulous States.²¹¹

Conclusions

Clearly this chapter has involved an analysis of what might be called extreme situations. In many cases, the effects will be mitigated in one way or another. In the case of torpedo actions, for example, recent practice suggests that the courts of the countries most associated with this type of bad faith forum shopping are taking steps to address the situation.²¹² However, there is no panacea; it is not enough to appeal to political will for effective regulation, or to hope that with increased development will necessarily come better, more sophisticated home-state regulation. The effects of globalization, both as wielded by TNEs against States and independently through the effect of interjurisdictional competition, militate against this. The TNE has become an actor beyond the territorial control of a single State.

This shift in State regulatory control ruins the domestic justice model presented in Part I of the chapter. Corrective justice becomes substantially impossible in any case where legal rules are not sufficiently developed, where State inaction prevents effective access to justice, or where corporate governance frustrates the imposition of liability. In all of these instances the TNC itself is exempted from responsibility, meaning that there is no redressing of the imbalance between wrongdoer and victim. The problem of the creation of legal externalities is thus not avoided, and it does not appear to be easily within the power of host-states, using current tools, to do anything about it.

²¹⁰ Celia Kay Wells & Juanita Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005)

²¹¹ There is a theory put forward by Moravcsik, which suggests that the political strategy of entering into intergovernmental agreements, and the international cooperation it engenders, redistributes domestic power in favour of national executives by permitting them to loosen domestic constraints imposed by legislatures, interest groups, and other societal actors (See Andrew Moravcsik, 'Why the European Community strengthens the state: Domestic politics and international cooperation' (Minda de Gunzburg Center for European Studies, Harvard University, 1994). It may be that cooperation with transnational corporate actors may create a parallel phenomenon, whereby the possibility of unpopular, or even in our case, abusive, action, is facilitated by the corporate involvement, enabling unscrupulous executives to move against political or other domestic opponents and afterward blame it on the foreign investor.

²¹² Cf, in Italy, *Corte di Cassazione*, 19 Dec 2003 *BL Macchine v Windmoeller & Holscher Riv Dir. Ind.*, 2, 2004; Štanko, (n 145) 23

Chapter 2

Extraterritorial State Regulation

I now turn to the extraterritorial aspects of domestic regulation of business activity. Extraterritoriality has almost become a dirty word in international law and relations, to the extent that ‘if a state wishes to avoid international criticism over its exercise of extra-territorial jurisdiction, it is better to base the prescriptive elements on territoriality, or nationality’.¹ To put it another way, as Michaels says ‘jurisdiction is still entangled in the dichotomy of (legitimate) territorial jurisdiction and (problematic) extraterritorial jurisdiction.’² According to Lowenfeld, the term itself is partisan: ‘when you read a book or article, or attend a symposium with 'extraterritorial jurisdiction' in the title, be advised that the authors or editors or sponsors are attempting to communicate an attitude before the audience has read or heard a single phrase’.³ This chapter examines the practice of extraterritorial regulation.

Perhaps even more than in the host-state situation, it explores problems concerning domestic regulation and liability which are specific to TNEs. In the last chapter, we saw that there are essentially three ways in which a transnational enterprise may act on the territory of a host-state: directly, including through a branch; through subsidiaries in an equity-ownership group model; and through networks founded on a contractual paradigm. Legal scholarship has tended to focus predominantly on the second of these. This is perhaps unsurprising, since it is the traditional means of corporate organizing across borders and is a common method in use in many sectors. It is certainly prevalent in the extractive industries for example.⁴ However this provides a conceptual escape-clause to a host-state in that by relying upon the local nationality or territoriality of the subsidiary, a host-state may side-step the private international law problems sketched out above entirely. Of course, as we saw this does not avoid the very real limitations on such regulation I

¹ James Crawford, *Brownlie’s Principles of International Law* (8th edn, OUP 2012) 486. See further: Lassa Oppenheim, *Oppenheim’s International Law Volume I* (Robert Jennings and Arthur Watts (eds), Longman 1992) 564

² Ralf Michaels, ‘Territorial Jurisdiction after Territoriality’ in Piet Jan Slot & Mielle Bulterman (eds), *Globalisation and Jurisdiction* (Kluwer Law International 2004)

³ Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (OUP 1996) 16

⁴ See e.g. the table of jurisprudence in: Katja Sontag, La justiciabilité des droits de l’homme à l’égard des sociétés transnationales’ in Laurence Boy, Jean-Baptiste Racine & Fabrice Siiriainen (eds), *Droit économique et droits de l’Homme* (Larcier 2009)

discussed in Chapter 1; it is more of a wilful short-sightedness on the part of host-state regulators and legal scholars.⁵

Outside the host-state, however, all business activity is, on one view, transnational since by definition it has crossed national borders and jurisdictions. So what claims do States make on regulating such activity? As before, the traditional distinction between private and public will be pertinent to this discussion. On the private side, most if not all situations will involve the operation of so-called private international law: the law of jurisdiction, conflict of laws and application and enforcement of judgments in cases containing at least one foreign element. I note that the denomination ‘international law’ here is a misnomer, in the sense that it is not hierarchically equivalent to general (public) international law but is in fact traditionally ‘seen as an emanation of domestic or municipal law, or in other words as *derivative* of State power and not truly international law at all’.⁶

The chapter proceeds as follows: Part I examines the question of regulation by the ‘home-state’ of a TNE, the logical next step in the discussion. Part II then looks at regulation by ‘third-states’, *viz.* those States which do not traditionally have a claim to being the home-state or a host-state for a TNE’s operations.

I. False Extraterritoriality? Home-State Regulation

The TNE presents a unique challenge for transnational regulation and the operation of systems such as private international law; it is capable of choosing the most favourable legal regime for it at any given time, and, as I argued in Chapter 1, even of negotiating with States to opt-out of supposedly mandatory systems of regulation. In respect of the host-state, this may be geographically limited depending on the sector in which it operates, but nonetheless as we saw previously, causes competition between potential host-states to adopt favourable investment regimes. In respect of the home-state, it does so by selecting its seat or place of incorporation at the outset. However it would be wrong to see this as an immutable choice, set in stone for the lifetime of the company that was incorporated.

⁵ See: Philip Alston, ‘The Myopia of the Handmaidens: International Lawyers and Globalization’ (1997) 8(3) EJIL 435

⁶ Benedict S. Wray & Rosa Raffaelli, ‘False Extraterritoriality? Municipal and Multinational Jurisdiction over Transnational Corporations’ (2012) 6(1) Human Rights and International Legal Discourse 108 at 112. See further Audit B, *Droit International Privé*, (2006, Paris: Economica) pp. 9 – 10; James Fawcett & Janeen M. Carruthers, *Private International Law*, (2008, OUP) 9 – 10

Firstly, within an equity-based group, it is usually a simple matter to incorporate a new company in another jurisdiction. If this becomes the parent of older entities within the group by acquiring a controlling interest in them, indeed it may even be possible to reverse the parent-subsidiary relationship by the subsidiary buying shares in the parent.⁷ Alternatively, it may be possible to directly move the company out of the jurisdiction.⁸ Alternatively, a company has the “nuclear” option of winding up in one jurisdiction and re-incorporating in another, although this process is likely to be complex, expensive and drawn-out.

TNE arbitrage is thus not necessarily decreased in respect of home-states. It has a freedom of incorporation and a more limited freedom of reincorporation.⁹ It may therefore be a factor in the balance of exercising those freedoms the extent to which an intended home-state will attempt to regulate its behaviour elsewhere. It is also important to note that it is no longer the case, as it may have been in the past, that TNEs are predominantly controlled from rich countries in the global North.¹⁰ According to the UN, ‘investments by developing-country multinational enterprises... reached a record level [in 2015] ... FDI from developing economies has grown significantly over the last decade and now constitutes over a third of global flows’.¹¹ The international division of labour is thus shifting, although I note that the OECD has concerns that the level of outward investment from emerging market economies may be unsustainable.¹² The relevance of this to my thesis is only oblique, since I am concerned with describing the situation of TNE’s operation in respect of classic State architecture, irrespective of whether that state is a country in the global North or South. However, the empirical reality does have a bearing on two important background features: availability of dispute resolution mechanisms and problems of legal underdevelopment. Although these may apply to any State, whether operating as host- or home-state, it may increase

⁷ See, in respect of English law: Derek French, Stephen Mayson & Christopher Ryan., *Company Law* (29th edn, OUP 2012) 301; *Acatos and Hutcheson plc v Watson* [1995] 1 BCLC 218 (EWHC)

⁸ Although traditionally this was difficult: in the U.K., it requires a private Act of Parliament, i.e. a legislative act, to move a registered company: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506 at 544 (EWHC); *Tayside Floorcloth Co Ltd* 1923 SC 590 (Scottish CS(IH)); *Bateman v Service* (1881) 6 App Cas 386 (PC); French, Mayson & Ryan, (n 8) 65. In respect of the EU, see: William W. Bratton, Joseph A. McCahery & Erik P. M. Vermeulen, ‘How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis’ (2009) 57 AJCL 347; Case C-210/06 *Cartesio Oktató és Szolgáltató Bt* [2008] E.C.R. I-9641. However in the case of a European Company (*societas euopaea*) incorporated as such in an EU Member State, it can move freely within the EEA: Regulation (EC) No 2157/2001

⁹ Horatia Muir-Watt, *Aspects économiques du droit international privé: réflexions sur l’impact de la globalisation économique sur les fondements des conflits de lois et de juridictions* (Martinus Nijhoff 2004); Bratton, McCahery & Vermeulen (n 8);

¹⁰ Although note that of the world’s 100 biggest enterprises, more than a third are based in the U.S., Japan, U.K, France, or Germany. Source: ‘Fortune 500’ (Fortune Magazine, 2009) <http://fortune.com/global500/2009/> (accessed 03 March 2015).

¹¹ UNCTAD World Investment Report, 2015.

¹² OECD, Business & Financial Outlook, 2015, p.194

the likelihood that appropriate legal rules or enforcement mechanisms will be unavailable, particularly in cases of South-South FDI.

1. Private International Law¹³

I begin with private regulation. In the domestic context, this is captured by the discipline of private international law.

A. Jurisdiction

(i) Bases of Jurisdiction

Jurisdiction has, in both the publicist and private international traditions, been based on three traditional and well-established bases and two which may be regarded as more controversial. The traditional premises of jurisdiction are easily stated, and are perfectly encapsulated in a quote from Joseph Story, writing in 1834, that '[n]o state can, by its laws, directly affect or bind property from out of its own territory or bind persons not resident therein, except that every nation has a right to bind its own subjects by its own laws in every other place'.¹⁴ This immediately reveals the first two grounds of jurisdiction: territory and nationality. A third can also be deduced, jurisdiction based on residence or domicile (which is after all little more than an extension of the territorial principle).

Interestingly, we approach a split between the common and civil law traditions of private international law. Civil systems have tended to ascribe jurisdiction on the basis of nationality while common law systems favoured domicile (except, when it comes to adjudicative jurisdiction to hear a case, the rather special case of the U.K.). As Ryngaert puts it, '[i]n continental Europe, the territoriality principle, while being the basic principle of jurisdiction, is not endowed with the almost sacrosanct status which it has in common law countries'.¹⁵ The reasons for this may be historical, given many European Civil law systems' derivation from Roman law.¹⁶

¹³ Much of the material which has gone into this section was researched with Claire Bright née Staath and appeared in a slightly different form in an earlier joint paper. I am grateful to her for allowing me to reproduce it and for having taught me a great deal during the course of its composition. See: Claire Staath & Benedict S. Wray, 'Corporations and Social Environmental Justice: The Role of Private International Law' in Marie-Ange Moreau & Antoine Duval (eds), *Towards Social Environmental Justice* (EUI WP LAW 2012) 85 – 104.

¹⁴ Joseph Story, *Commentaries on the Conflict of Laws*, (Boston 1834), sections. 18-22

¹⁵ Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 43

¹⁶ The basis for nationality-based jurisdiction in France, for instance, is pre-Revolutionary and existed in the *ancien droit*. See Audit & d'Avout, (n 7). Ryngaert demonstrates that it harks back to the ancient world, a world 'composed of communities rather than territories, [where] allegiances based on religion, race, or nationality prevailed over those based on territoriality', and was also preeminent in Roman law conceptions of jurisdiction: Ryngaert, (n 15) 44 - 5.

¹⁶ Joseph Story, *Commentaries on the Conflict of Laws*, (Boston 1834)

Linked to the nationality principle – also known as active personality – is the principle of *passive* personality: the right of a State to assert its jurisdiction against acts of aliens abroad which harm its own nationals. Despite criticism,¹⁷ it is firmly in place in the criminal systems of numerous States, and passed without comment in the *Lotus* case before the PCIJ.¹⁸ As Crawford points out, it is also extant in several criminal law treaties.¹⁹ However in most European and common law systems of private international law it has for long been uncontroversial to assert jurisdiction over foreign nationals.

The final grounds of jurisdiction are the protective (or ‘security’) principle and the doctrine of ‘effects’. The first, which Crawford describes as widespread,²⁰ and Ryngaert as uncontroversial in practice if not in theory,²¹ provides that a State may assert jurisdiction where its security or fundamental interests are affected. Again, this may be relatively unimportant for private international law; certainly it is not something that has received much doctrinal attention. The second, however, assumes great importance. In the publicist and criminal traditional, it ‘was at least acknowledged by the majority in *Lotus* and by certain members of the ICJ in *Arrest Warrant*²².²³ It is practised by the EU in respect of competition law.²⁴ In the U.S., the largest State user of the doctrine,²⁵ it has been described as ‘settled law’ since at least 1945.²⁶ Furthermore, it is widely used

¹⁷ See: Crawford, (n 1) 461 - 2; Ryngaert, (n 15) 91- 6 & works cited.

¹⁸ *The Case of the S.S. "Lotus" (France v. Turkey)* PCIJ Rep Series A No 10. (PCIJ)

¹⁹ Crawford, (n 1) 461

²⁰ *ibid.*, 462

²¹ Ryngaert, (n 15) 98 - 9

²² *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3

²³ Crawford, (n 1) 462-4

²⁴ Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-753; *ICI v EEC Commission* (1972) 48 ILR 106

²⁵ U.S. Restatement (Second) of the Conflict of Laws §52: ‘U.S. Restatement (Second) of the Conflict of Laws ‘A state has power to exercise judicial jurisdiction over a foreign corporation which causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable’; *Timberlane Lbr. Co. v Bank of America*, NT & SA, 549 F.2d. 597 (9th Cir., 1976). cf U.S. Restatement (Third) of The Foreign Relations Law of the United States, §421: ‘(j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity...’. See further: Christopher L. Blakesley, ‘Extraterritorial Jurisdiction’, in M. Cherif Bassiouni (ed), *International Criminal Law: Procedural and Enforcement Mechanisms* (2nd edn, Transnational Publishers 1999) 53 – 53; Frank Höpfel & Claudia Angermaier, ‘Adjudicating International Crimes’ in Philip Reichel (ed), *Handbook of Transnational Crime and Justice* (Sage 2005) 313.

²⁶ *United States v Aluminium Co of America*, 149 F.2d 416, 443 (2nd Cir., 1945)

by the U.S. as a ground of private tort law jurisdiction,²⁷ subject to the requirements of ‘minimum contacts’.²⁸

Audit calls this classification of jurisdiction publicist, in that it is based on the exercise of sovereign will and intrinsically linked to *public* international concepts of jurisdiction to adjudicate the bounds of sovereign reach. He distinguishes a publicist with a *privatiste* conception based on the private interests at stake between two litigators (above and beyond any considerations of the public peace).²⁹ The federal common laws of the U.S, and to some extent Australia, have a strict statutory approach to jurisdiction which is based primarily on publicist concepts: federal courts do not have jurisdiction at all unless granted by an enabling statute, and State courts are subject to constitutional (and international law) limits.³⁰ When a company is resident within the territory, however, a court generally has jurisdiction.

However, common law systems share an important limit to their exercise of jurisdiction: where jurisdiction does exist, it is open to the defendant to argue that an alternative forum is more appropriate, or ‘convenient’, through the plea of *forum non conveniens* although it is important to note that there are significant variations in the factors courts in different legal systems will consider, as we shall come to see.

Civil law systems have also tended to follow, at least initially, a publicist conception of jurisdiction as an expression of sovereign will. Jurisdiction is, generally, mandatory; there is no exercise of discretion in deciding whether or not a court has jurisdiction to hear a case.³¹ Thus where the defendant is a national (as in the case of a parent company incorporated (or having its seat) there),

²⁷ As well as, notably, antitrust/competition and taxation. See: *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945); Stanley D. Metzger, ‘The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction’ (1966) 41 N.Y. ULR 7; James J. Freidberg, ‘The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine’ (1991) 52 U Pitt. LR 289; Bernard H. Oxman & Mary Coombs, (2001) 95 Am. J Int’l L 438

²⁸ *International Shoe Co v Washington*, 326 U.S. 310 (Sup. Ct., 1945) (USSC); *World-Wide Volkswagen Corporation et al. v. Woodson et al.*, 444 U.S. 286 (Sup. Ct, 1980); *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2nd Cir, 2013), discussed above, Chapter 1, p.67, and see further: Lea Brilmayer et al, ‘A General Look at General Jurisdiction’ (1988) 66 Tex. LR 721;

²⁹ Bernard Audit., (n.6), pp.280 *et seq*

³⁰ See in respect of Australia: Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004) 122. For U.S. States, a general indication may be gleaned from the relevant *Restatements*, non-binding treatises which attempt to codify and summarize case law to provide persuasive authority for future cases. See Restatement (Second) of Conflict of Laws, Chapter 3 ‘Judicial Jurisdiction’; Restatement (Third) of The Foreign Relations Law of the United States, §§421-423.

³¹ Gerhard Walter & Rikke Dalsgaard , ‘The Civil Law Approach’ in Campbell McClachlan & Peter Nygh (eds), *Transnational Tort Litigation: Jurisdictional Principles* (Clarendon Press 1996) esp. 46. Exceptions, such as the problem thrown up by the Montreal Convention, do exist: See above, Chapter 1

there is generally no bar to finding jurisdiction to hear a case. Indeed, in the EU the question is definitively settled by the ‘Brussels I’ Regulation, which provides that a Member State always has jurisdiction over a defendant domiciled there, subject only to the exclusive jurisdiction of another Member State.³²

Whatever the basis, nationality or domicile, almost all States admit their jurisdiction over a corporate defendant based in their home territory (whether by incorporation and registration, or on the basis of the ‘real seat’ doctrine³³). This is necessarily, a legal fiction, since as Michaels points out ‘[c]orporations are artificial persons which are not physically present anywhere’.³⁴ Cutler also highlights the anational qualities of TNEs:

‘Indeed, Detlev Vagts... argues that for a “truly non-national, autonomous entity” a corporation would have to meet five requirements: no country of incorporation; widely dispersed business activities across different states; multinational distribution of shareholders; internationalization of management; and declining national claims to the extraterritorial application of domestic laws. Arguably, many corporations meet the second, third, and fourth criteria. However, there is no mechanism for international incorporation and the extraterritorial application of laws continues to be practiced by states such as the United States.’³⁵

This presents a singular problem in the case of a TNE. Whether a pyramidal equity-based group or a network enterprise, it may be difficult to localize and identify the ‘home-state’ of a large group. Shell, for example, is ostensibly a Dutch-English company. But international law – both public and private – struggles to deal satisfactorily with the multiple nationality of individuals.³⁶ Choosing the ‘nationality’ of a transnational enterprise is even more fraught with difficulty. Not only are norms intended to regulate the actions of natural persons sometimes singularly ill-adapted for the fictitious corporate form as Michaels points out, it can be a challenge to identify an appropriate

³² Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 2. See Case 281/02 *Onusu v Jackson (t/a Villa Holidays Bal Inn Villas)* [2005] ECR I-1383. Exclusive jurisdiction for these purposes means jurisdiction over real property and rights *in rem*, public registers, validity of constitution and dissolution of companies, registration or validity of patents (Brussels I, art. 22). It also includes a jurisdiction agreement (art. 23).

³³ Both of which are admitted by the Brussels I Regulation in European private international law: art. 60

³⁴ Michaels, (n 3) 110

³⁵ A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge UP, 2003) 202

³⁶ Olivier Vonk, *Dual Nationality in the European Union: a Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (PhD Thesis, EUI 2010).

home-state in different legal scenarios. In the case of group insolvency, for example, Mevorach shows that there are multiple candidates: “Incorporation” as jurisdictional basis for insolvency matters seems to lose its significance, mainly because it might not represent any real connection to the debtor.³⁷ Alternatives include an assets-based test,³⁸ the place of central administration and control,³⁹ and the place of the ‘centre of main interests’.⁴⁰ There may be numerous connecting factors pointing to multiple different jurisdictions.⁴¹

Ultimately, however, this may not prove a problem from the point of view of victims looking to sue a particular enterprise, since it is likely to provide them with a choice of available forums. The Dutch courts, for example, were happy to adjudicate claims regarding Shell’s activities in Nigeria, holding that because claims against the British and Dutch former parent companies, the Dutch current parent, and the Nigerian subsidiary were interconnected it would accept jurisdiction over all of them.⁴²

(ii) Forum non conveniens

Given the *ouverture* of jurisdiction over ‘home’ parent companies, the question arises as to the limits which may be placed on such jurisdiction. In common-law countries, perhaps because of the generally wide grounds of jurisdiction available, a major limitation is placed on the exercise of jurisdiction through the doctrine of *forum non conveniens* (‘FNC’), or “inconvenient forum”. By actively invoking this before a court, a defendant may argue that another forum is more appropriate or convenient.

U.S. Practice

In the U.S., FNC has become a major battleground in TNE cases. It was the conclusive skirmish in the American part of the Bhopal cases between the victims of the explosion and the Union

³⁷ Irit Mevorach, ‘The “home country” of a multinational enterprise group facing insolvency’ (2008) 57 ICLQ 427 at 436-7

³⁸ *ibid*, p.438

³⁹ *ibid*, p.436

⁴⁰ Somewhat assimilated to the centre of administration in the EU and UNCITRAL models. *ibid*, p.439-40

⁴¹ See *Re Bank of Credit & Commerce International SA (No 10)* [1997] 2 W.L.R 172 (EWHC), discussed in Mevorach (n 37) 441.

⁴² *Akpan v Royal Dutch Shell*, 30 Jan 2013 (Case No. C / 09/337 050 / HA ZA 09-1580) (Hague District Court), available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:BY9854> (accessed 12 July 2014). See: Nicola Jägers, Katinka Jesse, & Jonathan Verschuuren, ‘The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell’ (Jan 2014) *AJIL Unbound*, reproduced in *Agora: Reflections on Kiobel – Excerpts from the American Journal of International Law and AJIL Unbound* (ASIL, 2014)

Carbide Corporation,⁴³ although it is just one of many similar decisions where the U.S. courts have returned litigation involving U.S. corporations to host-states.⁴⁴ In Bhopal the U.S. judge effectively declined jurisdiction by transferring the case to India, largely on the grounds that the ‘public interest’ of India was greater than that of the United States, as well as according to a number of “private interest” factors.⁴⁵

The latter bear restating, as Baxi and others argue that the approach of U.S. courts to private interest factors is misconceived in the case of TNEs.⁴⁶ The classic private interest factors, under the *Gilbert* doctrine in U.S. law,⁴⁷ are access to the ‘sources of proof’, namely documentary evidence and witnesses, as well as enforceability of the judgment. Yet, as Joseph points out, where the host-state is a developing country, it often lacks the resources and judicial architecture to ‘unravel’ the corporate veil.⁴⁸ Not only that, but many of the sources of proof in a mass violation will be with the parent company, at least in so far as establishing the latter’s liability or control is concerned. What is more, in Bhopal, India itself acted as the *parens patriae* plaintiff on behalf of the victims and argued that its own legal system was ‘unable to cope with determination of rights and responsibilities in a *sui generis* situation of an archetypal mass disaster’.⁴⁹ Although seen by some as legal argument ‘straight out of “[Alice] Through the Looking Glass,”⁵⁰ it is ironic that it was in part India’s public interest that resulted in the grant of *forum non conveniens* despite its own pleas to the contrary. Aspects of the U.S. application of *forum non conveniens* may therefore appear hypocritical, given that decisions such as Bhopal ignore the factual reality of the very test they purport to apply.

The ‘fatal attraction’ in Bhopal may be its appeal to sound administration of justice and the idea that justice can best be served by those courts which are most geographically proximate to the

⁴³ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal in India*, 1984 809 F. 2d 195 (2d Cir)

⁴⁴ See: *inter alia*, *Benal v. Freeport-McMoran, Inc.* 969 F. Supp. 362; *Aguinda v Texaco* (2002) 303 F.3d 470 (U.S. Court of Appeals, 2d Cir.); *Sequihua v Texaco Inc.* 847 F. Supp. 61 [1994]; *Turedi v. Coca-Cola Co.* 343 Fed.Appx. 623 (2nd cir., 2009)

⁴⁵ Upendra Baxi, ‘Mass Torts, Multinational Enterprise Liability and Private International Law’ (1999) 276 RCADI 297 at 356

⁴⁶ *ibid*, 354 – 364

⁴⁷ *Gulf Oil Corporation v. Gilbert* 330 US 501 (1947).

⁴⁸ Joseph, (n 30) 5

⁴⁹ Baxi (n 45) 356.

⁵⁰ Simon Baughen, *Corporate Accountability and the Law of Tort: The Inconclusive Verdict of Bhopal* (University of Manchester, Faculty of Law, 1993).

facts giving rise to the litigation.⁵¹ For the Bhopal victims, this meant expressing a marked preference for the *forum delicti*, rather than the *forum rei* of the parent company. Yet such reasoning ignores the myriad practical reasons why pursuing a parent company in its home-state may in fact be better from the point of view of administration of justice, such as discovery rules and high probability of enforcement.⁵² Secondly, it may miss the problems discussed in the previous chapter, such as underdevelopment in the host-state, the problem of complex torts with multiple *loca delicti* or *loca damni*, or the fact that assets to meet any claim in damages may have already fled the jurisdiction of local courts.⁵³ It also ignores the structural problems which arise from State-TNE bargaining in the context of investment, or in terms of legislative competition with other States operative in the same sector.⁵⁴

However, this is not to say the U.S. is unwilling in all home-state cases to assert its jurisdiction. In *Carijano v Occidental Petroleum Corp.*,⁵⁵ the U.S. Court of Appeals for the Ninth Circuit overruled a district court's decision to decline jurisdiction and send a case to be heard in Peru. Occidental Petroleum and its subsidiary, Occidental Peruana Inc., were both U.S. corporations incorporated in California. In the 1970s they began development of land in Peru for oil extraction near the border with Ecuador. The claim was brought by the Achuar indigenous group, whose lands encompassed the areas under exploitation by Occidental, with the support of Amazon Watch, a U.S. NGO. In the words of the Court:

‘The complaint alleges that, during its thirty years in the Achuar territories, Occidental knowingly utilized out-of-date methods for separating crude oil that contravened United States and Peruvian law, resulting in the discharge of millions of gallons of toxic oil byproducts into the area’s waterways⁵⁶

The consequent pollution was alleged to have caused widespread illness and injury to Achuar persons, decreasing yields of fish, land animals and crops. The Court of Appeals carefully reviewed the lower court's application of FNC. It concluded that the court had acted correctly in applying the first part of the test, whether Peru offered an adequate forum. In doing so it highlighted on

⁵¹ Staath & Wray, (n 13)

⁵² See S. Joseph, *op. cit.* n.48

⁵³ As was the case in Bhopal.

⁵⁴ See Chapter 1

⁵⁵ 643 F.3d 1216 (9th Cir., 2011). The defendant, Occidental Petroleum, applied to have the appeal re-heard *en banc* but this was refused and *certiorari* was denied by the Supreme Court in 2013. The case is now being re-heard by the trial court, including the question of whether the NGO plaintiff has standing to bring the case.

⁵⁶ *ibid*, 1222

interesting feature of the U.S. FNC doctrine, which is that where a foreign forum offers a ‘clearly unsatisfactory’ remedy it will not be adequate.⁵⁷ However, provided there is ‘some remedy’ available, the U.S. Court will not enquire further. Similarly it is theoretically possible to find a foreign forum inadequate because of corruption,⁵⁸ but the burden to be reached is very high: it was insufficient in this case that the plaintiffs’ expert –

‘asserted that the Peruvian judiciary suffers from “institutionalized” corruption, including widespread lobbying of judges, third party informal “intermediaries” between magistrates and parties, and the exchange of improper favors and information.’⁵⁹

However, the lower court had correctly concluded that this was ‘too generalized and anecdotal’ to pass ‘value judgments on the adequacy of Peru’s judicial system’. The Court of Appeals agreed that “‘one of the central ends of the *forum non conveniens* doctrine is to avert ‘unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations’”.⁶⁰

It was in the application of the private and public interest factors that the lower court erred, in the Court of Appeals’ opinion, *because the defendant’s home jurisdiction was also the chosen forum*, which also had a strong connection to the case because Amazon Watch was a U.S. citizen. Consequently, there was a ‘strong presumption’ in favour of Amazon Watch (if not the Peruvian victims) that its choice of forum was convenient.⁶¹ Other private interest factors, such as convenience, availability of witnesses, etc., were not conclusive since it was necessary not only to consider the ‘inconvenience’ for Peruvian witnesses flying to California, but also of U.S. witnesses flying to Peru. However when it came to enforceability of any judgment, the lower court had ‘most crucially’ failed to take into account that it would be difficult to enforce in Peru.⁶² On the public interest front, the lower court ‘undervalued California’s significant interest in providing a forum for those harmed by the actions of its corporate citizens’.⁶³ Weighing all the factors, the lower court ought not to have dismissed the case.

⁵⁷ Citing *Piper Aircrafts Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)

⁵⁸ *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir., 2006)

⁵⁹ *Carijano*, (n 55) 1225

⁶⁰ *ibid*, 1226. As an aside, it is interesting to note the cognitive dissonance of the U.S. judicial system: in FNC cases, it is almost oversensitive to approbation by foreign courts’ while in public international law cases such as *Avena & other Mexican Nationals (Mexico v. United States of America)* (Merits) [2009] ICJ Rep 3 it wilfully ignores the judgment of an international court to which it subscribes.

⁶¹ *Carijano*, 1229

⁶² *ibid*, 1231-2

⁶³ *ibid*, 1233

The Ninth Circuit's reasoning betrays a marked bias in favour of U.S. plaintiffs (and U.S. defendants).⁶⁴ However, it does show that not all cases involving corporate behaviour abroad will necessarily be thrown out. The difficulty is predicting when FNC will or will not be applied by U.S. courts, as the practice is not consistent. The inconsistency has led some to conclude that the U.S. is 'left with a doctrine unbounded by rules or standards and ungrounded in any clearly stated policy. Most observers find that the results are unpredictable and unfair in both practice and perception'.⁶⁵

FNC in the U.K.

Traditionally, the English experience was similarly restrictive, the general rule being that litigants must 'take a foreign forum as they find it'.⁶⁶ One feature of the English test is interesting, however, in that it is founded on the idea of being 'for the interests of all parties and for the ends of justice'.⁶⁷ Whincop and Keyes note that justice is an oft-neglected term in conflicts discourse.⁶⁸ This was developed further in the *Spiliada* case,⁶⁹ which provides the current law of FNC in England.

Under *Spiliada*, there is a two-part test to be satisfied:

'The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.'⁷⁰

An important distinction with the U.S. test is the lack of any so-called 'public interest' factors. The English test is based on a *privatiste* conception. In deciding the first part of the test, *viz.* whether another forum 'having competent jurisdiction' which is more 'appropriate' exists, the court will

⁶⁴ See: Ronald A. Brand & Scott R. Jablonski (eds), *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements*, (OUP 2007) 73

⁶⁵ Simona Grossi, *The U.S. Supreme Court and the Modern Common Law Approach*, (CUP 2015) 96; Allan R. Stein, 'Forum Non Conveniens and the Redundancy of Court-Access Doctrine' (1985) 133 U Pa. LR 781; ROBERTSON David W. Robertson & Paula K. Spec, 'Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions', (1990) 68 Tex. LR 937

⁶⁶ *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] A.C. 460 at 482 (HL)

⁶⁷ *Sim v. Robinow* (1892) 19 R. 665 at 668. Note that although *Sim* is a Scottish case, it was held in *Spiliada v Cansulex* that 'on this point, English law and Scots law may now be regarded as indistinguishable': [1987] AC 460 at 474 (HL)

⁶⁸ Michael J. Whincop & Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Aldershot: Ashgate/Dartmouth Publishing, 2001), at 101 et s.

⁶⁹ *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] A.C. 460 (HL)

⁷⁰ *ibid*, 476; *per* Lord Goff of Chievely

look at ‘convenience and expense’,⁷¹ the applicable law, and ‘the places where the parties respectively reside or carry on business’.⁷²

The second part of the test is perhaps the most remarkable, and takes it far beyond the restrictiveness of the U.S. doctrine. If there is another forum which ‘*prima facie* is clearly more appropriate’ the court will normally grant a stay ‘unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted’,⁷³ also known as the ‘substantial justice’ limb. Excessive delay,⁷⁴ and a lack of independence of the judiciary⁷⁵ have both justified refusing to apply *forum non conveniens* under this part of the test. More recently, the lack of procedural sophistication or the unavailability of funding have both – remarkably – justified retaining litigation in England under this limb. As we saw in Chapter 1, in *Lubbe v Cape*, the lack of developed funding and procedures for group litigation was enough to keep the case in England.⁷⁶ In *Connelly v RTZ Corporation*,⁷⁷ another TNE case, the non-availability of financial assistance from the State (“legal aid”) was enough to prevent a stay.⁷⁸

Even leaving the generosity of the *Spiliada* test aside, U.K. *forum non conveniens* has been further restricted by the Brussels I Regulation.⁷⁹ Under the case law of the CJEU, the jurisdiction of a Member State court under article 2 (domicile of the defendant) is mandatory. It is not generally possible to decline jurisdiction through the use of *forum non conveniens*.⁸⁰ In the case of a company, its domicile is its statutory seat or place of incorporation, or failing that the place of its central administration or principal place of business.⁸¹

⁷¹ *MacShannon's case* [1978] A.C. 795 (HL)

⁷² *Spiliada*, (n69) 478

⁷³ *ibid*

⁷⁴ *The Vishva Ajay* [1989] 2 Lloyd's Rep 558 at 560

⁷⁵ *The Abidin Daver* [1984] AC 398

⁷⁶ See *supra*, Chapter 1

⁷⁷ [1997] UKHL 30

⁷⁸ *Connelly* was applied in a substantially similar case: *Carlson v Rio Tinto plc & anr* [1999] C.L.C. 551, (EWHC)

⁷⁹ Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12

⁸⁰ Case C-281/02 *Owusu v Jackson* [2005] E.C.R I-1383 (CJEU). See further: Cedric Ryngaert & Jan Wouters, ‘Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction’, (2009) 40 *Geo. Wash. Int'l L. Rev.* 939. Note, however, that this rigid rule has been attenuated in the Brussels I Recast – see further *infra*.

⁸¹ Brussels I Regulation, art. 60

Other Countries

In Quebec, FNC is seen as an exceptional order.⁸² This has found its way into the jurisprudence of the Canadian Supreme Court, in the *Spar Aerospace* case.⁸³ This represents an evolution from earlier case law: in 1998, in *Recherches internationales Québec v. Cambior Inc.*,⁸⁴ litigation was returned to Guyana by the Quebec Superior Court, in part due to the nationality (and domicile) of the Guyanese claimants. Exceptionality has since been reaffirmed in the *Kilwa* case.⁸⁵ However where there is no ‘serious connection’ with Canada based on ten indicative factors, a court may decline its jurisdiction.⁸⁶

Canadian common-law provinces, although not sharing the exceptionality provision with Quebec, nonetheless operate a similar test, derived from *Spar Aerospace*.⁸⁷ *Lubbe v Cape*, the English case, has also been cited with approval to found a similar test of substantial justice. In *Wilson v Servier Canada*,⁸⁸ the Ontario Superior Court refused to use FNC in a product liability class action brought by French plaintiffs for injuries suffered in France. It held:

‘France does not have class proceedings legislation. To require that the class members travel to France to present individual claims in protracted, expensive and extremely complex litigation would effectively deny them access to justice. When a stay would lead to a denial of justice to the plaintiff, a stay will not be granted: *Lubbe v. Cape plc*,... There would be a very significant loss of juridical advantage if they were not permitted to proceed with their action... in Canada.’⁸⁹

⁸² Quebec *C.Civ* art. 3135: ‘Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute’.

⁸³ *Spar Aerospace Ltd v American Mobile Satellite Corp.*, [2002] CSC 78, (CSC). Claire Bright, ‘L'accès à la justice civile en cas de violations des droits de l'homme par des entreprises multinationales’ (PhD thesis, EUI 2013) 104.

⁸⁴ [1998] QJ No 2554

⁸⁵ *Association canadienne contre l'impunité v. Anvil Mining Ltd.*, 2011 QCCS 1966, (QSC), overruled on appeal on a different ground: 2012 QCCA 117, (QCA).

⁸⁶ *Spar Aerospace*, *supra* at [71]; *Yassin v. Green Park International Inc.*, 2010 QCCA 1455, (QCA), where the Quebec Court of Appeal dismissed a claim against a Quebec corporation carrying on business in the West Bank, which had no assets in Canada and was only incorporated there for the purposes of domestic tax avoidance in Israel. See esp. at [85]-[86]: ‘The appellants are correct to argue that the principal party, Gideon Badt, who chose to incorporate in Quebec in order to take advantage of tax benefits, cannot now avoid the obligations arising from his choice. That said, the fact remains that the dispute pits citizens of the West Bank against corporations carrying out work in the West Bank in compliance with the law applicable in the West Bank. It requires a great deal of imagination to claim that the action has a serious connection with Quebec.’

⁸⁷ See, *inter alia*, *Mazda Canada Inc. v. Cougar Ace (The)* [2009] 2 FCR 382, (CFCA) at [11];

⁸⁸ (2000) 50 OR (3d) 219, [2000] O.J. No. 3392, (SCJO)

⁸⁹ *ibid*, at [34]

Canada's application of FNC as it is applied today is substantially similar to the U.K.,⁹⁰ save in respect of two aspects. First, there is no further limit which is imposed by legislation such as the Brussels I Regulation in the EU. Second, the *Spar Aerospace* test explicitly incorporates the possibility of enforcement of the judgment in another jurisdiction, while the U.K. test does not. Nonetheless, as regards suing Canadian companies at home, the jurisdictional exercise is substantially more generous than in the U.S.

Australia apparently goes even further than Canada and the U.K.. According to *Voth v Manildra Flour Mill*,⁹¹ the High Court of Australia held that 'cases will only be dismissed... if the relevant Australian jurisdiction is a "clearly inappropriate forum"'.⁹² It has been argued that this has led to far fewer FNC challenges being brought in TNE cases.⁹³ In some respects, however, the *Voth* test incorporates elements of the English test from *Spiliada*, incorporating the same factors in assessing appropriateness.⁹⁴ However when the test was reaffirmed in *Dow Jones & Co, Inc. v. Gutnick*,⁹⁵ Kirby J noted that the Australian test was arguably more protective of Australian courts' jurisdiction than the English doctrine.⁹⁶ Brand and Jablonski conclude that Australia 'remains the most difficult common law jurisdiction in which to succeed on a *forum non conveniens* motion'.⁹⁷

(iii) *Lis pendens*

Interestingly, the CJEU judgments on antisuit injunctions somewhat bypassed certain civil law courts. Where proceedings have already begun in another State, French private international law provides that the French courts have a discretion to decline jurisdiction providing that the dispute is the same, and the foreign judgment would be recognized in the forum.⁹⁸ This has never been the subject of a challenge before the CJEU. In article 34 of the Brussels I recast regulation, this possibility has now been included in EU law, allowing the court of a Member State which has jurisdiction under the regulation to stay its proceedings in favour of a third State, where:

⁹⁰ See: Joseph, (n 30) p.127

⁹¹ (1990) 171 CLR 538, (HCA).

⁹² Joseph, (n 30) 123

⁹³ *ibid*, 124; Peter Prince, 'Bhopal, Bougainville and Ok Tedi: Why Australia's *Forum Non Conveniens* Approach is better' (1998) 47 ICLQ 573

⁹⁴ *Voth*, *supra* n.91 and see: Brand & Jablonski, (n.64) 91-5

⁹⁵ (2002) 210 C.L.R. 575, (HCA)

⁹⁶ *ibid*, 641; *per* Kirby J, concurring

⁹⁷ Brand & Jablonski, (n.64) 100

⁹⁸ French C.Cass., Ch. Com., 19 February 2013 (N° de pourvoi 11-28846),

‘proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:

- (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
- (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.⁹⁹

Article 34 provides an equivalent for concurrent proceedings which are merely related, and not identical. This is functionally similar to a *forum non conveniens* stay, except that proceedings must have already begun elsewhere. However, it gives TNEs an important forum-selection tool; it allows for, if not a torpedo, at least an underwater mine, in the rush to litigate. In the English courts, for example, unless and until the CJEU says otherwise the test of ‘necessary for the proper administration of justice’ is likely to be interpreted in a similar way to the *Spiliada* test.

(iv) Blocking Statutes

The *forum non conveniens* doctrine provides a self-referential limit on home-state jurisdiction. However, attempts are also sometimes made by the host-state to restrict or prevent an exercise of jurisdiction by the home-state. The most common of these is the use of ‘blocking statutes’ which purport to restrict host-state citizens’ right to sue elsewhere. We saw an extreme example of this in Chapter 1, where Papua New Guinea, pursuant to an agreement with BHP Ltd., made it a criminal offence to seek compensation in foreign courts in respect of the Ok Tedi mine.¹⁰⁰ More banal examples of blocking statutes also exist, and the practice is more widespread – including among developed nations – than might at first be supposed. In *Wilson v Servier*, above, it was argued that article 15 of the French civil code, which grants jurisdiction to French courts over French defendants, would operate to frustrate enforcement of any judgment of the Ontario courts.¹⁰¹

Blocking statutes are usually perceived as an interference with the jurisdiction of the home-state courts and a violation of the principle of judicial comity. In *Wilson*, Cumming J stated that a blocking statute ‘has no place in the contemporary, interconnected world of globalization and

⁹⁹ Regulation 1215/2012, article 33

¹⁰⁰ *Dagi v BHP Ltd & Ors* [1995] VicSC 524 (25 September 1995), (ASCV)

¹⁰¹ *Wilson v Servier* (2000) 50 OR (3d) 219, [2000] O.J. No. 3392, (SCJO), at [25]-[28]. See Audit, *Droit International Privé*, (4th Ed.) (Paris : Economica, 2006) 299-300, 379-80.

global trade, which depends upon mutual recognition and respect for settled international norms, including the principle of comity'.¹⁰² In another case involving *Servier*,¹⁰³ this time in England, *Servier* claimed it would be liable to criminal prosecution in France if it disclosed material prohibited by a trading statute.¹⁰⁴ Perhaps unsurprisingly, the Court of Appeal concluded that the English courts could nonetheless order disclosure, although their reasoning was more nuanced than the Australian courts in *Dagi*. Although a court could not order disclosure if such disclosure would be an offence in England, 'the risk of prosecution in another country is not an absolute reason for refusing to answer questions or to produce documents and the privilege against self-incrimination does not provide otherwise'. However, the disclosure orders 'were orders of a procedural nature in the pending claims and their making was, therefore, governed by the *lex fori*, namely the law of England and Wales... The English court still retains a jurisdiction under the *lex fori* to make them'.¹⁰⁵

Approaches to blocking statutes tend to depend greatly on context. In *Mackinnon v Donaldson Lufkin & Jenrette Securities Corp*,¹⁰⁶ the English High Court, discussing the position of banks whose duty of confidence is often regulated criminally, pointed out that:

'If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure'.¹⁰⁷

The court therefore needed to show a degree of deference where foreign sovereignty would be infringed. It refused to order the production of documents held by an American bank at its offices in New York. By contrast, the court in *Dagi* avoided the clash of sovereignties by directing its attention towards the defendant. On the facts as proved,¹⁰⁸ BHP had directly participated in the

¹⁰² *Wilson*, *supra*, at [30]

¹⁰³ *Secretary of State for Health v Servier Laboratories* [2014] 1 W.L.R. 4383

¹⁰⁴ *Loi N° 68-678* of 26 July 1968, which provides: 'Sous réserve des traités ou accords internationaux et des lois et règlements en vigueur, il est interdit à toute personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier, ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci.'

¹⁰⁵ [2014] 1 W.L.R. 4383 at 4420 *per* Rimer LJ

¹⁰⁶ [1986] Ch. 482, (EWHC)

¹⁰⁷ *ibid*, at 494, cited with approval by the House of Lords in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation & Ors* [2004] 1 A.C. 260 at 274, (HL)

¹⁰⁸ By a difficult process of oral and secondary evidence, as all physical copies of the legislation and the agreement which had given rise to it were held by the Papuan government.

drafting of the blocking statute. In fact it was based on and pursuant to a written agreement drawn up between the Papuan government and the company. It was this participation which the Australian court regarded as an interference with its jurisdiction. It consequently held BHP to be in criminal contempt of court.¹⁰⁹ This is interesting because it represents an important limit on the misuse by TNEs of their bargaining power; although they may indeed be able to dictate terms to host-states, they are not immune from legal consequences in their home-state if they do so.

In conclusion, although practice varies, blocking statutes may present a lesser or a greater barrier to home-state regulation. However, except in cases such as *Kilma*, above, where the defendant is in reality a 'shell' company with no assets, there will usually be at least some possibility of enforcement of any judgment against the defendant. Failing that, there is the possibility which was taken in *Dagi*, to hold the defendant in contempt where they have participated in or procured the interference with the court's jurisdiction.

B. Conflict of Laws

Choosing the law applicable to a dispute has major practical consequences as it is according to that law that the forum will determine, amongst other things, the basis and extent of liability. This will include the determination of persons who may be held liable for acts performed by them; the grounds for exemption from liability and division of liability; the existence, the nature and the assessment of damage or remedy claimed; the persons entitled to compensation for damage sustained personally; the liability for the acts of another person; and the manner in which an obligation may be extinguished. As with jurisdiction, applicable law may contribute to or be affected by the other problems which bear upon TNE liability. In this section I consider the traditional private international law responses in cases of tort/delict against the possibility of instead applying the law of the home-state or the *lex fori*.

(i) The Applicable Law under Traditional Conflict of Laws Rules

Theoretically, various approaches exist to determine which law is applicable in the case of tort cases against multinational corporation groups for.¹¹⁰ However, under the traditional Savignian conflict of laws rule for torts, the applicable law usually vacillates between the *lex loci damni* and the

¹⁰⁹ *Dagi v BHP*, *supra* n.100

¹¹⁰ See M. Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 Wash L.J. 399 at 415-418; See also G. Betlem, 'Transnational Litigation against Multinational Corporations before Dutch Civil Courts', in M. Kamminga and S. Zia-Zarufi (eds.), *Liability of Multinational Corporations under International Law* (Kluwer Law International, 2000) pp. 283 et s.

lex loci delicti commissi. This is embodied in European private international law. For example, Article 4 of the 'Rome II' Regulation states that:

‘the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.’¹¹¹

Article 4(1) thus lays down a general conflict of laws rule, to wit that the applicable law for torts is the law of the country in which the damage occurs. This rule, known as the *lex loci damni*, has traditionally been used in the comparative private international law of tort as an alternative to the *lex loci delicti* (i.e. law of the place where the event giving rise to the damage occurred) and to the *lex fori* (i.e. law of the forum).¹¹² However, difficulties have arisen in cases where the country in which the damage occurred differs from the country in which the event giving rise to the damage occurred, as illustrated by the *Mines de Potasse* case discussed previously,¹¹³ in which the pollution in question, a salt leak, originated in France, went through German waters, and ended up causing damage in the Netherlands.

As a result of this problem, States have had to choose (or leave it up to the victims to choose) between the *lex loci damni* and the law of the place where the event giving rise to the injury occurred (*lex loci delicti commissi*). The drafters of Rome II justified their choice of the former by stating that ‘a connection with country where the direct damage occurred [...] strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability’.¹¹⁴ One of the main arguments in favour of the *lex loci damni* is that, by making applicable the law of the country of injury, it actually points to the place where the tort materialized, facilitating localization as a result. In addition, the damage is the starting point of the intervention of tort law, since liability does not always depend on a fault on the part of the tortfeasor but may result from

¹¹¹ Regulation (EC) N° 864/2007 of the European Parliament and of the Council of the 11 July 2007 on the law applicable to non-contractual obligations (Rome II) applicable to all Member States except for Denmark..

¹¹² M.-A. Moreau, *Structure du rattachement et conflits de lois en matière de responsabilité civile délictuelle* (thèse Université de droit, d'économie et de sciences sociales de Paris, 1985).

¹¹³ Case 21/76, *Bier BV v Mines de Potasse D'Alsace SA* [1976] ECR 1735 (CJEU). The facts are set out in Chapter 1, p.63

¹¹⁴ Rome II, Recital 16.

a strict liability regime.¹¹⁵ Moreover, it might be considered that the State in which the damage occurred has “a comparative regulatory advantage” to have its law applied to the situation.¹¹⁶

Nonetheless, this rule has been criticized as being excessively detrimental to the tortfeasor in cases such as *Mines de Potasse*, where the injury was not objectively foreseeable.¹¹⁷ In addition, it has been considered as being unfair to non-European victims by making it unlikely for a European legal system to apply in situations where the tort is committed by the non-European subsidiary of a European head-office, thereby increasing the parties’ inequality even further.¹¹⁸ Moreover, it can sometimes be extremely difficult to determine precisely where the direct damage took place, which can encompass more than one country. Furthermore, it can be to the disadvantage of the victim who might not be acquainted with that specific law. In such cases as *Babcock v. Jackson*,¹¹⁹ although the injury occurred in one State (resulting from a car accident that occurred during a short trip in that State), most of the other elements pointed to another State (namely domicile of the parties and the insurer), it has been considered that applying the law of the place of injury would have been to the disadvantage of the victim (as the law of that State prohibited that specific action) and would have failed to take into account the interest that another State might have in having its law apply to the case.

As a result, Symeonides states that ‘the only balance the *lex loci damni* rule strikes between the parties is that it can be equally unfair to the plaintiff in some cases as to the defendant in others’.¹²⁰ It is for this type of cases that exceptions were added to Rome II, according to which ‘where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply’,¹²¹ and

¹¹⁵ H. Batiffol, *Aspects philosophiques du droit international privé*, (Daloz, 2002), 238.

¹¹⁶ Richard A. Posner, *Economic analysis of law* (7th ed) (Wolters Kluwer Law & Business: Aspen Publishers, New York, 2007),.

¹¹⁷ Symeon S. C. Symeonides, ‘Rome II and Tort Conflicts: A Missed Opportunity’,, (2008) 56 *American Journal of Comparative Law* 173

¹¹⁸ V. Van Den Eeckhout, ‘Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor’, (2011) Working Paper Series (July 26, 2011), Available at SSRN: <http://ssrn.com/abstract=1895690> at 12.

¹¹⁹ *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963) in which, pursuant to a traffic accident that occurred during a short trip in Ontario, the plaintiff, passenger in the car of the defendant (that had been driving) sued the latter for the injury sustained. Both the plaintiff and the defendant were from New York, as well as the insurer. For discussion, see above, Chapter 1, p.65.

¹²⁰ Symeon C. Symeonides, “Rome II and Tort Conflicts ...”, *op. cit.* n.117 at 22.

¹²¹ Article 23 of the Regulation goes on saying that: “the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. Where the event giving rise to the damage occurs, or

‘where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than indicated in paragraphs 1 or 2, the law of that other country shall apply’.

However, one of the main advantages of this rule is that it makes it possible to subject the tortfeasor to the law of the country in which his actions caused some harm, which is a law that he or she could and should know. It therefore respects the expectations of the parties, or at the very least those of the tortfeasor (if the *lex loci delicti commissi* differs from the *lex loci damni*, the expectations of the victim may be better respected by the *lex loci damni*). Another advantage is that, for complex cross-border torts, it may sometimes be easier to determine where the event giving rise to the damage occurred, as opposed to where the injury occurred.

