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### Corporate liability for environmental harm

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## **Corporate Liability for Environmental Harm**

Amanda Perry-Kessaris\*

This chapter explores issues of special relevance to corporate liability for environmental harm. The term environmental harm is employed in a broad sense, including damage to human, animals, plant life, water, soil and so on. Where relevant, a distinction will be drawn between liability for harm to the environment, and liability for damage to human interests which result from harm to the environment.

The first half of the chapter explores some essential conflicts between the legal structure of corporations, and the desire of regulators and victims seeking to hold them liable for their environmental harm. The corporate form is a construct of national legal systems. The specific structure and operation of corporations varies globally, but the basic components are legal personality, limited liability, transferable shares, management by a board and ownership by investors (Hansmann and Kraakman, 2004, pp. 1, 5-15). Of these, it is a corporation's legal personality and limited liability which are of particular relevance to the topic of liability for environmental harm. The former ensures that corporations enjoy many of the same rights as human beings, and some of the responsibilities, but no allowance is made for the fact that they have no soul. The latter affords corporations with substantial opportunities to restrict and even avoid liability for their environmental harm.

The second half of this chapter explores what progress has been made at the international level towards ensuring that corporations are liable for their environmental harm. Corporations, like other non-state actors, have a somewhat fuzzy status under the law of nations. Corporations are primarily the objects, rather than subjects, of the international legal system. They may benefit from certain aspects of international law, such as the provisions of bilateral investment treaties, and there are some international fora in which MNEs have the right to participate, such as the North American Free Trade Association (NAFTA), but in general, corporations must rely on states to advocate on their behalf. However, being an object is not all bad, for it also tends to shield one from being a carrier of liability. Perhaps because states are chary of the prospect of squaring up to corporations and hobbling their own businesses with the costs of their externalities, the general principles of international environmental law, including the polluter pays principle, have not been 'explicitly addressed to enterprises' (OECD, 2000, Commentary para 37).

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# 1 What is so special about corporations?

## 1.1 Unnatural personality

The corporation was invented as an entity into which investors could place their capital, and from which those investors could derive their share of profits, but which would protect those 'shareholders' from the full extent of financial liability arising from the activities of the corporation (See Blumberg, 1993, Chapter 1). The aim was to enable investors to pool their assets and take on bigger or otherwise riskier, projects. In Anglo-American terminology, the corporate form acts as a 'veil' to shield the investor. All that the shareholder stood to lose when a company falls is the investment they have made in the company itself, as well as expected profits from the shares. The corporation could flounder to bankruptcy without dragging the shareholders' personal finances down with it. This facility proved popular and, 'by the early twentieth century, corporations were typically combinations of thousands ... of broadly dispersed, anonymous shareholders' (Bakan, 2004, p. 14).

But the law was now faced with a problem. These shareholders were too weak, individually or collectively, to influence the manner in which companies were managed. From a legal perspective, there was a need to identify 'some other person to assume the legal rights and duties firms needed to operate in the economy' (Bakan, 2004, p. 15). The solution was to vest the corporation itself with legal personality:

[T]hrough a bizarre legal alchemy, the courts fully transformed the corporation into a "person" with its own separate identity...and empowered, like a real person, to conduct business in its own name, acquire assets, employ workers, pay taxes, and go to court to assert its rights and defend its actions (Bakan 2004, p. 16).

The attribution of legal personality to corporations has created its own problems. The law provides to corporations the rights of humans, but it cannot rely upon corporations to be constrained by the internal moral and social checks and balances that are natural to most humans. Indeed, Joel Bakan has observed that, as a consequence of its legal structure, the typical corporation (as distinct from its executives and shareholders) shares the characteristics of a psychopath. Corporations, like psychopaths, are 'singularly self-interested and unable to feel genuine concern for others'. They 'often refuse to take responsibility' for their actions and are 'unable to feel remorse.' They are 'manipulat[ive]', 'grandiose', interact only 'superficially', and are able neither to 'recognize nor act upon moral reasons to refrain from harming others' (Bakan, 2004, p. 56-7 and 60).