Wherever the damage occurred, Article 14 of the Rome II Regulation makes it possible for the parties to agree upon the applicable law after the dispute has arisen. This is a manifestation of the increasing pervasion of party autonomy¹²² throughout the different areas of private international law. However, the choice is limited by the fact that it has to be made after the dispute has arisen, and more importantly, the article specifies that such agreement cannot prejudice the mandatory rules of a State other than the one which law has been chosen, and in which all the other elements of the situation are situated at the time when the event giving rise to the damage took place. This rule is aimed at avoiding a complete detachment from regulatory rules which can sometimes occur as a *effet pervers* of party autonomy.¹²³ In tort cases, the place where “all the other elements of the situation are situated at the time when the event giving rise to the damage took place” usually points to the *lex loci damni* or the *lex loci delicti commissi*. As a result, taking these different rules together, in cases where a TNC is conducting activities which damage the environment (resulting in injury to people) through its subsidiaries, the mechanism of applicable law under the Rome II Regulation does usually point to the law of the “host country” as the applicable law for the tort (either as the

the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence”.

¹²² P. Nygh, *Autonomy in International Contracts* (Clarendon Press, Oxford, 1999); J.-P. Niboyet, ‘La théorie de l’autonomie de la volonté’, (1927) 16 RCADI 1.

¹²³ R. Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age’, (2002) *Columbia Journal of Transnational Law* 209; L. Radicati di Brozolo, ‘Mondialisation, jurisdiction, arbitrage: vers des règles d’application semi-nécessaires?’, (2003) *rev. crit. DIP*, 1; H. Muir-Watt and L. Radicati di Brozolo, ‘Party Autonomy and Mandatory Rules in a Global World’, (2004) 6 *Forum du droit international* 2 ; C. Gibson, ‘Arbitration, Civilization and Public Policy : Seeking Counterpoise between arbitral Autonomy and the Public Policy Defense in View of foreign Mandatory Public Law’, (2009) 113 *Penn St L Rev* 1127; G. P. Romano, ‘Règles internationalement supplétives et règles internationalement disponibles’, in *Regards comparatistes sur le phénomène contractuel*, (PUAM, 2009). H. Muir-Watt, “Party Autonomy” in *International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, (2010) 3 *European Review of Contract Law* 250

lex loci damni or as the *lex loci delicti*, or both). This solution is not entirely satisfying, and I now turn to consider the possibility of using the law of the home-state instead.

(ii) *Lex Domus*? Justifications for Applying Home-State Law

It could be argued that the Rome II solution is satisfying and respects the spirit of tort law by making applicable the law of the country that has the most territorial proximity with the tort. In the Bhopal case for instance, the damage occurred in India, the victims were Indian and the event giving rise to the damage occurred – at least materially – in India. Nevertheless, when it comes to multinational corporate groups causing environmental and/or social harm, the idea of territorial proximity may need to be rethought of in order to take into consideration the economic reality of the business entity as well as the needs of victims to be granted an enhanced access to substantive justice, and the needs of the society as a whole in having higher environmental standards globally.

Indeed, as we have already seen, the solution pointing at the law of the host-state as the applicable law often results in the victims not being properly compensated if compensated at all, as in Bhopal, which in turn, points to a failure to perform any corrective or distributive function traditionally attributed to tort law to satisfy, nor does it play a deterring role. Likewise, there may be sound administration of justice reasons for preferring home-state jurisdiction where the home-state has a developed legal system.

Where the home-state is a developed State and the host-state is not, it may be that the law of the home-state, where the parent or controlling enterprise is based is more beneficial to victims than *vice versa*.¹²⁴ Anderson argues that –

“generally speaking, parent companies are located in economically developed States that have had the opportunity to develop more sophisticated and generous rules for compensation. Their longer history of environmental degradation, the higher incomes, and the greater freedom to develop complex rules tend to endow them with substantive tort rules better adapted to deal with environmental claims”.¹²⁵

As I have noted, this appears to no longer be the case, with one-third of FDI flows now coming from developing countries (although doubts have been raised as to the sustainability this trend).¹²⁶ Conversely, if the host-state is a developing county, or otherwise bears the hallmarks of legal underdevelopment discussed earlier, is more likely to have lower standards. In the Bhopal case, it

¹²⁴ L.F.H. Enneking, ‘Crossing the Atlantic? The political and legal feasibility of European foreign direct liability cases’, (2009) *The George Washington International Law Review* 4.

¹²⁵ Michael Anderson, ‘TNCs and Environmental Damage: Is Tort Law the Answer?’ (2001) 41 *Wash. L.J.* 399

¹²⁶ See above, p.85

was argued that applying American standards as opposed to Indian ones would have been beneficial to the victims. However, this is a two-edged sword: if – consistent with recent trends – the home-state law is itself less developed than that of the host-state, applying it to a case could end up being an own goal from the point of view of correcting an injustice, exacerbating rather than alleviating the problem. Second, as I argued in the previous section, developed States are still susceptible to legislative bargaining, competition and political influence. Opting for home-state law could therefore potentially merely shift the focus of such tactics by TNEs and result in a weakening of their own legal rules or their scope.

C. Recognition & Enforcement of Judgments

(i) Host-State Refusal to Enforce

The problems when it comes to execution of judgments in a different State are complex, but two situations are of particular interest to us in respect of TNEs. The first is that specific legislation, such as the blocking statutes discussed earlier, may prevent the execution of judgments in specific cases. Where a TNE has most, or all, of its assets in the other State, this may operate to substantially frustrate any liability and thus home- or host-state regulation. Clearly, there is little that can be done about this: ultimately courts of one State have limited powers to ‘reach’ into the jurisdiction of other sovereigns.

However, there is a practice widely used in the U.S. of anonymising plaintiffs who have cause to fear reprisals if they are named to a foreign court action. This technique was used in the litigation against Unocal in respect of its activities at the Yadana pipeline in Burma/Myanmar. The two class actions lawsuits were begun in the names “Doe” and “Roe” (the U.S. legal system’s surname of choice for persons unknown).¹²⁷ Where permitted, this may offer a very effective protection against the operation of blocking statutes, and in particular criminal prosecution or retribution in the host-state. Although it has gained prominence as a U.S practice, possibilities for its use exist elsewhere, certainly in England.

(ii) Public Policy Limitations

The second situation may operate as a limit on enforcement in either host- or home-state. In Chapter 1 I discussed the various aims of private and criminal law, noting that compensation is often regarded as the ‘primary’ aim of tort law. Where the legal system takes a strict approach to this, it may view an attempt to go beyond mere compensation as unacceptable. Most systems of

¹²⁷ *Doe v Unocal*, 403 F. 3d 708 (9th Cir, 2005). The facts are discussing in Chapter 1, p.80

private international law admit for exceptions based on the public policy (*ordre public*) of the forum. This can operate in a number of ways: by refusing the application of the law designated as applicable by the conflict of laws rule;¹²⁸ refusing to recognize the legal effects of a foreign decision;¹²⁹ and by refusing to recognize and/or enforce a foreign judgment. It is this last possibility which interests us here.

In Chapter 1, we examined the extent to which different rules effectively deter or prescribe future behaviour. I argued that unless damages awards or fines force enterprises to reinternalize negative externalities, there will be a limit to such prescriptive aims as regards enterprises generally, and TNEs in particular. However, the public policy exception may present a further barrier where TNEs are concerned. As Gotanda notes, '[m]ost civil law legal systems limit recovery of damages in private actions to an amount that restores a party to its pre-injury condition... As a result, they may refuse to recognize and enforce a foreign court judgment'.¹³⁰ In Germany, the *Bundesgerichtshof* has, indeed, refused to recognize U.S. judgments with a punitive damages element.¹³¹ Clearly, whenever the home-state refuses a judgment over one of its corporate citizens from another jurisdiction or the home-state refuses to recognize home-state decisions on such a basis, this may present a further barrier to TNE liability. This may even operate to frustrate the regulatory aim of the foreign legal measure. Staying with the punitive damages example, where this reflects a particular regulatory balance that would otherwise need to be met by other forms of liability (such as administrative or criminal liability), it may contribute to generating cross-border impunity gaps, since the TNE in question will be able to avoid the normal operation of regulation in one area it does business.

2. Criminal Law & Administrative Liability

(i) Criminal Law

What of criminal or administrative regulation by home-states? Traditionally, the rules on the scope of application of criminal law were rules of purely domestic law: they were derivative of State

¹²⁸ For the English doctrine, see *Kuwait Airways Corp. v Iraqi Airways Co. et al* [2002] UKHL 19, (HL), and see Fawcett & Carruthers. *Cheshire, North & Fawcett Private International Law*, (14th Ed.)(OUP, 2008) 139 et seq. In France, for example, the right of divorce is considered to be d'ordre public: French C.Cass. 1^{ère} Ch. Civ., 15 May 1963, Patiño.

¹²⁹ In France, this is known as 'l'effet "attenué" de l'ordre public' and is less extensive than where public policy is used to justify the disapplication of the law otherwise applicable. See Audit, *Droit International Privé*, (4th Ed.)(Paris : Economics, 2006), p.262 et seq.

¹³⁰ John Y. Gotanda, 'Punitive Damages: A Comparative Analysis', Villanova University School of Law Working Paper 2003/8, pp.5-6

¹³¹ See Ernst C. Stiefel et al., 'The Enforceability of Excess U.S. Punitive Damage Awards in Germany', (1991) 39 Am. J. Comp. L. 779; Peter Hay, 'The Recognition of American Money Judgments in Germany – The 1992 Decision of the German Supreme Court', (1992) 40 Am. J. Comp. L. 729

power in the same way sketched above in relation to private law, and even more so as criminal law was considered one of the most typical exercises of the State's power over its territory, and its citizens.¹³² This quickly led criminal law to confront the same paradox as private international law, giving rise to two opposing views of the limits that international law imposes upon States' power to assert their prescriptive jurisdiction over crimes. On the one hand, as States are equally sovereign and independent, and as 'international law governs relations between independent States,' the rules of law binding upon States 'emanate from their own free will'; 'restrictions upon the independence of States cannot therefore be presumed'.¹³³ According to this view, while international law prohibits States from exerting their powers on the territory of another State (so-called enforcement jurisdiction), it does not include any general rule limiting their power to make their laws applicable to facts committed on foreign soil, either by citizens or by foreigners. On the other hand, the same principle of the equal sovereignty of States was intended to restrict their power to assert jurisdiction over facts committed abroad. As the logical source of a principle according to which national laws only apply on the national territory,¹³⁴ some authors argue that the principle of the freedom of States, as emerges from the *Lotus* judgment, is no longer valid, and that the general rule is nowadays that States must justify their exercise of extraterritorial jurisdiction, which would otherwise constitute a violation of international law.¹³⁵

This traditional clash between two theories is also often historically justified: on the one hand, many cite Roman and medieval sources attesting the existence of the principles of active and

¹³² See for instance G. J. Fierro, *La ley penal y el derecho internacional*, Buenos Aires, ed. Depalma, 1977, p. 61; F. A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, (1984) RCADI 9, at 20.

¹³³ In the words of the Permanent Court of International Justice in the famous *Lotus* case: *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). According to some authors, the principle of the freedom of States is still valid in international law: see for instance M. Bos, *Rapport*, in 65 *Annuaire de l'Institut de Droit International*, 1993, 13 ff., at 38.

¹³⁴ Reference is made to the dissenting opinions attached to the *Lotus* judgment cited above, in particular those of Judge Loder, Judge Weiss and Lord Finlay. Also see Oppenheim's *International Law*, IX ed., vol. I (Peace), § 137, p. 458 (according to which, territoriality and active personality are the only justified principles governing national criminal jurisdiction).

¹³⁵ See in particular C. Ryngaert, *Jurisdiction in international law*, (OUP 2008), p. 21. This also seems to be the approach of the Harvard Research in International Law, whose end result (a Draft Convention on jurisdiction) included a list of admissible principles of jurisdiction while excluding the legality of any assertion of jurisdiction not based on these principles, or exceeding their limits: see *Jurisdiction with respect to crime*, Introductory comment, in 29 *AJIL* 1935, Supplement, p. 446.

passive personality, and of protection;¹³⁶ on the other, the primacy of the territoriality principle is linked back to the traditions of England and of the USA.¹³⁷

(ii) Administrative Law

Administrative provisions by the home-state will usually relate to export controls, or restrictions on practising a regulated activity. Francioni has argued that where there is a hazardous export (such as waste) and the actions of a TNE breach of a substantive norm of international law sufficient to create a regulatory duty on the home-state, that State can be internationally responsible for its failure to hold the TNE to account.¹³⁸ This is interesting, since not only does it posit the existence of such administrative controls, it also implies a failure by a home-state to regulate may be an internationally wrongful act, creating an obligation upon home-states to provide proper export processing regimes. In the case of Private Military and Security Companies, for instance, international regulation may require States to provide, at a minimum, to operate a system of permits and licences.¹³⁹ In this sense a manifest injustice would be created where the home-state failed in fact to regulate.

Since *ex ante* export licensing and outward control over TNEs will restrict their market access to any potential host-state without prior authorisation from the home administrative authorities, it is clear that such export processing can be a powerful tool in both prescribing TNE behaviour by ensuring compliance with home-state regulatory standards (where these exist) and preventing harm. It may also be theoretically possible for victims to pursue the home-state before certain tribunals (such as human rights courts) to obtain some measure of compensation *ex post*.

The obvious limitation to export controls will be where a TNE has managed to organize itself so as to escape being caught by the regulations. This may be possible through various forms of offshore business structures. An example is provided by Blackwater. According to the investigative journalist Jeremy Scahill, Blackwater, in addition to its U.S. based operations, incorporated a

¹³⁶ See S. Chybichowski, *La compétence des tribunaux à raison d'infractions commises hors du territoire*, in *Recueil des Cours de l'Académie de droit international*, 1926, II, 251; Ryngaert (n15) and works cited.

¹³⁷ See for instance M. Hirst, *Jurisdiction and the ambit of the criminal law*, OUP 2003, p. 28 et seq; Ryngaert (n 15) 42-84

¹³⁸ Francesco Francioni, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?', in F. Francioni & T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (London/Boston: Graham & Trotman, 1991), 275 – 298

¹³⁹ Francesco Francioni, 'The Responsibility of the PMSC's Home State for Human Rights Violations arising from the Export of Private Military and Security Services' (EUI WP AEL 2009/18)

second company called Greystone Ltd in Barbados.¹⁴⁰ It is not difficult to see how a TNE which is sufficiently diversified globally could divert materiel strategically in order to avoid export regulations, albeit that this is probably an extreme case applicable to relatively few TNEs currently operating.

3. Regulatory Competition in Home States

The problems we discussed in chapter 1 are equally relevant in the case of home-states. A high profile example of underenforcement in a home-state context is to be found, in that of the private military company Blackwater. Scahill claims that Blackwater lobbied extensively and used its close links to the Bush administration to ensure that those appointed for oversight and control of government contracts would act in the interests of the company and industry, rather than the public interest. This culminated in a large amount of inaction on the part of the Department of State inspectorate in investigating Blackwater's activities in Iraq and even, allegedly, active obstruction.¹⁴¹ If true, it is a damning indictment of the democratic integrity of the U.S. executive at the time and reinforces what was said in the preceding section that even powerful home-states are not immune from political influence.

Whether the home-state is a developed or developing country, interjurisdictional competition is no less of a problem. First world countries, as much as the developing world, may suffer from interjurisdictional competition and the fear that unilaterally reinforcing legal rules will cause companies and their capital to flee abroad. A good example was the discussion in the U.K. and elsewhere about increasing regulation of the banking sector following the financial crisis, with the concern that 'overly prescriptive measures ... would encourage top executives to move abroad'.¹⁴²

The invisible hand of the market can also be felt in judicial decisions which show excessive deference to the executive branches of both the host- and home-states. In the *Lago Agrio* litigation, Ecuadorian and Peruvian citizens sued Texaco in the U.S., claiming that oil operations polluted the rainforests and rivers in the *Lago Agrio* region, causing environmental damage and health problems to nearby residents. In the first round, Ecuador intervened aggressively against the litigation. In a letter to the U.S State Department, it asserted that the actions were 'an affront to Ecuador's national sovereignty'.¹⁴³ An *amicus curiae* brief followed, again supporting Texaco's

¹⁴⁰ Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army*, (London: Serpent's Tail, 2008), 433 – 437

¹⁴¹ *ibid*, 209 – 230

¹⁴² <http://www.forbes.com/feeds/afx/2009/08/12/afx6770168.html> (accessed 30 February 2010)

¹⁴³ *Jota v Texaco, Inc.*, 157 F.3d 153, 156 (2nd Cir., 1998)

attempt to have the case dismissed.¹⁴⁴ The district courts felt obliged, in part on grounds of comity, to remit the cases to Ecuador.¹⁴⁵

In 1996, following political changes in Ecuador, the State radically changed its position, and attempted to intervene in the U.S. litigation *on behalf of the plaintiffs*.¹⁴⁶ This led the Court of Appeals for the 2nd Circuit to grant an appeal against dismissal, holding *inter alia* that

‘Upon remand, it will be appropriate for the District Court to give renewed consideration to the comity issue in light of all the then current circumstances, *including Ecuador’s position with regard to the maintenance of this litigation in a United States forum*.’¹⁴⁷ (emphasis added)

Following that decision, Ecuador refused to intervene further on that basis that it did not wish to waive its sovereign immunity.¹⁴⁸ Texaco in turn stated that it would submit to the jurisdiction of the Ecuadorian courts.¹⁴⁹ In 2002 the Court of Appeals affirmed the judgment and the first round came to an end. But the risks such deference in such a publicist, comity-oriented approach are clear from the ensuing rounds. In 2003 the plaintiffs brought a case in Ecuador, which was plagued by allegations of corruptions and misconduct levelled by Chevron (Texaco’s legal successor) against the Ecuadorian judiciary. Cutting a long story short,¹⁵⁰ the lower courts found for the plaintiffs, and once the case had been to Ecuador’s highest court damages were owed by the enterprise to the tune of U.S. \$9.51 billion. In a final bizarre twist, an ongoing fraud lawsuit by Chevron against the plaintiffs’ lawyers exposed widespread misconduct by the latter in the Ecuadorian litigation, leading a New York District Court to declare ‘if ever there were a case warranting equitable relief with respect to a judgment procured by fraud, this is it’.¹⁵¹ In an extensive judgment, it found that the plaintiff lawyers had bribed judges and experts, and interfered in the drafting of evidence and judgments, and promptly made orders preventing the lawyers from enforcing the Ecuadorian judgments anywhere in a world and requiring restitution of any proceeds they took from enforcement by other parties.

¹⁴⁴ *ibid*, at 157

¹⁴⁵ *Aguinda v. Texaco, Inc.*, 945 F.Supp. 625 (S.D.N.Y.1996); *Sequibua v. Texaco, Inc.*, 847 F.Supp. 61 (S.D.Tex.1994)

¹⁴⁶ *Jota*, *supra* n.143 at 158

¹⁴⁷ *ibid*, at 161

¹⁴⁸ *Aguinda*, *supra* n.145, at 475

¹⁴⁹ *ibid*, at 476

¹⁵⁰ For various accounts, see <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (accessed 5 Jan 2015);

¹⁵¹ *Chevron Corp. v. Donziger et al*, 974 F.Supp.2d 362 (S.D.N.Y., 2014)

There is a great deal that could be said about the *Lago Agrio* cases,¹⁵² but for present purposes let us focus on the results of the comity-based *forum non conveniens* decision of round one. As the subsequent racketeering showed, significant problems can ensue from a refusal by a home-state to keep litigation in the forum. Having agreed to submit to Ecuador's jurisdiction (a condition on the exercise of *forum non conveniens*), Chevron later reportedly lobbied hard at the U.S. Government to end trade preferences with Ecuador over the lawsuit.¹⁵³ Ultimately, what is important from my perspective is that retaining, or declining jurisdiction is never a neutral act from the perspective of international relations or its legal reflection judicial comity. Had the U.S. courts retained jurisdiction, it is likely that Ecuador (at least in the first phase) would have been very upset. However, as the second round showed the opposite result could just as easily be produced.

II. Extraterritorial or Universal? "Third-State" Intervention

Supposing the barriers to both host- and home-state regulation prove insuperable, the question remains whether the TNEs operating in this legal no-man's land may be apprehended by another State. In order to exert jurisdiction in such a situation, what conditions would need to be met? This section attempts to provide a limited answer to that question, through a discussion of the restrictive doctrine of criminal universal jurisdiction, followed by the possibilities for wider, civil jurisdiction.

1. Universal Criminal Jurisdiction

The concept of "universal" jurisdiction dates back to the sixteenth century, but has been rediscovered and applied more recently, particularly in criminal cases involving the commission of so-called "core crimes" or violations of *jus cogens* norms of international law. Historically, the re-emergence of the concept was linked to piracy; pirates, having forsaken nationality and being ostensibly based outside of national territories, were *hostis humani generis*, the enemies of all mankind. Indeed, it could be said to that pirates were the first truly transnational criminals, thus the crime of piracy could not be entirely left to States acting alone but needed an international coordinating rule to enable their apprehension. In an international system which did not have international courts and tribunals, it fell to State courts to become the new international criminal judge.¹⁵⁴

¹⁵² Cf. Sarah Joseph, 'Protracted lawfare: the tale of Chevron Texaco in the Amazon', (2012) 3 *J.H.R. & Env.* 70

¹⁵³ <http://www.newsweek.com/chevron-lobbyists-fight-ecuador-toxic-dumping-case-93189> (accessed 3 Dec 2014); <http://www.earthrights.org/campaigns/chevron-attempts-escape-liability-environmental-destruction-ecuadorean-amazon> (accessed 3 Dec 2014)

¹⁵⁴ On the emergence of universal jurisdiction with regard to pirates see, in particular, A. Cassese, *International criminal law*, OUP 2003, p. 284; M. C. Bassiouni, *Universal jurisdiction for international crimes*, in 42 *Va. J. Int'l L.* (2001), 81, at 108 ff.

Piracy is important in the development of modern jurisdiction, and for international criminal law, since it may be argued that pirates were the first legal entity, other than States, capable of breaking international rules. But in the literature on piracy in international law, the intertwining of piracy and commerce is often overlooked. Privateering, of one sort or another, has always been big business: Sir Francis Drake provides one historical example.¹⁵⁵ In the Napoleonic wars, hands signing on to British privateers under a letter of marque often expected not a salary, but to receive a share of the profits of any vessels and cargo seized. In the U.S. case of *Bolchos v. Darrell*,¹⁵⁶ a French captain captured a Spanish slave ship containing slaves owned by a British subject. Leaving aside the slavery element, it is significant that the lawsuit concerned who had a right to the cargo or its saleable value.

As Ryngaert explains, '[n]owadays, the main offences arguably amenable to universal jurisdiction are the so-called "core crimes against international law," which include crimes against international humanitarian law and crimes of torture'.¹⁵⁷ The current debate, however, has concentrated on the legitimacy of universal jurisdiction, in particular when exerted *in absentia*,¹⁵⁸ and has become increasingly polarized. While many scholars and NGOs view universal jurisdiction as a brilliant – and perfectly justifiable – solution to the problem of impunity for international crimes,¹⁵⁹ others contest its validity, using both legal arguments and diplomatic means.¹⁶⁰ In the 1990s universal jurisdiction rose to the fore due to its use by – in particular – Spain and Belgium. In response to the political firestorm which grew up around the *Arrest Warrant*¹⁶¹ and other high-profile cases, Belgium repealed its law and replaced it with one based on the traditional principles of territoriality, personality and protection. Spain eventually did likewise in 2009.

¹⁵⁵ See discussion in the introductory chapter.

¹⁵⁶ 3 F. Cas. 810 (D.S.C. 1795)

¹⁵⁷ Ryngaert (n 135) 110

¹⁵⁸ As happened in a number of cases involving the criminal jurisdiction of Belgium according to the law adopted on 16 June 1993; the Belgian law was subsequently amended and no longer allows for universal jurisdiction *in absentia*. On the evolution of the Belgian legislation see P. D'Argent, *L'expérience belge de la compétence universelle: beaucoup de bruit pour rien?*, in RGDIP, 5987 ff.

¹⁵⁹ See, for instance, with regard to (conditional) universal jurisdiction (i. e., not exerted in absentia), A. Cassese, *Is the bell tolling for universality?* In JICJ 2003, 589 ff.; also see, in general, the Amnesty International "No safe haven" series.

¹⁶⁰ See, contesting the validity and the legitimacy of the principle of universal jurisdiction, G. P. Fletcher, *Against universal jurisdiction*, in J. Int'l Crim. Just., 2003, p. 580 ff. (basing his criticisms, in particular, on the protection of the rights of the defendant, in particular with regard to double jeopardy); *Separate Opinion of President Guillaume*, attached to the ICJ judgment in the case of the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002 (the President contests the international legitimacy of universal jurisdiction and strongly criticizes its exercise *in absentia*, see para. 15 of the Opinion).

¹⁶¹ *Democratic Republic of the Congo v. Belgium, Arrest Warrant of 11 April 2000* [2002] ICJ 1, (ICJ)

As Rosa Raffaelli and I have argued elsewhere,

‘criminal law remains to a certain extent trapped by this publicist vision of the world – caught between international crimes with (some) universal jurisdiction, and domestic, state-derived, crimes based on strict territoriality and nationality principles. Transnational crimes, on the other hand, seem not to fit in this bipartite system: although serious, they are often not serious enough to justify the exercise of universal jurisdiction, as they do not qualify as core-crimes, while their repression by national States, according to traditional jurisdictional rules, leaves serious impunity gaps.

When it comes to debates opposing *territorial* and *extraterritorial* application of criminal law, and in particular universal jurisdiction, however, it is often unclear what exactly is meant by *territorial* jurisdiction. Indeed, if one of the reasons often cited in support of a stricter territorial application of criminal law is its capacity to reduce conflicts of jurisdictions, an analysis of the application of the territorial principle and of its historical evolution shows that it actually may foster conflicts between states, in particular in cases involving transnational crimes. Indeed, the perceived dividing line between territorial and extraterritorial application of the law is much more blurred than is often assumed; this simple fact, together with the generally accepted legitimacy of the extraterritorial application of criminal law in accordance with the principles of active personality and protection, surely complicates a debate that has often adopted a polarized view, but might also serve in identifying possible solutions.’¹⁶²

The desire to allow for prosecution of transnational crimes wherever they occurred, thus ensuring that there is no safe haven for cross-border criminals, led the UN General Assembly to call for the adoption, and later on to adopt, the UN Convention against Transnational Organized Crime and its Additional Protocols.¹⁶³ Their implementation, however, is still based on the traditional principles of jurisdiction. Territorial jurisdiction is mandatory, active and passive personality is allowed, and the *aut dedere aut judicare* rule is only mandatory for States not allowing for extradition of their own nationals.¹⁶⁴ It can thus be seen that, whatever the historical status of universality for certain “core” crimes, its availability today has been severely curtailed.

The Belgian chapter in case against Total regarding the Yadana pipeline atrocities in Burma provides an illustration.¹⁶⁵ In addition to the ATS civil claims, criminal proceedings were begun in

¹⁶² Wray & Raffaelli, ‘False Extraterritoriality...’ *op. cit.*, n.6, at 119. On the distinction between truly universal jurisdiction, exerted over core crimes with a view to protecting fundamental human rights and values common to the whole humanity, and universal jurisdiction over crimes such as piracy, see for instance Ryngaert (n 135) 109; A. Cassese, *International Criminal Law*, at 284.

¹⁶³ See: GA Res. 55/25, adopted on 15 November 2000.

¹⁶⁴ See: article 15 of the Convention.

¹⁶⁵ For an overview of the facts, see Chapter 1, p.80. See further: Ludovic Hennebel, ‘L’affaire Total-Unocal en Birmanie jugée en Europe et aux Etats-Unis’ (2006) CRIDHO Working Paper 2006/09; Olivier De Schutter, ‘Les affaires *Total* et *Unocal*: complicité et extraterritorialité dans l’imposition aux entreprises d’obligations en matière de

Belgium, under universal jurisdiction *stricto sensu* and in France on the basis of home-state liability. Originally, Belgian criminal law provided for unlimited universal competence over international crimes, and proceedings were begun following the complaint of four Burmese nationals to the *juge d'instruction* at the Brussels court.¹⁶⁶ Following intense international diplomatic and economic pressure,¹⁶⁷ the legislator modified the universal jurisdiction law to restrict it to, in essence, Belgian-national and Belgian-resident perpetrators and victims. According to the *Cour de cassation*, this prevented a refugee from bringing a complaint. Despite the constitutional court¹⁶⁸ ruling this discriminatory,¹⁶⁹ the *Cour de cassation* considered it was unable to remedy the lacuna left by the legislator, dismissing the case.¹⁷⁰ Despite a later ruling annulling the discriminatory provision,¹⁷¹ the *Cour de cassation* refused to reopen proceedings, such retraction being only available to criminal defendants.¹⁷²

Ultimately, therefore, there is no example of universal criminal jurisdiction having been used successfully to prosecute a corporate actor, notwithstanding its wide deployment to justify civil liability under the ATS, discussed in the following section. Admittedly in the Nuremberg trials, the international community came close to prosecuting corporate crime using universal jurisdiction as a basis, notably in the Zyklon B and Krupp cases, but as *Total* attests – coupled with the general decline in its use to prosecute individuals – the practical utility of universal criminal jurisdiction as a vehicle for TNE responsibility is doubtful.

2. Third-State Civil Jurisdiction

Given the *échec* of universal criminal jurisdiction, it remains to be seen whether private law can fill the gap. This follows a study of the same countries and practices highlighted in the first part of the chapter.

droits de l'homme' (2006) 52 *Annuaire français de droit. int.* 55-101; Katja Sontag, 'La justiciabilité des droits de l'homme à l'égard des sociétés transnationales' in Laurence Boy, Jean-Baptiste Racine & Fabrice Siirainen (eds), *Droit économique et droits de l'Homme* (Larcier 2009), 253-269

¹⁶⁶ Specifically, the Tribunal de première instance de Bruxelles

¹⁶⁷ De Schutter, (n 113), 66

¹⁶⁸ Then the *cour d'arbitrage*

¹⁶⁹ Belgian C.Cass., 2e ch., section française, 5 May 2004 (RG P.04.0482.F) (posing the question to the *cour d'arbitrage*); Belgian Cour d'arbitrage, 13 April 2005 (n° 68/2005)

¹⁷⁰ Belgian C.Cass., 29 June 2005

¹⁷¹ Belgian Cour d'arbitrage, 21 June 2006 (n° 104/2006)

¹⁷² Belgian C.Cass., 28 March 2007

(i) U.S. Hegemony? The Alien Tort Statute

The *Alien Tort Statute*,¹⁷³ grants jurisdiction to the U.S. Federal courts for a civil action brought by an alien for a tort ‘committed in violation of the law of nations or of a treaty of the United States’. It is remarkable in two respects: first, it grants a very extensive jurisdiction power to the U.S. courts; and second, it sidesteps the usual problem (in a private international legal rule) of how to determine the applicable law by instead referencing international customary and treaty law directly. This, coupled with several perceived procedural advantages,¹⁷⁴ has led to the U.S. at least temporarily becoming the forum of choice for litigation against TNCs.

Historical Development

The ATS is a venerable piece of legislation. It is almost as old as the U.S. Constitution, although it has attracted far less respect than that document in U.S. case law and doctrine. It was enacted in 1789 in the Judiciary Act and now codified into the U.S. Code. According to some, ‘it was apparently intended to show European powers that the new nation would not tolerate flagrant violations of the “law of nations”’.¹⁷⁵ The received wisdom is that it remained largely dormant until its “rediscovery” at the end of the 1970s. However this is not strictly speaking accurate, and the early judicial deployments of the ATS offer an interesting insight into its importance.

The first phase of ATS deployment was in cases of capture at sea. In *Moxon v The Fanny*,¹⁷⁶ a case against French privateers for the seizure within U.S. waters of a British boat, the brig *Fanny*. It was dismissed by the court, on the basis that as it was a claim for seizure of the boat and its effects (i.e. a claim *in rem*), the ATS did not grant jurisdiction as it was not ‘for a tort only’. However in *Jansen v. The Vrow Christina Magdalena*,¹⁷⁷ the court did recognize its jurisdiction on the basis of the ATS. The case involved the capture of a Dutch vessel by an American who purported to have renounced his citizenship in order to take command of a French privateer. Although the act was not piracy, said the court, it was a violation of the treaty with Holland. The Supreme Court, on appeal, interestingly held that ‘[t]he general law of nations are inquirable and may be proceeded against in any nation where no special exemption can be maintained, either by the general law of nations, or

¹⁷³ 28 U.S.C. §1350, a.k.a the ‘Alien Tort Claims Act’

¹⁷⁴ cf. Beth Stephens, ‘Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002) 27 Yale J. Int’l L. 1; Joseph (n 30) 16

¹⁷⁵ Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, (July 2003, Institute for International Economics), p.3; Stephens, (n174) 21

¹⁷⁶ 2 Pet. Adm. 309 (D.C.Pa, 1793)

¹⁷⁷ *Jansen v. The Vrow Christina Magdalena* 13 F.Cas 356 (D.C.S.Ca, 1794); see also *Talbot v. Jansen*, 3 Dall. (3 U.S.) 133 (1795)

by some treaty which forbids or restrains it'.¹⁷⁸ Finally, in *Bolchos v. Darrell*,¹⁷⁹ mentioned above, the District Court concluded it had jurisdiction under the ATS, and – in a ruling which would be repugnant today – promptly ordered restitution of the slaves or the proceeds of sale to the French captain, on the basis of the treaty then in force between the U.S and France.

The next use of ATS jurisdiction was in *O'Reilly De Camara v. Brooke* in 1908.¹⁸⁰ The plaintiff was a Spanish resident of Cuba, who claimed against the U.S. military governor for damages arising from his abolition of a mayoral office and its stipend. In the judgment of the Supreme Court, the issue of jurisdiction does not appear to have been controversial. The case was dismissed on the basis that the courts 'will not declare an act to be a tort in violation of the law of nations or of a treaty of the United States when the Executive, Congress, and the treaty-making power have all adopted it'.

*Pauling v. McElroy*¹⁸¹ marks the beginning of the modern use of the ATS. The plaintiffs were residents of the Marshall Islands and U.S. anti-nuclear campaigners who were seeking an injunction to restrain nuclear testing in the Eniwetok and Bikini Atolls. The District Court dismissed the case on the basis the plaintiffs could not show standing.¹⁸² However it noted, without deciding the point, that '[i]t is doubtful that this Court has jurisdiction under 28 U.S.C. §1350 [the ATS] over the claim asserted by the residents of the Marshall Islands...'.¹⁸³ The next stage came in *Adra v. Clift*,¹⁸⁴ a child abduction case. An Iraqi mother forged passports to obtain entry with her daughter to the U.S. The child's Lebanese father applied for custody of the child. The court found that it had jurisdiction, in part because the passport fraud was an internationally wrongful act. *Nguyen Da Yen v. Kissinger* is another interesting case, again involving alleged child abduction and the Vietnamese orphan "Babylift" operation.¹⁸⁵ During the final phases of the Vietnam war, 'various agencies of the United States Government, in concert with private American adoption agencies, participated in an airlift to evacuate children from Vietnam'. Although declining to rule on the applicability of the ATS, the court nonetheless noted, building on *Adra v. Clift*, that 'illegal seizure,

¹⁷⁸ 3 Dall. (3 U.S.) 133 (1795) at 160

¹⁷⁹ 3 F. Cas. 810 (D.S.C. 1795)

¹⁸⁰ 209 U.S. 45, 28 S. Ct. 439 (1908)

¹⁸¹ 164 F.Supp. 390 (D.D.C. 1958)

¹⁸² Because they could not point to an immanent irreparable injury which would justify an injunction: *ibid.* at 392

¹⁸³ *ibid.* at 393

¹⁸⁴ 195 F.Supp 857 (D.Md. 1961)

¹⁸⁵ 528 F.2d 1194 (9th Cir. 1975)

removal and detention of an alien against his will in a foreign country would appear to be a tort... and it may well be a tort in violation of the “law of nations”¹⁸⁶.

But it was *Filártiga v. Peña-Irala*¹⁸⁷ which has become infamous as the beginning of the ATS as a tool for ‘activist’ litigation. The case involved the torture and killing of a young Paraguayan, Joelito Filártiga by a Paraguayan police officer, Americo Peña-Irala, in 1976. In 1978 Peña-Irala moved to the U.S. and the sister and father of the late Joelito sued him in New York on the basis of the ATS. The District Court and the Court of Appeals for the Second Circuit confirmed that it was applicable in this case, despite the acts having taken place abroad. The Court of Appeals held that ‘deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties... for purposes of civil liability, the torturer has become — like the pirate and the slave trader before him — *hostis humani generis*, an enemy of all mankind’.¹⁸⁸ Regarding the extraterritoriality of the acts complained of, the Court of Appeals had the following to say:

‘It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.’

The Court of Appeals’ decision, and the subsequent judgment of the District Court, both show an unambiguously *privatiste* approach to the nature and reach of the ATS. It is entirely in keeping with cases like *Babcock v. Jackson*,¹⁸⁹ and with the view that jurisdiction and applicable law are to be treated separately. However it also recognizes the unique character of the ATS, namely the precondition that the facts complained of must show a violation of international law, hence the need, in *Filártiga*, to identify torture as, in effect, a *jus cogens* norm.

The stages in the evolution of the ATS are worth considering. If only successful decisions are included, then the first stage began with piracy and its relations – privateering and illegal capture. Thus in the legal environment of the eighteenth and early nineteenth centuries, when trade was based on the seas, civil reparations were considered too important to be left out of account when dealing with the *hostis humani generis* of the day. By the twentieth century, international abduction –

¹⁸⁶ *ibid*, at 1201

¹⁸⁷ 577 F. Supp. 860 (E.D.N.Y. 1984)

¹⁸⁸ *Filártiga v. Peña-Irala* 630 F.2d 876 at 884,890 (2nd Cir., 1980)

¹⁸⁹ *Supra*, n.119

centred on children – had become the internationally reprehensible conduct, again needing to echo domestic civil liability in the days before the Hague Convention.¹⁹⁰ By the time *Filártiga* came around, the torturer had become the *hostis humani generis*. There is a clear, if slow, progression which is nicely matched by the decisions stating – consistently with received international legal wisdom – that international law is organic and to be judged by the standards of the day by reference to jurisprudence, State practice, and the works of renowned publicists.¹⁹¹

The ATS Today

Filártiga led to a renaissance in what may be properly described as international civil liability. It spawned a vast number of claims, from copycat actions against State officials such as *Kadic v. Karadzic*,¹⁹² to vast class actions against groups of corporations for aiding and abetting repressive political regimes. But the modern reality is far from the elegant private and public international orthodoxy of the *Filártiga* decision. The ATS has become a tangled web of competing decisions, inter-Circuit divergences, and confusing interventions from the Supreme Court. I examine this in three sections: the justiciability of corporate and extraterritorial torts; the jurisdictional elements; and the substantive content of international obligations as identified by the U.S. courts.

Justiciability

Corporate Liability

Given that over 120 noteworthy lawsuits have been brought under the ATS or its sister statutes against corporate defendants, it might be thought that the question of the justiciability of such claims would have been settled. Far from it. There is a sharp divergence in the practice of different U.S. Circuits, one which the Supreme Court ultimately declined to resolve in *Kiobel v. Royal Dutch*

¹⁹⁰ i.e. the Hague Convention on the Civil Aspects of International Child Abduction, 25 Oct 1980

¹⁹¹ Cf. Article 38 of the Statute of the ICJ, 16 Dec 1920, 112 BFSP 317. In the context of ATS litigation, *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292 (D.C. E.Pa., 1963) ‘What the law of nations is “may be ascertained by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.” The court’s examination of the phrase “the law of nations” must consider the words used as part of an “organic growth.”’

¹⁹² 70 F.3d 232 (2nd Cir., 1995)

*Petroleum Co.*¹⁹³ Currently, the D.C.,¹⁹⁴ Seventh,¹⁹⁵ Ninth¹⁹⁶ and Eleventh¹⁹⁷ Circuits have explicitly recognized that corporate defendants are amenable to suit under the ATS. However in *Kiobel* in 2010, with what was arguably a reversal of its own jurisprudence, the Second Circuit denied that corporations could be sued under international law and hence the ATS.¹⁹⁸

It is a great pity that the U.S. Supreme Court did not, for the benefit of legal certainty, use the opportunity offered by *Kiobel* to clarify the position on corporate liability. However as the above snapshot shows, judicial reception to the immunity of corporations to suit under the ATS has been lukewarm at best. Indeed, a District Court in the Second Circuit recently declined to follow the Court of Appeals' *Kiobel* ruling, holding that the fact the Supreme Court had not responded to the corporate liability aspect of the case meant that they had implicitly overruled the lower court's decision.¹⁹⁹

Much has been said over the last five years regarding the Second Circuit's judgment.²⁰⁰ One of the most outspoken critics has been Ku, who argues that there is no basis for corporate liability under international law and thus U.S. courts have no jurisdiction under the ATS.²⁰¹ Ku and the *Kiobel* court conflate two issues – that of the tort (which must equate to a violation of an international norm) and that of the persons over which the ATS grants jurisdiction. The ATS is not a piece of international law, nor does it carve out an international law fiefdom within U.S. federal law. There is no international law of torts *qua* torts. Rather, the ATS is, at its heart, a private international law statute which designates international law as the applicable law and incorporates it into U.S. federal

¹⁹³ 133 S. Ct. 1659, 569 U.S. 12 (USSC, 2013)

¹⁹⁴ *Doe v Exxon Mobil Corp.*, 654 F.3d 11 (D.C Cir., 2011), accusing the 2nd Circuit in *Kiobel* of 'conflat[ing] the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law at issue here; even on its own terms, its analysis misinterprets the import of footnote 20 in *Sosa* and is unduly circumscribed in examining the sources of customary international law' (at 41)

¹⁹⁵ *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir., 2011)

¹⁹⁶ *Doe I v Unocal*, 395 F.3d 932 (9th Cir. 2002), which held that a 'private party, such as Unocal' could be sued under the ATS; *Sarei v Rio Tinto plc*, 671 F.3d 736

¹⁹⁷ *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Romero v. Drummond Co. Inc.*, 552 F.3d 1303 (11th Cir. 2008)

¹⁹⁸ 621 F.3d 111 (2^d Cir. 2010)

¹⁹⁹ *In Re South African Apartheid Litigation* (S.D.N.Y, 17 April 2014)

²⁰⁰ See *inter alia*: Murray, Kinley & Pitts, 'Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of *Kiobel*' (2011) 12 Melbourne J.I.L. 57; Jordan J. Paust, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion', (2011) 51 *Vir. J. Int'l L.* 977; Vivian Grosswald Curran, 'Extraterritoriality, Universal Jurisdiction, and the Challenge of *Kiobel v. Royal Dutch Petroleum Co.* (2013) 28 Maryland J.I.L. 76; Julian G. Ku, 'The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2010) 51 *Virg. J.I.L.* 353

²⁰¹ Ku, *ibid*

tort law. The District Court in *Filártiga* recognized this explicitly. The issue is essentially one of what private international lawyers call classification.²⁰² As the court put it

‘where the nations of the world have adopted a norm in terms so formal and unambiguous as to make it international "law," the interests of the global community transcend those of any one state. That does not mean that traditional choice-of-law principles are irrelevant. Clearly the court should consider the interests of Paraguay...’²⁰³

This may be going a little far. Most scholars would treat the application of international law as meriting unilateral, rather than bilateral, conflict of laws methodology. But the important thing to realize is that the ATS, as with any private international law statute, necessarily involves the *lex fori* in determining its application. In 1789 international law had no ICJ, and did not admit that international acts could be committed by individuals *per se*. The ATS does not expand international law itself, but expands its *application* domestically,²⁰⁴ through the *lex fori* concept of tort. Were it otherwise, then prior to 1945, one could have expected U.S. courts to refuse jurisdiction wherever the claim was not brought by or against a State!

However, even assuming the methodology of the *Kiobel* Court of Appeals to be the correct one, *viz.* that it is necessary to look to international law to determine who can violate it, this ignores recent developments in doctrine and jurisprudence. Ku states ‘There is little or no support from international practice for the imposition of customary international law duties on corporate entities. Such duties are rarely imposed on natural persons...’²⁰⁵ But this is unsurprising: the international courts have limited jurisdiction defined by their governing treaties. The ICJ can only hear inter-state complaints. The Nuremburg trials and the extraordinary criminal courts were set up in a specific, limited and unabashedly criminal context.²⁰⁶ Nonetheless Ku and the Court of Appeals ignore several instances of corporate liability pursuant to international legal regimes.²⁰⁷

²⁰² *Qualification* in the French conflict of laws.

²⁰³ 577 F.Supp. 860 at 863-4

²⁰⁴ Compare *Jones v Saudi Arabia* [2007] 1 A.C. 270 (UKHL), relying on the absence of any universal tort jurisdiction in international law itself to reject a civil claim for torture predicated on international law.]

²⁰⁵ *ibid.*, at 389

²⁰⁶ See Jaye Ellis, ‘The Alien Tort as Transnational Law’ (2013) 28 *Md. J.I.L.* 90 at 97, arguing that the reason corporate liability was not mooted at Nuremburg is ‘historically contingent, and ought not to be seen as standing for the proposition that corporations cannot be liable at international law’; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d. Cir. 2010) *per* Laval J, p.26 (concurring)

²⁰⁷ See Andrew J. Wilson, ‘Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act’, in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights*, (Oxford: Hart, 2006), pp.43-72; Murray, Kinley & Pitts, *supra* n.200 at 84 et seq.; Andrew Clapham, *Human*

We have already seen how in the criminal context the issue of corporate liability is controversial from a comparative law perspective. But this limitation never applied to private law. It would be at the least unusual for a private law statute to distinguish between natural and legal persons in a tort context. Furthermore the piracy cases are particularly instructive in this regard: criminal prosecutions for piracy were carried out by domestic courts under their universal international jurisdiction. And as the early ATS cases show, they were sometimes accompanied by civil claims. The fact that international law is silent as to the possibility of corporate liability is in itself instructive: the *Lotus* judgment makes clear that it is open to States to exercise jurisdiction where it is not *prohibited* by a rule of international law;²⁰⁸ and the ATS is, first and foremost, a jurisdictional statute.²⁰⁹

Extraterritoriality

The second aspect of the *Kiobel* judgment, this time from the Supreme Court, was to clarify that the presumption against extraterritoriality applied to the ATS.²¹⁰ In order for the ATS to apply, plaintiffs must now show that the acts complained of ‘touch and concern the territory of the United States...with sufficient force to displace the presumption’.²¹¹ It is difficult to understate the restrictive effect this has had on ATS litigation.²¹² Not only has it led to widespread dismissals of cases against “foreign” enterprises,²¹³ it is also preventing claims under the statute against U.S. corporations.²¹⁴

Whatever the position of the court’s assessment vis-à-vis domestic statutory interpretation,²¹⁵ the application of the presumption is arguably consistent with the modern international law orthodoxy

Rights Obligations of Non-State Actors, (OUP, 2006) at pp.248-252; Beth Stephens, ‘The Amoral of Profit: Transnational Corporations and Human Rights’, (2002) 20 *Berk. J.I.L.* 45; Bright (n83) 129-131

²⁰⁸ *The Case of the S.S. "Lotus" (France v. Turkey)* PCIJ Rep Series A No 10. (PCIJ)

²⁰⁹ See *Sarei v Rio Tinto*, *supra* n.196

²¹⁰ In doing so, it ‘imposed a twenty-first-century standard of interpretation-requiring a clear indication that Congress intended the courts to recognize extraterritorial common law claims-on an eighteenth-century statute’: Stephens, ‘Extraterritoriality and Human Rights After *Kiobel*’, 28 *Md. J.I.L.* 256 at 267. The standard in question had only been formulated in such broad terms by the Supreme Court three years earlier, in *Morrison v. Nat’l Australia Bank*, 130 S. Ct. 2869, (USSC, 2010)

²¹¹ 133 S. Ct. 1659 at 1669 (USSC, 2013)

²¹² See e.g. Marco Simons, ‘*Kiobel v Royal Dutch Petroleum*: A Practitioner’s Viewpoint’, (2013) 28 *Md. J.I.L.* 28

²¹³ As in *Kiobel* itself, for example.

²¹⁴ Cf. *Balittulo v Daimler AG*, 727 F.3d 174 (2nd Cir., 2013), and *In Re South African Apartheid Litigation*, (S.D.N.Y., 28 August 2014)

²¹⁵ See e.g. Stephens, ‘Extraterritoriality...’, *op. cit.* n.210 at 267 et seq., arguing that the Court’s decision ‘ignored the common sense reading of the text of the ATS, contemporary understanding of its reach, prior judicial interpretations, and the congressional response to the application of the statute to extraterritorial acts’

that assertions of extraterritorial jurisdiction require justification. However, it goes rather further than the rule in international jurisprudence epitomized by the *Lotus* case, and ignores the ‘inevitability’ of extraterritorial jurisdiction in a globalized world.²¹⁶ It also conflates extraterritoriality with ‘interference’ in a foreign sovereign’s jurisdiction. There are two immediate observations which can be made in response to that. First, what of situations where sovereignty is in abeyance, such as conflict zones?²¹⁷ There may not be any ‘national’ authority able to exert sovereignty in such a scenario but the wide formulation of the extraterritoriality rule as applied in *Kiobel* leaves no room for such nuance.²¹⁸ Second, what of the only slightly more problematic situation where a foreign sovereign is unwilling to exercise jurisdiction, perhaps because of its own complicity in the wrongful acts?²¹⁹

This type of conflict, *viz.* a clash of sovereignties, has traditionally been dealt with in common law systems under the various doctrines of judicial comity. *Forum non conveniens* is often justified as an expression of this wider principle. It is clear that comity offers a more nuanced approach to jurisdiction over conduct taking place abroad than the ‘one-size-fits-all’ approach of the Supreme Court. It is submitted that refinement or clarification of the principles of judicial comity could have offered an alternative route to restraint in the exercise of “extraterritorial” jurisdiction than what is effectively a prohibition on foreign tort claims unless and until the U.S. Congress intervenes to re-extend the ATS’s jurisdictional reach. Alternatively, it would be possible to adopt the approach of the English courts and focus on so-called private interest factors exclusively. This would admit the inherent equality of sovereign States at the stage of jurisdiction over cases with a foreign element, and avoid the messy problem of governments (both home and abroad) intervening in legislation in a game of jurisdictional ping pong.²²⁰

Whatever the *bien fondé ou non* of the *Kiobel* decision and its progeny, the fact remains that the strict doctrine of extraterritoriality enounced by the Supreme Court leaves relatively little room for

²¹⁶ Cf. Cedric Ryngaert, *Jurisdiction in International Law*, at 27 (Oxford University Press, 2008); Wray & Raffaelli, ‘False Extraterritoriality? Municipal and Multinational Jurisdiction over Transnational Corporations’ (2012) 6 H.R. & I.L.D. 108 at 110

²¹⁷ On which, see generally the special issue of Human Rights & International Legal Discourse, (2012) 6 H.R. & I.L.D.

²¹⁸ Compare the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Final Report (S/2002/1146) (2002), Annexes I, II and III. At §170 of the Report, the Panel stressed that ‘the Governments of the countries where the individuals, companies and financial institutions that are systematically and actively involved in these activities [i.e., in the illegal exploitation of Congo’s natural resources] are based should assume their share of the responsibility’.

²¹⁹ See the discussion of ‘citizen-friendly’ versus ‘investor-friendly’ behaviour in chapter 1.

²²⁰ See above at n.143

holding non-U.S. enterprises liable in the U.S.²²¹ In fact it is difficult to see what scope for its application is left at all where TNEs are concerned, since where acts are carried out on U.S. territory, State and federal common law will usually be applicable and courts will have jurisdiction under normal U.S. rules of general jurisdiction.²²² One limited example may be cases of human trafficking, where victims are brought to the U.S. and thus the acts complained of sufficiently ‘touch and concern’ U.S. territory.²²³

Jurisdiction – forum non conveniens

Where ATS liability has been asserted in the past, a key limit on its reach was, unsurprisingly, the doctrine of *forum non conveniens*. We saw in part I of this chapter how FNC has been deployed in cases involving U.S. corporations. In ATS cases it has been used aggressively by defendants, with varying degrees of success. For example, in *Aldana v Del Monte Fresh Produce NA, Inc.*,²²⁴ a federal appeals court refused to revoke a FNC order despite the fact that the plaintiffs had attempted to litigate in the designated forum (Guatemala), only to be prohibited from doing so by a blocking statute in force there. The Eleventh Circuit Court of Appeals referred to the *West Caribbean Airways* decision²²⁵ and held the plaintiffs responsible for their ‘failure to mention the blocking law or the unavailability of a foreign forum to the district court during the prior proceedings’.²²⁶ A very similar result was reached in the first round of litigation against Chevron in the *Texaco/Chevron Lago Agrio* litigation.²²⁷ This type of rigid formalism is unfortunate; since it would not be a great stretch to find that the original decision granting FNC was decided *per incuriam*.²²⁸ The practical result is to place a burden on plaintiffs to fully investigate potential foreign forums *before* bringing a claim in the U.S., despite the fact that FNC is a motion by the Defendant and not a prerequisite to bringing an action. In many cases, it may be difficult for plaintiffs to predict the operation of a piece of domestic law in this way.

²²¹ Simons (n.212)

²²² See Brilmayer (n.28)

²²³ See *Doe v. Reddy, et al*, 2003 WL 23893010 (N.D. Cal., 4 Aug. 2003)

²²⁴ 741 F.3d. 1349 (11th Cir., 2014)

²²⁵ 715 F.3d 1290 discussed above, chapter 1

²²⁶ 714 F.3d 1349 at 1351

²²⁷ *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2nd Cir., 2002) (consolidated with *Jota v. Texaco, Inc.*); *Sequibua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D.Tex., 1994)

²²⁸ It could also be said that the reference to the *West Caribbean* case is somewhat inapposite – in that case the District Court based its rejection of the French courts’ reasoning on the fact that the provision in issue was contained in a treaty. See *In re West Caribbean Airways* 2012 WL 1884684 (S.D.Fla., 2012) (affirmed *Galbert v. West Caribbean Airways*, 715 F. 3d 1290, (11th Cir., 2013))

Substantive Content

In the only other Supreme Court judgment on the ATS, *Sosa v. Alvarez-Machain*,²²⁹ the Supreme Court laid down important guidance and limits on the substantive obligations which are actionable under it. In 1985, a United States Drug Enforcement Agency agent was kidnapped and murdered by a Mexican drug cartel. The DEA concluded that Humberta Alvarez-Machain had participated in the murder and an arrest warrant was issued. Unable to convince Mexican authorities to extradite Alvarez-Machain, the DEA hired Mexican nationals to capture him and bring him back to the United States. Alvarez-Machain filed a group of civil suits against the United States and the Mexican nationals who captured him. When the case came before it, the Supreme Court had to decide whether the ATS allows private individuals to bring a suit against foreign citizens for crimes committed extraterritorially in violation of the law of nations. The Court was unanimous in ruling that the ATS did not create a separate cause of action for claiming violations of the law of nations – it was primarily a jurisdictional instrument. The Court went on to lay down the universality and specificity requirements it considered necessary for the ATS to “bite”:

‘courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized’²³⁰

In other words, the international obligation involved should be ‘specific, universal, and obligatory’.²³¹ According to De Schutter, this limits the ATS’s scope *rationae materiae* to ‘*les violations les plus graves du droit international des droits de l’homme qui font l’objet d’une reprobation universelle*’.²³²

Wiwa v. Shell provides an illustration of *Sosa*.²³³ This was one of the two ATS cases brought out of the Ogoni/Shell disputes. The family of an MSOP leader, Ken-Saro Wiwa, and a number of other plaintiffs brought a group action in New York against Shell. They alleged a number of different rights violations, but ultimately the only ones which met the *Sosa* standard, according to the District Court, were crimes against humanity, including ‘torture, murder, political persecution, and

²²⁹ 117 S. Ct. 508, (USSC, 2004)

²³⁰ *ibid*, at 725

²³¹ *ibid*, at 732

²³² ‘The most serious violations of the international law of human rights, which are the object of universal reprobation’. Olivier De Schutter, ‘Le contrôle du respect des droits de l’homme par les sociétés transnationales : le rôle de l’Etat d’origine’, in Marie-Ange Moreau, Horatia Muir Watt, and Pierre Rodière (eds.), *Justice et mondialisation en droit du travail*, (Paris: Dalloz, 2010), pp. 107-168 ;

²³³ *Wiwa v Royal Dutch Petroleum Co.*, 626 F.Supp. 2d 377 (S.D.N.Y., 2009). Compare *Doe I v. Unocal*, 248 F. 3d 915 (9th Cir., 2001),

unlawful imprisonment'. By contrast, rights to peaceful assembly (i.e. classic human rights) were not so specific. Environmental rights did not even enter into question. *Wima* settled shortly after the international crimes part of the suit was allowed to go forward for a reported \$15 million.²³⁴

It will be immediately appreciated that the high standard of *Sosa*, reinforced in numerous other decisions under the ATS, leaves a gap between certain international human rights and others: although the most heinous international crimes, such as torture, or arbitrary arrest and detention, are well established and constitute actionable violations, rights such as peaceful assembly do not. Economic, social and environmental rights also tend to get passed over. There is also a gap at the level of comparative injustice, where the *noyean dur* of international crimes and human rights does not operate.

U.S. Alternatives to the ATS

It should not be forgotten that the U.S. have extensive possibilities to assert State jurisdiction over defendants with a business presence and under the doctrine of effects. This may allow some cases to be brought against some foreign corporations, by both consumers (*Kaskey v. Nike*) and occasionally foreign plaintiffs, subject to the usual limits discussed in Part I.²³⁵

(ii) U.K. Imperialism: Worldwide Jurisdiction

Jurisdiction

When it comes to adjudicative jurisdiction, England presents a special case compared to the other common-law countries discussed. As Nygh notes, the foundational concept of jurisdiction is service of process (historically, the 'writ').²³⁶ As he accepts, this developed before 'the principle of territoriality was beginning to gel'.²³⁷ Although backed by a public threat – the writ was 'a call to submit to royal justice'²³⁸ – it was not conceived as an exercise of sovereignty *per se*. In Audit's classification, it is an intensely *privatiste* approach to jurisdiction. Although the development of territoriality in the nineteenth century brought with it some rationalization, leading to the

²³⁴ http://www.nytimes.com/2009/06/09/business/global/09shell.html?_r=0 (accessed 10 October 2013)

²³⁵ For examples, although ultimately dismissed, see: *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir., 2000) (removed to the federal court for procedural reasons); *Alomang v. Freeport-McMoran, Inc.*, 811 So. 2d 98 (4th Cir., 2002), (dismissed on the basis of a failure to state facts allowing the court to lift the corporate veil under the "alter-ego" doctrine).

²³⁶ NYGH P, 'The Common Law Approach', in MCCLACHLAN & NYGH (eds), *Transnational Tort Litigation...*, *op. cit.*, pp.21-36

²³⁷ *ibid*, p.27

²³⁸ *ibid.*, p.24

unfettered right of service within the territory but the imposition of rules on service abroad,²³⁹ the fact that service “out-of-jurisdiction” remained possible at all is remarkable. Indeed the language of English law is interesting in itself. The word ‘territory’ does not appear in a single jurisdictional rule or statute except in relation to treaties which use the term. Instead the term used is ‘jurisdiction’, defined as ‘unless the context requires otherwise, England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales’.²⁴⁰ Although this modern definition conflates jurisdiction and territory (‘unless the context requires otherwise’),²⁴¹ the continued insistence on the use of the term implies the enduring criterion is power – power to compel a defendant to answer in court, rather than territory *per se*.²⁴²

English jurisdiction today goes far beyond the territorial principle. The grounds for service ‘out of the jurisdiction’ include: a tort claim where ‘the damage sustained resulted from an act committed within the jurisdiction’; a claim is made ‘to enforce any judgment or arbitral award’; a claim in respect of a contract ‘where the contract... is governed by English law’; a claim for an interim remedy; a probate claim; a claim for (litigation) costs against a non-party in existing English proceedings.²⁴³ Many of these do not respond to nationality, to domicile, or even to the doctrine of effects. Perhaps the most striking is a claim for an interim remedy – particularly when one takes into account the fact that interim remedies in English law include a worldwide freezing injunction,²⁴⁴ and search orders.²⁴⁵

England’s continued *laissez-faire* approach to jurisdiction is perhaps explained by the fact that it has become a litigation forum of choice in many specialized areas, which in turn brings a great deal of revenue to the country.²⁴⁶ Adoption of a more formalistic approach to jurisdiction could cause a contraction in claims. Whatever the reasons, it is clear that from a purely jurisdictional perspective,

²³⁹ *ibid.*, p.29

²⁴⁰ English Civil Procedure Rules, r.2.3

²⁴¹ One example of where the context might otherwise require is in cases on board a ship under governmental control, outside territorial waters.

²⁴² See J. A. Clarence Smith, ‘Personal Jurisdiction’ (1953) 2 ICLQ 510

²⁴³ English Civil Procedure Rules, rule 6.36 and Practice Direction 6B, §3.1

²⁴⁴ Also known as a *Mareva* injunction. English Civil Procedure Rules, r.25.1(1)(f) ‘an order (referred to as a freezing injunction)- ... (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not’

²⁴⁵ Formerly *Anton Pillar* orders. See English Civil Procedure Rules, r.25.1(1)(g) ‘an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction’

²⁴⁶ In the English commercial court, for example, over 80% of claims involve a foreign party, and it is estimated that it brings over £800 million in revenue into the U.K. annually. See Sealy & Hooley, *Commercial Law: Text, Cases & Materials* (4th Ed.)(OUP, 2009), p.13

England is very hospitable to litigation involving foreign actors, be it as claimant or defendant. It is also worth mentioning that it may be possible to use the powerful interim measures provided for by English civil procedure – one of the explicit areas in which foreign service is permissible – in combination with contempt of court provisions to provide potentially far-reaching enforcement of corporate obligations.

Applicable Law

Beyond jurisdiction, England incorporates international law directly into its common law.²⁴⁷ So far, most claims referencing international law directly have involved State actors, and have been dismissed on immunity grounds.²⁴⁸ However, in the *Belhaj* case, the Court of Appeal recently gave a startling judgment about the precise content of international law as it is understood by English courts:

‘a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place... These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate.’²⁴⁹

This statement must be taken as an authoritative for now.²⁵⁰ *Belhaj* provides a striking example of a possible ATS-like claim in English law. Although it is a case brought against British defendants, it involves a similar consideration of the application of international law as in an ATS case. Interestingly, like the court in *Filártiga*, the English courts felt it necessary to rule on the question of applicable law, emphasizing the *private* international element of the case. The Court of Appeal held that – unless its substantive provisions were contrary to public policy – the applicable law would be the law of the place where the alleged conduct occurred (variously, China, Malaysia and Libya).²⁵¹ *Belhaj* was applied by the High Court in *Rahmatullah v Ministry of Defence*,²⁵² another

²⁴⁷ *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 2 W.L.R. 356, (EWCA)

²⁴⁸ *Jones v Saudi Arabia* [2007] 1 A.C. 270 (UKHL); *Al-Adsani v Kuwait* (1996) 107 I.L.R. 536 (EWCA);

²⁴⁹ *Belhaj v Straw* [2014] EWCA Civ 1394

²⁵⁰ Although an appeal is outstanding to the Supreme Court at the time of writing.

²⁵¹ [2014] EWCA Civ 1394 at [134]-[159]

²⁵² [2014] EWHC 3846 (QB). Again, an appeal is currently outstanding.

Filártiga-type claim alleging false imprisonment, ill-treatment and torture in Afghanistan by British and U.S. officials.²⁵³

The closest England gets to a pure third-state case is in the *Trafigura* litigation. This was one of several cases arising out of dumping of toxic waste in the Ivory Coast. The by-product of oil-refining carried out aboard the *Probo Koala*, a ship chartered by Trafigura, was offloaded to a local contractor in Abidjan in August 2006 and subsequently dumped at 12 different sites releasing foul-smelling gases that enveloped much of the city. A group claim was brought in the English High Court in 2006. However the claim settled before any judicial decisions were made. The only court pronouncement to come out of the litigation was to decide the amount of costs to be paid to the claimants' solicitors.²⁵⁴

(iii) Civil law systems

We have already seen that the Dutch courts were prepared to pass judgment on Shell's Nigerian subsidiary on the basis of its jurisdiction over the parent company and the interconnected nature of the claims.²⁵⁵ This raises an interesting possibility under the Brussels I Regulation,²⁵⁶ as discussed previously, where a defendant is domiciled in a Member State, the civil jurisdiction under article 2²⁵⁷ is essentially mandatory.²⁵⁸ It is thus conceivable that a claim could be brought against a subsidiary in a Member State, with a foreign parent as co-defendant. Whether it would be permissible to decline jurisdiction against the foreign parent only is still an open question under article 6, but this seems unlikely, particularly following the reasoning of the Dutch courts and the approach thus far of the CJEU.

²⁵³ Although only the former are defendants to the action.

²⁵⁴ *Motto et al v Trafigura* [2011] EWCA Civ 1150

²⁵⁵ *Akpan v Royal Dutch Shell*, 30 Jan 2013 (Case No. C/09/337 050/HA ZA 09-1580) (Hague District Court), *supra* n.42

²⁵⁶ Regulation 44/2001. This Regulation has now been replaced by Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The new regulation entered into force on 10 January 2015. The substantive provisions I discuss, however, are unaffected. A correlation table is provided in the new Regulation.

²⁵⁷ Now art. 4 Reg. 1215/2012

²⁵⁸ Although it must be noted that the Brussels I recast has now introduced the possibility of a discretionary stay where proceedings are already pending in a third state: Reg 1215/2012, arts. 33, 34

Several other possibilities also exist. The first of these is the idea of a *forum conveniens*, espoused by Ryngaert and Wouters.²⁵⁹ An example of this is provided by article 11 of the Belgian Code of Private International Law, which provides:

"Irrespective of the other provisions of the present Code, Belgian judges have jurisdiction when the case has narrow links with Belgium and when proceedings abroad seem to be impossible or when it would be unreasonable to request that the proceedings are initiated abroad."²⁶⁰

Although the requirement of 'narrow links' does not equate to the universality of the ATS, it may 'raise some hopes for foreign victims of human-rights violations committed abroad by foreign corporations'.²⁶¹

The second possibility lies in the operation of a *forum necessitatis*. This 'rarely invoked' doctrine exists in Dutch law,²⁶² and was also at one point in time proposed for the Brussels I recast,²⁶³ although it did not make it into the final Regulation. This 'residual' ground of jurisdiction allows a court to assert jurisdiction where it appears no other court can or shall do so. It is sometimes (as in the EU Commission proposal) tempered by a requirement of 'minimum connection' to the forum, in which case it begins to resemble the Belgian *forum conveniens*. It also exists in French private international law, reasoned inductively from the concept of denial of justice. Thus, where it is impossible to seize a foreign court, for reasons of fact (such as insurrection) or law (e.g. in the absence of a jurisdiction rule), the French court would consider itself competent.²⁶⁴

In the European Member States which have some form of *forum necessitatis*, the Brussels I recast does not prevent its continued application. And in respect of the United Kingdom, we have already seen that the *availability* (as opposed to the 'convenience') of the English forum is, generally speaking, wide open.

²⁵⁹ Cedric Ryngaert & Jan Wouters, "Litigation for Overseas Corporate Human Rights Abuses...", *supra* n.80 at 962 et seq.

²⁶⁰ Belgian *C. de droit international privé*, art. 11, added in 2004

²⁶¹ Ryngaert & Wouters, *supra* n.259

²⁶² See Nicola M.C.P. Jägers & Marie-José van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands', (2008) 33 *Brook J.I.L.* 833 at 854

²⁶³ Commission proposal, COM(2010) 748/3

²⁶⁴ Audit (n 6) 298 ; Bright, (n 83) 213-6

Conclusions

Given today's obsession with the sacrosanctity of territory, a student of jurisdiction could be forgiven for assuming that third-states would have the least amount of litigation, and be the least ready to open the regulatory book. Given the implicit hierarchy territory assumes, with the highest right accorded to the territorial State, then next to the territorial of the State where a TNE is "based", and only last to the controversial possibility that a third-state could involve itself. At first blush, given the controversial nature of so-called "universal" forms of jurisdiction, it might be expected that the student would dismiss outright the possibility for meaningful litigation in the third-state's courts, nothing tangible having taken place on their soil.

And yet in the reality of a globalizing world, it is the opposite that has happened. The vast majority of litigation over the last 30 years has centred on the third-state private law liability of the U.S. The reasons for this apparently startling phenomenon have been little studied by the doctrine. Often dismissed as a mere example of U.S. hegemony or exceptionalism, the only concrete explanation has been in the presence of perceived 'procedural advantages' of the U.S. forum. Stephens has offered the most comprehensive list. She explains:

'In addition to a legal and popular culture that favours civil litigation as a means of influencing public policy, human rights litigation is aided by a series of favourable rules of civil procedure... the following list offers an overview of some of the most important:

No penalty for losing... contingency fees... punitive damages... default judgments... discovery'²⁶⁵

In my view, much of Professor Stephens' list simply assumes, rather than considering *in concreto* the advantages and disadvantages of litigating in a particular forum. For example, the U.K. had, for many years, a system broadly comparable to that of the U.S., as shown by the following non-exhaustive list:

- (i) Until 2014, a system of conditional fees (with an uplift of up to 100% on lawyers' hourly rates) coupled with widespread after-the-event legal insurance meant a claimant would personally suffer no penalty for losing, particularly since it was ruled that the insurance premium itself was a recoverable cost from a losing defendant, while allowing law firms to run a profit providing they won at least 50% of cases.²⁶⁶ Although different to contingency fee agreements, it nonetheless produced a similar procedural advantage.
- (ii) Default judgments are equally available in England as they are in the U.S.

²⁶⁵ Stephens, (n 174) 14-16

²⁶⁶ See Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 City U. Hong Kong L.R 1 at 18

- (iii) Punitive damages are available in some limited contexts, and even where they are not claimants could still expect full compensation, with no part of their damages being eaten up by a contingency fee agreement.²⁶⁷
- (iv) Disclosure is wide-ranging and operates on similar principles as in other common-law countries. While not as claimant-friendly as the U.S. doctrine,²⁶⁸ it nonetheless offers the advantages ascribed to it by Stephens, namely that a case can be pleaded which discloses a *prima facie* cause of action, which may then be proved from documents provided by the defendant during the disclosure proceedings.

Furthermore, while Stephens identifies some procedural aspects, she neglects others. Although she accepts her list of advantages is non-exhaustive, there is no discussion of procedural disadvantages to the U.S. system. In my view the most glaring omission is the doctrine of *forum non conveniens* itself, which is after all a procedural rule determined by the law of the forum. Similarly a comparison could be made with the English assertion of jurisdiction based on service of the claim form,²⁶⁹ with the possibility for service worldwide, is a significant advantage wholly absent from the U.S system. This is an important omission by scholars, for as Sanger concludes,

[h]undreds of claims against corporations have been filed under the ATS, but fewer than half a dozen have been filed in English courts; by contrast, most claims in English courts have been successful, but very few ATS cases have resulted in a judgment or settlement²⁷⁰

I do not mean to proclaim England as the Holy Grail for activism and public-interest human rights litigation,²⁷¹ but I merely offer it as an example of the lack of discussion in the doctrine. I could easily cite the bases of jurisdiction in Brussels I, or the statutory limits on legal fees provided for in many countries (rendering litigation cheaper than where litigation costs remain market-based),²⁷²

²⁶⁷ The difference between the contingency and conditional fee systems is that a contingency fee is an agreement to be paid out of recovered damages, while a conditional fee is merely conditional on the success or failure of the case. When used with insurance, and the loser-pays principle, it offers claimants a ‘no-win no-fee’ option which leaves their total damages unaffected.

²⁶⁸ For one, defendants are not expected to bear the costs of disclosure unless they lose, under the normal “loser pays” rule of legal costs. Secondly, the process operates within a number of limits defined by the courts, to prevent “fishing expeditions” by claimants: standard disclosure is limited to those items or documents which support one party’s case or undermine another’s (English Civil Procedure Rules, r.31.6). Further disclosure requires evidence and a *prima facie* case in order to be granted by the court (ibid, r.31.12)

²⁶⁹ What was formerly called the ‘writ’

²⁷⁰ Andrew Sanger, ‘Corporations and Transnational Litigation: Comparing *Kiobel* with the Jurisprudence of English Courts’, *AJIL Unbound* (Jan 2014), reproduced in ‘Agora: Reflections on *Kiobel* – Excerpts from the American Journal of International Law and *AJIL Unbound*’ (ASIL, 2014), e-23

²⁷¹ In fact, recent reforms are likely to significantly reduce the benefit many of these offer, such as higher damages, and reform of the conditional fee system. Meeran, *op. cit. supra* n.266 at pp.18-19

²⁷² For instance, Quebec and Greece are two legal systems which place significant limits on allowable amounts of legal fees in various types of litigation.

as others. The point is that amazingly, no-one seems to have seriously studied the comparative procedural advantages of large TNE litigation. Jägers and van der Heijden, for instance, largely respond to Stephens' categories.²⁷³

This reveals a final and telling limit to TNE liability across jurisdictions, which consists of the economic reality and perceptions of the legal profession. Without the kind of serious comparative forum-selection analysis that large corporate firms are capable of, it may be difficult for claimant lawyers to appreciate where litigation is best commenced.²⁷⁴ Most claimant firms tend to be more limited to their home legal system than are many corporate firms. This inequality of litigation resources between TNEs and victim-claimants may often present a barrier to deterrence through litigation, even where rules exist, since private law as a regulatory mechanism depends on litigators to enforce it. And yet numerous opportunities exist to remedy this issue.²⁷⁵ Not least, no one appears to have considered the private international law implications of signing a conditional fee agreement and insurance contract in one jurisdiction in order to litigate in another.²⁷⁶

The home-state and third-state picture which emerges is one which, while it leave many gaps still open through which TNEs can fall with impunity, is nonetheless replete with interesting but not fully realized possibilities. What is clear, however, is that the TNE is effectively beyond the regulatory control of any single State. The home-state/host-state dichotomy leads to a cycle of international relations and legal difficulties, as the forum of litigation inevitably ruffles the feathers of trade relations. It is too easy to dismiss this problem as one requiring political will to overcome;²⁷⁷ as *Lago Agrio* shows all too clearly, the politics of TNE regulation oscillate and vacillate, often as a function of which court chooses to assert jurisdiction over a claim (and why).

²⁷³ Nicola Jägers & Marie-José van der Heijden, *op. cit., supra*, n.262 at 860-1. In a recent paper, a couple of advantages of the Dutch forum as opposed to courts in developing countries were mentioned in a single paragraph: Jägers et al, *op. cit., supra* n.42 at e-41

²⁷⁴ Nicola Jägers & Marie-José van der Heijden, *op. cit., supra*, n.262 at 860-1, noting that the Netherlands does not have the same legal culture, with a degree of *pro bono* involvement as in the U.S., for example.

²⁷⁵ There may be some steps that things are improving – now *Akpan* has broken a path for other lawyers to follow in the Netherlands, and looking at the forum-shopping that was attempted in *Allen v Depuy International Ltd* [2015] 2 W.L.R. 442, (EWHC).

²⁷⁶ Admittedly the absence of uplifts on fees, and/or ethical constraints on lawyers in particular jurisdictions may operate as constraints, but that does not mean it is not worth investigating. Furthermore where fees are backed by insurance, and the law firm or insurer can effective reinsure, this risk can be managed.

²⁷⁷ Cf. Joris Larik, 'Corporate International Criminal Liability: Oxymoron or an Effective Tool for 21st Century Governance?' in Hertwig et al (eds.), *Global Risks – Constructing World Order through Law, Politics and Economics*, (Peter Lang, 2010), 119-142 at 138

Meanwhile TNE economic and political influence at both host- and home-state level can become entwined in such litigation.

Third-state involvement has not been politically neutral either. Despite its enduring presence as a ground of jurisdiction in international law, universal jurisdiction for core crimes has become extremely controversial, despite the deeply reprehensible nature of the conduct it seeks to prevent. While tort and civil law actions remain perhaps more open than criminal prosecution – perhaps due in part to the perceived private nature of the interests they seek to protect – this has not been immune from calls for reterritorialization, as the experience of the ATS over the last three decades clearly shows. Yet many scholars, judges, and policy-makers are all guilty of the short-sightedness Alston warned of in 1997:²⁷⁸ other avowedly legitimate bases of jurisdiction are often ignored in the reductionism of the extraterritoriality debate. This tendency is dangerous, as it ignores economic and political realities and actually contributes to the decoupling of the TNE from State control and regulation.

²⁷⁸ Alston (n.5)

Chapter 3

The Limits of International Legal Frameworks

At the level of international law, a great deal of ink has been spilled coming up with ideas to better regulate TNEs. In most instances, where those translated into concrete proposals, they ultimately failed to be adopted by the international community, perhaps the best example of such a failure being the draft UN Norms on Transnational Corporations. Since 2011, many would argue the game has changed,¹ thanks to the endorsement by the UN Human Rights Council of the Guiding Principles on Business and Human Rights.² However the precise nature of these norms is debatable. In the meantime, significant hurdles remain in international law before it provides an effective tool for regulating TNE behaviour, not least the vexed issues of jurisdiction and personality.

I. The TNE: International Audience or Actor?

1. Public International Law Subjectivity

‘Since the participation of private corporations at the level of international law would now seem to be a *fait accompli*, international lawyers should stop being negative in their approach to this obvious fact. They must realize that as a result of these new arrivals in the international scene, the commercial law of nations, more than ever before, now constitutes a formidable challenger to international and comparative lawyers alike. It is only by their co-operations and positive contribution (rather than by their cowardice, pessimism and conservatism, evident in their out-moded dogmas or concepts) that this new branch of law can be developed into an acceptable part of extension of public international law’ (Ijalaye, 1978)³

The controversy of the international legal personality of TNEs is a well-trodden path. But it is probably fair to say that the international community did not rally to Ijalaye’s call in the late 1970s; the international legal personality of TNEs is still a hotly debated subject in the twenty-first century. As Cutler wrote in 2003, ‘...today transnational corporations are significant *de facto* subjects of law, notwithstanding their analytical status as “objects” and not “subjects” of law and

¹ See, e.g. Janice R. Bellace, ‘Hoisted by their own Petard? Business and Human Rights’ (2014) 56 J Ind. Rel. 442

² UNCHR ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31

³ David Adedayo Ijalaye, *The Extension of Corporate Personality in International Law* (Oceana 1978) 245

their theoretical insignificance or “invisibility” under international law’.⁴ And a standard authority on international law, repeated as recently as 2012 the worn-out truism that ‘in principle... corporations do not have international legal personality’.⁵

The jurisprudence of the ICJ fairly rigidly toes this line. In *Lotus*, the PCIJ defined ‘principles of international law’ as principles existing between independent and sovereign States.⁶ This caused some difficulty in the *Las Palmas* case. In this territorial dispute, the Netherlands argued that the island was theirs as they had exercised authority over it since the Dutch East India Company negotiated “treaties” with the locals in 1677. In the end, the arbitrator ruled in favour of the Netherlands, favouring title based on continuous sovereignty over title by discovery.⁷ Jessup has pointed out the ambiguities of the arbitrator’s approach: he held that the agreements signed by the companies were neither treaties nor conventions capable of creating international rights or obligation. Instead, he ‘felt impelled to attribute to them certain legal significance which is hardly distinguishable in fact from that which they would have had if he had called them international treaties’.⁸

In the *Reparations for injuries* case the ICJ had to decide whether ‘the United Nations, as an Organization, [had] the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view of obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?’.⁹ In other words, ‘does the Organization possess international personality?’¹⁰ In coming to the conclusion that the United Nations was an international legal person,¹¹ the Court referred to the following indicia: the presence of organs independent from the member States, privileges and immunities in the territories of its member States and the capacity to conclude treaties.¹² The Court added that the United Nations ‘could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with

⁴ A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (CUP 2003) 23

⁵ James Crawford, *Brownlie’s Principles of International Law*, (8th edn, OUP 2012) 122

⁶ *The Case of the S.S. "Lotus" (France v. Turkey)* PCIJ Rep Series A No 10. §238 (PCIJ)

⁷ *Palmas Island Case*, Perm. Ct. Arb. 1928, 2 U.N. Rep. Intl. Arb. Awards 829

⁸ Philip C. Jessup, *A Modern Law of Nations* (MacMillan 1958) 22

⁹ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion [1949] ICJ Rep 175

¹⁰ *ibid*, 178

¹¹ *ibid*, 179

¹² *ibid*, 178 - 9

the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged'.¹³

The first time the ICJ had to consider the specific case of a business enterprise was in the infamous *Barcelona Traction* case. The Barcelona Traction, Light and Power Company Limited was incorporated in 1911 in Canada where it had its head office. For the purpose of carrying out business in Spain, it formed a series of subsidiaries some of which were incorporated in Canada and others in Spain. Following a series of restrictions placed on business by the Spanish government and the bankruptcy of Barcelona Traction, several Belgian shareholders complained and the Belgian government brought a claim before the ICJ. The ICJ decision deals with a multitude of topics, including issues of diplomatic protection and *erga omnes* obligations. For present purposes, the most important part of the case is the court's approach to the capacity of individuals and corporations to bring forth an international claim:

'The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit [...]. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to further their case or obtaining redress.'¹⁴

In short, to the ICJ, corporations are analogous to State nationals. Moreover, there is no room in the ICJ's approach to take account of the corporate group or network: each individual company is considered to have the nationality of the State in which it is incorporated or has its seat. This was forcefully reaffirmed in *A. S. Diallo* in 2007.¹⁵

For Clapham, the traditional position conflates the issues of authorship of international law with personality under it. The literature is often confused, while the positions taken on the primacy of States as the (sole) subjects of international law are often inconsistent. 'Most doctrine would include as subjects of international law entities on their way to becoming States, and actors with State-like qualities'.¹⁶ When it comes to TNEs, Clapham notes that acts of corporations 'can be regarded as international crimes' and notes that the orthodoxy's 'concerns lose much of their sting when one reorientates the issue and simply asserts that corporations have limited international

¹³ *ibid*, 179

¹⁴ *Barcelona Traction, Light and Power Company Limited*, Judgment, [1970] ICJ Rep 3

¹⁵ *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Preliminary Objections [2007] ICJ Rep 582

¹⁶ Andrew Clapham, *The Human Rights Obligations of Non-State Actors* (OUP 2006) 59

legal personality rather than pretending that multinationals are proper/primary subjects of international law with the “status” that implies’.¹⁷ In other words, there is no need to throw the baby out with the bathwater in admitting TNEs to international law.

Others have advocated a more limited approach, accepting the limited legal personality of TNEs for defined purposes in defined contexts. Thus Dupuy supports their personality in the context of international contracts and their consequent arbitrations.¹⁸ Some scholars, however, while not necessarily supporting the State-to-State paradigm, do not see a change to provide for the international personality of TNEs as likely, because ‘they carry out their activities in the realm of the sovereignty of states’.¹⁹

In common with Ijalaye twenty-five years earlier, however, Cutler sees the legal ‘invisibility’ of corporations under international law as ‘deeply troubling empirically and normatively’.²⁰ As she explains:

“Transnational corporations and other private business associations in fact function as legal subjects, while legal doctrine pronounces their “invisibility” as “subjects.” Sources doctrine is similarly obfuscatory in its identification of legal sources that are in practice being eclipsed in significance by sources that are not recognized as instruments of law-creation. Privatized dispute settlement, in turn, infuses private activity with public purposes, eroding the foundations for accountability under the rule of law but, by virtue of self-disciplining distinctions between public and private activities and politics and economics, is neutralized or sanitized of public content and function. These tendencies reflect a profound disjunction and asymmetry between legal theory and state practice.”²¹

Acconci points to the failure of the U.N. Norms on Transnational Corporations and Human Rights²² as evidence, both of the desire of States to reaffirm their sole claim to subject supremacy in international law, and as reason to be pessimistic about the likelihood of TNEs assuming – or being granted – direct international law rights and duties.²³

¹⁷ *ibid*, 78 - 79

¹⁸ Pierre-Marie Dupuy, ‘L’unité de l’ordre juridique international’ 297 RCADI 105, 117

¹⁹ Pia Acconci, ‘Accountability of Multinational Enterprises for Human Rights: Is Anything Going Differently?’ in Marie-Ange Moreau & Francesco Francioni (eds), *The Pluridisciplinary Dimension of CSR*, (Presses Universitaires d’Aix-Marseille 2007) 117

²⁰ Cutler, (n 5) 249

²¹ *ibid*, 239

²² UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2

²³ Acconci, (n 20)

In the words of Kinley and Chambers, the U.N. Norms ‘attempt[ed] to take up the human rights obligations most relevant to companies and apply them directly to TNCs and other business enterprises, within their respective spheres of activity and influence’.²⁴ They were originally intended to form a binding treaty that would enshrine international legal obligations for companies.²⁵ They explicitly proclaimed the corporation as a duty-bearer, and then established which rights they might violate. It also used the concept of the corporation’s ‘sphere of influence’ to define the boundaries of obligation. They also went beyond “traditional” human rights in including various consumer protection and anti-corruption provisions.²⁶ However, it was ‘the very idea of an international instrument apparently speaking directly to nonstate entities, as well as to states, which... caused consternation’.²⁷ The norms were opposed by business and by many States. Eventually, in the words of the Special Representative on Business and Human Rights, John Ruggie, the debate about the Norms ‘ended in stalemate’.²⁸ He also criticized the notion of ‘sphere of influence’ as a poor grounder of legal obligations: ‘it has no legal pedigree; it derives from geopolitics. Neither the text of the Norms nor the Commentary offers a definition nor is it clear what one would look like that would pass legal liability test’.²⁹ Ultimately, it was Professor Ruggie’s view that the Norms ought to be abandoned.

The Norms, however, had a long pedigree. There had been a previous attempt at the UN level to establish a Code of Conduct for Transnational Corporations,³⁰ and were also preceded by the then venerable OECD Guidelines for Multinational Enterprises,³¹ and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises.³² The difference between these initiatives and

²⁴ David Kinley & Rachel Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6 HRLR 447

²⁵ See, generally: Carolin F. Hillemanns, ‘UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 4 Ger. LJ 1065; David Weissbrodt and Muria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 AJIL 901; Larry Catá Backer, ‘Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law’ (2006) 37 Colum. HRLR 287;

²⁶ cf articles 11, 13 of the UN Norms (n 23)

²⁷ Kinley & Chambers, (n 25) 452

²⁸ UNCHR Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (22 February 2006) UN Doc E/CN.4/2006/97, 14

²⁹ *ibid*, 17

³⁰ UN Draft Code of Conduct for Transnational Corporations UNCTC, *Transnational Corporations, Services and the Uruguay Round* (United Nations, 1990) 231 – 43

³¹ See further *infra*, chapter 4.

³² Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO (Geneva, 2006), available at

the Norms was their essentially voluntary character, and the lack of direct international legal obligations. Some see the 2006 report as sounding the ‘death knell’ for the norms,³³ but they were seen by many States as an attack on their primacy as international legal subjects. A submission from the U.K. Government, for example, stated that an ‘ongoing process should not seek to place companies in the same position as States with regard to obligations in international human rights law’.³⁴ The Norms ‘questioned the very essence of the State-centred doctrine’,³⁵ which may in part explain their ultimate failure.

This brings us to a problem which – while not necessarily non-existent at the national level – is particularly visible internationally: paralysis. Paralysis is well understood by social scientists at the domestic level, and one of the features of globalization in the information age has been the rise of transnational advocacy networks to generate “boomerang” effects to break domestic paralysis.³⁶ However a feature of the boomerang models of human rights advocacy is their inclusion of State and inter-governmental actors in the vectors of pressure which are brought to bear on domestic State authorities. The same possibilities do not necessarily exist when the community being targeted is the international community itself.³⁷

The calls for inclusion of TNEs in the international legal regime are perennial. They have been made since at least the 1970s. Forty-five years later, we are no closer to an international legal order which admits – as a principle of general international law – that TNEs may be duty-bearers of

<http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf>

³³ See discussion in: Pini Pavel Miretski & Sascha-Dominik Bachmann, ‘The UN “Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”: A Requiem’ (2012) 17 Deakin LR 6

³⁴ HM Government, ‘The Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights’, Communication to the Office of the High Commissioner for Human Rights’, Undated, cited in: Miretski & Bachmann, (n 34).

³⁵ *ibid*, 39

³⁶ See, *inter alia*: Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell UP 1998); Risse et al (eds), *The Power of Human Rights* (CUP 1999); Ellen Lutz & Kathryn Sikkink, ‘The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America’, (2001) 2 Chi. JIL 1; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, (W.W. Norton & Co 2011); Risse et al, *The Persistent Power of Human Rights: From Commitment to Compliance*, (CUP 2013).

³⁷ For examples of the discussion of ‘paralysis’ in international legal discourse, see e.g. John H. Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’ (2003) 97 AJIL 782; Hannah Yiu, ‘*Jus Cogens*, the Veto and the Responsibility to Protect: A New Perspective’ (2009) 7 N.Z. Yearbook Int’l Law 207; Ved P. Nanada, ‘From Paralysis in Rwanda to Bold Moves in Libya: Emergence of the “Responsibility to Protect” Norm under International Law – is the International Community Ready for it?’ (2011) 34 Hous. JIL 1; Allen Buchanan. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004)

international legal obligations.³⁸ The success of the new Guiding Principles³⁹ may be attributed, I would argue, to its rejection of this paradigm and its adoption of the far less controversial CSR-voluntarism model (and hence its inclusion in chapter 4, rather than here).⁴⁰ There is clearly a degree of paralysis at the international level which, where TNEs are concerned, refuses to move beyond Leibniz towards a conception which reflects the *de facto* exercises of power, influence, and law explained by Cutler.

It is not impossible that this paralysis will be broken at some point in the future. Progressive elements of the doctrine, led by Clapham and his interlocutors, show that there are not necessarily any persuasive conceptual barriers to international legal *personality*, and that the subjectivity versus objectivity debate is a false construct. As Higgins famously put it, '[w]e have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint'.⁴¹ But the paralysis has endured on close on half a century. Whether or not international lawyers should avoid giving in to pessimism, as Ijalaye urges, does not make stating the reality unimportant. As I argue in the next chapter, the international business community has not stood still. Thus, without neglecting calls for greater evolution of international law in this direction, it is nonetheless important to explore alternatives to international legal personality.

2. International Human Rights Law

Of course, as discussions and earlier drafts of the Rome Statute show, it may be possible to include TNEs in particular treaty-based international regimes, such as international criminal law.⁴² This is a slightly different question to the problem of "full-blown" international subjectivity. Since jurisdiction is granted by treaty or international agreement, it does not break the State-sovereignty monopoly (although it may still nibble around the edges). In essence, when it is conceived in this way, international criminal jurisdiction over TNEs may be said to be one of political will, or paralysis as just discussed; the conceptual barriers to international criminal liability for TNEs are

³⁸ cf Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations under EU and International Law* (Edward Elgar 2011) 15: 'For the time being, however, neither businesses nor States seem to be ready to define international standards for MNEs'.

³⁹ Ruggie, (n 2)

⁴⁰ See: Miretski & Bachmann, (n 34)

⁴¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, (Clarendon Press 1994) 49

⁴² Although not adopted in the final draft, this proposal would have admitted criminal jurisdiction over 'legal persons, with the exception of States, when the crimes were committed on behalf of such legal persons or by their agents or representatives', art 23(5) (14 April 1998) UN Doc. A/CONF.183/2/Add.1. See: Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in M. T. Kamminga & S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer International Law 2000) 139 - 195

not ‘insuperable’.⁴³ The wider issues of criminal liability, and in particular the interaction between differentiated levels of criminal regulation, are discussed in the next chapter. However, it is important for the current discussion that international legal responsibility by treaty, to create a regime of individual and TNE responsibility, is not necessarily a conceptual leap.

The same cannot be said for international human rights law. In a world where the legal landscape has become dominated by human rights claims, TNCs may act both as victim and perpetrator.⁴⁴ Indeed, the literature on TNE harm has focused on human rights as its defining paradigm for decades. This is reflected in policymaking, for example in the failed U.N. Norms and the Guiding Principles. Nonetheless, the human rights regime is based on a foundational concept of public action; it does not easily admit private actors as perpetrators in direct horizontal relationships. This is true both at the international level (victim vs. State) and in domestic law where human rights legislation exists (victims vs. public body).⁴⁵ Thus far, human rights adjudication bodies have tended to only admit claims against States⁴⁶ (or in the domestic context, public bodies).⁴⁷

Thus extending human rights to the TNE, traditionally considered a private actor, and providing for horizontal application of rights originally conceived as vertical, invites questions of legitimacy which are still hotly debated. Professor Ruggie, the UN Special Representative on Business and Human Rights, would have it that there is no ‘direct obligation’ for corporations under international law in respect of human right, but merely a voluntary form of corporate ‘responsibility’:

⁴³ Joris Larik, ‘Corporate International Criminal Liability: Oxymoron or an Effective Tool for 21st Century Governance?’ in Hertwig et al (eds), *Global Risks – Constructing World Order through Law, Politics and Economics*, (Peter Lang 2010) 138

⁴⁴ Steven R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 Yale LJ 443

⁴⁵ See, e.g. the American Convention on Human Rights, article 1: ‘The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms’; European Convention on Human Rights, article 1: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I’; English Human Rights Act 1998, c.42, section 6: ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’.

⁴⁶ E.g. in the ECHR system, the ECtHR can only receive claims under the convention brought by one contracting State against another (art. 33) or by an individual against a State (art. 34). Similar provisions apply to the U.N. treaty-monitoring bodies.

⁴⁷ English Human Rights Act 1998 c.42, s.6

“The term “responsibility” to respect [human rights] rather than “duty” is meant to indicate that respecting rights is not an obligation current international human rights law generally imposes directly on companies’.⁴⁸

This statement illustrates the positivist dilemma at the heart of thinking about TNEs and transnational harm. Since human rights law has developed as a system of public law, designed to impose obligations upon States to respect, protect and fulfil, it makes no sense to talk of corporate human rights obligations.

As an aside, it might be questioned why the unilateral adoption of human rights standards by TNEs is less controversial, since it amounts in effect to the co-option of standards traditionally applied to States by an actor not treated as such in the international legal order. It could be argued this actually removes human rights standards from the oversight mechanisms designed to ensure and monitor their protection, including international courts and treaty bodies, and privatizes a public debate. In this sense, it might be said that so-called voluntary human rights standards are another example of TNEs acting as *de facto* subjects,⁴⁹ but without the checks and balances of public authority mechanisms.

Attempts to overcome these problems abound, and ‘slot in’ business actors to the various State-based regimes. Theorizing the human rights obligations of business and TNEs has almost become a global industry of its own. Many of these, such as Ratner’s seminal work, start from the premise of the corporation as a “global actor” with both the power and opportunity to violate human rights.⁵⁰ According to this line of thought, State actors no longer have the monopoly on power which would enable them to prevent and repair violations by corporate actors against individuals; it is therefore necessary to prescribe international human rights law obligations to them in order to regulate the potential harm such TNCs may cause.⁵¹ This is closely linked to the literature which describes the changing role of the State following globalization and the emergence of new economic centres of power.⁵²

Conceptualizing human rights from the bottom, i.e. from the perspective of the victim of a violation, provides a rather different perspective. Starting with the natural counterpart to corporate

⁴⁸ Ruggie 2010a, at 55

⁴⁹ cf Cutler, (n 4)

⁵⁰ Ratner, (n 45) esp. 461 – 473

⁵¹ *ibid*; Ratna Kapur ‘From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations’ (1990) 10 *Bost. Col. Third World LJ* 1

⁵² cf Cutler, (n 4); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (CUP 1996)

law, labour law, it has been said that 'TNEs 'can have a substantial impact on the enjoyment of economic, social and cultural rights'.⁵³ Thus the 'verticality' of human rights described above may be a result of historical contingency.⁵⁴ They can also 'cause extensive environmental damage... which can impact the rights to health, life, minority rights and the right to self-determination', and 'there have been allegations of severe human rights abuse, including tortures and killings'.⁵⁵ Of course, many of these rights correspond to rights in domestic legal systems, such as the tort and criminal prohibition on murder, or workers' rights to a safe working environment. Ruggie hints at this when he repeatedly points out that human rights abuses by companies may be protected through the domestic laws of States. However this congruence is rarely perfect: there may be both areas of domestic law which provide protections not part of the international human rights canon (or not widely accepted as part of the core human rights), and States where domestic law offers no protection for a given human right.⁵⁶ It is for this reason I introduced the concept of manifest, serious and comparative injustice in the first chapter, in order to provide a comprehensive framework for discussion of TNE harm.

Unfortunately, however, it is the verticality of human rights which has dominated international discourse, contributing in no small part to the failure of the U.N. Norms and the State-centric grounding of mandatory obligations in the Ruggie framework. Just as experience with the Rome Statute shows there is no conceptual bar to subjecting TNEs to the adjudicative jurisdiction of an international criminal court, so it may be possible to provide for TNEs to be included before a human rights court. Early twenty-first century pleas for a world court saw the ATS as an exportable model; one that would judge claims brought by private persons against States (including their own State) which violated their human rights.⁵⁷ While Gibney's concept is aimed at avoiding the difficult issues of sovereign immunity in domestic courts, his use of the ATS as a potential model, as well as his titling of the court as a civil – not a 'human rights' – court, would tend to imply a potential for including defendants other than States. Indeed, Gibney poses the question–

⁵³ Gatto, (n 39) 9

⁵⁴ Margot Salomon, 'The Future of Human Rights', (2012) 3 Global Policy 455

⁵⁵ Sarah Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises' in M. T. Kamminga & S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer International Law 2000)

⁵⁶ E.g. the criminal blocking statute in Papua New Guinea which regulated compensation at the Ok Tedi mine: see discussion in Chapter 1.

⁵⁷ Mark Gibney, 'On the Need for an International Civil Court', (2002) 26 Fletcher F. World Aff. 47

‘children in Uganda might possess a "right" to an education, but the duty to meet this right rests with the Ugandan government and that government alone. What happens if this right (or any other) is not met by the Ugandan government?’⁵⁸

But the remainder of Gibney’s argument considers only one facet of the scenario; where the Ugandan State is the entity responsible for fulfilling the right. However in education – as with most economic and social rights – business has long played a significant role, particularly in developing countries. To paraphrase, what happens if this right is not met by the Ugandan Government but has been contracted out to a transnational enterprise? Logically, using the ATS as a model (and ignoring the narrow conception which argues that absence equals prohibition in international law and thus corporates are not amenable to suit),⁵⁹ Gibney’s proposal should admit for corporate and other organizational defendants which are granted responsibility for the provision of public goods or arrogate such provision to themselves.

Indeed, such an evolution is what has been mooted in the recent World Court of Human Rights project. This proposes a new international treaty providing for an international court of human rights, along the lines of the International Criminal Court, which would have jurisdiction over human rights violations worldwide.⁶⁰ The option of a new treaty, the deliberate avoidance of treaty amendment in the World Court project is telling: it allows for drafting which opens up the category of human rights duty-bearer without the need for messy reconceptualization of rights and treaties written for, and about, States. It is thus explicitly envisioned in the draft statute that ‘entities’ including TNEs may unilaterally declare that they recognize the jurisdiction of the court, paving the way for universal human rights adjudication of corporate action.

It is far from clear that the European or Inter-American human rights courts, to name but two examples, could be so easily modified without extensive treaty amendment. Any attempt would be likely to meet significant opposition from States and business actors, and would also have to confront geopolitical realities, such as the domestic opposition to “human rights” currently in evidence in the U.K., for example. It is thus clear that so far as extending the existing human rights canon to TNEs, rather than reifying it through new dialogue and instruments as in the World Court, international human rights law suffers similar institutional paralysis as general international

⁵⁸ *ibid*, 47

⁵⁹ As per the debate around the lower courts’ original decision in *Kiobel*. See above, chapter 2.

⁶⁰ Martin Scheinin, ‘International Organizations and Transnational Corporations at a World Court of Human Rights’ (2012) 3 *Global Policy* 488; Julia Kozma, Manfred Nowak & Martin Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010); Manfred Nowak, ‘The Need for a World Court of Human Rights’ (2007) 7 *HRLR* 251

law. This paralysis may be more easily surmounted, particularly if the aforementioned reification efforts come to fruition, but as before it does not affect the need to recognize this paralysis and take it into account in analysing and developing TNE accountability on the world stage.

II. State Responsibility for Corporate Action

‘Nay, fly to Altars; there they’ll talk you dead;
For Fools rush in where Angels fear to tread.’

Alexander Pope, *An Essay on Criticism*

The discussion of international State responsibility for business actors has been so exhaustively discussed that I hesitate to recapitulate it here. An excellent – and comprehensive- overview is provided in the seminal work of Nicola Jägers.⁶¹ However, I find a brief sketch is necessary in order to tease out some of the limitations inherent in this approach as a method for the accountability of businesses. I have, however, tried to keep this sketch as brief as possible to avoid substantially repeating what others have already said better.⁶²

Proceeding on the current reality of international legal obligation, what possibilities exist for the regulation of TNE conduct, whether or not we accept the premise of the international legal system as one which will only admit the participation of States? There are three main legal bases for engaging State responsibility under international law. Firstly, it may be possible for victims to claim against the State directly before human rights courts where the State is complicit in the abuse.⁶³ Secondly, States may represent their citizens on the international level, either against another State which has committed human rights abuses together with a company (easy to imagine in, for example, cases involving environmental damages which easily spreads across borders), or in specialized fora such as investor-state arbitration.

⁶¹ Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability*, (Intersentia 2002)

⁶² For selected examples, see: Pia Acconci, (n 19); Mzikenge Chirwa, ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights’ (2004) Melb. JIL 1; Francesco Francioni, ‘Imprese multinazionali, protezione diplomatica e responsabilita internazionale’ (Milan 1979); Francesco Francioni, ‘Four Ways of Enforcing the International Responsibility for Human Rights Corporations by Multinational Corporations’ in Marie-Ange Moreau & Francesco Francioni (eds), *The Pluridisciplinary Dimension of CSR*, (Presses Universitaires d’Aix-Marseille 2007) 155 - 174; Edith Brown Weiss, ‘Invoking State Responsibility in the Twenty-First Century’ (2002) 96 AJIL 798

⁶³ See: Clapham, (n 17)

1. International State Responsibility

Under the International Law Commission's Articles on State Responsibility, States may be internationally responsible where a private actors is 'empowered... to exercise elements of the governmental authority' (article 5), is 'directed or controlled by' the State (article 8), or conduct is 'adopted by a state as its own' (article 11).⁶⁴ In theory, this could lead to the imposition of responsibility over a host-state where it acts in concert with a TNE in abusing rights.