The psychopathic tendencies of the corporation pose particular challenges to the environment—a resource which only the most selfless and charitable of human beings tend to be prone to preserving. For example, Union Carbide, has demonstrated a remarkable degree of self-involvement and callousness in its response to 1984 Bhopal disaster, in which toxic gas escaping a factory run by its subsidiary caused thousands of people died, and ruined the lives of hundreds of thousands of individuals. Until it was amended in 2004, Union Carbide's website described the incident in the following, alternately self-pitying and coldly calculating, terms:

'The Bhopal sabotage tragedy, caused by actions of a disgruntled Indian employee, continues to be a source of anguish for Union

Carbide... Disbursement to victims of the \$470 million settlement, paid in February 1989 to the Indian government, proceeds slowly... The State Government [of Madhya Pradesh] determines that there were 40 victims with permanent total disability and 2,680 persons with permanent partial disability; 1,313 persons with temporary disability from permanent injury and 7,172 persons with temporary disability from temporary injury; 18,922 persons with permanent injury with no disability and 173,382 persons with temporary injury with no disability; 3,828 deaths; and 155,203 who came in for medical examination had no injury' (Union Carbide Bhopal Website up to 2004).

The Bhopal disaster illustrates that the legal and business downsides are often not significant enough to prevent corporations from first causing environmental harm, and then evading liability for it.<sup>1</sup> Legal systems tend to convert liability for environmental harm into fines payable to regulators, or into tort damages payable to victims. So in the corporate calculation, environmental harm becomes a cost along with all the others such as the price of raw materials, shipping, human resources and so on. The legal imperative for a corporation to maximise shareholder value ensures that its 'predatory instincts' are curbed only by a 'pragmatic concern for its own interests' (Bakan, 2004, pp. 60-1). So, corporations require constant reminding and encouragement to honour environmental considerations and, crucially, these reminders must be delivered in the corporation's mother tongue: profit maximisation and shareholder value. In some cases, it is possible to rely upon the good conscience of a company's shareholders as a check on environmental malpractice by a company. But, as the Union Carbide example suggests, sometimes these shareholders are themselves 'psychopathic' corporations.

## 1.2 Corporations as multinational shareholders

At the beginning of the last century, the US states of New Jersey and Delaware lead a further transformation of the corporate form, by dispensing with the requirement that corporations be constrained in their purpose, duration and location. The rules governing mergers and acquisitions were liberalised and cross ownership between companies was allowed. This series of reforms was mimicked across the US and abroad, and corporations became ever larger and more complex, forming themselves into corporate groups and then multinational enterprises (See Blumberg, 1993, Chapter 3).

The environmental liability—or lack thereof—of multinational enterprises (MNEs) has been of increasing concern to national and international commentators, policy makers and civil society actors in recent times has been. MNEs are composed of corporations or other entities, which are established in more than one country, and which are linked, whether by contract or

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<sup>1</sup> See the BBC Bhopal Website <http://www.bbc.co.uk/bhopal/>; Union Carbide's Bhopal Website <http://www.bhopal.com>; Galanter, M. (2002), 'Law's Elusive Promise: Learning from Bhopal' in Likosky, M. ed. *Transnational Law and Legal Process: Globalisation and Power Disparities* Butterworths, 172-83; and Muchlinski (1987) 'The Bhopal Case Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors' 50 MLR 545.

equity (share ownership), in such a way that they are able to co-ordinate their activities. The purpose of adopting the form of an MNE is to maximise 'shareholder value'. Profits (value) can be maximised by cutting costs, increasing revenues, or both. Foreign countries can help in this process by acting as an additional market for the goods and/or services produced by the firm; or by acting as a cheaper, better quality or more accessible source of the inputs (labour, raw materials) required by the firm. Firms can access these benefits that foreign countries can provide in three ways: trading with the country (possible contract MNE); licensing the production of goods in that country (possible contract MNE); or investing directly in that country (equity MNE). For example, Nike is formed of a US parent company, range of wholly and partly-owned subsidiary companies scattered across the globe. Furthermore, some of Nike's suppliers, shippers, retailers and service providers are connected to Nike by long term contracts. To the extent that these contracts introduce an element of control by Nike over the other entity, the latter can be regarded as part of the multinational *enterprise* (although not the corporation) that is Nike (see Nike Website). Attention to this issue is generated by a number of, sometimes contradictory, factors.