The jurisprudence of the ICJ is deeply conservative on this point. The starting point is, of course, the *Nicaragua* case.⁶⁵ Although, in the findings of the court, it was 'is established that the Contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States',⁶⁶ this did not 'warrant the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State'.⁶⁷ In the *Genocide* case,⁶⁸ the Court clarified that responsibility could also be engaged where the State had directed operations, or exercised 'effective control'.⁶⁹

According to the ICJ, there is no international standard of 'complicity' in general international law. The closest one gets is in article 14 of the Articles on State Responsibility, endorsed in the *Genocide* case, which is limited to aiding or assisting another State. However another potential route to State responsibility is where the State adopts the acts of a private party as its own.⁷⁰ This principle was considered in *Tebran Hostages* although rejected on the facts.⁷¹ However the case is interesting for another reason, since the Court found that Iran was internationally responsible on the basis of an omission, i.e. a failure of its obligation to protect U.S. Embassy staff. It is conceivable that such reasoning could be applied *mutatis mutandis* to cases where a TNE (or, for example its private

⁶⁴ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, 2001 (UN Doc. A/56/10)

⁶⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (merits) [1986] ICJ Rep 14

⁶⁶ *ibid*, 63

⁶⁷ *ibid*, 65

⁶⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (merits) [2007] ICJ Rep 43

⁶⁹ *ibid*, 208

⁷⁰ See Articles on State Responsibility, above n.64, article 11

⁷¹ *United States Diplomatic and Consular Staff in Tebran (United States of America v. Iran)* (merits) [1980] ICJ Rep 3

security contractors) commits acts which amount to breaches of customary international law, such as extrajudicial killings or torture, and the host-state fails to step in.⁷²

To date, no case has been brought before the ICJ to hold a host-state (or a home-state) internationally liable for the acts of a TNE. In addition to the very high threshold for State responsibility sketched above, three major barriers lie in the way. First, there needs to be an international character to the dispute. For an interstate case, the complainant State must be affected by the actions of another State to the extent that there is a dispute between them, and the complainant has a legal interest. This is likely to be difficult to establish in cases involving situations which are essentially internal to the host-state, as in the Ogoni situation.⁷³ Perhaps the most probable scenario would be of a home-state whose citizens are affected by a mass disaster imputable to the actions of a company whose acts are in fact attributable to the home-state. The *Nicaragua* case offers the closest example, and other private military company activities could also fit this mould, particularly where the company operates as the subcontractor of a State, as in the case of Halliburton and Blackwater in Iraq.

The second barrier is a corollary to the first; the complaint requires State involvement, which presupposes a citizen-friendly State willing to take up the torch against the host-state and act effectively as *parens patriae*. Again, this is possible but uncommon in practice; the closest example is the complaint by Ecuador against Colombia in respect of the ‘Plan Colombia’ aerial spraying, which was ultimately removed from the ICJ’s list by consent.⁷⁴ Finally, there is the requirement of consent to proceedings, since unless the jurisdiction of the Court is established by article 36(2) of the ICJ Statute⁷⁵ or by treaty, consent to jurisdiction must be given by the State in every case.

2. Regional and International Human Rights Adjudication

International human rights law follows a well-established tripartite typology. States have obligations to ‘respect, protect and fulfil’ human rights.⁷⁶ As is well known, while the first of these

⁷² It is not difficult to find parallels in, for instance, EU case law, where Member State failure to prevent the actions of private parties with free movement rights can be wrongful. See: *Case C-265/95 Commission v France* [1997] ECR I-6959 (free movement of goods). For a more limited analogy, relevant only insofar as it left open the door to human rights being subject to the same reasoning as for economic liberties: *Case C-112/00 Schmidberger v Austria* [2003] ECR I-5659 (rights of association and expression).

⁷³ See Chapter 1

⁷⁴ See <http://www.icj-cij.org/docket/index.php?p1=3&code=ecol&case=138&k=ee> (accessed 12 March 2014). See also discussion of the ATS cases brought against the companies involved in the spraying, discussed above, chapter 1.

⁷⁵ Now rare – the only Security Council member which still recognizes the Court’s jurisdiction in this way is the U.K.. See: Crawford, (n 6)

⁷⁶ An amalgam of approaches developed by Asbjorn Eide when Special Rapporteur UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (Right to Adequate Food as a Human Right, Report

is essentially uncontroversial, the second and third entail more extensive “positive” obligations. In protecting rights, States may need to take positive measures to prevent rights-violating acts by third parties, including private actors. The obligation to fulfil, the most controversial, includes positive obligations to ensure the needs required by a particular right – such as the right to food, or health – are met. ‘Respect, protect, fulfil’ has been widely adopted at the UN level and by human rights courts, as well as in other international human rights instruments such as the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.⁷⁷

This tripartite framework has allowed human rights courts to go much further in attributing responsibility to State parties for the acts of other actors, including TNEs. By way of illustration, let us return to the Ogoniland disputes, discussed already in chapters 1 and 2. In addition to the ATS cases, a case was brought before the African Commission on Human and Peoples’ Rights.⁷⁸ In its determination, the Commission applied the tripartite framework, and used it to justify violations of a number of environmental rights which on the basis that Nigeria had failed ‘to take reasonable and other measures to prevent pollution and ecological degradation’.⁷⁹ It went on to find that:

‘Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties’⁸⁰

The Commission also found that the Nigerian government had ‘facilitated the destruction of the Ogoniland’ and found violations of the rights to dispose of natural resources,⁸¹ to adequate housing,⁸² to food,⁸³ and to life and integrity of the person.⁸⁴ It commented:

prepared by Mr A. Eide, UN Doc E/CN.4/Sub.2/1987/23 (1987)) and: Henry Shue ‘The Interdependence of Duties’, in Philip Alston & Katarina Tomasevski (eds), *The Right to Food* (Martinus Nijhoff 1985) 83 - 95. See further: Olivier De Schutter, *International Human Rights Law: Texts, Cases & Materials*, (CUP 2014) 35 - 60

⁷⁷ Adopted by a group of academic experts in Maastricht 22-26 January 1997; reissued in 2000 as UN Doc E/C.12/2000/13.

⁷⁸ Case 155/96 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR/COMM/A044/1. For an overview, see: Fons Coomans, ‘The Ogoni Case before the African Commission on Human and Peoples’ Rights’ (2003) 52 ICLQ 749

⁷⁹ ACHPR/COMM/A044/1 at [52]

⁸⁰ *ibid*, [57]

⁸¹ *ibid*, [58]

⁸² *ibid*, [62]

⁸³ *ibid*, [66]

⁸⁴ *ibid*, [67]

“The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community⁸⁵

One only has to consider the striking differences in the Ogoniland cases between *Wima v Shell*,⁸⁶ on the one hand, and the African Commission case, on the other. Operating as they did in very different frameworks, they placed very different emphases on particular aspects of the dispute. The African Commission case is startling for the predominance given to economic, social and environmental rights, as opposed to “core” civil and political rights, while *Wima* focused exclusively on the latter. Indeed, the case was only permitted to go forward on the basis of those acts which constituted international crimes and customary norms.⁸⁷ Given the limitations placed on the ATS by *Sosa*,⁸⁸ this is not surprising but – because corporate actors cannot yet be sued before human rights courts – there was no other forum available for considering Shell’s involvement. Economic, social and environmental rights were not things the U.S. courts could consider, leading to an artificial *dépeçage* of the root claim. This highlights another limit of the existing frameworks for TNE liability, since where legal rights exist but do not match up with the jurisdiction of the court able to hear the complaint against a particular party, such dissonance is inevitable.

This is to be criticized for two reasons: it means that impugned actors may be denied a possibility to respond to allegations. In the African Commission case, Shell was not a party to the action, and its views were not solicited by the court. Yet aspects of the judgment bear upon its conduct, such as where the court censured the ‘destructive and selfish role-played by oil development in Ogoniland’,⁸⁹ and the acceptance and citation of the complaint alleging that ‘the Nigerian Government has condoned and facilitated [the]... violations by placing the legal and military powers of the State at the disposal of the oil companies’.⁹⁰ On the other hand, it creates a very unsatisfactory situation from a victim’s perspective, since it creates a very difficult environment for legal accountability, meaning claims must needs be truncated in order to be admissible before

⁸⁵ *ibid*

⁸⁶ *Wima v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377 (S.D.N.Y, 2009)

⁸⁷ *ibid*

⁸⁸ *Sosa v. Alvarez-Machain*, 542 US 692, 124 S. Ct. 2739, (USSC, 2004). See above, chapter 2

⁸⁹ ACHPR/COMM/A044/1 at [55]

⁹⁰ *ibid*, [3]

each partial forum. In an attempt to square the circle, they can then be parcelled out to the various fora but this brings with it its own practical difficulties.⁹¹

Other regional human rights courts have been similarly ready to find violations where States have not prevented acts by non-state actors. In the ECtHR there is an extensive body of case law providing for positive obligations on the State in relations between private parties. For example, a responsibility to protect the right to freedom of expression in a privately-owned shopping mall was admitted in principle in *Appleby v U.K.*, although no violation was found on the facts.⁹² In *López Ostra v Spain*,⁹³ however, it found the State liable for failing to regulate a tannery waste treatment plant and found violations of the applicant's right to private and family life.

The Inter-American Court has also made some path-breaking judgments, particularly in respect of community and indigenous peoples rights. An example is to be found in the *Saramaka v Suriname* case,⁹⁴ which held that the State's grant of logging concessions violated the tribal community's right use and enjoy the natural resources on its traditional lands. By way of remedy, it ordered the State to 'delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people', to review the existing concessions, and to provide through legislative, administrative and other measures effective prospective protection of the Saramaka. This would include the recognition of their collective legal personality, the right to be consulted, and the provision of 'adequate and effective recourse'.

A similar decision was reached in the earlier *Awas Tingni* case. As in *Saramaka*, the inhabitants of the Awas Tingni region were an indigenous group, this time a Mayagna Sumo community. In the mid-nineties, Nicaragua granted a logging concession and the right to build a highway to a Korean company, the Sol del Caribe S.A. (SOLCARSA) in the Awas Tingni region. The community, with the help of NGOs and an American university, first tried to find a solution through the Nicaraguan national courts. Although the Supreme Court ruled the SOLCARSA concession unconstitutional,⁹⁵ this failed to result in the cessation of SOLCARSA activities or any grant of title to the Awas Tingni community. The subsequent case to the Inter-American court led to the court finding

⁹¹ Not to mention the potential financial consequences for claimants of litigation before multiple courts.

⁹² *Appleby and others v United Kingdom*, (App. no. 44306/98), Judgment of 6 May 2003

⁹³ Judgment of 9 December 1994

⁹⁴ *Case of the Saramaka People v. Suriname*, Judgment of 28 November 2007, Series C No. 185 (IACHR)

⁹⁵ See, e.g. Jennifer A. Amriott, 'Environment, Equality and Indigenous Peoples' Rights in the Inter-American Human Rights System: *Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*', (2002) 32 *Envtl L.* 873, 894

violations of the right to property (art. 21), judicial protection (art. 25), equal protection (art. 1(1)), and harmonization (art. 2).⁹⁶

In addition to the regional courts, the UN treaty-monitoring bodies have also, on occasion, considered claims involving corporate activity.⁹⁷ A good example, which bears similarities to the Inter-American cases discussed above, is *Hopu & Bessert v. France*.⁹⁸ The complaint was brought by residents of French Polynesia against a proposed hotel development on the island which they alleged would desecrate an ancestral burial ground and interfere with indigenous fishing activities. Ownership of the land had been previously granted by the French courts to the *société hôtelière du Pacifique sud*, later solely owned by the Territory of Polynesia.⁹⁹ It was then subleased, ultimately to a company called the *société hôtelière RIVNAC*.¹⁰⁰ The latter succeeded in gaining an injunction against the community in the French courts, preventing continuing protests against the hotel development. They brought a complaint to the Human Rights Committee under the optional protocol to the ICCPR, alleging breaches of the right to private and family life (articles 17 and 23), and the right of minorities to enjoy their culture, religion and language (article 27). The majority of the committee found violations of the rights to privacy and family life but ruled the minority rights complaint inadmissible.

Hopu & Bessert is interesting for its focus on enabling acts – the State duty to protect – rather than commission of the actual violation. Although the company holding the head lease of the land was publicly owned, the sub-lessee (RIVNAC) undertaking the work that would actually interfere with the claimants' rights was not. By focusing on the act of *leasing* the land for hotel development, rather than the actual planned works which were evidently not under direct State control, the Committee bypassed difficult questions about whether the société RIVNAC was a human rights duty-bearer. In the later case of *Poma Poma v Peru*,¹⁰¹ a case involving rights to water, minority rights were used to protect rights to water from State-sponsored deprivation in the Tacna region of Peru.

⁹⁶ *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Series C No. 79 (IACHR)

⁹⁷ An overview is given in Jernej Letnar Čeranič, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights* (Europa Law Publishing, 2010) 94 - 108

⁹⁸ Human Rights Committee, 60th Session, Views of the Human Rights Committee under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, concerning Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1

⁹⁹ *ibid*, §2.1

¹⁰⁰ *ibid*, §2.2

¹⁰¹ Human Rights Committee, Ninety-fifth session, Views of the Human Rights Committee under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, concerning Communication No. 1457/2006, U.N. Doc CCPR/C/95/D/1457/2006

Although the entities involved in the Tacna project were all public, it is not difficult to see how the reasoning of *Hopu & Bessert* could apply, *mutatis mutandis*, to *Poma Poma*.

Conclusions

In the long history of regulation of commercial activity, from the early days of the Medici bankers to the Second World War, there was always a higher power with an opportunity to curb the worst excesses of capitalist gluttony. First the Catholic Church (and indeed the various Islamic authorities) took steps to outlaw usury, then later the nation-state was sovereign, with an easy reach over its corporate citizens. Since Bretton Woods and the advent of modern globalization, however, it might be questioned what higher power now really exists above the TNE. We have seen that supposedly sovereign States are often subject, if not to the desires of individual enterprises, then certainly to the whims of the market and the need to attract investment or protect their home economy. Domestic regulation is further weakened from above by the effect of international investment law and arbitration, which draws the teeth from domestic court judgments and passes the risk of investment to the State and indirectly the people affected by it, effectively meaning investors can have their cake and eat it. And when it comes to the courts of home-states there is often a fatalistic insistence on territorial jurisdiction and refusal to consider the actions of enterprises abroad.

At the international level, attempts to elevate TNEs to the status of an international actor, with legal personality, have been repeatedly thrown out. Although the conceptual barriers to this may be weaker than first appears, and TNEs have for decades acted as *de facto* participants in international law and relations, influencing legislative development both at the international level and in their relations *qua* investors with individual States, international law is gripped by an institutional paralysis which has – so far – steadfastly refused to take even the partial the step of admitting TNE liability. Individual States have been slow to notice this new construction project happening in their backyard. States seem trapped in a ‘my home is my castle’ view, slow to appreciate the limits imposed upon them by economic and legal globalization and the fact that regulating TNEs is unlikely to be something that they can do alone.

This same is largely true of international law as it stands, even allowing for radical overhaul of the system or the development of a world court of human rights with power to pass judgment on TNEs. First, international law is complementary to domestic systems and not a comprehensive legal system by itself. Second, even with a system of universal, binding human rights adjudication, (a) it would be necessary for domestic courts to bear much of the burden, and (b) it would still

leave certain types of claim unaccounted for. State responsibility for the actions of TNEs are far from established before international courts (including regional human rights courts) and are often themselves trapped by the State-centric drafting of human rights treaties, which may make fully capturing the relationship between State and TNE difficult.

Where it is available, State responsibility – be it based in general international law or in human rights law – may afford the victims a degree of compensation.¹⁰² The ensuing international publicity can also, as happened in the *Awas Tingni* case, cause international organizations to exert extra-legal pressure, for example through conditional aid packages. In *Awas Tingni* the World Bank made conditioned its aid on legislative reform by Nicaragua to demarcate indigenous lands.¹⁰³ From the point of view of regulation of TNE behaviour, however, it is essentially a hollow standard. The remedy is provided from the taxpayer, not by the wrongdoer, meaning any correlative justice between the enterprise and victim is not satisfied, and there is no punitive or deterrence aspect in the award from the enterprise’s point of view. There is simply no direct legal relationship between the enterprise and those affected (see Figure 1). Consequently, if there is a corresponding lack of available domestic forums or legal rules,¹⁰⁴ TNEs can continue to act with impunity in such cases, creating a deregulatory effect notwithstanding international or human rights legal obligations.

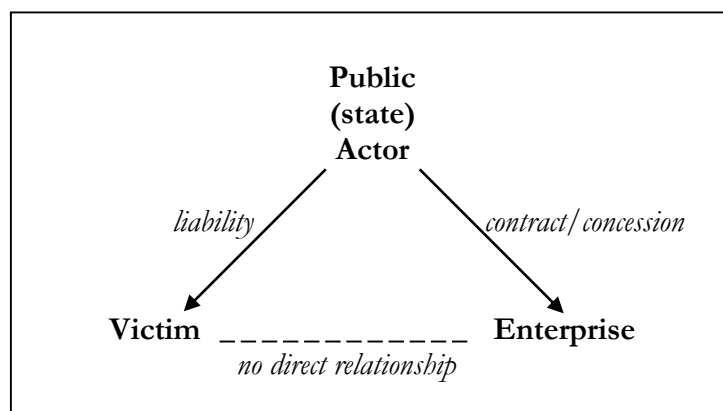


Figure 1

¹⁰² Providing the judgment is honoured by the state – there are indications that this is not the case in the *Saramaka* case. See The Report of the UN Working Group on Business and Human Right’s work on individual cases of alleged human rights violations and abuses, March 2014, which expressed concern to Suriname over planned mining activities on 4 April 2013, available at <http://business-humanrights.org/sites/default/files/media/documents/unwg-individual-cases-mar-2014.pdf> (accessed 17 February 2015). See also Luis Vittor, ‘Les peuples autochtones et le traité sur les sociétés transnationales et les droits de l’homme’, *El Correo de la diáspora latinoamericana*, 12 February 2015, <http://www.elcorreo.eu.org/Les-peuples-autochtones-et-le-traite-sur-les-societes-transnationales-et-les-droits?lang=fr> (accessed 17 February 2015).

¹⁰³ Amriott (n 95), 899

¹⁰⁴ See chapters 1 & 2

It is important to note, however, that international adjudication is not always merely compensatory. Perhaps the most interesting aspect of the international human rights courts (and the UN treaty bodies and Inter-American Court in particular) is the ability to *compel* regulatory or legislative action by States. In both *Awas Tingni* and *Saramaka*, the IACHR laid down explicit requirements for legislative and/or regulatory reform which were obligatory on the violating State, in order to provide prospective protection and also remedial action such as restitution or reinstatement. Although the brevity of Human Rights Committee views leaves little room for such expansive provisioning, the same impetus is no less present in those decisions. And other treaty bodies have on occasion been more specific: Letnar Čerňič notes, for instance, the *F.A. v. Norway* case before the Committee for the Elimination of Racial Discrimination, which required Norway to reform housing procedures and legislation binding on private parties in order to eliminate discrimination.¹⁰⁵ The difficulty comes when, as in *Saramaka*, the State refuses to play along. Then, of course, there is the fact that any legislative or regulatory measures must, in order to be effective, surmount the obstacles identified in chapters 1 and 2.

¹⁰⁵ Letnar Čerňič (n 97) 102

Chapter 4

Transnational Law & Regulation

So far we have examined the regulation of business in domestic and international law. I argued that there are a number of varying strategies TNEs may use to frustrate effective regulation. Some of these arose from the imperfect congruity between the TNE as an economic and political actor and the attempt to describe it legally, and others were due to systemic or axiomatic limitations in the domestic and international systems.

Unsurprisingly, however, this is not the end of the story. As TNEs and other actors not captured by the traditional legal orders have risen in prominence their power to influence those systems has increased. As Cotula puts it, '[n]egotiations among these players shape the design of an investment project and influence its outcomes'.¹ But it is not only in shaping the legal rules of domestic systems that this plays. There is also a *transnational* space which TNEs inhabit. The norms which regulate this space do not necessarily have their origin in domestic or international laws.

There has always been a residual transnational space where regulation was more fluid than elsewhere. In stark geographical terms, the high seas, outside the bounds of single State control, was one such space; problems with piracy and trade led, as we saw in chapter 2, to the development of universal jurisdiction over the crime of piracy. But the *lex mercatoria* is another; from its origins in the Roman *ius gentium* through the middle ages and in its modern form, 'it supported a predominantly private commercial order, generating merchant laws and institutions that operated outside the local political economy of the period'.² Arbitration also offered an alternative judicial process to transnational players, embedded in but independent of domestic legal dispute resolution mechanisms. According to some authors, arbitration has existed since time immemorial,³ but what is certain is that since the ratification of the New York Convention,⁴ it has offered an alternative to domestic litigation with immensely simplified enforcement procedures. And yet despite its recognition in international conventions and domestic laws, it provides a judicial or quasi-judicial

¹ Lorenzo Cotula, *Human Rights, Natural Resources and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (Routledge 2012) 2

² A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge UP 2003) 8

³ Frank D. Emerson, 'History of Arbitration Practice and Law' (1970) 19 Clev. St. LR 155

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (adopted 10 June 1958, entered into force 7 June 1959) 7 ILM 1046 (1968) (New York Convention)

process over which States have little control. Choice of arbitrator, for example, is the choice of the parties and must be respected by domestic courts.⁵ In this sense the arbitrator is akin to a privately agreed, transnational judge.

Transnational law, what it is and how it should be articulated, is a fashionable topic in legal studies at present. Although I cannot avoid discussing its theoretical implications, I leave this for chapter 5. For now all I am interested in doing is describing those systems which could be described as transnational and subjecting them to a similar analysis as in the preceding chapters. The essential questions are what their inherent limits are (if any), and what limits they place on other forms of regulation. With that in mind, in part I, I examine legal frameworks with a transnational element, but which are nonetheless unequivocally ‘law’ while in part II I consider the vexed question of ‘transnational regulation’. I do not use the term ‘soft law’ because in my view that presupposes that the rules under discussion do indeed fit into the schema of transnational – or other – law, when really that is the whole question that transnational legal theory is trying to address. Secondly I have deliberately avoided including ‘private’ in my formulation. For reasons to be discussed later, it is a dangerous term to use. To analogize from Goldsmith and Levinson, I ‘avoid the term “private law” because when it is used in contrast to public law it comes freighted with the ... theoretical and historical baggage of the public/private distinction, and because its meaning becomes even more ambiguous as it crosses the boundary between domestic and international law’.⁶

I. Transnational Legal Frameworks

1. *Lex mercatoria*

Historical Development

Medieval merchants

The *lex mercatoria*, or merchant law, developed properly in the middle ages, although its genesis has been traced to the Roman *ius gentium*.⁷ It was ‘an international law of commerce... based on the general customs and practices of merchants which were common without Europe’.⁸ It was ‘applied

⁵ *ibid*, article 5(1)(d) ‘The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place’. Thus where the parties have agreed on an arbitrator, it is not open to a domestic court to question their choice provided it was made in accordance with their agreement.

⁶ J. Goldsmith & D. Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ (2009) 122(7) Harvard LR 1791

⁷ Cutler, (n 2) 108

⁸ LS Sealy & RJA Hooley, *Commercial Law* (4th edn, Oxford University Press 2009) 14

almost uniformly by the merchant courts in different countries'.⁹ It thus developed outside the legal systems of individual countries, although it may have imported principles from them. However, it focused on speedy resolution of disputes in the merchant courts, often deciding cases *ex aequo et bono*. And the courts themselves were special; they were usually composed of merchants themselves and existed, for instance, at 'the fairs and boroughs and staple courts' of the places where merchants would travel to market their goods.¹⁰ It was thus 'a deterritorialized legal order "that did not derive its normative claims from treaties amongst sovereign states"'.¹¹ The influence of territorial authorities (national, feudal, municipal or ecclesiastical) was limited:

[They] did not participate in the regulation of international trade, beyond the granting of charters to trade and to hold fairs and markets, the general provision of safe conduct for merchants in their transit to the fairs and markets, and awarding exemptions from local laws in return for the payment of customs and duties.¹²

Indeed, looking at its ensemble of factors: its specialty, sources, administration, procedures and principles, *lex mercatoria* truly was 'transnational' in character.¹³ What is more, the 'merchant courts' were essentially, by the standard of the time, private. They were not backed by ecclesiastic or State sanction, and arguably looked 'more like contemporary arbitration tribunals than courts of law'.¹⁴ The merchant courts and *lex mercatoria* derived their authority 'from voluntary acceptance by the merchants whose conduct [they] regulated'.¹⁵

Modern Revivalism & Globalization

The modern form of *lex mercatoria* is more difficult to pin down. Sealy & Hooley view modern codification and the generation of a 'transnational commercial law' as 'falling short' of true *lex mercatoria* because –

⁹ *ibid*

¹⁰ *ibid*

¹¹ Cutler, (n 2) 109, citing: Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* (Routledge 1995) 289

¹² *ibid*, 109

¹³ See: Harold J. Berman & Colin Kaufman, 'The Law of International Commercial Transactions (Lex Mercatoria)' (1978) 19 *Harvard ILJ* 221

¹⁴ Cutler, (n 2) 133

¹⁵ Sealy & Hooley, (n 8)

‘it only has legal force by virtue of its express or implied incorporation into contract, or its reception into national law, or supranational law (e.g. EC law), through judicial recognition or legislation, and not simply by dint of its mere existence.’¹⁶

They are echoed by Goode, who has argued that as ‘observed practice the [modern] *lex mercatoria* is not dependent on external legal recognition at all, for it is not truly *lex*’.¹⁷ But this objection misses the fundamental point about the medieval merchant law; it was also entirely dependent on voluntary acceptance by the merchant community for its effectiveness.

The content of modern *lex mercatoria* lies in various harmonization movements – such as UNCITRAL and UNIDROIT – as much as in trade custom and usage. There is also a degree of ‘conscious and unconscious borrowing of legal concepts’ from different systems, or ‘judicial paralegalism’.¹⁸ The goal is the creation of a modern *ius commune* akin to medieval merchant law’s ubiquity. Its development, argues Cutler, is governed by the ‘mercatoracy’, an ‘elite association of transnational merchants, private lawyers and their associations, government officials, and representatives of international organizations’.¹⁹ Cutler is not alone – French doctrine posits a similar sociological analysis, famously caricatured by Teubner.²⁰

As well as its focus on custom, unification and harmonization of commercial rules into a *ius commune*, modern transnational commercial transactions are equally marked by their predilection for arbitration, as was the medieval *lex mercatoria*. ‘Today’ Cutler emphasizes, ‘the settlement of commercial disputes through private arbitration is the norm’.²¹ This has brought about a paradox in State regulation; just as State authority has ‘been curtailed in the settlement of substantive commercial legal issues and disputes,’ it has been ‘strengthened as states undertake the binding commitment to enforce foreign arbitral awards’.²² With the adoption of UNCITRAL’s Model Law

¹⁶ *ibid*, 18

¹⁷ Roy Goode, ‘Rule, Practice, And Pragmatism In Transnational Commercial Law’ (2005) 54 ICLQ 539

¹⁸ Sealy & Hooley, (n 8) 18

¹⁹ Cutler, (n 2) 185

²⁰ See: Gunther Teubner, *Breaking Frames: “The Global Interplay of Legal and Social Systems”* (1997) 45(1) AJCL 149, at 2nd footnote and works cited.

²¹ Cutler, (n 2) 225

²² *ibid*, 226

on International Commercial Arbitration,²³ however, the primacy of party autonomy was greatly enhanced. For Cutler, it ‘embodies the principle of merchant autonomy’.²⁴

Relevance to TNEs

Lex mercatoria is relevant to TNEs in two ways. Firstly, as a challenge to the traditional ideas about public authority and legitimacy, and secondly through the recent rise in commercial arbitration.

Private and Public Authority

Firstly, it is an illustration of the intermingling of traditional private and public authority which may occur in the transnational space. This is intrinsically bound up in two fundamental questions about *lex mercatoria*: the vexed question of whether it is “law”, and the corollary, whether it is truly ‘beyond the state’.²⁵

So is this post-modern *lex mercatoria* “law”, or as Goode claims, only law insofar as it is tied to national or supranational law? More to the point, is it “anational”, existing autonomously beyond State interference, or is it really an emanation of State power? The first question is, for my purposes, of limited interest. I therefore content myself with recalling that in Hartian positivism the coercion behind rules is not what qualifies them as ‘law’. As I discussed in Chapter 1,²⁶ for Hart it is the acknowledgement of the internal aspect of rules and the habitual, generalized acceptance of legislative power as generative of legislative (public) *authority* that marks legal systems, not coercive power. The State law partisans in the *lex mercatoria* debate²⁷ fall, as I see it, into the same error of many theorists of international law; that compliance is a necessary and/or sufficient condition for labelling a system of rules as “law”.²⁸

But it is the second question that is more important; or rather, for present purposes, to what *extent* the new *lex mercatoria* escapes State control. Michaels argues, convincingly in my view, that ‘a *lex mercatoria* as a truly anational legal system, though theoretically possible, has never existed’.²⁹ In

²³ UN Doc. A/ Conf. A/ 40/ 17

²⁴ Cutler, (n 2) 232

²⁵ See: Gunther Teubner, *Global Law without a State*, (Ashgate 1997) esp. 31 - 44; Teubner (n 20)

²⁶ H. L. A. Hart, *The Concept of Law* (2nd edn, OUP 1997) 50 - 78 esp. 55 - 59.

²⁷ For an overview of the “anational” vs. state law debate, see Ralf Michaels, ‘The True Lex Mercatoria: Law Beyond the State’ (2007) 14 Ind. J Global LS 447

²⁸ cf Robert Howse & Ruti Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’ (2010) 1(2) Global Policy 127

²⁹ Michaels, (n 27)24 454

reality, it ‘contains both state and non-state norms and institutions’.³⁰ This accords with Cutler’s view that States have become embroiled in transnational *lex mercatoria* as much as “private” actors.³¹ Thus, for many, *lex mercatoria* epitomizes ‘hybridity’ between public – State – institutions and private ones.³²

There is a fatalistic attraction in this terminology. But ultimately, use of hybridity to describe complex phenomena such as *lex mercatoria* is lazy; as Tuori argues, ‘[t]here are no legal hybrids as such... What we today call legal hybridity is a sign of our conceptual confusion: new conceptual and systematizing grids are needed, but our legal mind-set is still in many respects attached to... State-sovereignism... and the distinctions of the traditional systematization’.³³ Perhaps it is meaningful at the level of entire legal systems to describe them as hybrids: the prime examples being Québécoise and Scottish law, developed under the joint influence of both civil and common law. But referring to hybridity in *lex mercatoria* only begs the question of what, precisely, it is a hybrid of, which in turn refers us back to the public/private distinction. After all, we expect, in a mature legal system such as domestic law, to find elements of both public and private.³⁴ Public authority, as is explicit in both Cutler’s thesis and Hart’s analytic jurisprudence, is what distinguishes legitimacy from mere coercion. Its improper usurpation is dangerous.³⁵

Lex mercatoria thus presents a double challenge to “public” State authority, in both its internal (domestic law) and external (international law) manifestations. It ‘challenges the State monopoly on the creation and adjudication of law’.³⁶ Secondly, *lex mercatoria* is a key element in the legislative

³⁰ *ibid*, 459

³¹ Cutler, (n 2) 225

³² cf Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus & Running Code: A Theory of Transnational Private Law* (Hart Publishing 2010) 32; Gralf-Peter Calliess & Moritz Renner, ‘Between Law and Social Norms: The Evolution of Global Governance’ (2009) 22 *Ratio Juris* 260. Views against: Hans Micklitz, ‘Rethinking the Public/Private Divide’ in Miguel Maduro, Kaarlo Tuori & Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge UP 2014); Kaarlo Tuori, ‘On Legal Hybrids’ in Hans-Wolfgang Micklitz & Yane Svetiev (eds) ‘A Self-sufficient European Private Law: A Viable Concept’ (2012) *EUI Law* 31/2012, 67-75.

³³ Tuori, (n 32) 67-75

³⁴ The “private” elephant in the room in international law, for example, may be lurking in both investment law and international criminal law.

³⁵ cf Cutler, (n 2): ‘the enhanced power of private capital is rendered virtually “invisible” by the dominant ways of thinking about political authority. This portends a legitimacy crisis that is empirical, theoretical, and normative. From an empirical point of view, the law governing international legal personality tells us very little about the nature of the corporate world, the authority wielded by corporations, or their complex relationships with states, both national and foreign. Theoretically, international law is unable to theorize about its “subject” in any but the most formalistic and artificial ways. The corporation is undertheorized, while the state is overtheorized. Finally, and probably most importantly, the normative implications of the problem of the “subject” are obscured by the same moves suppressing the corporate subject.’

³⁶ Michaels, (n 27) 468

bargaining discussed in chapters 1 and 2. In a creative review essay, Teubner illustrates this through the ‘paradigmatic case of *lex mercatoria* [which] would involve a multinational enterprise striking a huge investment contract with a developing country’.³⁷ The case is slightly different to the examples discussed earlier: whereas before we were interested in the direct *legislative* interference a TNE (or globalized legal markets) may exert, here we are concerned with contractual negotiation, something traditionally viewed through Westphalian eyes as quintessentially private. But what Teubner’s illustration and the discussion of *lex mercatoria* reveal is the essential norm-generating function at play in such a scenario. It might be thought that the State is acting in its “private international” or “commercial” character.³⁸ Yet it would be wrong to assume that that brings such negotiation unequivocally within domestic law’s imperium, or that it cannot negate, circumvent or otherwise alter the regulatory balance of domestic law.

Consider one example, one which is common in the extreme in international commercial or investment contracts: indemnity clauses. Investment law practitioners know that these are widely used by both States and TNEs. But where it is used by the latter, it can have the effect of ‘exempting the investor from liability and placing the onus of dealing with claims on the government’.³⁹ So what? A traditionalist would point out this is entirely within the purview of private relations in the modern risk society; the parties to the contract are merely bargaining to decide where the risk should best fall. Similarly, proponents of private governance beyond the State would likely argue that such bargaining likely to produce the most efficient outcome.⁴⁰ The problem lies in considering the regulatory function of domestic law: if an indemnity clause operates ‘in reverse’ as per Tienhaara’s formulation, it denudes an otherwise operative legal sanction of effect against the company or enterprise.

This may not be harmful in isolation – indeed it may provide an important means for smaller enterprises to operate globally by the provision of what is effectively a form of State subsidy to the investment operations. However placed in the context of the inequality of bargaining power

³⁷ Teubner, (n 20) 150

³⁸ See chapter 3 above

³⁹ Kyla Tienhaara, ‘Foreign Investment Contracts: Unexplored Mechanisms of Environmental Governance’, (Australian National University 2009) Climate & Environmental Governance Network Working Paper 03, 15

⁴⁰ See: Michaels, (n 27) 452; See also: Leon Trakman, *The Law Merchant: The Evolution of Commercial Law* (F.B. Rothman 1983) 97, proclaiming almost as an article of faith that: ‘What merchants do in international trade is the result of what they have learned to do, what other merchants in similar positions have done in the past and what merchants should continue to do in the future in the interests of economic survival and the just allocation of resources. The legal regulation of such business activity can only truly advance when the law reflects upon, indeed embodies, merchant values.’

presented earlier, and where the use of such ‘reverse indemnities’ is systematic, it takes on a different character. Through the ‘hollowing out’ of the legal rule it creates an impunity gap, and falsifies the prescriptive function of the rule.

Commercial Arbitration

As mentioned above, arbitration is not a new phenomenon. It may well have existed since ancient times (perhaps unsurprisingly since where legal systems are underdeveloped or primitive, alternatives to judicial resolution of disputes would be a necessity). It contributes to the challenge on the State regulatory monopoly since it appropriates judicial decision-making power to itself, and through the process of State recognition in treaties such as the New York Convention,⁴¹ possibilities for review by domestic courts are extremely limited. Only the forum which constitutes the seat of arbitration can exercise this supervisory authority to annul or set aside an arbitral award.⁴² Crucially, most domestic courts will not review errors of law by the arbitral tribunal, although the English courts will do so providing the law applicable to the arbitration is English law.⁴³

Secondly, however, is the scale of encroachment by arbitrators into branches of State law traditionally seen as public, even laws of a mandatory character or *d’ordre public*.⁴⁴ As Cutler states:

‘In the United States, for example, disputes governed by mandatory legislation , such as disputes over antitrust and competition laws and policies, consumer and environmental protection laws, and intellectual property and securities laws and regulations, are being held to be arbitrable subject-matter, thus removing their resolution from the judicial realm and placing it in the privatized and delocalized realm of international commercial arbitration.’⁴⁵

The challenge to the regulatory force of domestic law is self-evident. Stepping back, one might consider the remarkable contrast between judicial pronouncements on treaty interpretation by a foreign court viewed as wrong,⁴⁶ and vigorous assertions right to secrecy in the arbitral process.

⁴¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

⁴² New York Convention, Art. V(1)(e)

⁴³ English Arbitration Act 1996, s.69

⁴⁴ See, e.g. *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth Inc.*, 473 U.S. 614 (USSC), discussed in Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization’ (2001) 40 *Columb. J Transnat’l L* 209

⁴⁵ Cutler, (n 2) 233

⁴⁶ cf District Court for the Southern District of Florida in the *West Caribbean Airways Case*: ‘While the Cour de Cassation may interpret the Montreal Convention as it sees fit, this Court is not obligated to accept that interpretation’

2. International Investment Arbitration

No less than transnational commercial law, or *lex mercatoria*, the law and practice of international investments does not sit fully inside the international system. Although many rights are provided for through a vast panoply of bilateral investment treaties (BITs),⁴⁷ the status of the system of international investment arbitration remains controversial. Dupuy, for instance, argues that it forms an indivisible part of international law, and even bears important similarities to human rights adjudication.⁴⁸ Van Harten, on the other hand, characterizes the arbitral system as a private one which ‘contracts out’ the judicial function.⁴⁹

It is certainly true that the international arbitral system shares many parallels with commercial arbitration, notwithstanding that many if not most BITs provide for the compulsory jurisdiction of certain arbitral tribunals. Indeed, where the dispute between investor and State fits the New York Convention definition of ‘commercial’, it is subject to the same rules and constraints of international commercial arbitration discussed above. The Supervisory jurisdiction of domestic courts depends on the seat of arbitration and is generally limited to ‘jurisdictional error, procedural impropriety, or serious violation of public policy...not... errors of law’.⁵⁰ Setting aside an arbitral award in the place of enforcement is restricted to the specific grounds laid out by the New York Convention.⁵¹

Beyond the commercial arbitration conventions, it may be possible for parties to an investment agreement to avail themselves of the International Centre for the Settlement of Investment Disputes (ICSID). The ICSID has its own treaty basis,⁵² and is fully autonomous from the supervisory jurisdiction of international commercial arbitration; applications to set aside an award are heard instead by an internal ICSID annulment committee.⁵³ Contracting States where

⁴⁷ A system that is staggering by its size and complexity. As of 2009 there were over 2600 BITs worldwide and 191 just between EU Member States: Hanno Wehland, ‘Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?’ (2009) 58 ICLQ 297, 298.

⁴⁸ Pierre-Marie Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’ in Dupuy, Francioni & Petersmann (eds.), *Human Rights in International Investment Law & Arbitration*, (OUP, 2009) 45 – 62.

⁴⁹ Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (OUP, 2007), 54 – 62

⁵⁰ *ibid*, 155-6. But see above, n 43

⁵¹ New York Convention, Art. V; Van Harten (n 49) 157.

⁵² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965) (‘the ICSID Convention’), [1965] 4 ILM 524

⁵³ ICSID Convention, Art. 52

enforcement is sought must recognize ICSID awards as binding without any further review, ‘as if it were a final judgment of a court in that State’.⁵⁴ More importantly, ICSID arbitration is not limited to ‘commercial’ disputes but extends to ‘any legal dispute arising directly out of an investment’.⁵⁵ It thus extends to public and regulatory law disputes.⁵⁶

Given the duality of investment arbitration taking place both within and without the ICSID system, it is difficult to easily delimit its integrality to general international law. Logically, this would involve inclusion of those investment arbitrations which fall under the international commercial regime, thereby raising international commercial arbitration to the status of international law. Furthermore, while Dupuy highlights the speciality of investment arbitral panels as a parallel to human rights adjudication,⁵⁷ the negotiated composition of arbitral tribunals is a sharp divergence.⁵⁸

Thus international investment arbitration shares several characteristics of transnational commercial law or *lex mercatoria*, with several scholars highlighting legitimacy problems.⁵⁹ Stone Sweet recently argued that investor-state arbitration is ‘at a crucial point in its historical development, poised between two conflicting conceptions of its nature, purpose, and political legitimacy’.⁶⁰ For Francioni, the very existence of an investor-state arbitral system undercuts the effectiveness of the domestic court systems of host-states,⁶¹ a fact to which the reality of arbitral practice bears striking witness.

⁵⁴ ICSID Convention, Art. 54(1)

⁵⁵ ICSID Convention, Art. 25(15)

⁵⁶ Van Harten (n 49) 56-7

⁵⁷ Dupuy (n 48) 55

⁵⁸ Even ICSID arbitrators are subject to party agreement: ICSID Convention, Art. 37. In default of agreement, the arbitrator may after 90 days be appointed by the ICSID Chairman.

⁵⁹ Francesco Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ in P.M. Dupuy F. Francioni, & E.U. Petersmann (eds), *Human Rights in International Law and Arbitration* (OUP 2009); L.E. Peterson & K. R. Gray, ‘International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration’ (International Institute for Sustainable Development 2003), <http://www.iisd.org/sites/default/files/pdf/2003/investment_int_human_rights_bits.pdf> accessed 10 Jun 2014; Julien Topal, ‘Conceptualizing corporate responsibilities : agency, reciprocity and the constitutive role of law’ (EUI PhD thesis 2014); ; J. Fox, ‘Introduction: framing the panel’ in D Clark, J Fox, K Treake (eds.), *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*, (MD: Rowman & Littlefield, 2003) xi–xxxii; Katia Fach Gómez, ‘Rethinking the Role of *Amicus Curiae* in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest’, (2012) 35 Ford. ILJ 510

⁶⁰ Alec Stone Sweet, ‘Investor-State Arbitration: Proportionality's New Frontier’ (2010) 4 Law & Ethics H.R. 47 at 48

⁶¹ Francioni (n 59)

In *Saipem v Bangladesh*⁶², an ICSID arbitration, delays arising from local opposition to investment led the investor, an Italian oil company, to begin commercial arbitration proceedings. The Bangladeshi public authorities then went before the domestic courts and succeeded in obtaining an anti-suit injunction to restrain the commercial arbitration. The investor then filed an ICSID claim, and the ICSID tribunal held that the right to arbitrate in the contract between the investor and the Bangladeshi authorities could form the object of an expropriation. Whatever the merits or not of this claim, what is striking is that it provides an instance of the judicial authorities of a (host) State being entirely undercut by a private arbitration.

Meanwhile, the *Metalclad* arbitration,⁶³ an arbitration based on the NAFTA⁶⁴ treaty, provides for similar subornment of executive decision-making. The case involved the creation of a hazardous waste landfill site. Following negotiation and after seeking executive approval at various levels, Metalclad bought the site and began construction, but a year later was forced to stop after the local authorities informed it did not have the necessary municipal permit, and refused to grant one when Metalclad promptly applied. The arbitrators held that the State had failed to ensure a ‘transparent and predictable framework’ for business planning and investment,⁶⁵ extending the concept of indirect expropriation.⁶⁶

A similar conclusion was reached in the *CMS Gas v Argentina*, another ICSID arbitration, except that this time the case involved a legislative provision.⁶⁷ The *CMS Gas* case is also the focus of some controversy. The collapse of the Argentine peso following its unpegging from the U.S. dollar in 2001 has led to a still-ongoing saga of investment arbitrations against the Argentine Republic. To date, eighteen cases have resulted in arbitral awards, of which thirteen are final,⁶⁸ three have

⁶² *Saipem SpA v The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007. (ICSID)

⁶³ *Metalclad Corp. v Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000 (ICSID)

⁶⁴ North American Free Trade Agreement

⁶⁵ Compare *Robert Azinian, Kenneth Davitian & Ellen Baca v. Mexico* (ICSID (Additional Facility) Case No. ARB(AF)/97/2, Award of 1 November 1999

⁶⁶ See, e.g. Maurizio Brunetti, ‘Indirect Expropriation in International Law – Introduction’ (2003) 5 Int’l L.F. 150 at 152

⁶⁷ *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005. (ICSID)

⁶⁸ *Impregilo S.p.A.* (ICSID Case No. ARB/07/17); *TSA Spectrum de Argentina, S.A.* (ICSID Case No. ARB/05/5); *Daimler Financial Services AG* (ICSID Case No. ARB/05/1); *Wintershall Aktiengesellschaft* (ICSID Case No. ARB/04/14); *El Paso Energy International Company* (ICSID Case No. ARB/03/15); *Continental Casualty Company* (ICSID Case No. ARB/03/9); *Metalpar S.A. and Buen Aire S.A.* (ICSID Case No. ARB/03/5); *Siemens A.G.* (ICSID Case No. ARB/02/8); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.* (ICSID Case No. ARB/02/1); *Azurix Corp.* (ICSID Case No. ARB/01/12); *CMS Gas*, above (n 67); *Houston Industries Energy, Inc. and others* (ICSID Case No. ARB/98/1); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* (ICSID Case No. ARB/97/3)

outstanding annulment proceedings⁶⁹ and two are undergoing resubmissions hearings following annulment of the original award.⁷⁰ *CMS* itself was annulled by a panel consisting of the president of the ILC, and two members of the ICJ; the ICSID was taking no chances.⁷¹ The heart of the controversy lies in the use by Argentina of the ‘necessity’ defence as a justification for pesification. However for our purposes, it is the potential for arbitral tribunals to overrule or denude national legislative measures that is of importance. And *CMS* is far from the end of the story. In *Impregilo S.p.A.* for instance, a concluded arbitration, the tribunal found other reasons why the necessity defence was not available with the same end result as in the original *CMS* award.⁷²

In the *Lago Agrio* saga,⁷³ not only has the drama played out in the U.S. and Ecuadorian courts (and now in several other jurisdictions), it also led to an arbitration under the BIT, albeit not an ICSID arbitration. In 2009, eighteen months before the first instance decision in the Ecuadorian courts, Chevron filed for arbitration at the Permanent Court of Arbitration in The Hague, claiming that the domestic Ecuadorian proceedings were ‘egregiously unfair, in contravention of the BIT, such as its guarantee of fair and equitable treatment’.⁷⁴ In February 2011, the arbitrator issued interim measures against Ecuador requiring it to suspend enforcement and recognition of the Ecuadorian judgment ‘within and without Ecuador’.⁷⁵ As Joseph put it, ‘[t]he acceptance of Chevron’s arguments would be disastrous for the Lago Agrio plaintiffs, yet there is no avenue for them to be party to these arbitral proceedings’.⁷⁶

Again, what is of interest is not the *bien fondé* of the investors’ complaints in these cases, but the fact that through the operation of private arbitration, the legislative and executive will may be suborned to the expectations of the investor. This is truly remarkable. The effect of cases such as these, in my view, is to contribute to the elevation of investors and TNEs in certain cases from a sub-state level in the legal hierarchy to one on a par or even superior to the host-state. Moreover, not only is the legal position of TNEs affected, but they are put in a position to negotiate on a

⁶⁹ *SAUR International v. Argentine Republic* (ICSID Case No. ARB/04/4); *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23)

⁷⁰ *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3)

⁷¹ Stone Sweet (n 60) 72

⁷² *Impregilo S.p.A. v. Argentine Republic*, above (n 68), award of 21 June 2011

⁷³ See above, chapters 1 and 2

⁷⁴ See Sarah Joseph, ‘Protracted Lawfare: The Tale of Chevron Texaco in the Amazon’ (2012) 3 H.R & Env. 70

⁷⁵ Permanent Court of Arbitration, ‘Order for Interim Measures’, 9 February 2011 (PCA Case No. 2009-23)

⁷⁶ Joseph (n 74)

quasi-equal playing field with States. Arguably, it again shatters the Westphalian paradigm of the host-state law's empire in which the legislative and judicial branches are able to effectively curb excesses of private power and balance competing interests within their territory. Rather, the domestic judicial and legislative will is subordinated to the transnational rights of the investor as interpreted by the arbitrators. In this way, investment law functions as one of the motors of economic globalization.

I do not deny the need for protection for foreign investors, the *raison-d'être* of international investment law and arbitration. I accept, as do Van Harten and many others, that 'a major purpose of the system is to alleviate the regulatory risks faced by foreign investors'.⁷⁷ However while the effect of the current system might be said to be an elevation of TNEs to an international level, the question whether there is a corresponding protection of the rights of victims of investors' actions. Of course, although citizens and victims may not have any direct rights of access to arbitrations, this does not preclude any representation of their interests at all. On the one hand, (host-) States may take up the cause of their citizens, in the same way that in litigation over diplomatic protection before the International Court of Justice States represent their citizens' diplomatic rights. Recent evolutions in international law, such as in the *Avena*⁷⁸ and *LaGrand*⁷⁹ cases, which accepted the principle that consular assistance (and by extension diplomatic protection generally, according to some authors)⁸⁰ is not only a State right or privilege, but also an individual right, may open the door to similar adventurism by arbitral tribunals. Certainly a part of the doctrine argues that the principle of fair and equitable treatment entails not only rights for investors, but also obligations for investors towards those affected by their activities.⁸¹

However, there are two immediate difficulties. Firstly, as Francioni points out, the effectiveness of such ephemeral rights relies on a 'paternalistic' concept of the State, an expectation which is patently unrealistic in many of our examples.⁸² Secondly, the possibility on a case-by-case basis for indirect representation in proceedings, cannot be considered a true equality of arms when

⁷⁷ Van Harten (n 49) 94

⁷⁸ *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12 (ICJ)

⁷⁹ *LaGrand (Germany v. United States of America)* [2001] ICJ Rep 466 (ICJ)

⁸⁰ See e.g. UNGA 'First report on diplomatic protection' (7 March 2000) UN Doc. A/CN.4/506; A. Vermeer-Künzli, Restricting discretion: judicial review of diplomatic protection, *Nordic Journal of International Law*, vol. 75, no. 2, June 2006, pp. 279-307.

⁸¹ A principle particularly strongly advocated by Professor Francioni. See: Francesco Francioni, *Environment, Human Rights and International Trade* (Oxford, 2001); Francioni, (n 47). See also Fox (n 59)

⁸² Francioni, (n 47); and see chapters 1 and 2 above.

compared to full participation as the party to an action. Thus the transformation engendered by international investment law is one-sided, since there is as yet no ‘mirror image’ of transnational rights,⁸³ whereby investor rights are effectively counterbalanced by corresponding rights for victims and other civil society actors affected by investment.

As long as the primary locus of regulation of TNE activity continues to be the domestic legal order, this leads to further hollowing out of effective regulation. In fact, this concentrates the deregulatory effect identified with international State responsibility identified in chapter 3. Through expansion of the indirect expropriation, fair and equitable treatment, and related concepts, investor-state arbitration can actually contribute to a shift of regulatory liability away from TNEs and onto the State. Thus – as in *Lago Agrio* and *Saipem* – even where an attempt to hold a TNE to account succeeds domestically is successful, actual liability may ultimately be shifted to the host-state. Where the taxpayer indeed meets this liability this may, as we saw in chapter 3, lead to some measure of monetary compensation to victims. But there is partial or total failure of the prescriptive regulatory effect of the measure in question, just as in the use of contractual mechanisms such as indemnity clauses (see Figure 2).⁸⁴

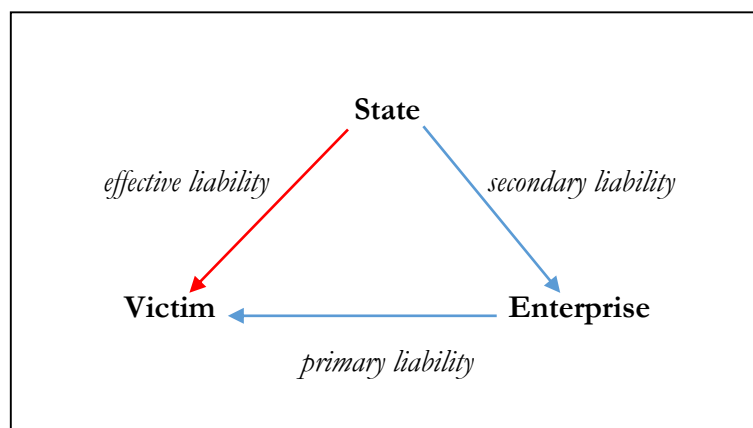


Figure 2

II. Transnational Regulation⁸⁵

The second norm-generative family of regimes which exists in the transnational space is what I term transnational regulation. I avoid the terms ‘transnational private regulation’⁸⁶ and ‘soft law’

⁸³ See: Fox, (n 59)

⁸⁴ See above at p.163

⁸⁵ I am indebted to Andrea Talarico for this section of the chapter. Much of the material is drawn from a joint contribution to a book on the enforcement of private regulation which ultimately was not put forward for publication.

⁸⁶ Fabrizio Cafaggi, ‘New Foundations of Transnational Private Regulation’ (2011) 38 J.L&Soc 20

deliberately. The former I reject for the same reasons as explained in the preceding section; it presupposes that all transnational regulation comes from ‘private’ actors or is private in character when it manifestly does not.⁸⁷ In that sense it is self-limiting and risks closing the door on more ‘public’ forms of regulation – as with criminal law in the above discussion.

The terminology of ‘soft law’ is, in my view, deeply problematic. The term “law” implies that the rule is worthy of being called law by whatever analytic standard one chooses to apply, something controversial at best. But the moniker ‘soft’ introduces an indelible confusion to whatever conclusion one might draw from such rules’ ‘legal’ character. Cassese defines soft law as having three features:

‘First, they are indicative of the modern trends emerging in the world community... Second, they deal with matters that reflect new concerns of the international community... Third, for political, economic, or other reasons, it is, however, hard for States to reach full convergence of views and standards... so as to agree upon legally binding instruments.’⁸⁸

Arguably it is the last of these criteria that leads to difficulty from a philosophical perspective. I do not mean that soft law may not be useful in the sole context of international law to describe norms which exist but nonetheless do not fit the paradigms of an international instrument or domestic legislation. But in the context of TNEs, it is unhelpful. Soft law has little to say about the enforceability of such norms, their regulatory aspect, or indeed their deeper jurisprudential character. Indeed, the internal regulatory regimes of TNEs – often grouped into the category of soft law – are seen by some as a ‘strong candidate’ for transnational law *qua* law.⁸⁹

It is such regulatory regimes that I examine in this part. They include various different instruments, from ‘unilateral’ codes of conduct to multi-stakeholder initiatives, guidelines promulgated by international organizations, standardization, and the current hot topic of the UN Business and Human Rights guidelines. Most if not all of these may fit the label of corporate social responsibility (‘CSR’). However CSR has become an overused term in TNE studies. It could, indeed, be

⁸⁷ See: Gunther Teubner, ‘Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct’ (2011) 18 *Ind. J Global Legal Stud.* 617

⁸⁸ Antonio Cassese, *International Law* (2nd edn, OUP 2005) 196-7

⁸⁹ Teubner, (n 20) 157; Jean-Philippe Robé, ‘Multinational Enterprises: The Constitution of a Pluralistic Legal Order’, in Gunther Teubner (ed), *Global Law Without a State*, (Ashgate 1997) 45-77; Peter T. Muchlinski, ‘“Global Bukowina” Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community’, in Gunther Teubner (ed), *Global Law Without a State* (Ashgate 1997) 79-108

considered to describe this entire dissertation as some see it as including the legal frameworks described in Part I,⁹⁰ and I avoid it for this reason. Table 1 details several examples:

Examples of transnational CSR initiatives classified by level of adoption			
Level of adoption	Initiative	Process of adoption	Examples
Single firm	International framework agreement	Bilateral labour negotiation	Ikea and IFBWW ICEM and IFM
	Codes of conduct (CoC)	Self-regulation	Levis CoC Wal-Mart CoC
Sector	Codes of conduct	Multi-Stakeholder	Clean Clothes Campaign model CoC
		Industry self-regulation	Electronics industry CoC
	Certification / Labelling	Multi-Stakeholder	Rugmark / Goodweave
Global	Reporting	Multi-stakeholder	Global Compact
		Soft Law	OECD Guidelines
	Certification / Labelling	Multi-Stakeholder	ISO 26000, Social Accountability International

Table 1

1. Regulatory Initiatives and Enforcement

(i) Business & Human Rights – the Ruggie Principles

The history of the Business and Human Rights movement within the U.N. has been exhaustively discussed elsewhere. I therefore give the briefest possible overview here. Following the failure of the U.N. Norms,⁹¹ a new Special Representative was appointed by the Secretary-General for Business and Human Rights. Professor John Ruggie was appointed to the post. After carefully dissociating the new project from the ill-fated U.N. Norms,⁹² he first carried out extensive research into business accountability for human rights,⁹³ and then progressively developed a tripartite

⁹⁰ See e.g. Tineke E. Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR* (Kluwer 2010)

⁹¹ Discussed in Chapter 3

⁹² UNCHR 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006) UN Doc E/CN.4/2006/97; Some commentators have said this report spelt the 'death knell' for the U.N. Norms: Bart Mongoven, 'The Death of the UN Norms' (Stratfor, 2006); David Kinley & Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law', (2006) 6 HRLR 447; Pini Pavel Miretski & Sascha-Dominik Bachmann, 'The UN "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights": A Requiem' (2012) 17 Deakin LR 6

⁹³ UNCHR 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006) UN Doc E/CN.4/2006/97; UNCHR 'Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational

‘respect, protect, remedy’ framework.⁹⁴ In 2011, this culminated in the ‘Guiding Principles on Business and Human Rights’.⁹⁵ On 16 June 2011 the Guiding Principles were adopted by the U.N. Human Rights Council,⁹⁶ which also established a new working group on business and human rights.

Although sharing the same conceptual context as the U.N. Norms, the Guiding Principles are explicitly claimed to stop short of creating new legal obligations. Instead, they are said to merely restate existing international law on States’ legal duty to *protect* and human rights and proclaim a non-legal “responsibility” on business to *respect* human rights.⁹⁷ Both States and business are addressed by the ‘remedy’ branch of the framework, but only insofar as it is consistent with their primary obligation: States are legally required to provide access to remedy mechanisms, while corporations merely have a “responsibility” to do so.⁹⁸

In 2013, the U.K. Government published its response to the Guiding Principles. What is noteworthy, from a legal perspective, is that the single mention of any *legal* accountability

corporations and other business enterprises’ (9 February 2007) UN Doc A/HRC/4/035; UNCHR ‘State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries’ (13 February 2007) UN Doc A/HRC/4/035/Add.1; UNCHR ‘Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops’ (15 February 2007) UN Doc A/HRC/4/035/Add.2; UNCHR ‘Human rights policies and management practices: results from questionnaire surveys of Governments and the Fortune Global 500 firms’ (28 February 2007) UN Doc A/HRC/4/035/Add.3; UNCHR ‘Business recognition of human rights: Global patterns, regional and sectoral variations’ (8 February 2007) UN Doc A/HRC/4/035/Add.4; UNCHR Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (5 February 2007) UN Doc A/HRC/4/74

⁹⁴ UNCHR ‘Protect, respect, and remedy: a framework for business and human rights’ (7 April 2008) UN Doc A/HRC/8/5; UNCHR ‘Clarifying the Concepts of “Sphere of influence” and “Complicity”’ (15 May 2008) UN Doc A/HRC/8/16; UNCHR ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (22 April 2009) UN Doc A/HRC/11/13; UNCHR ‘State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions’ (15 May 2009) UN Doc A/HRC/11/13/Add.1; 2010, UNCHR ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (9 April 2010) UN Doc A/HRC/14/27

⁹⁵ UNCHR ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, (21 March 2011) UN Doc A/HRC/17/31

⁹⁶ UNCHR ‘Human rights and transnational corporations and other business enterprises’ (6 July 2011) UN Doc A/HRC/RES/17/4

⁹⁷ UNCHR ‘Protect, respect, and remedy: a framework for business and human rights’ (7 April 2008) UN Doc A/HRC/8/5; UNCHR ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (22 April 2009) UN Doc A/HRC/11/13

⁹⁸ See, e.g. GP 22, ‘Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes’; GP 29, ‘To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted’

mechanism is a ‘clarification’ of the U.K. Companies Act 2006 that ‘means that company directors will include human rights issues, in their annual reports’.⁹⁹ Throughout the remainder of the document, there is no commitment to improving access to legal remedies or to clarifying the law in respect of the ‘home-state’ responsibility of British enterprises. On access to remedy, the most concrete commitment made is to share best practice learnt from the complaint and grievance mechanisms developed in the context of the 2012 London Olympics by the London Organising Committee of the Olympic and Paralympic Games.¹⁰⁰

So what has the U.N. Framework and Guiding Principles changed, legally speaking? From an international legal positivist perspective, the answer must surely be very little. At best, it has removed ‘wiggle room’ for States in how they choose to interpret existing international legal obligations, and the adoption at U.N. level provides important evidence of *opinio juris* and State practice. However, without concrete steps towards implementation it is unlikely to convince national courts to go further than they have already in cases involving human rights violations involving TNEs.¹⁰¹ At worst, it looks like a political instrument which does no more than draw attention to existing commitments that are already codified and which TNEs may choose if they wish to incorporate into their activities.

However from a more transnational perspective, the U.N. framework presents several interesting features. First, it is explicitly addressed to business actors as well as States. Although it does not elevate them to the status of a subject of international law, it nonetheless addresses them as an object of international obligations.¹⁰² But this ‘objectivity’ is subjective(!): it depends upon voluntary adoption of those aspects the business actor – or its host- and home-states – considers appropriate. It follows that the U.N. Framework is customizable; it is designed to be a cloak cut to fit the legal person who chooses to wear it. In an international legal framework, this is remarkable. It also demonstrates a similar background, coordinating role of States to that which marked the transnational legal frameworks discussed in the preceding section.

Secondly, it shares the CSR paradigm of voluntariness in adoption but potentially productive of legal effects. The incorporation of grievance mechanisms from the remedy section of the Guiding

⁹⁹ Foreign & Commonwealth Office, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (Cm 8695, 2013)

¹⁰⁰ *ibid*, 17

¹⁰¹ In the U.S. in particular, query whether the Guiding Principles meet the standard of specificity necessary to be recognized as self-executing international law as per the *Sosa* decision (see above, chapter 2)

¹⁰² See above, Chapter 3

Principles, for example, is likely to lead courts confronted with claims by persons unhappy with the result of a grievance procedure to a similar contractual and/or tort law analysis of obligation as in cases involving corporate codes of conduct (on which see below).

Thirdly, it changes the boundaries of legitimacy for other normative actions by enterprises, other non-state actors and States. To give a banal example, it will be difficult to claim that an internal human rights policy is legitimate if it does not proclaim the irreducible core rights mentioned by GP 12, *viz.* ‘those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work’.¹⁰³ Adopting an interactional account of international legal practice, the U.N. Framework creates a ‘community of practice’ in which the contours of legitimacy may be explored but are not unbounded.¹⁰⁴

In practice, the Guiding Principles may provide TNEs with a useful roadmap for action although they do not solve all problems. The pentobarbital example provides an example: pentobarbital is a drug used for the treatment of certain forms of epilepsy, manufactured by the Danish firm Lundbeck. In 2011, certain U.S. States began using pentobarbital as a lethal injection ingredient for carrying out executions and NGOs lobbied Lundbeck to cease production. As Buhmann has shown,¹⁰⁵ Lundbeck faced a dual problem; on the one hand it was ‘complicit’ in the death sentences carried out using its drug,¹⁰⁶ and on the other if it ceased production it would deny therapy and treatment for legitimate medical uses and become complicit anew.¹⁰⁷ In such a scenario the TNE must in effect carry out a balancing exercise, as do other human rights decision-makers when rights are in conflict. Here the Guiding Principles are deafening in their silence. GP 23 notes, for instance, that businesses should ‘seek ways to honor the principles of internationally recognised human rights’, which does no more than beg the question. GP 24 also merely exhorts businesses where

¹⁰³ U.N. Guiding principle 12 in: UNCHR ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, (21 March 2011) UN Doc A/HRC/17/31

¹⁰⁴ See: Jutta Brunée & Stephen J. Toope, *Legitimacy and Legality in International Law – An Interactional Account* (Cambridge UP 2010) esp. 88 - 125, 352 - 5.

¹⁰⁵ Karin Buhmann, ‘Damned If You Do, Damned If You Don’t? The Lundbeck Case of Pentobarbital, the Guiding Principles on Business and Human Rights, and Competing Human Rights Responsibilities’ (2012) 40 J. Med. Ethics 206

¹⁰⁶ Although not complicit in a strict legal sense, but in terms of the wider complicity which stems from the corporate responsibility to respect under the Guiding Principles; Buhmann, *ibid*, 212

¹⁰⁷ *ibid*, 215

prioritization is necessary to focus on those impacts that are the ‘most severe or where delayed response would make them irremediable’.

Somewhat surprisingly, there appears to have been little treatment of this issue in the scholarship or in the work of the Special Representative. Ruggie only mentions balancing in the context of State legislative responsibilities.¹⁰⁸ Ultimately, Lundbeck adopted its well-known ‘drop-ship’ programme of distribution, whereby Lundbeck reviews each order for pentobarbital and recipients are contractually bound not to use or supply it for capital punishment. For Buhmann, this decision ‘may be substantiated’ under the Guiding Principles,¹⁰⁹ but leaves the question of balancing unresolved, a problem to be solved by the new U.N. Working Group on Business and Human Rights.

The problem of balancing is not trivial. An issue in investment arbitration which I did not discuss in any detail is the risk of irreconcilable judgments, a particular feature of the numerous Argentina cases. A similar issue arises in the case of applications of the Guiding Principles where rights are in conflict, since without adjudicatory supervision, it is left to individual businesses to draw their own balance which may differ radically from other businesses in the same sector making the similar decisions. From the perspective of stakeholders, this is clearly an interpretive regulatory act just as it would be if a public body were conducting the balancing exercise, but without the supervisory oversight of national or international human rights courts to condition the balancing exercise. The shadow of the law is very short. Thus even under the Guiding Principles, there is a regulatory space in which TNEs act normatively which can be difficult to distinguish from the acts of public bodies.

(ii) Self-regulation

Businesses are increasingly adopting private codes of conduct dealing with human rights, labour and employment matters, often as a result of pressure from NGOs and consumer groups. These private codes include both internal codes designed and implemented by a single company or within a specific industry, and multi-stakeholder¹¹⁰ codes developed by several parties. Two examples are

¹⁰⁸ Ruggie, 7 April 2008 (n 94) 8; Ruggie, 2010 (n 94) 21

¹⁰⁹ Buhmann (n 105) 217

¹¹⁰ A stakeholder, as defined by the Supreme Court of Canada, includes ‘shareholders, employees, suppliers, creditors, consumers, governments and the environment’: *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461 (CSC). Primary stakeholders include communities, customers, employees, suppliers and financiers, whereas governments, competitors, consumer advocate groups, special-interest groups and the media are considered secondary stakeholders: see: R. Edward Freeman, Jeffrey S. Harrison, and Andrew C. Wicks, *Managing for stakeholders: Survival, reputation, and success* (Yale UP 2007)

the model code of conduct of the Clean Clothes Campaign,¹¹¹ and the Fair Labor Association.¹¹² Some, like the European Code of Conduct on Arms Exports, and the International Code of Conduct for Private Military and Security Companies, also involve States and supranational authorities in their creation.¹¹³

Generally, the credibility of a code in dealing with labour and employment rights will partially depend on its inclusion of the ILO's four "core" labour rights,¹¹⁴ while for human rights more generally, the inclusion of standards from international human rights instruments is rapidly becoming widespread.¹¹⁵ Following the adoption of the U.N. Guiding Principles, it is likely to be difficult for codes of conduct to do less than refer to the minimum rights and principles set out therein.¹¹⁶

When a company subscribes to a code of conduct, it makes a voluntary written pledge to respect the rights enumerated in that code.¹¹⁷ Despite frequently expressed scepticism regarding such codes, they can present certain advantages. Firstly, their nature is transnational to the core; they do not 'stop at the border' but they apply throughout the supply-chain. Furthermore, they are extremely specialized instruments, designed to suit the reality of a specific corporation.¹¹⁸ The first company to adopt a code of conduct in 1991 was Levi-Strauss, whose Global Sourcing and Operating Guidelines apply to all the company's contractors and subcontractors.

The actual content of codes of conduct can vary widely. In respect of labour rights, for example, Caterpillar's worldwide code of conduct actively discourages trade union representation and collective bargaining,¹¹⁹ while a study in the late nineties found that in respect of the ILO core

¹¹¹ <http://www.cleanclothes.org>

¹¹² <http://www.fairlabor.org> FLA participating companies include Adidas, American Eagle, Asics, Hennes & Mauritz, Liz Claiborne, New Balance and Nike.

¹¹³ Andrew McLean, 'The European Union Code of Conduct on Arms Exports' in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999)

¹¹⁴ Renée-Claude Drouin & Isabelle Duplessis, 'La régulation internationale du travail de 1998 à 2008: un Eldorado normatif ou un désert interprétatif?' (2009) 14(2) *Lex Electronica* 1 < http://www.lex-electronica.org/en/resumes_complets/242.html> accessed 7 March 2015

¹¹⁵ See: Dominique Bé, 'Business Commitments in CSR Codes of Conduct and International Framework Agreements: The Case of Human Rights' in Karin Buhmann, Lynn Roseberry & Mette Morsing (eds), *Corporate Social and Human Rights Responsibilities: Global Legal & Management Perspectives* (Palgrave Macmillan 2011)

¹¹⁶ cf UN Guiding Principle 12 (n 101)

¹¹⁷ Robert J. Liubicic, 'Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights through Private Initiatives' (1998 - 1999) 30 *Law & Pol'y Int'l Bus.* 111

¹¹⁸ K. Ahmed, *International Labour Rights – A Categorical Imperative?*, (2004), 35 *R.D.U.S.* 145 – 186, par. 47-49.

¹¹⁹ 'We expect to conduct our business in such a way that employees will not feel the need for representation by unions or other third parties. Where employees have chosen such representation, or been required by law to do so, we will

rights, only 45% of private codes addressed the issue of child labour, only a fourth mentioned forced labour and fewer than 15% made mention of freedom of association.¹²⁰ The European Arms Exports code has also been criticized for several omissions likely to undermine its effectiveness.¹²¹

It is clear that, without adequate enforcement mechanisms, there is a risk that private codes of conduct can become mere marketing instruments.¹²² Where a company is genuinely committed to implementing its code, however, then there are a number of ways it may choose to do so. Table 2 overleaf summarizes the main procedures by which companies enforce their own codes of conduct, be those unilateral codes or multi-stakeholder standard codes. In essence, enforcement by the company is contractual and is either aimed internally, at employees and officers of the organization, or externally along the supply-chain. In both cases the ultimate sanction is a termination of the contractual relationship: in the employee case anything up to and including dismissal; and for suppliers the option to curtail or cease purchase orders.

In practice, the effectiveness of compliance monitoring is an essential first step in the enforcement process, since it is the primary channel by which the company can identify code of conduct breaches. The traditional method, reporting by employees up the management hierarchy, is often supplemented by alternative reporting mechanisms such as a global hotline, email and web-based communications. Generally speaking, these hotlines are anonymous, and are often available in multiple languages to cover the areas in which the company does business. A good example is the B.H.P. Billiton code, which provides freephone or direct line numbers for seventeen countries, a fax number, postal address and website for raising ethics concerns. The advantage of the global hotline and e-communications method is that it allows for interested third-parties, including NGOs or local communities, with a direct line to the company to raise code of conduct grievances.

pursue and honest, business-like approach in working with those representatives': 'Our Values in Action: Caterpillar's Worldwide Code of Conduct (Caterpillar Inc. 2010)

¹²⁰ Janelle Diller, 'A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives' (1999) 138(2) *Int'l Labour R* 99

¹²¹ See: McLean, (n 108) 119-121

¹²² André Sobczak, 'La responsabilité sociale de l'entreprise: menace ou opportunité pour le droit du travail?' (2004) 59(1) *Relations Industrielles/Industrial Relations* 26

Methods of enforcement by the company for code of conduct breaches								
Addressee	Type of process	Rule-maker	Decision-maker	Sanctions	Appeals procedure	Procedure	Examples	Notes / Limits
Internal/ Employees	Internal Compliance Monitoring	Company	Company or third-party auditor	Contractual, up to and including dismissal	Varies by employment contract	Varies by employment contract	Chevron Gap	Rarely independent; Non-transparent
Supplier / sub- contractor	Internal compliance monitoring	Company	Company or third-party auditor	Contractual: Modification or termination of business relationship	Not usually provided for / negotiation	Varies. Often includes: - stakeholder reporting via management or global hotline. - site inspection and employee interviews	Coca-Cola Nike Gap	Rarely independent. Non transparent

Table 2

The second method is also of clear utility when it comes to companies operating a supply-chain model, since it provides a direct link from those affected by the actions of suppliers (contractually bound to meet agreed standards) and the company. This can alert companies to supplier-side workplaces that require investigation. In the case of supply-chain codes of conduct, most, if not all, such codes allow the buyer to inspect supplier premises to check compliance. In the case of the Coca-Cola Company (See below, Table 3) compliance monitoring of supplier's bottling factories includes the use of independent third-parties to conduct announced and unannounced site visits, and the use of anonymous interviews with employees, as well a contractual obligation on suppliers to provide documentation upon request and to maintain transparent records.

Once a breach is identified, it is obviously up to the company (in the case of many of the larger multinationals examined here, by its global ethics department or equivalent organ) to decide what action to take. For employees, this may involve internal disciplinary processes, including dismissal, and may also include passing information on to relevant law enforcement agencies if the breach also amounts to a violation of a legal obligation. Shell, to take one example, makes it clear in its code of conduct that 'all breaches may involve serious consequences up to and including dismissal, and in some cases fines and imprisonment'.¹²³ It is difficult to draw clear conclusions about the extent or effectiveness of this type of enforcement, since statistics covering employee dismissal are rarely transparent and dismissals are often subject to legal confidentiality requirements.

In respect of supply-chain enforcement, judging the effectiveness of contractual measures against suppliers depends greatly on the degree of transparency to which the company adheres. Table 3 summarizes a number of example codes of conduct by large multinationals. At the top end of this scale are companies such as Nike, which publicly makes available its list of active factories, as well as the tools it uses to monitor compliance, and provides comprehensive reporting on the implementation of its compliance procedures. Its remedial strategy aims at addressing systemic issues rather than simply causing "yo-yo" behaviour where suppliers temporarily improve conditions following monitoring, then revert to their earlier noncompliant practices.¹²⁴ Nike also publishes detailed aggregate statistics on the compliance levels along the supply chain, as does Gap.

¹²³ 'Code of Conduct: Helping you live by our Core Values and our General Business Principles' (Shell International Ltd. 2010) 2

¹²⁴ 'Corporate Responsibility Report' (Nike Inc. 2009)

Enforcement By Company for Breach of Code of Conduct: Example Processes							
Company	Addressee	Type of enforcement process	Rule-Maker	Decision-Maker (Judge)	Sanctions	Appeals procedure	Procedure
Royal Dutch / Shell	Internal/ Employees	Internal (managerial)	Shell	Shell	Contractual sanctions up to dismissal.	Not specified	- Complaint to line manager or other senior manager; or - Independent Global hotline
Chevron	Internal/ Employees	Internal (managerial)	Chevron	Chevron	Contractual sanctions against employees up to dismissal	Not specified	- Supervisor(s) or Global Hotline
B.H.P. Billiton	Internal/ Employees	Internal (managerial)	Billiton	Billiton (Global Ethics Panel)	Contractual sanction against employees up to dismissal	Not specified	Supervisor/Manager; or Business Conduct Advisory Service (telephone/fax/web/mail)
Coca-Cola	Internal/ Employees	Internal (Managerial)	Coca-Cola	Coca-Cola	No special sanctions provided for	n/a	Existing Contractual mechanisms or third-party Global hotline/website
	Suppliers	Contractual	Coca-Cola	Third-Party	- Require corrective action and compliance - Termination of business relationship	Negotiation	Independent third-party compliance monitoring, including confidential on-site employee interviews
Gap Inc.	Suppliers	Contractual	Gap	Gap	- Require corrective action - Terminate business relationship	Negotiation	Monitoring/Compliance processes, (including announced and unannounced visits?)
	Internal/ Employees	Internal (managerial)	Gap	Gap (Management or "Global Integrity & Compliance Department")	- Contractual sanctions against all employees for violations - Annual reporting (senior employees) - Internal Reporting/Audit	Varies by complaint/sanction type	Global hotline or email, or direct complaint to supervisor/manager/Human Resources Representative
Nike	Suppliers	Monitoring	Nike	Nike/Third Party	- Require remedial action. - Reduce orders or terminate relationship.	Not specified	Announced and unannounced visits/inspections (internal audit)
Caterpillar	Internal/ Employees	Internal (managerial)	Caterpillar	Caterpillar	Contractual sanctions against employees? (not specified in code)		- Complaint to local management; or - Hotline, fax or E-mail with data privacy control
Walmart	Internal/ Employees	Internal (managerial)	Walmart	Walmart	Contractual sanctions against employees up to dismissal	Not specified	- Supervisor/Manager or - Global Ethics Office (hotline/email/web/mail)
	Suppliers						Global Ethics Office (email/web/telephone)

Table 3

At the other end are companies such as the Coca-Cola Company, which although its Supplier Guiding principles and implementation guide provides for monitoring processes including third-party monitoring/auditing, provides comparatively little data on the results of that process, the methodology, or long-term strategy. The 2009 – 2010 Sustainability Review, for example, simply claimed that 65% of facilities had been audited, of which 72% were SGP compliant, and that ‘work is under way to close any gaps identified’,¹²⁵ which sits in stark contrast to the detailed breakdown and public disclosure data of Nike and Gap.

When it comes to actual enforcement and the carrying through of contractual sanctions – such as reduced orders or termination of the business relationship – the story is a little less clear. Again, when a company such as Nike publicly discloses its active factories, it is obviously possible to collate data on which factories are dropped. Nike also provides some limited information in its reports, for example it stated in its 2007 – 2009 Report that in March 2009 it was discontinuing orders from four factories. There are inherent difficulties in drawing conclusions from such data, however, since other factors such as performance, business consolidation, and economic considerations can also influence the decision to discontinue orders, in addition to noncompliance. Furthermore, in many cases such information is simply not disclosed: Gap Inc. provides one high-profile example. It repeatedly stated in its 2007 – 2008 Sustainability Report that it will terminate the relationship with a factory for consistent Code of Conduct violations, but gave no indication of how often this had occurred.

Another factor to consider in the effectiveness of enforcement by the company is the influence of external pressures, including consumer, non-governmental organization and civil society pressure. It is worth asking the question whether they are the real enforcers, with their power to affect the market either directly, through purchases and boycotts, or indirectly, by bringing to light noncompliant behaviour and potentially exposing the company to liability. Without the element of market risk which public, civil society and consumer concern entails, it may be doubted whether companies would interest themselves in CSR compliance at all.¹²⁶

Of course, it is also true that pressure brought by a third-party such an NGO may also lead to misplaced resort to enforcement measures. On one view, this is what happened in the G-Star case, where a dispute regarding factory working conditions between the Clean Clothes Campaign and

¹²⁵ ‘Sustainability Review’ (The Coca-Cola Company 2009)

¹²⁶ Although the extent to which share price, for example, is affected by negative publicity has been doubted: see Simon Zadek & Maya Forstater, ‘Making Civil Regulation Work’ in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999)

its affiliates and the G-Star corporation and its suppliers. G-Star contracted with a large Italian-India manufacturer, Fibres & Fabrics International (FFI) to supply clothes. FFI used certain factories in Bangalore, employing around 5,500 people. FFI sought, and obtained, SA 8000 certification for its labour processes, and by its own account had very high standards in place at its Bangalore factories. In late 2005, a new trade union, GATWU, was launched which, although it had some members from the FFI factories, did not have sufficient numbers to be qualified as a representative trade union under Indian law. Following complaints and an investigation, GATWU attempted to deliver a report to FFI regarding overtime, lack of contracts and other complaints. FFI's response was that the allegations were unfounded, and produced evidence in support of their claims. Indeed in GATWU's final report, some complaints were labelled 'solved'.

Notwithstanding that fact, GATWU began a non-stop campaign against FFI, and the Clean Clothes Campaign (CCC) became involved on the GATWU side. Following very few preliminary meetings between FFI and CCC/GATWU, for which both sides produced wildly different minutes, there was a total breakdown in communication and constructive dialogue. GATWU and CCC, on the one hand, continued to repeat the initial accusations in a very public campaign in the Netherlands and elsewhere. FFI, for their part, decided to resort to litigation.

In the first instance, they brought an action for an injunction in the Bangalore Court to prevent the dissemination of 'any untrue and unsupported information'. GATWU et al appeared before the court but did not adduce any evidence in support of their claims and failed to lift the injunction. Thereafter, action at the international level from CCC increased, and they began to pressure several of FFI's clients to discontinue orders. As a result of the campaigning, several clients cancelled orders. FFI's response was to bring a criminal charge against CCC and the campaigners for defamation in the Bangalore Magistrates' Court. Following an undertaking by the Dutch individuals that they would attend court, a notice was issued. This was not complied with, and it later transpired that they had not even attempted to apply for visas to enter India.

In response, the Court issued arrest warrants. The Indian government began pressing for the extradition of the Dutch campaigners, and threatening WTO action in respect of the campaign which they claimed was acting as a barrier to trade. Meanwhile the campaign against FFI only intensified and CCC brought G-Star into the equation, labelling them "Gag-Star" for their complicity in respect of the injunction. The pressure eventually led G-Star to announce that it was terminating its relationship with FFI, threatening the company with bankruptcy.

Eventually, the parties agreed to the mediation of the former Dutch Prime Minister, Ruud Lubbers. Largely successful, this succeeded in convincing FFI to withdraw the cases against the campaigners and in putting a halt to the campaigning. The solution was the appointment of a mutually acceptable ombudsman with the power to receive complaints, publish reports, safeguard communications and encourage CSR certification for FFI.

A feature of this dispute was the polarization of the two opposing narratives, that of the campaigners on the one hand, and that of the companies on the other, with the former refusing to respond to the latter's attempts to respond to the complaints.¹²⁷ It is arguable that the actions of the NGOs, if they were indeed based on incomplete, erroneous or misunderstood information, almost brought about the insolvency of G-Star's supplier and mass redundancies, through the pressure applied to G-Star. This provides a specific illustration of a wider problem, which is that activism, particularly by NGOs, may be 'piecemeal and inconsistent'.¹²⁸ It is to be expected that CSR commitment, and self-enforcement, will vary greatly by company and industrial sector.

And yet codes of conduct, when incorporated down the supply-chain or across the corporate network, also constitute contractual obligations assumed by the TNE. Many authors support the contention that as such, these CSR commitments are legally enforceable.¹²⁹ In the case of direct employees of the TNE, the code of conduct is usually incorporated into their contract of employment and they may be able to enforce it in employment law proceedings. For employees of a subsidiary, subcontractor or supplier, however, the picture is often less clear, as shown by the discussion of the *Wal-Mart* case and the corporate veil in chapter 1.

Another route to judicial enforcement, which came to prominence in the nineties, was the use of consumer and false advertising laws to hold companies to their codes of conduct. In 1998, Mark Kasky attempted to obtain an injunction against the clothing manufacturer Nike and to obtain monetary compensation under Californian laws forbidding false advertising and unfair competition. According to Kasky, Nike made false claims regarding the working conditions in its factories in order to respond to consumer criticism and to boost sales. The main legal question raised before both the Court of Appeals and at the Supreme Court of California was one of freedom of speech:

¹²⁷ See: Lambooy (n 88) 435 - 84

¹²⁸ McCorquodale, 'Human Rights and Global Business' in Stephen Bottomley & David Kinley (eds), *Commercial Law and Human Rights* (2002) 111 - 3

¹²⁹ See, e.g.: Lambooy (n 90)

‘The issue here is whether defendant corporation’s false statements are commercial or noncommercial speech for the purposes of constitutional free speech analysis under the state and federal Constitutions. Resolution of this issue is important because commercial speech receives a lesser degree of constitutional protection than many forms of expression, and because governments may entirely prohibit commercial speech that is false or misleading.’

The Supreme Court of California decided that Nike's claims were commercial speech and therefore did not benefit from the same level of protection as non-commercial speech under the U.S. Bill of Rights. Ultimately, both parties reached a settlement for U.S. \$1.5 million, including investments by Nike to strengthen workplace monitoring and factory worker programmes.

According to Sobczak, the Kasky decision presents an intrusion of commercial law into labour law that may demonstrate that codes of conduct are generally better suited to protecting the interests of consumers (usually from the so-called “first world”) rather than the interests of the workers (generally from the “third world”).¹³⁰ One may thus question the long-term effectiveness of using consumer litigation in cases where consumer interests may diverge from employee interests. However, where the possibility exists, consumer litigation such as this may avoid the difficulties of a jurisdictional challenge such as *forum non conveniens* or issues regarding conflict of laws.¹³¹

Nike v Kasky and *Wal-Mart* (as well as *Chandler v Cape*, discussed in Chapter 1) are both instructive on the relationship between legal obligation and CSR. The incorporation of CSR policies may find its echo in standards of private law – here, contract and negligence – which delimit everything from voluntary obligations to omissions. However, judicial recognition of this possibility has been limited, as we have seen. What is more, the standard to be applied ultimately depends on what is voluntarily adopted by the business; as the contours of obligations arising from codes of conduct become clearer in the jurisprudence of national courts, we can expect to see enterprises modifying the extent of those commitments in response.¹³²

(iii) Reporting Initiatives: The U.N. Global Compact

Reporting initiatives require TNEs to submit periodic – usually annual – data detailing CSR commitments and compliance. Perhaps the most prominent of these is the UN Global Compact. In 1999, during the World Economic Forum in Davos, then UN Secretary-General Kofi Annan gave a strong signal that the international community had an interest in the social responsibility of

¹³⁰ A. Sobczak, “La responsabilité sociale de l’entreprise, menace ou opportunité pour le droit du travail?”, *Relations industrielles*, 2004, vol. 59, no 1, 26, p. 33.

¹³¹ See: Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004) 106 - 7

¹³² See by analogy: *ibid*, 109 - 11

corporations by inviting corporations to respect ten core principles.¹³³ The Global Compact was officially launched on 26th July 2000. As of January 2011, the initiative included more than 8,700 participants, including corporations, business associations, labour unions, NGOs and six UN agencies, thus making it the largest voluntary corporate responsibility initiative in the world (www.unglobalcompact.org).¹³⁴ The Global Compact can be defined as a voluntary multi-faceted and multi-stakeholder initiative coordinated by an international body but aimed at business actors.

The Global Compact asks companies to ‘embrace, support and enact, within their sphere of influence’ the ten principles. Principles one and two deal specifically with human rights, principles three through six focus on the core labour rights, principles seven through nine deal with the environment, and the last principle encourages businesses to work against corruption. It treads a fine line between merely encouraging good behaviour and actual enforcement of its ten principles. Set up as a forum for stakeholder dialogue, and not as a ‘hard’ CSR mechanism, officially the Global Compact considers itself to be a ‘forum for learning’ and not ‘a means of monitoring company behaviour and enforcing compliance’.¹³⁵ Obviously, membership is voluntary, but once a company has joined there are three ways in which certain obligations may, in fact, be enforced: through the ‘communication on progress’, de-listing and action under the Global Compact’s ‘integrity measures’.

Communication on Progress

The main commitment which companies joining the Global Compact must make is to provide an annual, public, ‘communication on progress’ (‘COP’) which informs other stakeholders what progress the company has made in implementing the ten principles. It must include a statement of continued support for the Global Compact, a description of practical actions taken to implement the Compact’s principles and broader development goals, and a measurement of outcomes to allow the actions to be assessed. It is this last element which grants the COP its effectiveness, as it provides stakeholders with the information necessary to determine whether the company is complying with the ten principles. The COP must meet the minimum criteria specified

¹³³ Jean-Pascal Gond & Jacques Igalens, *La Responsabilité Sociale des Entreprises* (Presses universitaires de France 2008)

¹³⁴ Fortune 500 companies which are part of the initiative include: General Electric (fourth on the 2010 Fortune 500 rating), Ford (eighth) and Hewlett-Packard (tenth), while some which do not take part include: Wal-Mart, Exxon Mobil, Chevron (first, second and third respectively), Bank of America, ConocoPhillips, AT&T (fifth, sixth and seventh), Citygroup, Verizon (twelfth and thirteenth) and General Motors (fifteenth).

¹³⁵ ‘After the Signature: A Guide to Engagement in the United Nations Global Compact’ *UN Global Compact Office* (September 2010) <www.unglobalcompact.org> accessed 1 May 2011.

above to be accepted as valid, and thus it may be argued that it is in itself a form of enforcement of a company's CSR commitments.

This is further supported by the three-tier structure of the COP system, under which companies whose COPs demonstrate a high level of transparency and compliance are listed as 'Advanced Level' instead of merely 'Active'. There is also the 'Learner Platform' which gives new companies a 12 months grace period if their first COP does not meet minimum requirements. Although the Compact is careful to reiterate that it 'will not itself assess the performance of companies', this 'Differentiation Programme' nonetheless involves an element of assessment, as the Global Compact itself recognises, promising to work with its partners to 'create a meaningful vetting process of the accuracy of their disclosure and performance'.¹³⁶

De-listing

COPs are directly enforced through the procedure of de-listing. Any company which fails to submit a COP is listed as 'non-communicating' and a failure to meet two consecutive deadlines – or two years since the last COP – leads to the company being de-listed from the Compact. It can re-apply for admission, at the discretion of the Global Compact office. Whether or not that affects a company's behaviour is obviously dependent upon market preferences and access, but exclusion from the Global Compact clearly has the potential to stigmatize, and – with the rise of disclosure and 'report or explain' clauses in several countries' company laws – may affect access as well.¹³⁷ Note also that the Global Compact will take measures to prevent misuse of its logo or association, including referring cases to the UN bodies designated 'Guardians' of the ten principles, or taking legal action.

Integrity Measures

As the UNGC literature likes to reiterate, provided a COP has been submitted and meets the minimum requirements, it will not examine the adequacy of the report, instead leaving all such matters to stakeholder dialogue. There is, however, one notable exception to this rule, and that is where there has been 'systematic and egregious abuse' of the Global Compact's overall aims and purpose. A complaint may be brought by any individual, group or organization to the Global Compact Office which then investigates and decides on what measures to take. In the first

¹³⁶ COP Team, 'Differentiation Programme' *UN Global Compact* (28 February 2013) <http://www.unglobalcompact.org/COP/differentiation_programme.html> accessed 1 June 2011.

¹³⁷ A report or explain clause requires a company to provide a report on CSR issues or give an explanation as to why it should not do so, while a disclosure clause simply requires that a particular type of disclosure be made (See further: Lambooy, (n 88) 235 – 237)

instance, they will seek to initiate ‘information facilitation’ allowing the problem to be addressed through multi-stakeholder dialogue, but if this fails to resolve the problem then the offending company will be de-listed.

Despite its limitation to only the most serious complaints, this is a far cry from the “hands-off” approach of the COP policy, where de-listing is a technical procedural sanction. For a complaint under the integrity measures, de-listing is instead used as a substantive sanction. Given that at the time of writing no complaint under the integrity measures has resulted in delisting, it is difficult to draw any conclusions as to how far the Global Compact Office will go in its assessments. Imagine a company, in its COP, provides a commitment statement, mentions the ten principles and a measurement device but then shows no real substantive implementation of the ten principles, or fails to make any progress in subsequent COPs. Whether this would meet the threshold of ‘systematic and egregious abuse’ is unclear. There is obviously a risk that the Global Compact Office may become a quasi-judicial body in its own right as the Global Compact gains notoriety and as NGOs and other stakeholders begin to avail themselves of the integrity measures system. Indeed, this is already happening. In 2010, 21 cases were raised under the integrity measures, although very few of these proceeded to dialogue facilitation and none have yet resulted in de-listing or other action.

(iv). Certification and Labelling Initiatives

Certification and labelling initiatives are initiatives that involve the “award” of a certification or a label to identify that a product or a corporation meets certain criteria. Private standardization and certification initiatives are created by independent corporations and can either be geared towards a specific industry (e.g. forestry, textiles, etc.) or can apply to multiple industries.¹³⁸ They are usually comprised of a series of procedures to ensure that a product, material, method or service meets specific objectives. If a corporation meets these criteria, it may then receive certification. The best known private standardization initiative is the International Organization for Standardization (ISO). Enforcement of certification varies, but usually the ultimate sanction is revocation of certification and loss of the right to use logos, marks etc. on the enterprise’s products and in communications. Table 4 presents a comparison of enforcement mechanisms included in some of the main certification and labelling initiatives.

¹³⁸ Olivier Boiral, ‘The Certification of Corporate Conduct: Issues and Prospects’ (2003) 142(3) Int’l Lab. R 317

Table 6: Enforcement of selected Labelling and Certification Mechanisms

Labelling/ Certification Mechanism	Rule-Maker	Decision-Maker (Judge)	Sanctioning process	Sanctions	Complaints procedure
Rugmark/ Goodweave	GoodWeave Standards Committee (responsible for the development of the standards)	GoodWeave Certification Committee (oversees the monitoring and certification processes)	Inspection and monitoring program. GoodWeave Certification Committee makes final decision by consensus based on inspection report.	Withdrawal of the Rugmark / Goodweave label	A complaint can be filed with the Secretariat of Rugweave and must include documentary evidence. The Secretariat designates a Complaint Administrator (CA). The CA makes an initial decision regarding acceptance or rejection of the complaint within 10 days of receipt. If accepted, the complaint is transmitted to the Certification Committee which has 30 days to make a decision.
Fair Wear Foundation (FWF)	Board of Directors (one independent chairperson, representatives of garment suppliers, trade-unions and NGOs)	Not specified in the FWF charter. Final decisions are presumably taken by the Board of Directors.	Factory audits (announced) preceded by off-site interviews with workers. Management system audits after one year of membership (verifies the internal management systems to better support workplace conditions)	Factories not listed as FWF compliant	Workers can reach local complaints officer (reachable on at a local telephone number). Complaints procedure exists only where workers aren't able to access a local grievance system.
Social Accountability International	Advisory Board (representatives from trade unions, companies, NGOs, suppliers, government agencies and certification bodies)	Certification auditors are certified and supervised by the Social Accountability Accreditation Service (independent from SAI)	Factory audits by certified auditors. SAI audits the auditors but not the factories.	Withdrawal of the SAI8000 certification	None.

Table 4

Fair Wear Foundation

The Fair Wear Foundation (FWF) is an NGO founded in 1999 in the Netherlands FWF focuses on the garment industry and on phases of garment production where sewing is the main manufacturing process. When a company joins FWF, it commits to implementing the FWF Code of Labour Practices across its supply chain. The implementation of the Code is then ensured through factory audits, a worker and third-party complaints mechanism and by helping factories develop internal management systems to support better workplace conditions. The FWF Code of Labour Practices is based on the fundamental ILO conventions and on the Universal Declaration of Human Rights.¹³⁹

Social Accountability International

Social Accountability International (SAI) defines itself as a ‘non-governmental, multi-stakeholder organization whose mission is to advance the human rights of workers around the world’. The SA8000 standard is the central part of the work of SAI (www.sa-intl.org). It is based on the ISO model, but is oriented exclusively to the social dimensions of corporate accountability. Based on the conventions of the ILO, the Universal Declaration of Human Rights and the UN Convention on the Rights of the Child, it is comprised of 9 standard elements, namely child labour, forced labour, health and safety, freedom of association and the right to collective bargaining, discrimination, working hours, compensation and management systems (www.sa-intl.org). As of 30th September 2010, 2330 facilities representing 1,365,236 workers were certified SA8000 compliant.

Rugmark / Goodweave

Rugmark and Goodweave are product labelling initiatives, which use labels to inform consumers that products meet specific socially desirable criteria. Rugmark began in 1994 ‘in response to consumer pressure in Europe’ to identify hand-knotted carpets made without child labour. To be certified by Rugmark, carpet-makers sign an agreement with the following obligations: to produce carpets without employing children under fourteen years of age, to pay their workers at least the official minimum wage, to register all looms and manufacturing units with Rugmark and to allow access to looms and factories for unannounced inspections by Rugmark inspectors.¹⁴⁰ In 2009, Rugmark launched the Goodweave brand and label for its expanding certification programme. ‘The Goodweave label addresses environmental and adult working conditions in addition to its

¹³⁹ (<http://www.fairwear.org>).

¹⁴⁰ (www.rugmarkindia.org)

strict no-child-labor criteria'. Since its foundation, more than 7.5 million certified carpets have been sold in Europe and in North America and it is estimated that the number of children involved in carpet-making work has dropped from one million to 250,000.¹⁴¹

ISO 26000

The ISO operates as a network of standards institutes in 157 countries. Its operations are carried out via a system of 'nearly 3000 Technical Committees, Sub-Committees and Working Groups' together with the cooperation of experts from corporations, governments and civil society. The ISO has developed two certifications for the responsibility of corporations *vis-à-vis* stakeholders, namely the ISO 14000 Environmental Management standard and the ISO 26000 Social Responsibility standard (www.iso.org). The purpose of the ISO 26000 standard is to assist corporations 'in their efforts to operate in the socially responsible manner that society increasingly demands'. (www.iso.org). It is important to specify here that the ISO 26000 standard is not intended for use in certification. It exists to provide guidelines.

(v). International Framework Agreements

International framework agreements (IFAs) are agreements, negotiated on a global level between global trade union federations and corporations, which lay down rules of conduct for transnational companies (www.imfmetal.org). IFAs are characterized by four elements: first, the participation of international trade union organizations in their elaboration; second, references made to the ILO's four core labour rights; third, the inclusion of an implementation procedure; and, fourth, recognition by the company that the agreement shall apply to all sub-contractors in the supply-chain.¹⁴²

IFAs can be considered a trade union response to unilateral codes adopted by companies.¹⁴³ Indeed, 'while codes of conduct in general establish no dialogue with the company workforce, global framework agreements establish fora and procedures for continuous discourse'. The IFAs 'serve as statements of good intent, give labour a role in establishing the terms of good labour relations and in monitoring developments on the ground, and opens up new possibilities for

¹⁴¹ (www.goodweave)

¹⁴² R.-C. Drouin, 'Procédures de règlement interne des différends de droit du travail dans l'entreprise multinationale', in M.A. Moreau, H. Muir-Watt, P. Rodière, *Justice et Mondialisation en droit du travail: Du rôle du juge aux conflits alternatifs*, (Daloz, 2010). Accor, BMW, Carrefour, Chiquita, Danone, Faber-Castell, Hennes & Mauritz Ikea, Lukoil, PSA Peugeot Citroen, Statoil and Volkswagen are amongst the companies to have signed IFAs.

¹⁴³ C. Marzo, 'Les risques juridiques créés par les accords-cadres internationaux: opportunités, dangers et stratégies', in M.A. Moreau, H. Muir-Watt, P. Rodière, *Justice et Mondialisation en droit du travail: Du rôle du juge aux conflits alternatifs*, (Daloz, 2010)

further dialogue with corporate management'. IFAs are not collective bargaining agreements, and the ability to invoke them before a court remains to be determined.

IFAs generally present one of three forms of enforcement mechanism: managerial, bilateral and complaint mechanisms. So-called managerial modes of enforcement usually involve verifications along the supply-chain through an auditing process and often involve drafting an annual report. Bilateral mechanisms include periodic meetings between managers and employees or trade-unions. Whereas some IFAs create a body to supervise their implementation, others assign this task to the European Works Council. Finally, some IFAs provide for a complaints mechanism. An employee can complain of a violation of the agreement, either alone or through his union representatives.¹⁴⁵

Table 5 presents example IFAs along with their enforcement processes. IFA enforcement mechanisms are negotiated between the parties, and though they can be loosely grouped into three categories, they vary greatly.¹⁴⁶ One must however question their effectiveness for improving labour or human rights standards. Quebecor Inc., a large media company based in the province of Quebec (Canada), signed an IFA with UNI in 2007. The IFA begins with the recognition that it is not legally binding. The preamble affirms both parties' commitment to 'good industrial relations practice derived from universally accepted agreements on human and labour rights' and the agreement makes reference to both core ILO conventions on the right to unionize and negotiate collectively. The IFA is to be implemented through annual meetings between representatives of UNI and of Quebecor. Finally, article 8 of the IFA specifies that it applies to all subsidiaries.

Quebecor operates through various subsidiaries including Sun Media, which publishes both *Le Journal de Montreal* and *Le Journal de Quebec*. In April 2007, the management of the *Journal de Quebec* locked out its unionized employees. The fourteen month lock-out (a practice recognized by Quebec law, by which an employer can "lock out" its employees – the employer equivalent of a strike) was, at the time, the longest lock-out in Quebec media history. In January 2009, the 253 employees of the *Journal de Montreal* were locked out for nearly two years leading to the

¹⁴⁵ R.-C. Drouin, (n 142)

¹⁴⁶ For example, the IFA signed between Electricité de France and the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) provides for a reporting mechanism; the Inditex-ITGLWF IFA provides an inspection and audit based mechanism; the Rhodia-ICEM agreement provides for a joint monitoring mechanism; the IFA between the IMF and Aker provides for a five step dispute resolution procedure including a reference to arbitration; and the agreement between Skanska and the Building and Wood Worker's International (IBB) provides for a multistep process combining reporting, bilateral discussion and arbitration.

termination of nearly two-thirds of their employment agreements. During this lock-out, the newspaper continued to operate through the use of news agencies.

Could the use of the IFA have prevented such unilateral actions on the part of management? The vagueness of the wording of the agreement, the lack of any legal value and the “soft” implementation make the usefulness of the IFA questionable. Although Quebecor’s actions were legal under Quebec law, it is arguable that the company exploited loopholes in outdated legislation to bypass the collective negotiation process. In this case, the IFA was of no use in providing additional protection to Quebecor employees.

Enforcement of sample International Framework Agreements						
	Type of enforcement	Rule-Maker	Decision-Maker (Judge)	Sanctions	Appeals procedure	Complaints procedure
EDF	Managerial (annual report)	Negotiated between EDF and ICEM	N/A	No sanctions outlined	No appeals procedure	No formal complaints procedure
Rhodia	Managerial (joint monitoring mechanism)	Negotiated between Rhodia and ICEM	N/A	No sanctions outlined	No appeals procedure	No formal complaints procedure
Inditex	Managerial (joint monitoring)	Negotiated between Inditex and ITGLWF	N/A	No sanctions outlined	No appeals procedure	No formal complaints procedure
IKEA	Managerial mechanisms (joint monitoring)	Negotiated between IKEA and IFBWW	N/A	No sanctions outlined	No appeals procedure	No formal complaints procedure
Volkswagen	Bilateral (discussion during meetings of the Global Works Council)	Negotiated between VW and IMF	N/A	No sanctions outlined	No appeals procedure	No formal complaints procedure
BMW	Bilateral (discussion during periodic meetings)	Negotiated between BMW and IMF	N/A	No sanctions outlined	No appeals procedure	No formal complaints procedure
Aker	Mixed (Bilateral mechanisms followed by dispute resolution mechanisms)	Negotiated between Aker and IMF	Management with eventual referral to bipartite monitoring group and ILO arbitrator	Termination of the agreement when all steps are exhausted	No appeals procedure	Complaint raised with local management, brought to Aker's regional president; Complaint referred to bipartite monitoring group. Arbitration brought before ILO arbitrator. If no consensus, termination of the agreement.
Skanska	Mixed (Bilateral mechanisms followed by a dispute resolution procedure)	Negotiated between Skanska and IBB	Bipartite group with eventual referral to arbitration board	"relevant corrective measures"	No appeals procedure	Complaint referred to an application group (bipartite) who is responsible for visiting the sites. Reports of violations referred to Group Management Staff (ensures that the relevant corrective measures are implemented). Referral to arbitration board.

Table 5

(vi). Multilateral & Expert Guidelines

Another prominent source of transnational regulatory norms are the various “guidelines” on corporate conduct in circulation. The source – and thus, potentially, the legitimacy – of these initiatives varies from those promulgated by multilateral international organizations (such as the OECD), those produced by committees of autonomous experts,¹⁴⁷ and multi-stakeholder groups. Perhaps the most interesting example for discussion are the OECD Guidelines for Multinational Enterprises. Along with the UN Guiding Principles on Business and Human Rights, they are the only universal corporate responsibility documents formally and multilaterally adopted by States.

The nature and aim of the Guidelines are described in the Preface.¹⁴⁸ Once again, the main reference point for the behaviour of corporations is the respect of domestic laws. This reference to State law as well as the voluntary nature of the Guidelines is further reiterated in the first two clauses of the Concepts and Principles:

- (1) ‘The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable;
- (2) Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the *Guidelines* encourage the enterprises operating on their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host country.’

The Guidelines are divided into eight sections: general policies; employment and industrial relations; disclosure of information; competition; financing; taxation; environmental protection; and science and technology. But what is most interesting is their enforcement mechanism. The OECD Guidelines are mainly enforced through a system of National Contact Points (NCPs). These generally consist of senior government representatives, although businesses, worker organizations and NGOs may also be represented. The purpose of the NCP is to ‘offer a forum for discussion’ and to ‘assist the business community, worker organizations, other non-governmental organizations, and other interested parties concerned to deal with the issues raised

¹⁴⁷ Such as the recent Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights

¹⁴⁸ “The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The *Guidelines* aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. [...]”

in an efficient and timely manner and in accordance with applicable law'. Their main roles are: to make the OECD Guidelines known and available; to raise awareness of the implementation procedures they contain; to respond to enquiries from other NCPs, the business community, worker organizations, NGOs, the public or governments of OECD countries; and finally, to resolve disputes arising from the implementation of the Guidelines.

After an initial assessment of whether the issues submitted merit further examination, the NCP then offers to help the parties involved to resolve the issues. The NCPS can 'seek advice from relevant authorities, and/or representatives of the business community, worker organizations, other non-governmental organizations, and relevant experts', consult other NCPs, and, with the consent of the parties, facilitate access to conciliation or mediation. After consulting the concerned parties, the NCP will make the results of the implementation procedures publicly available. If the NCP reaches the conclusion that the issues do not merit further consideration, it will issue a statement that, minimally, describes the issues raised and the reasons for its decision. If the parties have reached an agreement, the NCP report shall describe the issues, the procedures initiated by the NCP and the agreement reached. Finally, if no agreement was reached or if a party was unwilling to participate in the procedures, the statement shall describe the issues, the reasons why the NCP decided the issue merited examination and the procedures initiated by the NCP. The statement can also, when appropriate, include the reasons why an agreement could not be reached.

2. The Nature & Effect of Transnational Regulation

According to John Ruggie, the U.N. Special Representative on Human Rights and Transnational Corporations, there exists a minimal set of norms that companies should respect which are set out in what he dubs the International Bill of Rights. This includes the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Furthermore, these minimal standards include the core conventions of the ILO. Taken together, these norms are the foundational elements of the international human rights regime.¹⁴⁹

For Drouin, the quasi-systematic inclusion of the ILO's core labour rights in IFAs can be considered a form of contractualization of international law and can serve to build bridges between private and public initiatives in this branch of law.¹⁵⁰ As such, corporate social responsibility

¹⁴⁹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework', 9 April 2010, UN Doc. A/HRC/14/27

¹⁵⁰ Drouin, (n 142)

initiatives in the field of labour rights can be seen as a way of transferring to the private sphere elements of generally accepted public international law. Furthermore, it may be possible to consider CSR initiatives as something that reinforces the recognition of the universality of these norms. Viewed in this way, many CSR initiatives, such as IFAs, can indeed be considered “constitutional” documents of international business. Furthermore, as the *Kasky* case discussed above illustrates, CSR enforcement may often interact with fundamental constitutional rights such as freedom of expression.

The shift from command-and-control to a more contractual business model has had far-reaching implications for labour rights which are only beginning to be addressed. As the corporate group has metamorphosed into transnational supply network, a host of new CSR responses have developed in an attempt to ensure the protection of labour rights. Codes of conduct, only twenty years ago vague, imprecise and underdeveloped, are now firmly incorporated into many supply contracts and provide grounds for terminating business relationships if fundamental social rights are not respected. These, in turn, are reinforced by the rise of certification and labelling and by multi-stakeholder initiatives such as the Global Reporting Initiative or Global Compact. The ILO core labour rights have thus taken their place, at the level of principle and rhetoric, in the transnational marketplace.

The fact remains, however, that many of the tools which have grown up are still in their infancy. The Global Compact, for instance, while having had notable successes in many high-profile companies improving their transparency and compliance processes, faces challenges in ensuring its continuing credibility as its popularity grows, and much may depend on to what extent it is willing to get its hands dirty in examining the detail of COPs and enforcing its integrity measures. Similarly, while gains in transparency in the garment industry, for example, are to be welcomed, it remains difficult to draw definite conclusions about the effectiveness of contractual enforcement of codes of conduct due to the inherent uncertainty about end results; whether a decision to discontinue orders from a supplier actually results from a code of conduct breach – in the absence of NGO or other pressures – is almost impossible to say.

One area which has perhaps shown some measurable success in enforcing labour rights through CSR is certification and labelling. Sector-specific labels such as Rugmark claim important gains in improving wage and working conditions in their sectors, while the arrival of ISO on the social accountability scene with ISO 26000 may provide an element of coherence and visibility to this area that it has hitherto lacked. If the new ISO standard proves popular, it may indeed operate as a powerful incentive with the possibility for loss of market share or access by noncompliant

companies. Ultimately, though, CSR is an area which has little in terms of judicial or quasi-judicial enforcement. The almost neurotic insistence by the Global Compact that it is merely a “forum” for communication provides but one example, while the refusal by the UN Special Representative to countenance legal obligations for transnational corporations is yet another.¹⁵¹ Where national courts have become involved, their responses have barely coped with the old hierarchical business model, let alone with supply-chains, something the *Wal-Mart* case amply demonstrates.

Conclusions: Norm Shopping in the Global Marketplace

The transnational legal and regulatory regimes presented in this chapter share many features in common. They all purport to apply across or irrespective of territorial boundaries. They are all highly specialized. They are all marked, to a greater or lesser extent, by a retreat of the State: either because the sources of the commitments or obligations they generate go beyond the State, or because their administration and enforcement has been effectively delegated to negotiated or multi-stakeholder bodies. But perhaps the feature which marks them most for present purposes is the choice which TNEs have in selecting which norms apply to them. Global legal pluralism has given way, in a sense, to global regulatory pluralism.

Legally speaking, this essential negotiability operates on two – or possibly three – levels: law (and “norm”) shopping, and forum shopping. Law shopping, or ‘normative “self-service”’¹⁵² consists in the ability to choose – and to tailor – the legal regimes applicable to one’s constitution, actions, and transactions. For a TNE, this traditionally operates *a priori*, in the choice of incorporation, *a posteriori* in the choice of subsidiary incorporation and re-incorporation,¹⁵³ and *in vivo* through ‘delocalizations’.¹⁵⁴ But with the transnationalization of law and regulatory norms, the available choices have multiplied. It is now open to enterprises to select from a plethora of norms which all purport to regulate the same behaviour. Through unilateral adoption of available – and preferential – transnational regulatory instruments, coupled with selective localization (such as relocation of key executives to a State with a favourable criminal law), TNEs have a powerful ability to create

¹⁵¹ Ruggie, (n 149)

¹⁵² Gilles Lhuilier, ‘Law Shopping et délocalisations. La redéfinition du « choix de la loi » par la pratique du droit international des affaires’ in Xavier Boucobza (ed.), *Les groupes internationaux de société : nouveaux enjeux, nouveaux défis*, (Economica 2007) 127 - 157 ; A. Supiot, ‘Du nouveau au self-service normatif. La responsabilité sociale des entreprises’ in *Analyses juridiques et valeurs en droit social* (Daloz : mélanges Pélessier, 2004) 541

¹⁵³ See *supra*, chapter 2

¹⁵⁴ A ‘delocalization’ is the moving (by closure and re-opening) of factors or activities of production in order to benefit from legal rules which offer greater benefit to the employer: *ibid*, 128

for themselves a bespoke legal regime which combines elements of national, international and transnational rules with unilateral ‘commitments’ of doubtful legal effect.

There is also a risk of norm saturation. According to an OECD report in 2006, the overabundance of labelling initiatives in the fisheries sector meant ‘Dolphin-safe labels are a typical case where numerous labels compete with each other, confusing consumers’.¹⁵⁵ This may offer an opportunity to TNEs wherever they have freedom of choice between competing norms to adopt the least onerous.¹⁵⁶ Secondly, where market impact is modest (again as in fishing),¹⁵⁷ or consumers are unlikely to know or care whether a particular standard has been applied in production,¹⁵⁸ TNEs are in a position to choose the most favourable or least onerous standard, and to safely ignore higher standards which are irrelevant to market choice and/or liability.

Following materialization of a risk or commission of a harm, the TNE has several forum shopping possibilities available to it, already alluded to in chapters 1 and 2. But it goes beyond what might be termed ordinary forum shopping, the possibility of choice that is open to anyone confronted with multiple available forums in which to litigate. The TNE is a forum shopper *par excellence*. As Baxi states, TNEs may strategize through techniques such as *forum non conveniens* to ‘reverse forum shop’:

‘a process in which courts empower a United States multinational corporation confronted by mass torts foreign plaintiffs to choose locus delicti forum. This facilitates ways of corporate governance that promote the best possible mode of multinational enterprise juridical management of the legal aftermath of a mass disaster.’¹⁵⁹

Baxi highlights, for example, the conditionality of U.S. *forum non conveniens* which requires a defendant to submit to the foreign jurisdiction, thus rendering the doctrine not forum-selective but ‘forum-creative’.¹⁶⁰ Furthermore, TNEs have extensive possibilities to use fora unavailable to

¹⁵⁵ Barbara Fliess et al, ‘CSR and Trade: Informing Consumers about Social and Environmental Conditions of Globalised Production’, (2006) OECD Trade Policy Working Paper No. 47, 46 - 7 <http://www.oecd-ilibrary.org/trade/csr-and-trade-informing-consumers-about-social-and-environmental-conditions-of-globalised-production_246322000033> accessed 10 Jan 2007

¹⁵⁶ Event where states have provided for mandatory CSR reporting, such as the U.K. Companies Act 2006, there is often an element of choice in choosing which initiative to subscribe to.

¹⁵⁷ Fliess et al, (n 155) 46

¹⁵⁸ Consider the judgment of the English Court of Appeal in *Tesco Stores Ltd v Pollard* [2006] EWCA Civ 393, a product liability case, at [17] *per* Laws LJ: ‘Members of the public — purchasers like [the claimant]— are unlikely to have the faintest idea to what safety standard the product they are buying has been designed, if it has been designed to any’

¹⁵⁹ Upendra Baxi. ‘Mass Torts, Multinational Enterprise Liability and Private International Law’ (1999) 276 RCADI 297

¹⁶⁰ *ibid*, 361

claimant/victims, such as investment arbitration, or to encourage arbitration as an alternative to judicial settlement (for example due to its perceived speed compared to a slow judicial system). Aside from this regulatory and jurisdictional competition, internormative contestation between competing norms is all but inevitable. This can only contribute to the weakening of single-state regulatory authority, as laws come into conflict with each other and with regulatory initiatives, leading to TNEs 'opting-out' of State regulation.¹⁶¹

¹⁶¹ See: Wai, (n 43) 256

Part II

Securing Justice

Transforming Transnational Enterprise Accountability

Chapter 5

The Transnational Enterprise as a Transnational Legal Field

In Part I of this dissertation I considered the limits from a regulatory and compensatory perspective of existing and emerging legal frameworks for TNE accountability. In this chapter, I discuss the overall picture that emerges from the somewhat desultory examination I have undertaken. In the first section, I argue that fundamental challenges to the traditional conception of State/non-state, private/public has emerged, and that the consequence of this (and of the character of the TNE) is to generate normative conflict as never before. The TNE, properly conceptualized, is not an entity, but itself a field for inter-normative contestation.

This leads to a reflection on the theoretical basis of transnational law, the TNE's natural home, in section II. I critically review some of the theories of transnational law and argue that there is a need for a normative framework which admits the coordinative regulatory function of the State and provides an impartial basis for regulatory and legal equality between TNEs and victims.

I. The TNE as an Expression of Transnational Legal Obligation

1. Challenging the Public-Private Divide¹

(i) Jurisdiction in Public and Private International Law Revisited

In chapter 2, due to its essential influence on domestic legal assertions of jurisdiction, the international grounds of jurisdiction were briefly presented. We identified what, for modern purposes, may be called the foundational bases of jurisdiction: personality (or nationality), territory and domicile. These meet the sixteenth and twentieth century notions of universal and protective jurisdiction, and finally the ultra-modern 'doctrine of effects'. But as I argued earlier, how we think about these is important. For one, the effects doctrine is explicitly based in the territorial principle, for all it allows an exercise of jurisdiction over *actors* or *conduct* occurring extraterritorially. After all, the *effects* must be created on the territory of the court or regulator claiming this as a basis. In that sense it is largely similar to jurisdictional and conflict of laws rules based on the *lex loci damni*, the law of the place where the damage occurred which may not necessarily have a link to either the

¹ This section draws heavily on earlier work with Dr Rosa Raffaelli. I am grateful to her for permitting me to reproduce it here. See: Benedict S. Wray & Rosa Raffaelli, 'False Extraterritoriality? Municipal and Multinational Jurisdiction over Transnational Corporations' (2012) 6(1) H.R & I.L.D 108.

nationality of the actors or the place where the conduct occurred, but is clearly the place where the *fait juridique* produces its most obvious effects.

And yet in the new European private international law of torts – the ‘Rome II’ Regulation² – the *lex loci damni* was adopted without controversy or protest from international lawyers concerned about such potential extraterritorial reach. Indeed, it was justified as enhancing foreseeability and legal certainty.³ However, regardless of the particular interpretation suggested by the Regulation, the concept of *locus damni* has been interpreted differently in various jurisdictions, often to justify opening up jurisdiction. For example, in the Australian case of *Regie Nationale des Usines Renault SA v Zhang*,⁴ the High Court found that the Australian courts had jurisdiction over a French car manufacturer with no presence in Australia, for an accident occurring in the French territory of New Caledonia, on the basis that the claimant was receiving treatment for his injuries in Australia.⁵

Similarly, domicile is based on an expression of “territoriality” albeit that – as is well known – it is often used to justify worldwide tax liabilities over individuals mostly residing elsewhere, the inevitable conflicts which arise from such taxation exceptionalism being generally resolved through the conclusion of bilateral double-taxation treaties.

Personality and nationality have also become conflated in modern jurisdictional theory. The personality principle is variously known as active and passive ‘nationality’. But what is clear is that the modern obsession with territoriality, no less than the focus on ‘nationality’ (rather than personality) is tied to the notion of the Westphalian nation-state. As it has been put in one prominent study on U.S. jurisdiction, ‘[t]his general view of general jurisdiction is born of a perspective founded on a theory of the legitimate exercise of power by sovereign states’.⁶ It is submitted that territoriality is as much a function of the construction of the nation-state as the concept of national.⁷

In the traditional conceptions of private and public international law, the scholarship in both disciplines generally holds that there is a strict divide between private and public international law

² Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

³ *ibid*, recitals 14, 16, 17

⁴ (2002) 210 CLR 491 (HCA)

⁵ Although it is worth noting that, having asserted jurisdiction, they then applied the *lex loci delicti*.

⁶ Lea Brilmayer et al, ‘A General Look at General Jurisdiction’, (1988) 66(4) Texas L.R. 721 at 783.

⁷ Richard Ford, ‘Law’s Territory (A History of Jurisdiction)’, 97 *Michigan L.R.* 843; Berman, P. S., ‘The Globalization of Jurisdiction’, (2002) 151 *U. Penn. L.R.* 311, esp. at 441 - 459

in the same way that there is a public/private divide in domestic law. However, this flattens a debate which is not really about public and private as between subjects equal before the law, but about the hierarchical relationship of distinct legal orders. Private international law ‘has, in fact, been seen as an emanation of domestic or municipal law, or in other words as *derivative* of State power and not truly international law at all. One might therefore consider that in fact private and public international law are separated both horizontally and vertically (see Figure 3), and in this sense they do not coincide in the same space’.⁸

	Public law	Private law
International law	Public International law	--
Domestic law	--	Private International law

Figure 3⁹

Thus, the inherent simplicity of the terms private and public mask the subtle but important difference those terms imply, being employed in two hierarchically different contexts. The traditional view of public international law outlined in chapter 2 supports this view.¹⁰ Recent international legal theory also seeks to emphasize the statist character of international law: Goldsmith and Levinson argue that international law is in some way the external manifestation of public law, while administrative and constitutional law constitute its internal aspect.¹¹ For them, international law provides a review mechanism or a check on unbridled State power which is necessary to regulate international affairs. Modern literature by *privatistes* is similarly dogmatic, being arguably reiterated and reinforced through the insistence on the private character of actors and regulation in the transnational sphere.¹²

⁸ Wray & Raffaelli, (n.1) at 112

⁹ *ibid* at 113

¹⁰ See, e.g. Oppenheim, *supra* note 3.

¹¹ J. Goldsmith and D. Levinson, Law for States: International Law, Constitutional Law, Public Law 122(7) Harvard Law Review 1791 (2009).

¹² See, for example, Fabrizio Cafaggi, ‘New Foundations of Transnational Private Regulation’, (2011) 38 Journal of Law and Society 21: ‘[transnational private regulation] endorses a broad definition of the private sphere, going beyond industry to include NGO-led regulators and multi-stakeholder organizations.’

Some *privatistes* often sidestep the trickier questions of jurisdiction from an international law perspective by appealing to the classic idea of sovereignty as unbound: ‘a sovereign is free to provide, if he so chooses, that the area over which a rule of substantive law, whether domestic or foreign, is to prevail shall be wider than the territorial jurisdiction in which it originates’.¹³ This is a view which is simply unhistoric in view of the development of federal and supranational legal orders which provide for various forms of differentiated sovereignty. It is also manifestly incompatible with globalization, and the rise of transnational systems of regulation sketched in the last chapter.

There are numerous examples of laws which explicitly produce international effects. Regulation of finance and banking is a good example; taxation is another. When it comes to TNEs, such measures proliferate; for example competition/antitrust law is infamous for its global reach. A good example of a recent measure which affects worldwide human rights compliance for TNEs in certain sectors is section 1502 of the U.S. Dodd-Frank Act.¹⁴ This small provision buried away in a large financial regulatory statute addresses the use of conflict minerals by introducing a reporting requirement for listed companies. It has its roots in the Kimberly Process, a transnational multi-stakeholder regulatory initiative¹⁵ which aims at ensuring supply-chain transparency in the diamond sector through a certification scheme.¹⁶ But the Dodd-Frank Act is interesting for two reasons. First, although there is no direct sanction for use of conflict minerals, the Securities and Exchange Commission can apply severe sanctions if a company does not meet its reporting requirements. And the cost of compliance is high: the cost of producing the report for a single company has been estimated at \$16.5 million, and \$4bn sectorally.¹⁷ Drimmer and Phillips opine that costs of compliance may ‘increase the cost of minerals from Congo... [and] drive at least some purchasers to seek minerals from other, less expensive jurisdictions’.¹⁸

The Dodd-Frank Act is a good example of the progressive irrelevance of territoriality in the regulation of transnational activity. Its genius lies in the fact that it imposes obligations only on

¹³ J. Fawcett, J. Carruthers and P. North, Chesire, North & Fawcett: Private International Law 6 (Oxford/New York: Oxford University Press, 2008).

¹⁴ The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010

¹⁵ For discussion of multi-stakeholder and transnational regulation, see chapter 4

¹⁶ For an overview of the transnational regulation in the gold and diamond sectors, see Mary Footer, ‘Shining Brightly? Human Rights and the Responsible Sourcing of Diamond and Gold Jewellery from High Risk and Conflict-Affected Areas’, (2012) 6 H.R. & I.L.D 159

¹⁷ See Dimmer & Phillips, ‘Sunlight for the Heart of Darkness: Conflict Minerals and the First Wave of Sec Regulation of Social Issues’ (2012) H.R. & I.L.D 131 at 148

¹⁸ *ibid* at 149

particular (large) TNEs which choose to enter the U.S. market. But through supply-chain economics and transfer pricing, its effects will filter down the global supply-chain, changing market conditions worldwide. In the traditional conception of public vs. private, while domestic laws may produce international effects, they must be subject to the refusal of other sovereign States to recognise those effects in their own domestic legal systems. Thus private international law returns to an essential paradox: while any sovereign can prescribe any effects he likes, that power is limited by the recognition given to those effects by other States. But the Dodd-Frank Act sidesteps this issue entirely: its obligations produce economic, not legal effects, which are not of their nature subject to approbation by a foreign court. Any challenges to the legality or implementation of the Act are limited to the U.S. forum. The only way to avoid its application, for a company that otherwise meets the criteria in the Act, is to avoid having a U.S. presence at all.

The separateness of the private and public in international law has not always been so vehemently affirmed. There is a large literature concerning the cross-pollination of private and public international law, particularly sectoral studies which examine the interaction in relation to specific areas of substantive law,¹⁹ as well as work which questions the precise nature of private international law and its overlooked ‘regulatory function’.²⁰ Finally, judicial pronouncements, such as in the early ATS case *Adra v Clift*, also challenge the divide.²¹ Assuming that this strict

¹⁹ See, *inter alia*, O. Vonk, *supra* note ; I. Seidl-Hohenveldern, The Impact of Public International Law on Conflict of Law Rules on Corporations, 123 *Recueil des cours de l'Académie de droit international de La Haye* 1-116 (1968); D. Kinley and R. Chambers, The UN Human Rights Norms for Corporations: The Private Implications of Public International Law, 6(3) *Human Rights Law Review* 447-497 (2006); H. Muir Watt, *Droit Public et Droit Privé dans les Rapports Internationaux (Vers une Publicisation du Conflit de Lois ?)*, 41 *Archives de philosophie du droit* 207-214 (1997); H. Muir Watt, *Privatisation du Contentieux des Droits de l'Homme et Vocation Universelle du Juge Américain : Réflexions à Partir des Actions en Justice des Victimes de l'Holocauste Devant les Tribunaux Américains*, 55(4) *Revue internationale de droit comparé* 883-901 (2003); H. Muir Watt, *Aspects économiques du Droit International Privé (réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions)*, 307 *Recueil des cours de l'Académie de droit international de La Haye* 25 (2004); F. Francioni, *Exporting Environmental Hazard*, in: F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* 275-298 (London/Boston: Graham & Trotman, 1991).

²⁰ See, for example, A. Mills, *The Confluence of Public and Private International Law* (Cambridge/New York: Cambridge University Press, 2009); U. Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, (1999) 276 *Recueil des cours de l'Académie de droit international de La Haye* 317 – ‘Although conveniently not foregrounded by the bourgeois law foundations and formations, that “private” in “private international law” remains inherently public’; J. P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Governmental Responsibility*, 26 *Vanderbilt Journal of Transnational Law* 1047 (1994); R. Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization* 40 *Columbia Journal of Transnational Law* 209 (2002); C. Joerges *The Idea of a Three-Dimensional Conflicts Law as Constitutional Form*, in: C. Joerges, E.U.Petersmann, R.Stewart and T.Cottier (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford: Hart 2011).

²¹ 195 F.Supp. 857 at 864, (D.Md, 1961): ‘Defendants argue that international law is divided into two mutually exclusive branches, the law of nations and private international law. *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95, relied on by defendants, does not so hold; there is some intertwining of the branches. Hyde’s *International Law*, 2d Rev.ed., 1945, vol. 1, sec. 11A, pp. 33-34, under the heading “The Relation of International Law to Private Individuals” says: “The commission of particular acts, regardless of the character of the actors, may be so detrimental to the welfare of the international society that its international law may either clothe a State with the privilege of punishing the

demarcation between interstate public international law on the one hand and domestic private international law on the other is a useful way of legal ordering based on the classic the State sovereignty model, the problem is that TNEs may often interrupt or usurp elements of the State monopoly. Moreover transnational law and regulation present an even more fundamental challenge, since they involve processes of norm-creation that the traditionalist conception has difficulty admitting.

(ii) Criminal Law & the TNE: Further Confusing the Boundaries

Just as tort is private, so criminal law is traditionally conceived of as part of public law. Thus, in the international context, it should naturally form part of public international law. Certainly, as mentioned previously, this is the accepted orthodoxy.²²

In addition to the established categories of jurisdiction, there is also limited support for so-called *vicarious* (or representational) jurisdiction, whose application seems to challenge some of our traditional views of criminal law and of criminal jurisdiction.²³ Vicarious jurisdiction is a form of subsidiary jurisdiction that one State may exert on facts having no nexus to the State itself, if other States more directly affected by the crime do not accept the extradition of the accused, or if extradition is not granted (and, in some instances, on the basis of a request by one of such States). Among its peculiarities is the fact that, in a few but significant cases, it is to be exerted by applying the national laws of the territorial State where the crime was committed (*lex loci delicti*), and it thus challenges the widely accepted presumption that ‘the Courts of no country execute the penal laws of another’.²⁴ Although the cases in which States decide to apply the criminal legislation of other States are scarce, and historically isolated, they are worth mentioning,²⁵ as they challenge the widely

offender, or impose upon it the obligation to endeavor to do so. The offender may be a private individual; and when he is subjected to the imposition of a penalty, he comes into close contact with the law of nations”.

²² See discussion in Chapter 2, p.107

²³ See: Ryngaert, (n 61) 102; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005) 111. Vicarious jurisdiction differs from universal jurisdiction both with regard to the crimes for which it may be exerted (not limited to international crimes, but potentially extending to any fact which is criminal according to the national legislation of both countries involved) and for its nature (by definition vicarious, that is, subsidiary to an inability to act on the part of the territorial State); however, it is often considered as a form of universal jurisdiction.

²⁴ As suggested in the often cited U.S. case *The Antelope*: U.S. Supreme Court, 1825, *The Antelope* 23 U.S. (10 Wheat.) 66, 123.

²⁵ Cases include the Criminal Code of Uruguay, art. 10 para. 5 and 6 (according to which, when jurisdiction is based on the active or passive personality principle, courts shall apply the criminal legislation which is more favourable to the defendant between the Uruguayan and that of the state where the crime was committed) and the Swiss Criminal Code, whose article 5 originally allowed for the direct application of foreign criminal laws. Also see § 86 of the Swiss *loi fédérale sur l'entraide internationale en matière pénale*, 20 March 1981, *Recueil systématique* 351.1, which establishes that in cases of vicarious jurisdiction exerted upon a request of the territorial state, the criminal legislation of the latter is to be applied if it is more favourable to the defendant. For other cases and peculiarities, in particular with regard to the

accepted idea that criminal law, as a branch of public law and thus an exercise of the State's sovereignty, is totally different from civil law, especially in its international aspects. Indeed, it could be argued that this form of criminal jurisdiction operates in a way that is substantially indistinguishable from private international law.²⁶

Thus, taking vicarious and universal jurisdiction into account it seems clear that the very distinction between public and private in international law is less evident than is often assumed. Support for this proposition can also be found in an analysis of the nature of the rules governing the repression of international crimes: in this respect, indeed, criminal law is considered to stem from *public* international law, as it attaches criminal sanctions to serious violations of the latter, and its application may go hand in hand with claims of State responsibility.²⁷ That in itself is interesting, since criminal law is primarily concerned with individual responsibility and retribution, not with providing an articulation of public power or regulating affairs between sovereign States. In this respect it has far more in common with tort – civil, private law – than with public law. As Beth Stephens has argued, there is a 'persuasive argument that the categories [of tort and crime] are largely a false construct', in the sense that they both seek to regulate the same behaviour, were enforced in analogous ways historically, and do not, from a comparative perspective, have a clear dividing line.²⁸ This led her to conclude that 'civil claims fit comfortably within the framework of international law and universal jurisdiction'.²⁹

This view is, of course, challenged by many theorists of tort and criminal liability. But – as Stephens' highlighted – it is in the comparative assessment that many of the objections become ephemeral. Simons argued that tort's functions are that claimant received and defendant pays damages (to compensate and sometimes in 'excess of compensation'), deterrence of future torts, loss-spreading, and reinforcement of social norms.³⁰ By contrast, criminal law's functions are to

penalty, see also: Fierro, (n 61) 198; and Alberto Di Martino, *La frontiera e il diritto penale: natura e contesto delle norme di diritto penale transnazionale* (Giappichelli 2006)

²⁶ A point already made by S. Cybichowski, '*La compétence des tribunaux: a raison d'infractions commises hors du territoire*' (1926) RCADI II, 251 at 251, according to whom the rules governing the scope of application of national criminal law, and thus the prescriptive jurisdiction of states, form part of 'international private law'.

²⁷ See for instance the judgment of the ICJ in the *Genocide* case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43 (ICJ)

²⁸ Beth Stephens, 'Translating Filártiga: A Comparative and International law Analysis of Domestic Remedies For International Human Rights Violations' (2002) 27 *Yale J Int'l L* 1 45; citing David Friedman, 'Beyond the Tort/Crime Distinction' (1996) 76 *Bost. ULR* 103.

²⁹ Stephens, (n 70) 46

³⁰ Kenneth W. Simons, 'The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives' (2008) 17(3) *Widener LJ* 719

inflict stigma and suffering, deter future crimes, (sometimes) incapacitate the defendant and reinforce social norms.³¹ Already the lack of clarity is evident, particularly where damages ‘in excess of compensation’ are available, since this arguably ‘inflicts suffering’ on a defendant. Both seek to deter, both seek to reinforce social norms. And it is highly debatable that tort does not seek to inflict stigma on a defendant in a fault-based system of liability. One of Simons’ main criteria is that it is the State who prosecutes. And yet the reality of this is far from clear. Historically, many prosecutions in the common law were private,³² and private prosecutions are still used today, for example in England.³³ State involvement is not, from a comparative perspective, a necessary requirement for criminal prosecution, notwithstanding statutory limits placed upon it in some jurisdictions.³⁴

In civil law systems, victims can sometimes present themselves as ‘civil parties’ in criminal proceedings, in which case following a conviction the criminal court will order the payment of civil compensatory damages.³⁵ Notwithstanding that when it does so, the criminal court normally bases itself on the substantive provisions of the Civil Code, *viz.* private law, this is nonetheless an interference of tort law in criminal law or *vice versa*. Furthermore, there is no *a priori* reason why compensatory damages paid to a victim as part of criminal proceedings *should* be strictly separated in this way. In England, for example, criminal courts can in some instances order damages to be paid to the victim,³⁶ but these are treated as part of criminal law and do not necessarily bind a civil court pronouncing on tort damages arising from the same facts. It is not difficult to imagine a society with no tort law, or where sanctions for private wrongs are castigatory. One need look no further than Shakespeare’s Merchant of Venice, quoted at the outset of this dissertation, for an

³¹ *ibid.*, 729

³² Friedman, (n 28) 103-4

³³ In England, all prosecutions were private until the Prosecution of Offenders Act 1985; up to that point, police officers prosecuting a case technically did so in their capacity as private citizens. Private prosecutions in England are on the increase and are becoming more widely used today, for instance in cases of internet piracy as in the *Vickerman* case. See: *Scopelight Ltd v Chief Constable of Northumbria* [2010] Q.B. 438 (EWHC). See also: Paul Peachey, ‘Two-tier justice: Private prosecution revolution’ *The Independent* (London, 16 August 2014) <<http://www.independent.co.uk/news/uk/crime/twotier-justice-private-prosecution-revolution-9672543.html>> accessed 10 October 2014.

³⁴ In Ontario, for example, private prosecution is subject to review by a crown prosecutor before it can proceed and must nonetheless always be in the public interest as for a public prosecution: s.507 (1) Criminal Code of Ontario, R.S.C., 1985, c. C-46

³⁵ This is possible, for example, in France, Italy, Spain

³⁶ As well as other forms of reparation, such as repainting a wall defaced by offensive graffiti

example. In Shakespeare's imagining of Venice, failure to pay a private debt almost rendered a man's life forfeit under the law by the terms of the private contract.³⁷

On the other side of the coin, part of the doctrine affirms tort's stigmatic, communicative, prescriptive and (potentially) punitive aspects.³⁸ Thus, from a comparative law perspective, the character of tort and criminal law is increasingly blurry. It is difficult to affirm its nature as truly private or public in either case. As the very least, one can argue that tort and crime are – to a certain extent – irrevocably bound up with one another. This is supported by the application of the ATS: although a private, civil statute, the case law draws heavily on international *criminal* norms to develop an autonomous standard of complicity – aiding and abetting – for which companies and other actors can be held responsible. *Doe v Unocal* is paradigmatic in this regard: the plaintiffs were villagers from the Tenasserim region of Myanmar who alleged that the Myanmar Military forced them to work under threat of violence. In addition to the forced labour program, the Myanmar Military subjected them to acts of murder, rape and torture.³⁹ The Court stated, 'the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the distinction between criminal and tort law less crucial in this context'⁴⁰ and went on to cite a number of international criminal decisions, concluding that Unocal had both the *mens rea* that it "knew or had reason to know" that the principal had the intent to commit the offense' as well as the *actus reus* of providing 'practical assistances...and encouragement'.⁴¹

Administrative liability adds further confusion into the mix. As noted previously, there is a differing conception of what administrative liability entails between different legal cultures. In the civil systems based on Roman law, such as Italy and France, administrative liability is conceived as part of a triumvirate alongside civil and criminal law. Administrative sanctions are not criminal in the strict sense, and yet their inherent repressive aspect and involvement of a public prosecuting/enforcing authority prevent them from being classified as civil either. By contrast, common law systems have tended to subcategorize criminal law between true crimes and

³⁷ A good subject for Coasian analysis, given the inherent inefficiency of the situation prior to Shylock's final agreement, under duress, to accept payment instead.

³⁸ Thomas H. Koenig, 'Crimtorts: A Cure for Hardening of the Categories', (2008) 17 Widener LJ 733; Thomas H. Koenig & Michael L. Rustad, 'Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts' (2004) 26 Law & Pol'y 189; John C. Coffee, Jr., 'Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation' (2000) 100 Colum. LR 370

³⁹ *Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002)

⁴⁰ *ibid* at 949

⁴¹ *ibid* at 951

regulatory offences (often subject to strict liability), both prosecuted in the criminal courts, and consider any non-criminal penalties to be civil in nature. The ECtHR adopts the same classification.⁴² Although the distinctions may be seen as fundamental from within a single legal culture, from a comparative perspective the clarity rapidly dissipates as with the tort/crime distinction just discussed. Thus, I would argue, explicit consideration of administrative regulatory regimes can only strengthen the argument that the law of wrongs cannot consider civil and criminal rules in isolation. Administrative sanctions must be included and the frontier between public and private beings to look rather insubstantial.

Given the increasing intertwining of criminal and civil standards in transnational cases, it could be argued that criminal law is a good candidate for inclusion in transnational law. Transnational actors may fall foul of both universal and extraterritorial domestic criminal laws, and individuals at least are also subject to conventional international jurisdiction under the Rome Statute.⁴³ As individuals and other private parties come to rely on international legal rules to sue TNEs – or their directors – criminally in jurisdictional spaces where it is possible, the State partly recedes from view except (as with *lex mercatoria*) as the ultimate enforcer of sanctions. This also calls the private-public divide further into question as a useful distinction in the transnational legal space.

2. Internormative Contestation – The TNE as a ‘Field’

If the foregoing has unveiled some cracks in the façade of the publicist view of international – or transnational – law and its consequent notions of jurisdiction based on territorial and nationalist principles, perhaps this would not matter if that view were adequate for articulating the transnational socio-legal landscape. However, as I have already suggested the approaches sketched above fail to fully take account of new global actors that have emerged – or gained power – as a result of globalization, and of the level of harm which they may cause by violating international law norms in weak States and conflict-affected areas. As we have seen, the ‘territoriality’ of any corporate entity is wholly fictional. And norm generation – dominated, if Cutler is to be believed, by a transnational ‘mercotocracy’⁴⁴ – which has moved beyond the confines of single-state control

⁴² As the ECtHR would have it: see, e.g. *Grande Stevens v. Italy* on the application of *ne bis in idem*. See further: Emmanuel Rosenfeld & Jean Veil, ‘Sanctions administratives, sanctions pénales’ (2009) 128 *Pouvoirs* 61-73.

⁴³ Rome Statute of the International Criminal Court

⁴⁴ Cf Patterson & Afilalo’s description of the ‘global trading class’, a process by which ‘globalization of economic forces and the erosion of control over welfare policies, thereby [led to the] eroding [of] the power of twentieth-century nation-states to exert the type of control over their economic units that characterized modern Statecraft’. D. Patterson & A. Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade*, (Cambridge, 2010), p.100

to the realms of multilateral pluralism and multi-level governance.⁴⁵ TNEs have ceased to operate as traditional private actors

Likewise, I would argue that it makes little sense to speak of transnational or globalized business actors as public, in the sense of a nation-state public actor. Although the growth of privatization means that in many situations corporations may exercise regulatory power,⁴⁶ this does not necessarily transform them into public actors in the traditional sense. But neither can globalized corporations be seen as merely private actors; as many others have attempted to show, the essential relationship of private rights derived from the nation-state simply no longer holds true.⁴⁷ To speak of hybrid actors in this context would seem question-begging since it still relies on an understanding of a clearly defined public-private divide and suffers the same drawbacks identified in discussing *lex mercatoria* as hybrid.⁴⁸

Capturing the essence of the TNE is a herculean task. We have seen the difficulty doctrinal legal studies have in coping with the multiplication of the corporate form in group and network structures, and attempts to respond by reconceptualising around the idea of ‘enterprise liability’.⁴⁹ As we saw in chapter 4, it has been argued that the internal regulatory regimes of TNEs are themselves a candidate for transnational law or regulation.⁵⁰ Indeed, it almost goes without saying that a TNE is more than the sum of its individual parts – be they equity-owned companies or

⁴⁵ On the latter, see Claire Methven O’Brien, *Human rights and transnational corporations: For a multi-level governance approach*, (Fiesole: EUI Thesis),

⁴⁶ Note that this is hardly a new phenomenon: consider Burke’s famous complaint in the 1770s that the British East India Company ‘did not seem to be merely a Company formed for the extension of the British commerce, but in reality a delegation of the whole power and sovereignty of this kingdom sent into the East’: Ford, (n 7) at 883, citing Griffiths.

⁴⁷ cf. A. Claire Cutler, *Private Power & Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge UP, 2003)

⁴⁸ See chapter 4

⁴⁹ See Phillip I. Blumberg, ‘Asserting HR against MNCs in U.S. law: Conceptual and Procedural Problems’ (2002) 50 Am. J. Com. L. Supp. 493; Phillip I. Blumberg, ‘Accountability of MNCs: The Barriers Presented by Concepts of the Corporate Juridical Entity’ (2000) 24 Hastings Int’l & Comp. L.R. 297; Phillip I. Blumberg, ‘The Transformation of Modern Corporation Law: The Law of Corporate Groups’ (2005) 37 Connecticut L.R. 605; Michael J. Phillips, ‘Reappraising the Real Entity Theory of the Corporation’ (1994) Fla. St. U.L.R. 1061; Kurt A. Strasser & Phillip Blumberg, ‘Legal Form and Economic Substance of Enterprise Groups: Implications for Legal Policy’ (2011) 1 Accounting, Economics & Law 4.

⁵⁰ Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems* (1997) 45(1) AJCL 149 at 157; Jean-Philippe Robé, ‘Multinational Enterprises: The Constitution of a Pluralistic Legal Order’, in Gunther Teubner (ed), *Global Law Without a State*, (Ashgate 1997) 45-77; Peter T. Muchlinski, ‘“Global Bukowina” Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community’, in Gunther Teubner (ed), *Global Law Without a State* (Ashgate 1997) 79-108; Graf-Peter Callies & Peer Zumbansen, *Rough Consensus & Running Code: A Theory of Transnational Private Law* (Oxford: Hart, 2010), Ch 4 pp.181-247

network units. A (perhaps particularly Western⁵¹) focus on the *corporate* identity, argues Robé, is based on false premises about the actual behaviour and theories of agency within the firm.⁵²

What the application of traditional and emerging normative frameworks to the TNE shows is that it sits at the centre of a space characterized by normative conflict. In my view, this responds best to the idea of interlegality. Interlegality is defined by Boaventura de Sousa Santos as being:

‘different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life.’⁵³

The concept has been further developed by Wai.⁵⁴ In his conception, ‘[i]ndividual members become carriers of different mixes of norms from system to system, constantly testing dominant norms of each system by providing argumentative bite to latent or minority normative strands within each order’.⁵⁵ Wai’s argument is that a degree of normative contestation is required in a cognitive account of law, which provides a ‘means in many legal systems for achieving regulatory goals’. His point is that private law’s role in this contestation should not be overlooked – particularly in the context of globalized corporate actors:

‘contestation through private law can also be understood as serving a communicative function in advancing broader policy debates in the global context; for example, high-profile litigation cases concerning foreign business conduct related to environmental or human rights, such as in extraction industries in Sudan, Burma, or Ecuador, can help to raise general issues about corporate social responsibility in a global context’.⁵⁶

In my article with Rosa Raffaelli,⁵⁷ we unearthed the somewhat radical Hague Academy lecture of Sigismond Cybichowski.⁵⁸ In it, he takes the position that criminal law jurisdiction undergoes the same conflictual process as private international law and proceeds to describe the paradox of the assumed territoriality of criminal law and the possibility of jurisdiction over extraterritorial crimes.

⁵¹ As opposed to the market focus of Eastern systems such as the Japanese *keiretsu*: Gunther Teubner, ‘The Many-Headed Hydra: Networks as Higher-Order Collective Actors’ in McCahery et al, *Corporate Control & Accountability: Changing Structures and the Dynamics of Regulation* (Oxford: Clarendon Press, 1992)

⁵² Jean-Phillippe Robé, ‘The Legal Structure of the Firm’ (2011) 1 *Accounting, Economics & Law* 5

⁵³ Boaventura de Sousa Santos, *Toward A New Legal Common Sense* (2d ed.) (Cambridge UP, 2002) 437

⁵⁴ Robert Wai, ‘The Interlegality of Transnational Private Law’, (2008) 71 *Law and Contemporary Problems* 107

⁵⁵ *ibid.*, at 117.

⁵⁶ *ibid.* at 117-118

⁵⁷ Wray & Raffaelli (n 1)

⁵⁸ Sigismond Cybichowski, ‘*La compétence des tribunaux a raison d’infractions commises hors du territoire*’ (1926) RCADI II, 251

In his view, therefore, criminal and private international law confront the same issues.⁵⁹ The practice of the U.S. ATS courts is no less telling. In light of the foregoing discussion, therefore, I would suggest that Wai's argument applies equally to criminal law, which as I argued earlier may also fulfil a prescriptive or regulatory function. There is, I would submit, an obvious reason for this, namely that in both public and private international law cases, a court seized must decide the 'reach' of the sovereignty of different States which have an interest in the case. Bomhoff develops the idea of 'reach' in his discussion of fundamental rights cases and the conflict of laws. As he points out, '[i]n superficially different but ultimately very similar ways, private international law, State action, and rights cases with foreign elements are all, in the end, about establishing the boundaries of normative orders—be they public or private, domestic or foreign'.⁶⁰ No less is true, in my view, of criminal law.

Taking a step back from the vast complexity of the overlapping regimes that the TNE comes into contact with – from customary international law, human rights, down to single-state private law and voluntary internal regulation within the enterprise itself, then the TNE becomes the carrier of varying differentiated rules and norms as it conducts its operations across geographical boundaries. Whether or not such cognitive internormative contestation (which speaks to Hart's internal aspect of legal rules) is a good thing, the reality of TNE action makes it inevitable.

If – as the interlegal model demonstrates – the TNE is not describable from within a single legal regime, nor subject to single regulator or system, how best to characterize it? We have already seen that TNEs may organize themselves transnationally in a number of different ways, be they contract-based or property-based. They are subject to regulatory initiatives from a number of different regulators, be they domestic, non-state, international or multi-stakeholder regulators. They are marked by their ability to operate across regulatory spaces and exploit their knowhow in a variety of markets and operational zones while retaining control over it, and to exploit price differences and distribute factor input savings throughout the enterprise. Consider the following illustration of the divide between domestic and international law, and between public and private (Figure 4). A typical TNE (here represented by the red-filled circle) could be said to sit right at the centre of these axes; it is subject to, affecting or affected by norms from all four areas.

⁵⁹ In his words, 'La *lex* et le *forum loci delicti commissi* ont, pour ainsi dire, un caractère naturel; de sorte que toute exception à la règle qui commande d'y recourir doit être justifiée': *ibid* at 379

⁶⁰Jacob Bomhoff, 'The Reach of Rights: "The Foreign" and "The Private" in Conflict-of-Laws, State-Action and Fundamental Rights Cases with Foreign Elements', 71 *Law and Contemporary Problems* 39 (2008).

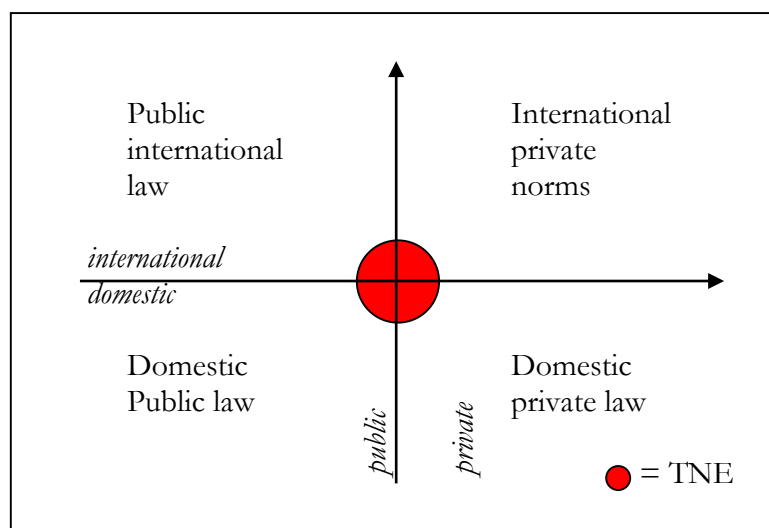


Figure 4

However, in any given transaction or discrete operation, the smart mix of regulatory measures will vary. The TNE is in a position to select in advance or affect *ex post facto* via a number of strategic choices, such as the law of incorporation, choice-of-law clauses in contracts, or the aforementioned ‘reverse forum shopping’.⁶¹ Again, the same *fait juridique* may be subject to different regulation depending upon where, and to whom, it occurs. An injured employee, for example, will benefit from a number of transnational and international labour rights regimes that a third-party stakeholder may not. In my view, the best way of approaching this seething mass of normative conflicts is to see the TNE not as a discrete legal subject *per se* but as a legal *field* in its own right, a field that is characterized by interlegality in the way I have just described. It is a relatively simple matter to transpose this to the TNE, where the individual members for the purposes of norm-carrying may be stakeholders or discrete units within the enterprise itself. In addition to preemptive regulatory choices made by the TNE, the type of actors and transactions will condition the extent of normative variety (potentially) in play. Finally, the role of norms emanating from within other legal fields will not be overlooked, thus avoiding the risks discussed in the preceding section.

Defining the TNE thus enables one to see the wood without being distracted by the trees, as it were. It also enables a conceptualization that does not suffer from the disjoint between *corporate* and *firm* agency.⁶² While it does not preclude solutions which focus on specific issues, it prevents

⁶¹ Upendra Baxi, ‘Mass Torts, Multinational Enterprise Liability and Private International Law’ (1999) 276 RCADI 317 at 357. See discussion in Chapter 4, p.199. Another (in)famous example of this type of strategic use of procedural and jurisdictional advantage is the so called torpedo action, discussed in Chapter 1, p.67 onwards.

⁶² Robé, (n 52)

the fragmentation of legal approaches to the TNE by viewing individual solutions in the wider context of the interlegal disputes they involve. It also avoids the trap of attempting to see the TNE as a super-company; a single, unitary, legal subject, or (to continue the metaphor) one giant tree. While it may be useful in particular legal situations to adopt a 'single (economic) entity' concept corresponding to a single legal subject, this is not the case across the board, and could generate problems in articulating the relationship between discrete legal personalities incorporated in given domestic legal orders and the wider legal personality of the enterprise as a whole.

Similarly, I would argue that there is an inherent risk in providing a tightly defined concept of the TNE which clothes it in the armour of legal personality for a given purpose, which is that it may promote forms of corporate organizing which fall outside the arbitrary legal definition so created. An example of this is provided by the debate on the status of the TNE as a subject of international law. Several scholars speak of the 'transnational corporation' as a candidate for international legal personhood, transnational corporation being defined as, for example:

'a group of companies operating under common ownership or control, whose members are incorporated under the laws of more than one State...an essential characteristic [being]... that shares of companies that are members of the group are not dispersed, and that management of the companies constituting the multinational enterprise is exercised by the parent company'.⁶³

The immediate weakness of such a definition should be apparent: it appears to completely exclude network organizations from its ambit. Granted, the use of 'control' in the first sentence is ambiguous, but the necessity of non-dispersed share ownership and parent company control is not. Conceptualizing the TNE as a field, however, means that while specific conceptions of the TNE may be appropriate in particular situations, the possibilities for egregious circumvention are more limited.

To conclude, then, I define the TNE as a legal field in its own right, one that is characterized by a degree of normative contestation, the latter being defined as a form of interlegality which encompasses both domestic and international and public and private norms and seeks to articulate their interaction in respect of the TNE.

⁶³ Institute of International Law, Guidelines concerning the responsibility of multinational enterprise, (1995), article 1.

II. Why Transnational Law Needs an Overarching Justice Framework: The Example of the TNE

The difficulty, today, of entering or reprising the “multinational” or “CSR” debate is surmounting the polarization which has come to be its hallmark. De Schutter wrote in 2005, ‘Multinational enterprises (MNEs) domiciled in the Member States of the European Union may generally be said to benefit from complete impunity’.⁶⁴ On the other side of the fence, popular business opinion argues ‘CSR is philanthropy with a few bits added on. CEOs should ignore this and go back to doing their jobs’.⁶⁵ The difficulty is a familiar one to anyone engaged in human rights research; but there is a difference. In the case of human rights, the system under discussion is arguably too new and too politically involved for easy arms-length analysis by its participants. Human Rights are either messianic, with a call to proselytise and spread the word, or they are the enemy (either to business and innovation or to traditional power structures). In the case of the liability – or responsibility – of business actors, the disagreement is more fundamental: it is about the value of business itself. For this reason, there is a tendency to conflate the social benefits (or ills) generated by business activity to the acts (or omissions) of a single undertaking.

According to one side of this debate, we should ignore the wrongs attributable to business abroad because it is either up to the local jurisdiction to prosecute those wrongs or they are likely outweighed by the social good such business activity engenders more generally. Increased “regulation” may stifle investment, development and wealth-creation. This justifies the increasing place for transnational commercial law and the *lex mercatoria* as the ultimate regulator of acts by transnational businesses. The alternative view cries out forcefully that one size fits all; the enterprise is a Hercules – only universal regulation of Olympian proportions will bring it to heel. Koskenniemi wrote that ‘[t]he virtue of international law lies in such a universalizing focus, allowing political injustice to be shown and condemned as a universal wrong, not only of concern to the immediate victims but of concern to “all”’.⁶⁶ This resonates with our Herculeans, and the approach to much litigation throughout the 1990s and early 2000s. For some time, it was hoped that universal jurisdiction would provide the answer to holding business actors to account for transnational wrongs. The multitude of Alien Tort Statute cases are but one manifestation of that hope. It may be doubted, however, that a universal solution is possible, practicable or even

⁶⁴ Olivier De Schutter, ‘The Accountability of Multinationals for Human Rights Violations in European Law’ in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP, 2005)

⁶⁵ The Economist, ‘Two Faced Capitalism’, 24 January 2004

⁶⁶ Martti Koskenniemi, ‘Constitutionalism, Managerialism and the Ethos of Legal Education (2007) 1 EJLS

desirable at present. As I argued in chapter 3, international law exhibits a degree of paralysis which makes meaningful universalism a distant hope.

But a solution *is* needed; otherwise we risk what Alston feared when he refuted Petersmann's theory of Human Rights in world trade law:⁶⁷ the merger and acquisition of victims' rights by the *lex mercatoria*. Alston was concerned about the priority of economic liberties to human rights. Similarly it is a mistake to assume that the appropriation and instrumentalization of legal rules by transnational business leaves existing regimes untouched. As I argued in Part I, there is not only a watering down of 'traditional' legal regimes but sometimes even a hollowing out of domestic and international legislative, regulatory and judicial systems. The unfolding *Lago Agrio* saga, with the multijurisdictional "lawfare" and the appropriation of domestic judicial determination through investment arbitration, provides a particularly startling example.⁶⁸

Many may disagree as to the precise content of private international law, *lex mercatoria*, or indeed transnational law. Therein lies the problem: these bodies of law are inchoate in a globalized legal economy. In the case of 'traditional' private international law, it is limited by its territoriality and/or regionalism.⁶⁹ Business undertakings have a degree of latitude in adopting seats of incorporation for their constituent entities which allow them to tailor the private international law rules which apply to particular actions. *Lex mercatoria* has historically varied and its precise content depends greatly on application and context. Nonetheless, transnational law – and transnationality – is unavoidable. Here, I attempt to argue why the business organization I have provisionally termed the *transnational* enterprise indeed needs to be considered from a transnational legal perspective, and why some coordinating framework is necessary to prevent the realization of Alston's fears on a global scale.

1. The TNE finds its Best 'Fit' at the Transnational Level

Having examined the existing liability frameworks, why opt for transnational law rather than focusing on, say, the role of particular States, or progressive reform of the international legal

⁶⁷ Philip Alston, 'Resisting the Merger & Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 EJIL 815

⁶⁸ Interestingly, *Lago Agrio* may end up providing a justification for the investment arbitration scheme. If, as Chevron argues, the Ecuadorian judgments against it were indeed procured by fraud, arbitration provides an important means of redress against the state responsible which indeed relates to the special status of investors under international law. However, there is a risk of obscuring one serious issue, the position of the victims, who after all are not themselves complicit in any fraud. They clearly have the same rights to compensation under their judicial system as Chevron does to investment protection under the BIT.

⁶⁹ See Chapter 1

system? In my view, the TNE finds its best ‘fit’ at the level of transnational law. I would argue there are at least four potential justifications for this view.

Firstly, there is the ability of the TNE to law, norm and forum shop to its best advantage. It is a forum shopper *par excellence*, as I argued in chapter 2. The systemic characteristics of the State and international investment regimes make this a continued possibility into the future, no matter which locus of regulation is adopted as a focus. The advantage of a transnational law model based on ideas of interlegality is that it allows a conceptualization which recognizes this inherent possibility and allows for a complete regulatory approach. Zumbansen puts it thus:

‘Considering the embeddedness of business corporations in an increasingly denationalized knowledge economy, their placement in a multilevel regulatory field, comprised of official and non-official normproducers, becomes more visible. On the one hand, T[ransnational] L[aw] comprises the law governing the global business corporation through a multi-level and multipolar legal regime of hard and soft law, statutes and recommendations, command–control structures of mandatory rules as opposed to an ever more expanding body of self-regulatory rules. On the other hand, TL constitutes a reflexive practice that critiques itself with regard to its regulatory and legitimizing aspirations.’⁷⁰

Meanwhile Wai emphasizes the coordinative role of States through norm-generation including private law. As he states, ‘[the] shadow cast by private law can be transnational even while private law remains largely domestic in source and institutions... In practice, we do see the behavioural effects of tort law on transnational economic actors’.⁷¹ TNEs react to, for instance, transnational tort litigation as they do to public norms.

Second, transnational law describes functional spaces, not geographical or *territorial* ones (although regulated sectors – such as sectors based on particular natural resources – may occupy a space which has geographical aspects). It enables looking beyond the compartmentalization of the TNE into distinct legal entities to view its ‘reach’ through networks of capital, influence, presence and operations. It allows for the inherent possibility of matching the reach or sphere of influence of the enterprise to the reach of right by those affected by its activity. I now reiterate my tentative preliminary argument with more confidence: to speak of the multinationality of corporations is self-defeating, since, ‘there is no legal subject corresponding to the “multinational” corporation’,⁷²

⁷⁰ Peer Zumbansen, ‘Transnational Law’ in Jan Smits (ed.), *Encyclopedia of Comparative Law* (Edward Elgar, 2006) 738 – 754

⁷¹ Robert Wai, ‘Private v Private: Transnational Private Law and Contestation in Global Economic Governance’ in Muir Watt & Fernández Arroyo (eds.), *Private International Law & Global Governance* (OUP, 2014) 34 – 54 at 49

⁷² See Jamie Cassels, ‘Outlaws: Multinational Corporations and Catastrophic Law’ (2000) 31 *Cumberland LR* 311

nor could there be without a radical overhaul of the whole concept of nationality and corporate personality.⁷³

Upendra Baxi, has challenged the claim that opening up jurisdiction, *à la* ATS or universal criminal jurisdiction, for example, will open the “floodgates” of litigation and leave hapless national courts enveloped by a swarm of foreign litigants:

‘Why, one may ask, are these jurisdictional spaces congested in the first place? Why is it the case that foreign plaintiffs suing American multinationals (or for that matter any First World multinational) are thought to impose unjust burdens, taxing American taxpayers with “heavy financial burden” occasioned by the costs of adjudication/litigation, jury duty, and related judicial administration costs? Are these “astounding costs” (as Judge Keenan expresses them) wholly unrelated to the overall gains symbolized by American GNP or GDP or the miracle of its trillions upon trillions of dollars of its current “balanced budget” surpluses? In what ways, one may ask, are victims of Bhopal (and related mass disasters/mass torts) parasitical on the American (and, generally, Northern) affluence levels? Is it at all imaginable that suits for mass torts seriously threaten American affluence by unconscionably causing a docket explosion?’⁷⁴

Baxi’s criticism finds an echo in the approaches of Ford and Berman, who describe the constructed nature of territoriality and community.⁷⁵ A transnational approach allows for an approach which goes beyond classic territoriality: ‘such a concept does not depend on effects being produced *in the territory* of a State but of the State economy *receiving the benefit* of a corporation’s activities’.⁷⁶ EU criminal law has recently made developments in this direction by encouraging (and in some cases mandating)⁷⁷ Member States to establish their jurisdiction over specific crimes which have been committed ‘for the benefit of a legal person’ established, or having its head offices, in their

⁷³ Olivier Vonk, *Dual Nationality in the European Union: a Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States* (PhD Thesis, EUI 2010). And consider the rigid application of company “nationality” in the *Barcelona Traction* and *A.S. Diallo* cases (*Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain), Second Phase* [1970] I.C.J. 4; *Diallo* case). In private international law, the situation is little better, since claimants must “pierce the veil” in order to get past the single personality of a subsidiary. See above, chapter 1, ; Blumberg, M. J., n.; Blumberg, P. I., ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’ (2004) 24 *Hastings Int & Comp. LR* 297; Matheson, J. H., ‘The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context’, (2008) 87 *N. Carolina L. R.* 1091

⁷⁴ Upendra Baxi, ‘Mass Torts, Multinational Enterprise Liability and Private International Law’ (1999) 276 *RCADI* 297 at 360

⁷⁵ Richard T. Ford, ‘Law’s Territory (A History of Jurisdiction)’, (1999) 97 *Mich L.R.* 843; Paul Schiff Berman, ‘The Globalization of Jurisdiction’, (2002) 151 *U. Penn. L.R.* 311

⁷⁶ Wray & Raffaelli (n 1) at 128

⁷⁷ See article 9 (d) of the Framework Decision on terrorism (2002/475/JHA). Other acts encouraging the adoption of this rule include, for instance, the newly adopted Directive against trafficking in human beings (2011/36/EU, replacing Framework decision 2002/629/JHA), on corruption in the private sector (2003/568/JHA), and the Framework decisions on the sexual exploitation of children and child pornography (2004/68/JHA) and a few others.

territory. However, I would argue, incorporation is only one way that benefit might be incurred. It might come through tax, through sales, through the presence of a holding company, a subsidiary,⁷⁸ payment of dividends, and so on. Admitting this multiplicity of connecting factors does no more than acknowledge the economic reality. It also recognizes and responds to the differing reasons for choosing to invest in a particular country.

Third, a focus on domestic and/or international law alone risks missing key elements in the global regulatory market, and thereby striking an inappropriate balance which does not allow for effective balance between TNE and victim, or does not provide the regulatory benefit it set out to. The prime, but by no means the only, example of this is the ‘lift-off’ and hollowing-out potential of regimes of international arbitration; whatever rules might be passed domestically or by international legislators, there is a risk of their subversion by contract wherever TNEs benefit from such systemically-reinforced bargaining power (whether or not the TNE is involved in negotiating the agreement or merely takes advantage of it in subsequent litigation).

Finally, a transnational approach avoids the territorial/universal dichotomy so mistrusted today by courts and policy-makers. Transnational networks are functional but limited by the extent of their reach as just outlined. Admittedly, their reach may be truly global but the number of TNEs this applies to will be a relatively small and select group. There is no need to grapple with the legitimacy problems of universal jurisdiction once the principle of transnational reach is accepted. Instead, the focus shifts to establishing the scope of a rule by reference to that reach. In a sense, this is what supply-chain regulatory mechanisms, such as the Kimberly Process, attempt to do. No one would argue that the Kimberly Process is universal in scope. Although its reach is global, it is nonetheless geographically limited by the sector and actors it addresses.

2. Avoiding Global *Lex Mercatoria*: A Justice Framework

In my view, it is clear that the tailored regimes of the TNE are drawing together the various strands of domestic and international law, and non-state transnational regulation, albeit in a highly selective and self-interested way. It is, I would argue, no longer possible to counter this by turning back the clock to a Westphalian legal paradigm, rather a disinterested (read impartial), and non-selective

⁷⁸ Chevron in Ontario Court of Appeal (appeal to Canadian Supreme Court currently pending)

framework is needed that will enable TNEs and their stakeholders, as well as States, to coexist without undue unfairness.

Currently, transnational law is the crystallization of a variety of formerly free-floating legal droplets into a single snowflake. And, rather like snowflakes, no two theories of transnational law are alike. This fact should not seem particularly surprising in light of this inherent heterogeneity: whatever it does or does not include, transnational law is a diverse mix of nuggets and intersections from different legal fields previously thought incompatible. It has been said to comprise, *inter alia*: parts of international law,⁷⁹ ‘soft law’, private international law,⁸⁰ international commercial custom (and *lex mercatoria*),⁸¹ State private law,⁸² and transnational private regulation.⁸³ Perhaps the simplest way of putting it is that it is ‘an integrated approach between private or domestic transnational practices and international public norms and doctrines’.⁸⁴

This does not mean, however, that transnational law somehow lacks coherency, far from it. As the competing theories demonstrate, it seeks to capture a new paradigm in legal interaction, one of vastly increased interdependence and interloping normativity between legal regimes. Most theorizing so far, however, has struggled to adequately define the structure of transnational law, often more focused on what the other theories have missed out.

In 2005, Steinhardt wrote, somewhat optimistically, that human rights standards were capable of informing, influencing and ultimately forming part of the new *lex mercatoria*.⁸⁵ But his article has not been widely cited outside the mainstream TNE canon. It is missing, for example, from Calliess & Zumbansen’s account,⁸⁶ as from a recent collection of essays on transnational law.⁸⁷ It might be wondered why this is, and whether leaving out human rights is a deliberate omission on the part of private lawyers concerned in theorizing the emergent transnational legal regimes.

⁷⁹ Kaarlo Tuori, *Ratio et Voluntas: The Tension Between Reason and Will in Law* (Ashgate, 2011)

⁸⁰ Wai (n 20)

⁸¹ Calliess & Zumbansen, 2010

⁸² Wai (n 54)

⁸³ Cafaggi (n 12)

⁸⁴ Ivana Isailovic, ‘Reframing the *Kiobel* Case: Political Recognition and State Jurisdiction’ (forthcoming, *Suffolk Trans. L.R.* 2015), on file with the author, p.5

⁸⁵ Ralph G. Steinhardt, ‘Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*’ in Alston (ed.), *Non-State Actors and Human Rights* (OUP, 2005)

⁸⁶ Calliess & Zumbansen, *Rough Consensus & Running Code: A Theory of Transnational Law*, (Oxford: Hart, 2010)

⁸⁷ Maduro et al (eds.), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge UP, 2014)

In my view, however, there is a danger in Steinhardt's suggestion, which mirrors the Alston-Petersmann debate on the WTO. The hallmark of *lex mercatoria* – and of proponents of a 'transnational private law' – is its emphasis of the 'private' (and commercial) character of the norms, in a self-perpetuation of the public-private divide. But as Cutler identified in 2002, '[such] privacy is fundamentally antithetical to the rule of law... and marks a substantial departure from the judicialized nature of dispute settlement in the second phase in the development of the law merchant'.⁸⁸ There is a very real risk that incorporation of human rights into the *lex mercatoria* regime – including adjudication through international arbitration – may suborn human rights values and the rule of law to commercial, economic interests. It denies the role of the State in articulating the rules of priority in normative conflicts.

Wai, in his earlier work, recognized the role of the State *qua* regulator, in coordinating legal conflicts through the traditional mechanism of private international law.⁸⁹ Similarly Calliess and Zumbansen emphasize the importance of consensus in their theory.⁹⁰ Consensus has an inherent usability in any account of transnational or international law based on legal pluralism. Nonetheless, "rough consensus and running code" is ultimately based mostly, if not entirely, on the reflexive idea. This not only accepts, but emphasizes, the autopoietic character of transnational networks and leaves little room for hierarchy – even relativized hierarchies – or originating context in deciding conflicts. In essence, it abdicates the right to determine conflicts *in concreto* to the normative choices of the various actors in the global plural legal order, until rough consensus emerges.

This has important implications for praxis. If the regulatory function of States is not to be fundamentally undermined, there must be a framework which courts, arbitrators and rule-makers (the dialectical components of transnational law) can use to decide such conflicts while avoiding the problems described in Part I of this dissertation. To put it another way, there is a need for an 'ordered pluralism'.⁹¹ Otherwise, there is a real risk that transnational private networks will arrogate regulatory authority to themselves, and misappropriate national legal rules.

To put it another way, faced with this appropriation of legal and regulatory power, it is clear that there is a need for an overarching framework to bring a measure of balance to the global village. For all that some of the houses may need renovation or extensions, there also need to be ways to

⁸⁸ Cutler (n 47) 233

⁸⁹ Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 Columbia Journal of Transnational Law 209

⁹⁰ Calliess & Zumbansen (n 86), esp. 134 – 152

⁹¹ Mireille Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit (tome 2)* (Seuil, 2006)

regulate the distribution of resources and manage disputes. Injustice exists in myriad forms in respect of transnational corporate harm. It exists when domestic law is circumvented or assets put beyond reach, denying compensation to those hurt, or when costs and risks are externalized onto foreign societies and populations. It is also present when rules are removed or do not exist, or when they do exist but are not enforced. There is a desperate need for a regulatory or legal meta-framework which can provide a means of ensuring that transnational business does not operate irrespective of such injustice but is sufficiently controlled to remedy and prevent it. If not, those dispossessed – the victims of disasters and abuse as in Bhopal or at Yadana, stakeholders such as NGOs and employees (and even consumers) – may find themselves in a State of global homelessness.

Chapter 6

Justice as an overarching meta-principle

‘Justice is a certain rectitude of mind whereby a man does what he ought to do in the circumstances confronting him’

~ Thomas Aquinas

It is trite to say that the aim of imposing legal liability is to ‘do justice’. Indeed, the word ‘justice’ is used so often that many have raised doubts as to its utility for legal scholarship. Yet the idea of justice pervades the whole legal field and is applied across legal jurisdictions and traditions: it suffuses our judgments, it underlies many legal rules, and it is even used synonymously with ‘court’ or ‘tribunal’ (in the sense of access to justice). Taking the quote above at face value, it is easy to see why. Legal rules provide a compulsion to adhere to certain behaviours; they ensure that people do in fact ‘do what [they] ought’ or risk penalty. Indeed, one might go further and claim, consistent with Hart’s ‘internal aspect’, to which I keep returning, that part of what makes rules qualify as law is that they meet the criteria of generating this ‘certain rectitude of mind’.¹ Of course, that is not to say that all that is just is law, nor that all laws are just. While an interpretivist might make one or both claims, my intention is more modest; I shall examine the connection between the concepts of law and justice and attempt to justify why it can inform the search for an overarching framework applicable to the transnational law of the enterprise.

I wish to make clear at the outset that I do not consider this to be an interdisciplinary endeavour *per se*, although it will be necessary to discuss the economic and political science literature at various points. Where the corporation – or the firm – is concerned, this is to a certain extent unavoidable; the modern business enterprise is both a legal and an economic phenomenon. As discussed in the chapter 5, it is at once a ‘higher-network’ actor with the ability to affect large groups of persons simultaneously and a collection of entities subject to control by State and non-state regulatory bodies. More than that it constitutes a unique legal field; a vector for interlegal conflicts it interacts across its sphere of influence with varying normative regimes. As the exploration of the limits of existing legal orders in Part I showed, the classic coordinating functions of, for instance, private or public international law, are not necessarily still well-equipped to cope with this globalized

¹ I am, of course, paraphrasing; my reference to Hart is to his discussion of the ‘internal’ aspect of rules, something that distinguishes them from rule by brute force: see Hart, 1994, esp. pp. 79 – 88, ‘The Idea of Obligation’

conflicts space beyond the State. What is more there are powerful economic and political forces at play which interact with the legal status quo to perpetuate this “grey market” in legal norm-generation and adjudication, largely to the benefit of the internationally invisible TNE.

However, when I speak of a justice-based approach to the TNE, I mean a uniquely *legal* approach, in the sense that justice is a term that lawyers can understand and which can found a normative *framework* for structuring legal obligations in a transnational, globalized environment. This will, partly, be based on received conceptions of justice in positive law: from elements of substantive justice such as that which appears in the English law on jurisdiction² to the theoretical underpinnings of discrete legal fields which shape and delimit legal obligation in those fields in particular legal systems. Where positive law and doctrine hits a gap, however – something all too common in the TNE field – our legal understanding of justice will necessarily have to search elsewhere.

The rest of this chapter is structured as follows: Section I examines competing approaches to TNE action, including the economics approach, and makes the case for justice by reviewing the relationship between law and justice in the abstract. Section II looks at approaches to the agency of the TNE and lays down tentative elements of an “enterprise” justice approach.

I. Why Justice? Justifying Justice as the lens

It could be argued that it is unnecessary, outdated, or inappropriate to adopt a justice methodology towards transnational corporate harm at all. These objections come from a number of alternative schools of thought. The law and economics approach, for example, posits that economically efficient outcomes to disputes improve aggregate welfare and are therefore to be preferred. A strict legal positivist, on the other hand, might argue that any answer to how to hold TNEs legally to account must come from within law itself. In this section I will attempt to sketch a response to these claims. I note at the outset, however, that this is in some ways an exercise in futility. All three schools – economics, moral rights, positivism – involve fundamental assumptions as to what value(s) are of overriding importance. For economics, the answer is collective welfare. For moral rights, it is that outcomes must be just, while for positivism, it is that outcomes must be legally valid.

² See Chapter 2

1. Why Not? Doctrinal and Functional Approaches Distinguished

(i) Justice vs. Efficiency

The debate between moral and economic theories of law has tended to focus on the need to choose between a functionalist account and a normative-interpretive one, the latter being what is generally understood by most lawyers as constituting the core of legal doctrine. I do not seek to enter into this debate. Naturally, moral and economic jurists are talking past one another when they claim explanatory force for their respective accounts; legal economists are necessarily concerned with the *effects* of law on society and how best to achieve efficient – i.e. desirable – effects, while moral lawyers are interested in what the effects *should be*, or what constitutes a desirable effect.

In this sense, assumptions about what I am, for the time being, labelling ‘desirability’ are axiomatic for the economists. Most definitions of efficiency are based in the idea of aggregate wealth or well-being, or to borrow from Kapstein: ‘in good utilitarian fashion, a welfare-enhancing regime ... could simply produce “the greatest good for the greatest number”’.³ At the risk of over-generalizing, the dominant definitions of efficiency all fall into this group; where they vary is what constitutes good / well-being / welfare / wealth. Admittedly in the concept of *pareto-optimality*, viz. that each agent is as well-off as she can be in a given scenario, there is also some notion of individual well-being, but in general efficiency is neutral as regards *distribution*. Wettstein argues that the ‘questions they [economists] leave unaddressed, however, are the ones about what values shall be created and for whom... These inherently and explicitly normative-ethical questions are systematically prior to the questions of instrumental efficiency’.⁴

Kaplow and Shavell in *Fairness versus Welfare* set out to destroy the appeal to fairness in theorizing and constructing law. Several of their assumptions, however, are simply inapplicable to the TNE context. In their examination of tort law, they examine reciprocal accidents and conclude that appealing to fairness leaves everyone worse off when victims and injurers come from the same group. They point out that in moral philosophy ‘behind a “veil of ignorance,” where individuals would not know which role they would occupy, they would not assign weight to such statuses per se’.⁵ However, there is no *a priori* reciprocity where the groups are individuals and firms; there *is* a reason to ascribe differing statuses to different types of actors. As Nussbaum puts it, if parties in

³ Ethan B. Kapstein, *Economic Justice in an Unfair World: Towards a Level Playing Field* (Harvard UP, 2006), xiii

⁴ Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press, 2009) (Kindle Edition, location 353)

⁵ Kaplow & Shavell, *Fairness versus Welfare* (Princeton UP, 2002), p.145

a Rawlsian original position ‘do not know that a multinational corporation exists, [they] will probably not imagine one as part of an ideal structure of global justice’.⁶ Second, it is difficult to easily generalize Kaplow and Shavell’s examples to the global level as it is currently constituted; injurer and victim may belong to conceptually distinct societal units, based in different nation-states. There is no easy expectation that injurer may later become victim or vice versa.

The approach to the agency of firms is also unsophisticated:

‘...fairness will often be moot, or at least substantially attenuated, when the tort defendant is a firm. The reason is that there may be little, if any, relationship between the culpable party and those who bear the cost of tort liability’.⁷

In Chapter 1, I argued that the enterprise’s internalizing of legal rules is substantially different to individuals, and has a uniquely economic (or at least institutional) flavour. However, that does not mean that deterrence or punishment is irrelevant. For one, legal stigma (arising from a finding of fault) may engender reputational losses.⁸ It does mean, however, that legal rule design needs to take account of the costs of compliance and the cost of punishment if deterrence is not to lose its force.

Of course, I am doing Kaplow and Shavell something of a disservice, since their target is not the complex space of transnational enterprise action but the more prosaic regulation of law in a single society. In their study of tort, they are primarily interested in the corrective justice school of private law theory. But it is the economics schools distributive neutrality that in my view renders economic analysis ultimately unhelpful in deciding how best to regulate transnational enterprise action. In fact, it is precisely *because* of those effects such as externalization which, when described economically, become starkly apparent, that I argue a deeper account is needed which can articulate the correctness or incorrectness of distribution at the transnational level.

There is another, perhaps more fundamental, point which militates against discarding justice entirely. Leaving aside the question of fairness or distribution, what moral theories of justice are concerned with is the structure of *obligation*. This is something that functionalism is not concerned

⁶ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard U.P., 2006)

⁷ Kaplow & Shavell (n 5) p.116

⁸ See, e.g. discussion of the reputational risks of the Dodd-Frank Act in Dimmer & Phillips, ‘Sunlight for the Heart of Darkness: Conflict Minerals and the First Wave of Sec Regulation of Social Issues’ (2012) H.R. & I.L.D 131

with. In this sense, where there is a need to look outside the law in order to theorize a new obligational framework, functionalist schools of thought may be of limited utility.

(ii) Inherent difficulties of a doctrinal legal approach

So much for functional accounts, but why not look within the law – i.e. take a positivist stance – and discuss the difficulty of transnational corporate harm as a human rights question, for example? Proponents of the positivist view point out that corporations *affect* human rights in a number of well-documented ways.⁹ The difficulty with international legal positivism for TNE studies, is that as we have seen it cannot easily articulate the relationship between TNEs and other actors due the former's "invisibility" on the international stage. In Part I we examined varying situations in which this *status quo* was productive of differentiated forms of injustice. But the relationship between law and moral theory in international law may go deeper than this. As Buchanan states, referring to the right of self-determination:

‘it might be thought that by moral reasoning we can determine whether the Chechens have the moral right to secede without raising the question of what would be a morally justifiable international legal rule regarding secession—that we can first settle the issue of whether the Chechens have the moral right to secede and then consider whether the principle according to which Chechen secession is morally justified would be appropriate for incorporation into international law. This, however, is a mistake. Recall that the assertion that the Chechens have the right to secede implies at the very least that they have the right to attempt to form a new legitimate state in a part of the territory of an existing state and that others ought not to interfere with this attempt.’¹⁰

Thus the relationship between legal and moral rights often betrays a certain circularity, or at least interdependence. Habermas shares a similar view that legal and moral rules simultaneously appear ‘side by side as two different but mutually complementary kinds of action norms’.¹¹

Formulating the question solely as a human rights problem, for instance, already implies an intellectual leap of faith, since without further clarification it assumes that:

- (a) Enterprises can violate human rights directly or indirectly.
- (b) Corporate conduct is not sufficiently protected through alternative normative regimes.

⁹ Sarah Joseph, ‘An Overview of the Human Rights Accountability of Multinational Enterprises’, in Kamminga & Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (Kluwer, 2000), 75 – 96

¹⁰ Allen Buchanan. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP, 2004)

¹¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge, MA: MIT Press, 1996) p.104, cited in Wettstein (n4)

- (c) Human rights are an appropriate tool to regulate corporations.
- (d) Enterprises can be the addressees of human rights obligations

Unfortunately, as we have seen many of these assumptions are challengeable and the academic debate on the theoretical possibility of using human rights to generate direct obligations for companies is far from closed. Even where the conceptual barriers are not insuperable, political paralysis and other external factors operate to maintain the enterprise outside the category of mandatory duty-bearer.

Many human rights authors – including Professor Ruggie – mention human rights as being protected through other legal rights in domestic systems. But this ignores the specificity of human rights, and the fact that in most conceptions, human rights are considered rights against the State, or public actors, to protect urgent interests that are particularly open to abuse through State action, and whose violation carries a particularly heinous or shocking quality.¹² It may be true, as is the case in tort and criminal law of injury to the person, for instance, that two distinct regimes sanction the same conduct, but it does not follow that they perform the same function or are necessarily addressed to the same actors. There is no perfect congruity of human rights with other legal fields.

Put another way, the formula –

conduct → interest → responsibility

(where → denotes “gives rise to”) is not identical in both cases, although the initial conduct (*fait juridique*) is the same. Something more is needed to justify a conclusion that the responsibility and interests generated are equivalent; *viz.* that the tort of unlawful killing, for example, protects the human right to life. Again, an example serves to illustrate the point. Suppose a State, X, has no criminal law of murder but only civil liability, and damages are capped to an arbitrary amount said to compensate the harm and suffering caused to relatives. Now suppose an evil individual, A, kills an innocent individual, B. B’s relative, C, claim against A and receives compensation. But A happens to be very rich, and happily pays up, only to go out on a killing spree. C may in such circumstances claim that State X failed to adequately protect B’s right to life by failing – through adequate legislative protection – to prevent the killing, whereas had there been a criminal system of liability giving rise to A’s imprisonment for murder, A’s impunity – generated by his wealth and

¹² Beitz, *The Idea of Human Rights* (OUP, 2009)

the consequent ineffectiveness of the civil sanctions – would have been negated, protection would have been improved and the killing would thereby have been potentially avoided.

This rather gross oversimplification recalls our defective cars example from chapter 1 and the problems of externalization in the enterprise context. I do not wish to produce the impression that other legal rights may *never* protect human rights interests, but merely that further explanation and justification is required to do so. This is particularly crucial in respect of corporate actors, at a time when most dominant discourses in law and philosophy consider human rights obligations to be public in nature, or at the very least take a statist view of their structure and purpose. This is not a new debate. It is in many ways a resurrection of the same questions which confronted Grotius and the early theorists of the *ius gentium*, the difficulty of piracy and the subsequent creation of universal jurisdiction in the eighteenth century, the problems faced by the eponymous international community at the Nuremburg trials, or the construction of the European Union.

Ultimately, therefore, the difficulty with human rights is that it can only offer a partial normative account of obligation between TNEs and other social actors, despite the rampant claims to holism that abound within the field.¹³ This is a point that has been made before, in particular by Martha Nussbaum.¹⁴ It is also important since, as I identified at the outset of Part I, below the level of many human rights there is room for comparative injustice – situations where a legal interest is protected in one legal system but not in another. It also does not easily fit with situations such as where rights under an investment treaty lead to the hollowing out of obligations owed to victims from a regulatory perspective. As I argued in chapter 5, there are risks to appealing to the cross-cutting or universalism of human rights so as to incorporate it into, for example, a form of *lex mercatoria*. The incorporation of human rights into corporate codes of conduct, for example, is to be welcomed, as are many other CSR-based human rights importations. But the wholesale incorporation into the realms of merchant law risks removing them from adjudicative fora which have a *prima facie* claim to legitimacy to those that do not. Indeed, in an extreme case, such as certain arbitrations, victims will not only have no right to representation but the right of interveners to introduce human rights arguments through e.g. *amici curiae* briefs may be curtailed. Principles

¹³ See e.g. Jernej Letnar Čeranič, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights* (Europa Law Publishing, 2010) 262-4

¹⁴ Martha Nussbaum (n 6)

such as the confidentiality of arbitration remove the public and communicative element which is often a primary aim of much human rights litigation.¹⁵

Finally, my aim, as explained in the last chapter, is articulating normative conflicts. Adopting an overarching human-rights approach will often involve a substantive, rather than a coordinative approach. Although, as Bomhoff has convincingly shown, the discipline of fundamental rights can also be conceptualized as conflict of laws.¹⁶ The same might be said of international law.¹⁷ I will argue in chapter 7 that human rights form an integral part of a transnational justice framework, but their partial character means that they cannot do this work by entirely alone; they are simply not structured as conflict-of-norms rules but rather constitute the rules which may be in conflict.

2. Justice & the Law: reviewing the relationship

(i) Justice as a moral concept: The Global Justice Debate

The starting-point in contemporary moral and political dialogue for duties owed to others beyond the traditional closed borders of the nation-state must be the global justice debate, with particular focus on the gamut of competing positions that can loosely be labelled cosmopolitanism. Opponents of the various degrees of cosmopolitanism – generally desirous of a return to more traditional, nationalist, ways of thinking – have been said to describe it as ‘at best unviable and, at worst, pernicious’. These criticisms must be met, and the strengths of a cosmopolitan approach made clear if it is to have any normative force for our purposes, which is the aim in the first section. Second, transnational corporate actors must be brought into the picture, and I offer two justifications for their inclusion here: first, an extension of the idea that TNEs – like States – are a form of ‘institutional actor’ or indeed a form of quasi-political community that justifies ties of obligation throughout their various spheres of operation. Second, from the perspective of TNEs as private actors, that their membership of a ‘dislocated community’ which largely ignores national borders justifies the extension of obligations from the national to the transnational level. Finally, remaining at the abstract level of moral obligation and moral agency, the final section in this part explores the mechanics of transnational reciprocity and solidarity as it might apply to transnational business operations.

¹⁵ See chapter 4

¹⁶ Jacco Bomhoff, ‘The Reach of Rights: “The Foreign” and “The Private” in Conflict-Of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements’ (2008) 71 L & Contemp. Problems 39

¹⁷ See Andreas Fischer-Lescano & Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 Mich. J.I.L. 999

Modern moral and political theories of justice tend to begin with a discussion of the work of the late John Rawls. However, Rawls' liberalism¹⁸ has, on the face of it, severe limitations when it comes to dealing with issues that cut across borders. It is a branch of ideal theory (or 'transcendental institutionalism' to use the words of Sen)¹⁹ which aims to provide a blueprint for institutional ordering within the nation-state. This limitation led Rawls²⁰ and others to attempt to extend or rewrite principles of justice for the international and global levels, giving rise to the global justice debate. At its most basic, it might be said that global justice is divided between the competing camps of the 'statist' and cosmopolitan viewpoints. As regards the latter, it has been repeatedly said that so called 'cosmopolitans' share the following positions:

'First, *individualism*: the ultimate units of concern are human beings, or persons. Second, *universality*: the status of the ultimate unit of concern attaches to every living being equally; Third, *generality*: this special status has global force'²¹

Statists, by contrast, adhere to the old view – stemming from Hobbes – that the preeminent unit of political authority is the sovereign (democratic) nation-state, and justice is only due between members of a State and insofar as States agree between themselves to respect certain obligations. Rawls' later work on international justice, *The Law of Peoples*, falls, I would submit, fairly into this camp, despite the distinction he draws between 'peoples' and 'states'.

It would be wrong, however, to suggest that State sovereignty is somehow incompatible with cosmopolitanism. Indeed, Pogge's early work²² was an attempt to marry precisely those two concepts and his famous criticism of the *Law of Peoples* aimed not at undoing Rawls' theory but at extending it to include a global egalitarian component.²³ More recent attempts to provide a bridge between the two camps talk of 'relational' and 'non-relational' conceptions of egalitarianism, the former holding that 'the practice-mediated relations in which individuals stand condition the content, scope, and justification of those principles', something which might be labelled an *internationalist* stance.²⁴ Thus, in this third camp, the special rights and obligations commensurate with nationality are justifiable, because the nature of the social interaction, the nation-state, justifies

¹⁸ John Rawls, *A Theory of Justice* (1999)

¹⁹ Amartya Sen, *The Idea of Justice* (London: Penguin, 2010) at 4

²⁰ John Rawls, *The Law of Peoples* (1999)

²¹ Thomas Pogge, 'Cosmopolitanism and Sovereignty', (1992) 103 *Ethics* pp. 48-75

²² *ibid*

²³ Thomas Pogge, 'An Egalitarian Law of Peoples', (1994) 23 *Philo. And Pub. Affairs* 195

²⁴ Andrea Sangiovanni, *Global Justice, Reciprocity and the State* (2007)

the special and particular institutional ordering – and consequent (re)distribution of resources – that is commonly defended, not least by Rawls' *A Theory*, and Dworkin's particular brand of moral philosophy.²⁵ However, the crucial difference with the statist view is that principles of justice are not grounded in the State *per se* (as being the manifestation of the social contract) but rather in the cosmopolitan ideal of human beings as such.²⁶

It is fair to say that the work of Amartya Sen shares some commonalities with the cosmopolitan view. In his recent offering, *The Idea of Justice* as much as in his earlier works,²⁷ he emphasized the notion of freedom – understood through the concept of capabilities – as being grounded in human beings as such. Arguably, his public discourse-oriented theory, which offers an 'impartial method of reasoning to assess the comparative justice of alternative states of affairs',²⁸ is compatible with an internationalist stance as sketched above, whereby the principles vary according to the nature and extent of social interaction (given that the nature of public discourse will necessarily vary as well). However, a strict reading of *The Idea of Justice* would in fact tend more to a globalist/cosmopolitan view. As Sen puts it himself, 'there are two principal grounds for requiring that the encounter of public reasoning about justice should go beyond the boundaries of a State or region, ... based ... on the relevance of other peoples *interests* ... and the pertinence of other people's *perspectives*'.²⁹ Indeed, Sen's principal interlocutor in much of the global justice debate, Nussbaum, has explicitly linked capabilities and global (or transnational) justice.³⁰

What is the relevance of the global justice debate for our purposes? Put simply, the traditional view of corporate actors is harmonious with old-school statism: companies are private entities, birthed by the internal legal rules peculiar to a given State and therefore under that State's control as artificial citizens.³¹ I discuss the limitations of adopting this approach in the next section, but it is

²⁵ See e.g. Ronald Dworkin, *Justice for Hedgehogs* (Harvard: Belknap, 2010)

²⁶ Admittedly, I am simplifying to an extent here: clearly a statist-internationalist view is also possible, in which obligations vary according to the level of social interaction, *because* they flow from the constitution of that interaction.

²⁷ Amartya Sen, 'Human Capital and Human Capability' (1997) 25 *World Development* 1959; *Development as Freedom* (Knopf, 1999); *The Idea of Justice* (London: Penguin, 2010)

²⁸ Samuel Freeman, A New Theory of Justice (Review of Sen, *The Idea of Justice*), 14 October 2010, New York Review of Books

²⁹ Sen, 2010 (n27) p.402

³⁰ Nussbaum (n 6)

³¹ An excellent example of this type of technical conceptualisation is given by the approach of the ICJ in the *Barcelona Traction* case, where the court held that diplomatic protection could not be extended to the third-country shareholders of a Canadian company as it was only the nationality of the legal person (the company) that mattered. This nicely illustrates an important point, which is that whenever corporate entities are concerned it is problematic to attempt to separate their moral or political agency from their legal presence. The two are necessarily co-dependent. See Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and power* (Constable, 2004) at 35.

clear that cosmopolitanism in its myriad forms offers an alternative paradigm which carry explanatory force when it comes to analysing obligations between TNEs and those affected by their activities. If justice concerns are independent of the State as a constitutive entity, then justice obligations between corporate actors and those affected may exist directly, without the need to pass through what I shall term the national veil.

(ii) Justice as a legal concept

In a recent essay on European Union law and transnational law, Douglas-Scott stated ‘Law and justice have a very close relationship, a special affinity’.³² She continued, ‘The rule of law is what is very often understood by the concept of “legal justice”, importantly acknowledging it as a form of justice. For many it is also seen as playing a key role in the legitimacy of law’.³³ Although not expressed as such, Douglas-Scott’s plea to think beyond injustice in the EU mirrors the discussion of ideal versus non-ideal theory by Sen, where he defends the need for a comparative approach based on injustice.³⁴

It is easy to lose sight of the fact that (almost) every legal regime makes, at its heart, an appeal to a notion of “justice”.³⁵ This can be seen in the embryonic development of the law of unjust enrichment in England, where scholars debating the philosophical foundations of the emergent rules all use some version of justice in their formulations.³⁶ Similarly, areas that many would consider established and secure in their normative foundations have been undergoing reassessment in the light of globalization; labour law is one prominent example.³⁷ There is also another, more subtle, way in which justice pervades legal reasoning, and that is in the design of legal rules themselves.

Even tort law is not immune, and it is particularly illustrative of the dialectical nature of justice as a meta-principle. Tort law provides perhaps a perfect example of pluralism in the structure of civil liability across legal systems. To reprise the discussion from chapter 1, recent debates on tort’s normative foundations have centred around three axes: Aristotelian corrective justice, Rawlsian

³² S. Douglas-Scott, ‘Rethinking Justice for the EU’, in Maduro et al (eds.), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, 2014)

³³ *ibid*

³⁴ Sen 2010 (n 27), esp. pp.15 et seq

³⁵ Maccormick, *Institutions of Law: An Essay in Legal Theory* (OUP, 2007)

³⁶ Chambers, Mitchell & Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment*, (OUP, 2009)

³⁷ Brian Langille, ‘Labour Law’s Theory of Justice’, in Langille & Davidov (eds.), *The Idea of Labour Law* (OUP, 2011)

distributive justice, and economic theories of civil liability.³⁸ The distinction is important, and not only for theorists. Corrective justice, for example, accepts with difficulty the principle of strict liability, while distributive theories would seem almost to demand it, and particular economic theories can easily accommodate it as well. In consequence, much ink has been spilled promoting or refuting the question of strict liability in tort, but there are few legal systems that do not admit some form of strict liability and others – such as the New Zealand public compensation scheme – that go far in the opposite direction.³⁹ This is important, since it affects the distribution of risk and cost within a given community, and obviously carries potential problems if applied out of context. Clearly this use of justice in law is highly normative, as compared to the binary “juridical justice” of adjudication. What it also demonstrates is that not only may substantive legal rules differ, but the underlying normativity is similarly pluralistic.

What, then, is the special status of the concept of justice in the law, and to what extent can we translate the principles discussed in the previous section into useful tools for legal analysis? I confess I am drawn by an idea raised by Jennifer Hendry of ‘justice as law’s common’.⁴⁰ Hendry aligns with Teubner in seeing justice as an unattainable *ideal* for the law.⁴¹ They also define legal justice negatively, in the sense of partially right injustice rather than as generative of perfectly just situations. But this concept of a common language of justice is interesting. It echoes calls in transnational legal scholarship to marry law and discourse theory. Tuori, for instance, has suggested that the spread of global legal culture entails a discursive meta-principle: ‘lawyers as primary legal actors seem to be in possession of a common language which enables them to engage in inter-systemic dialogue’.⁴² Likewise ‘in a globalising world the language of lawyers and legal culture... is also globalising’.⁴³ I would, again, argue that at the heart of this common language is an appeal to justice. As Teubner puts it, ‘Justice redirects law’s attention to the problematic question of its adequacy to the outside world’.⁴⁴

³⁸ See above, Chapter 1, p.41.

³⁹ Marie Bismark & Ron Paterson, ‘No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety’ (2006) 25 Health Aff. 278

⁴⁰ Jennifer Hendry, ‘Governance, Civil Society & Social Movements. Re-Claiming “the Common”’, (2008) 1 EJL. Hendry’s notion of ‘the common’ is taken from Hardt and Negri, *Multitude* (Penguin, 2004)

⁴¹ Gunther Teubner, ‘Justice Under Global Capitalism?’, (2008) 1 EJLS

⁴² Kaarlo Tuori, ‘Towards a Theory of Transnational Law (A Very First Draft)’, (Helsinki, 26 October 2010), on file with the author.

⁴³ Kaarlo Tuori, *Ratio et Voluntas: The Tension Between Reason and Will in Law* (Ashgate, 2011)

⁴⁴ Gunther Teubner, ‘Self-subversive Justice: Contingency or Transcendence Formula of Law?’ (2009) 72 MLR 1 at 10

The above discussion of tort law nicely demonstrates that this line of argument is not purely abstract. The hierarchy of pluralisms – substantive and normative – can nonetheless claim a common dialectical framework in which to discuss questions of obligation.⁴⁵ Thus, I would thus argue that a crucial component in providing a transnational legal framework for the TNE must be the Tuori/Hendry idea of a common concept or language, focused on justice.⁴⁶

There are many legal domains which have an account (or accounts) based on justice. If justice is indeed the law's common principle, then this applies from the extremes of Dworkin's interpretivism to strict positivism; even the latter must admit to at least the principle that, as Perelman puts it, 'essentially similar situations be passed on in a uniform way'.⁴⁷ But, as Teubner argues, discursive legal justice is nonideal; it is polycontextual in that:

'From the beginning it is split into different avenues. Each different concept of justice is realised in one specific social practice, obeys one partial rationality and one partial normativity'⁴⁸

Teubner rejects appeals to reciprocity and distribution due to law's inherent imperfection in translating extra-legal norms to legal form, which 'is why practitioners of law have always been sceptical towards rational theories of justice in the style of Rawls and Habermas'.⁴⁹ For Teubner, juridical justice represents law's internal struggle against itself, its self-transcendence and re-entry; a continuous cycle which strives 'to respond sensitively to extremely divergent external demands and to strive at the same time for high consistency'.⁵⁰

Like many, I often struggle to grasp the sophistication and abstraction of Teubner's thinking. I hope I do not do him an injustice when I say that it seems to me that there is room for dialogue in between the Rawlsian and Habermasian concepts which Teubner rightly casts as impossible for the law to translate within its own bounded, self-referential (ir)rationality, and the pure reflexivity of justice as law's inner Lucifer, condemned to a perpetual cycle of bringing light to law's darker recesses before falling to the abyss of positivistic self-reinforcement. As I shall argue shortly, what law can take from moral philosophy – in this case the global justice debate – is new information

⁴⁵ Unless one adopts a pure functionalist approach that denies the relevance of justice entirely.

⁴⁶ See Chapter 4, p.238

⁴⁷ Chaïm Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (Dordrecht, London, Boston: Reidel, 1980)

⁴⁸ Teubner, (n44) at 6

⁴⁹ *ibid*, 13

⁵⁰ *ibid*, 10

about shifting obligational relationships, and changes in the agency of different actors. The failure of ideal theory to bring reciprocity to law need not mean reciprocity, which after all finds its reflection in the structure and content of legal obligation in a plethora of legal orders, fields and systems, cannot inform the evolution of legal processes.

However, the self-referential process which Teubner describes, by which law reifies its inherent notion of justice, is compelling. A recurrent problem demonstrated in Part I of this dissertation – perhaps *the* recurrent problem – is one of equality before the law, or equality of arms.⁵¹ The common denominator in all the limitations upon regulation of TNE action which have been described is a rupture of the relational equality between TNE and victim (or TNE and stakeholder). Whether this is in the non-admittance of victims to particular forums (international investment law), or the hollowing-out of regulation (through bargaining, interjurisdictional competition, indemnification or adjudication), this basic equilibrium of the *culture juridique* is thereby disturbed. If, as I have argued, the traditional paradigms which provided for this relational equality – the State legal system – can no longer ensure it, law must assimilate a new (extra-legal) relational link in order to re-found it, which is what I attempt in the following sections.

II. The TNE and Justice

1. The TNE as a Moral Agent

Returning to global justice, it is noteworthy that Nussbaum goes significantly further than many cosmopolitans in her design for a global justice formula based upon capabilities. She criticizes, *inter alia*, both Pogge and Charles Beitz for their adaptation of Rawls,⁵² making the valid point that the idea of a global original position *à la* Rawls remains elusive and speculative, at best.⁵³ Aligning capabilities with entitlements-based approaches from Grotius to human rights movement, she sets it up as a partial but complementary approach to human rights: ‘the capabilities approach makes [the] idea of a fundamental entitlement clear, by arguing that the central human capabilities are not simply desirable social goals, but urgent entitlements grounded in justice’. According to Nussbaum, capabilities avoid the problem of having to challenge the public/private distinction, something ‘deeply bound up with the traditional liberal rights thinking’.⁵⁴ Thus, crucially, ‘multinational

⁵¹ And see Steven R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 Yale L.J. 443 at 460

⁵² see Thomas Pogge, *Realizing Rawls*, (Cornell University Press, 1989); Beitz ‘International Liberalism and Distributive Justice: A Survey of Recent Thought’, (1999) 1 World Politics pp. 269-96

⁵³ Nussbaum (n 6)

⁵⁴ Nussbaum, *Women and Human Development* (Cambridge University Press, 2000); Nussbaum (n6). I would argue it also avoids the rights imperialism as an *effet pervers* of justice in Teubner’s formulation, see above (n 44)

corporations have responsibilities for promoting human capabilities in the regions in which they operate'.⁵⁵ Going with Nussbaum's own claim to the complementarity of human rights, this sits nicely with the approach developed by the former UN Special Representative on Business and Human Rights, John Ruggie, whose 'respect, protect, remedy' framework envisages a moral – not necessarily legal – responsibility for TNEs to respect human rights.⁵⁶ Ruggie's claim is essentially based on praxis; for example, his 2009 report to the UN Human Rights Council pointed out that:

'the corporate responsibility to respect [human rights] is acknowledged by virtually every company and industry CSR initiative, endorsed by the world's largest business associations, affirmed in the Global Compact and its worldwide national networks, and enshrined in such soft law instruments as the ILO Tripartite Declaration and the OECD Guidelines.'⁵⁷

All well and good, although it does not particularly help us at the level of theory in deciding whether TNEs *should* bear a moral obligation to respect rights, promote capabilities, or fulfil some other entitlement. This goes back to Nussbaum's already quoted point that the non-inclusion of the concept of a TNE under a Rawlsian veil of ignorance would logically exclude it from any ideal institutional ordering that will result.⁵⁸ Yet, as she states, 'the world we live in exhibits changing configurations of power at the level of basic structure itself'.⁵⁹ What, I suspect, Nussbaum is hinting at is that the changed nature of TNEs as international actors necessitates a conception of global justice that includes rights and obligations that correspond to the possibility of the TNE to affect others' entitlements across borders. This is something echoed by Cutler when she states that 'the forces of globalization and privatization are relocating the boundaries between private and public

⁵⁵ Nussbaum (n 6)

⁵⁶ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5; UNCHR 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', (21 March 2011) UN Doc A/HRC/17/31

⁵⁷ UNCHR 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (22 April 2009) UN Doc A/HRC/11/13; UNCHR 'State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions' (15 May 2009) UN Doc A/HRC/11/13/Add.1

⁵⁸ Nussbaum (n 6)

⁵⁹ *ibid*

authority ... and creating new opportunities for private, corporate actors to exercise power and influence'.⁶⁰

Thus, we return to where we started: statism is inadequate in order to explain and regulate modern corporate behaviour in a globalized world. But I have not as yet put forward any justification as to why TNEs should be included in an account of global obligation. In my view, this justification is two-fold, and stems from the ambiguity at the heart of the TNE as a part-private, part-public actor. On the one hand, the resemblance of TNEs to States can at times be striking.⁶¹ They are both collective, or institutional, actors whose decision-making processes are similarly complex.⁶² They are both providers of collective goods as well as, in some cases, the generators of systematic harm on a mass scale, something which is often best captured in the idea of a human rights violation.⁶³ Indeed, as has been noted the corporate form was originally intended as a public body and a means of administering State monopolies.⁶⁴ However, perhaps one of the most informative accounts of the moral agency of TNEs on the world stage comes from the work of Erskine, endorsing the earlier work of French on corporate moral personhood. For Erskine, '[a] collectivity is a candidate for moral agency if it has the following: an identity that is more than the sum of the identities of its constitutive parts and, therefore, does not rely on a determinate membership; a decision-making structure; an identity over time; and a conception of itself as a unit'.⁶⁵ As she points out, TNEs easily qualify under these criteria. It follows, I would argue, that any reasonable account of transnational justice must necessarily include TNEs.

The second justification stems from the fact that TNEs operate in a transnational space that overlaps and interacts with national space and jurisdiction only partially. Evidently, wherever a TNE has operations of one sort or another (be that selling and distributing a product or service,

⁶⁰ A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge UP 2003); see also Kobrin, 'Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms and Human Rights' (2009) 19 *Bus. Ethics Quarterly* 349

⁶¹ See Wettstein, (n 4) at chapters 5, 6 & 7

⁶² Something that leads to serious problems in attributing responsibility using traditional accounts of causality and intention. See Claire Staath & Benedict S. Wray, 'Corporations and Social Environmental Justice: The Role of Private International Law' in Marie-Ange Moreau. & Antoine Duval (eds), *Towards Social Environmental Justice* (EUI WP LAW 2012) 85 – 104

⁶³ see Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) 111 *Yale L.J* 443; Teubner, 'The Many-Headed Hydra: Networks as Higher-Order Collective Actors' in Mccahery, Picciotto & Scott (eds.), *Corporate Control and Accountability* (Clarendon Press, 1993)

⁶⁴ Nick Robins, 'The Corporation That Changed the World' (Pluto Press, 2006); Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable, 2004)

⁶⁵ Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', (2001) 15(2) *Ethics and International Affairs* 67 at 72

acquiring or extracting materials for production, production itself or merely administrative presence) it will necessarily interact with the local communities, perhaps in superficially similar ways to a native citizen or member of those communities. While the importance of this should not be underestimated, there are two factors which differentiate the TNE from such 'native' interaction. The first is the power of *arbitrage* that the TNE possesses, giving it both potentially powerful political leverage and the ability to easily relocate its central administration and thus disassociate itself from the community into which it was "born". Secondly, there is a direct link between the different organs of the TNE and many other actors which is entirely independent of State borders. The most obvious and well-documented of these is in the case of employees, where decisions taken at a parent company, or further up or down the supply-chain, have a direct bearing on the actions and well-being of employees situated elsewhere. But it applies equally in cases of third-party stakeholders as well. In the Bhopal gas disaster, for example, it has been argued that a crucial decision to switch off a refrigeration unit, ultimately contributing to the harm which occurred to thousands of persons in India, took place at the Unocal headquarters in the U.S.⁶⁶

What both of these factors have in common is that they are both within the power of a TNE to choose its own spheres of operation or its own communities. In this sense, I would argue that TNEs, in deciding the places in which they do business, operate in a 'dislocated community', an idea again discussed in Erskine's work. For her, a dislocated community is one in which its members choose to become part of it, and is distinguishable from constitutive or 'found' communities (such as the community into which a person is born). This idea, I would argue, is extremely useful as an explanatory concept for describing the transnational space in which TNEs operate, which is neither wholly within the control of individual States nor wholly outside it. For Erskine, dislocated communities are *complementary* to constitutive communities, something which she uses to ground a theory of 'embedded cosmopolitanism', which at once rejects the traditional statist view as overly conservative, while refusing to deny the importance of constitutive communities such as nation-states.⁶⁷ The importance of this for our purposes cannot be overstated. On the one hand, it allows that due consideration be given to the specific context in which norms originate, *and* the specificity of the relationship of the TNE to that context, including its ability to choose the extent of its interaction. This is a point to which I shall return, but for the present, suffice it to say that it presents a conception of cosmopolitanism – and duties to others –

⁶⁶ See above, Chapter 1, p.66; M. R Anderson, 'Public Interest Perspectives in the Bhopal Case: Tort, Crime or Violation of HR?', in D Robinson & J Dunkley (eds.), *Public Interest Perspectives in Environmental Law*, (Wiley, 1995)

⁶⁷ Toni Erskine, *Embedded Cosmopolitanism: Duties to Strangers and Enemies in a World of 'Dislocated Communities'*, (OUP, 2008)

that does not suffer from the same problems that so-called ‘impartialist cosmopolitanism’ has in its apparent denial of the significance of States and other communities.

2. “Enterprise” Cosmopolitanism

When contrasted with State sovereignty, on the one hand, or economic liberalism, on the other, justice offers a conception of transnational law – and a method for resolving *interlegal* disputes – that does not rest solely upon self-interested bargaining; indeed, even if a contractarian model of justice were to be adopted, the whole point of the original position, in the Rawlsian tradition, is to put constraints upon bargaining which allow for a fair initial distribution.⁶⁸

It is a feature of transnational law, as a pluralist system, that it must accommodate this asymmetry and provide methods for conflict resolution. In the modern order, structured around States, private international law would have resolved any civil conflicts, while publicist questions such as criminal law fell to be regulated by the law of jurisdiction, essentially derived from international law.⁶⁹ The problem is self-evident from Stephen’s discussion when she states that ‘[t]he varieties of civil and criminal claims in domestic legal systems seeking redress for human rights violations span ... different categories, with their exact categorization dependent on the definitions used by each system’;⁷⁰ in a system of transnational law where domestic norms may interact with international and other norms, a meta-rule for resolving conflicts is clearly necessary. Traditional private international law is hamstrung by its exclusion of anything outside the realm of its domestically defined concept of ‘civil’ or ‘private’ and public international law-derived doctrines are similarly limited.⁷¹ Yet adopting a justice-based conception⁷¹ allows courts, lawyers and scholars to consider the competing justice aims – *derived from the systemic context in which they originate* – of the conflicting rules or policies against the wider transnational background to resolve disputes.

So, any reasonably complete account of global justice should include TNEs as more than mere rights-holders, but what obligations does that entail, exactly? It is fair to say that global justice has become closely associated with rights to development and the alleviation of global poverty. Consequently, many of the concrete obligations it envisages are – similar to Rawls institutional

⁶⁸ John Rawls, *A Theory of Justice* (1999)

⁶⁹ See Chapter 5; Benedict S. Wray & Rosa Raffaelli, ‘False Extraterritoriality? Municipal and Multinational Jurisdiction over Transnational Corporations’ (2012) 6(1) H.R. & I.L.D 108

⁷⁰ Beth Stephens, ‘Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002) 27 Yale J. Int’l L. 1;

⁷¹ Wray & Raffaelli (n 69)

design in *A Theory* – aimed not at immediate alleviation but at the collective design of just institutions.⁷² I do not intend to deal with these issues, which are endlessly discussed in the global justice literature, or indeed with issues of governance, and I therefore do not tackle arguments such as that of Andrew Kuper who puts forward concrete proposals for the inclusion of non-state actors in global governance bodies.⁷³ Rather, my target is the institution of law and its attendant organs, and two notions that feature in some of the recent literature on global justice – solidarity and reciprocity – are particularly relevant as the potential carriers of a form of global justice that may in turn inform our legal understanding.

Turning firstly to reciprocity, this is a concept that will be familiar to all as the basis for modern international law and international relations. It is something already firmly embedded in our (statist) international system as the basis for the normative force of treaties and agreements, for which, historically, the only exception was customary international law.⁷⁴ Andrea Sangiovanni has argued that equality as a demand of justice is best understood as a ‘relational idea of reciprocity among those who support and maintain the State’s capacity to provide ... basic collective goods’ He sums up his argument thus:

‘we owe obligations of egalitarian reciprocity to fellow citizens and residents in the state, who provide us with the basic conditions and guarantees necessary to develop and act on a plan of life, but not to noncitizens, who do not.’⁷⁵

There are two features of Sangiovanni’s argument which are of interest here. Firstly, it overlooks the fact that, as a result of globalization, it is no longer exclusively citizens and residents who are responsible for the provision of collective goods. Furthermore, we have seen that while the societal participation of a TNE in the places where it does business may be minimal (due to cross border capital flows), its societal impact may be large.⁷⁶ The traditional benefits of the economic

⁷² see Stan van Hooft, *Cosmopolitanism: A Philosophy for Global Ethics*, (Acumen, 2009)

⁷³ Andrew Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (OUP, 2004)

⁷⁴ Again, I accept the criticism that today this may not ring entirely true: many multilateral treaty systems have evolved beyond reciprocity, most notably the European Convention on Human Rights and Fundamental Freedoms. According to the jurisprudence of the Strasbourg court, many traditional reciprocity-based defences are not available in respect of the Convention: see *Demir and Baykara v Turkey* (ECtHR, 12 November 2008). Another example is provided by the constitution of the International Labor Organization, which is binding upon ILO members irrespective of signature and ratification (see Isabelle Duplessis, ‘La Déclaration de l’OIT relative aux droits fondamentaux au travail: une nouvelle forme de régulation efficace?’ (2004) 59 *Industrial Relations* 52).

⁷⁵ Andrea Sangiovanni, ‘Global Justice, Reciprocity and the State’ (2007) 35 *Philosophy and Public Affairs* 1

⁷⁶ Without wishing to labour the point, the *Bhopal* case again offers a good example of this: profits were channelled back to the U.S. parent corporation, while Indian citizens suffered a two-fold loss: firstly, in respect of the environmental harm and human suffering caused by the gas explosion; and secondly in the under-capitalization of the Indian subsidiary, which left far less assets within jurisdiction than were sufficient to meet the likely liability.

exploitation will largely be felt in the home-state of the controlling company or buyer, and even then may not realize their full potential.⁷⁷ Thus the statist reciprocity argument fails to take account of TNEs on both sides, from the perspective of the citizen or resident who may indeed be indebted to a non-resident TNE for the provision of a collective good, and on the TNE side who must be responsible in the provision of that good and also give something back to the society in return for the economic benefit it retains. Clearly, I would argue, this cannot be premised on the basis of the nation-state as the be-all-and-end-all.

Perhaps the foregoing analysis is a little unfair to Sangiovanni, since he does not claim to be an out-and-out statist. It is true that his 2007 argument remains focused on the State and still sees the State as the endpoint of *social* – if not moral – equality, with the consequence that *solidarity*-based obligations are not owed beyond the national context. Nonetheless, there is good reason to extend his argument further, which brings me to my second point. The basis of his self-confessed internationalist stance is that, as previously stated, ‘the practice-mediated relations in which individuals stand condition the content, scope, and justification of those principles’. In other words, principles vary according to the level of social interaction. This argument is developed significantly in a later paper by Sangiovanni, where he distinguishes between ‘cultural conventionalism’ and ‘institutionalism’ as two forms of so-called ‘practice-dependent’ theory and aligns himself with the latter.⁷⁸ There is no particular reason why this line of reasoning should end with the State; the best argument against it is put by Sangiovanni himself when he says:

‘Consider the basic extractive, regulative, and distributive capacities central to any modern state. When well-functioning, these basic state capacities, *backed by a system of courts, administration, police, and military*, free us from the need to protect ourselves continuously from physical attack, guarantee access to a legally regulated market, and establish and stabilize a system of property rights and entitlements ... Yet, *the global order*, in all cases but those of failed and occupied states, *does not provide this basis*’ (emphasis added).⁷⁹

⁷⁷ The best example of all this is tax, since significant, negotiated tax breaks are common with large multinationals on the basis of an actual or implied threat of relocation offshore. See, e.g. Walter Hickey, ‘Apple Avoids Paying \$17 Million In Taxes Every Day...’ (2013) Business Insider, <http://www.businessinsider.com/how-apple-reduces-what-it-pays-in-taxes-2013-5#ixzz3VtKBdCvd> (accessed 1 December 2014); Action Aid, ‘Give us a break: How big companies are getting tax-free deals’ (Action Aid, June 2013) http://www.actionaid.org/sites/files/actionaid/give_us_a_break_-_how_big_companies_are_getting_tax-free_deals_2.pdf (accessed 1 December 2014).

⁷⁸ Sangiovanni, Justice and the Priority of Politics to Morality, (2008) 16 J of Political Philo 137

⁷⁹ Sangiovanni, (n 75), 20 emphasis added

This empirical claim rests on a number of premises that I would argue no longer apply in today's globalized world. If we accept Sangiovanni's argument that justice is indeed practice-dependent, and depends upon the cultural and/or institutional context, then the reality of that context must be revised in order to take account of the various ways in which the global order *does* provide a number of such capacities. The right to property is well established as a principle of customary international law, as is the principle of *pacta sunt servanda*. There are a number of international courts in the strict sense, in addition to the fact that many domestic State courts are often called upon to pass judgment in international cases and interpret international law. Chapter VII of the U.N. Charter provides a number of grounds for collective security measure, including most recently measures that affect individuals directly as in the infamous *Kadi* case.⁸⁰ Finally, access to regulated markets is, as Sangiovanni actually accepts, something often regulated very much internationally, the WTO being a non-negotiable, 'take-it-or-leave it' package.⁸¹ To return to my earlier point about TNEs, I would point out that TNEs are, in the words of Steven Ratner, 'global actors',⁸² whose participation in the provision or denial of what Sangiovanni calls 'basic state capacities' may be partly or wholly independent of State involvement.

Thus, the global context, while not as tightly-knit as that of the nation-state, is replete with instances of the provision of collective goods and with actors, including TNEs and States, with significant opportunity to affect that provision both positively and negatively. Accordingly, I would argue, Sangiovanni's argument bears extension to include reciprocity-based justice obligations in the global context as well as the nation-state. There is no reason why this should not apply, *mutatis mutandis*, to solidarity-based obligations as well, as Sangiovanni points out.⁸³ As I mentioned in my first response to Sangiovanni's argument, there is often direct involvement in the provision or denial of collective goods by TNEs, with consequent mutual (reciprocal) obligations. But I also hinted at the generalized implication of my argument as well: the benefits flowing from exploitation by a TNE will be experienced *diffusely*, both in the State of exploitation (in the form of payments due under concession agreements, or gains in infrastructure, provision of services, goods and so on) and in the home-state (in the form of reinvestment in the economy and redistribution through taxes). They may even be felt in third States, in the form of exports and reinvestment. Similarly, the negative effects of exploitation and accompanying negative externalities may also extend across

⁸⁰ Case C-402/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] E.C.R. I-6351 (CJEU)

⁸¹ Sangiovanni, (n75),

⁸² Ratner, (n 63)

⁸³ See Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 OJLS 213

borders: the best example is in the case of environmental harm which spreads easily across State boundaries,⁸⁴ but may also have *ex ante* effects through the operation of legislative competition and a race to the bottom.⁸⁵ Taken as a whole, I suggest, these diffuse effects of transnational corporate action entail corresponding generalized obligations founded on solidarity within the affected groups.

However, while I accept the basic cosmopolitan ideal that the entitlements which correspond to these obligations must vest in individuals (or legal persons) *as such*, I do not see that it follows that they must be *universal*.⁸⁶ Transnational reciprocity and solidarity depends, as per my modification of Sangiovanni's argument, on the level and extent of social interaction, and therefore in the case of transnational corporate action, between those persons, groups, communities and States affected (both negatively and positively) on the one hand, and the corporation on the other. This is an important qualification, since it detaches my argument from the impartial cosmopolitan and internationalist viewpoints and from the realm of ideal theory. It is properly speaking *transnational* in scope and content, linking it back up to Erskine's 'embedded' cosmopolitanism and the idea of the dislocated community in which the TNE operates. It matches the ideas of reach and sphere of influence discussed earlier, and it is also compatible with the relativistic importation of such obligation into transnational law's internal justice dialectic.

Once reciprocity and solidarity are admitted as relative, relational principles of justice, it allows for the re-entry of human rights into the dialogue. Here we return to the vision of human rights that privileges the victim's perspective: any actor can violate those rights, and TNEs, as quasi-governmental actors are in a peculiar position to do so.⁸⁷ TNEs are global institutional actors, with capacities for systematic mass harm that only public and quasi-public bodies generally share. Human rights thus operate as the translator of concrete obligations once a relational link has been established and as a concept of international *ordre public*. But that does not mean that they are not relativized in this scenario. Since they apply only as between entities belonging to the TNE and to

⁸⁴ See, by way of example, the *Texaco* cases in Peru and Ecuador: *Aguinda v Texaco Inc.*, 303 F.3d 470 (2d. Cir. 2002); *Jota v Texaco Inc.*, 157 F.3d 153 (2d. Cir., 1998). A summary and links to the various court decisions is available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador>, accessed 20 September 2011.

⁸⁵ Horatia Muir Watt, *Aspects économiques du droit international privé: réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions* (2004) 307 RCADI

⁸⁶ Indeed, to attempt such an importation from a legal standpoint is to invite disaster, on Teubner's formulation: Teubner (n44)

⁸⁷ Wettstein (n4)

affected communities within its reach, their application is subtly different to the case of universal application at the international or regional level.

Thus, when contrasted with State sovereignty, on the one hand, or economic liberalism, on the other, justice offers fruitful concepts for importation into a transnational law that does not rest solely upon self-interested bargaining. This can help avoid the risk mentioned at the end of chapter 5, of subordinating human rights to economic principles. Experience from the EU shows that structuring a legal system around an economic paradigm (as is explicitly the case with the economic freedoms in the treaties) leads to the subordination of other areas – such as fundamental rights – to that paradigm. While that may be appropriate in a case where it is only economic interests that are at stake, the problem in the case of supranational structures such as the EU is that it may have the effect of destroying the policy aims of the subordinated area which – if a State law is at stake, for example – upset the distributive justice or constitutional setup of the State in question. The phenomenon of democratic deficit is another belaboured debate of transnational legal systems, focused on the procedural aspects of sovereignty and participation. But I submit that many of the players in that debate miss the substantive fact that many legislative measures also risk being subordinated in a legal decision-making process that places them out of context. The justice-based conception of transnational law offered above, I submit, avoids that problem by enabling the placement of economic interests on a level footing with the non-economic interests of those affected by corporate acts. It also allows for the due consideration of particular national policies in the context of TNE action, while retaining the inherent flexibility that enables differing legal systems to interact in context-appropriate ways.

Chapter 7

Constructing Transnational Justice

In this chapter, I attempt to draw together the disparate strands of my broad analysis from Part I and marry it to the approach and principles outlined in chapters 4 and 5. Accordingly, section I considers how such elements of a justice framework might be identified. It looks first for existing application of principles in positive law, and then it imagines how these elements might be extended in a principled way, through the legal acknowledgement of relational links and the application of human rights in a comparative approach. Section two sketches possible applications of this framework, to both the question of jurisdiction and normative conflict.

In outline, the framework has three aspects: jurisdiction, conflict-of-norms, and recognition and enforcement. The first of these looks at the functional reach, or sphere of influence, of the TNE and offers a justificatory approach to opening up jurisdiction within limits, thereby avoiding the territorial/extraterritorial dichotomy. The second aspect offers a modified conflict of laws methodology applied to the transnational sphere, which considers the regulatory aims of the norms in conflict set against the backdrop of an international *ordre public* defined by justice and human rights. The third provides as essential limit to the first two aspects, in its recognition that domestic *ordre public* still plays a part in curbing excessive applications of jurisdiction or self-interested regulation.

I. From Legal Justice to Legal Principles

Examples of law's translation of principles of justice can readily be found, I would argue, in positive law. This section offers some examples.

1. Domestic Law

Identifying rules of priority based on justice in domestic law is difficult, since conflicts between competing norms are generally resolved by reference to the hierarchy of norms, the supremacy of law, and so on. However, I tentatively offer restitutionary remedies for breaches of trust as one example.

In common law systems, the system of equity operated historically as corrective to the common law's tendency to formalism and rigidity. It operated on the conscience of the parties, and imposed sanctions to ensure behaviour *ad personam*. When it was still the purview of the Lord Chancellor of England in the late medieval period, it was often said that equity varied with the size of the

Chancellor's shoe. But elements of the modern system – as much formal law as any of the common law rules – retain elements of the appeal to conscience through the application of equitable maxims designed to provide this corrective element. Decisions which strip a wrongdoer of profits from a wrongful act offer an example of this. Let us return to *Lago Agrio*. In the recent decision of the New York District Court,¹ having made findings of massive fraud in procuring the Ecuadorian first instance judgment on the part of certain the plaintiffs' lawyers, the Court made an order stripping them of any profits they might receive from the judgment by imposing a constructive trust over his 'contractual and other rights to fees and payments...'.² In doing so it noted:

'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee'³

It went on to extend the trust to include a requirement to make restitution of all monies already received, noting that a 'court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief'.⁴

But it was at pains to reiterate that its actions were aimed at the conscience of the wrongdoing lawyers only:

'This Court does not here "set aside the Ecuadorian Judgment." It does not grant worldwide injunction barring any efforts to enforce the Judgment in other countries. And it does not, as Donziger claims, issue "a worldwide anticollection injunction." It prevents the three defendants who appeared at trial— over whom it has personal jurisdiction— from profiting from their fraud. This does not "disrespect the legal system of the country in which the judgment was issued" or those of "other countries" in which the L[ago] A[grio] P[laintiff]s now, or later may, seek to enforce the Judgment.'⁵

The application of constructive trust in a case such as this could be said to respond to the typology I presented in the last chapter. It is based, explicitly, on the relational links between the parties – in this case between the plaintiffs' lawyer and the defendant. Its remedy is not a valuation in damages, but an order which prevents the lawyer from profiting from his breach of the relational links with a party who is not his client. It provides a contextualization of contractual rights –

¹ *Chevron Corp. v. Donziger et al*, 974 F.Supp.2d 362 (S.D.N.Y. 2014)

² *ibid* at 641

³ *ibid* at 639

⁴ *ibid* at 641

⁵ *ibid* at 644

between the lawyer and the plaintiffs – which would otherwise entitle him to payment, by reference to his conduct to, in essence, a third party.

2. Private International Law

The private international law of jurisdiction may offer the best examples of application of justice principles for my purposes. That this is so is not surprising, since the vast majority of cases that have been litigated against TNEs have been decided on jurisdictional grounds and have rarely gone further due to the tendency of most corporate claimants – with the notable exception of Chevron – to settle human rights and mass tort cases.

The first example is from English private international law, the second from the French private international law and the third from international investment law. The reason for picking these cases is that all three involve a conflict between competing legal norms, which ultimately fell to be resolved by an appeal to principle. The first case concerns the grounds upon which an English court will decline jurisdiction in a private law case in favour of the courts of a third country. Essentially, this centres on the doctrine of *forum non conveniens*. Broadly speaking, if another forum is more appropriate ('convenient'), for example because the act complained of took place there, then the courts will usually decline their jurisdiction at the request of the defendant. The legal test to be applied is the *Spiliada* test, drawn from the case of *Spiliada Maritime Corp. v Cansulex Ltd*,⁶ and has two components: first, that 'the court is satisfied that there is some other available forum, having jurisdiction, which is the more appropriate forum'; and second, that 'the case can be tried more suitably for the interests of all the parties and the ends of justice' (emphasis added).⁷ The second limb is what interests me here, and it has been since developed into a test of 'substantive justice' taking into account 'all the circumstances' of the case.⁸ So far, this has been mainly been applied to retain jurisdiction for procedural reasons, such as: the alternative forum proposed did not have sufficient funding available for impecunious claimants;⁹ and that the alternative forum did not have developed procedures for handling group litigation in a case involving over 3000 claimants.¹⁰

The second case involves unilateral repudiation by an Algerian man of his Algerian wife. Having obtained a judgment of divorce in Algeria following his repudiation, he sought to have the

⁶ [1987] AC 640 (U.K., HL)

⁷ *ibid*, at 476 *per* Lord Goff

⁸ See, *inter alia*, *Connelly v RTZ Corporation plc*. [1998] AC 854 (UKHL) and *Lubbe v Cape plc*. [2000] 1 WLR 1545 (UKHL)

⁹ *Connelly v RTZ* (n 8)

¹⁰ *Lubbe v Cape* (n 8)

judgment recognized in France. However, the French court of Cassation refused, holding that ‘a unilateral repudiation by the husband without giving legal effect to the potential objections of the wife... is contrary to the principle of the equality of the spouses ... *and to international ordre public*’ (emphasis added).¹¹ Again, it is the latter part which interests me. Although most commentators have focused on the human rights element of this judgment, in my view the appeal to international *ordre public* masks a broader appeal to principles of justice, albeit dressed up in the language of public policy.¹² This is supported not least by Teubner’s implicit use of the concept *ordre public* in his article on justice.¹³ In my view it could also be read into the traditional private international scholarship,¹⁴ as well as into contemporary views on the close relationship of human rights law to private international law *ordre public*.¹⁵ Indeed, English jurisprudence on public policy, as with jurisdiction, makes the link explicit: as Scarman J said in *Re Fuld’s Estate (No 3)*, ‘an English court will refuse to apply a law which outrages its sense of justice and decency’.¹⁶

Private international law has also traditionally had a separate conception of justice which operates from the top down as a disciplinary principle: so-called ‘conflicts justice’, roughly synonymous with the international harmony of decisions. The objective is something akin to Perelman’s basic unit of legal justice: treating like cases alike.¹⁷ Conflicts justice is ‘an international systemic analysis, looking at the consistency of private international law as a whole rather than at any national policies or objectives’,¹⁸ which – traditionally – aims at reducing forum shopping by encouraging similar or harmonious decisions from different legal orders. This has its strengths, since on one conception,

¹¹ ‘une répudiation unilatérale du mari sans donner d’effet juridique à l’opposition éventuelle de la femme... est contraire au principe d’égalité des époux... et à l’ordre public international’, French C. Cass., 1^{ère} Ch., Civ, 17 February 2004. For a critique of this view, see Ivana Isailovic, ‘Political Recognition and Transnational Law Gender Equality and Cultural Diversification in French Courts’ in Muir Watt & Fernández Arroyo, *Private International Law & Global Governance* (OUP, 2014) 318 – 342.

¹² Without entering into a detailed account of the history of *ordre public international* in French law here, suffice it to mention that it differs in important respects from domestic public order in French law, being at once broader in scope and more restrictive in application. See Bernard Audit, *Droit International Privé* (4th ed)(Paris: Economica, 2006) 254 – 266; O. Kahn-Freund, ‘Reflections on Public Policy in the English Conflict of Laws’ (1953) 39 *Transactions of the Grotius Society* 39.

¹³ Gunther Teubner, ‘Self-Subversive Justice: Contingency or Transcendence Formula of Law?’ (2009) 72 *MLR* 1

¹⁴ See, e.g. Kahn-Freund (n 12): Kahn-Freund’s exposition of the ‘flexibility’ of continental *ordre public* and its natural force sounds a lot like Teubner’s characterization of justice as law’s internal dialogue.

¹⁵ J.J. Fawcett, ‘The Impact of Article 6(1) of the ECHR on Private International Law’ (2007) 56 *ICLQ* 1, esp. 16, recognizing that ‘[the] concept of public policy has the flexibility to take on board easily human rights concerns’.

¹⁶ [1968] P 675 at 698. See also James Fawcett & Janeen M. Carruthers, *Cheshire, North & Fawcett Private International Law* (14th Ed.)(OUP, 2008) 139 – 150

¹⁷ Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (Dordrecht, London, Boston: Reidel, 1980)

¹⁸ Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge UP, 2009) at 17

it involves ‘the implications of justice pluralism, of ‘meta-justice’ – the acceptance that different legal orders may equally be justly applied depending on the context’.¹⁹

3. Public International Law & Human Rights

Justice may be said to be at the forefront of the international legal order. Perhaps the first notable use for our purposes was in article 4 of the preamble to the constitution of the League of Nations, which proclaims the aim of the League to promote international co-operation and secure international peace and security, ‘by the maintenance of justice and a scrupulous respect for all treaty obligations...’.²⁰ Another reference is in the preamble to the ILO Constitution, which refers to social justice.²¹ Likewise, justice was not neglected in the establishment of the U.N. According to Article 1(1) of the U.N. Charter, among the purposes of the U.N. are:

‘to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’

Meanwhile sub-paragraph 3 appeals to human rights:

‘To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’

Human rights, when enshrined, generally occupy a special place in most legal systems. In domestic orders it may be as direct constitutional rights, or through their priority over other rules as proclaimed by courts, thereby revealing an essential constitutionalizing character. The truth of this in the international law context is amply demonstrated not only by the U.N. Charter extracted above, but by foundational unilateral declarations, such as the UDHR or the ILO’s declaration of core labour rights.

Baxi sees human rights as inherent to the creation of ‘a cosmopolitan jurisprudence’ which it is incumbent upon the law to develop to give effect to ‘the most minimal standards of rendering

¹⁹ *ibid*, 301-2

²⁰ Preamble to the Constitution of the League of Nations, art 4.

²¹ ILO Constitution, available at

http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (accessed 20 February 2015)

justice in mass torts situations'.²² The close relationship of human rights to justice is also apparent from their dual nature: as rights *qua* legal rights and as rights *qua* standards of public discourse.²³ The only other type of legal right which might lay claim to a similar dual status are constitutional rights, an interesting feature given human rights' long history and interaction with constitutional traditions (and the fact that human rights are, as aforementioned, often enshrined *as* constitutional rights).

II. Structure of a New Framework

As the exploration of limits to existing legal frameworks in Part I shows, there are fundamental imbalances between TNE action and on the one hand victims' rights and regulatory expectations on the other. Thus the structure of a new framework needs to aim at restoring those two imbalances.

1. Justice from Above: Reciprocity & Human Rights

What relevance for the overarching global justice principles articulated in chapter 6? As I argued there, I see these as *relational* principles. The dialogue of *forum non conveniens* and extraterritoriality, as evinced by judicial practice – in particular the experience of the ATS – has all but obscured from view the relativistic relationship between victims *qua* claimants and TNEs *qua* injurers. It reconceptualizes elements of a dispute as a clash of sovereignties and artificially raises it to the level of foreign relations dialogue.

A recognition of the inherent reciprocity of obligation reveals the shortcomings of such an approach. It might be thought that this is simply a reiteration of an intensely *privatiste* approach to litigation. However in my view it goes further. A recognition of enterprise cosmopolitanism accepts the functional, transnational view of TNE action I presented in chapter 5. Reciprocity is born out of the *transactional* links between TNE and actor. Thus it inherently recognizes the sovereign *equality* of host- and home-states in regulating the conduct at hand. It also recognizes the fallacy of defining the “home-state” in narrow terms, since it is clear that economic and legal links to a particular State by a company inherently grant it an interest in regulating conduct. A “third-

²² Upendra Baxi, 'Mass Torts, Multinational Enterprise Liability and Private International Law', (1999) 276 RCADI 317 at 411-12

²³ For both Amartya Sen and Charles Beitz, Human Rights are standards of evaluation in international politics. See Charles Beitz, 'Human Rights as a Common Concern' (2001) 95 Am. Pol. Sci. R. 269; Amartya Sen, *The Idea of Justice* (Penguin, 2009) 357 – 361

state” receives benefits (capital inflow, resource development, etc.) and burdens (negative externalization) wherever there is *corporate presence* or transactional effects.

But once the relational reciprocity is established, law needs to do more work to find an articulating standard. It is here that human rights have a central role. In addition to their constitutional character as alluded to above, human rights occupy a special place in international law due to their dualistic nature. They are at once legal rules or standards, and ethical standards of international public discourse.²⁴ Shue characterizes them international ‘basic rights’.²⁵ Topal argues that this conception:

‘has a farther-reaching implication for theorizing justice. The principle of basic subsistence right fulfilment is foundational to all practices, as a minimum requirement for justification. Under global circumstances of injustice, namely, the Humean assumptions Rawls introduced for a theory of justice to get off the ground become irrelevant. Not the possibility of full-blown justice guides the analysis of justification but the necessity of counteracting injustice. Shue already criticized liberal theory for assuming moderate scarcity as a presupposition of justification, effectively undermining a global application not of a principle of humanity but of the realization of a minimum basis of subsistence as an integral demand of social interaction.’²⁶

Although Topal’s target is enterprises and institutions themselves,²⁷ this definition of human rights is not irrelevant for law. Naturally, as Teubner shows, the interaction between the moral and legal elements of human rights involves a process of reification from a legal perspective of the extralegal human rights elements, which then become part of the positivist canon.²⁸

Human rights thus reflect a dual purpose from a legal perspective: they are both legal standards, directly applicable through the application of treaties or voluntary adoption by enterprise actors, as envisaged by the Guiding Principles, and they can serve a means of evaluating normative conflicts *with* and *between* other legal standards. This is what those such as Ruggie and Joseph hint at when they explain that human rights may be protected by other laws. As Mares puts it in his excellent paper on the interplay between business and human rights and negligence standards:

²⁴ Amartya Sen, *The Idea of Justice* (2010), pp.359-364

²⁵ For discussion, see Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford UP, 2009)

²⁶ Julien Topal, *Conceptualizing Corporate Responsibilities: Agency, Reciprocity and the Constitutive Role of Law* (Florence: European University Institute, Thesis, 2012) p.214

²⁷ His ‘basic structure model’ aims to articulate ‘the expectations that corporations *must* fulfil as a direct consequence of the demands of justice’: *ibid* p.231

²⁸ Teubner, (n 13); and see discussion above, chapter 6

‘What jurisprudence in negligence law and IHRL reveals—and the CSR movement has not yet fully grasped—is that when one determines liability for negligent omissions, various factors are juggled in a delicate balancing act where (legal) principles coexist with pragmatic considerations of public policy and societal perception of fairness.’²⁹

Recognizing an equality of sovereignty in regulating behaviour linked transactionally (either *ex ante* in deciding governing and governance standards for TNE operation or *ex post* when a dispute arises), however, does not reduce the risk of conflict. Indeed, it arguably increases it. This is the first place for human rights to play a role in coordinating regulatory efforts, as an expression of the international *ordre public*. Where competing legal rules or standards claim to regulate a dispute, if one of them violates an applicable human rights standard, it should be disapplied. This mirrors the application of human rights as *ordre public* in some systems of private international law already, in particular the right to a fair trial.³⁰ It also echoes Alex Mills’ conception of the confluence of private and public in international law, with rules formerly seen as the province of private international law operating as constitutional coordinators in the international system, although my conception is of wider application.³¹

How might this work in practice? Unfortunately, good examples from existing practice are hard to come by. But the indirect application by the English courts of human rights to widen the scope of existing horizontal relations offers some cases. Consider the case of press interference with privacy discussed at the outset of this dissertation.³² Privacy is considered to be a public law concept in English law. However, once a relational link has been established between the parties, then the court can consider the human rights aspects self-referentially. This is precisely how the English jurisprudence has developed – although a cause of action, usually in contract for e.g. breach of confidence, is required to invoke the right, privacy is then balanced against the newspaper’s right to freedom of expression and the public interest in having the article published.

2. Context-Specific Justice: Legal Origin

Of course, this is not the end of the story, for as we have seen human rights as a partial account may not apply in cases of comparative injustice, and reciprocity alone does not articulate the response. In such a case, the reading of comparative standards must be contextual. Indeed, this

²⁹ Radu Mares, ‘Defining the Limits of Corporate Responsibilities against the Concept of Legal Positive Obligations’, (2009) 40 *Geo. Wash. Int’l L.R.* 1157 at 1217

³⁰ See J.J. Fawcett, ‘The Impact of Article 6(1) of the ECHR on Private International Law’ (2007) 56 *ICLQ* 1

³¹ Mills (n 18) at 224 et seq.

³² See the Preliminary Chapter, p.**Error! Bookmark not defined.**

entails explicit recognition of Alex Mills' conception of justice pluralism as an explicit justice function of private international law, providing 'a set of tools which order and preserve the existence of diverse norms by minimising the potential for regulatory conflict'.³³ The aim is a 'determination (or 'meta-justice') that a source of regulatory authority may 'justly' be brought to bear on a dispute',³⁴ and what norm may or should take priority.

Let us return first to torts, and the prior discussion on different justice designs for tort law. Take the New Zealand system of strict liability once more. Although within a single nation-state, justice considerations are important *ex ante*, in order to decide the proper distribution, in a transnational scenario they become relevant *ex post* in order to decide which rule should best regulate a conflict, or how a rule should be applied. For example, if a strict liability system backed by compulsory insurance is designed to do the work that in another system would be provided by, say, a universal health system backed by taxation, then application of these norms in a transnational setting detached from its original context could produce perverse results. This is in some ways a similar problem to that addressed by the American governmental interest analysis of conflict of laws. It could be said that the concern in cases like *Babcock v Jackson*³⁵ was to prevent the application of the Ontarian law out of context which would frustrate a regulatory balance otherwise applicable to the parties.

What then, of private international law when it is brought into the mix, as might very well be the case in a transnational case? There are two stages to this enquiry, jurisdiction to hear the case, and the rules which should be applied. However, the classic distinction, that jurisdiction is procedural and applicable law substantive would not seem to hold water as it once did. *In concreto*, substantive questions may affect the need for assert or deny jurisdiction, such as the possibility for obtaining evidence from a parent company located in its home-state.³⁶ When it comes to applicable rules, the policy considerations I have sketched above must be brought into play. In order to bring this down to a more concrete level of reasoning, I want to illustrate my argument through some of the cases that have arisen in England against Cape plc., for its asbestos mining operations in South Africa. Cape plc., the parent company, was incorporated in England, but conducted its operations in South Africa through a subsidiary. Consider first *Lubbe et al v Cape*,³⁷ discussed in chapters 1 and

³³ Mills (n 18) 302

³⁴ *ibid*, 303

³⁵ 12 N.Y.2d 473 (N.Y. 1963)

³⁶ Baxi (n 22); Joseph, 2004

³⁷ [2000] 1 WLR 1545 (UKHL)

2. It will be recalled a large number of claimants brought a group action in England against Cape plc for asbestos-exposure injuries sustained while working at the South African mines. Cape sought to have the claim dismissed on the grounds of *forum non conveniens*, i.e. that the English courts should decline their jurisdiction in favour of the South African courts, South Africa being the most appropriate forum to hear the case. The House of Lords refused, applying the ‘substantive justice’ doctrine as part of the test for *forum non conveniens*, on the basis that South Africa did not at that time have a developed system for dealing with class actions or group litigation.

Following the House of Lords judgment, the case settled, and so the question of what rules to apply was never decided. Let us therefore take a second look at *Chandler v Cape*.³⁸ As the action was brought by an English-resident defendant employed by an English subsidiary of Cape plc on English territory, the issue of applicable law did not therefore arise, *stricto sensu*. However, the court considered that Cape plc. owed the claimant a direct duty of care on the basis that it assumed responsibility for health and safety policy and imposed that policy on its subsidiaries. This is crucially important, because *Lubbe v Cape* was pleaded on precisely the same basis (indeed, it is quoted in the House of Lords judgment), and it has been suggested by others that *Chandler* offers a route for transnational liability as well.³⁹ Such an approach potentially circumvents the operation of the applicable law rules altogether, alleging as it does a direct tort – *within jurisdiction* – by the parent company. But is that right? Let us speculate for a moment that *Lubbe* had not settled, and that South African law in fact laid down a much higher standard of health and safety standards than English law. Although the parent company may be the only entity able to meet the huge liabilities of a group action, on a strict understanding of private international law it would only be held to the lower standards of English law despite the harmful effects of its activities affecting only South Africa.

A consideration of the justice aims of the South African policy, and the interests it seeks to protect, would point to the South African law being applicable. First, let us return to first principles. Our TNE, Cape, is operating in South Africa although based in England. It owes obligations as a British citizen of sorts, and as an economic operator on South African territory. As such, there is a tie of reciprocity and solidarity as sketched in Part I between it and the South African population (and even more so for its employees) that would appear to be largely independent of the individual nation-state contexts of Britain and South Africa. When it fails to respect relevant standards (be

³⁸ [2012] 1 W.L.R. 3111, (EWCA)

³⁹ Andrew Sanger, ‘Corporations and Transnational Litigation: Comparing Kiobel with the Jurisprudence of English Courts’ in AJIL Agora: Reflections on Kiobel, (Jan 2014) AJIL Unbound e-23

they adopted by Cape itself or laid down by legislative will) and thereby causes mass harm to a class of the South African population (as for the 3000 claimants in *Lubbe*), it negatively affects a number of fundamental entitlements of that population. Unless Cape is held to the highest standard of protection potentially applicable (be that under English tort law, as in the original case, under South African law as in our counterfactual example, or by its own voluntarily adopted policies as in *Chandler*), one of those fundamental ties of transnational mutual obligation will be violated. In the case of English law, because the benefit of Cape's exploitation is largely or wholly expropriated from the South African victims who pay the cost, justifying that the English standard be applied since it is the English economy that benefits. In the South African case, it is because Cape has violated its obligation as an economic operator to respect the context in which it does business, and has therefore directly upset the justice equilibrium laid down by the South African State. In the case of voluntary adopted policies, it is because it has made a direct commitment to all within its sphere of influence to respect a particular level of safety throughout its operational reach irrespective of national boundaries, which will be reflected in its increased costs of operation and the price charged to buyers on the open market, salaries paid to employees, etc.

Another example which may be given is the French criminal case against Total for the Erika disaster. The Paris court of appeal adopted a very interesting position in the case by using the internal vetting procedures – adopted by Total on a voluntary basis as part of its internal regulatory regime – to serve as a basis for its criminal liability.⁴⁰ In essence, the voluntary procedures offered a means of examining Total's 'internal' appreciation of its duty to inspect. The fact that it had not followed them provided a basis for the court to find a crime of negligence or lack of care.⁴¹ This is almost the criminal law counterpart to *Chandler v Cape*.⁴² Where a negligence standard for criminal responsibility exists, it may be possible to refer not only to such procedures as the company has adopted, but also to look at the standards they would be expected to meet both in local law and the law of the forum, since either may offer indicative factors as to whether there is a reckless or negligent act.

⁴⁰ Cour d'appel de Paris, 30 mars 2010, unofficial version of the arrêt available at http://lexinter.net/JPTXT4/JP2005/arret_cour_d%27appel_erika.htm (accessed 20 Feb 2015); <http://www.environnement-france.fr/0331-cour-appel-paris-confirme-erika> (accessed 20 Feb 2015) (this part of the judgment essentially confirmed by the Court of Cassation: French C.Cass. Crim., 25 September 2012 (N° 10-82938))

⁴¹ Art. 121-3 French C.Pénal: 'Il y a également délit, lorsque la loi le prévoit, en cas de faute d'imprudence, de négligence ou de manquement à une obligation de prudence ou de sécurité prévue par la loi ou le règlement, s'il est établi que l'auteur des faits n'a pas accompli les diligences normales compte tenu, le cas échéant, de la nature de ses missions ou de ses fonctions, de ses compétences ainsi que du pouvoir et des moyens dont il disposait.'

⁴² Above (n 38)

III. Constructing Transnational Justice: Elements of a Framework

The above principles obviously apply differently depending on at which stage they are invoked. In this sense, my proposed framework necessarily mirrors the traditional tripartite structure of private international law: jurisdiction, conflict-of-norms, and recognition and enforcement. This is not an attempt to impose private international law dogma on public international law, but rather a recognition that ‘private international law might be better able than its public counterpart has been so far (for all its ‘global constitutional’ turn) to articulate a political project for the global governance of private power with a horizon of transcendence’.⁴³ It also recognizes the essential reality of modern transnational relations: the challenge to the law of jurisdiction presented by the TNE; the normative contestation – or conflict of norms – it entails; and the essential limit of such contestation – the need to enforce judgments in different (territorial) spaces.

Thus, although framed in the traditional, tripartite, private international law methodology, these elements of a framework seek a broader application. Through the re-grounding in cosmopolitan relational principles, and by appeal to the international justice hierarchy just discussed, they are intended to apply to all laws which purport to regulate TNE conduct: domestic, international or truly transnational.

1. Jurisdiction

As explained above, the focus on reciprocal, transactional links between the parties leads to the conclusion that there is equal sovereignty in the resolution of a dispute wherever a State is within the TNE’s sphere of influence: *viz.* where transactional or corporate presence means it receives a benefit or suffers a burden of TNE operations broadly conceived. This implies both an opening up and restriction on the exercise of jurisdiction. Jurisdiction is opened up in that it goes beyond the home-state/host-state typology, admitting the involvement of other interested states. It is restricted in that it does not admit for universal jurisdiction – in this sense, it respects Cybichowski’s contention that universality is illegitimate unless justified⁴⁴ and reflects countervailing notions about extraterritoriality. The limit is always tied to the extent of TNE operations. Thus a small enterprise, operating in, say, three countries (suppose for example, it has its headquarters in country A, manufactures goods in country B, and sells those goods in countries A and C) will not

⁴³ Horatia Muir Watt, ‘Private International Law: Beyond the Schism’ (2011) 2 *Transnational Legal Theory* 347 at 355

⁴⁴ Sigismond Cybichowski, ‘*La compétence des tribunaux a raison d’infractions commises hors du territoire*’ (1926) RCADI II, 251

risk suffering from this opening up of jurisdiction except in those three countries to which it has a clear connection. A larger enterprise, with global supply and/or distribution chains, however, will through its decision to do business in those markets, attract a greater number of jurisdictional claims.

The opening-up entails recognition of the neutrality of competing claims to jurisdiction and an emphasis on the so-called “private interest factors” in the U.S doctrine of *forum non conveniens*, for example. As with the current English test, emphasis needs to be on doing justice between the parties, and practical and procedural limits of a particular jurisdiction, not on a misplaced idea of the clash of sovereignties. It avoids the problems of excessive comity which – as Baxi has shown – entails not the respect of foreign sovereigns as much as the ‘conferment of *sovereign* powers on multinational enterprises’.⁴⁵ Thus issues such as evidence collection, funding arrangements, and so on, are the only permissible self-imposed limits on jurisdiction.⁴⁶

A practical example of a step in this direction might be found in the judgment of the Ontarian court of appeal in the *Lago Agrio* saga.⁴⁷ In the case, the Lago Agrio plaintiffs are seeking enforcement of the Ecuadorian judgment in Canada, and it was argued before the Superior Court and the Court of Appeal that Canadian courts have jurisdiction due to the presence of Chevron’s Canadian subsidiary. The Court of Appeal accepted this argument. In its concluding section, it stated:

‘as a condition of obtaining a dismissal of the plaintiffs’ claims, Texaco (Chevron’s predecessor) made promises and gave undertakings to the court, including (a) a promise to accept service of process in Ecuador and not object to the civil jurisdiction of a court of competent jurisdiction in Ecuador, and (b) recognition of the binding nature of any judgment issued in Ecuador,... Once the Ecuadorian courts made their decisions, Chevron chose not to abide by them. Indeed, Chevron sought and obtained a global injunction from a New York federal district court barring the enforcement of the Ecuadorian judgment in any court in any country in the world...

In these circumstances, I cannot agree with the motion judge that the Ecuadorian plaintiffs’ recognition and enforcement action in Ontario is an “academic exercise” and would be “an utter and unnecessary waste of valuable judicial resources.” In these circumstances, the Ecuadorian plaintiffs do not deserve to have their entire case fail on the basis of an argument against their position that was not even made, and to which they did not have an opportunity to respond. In

⁴⁵ Baxi (n 22), 405-6

⁴⁶ There is an obvious exception to this, sovereign immunities, which raises very different questions and is beyond the scope of my framework.

⁴⁷ *Yaiguaje v. Chevron Corporation*, 2013 ONCA 758 (CanLII)

these circumstances, the Ecuadorian plaintiffs should have an opportunity to attempt to enforce the Ecuadorian judgment in a court where Chevron will have to respond on the merits.⁴⁸

Although the court was careful to make clear that as an enforcement case this raised different questions to a case of jurisdiction *simpliciter*, it nonetheless shows an openness to asserting a regulatory claim over – at least part of – a dispute, due to the sole presence of Chevron’s subsidiary.⁴⁹

There are two limits to my principle of jurisdiction: denial of justice and core crimes. I argued that my framework avoids the legitimacy problems of universal jurisdiction, but it does not negate it. I do not seek to argue that universal jurisdiction over TNEs for the most serious breaches of international criminal law either cannot or should not be dealt with through an expression of universal jurisdiction. All I claim is to agree with the general position that universal jurisdiction requires additional justification in order to be exercised; that justification may exist in the case of, e.g. a *jus cogens* violation or an international core crime.⁵⁰ But I do not consider it necessary to enter that debate here as my jurisdictional principle does not depend on it. The two can easily coexist.

Denial of justice, however, presents a more difficult proposition. Where a State is within the sphere of influence, but not directly affected, and the States which might be expected to exercise primary jurisdiction refuse to do, it may be arguably justifiable to rely on so-called vicarious jurisdiction, as discussed in chapter 5 and elsewhere.⁵¹ But this may not prevent any or all denials of justice and does not constitute a true *forum necessitatis*. However if my principle is adopted as above it is difficult to see much practical scope left for *forum necessitatis*, since there will usually be a State with jurisdiction. One example where there might not is of course in conflict zones or where the only State with apparent jurisdiction suffers from endemic corruption of its judicial system, for example. In the first case, there is no obvious bar to the exercise of jurisdiction by public international law as it was applied in *Lotus*. The second however may require greater justification that is not provided by my framework as it stands, since in my reconception it remains an exorbitant ground of jurisdiction. The State seeking to intervene has no direct regulatory interest in the dispute. As with

⁴⁸ *ibid*, at [64] – [70]

⁴⁹ Although it remains to be seen whether the Supreme Court of Canada will take the same view when it hears the appeal.

⁵⁰ See e.g. Claire Bright, ‘L'accès à la justice civile en cas de violations des droits de l'homme par des entreprises multinationales’ (PhD thesis, EUI 2013)

⁵¹ Benedict S. Wray & Rosa Raffaelli, ‘False Extraterritoriality? Municipal and Multinational Jurisdiction over Transnational Corporations’ (2012) 6(1) H.R. & I.L.D 108

universal jurisdiction, however, that is not to say that such intervention cannot be justified in legal terms, merely that it is beyond the scope of the framework presented here.

2. Conflict-of-Norms

When it comes to the resolution of substantive normative conflicts, regulatory equality and wider reciprocity dictates a comparative evaluation of the norms in context. The actions of the TNE are not neutral – voluntary adoption of standards, and internal regulations which provide for a higher standard than the laws of the countries with an interest should *prima facie* be applied. Where the conduct in question also constitutes a violation of a universally or internationally recognized human right, the law or applicable standard which offers the highest standard of protection should be applied since to do otherwise violates the bounded reciprocity discussed earlier.

This also avoids the *effets pervers* of regulatory competition between host-states, when coupled with the indifference of the orthodox approach to extraterritoriality. It promotes legal certainty, since TNEs know that as a condition of doing business, when it comes to human rights they will be held to the highest applicable standard. And it avoids exceptionalism, since where a situation is local it means the highest applicable standard will still be appreciated in a judicial environment with which the TNE is familiar, and in the context of local understandings. It is thus, to use the term of Baxi, a “glocal” application; human rights and relations are global, but the application is localized, if nonetheless ensuring bounded uniformity in application.⁵²

In a case of pure comparative injustice, there is still the potential for the application of the highest applicable standard, but the essential legitimizing character of human rights as the expression of international justice standards has disappeared. Here the methods of private international law, and in particular interest analysis, come in to play, in coordinating the overlapping regulatory interests of competing normative regimes. As before, voluntary adoption of standards and other applicable non-state regulation in which the TNE can be construed as a participant, rule the roost. Beyond that, competing rules must be evaluated in context. Perhaps the best example of the application in to a comparative injustice case is in the hypothetical example sketched above using elements of *Lubbe* and *Chandler*.

Peu importe whether this the appreciation of context is done as an *in concreto* evaluation of competing regulatory interests in order to choose the applicable norm *a priori* or afterwards, in evaluating whether the chosen norm achieves the aims of *ordre public*. In this sense, *ordre public* operates as an

⁵² Baxi (n 22), 338

essential and important limit. On the one hand, it includes the perception of a rule's aim and considers whether (i) that aim is met and (ii) whether meeting that aim is compatible with the fundamental public policy of the forum. If either condition is unsatisfied then it is legitimate to apply the *lex fori* instead. Human rights also plays a role here, as an essential constituent of *ordre public*. If a comparative analysis concludes that a conduct which is not prohibited by the forum and is by the other norms in conflict, this will still be inapplicable if it would be incompatible with human rights.

3. Recognition & Enforcement

Finally, recognition of judgments from other forums – be they other States' courts or non-state tribunals – plays an essential role in mediating conflicts. Again, this is both to provide effective implementation of regulatory equality in practice, by allowing for recognition of judgments across the sphere of influence of the TNE, and as a brake on adjudicatory excesses which do not meet the standards of justice sketched above through the mechanism of *ordre public*. *Lago Agrio* again offers a striking example of this, since fraud is perhaps one of the clearest cases where a judgment may be deprived of its underlying legitimacy.

Conclusions

The elements of a framework presented here are far from comprehensive. This is not a complete theory of justice, nor even a complete framework. Rather it is an attempt to move in the direction of such, which can in any event only be achieved in practice by the adoption and refinement of principles such as the above by adjudicators, and to a lesser extent policy-makers.

To recapitulate, my argument is essentially three-fold. First, although justice as a moral concept has tended to focus on institutional design or individuals, it can inform our understanding of transnational obligation in the case of corporate action. Second, justice is not only a moral concept but informs our legal understanding as well, and consequent obligations of mutuality find their echoes in the legal theory of transnational law. Third, in order to construct a meaningful theory of justice for transnational law, it is necessary to consider the nature of obligations in the moral sphere, as well as the originating justice aims of the rules and laws which interact in a transnational dispute.

Moving from those wider considerations to legal principles, it is clear that the changed nature of relational linkages between TNEs, stakeholders and victims necessitates a re-evaluation of methods for applying norms in a contested legal space, and for resolving normative conflict. This plays out in practice through recognition of the regulatory equality of States within a TNE's sphere

of influence, leading to the widening of available fora but not in an unlimited fashion. Second, it provides a methodology for resolving substantive normative conflicts through an examination of the regulatory context, including international human rights both as a standard and as international *ordre public*. Finally, it requires that at the stage of recognition and enforcement, *ordre public* again operates as an essential check on excesses of regulatory zeal incompatible with international and domestic *ordre public* while assisting in the implementation of adjudicated standards.

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