### 1.2.1 Power and influence

One factor which causes MNEs to be at the heart discussions about environmental harm is the perception that they occupy a powerful position—in terms of finance, information, tactics, mobility, influence and so on—relative to national governments and their regulatory agencies. A positive spin on corporate power places MNEs in an unrivalled position to disseminate good environmental practice internationally, in their own practice and through their participation in professional networks, 'regardless of actual levels of governmental regulation' (Muchlinski, 2007, pp. 1001). On the other hand, a negative spin on the power of MNEs highlights the fact that public sector mechanisms, whether national or international, may not be up to the task of monitoring and punishing powerful MNEs for the environmental harm that they cause. Each company that makes up a multinational enterprise 'is subject variously to the laws of each and every state in which it does business' (Wallace, 2002, p. 11. See also OECD, 2000, Preface, Para. 7),<sup>2</sup> so the idea that MNEs are necessarily beyond the reach of regulators and victims is somewhat of a myth. That said, whether states award their regulators and victims the powers necessary to touch MNEs, whether regulators and victims choose to exercise those powers, and how MNEs respond to such efforts are important determinants of the practical extent of liability of MNEs.

For example, a weak environmental law system might be attractive to an MNE, and a state might choose to implement such a regime precisely in order to increase foreign investment. Firms choose whether to trade, license or invest and where to do it based upon the combined forces of what John Dunning called ownership, internalisation and location advantages.<sup>3</sup> Having

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<sup>2</sup> National legal systems tend not to refer directly to multinational enterprises, but they sometimes contain provisions to govern certain aspects of the relationships within groups of companies (Wallace, 2002, p. 165).

<sup>3</sup> An ownership advantage is a characteristic of the firm that places it at an advantage as compared to other firms – for example, Ford excelled in the early automobile industry by introducing a particularly efficient process for

identified ownership and internalisation advantages to be exercised, a firm will trade, invest or license in places with the most significant location advantages. For example, a country may have a better supply of skilled workers, natural resources or joint venture partners (See Dunning, 1993). There is concern that an MNE might also regard lax environmental regulation as such a location advantage, and that this might trigger a 'race to the bottom' in environmental standards as states try to attract MNEs.

Finally, MNEs are often perceived to have a heightened influence—whether positive or negative—over the environment. For example, they may be engaged in environmentally sensitive sectors, such as the extraction of natural resources; or their activities, although not inherently sensitive, may be conducted on an especially large scale, or in a region hitherto unspoiled by any industrialisation. Conversely, MNEs are often singled out for 'their ability to develop new environmentally friendly technologies and management practices', since they may be located at the cutting edge of these fields (Muchlinski, 2007, pp. 1001).

### 1.2.2 Jurisdictional challenges

Another reason why MNEs are a focal point for discussions about environmental liability is the fact that while their activities cross international boundaries with some degree of freedom, the ability of states to legislate and adjudicate over them is somewhat constrained. States generally do not legislate over acts performed outside of their territory, by those other than their nationals, because to do so challenges the sovereignty of other states.<sup>4</sup> Similarly, courts continue to experience difficulties in establishing, and then choosing to exercise, jurisdiction to adjudicate over cases involving acts which occur abroad.<sup>5</sup> For example, the question of whether the English courts should exercise jurisdiction over the UK-based Cape Plc. in relation to asbestosis caused by its South African subsidiary generated a series of unusually vacillating decisions in the High Court, Court of Appeal and House of Lords (*Adams v. Cape Asbestos*, 1990 and 1991). The final decision was that the English courts had jurisdiction and would exercise it, and this offers hope for future litigants. But 'literally hundreds of victims died' during the 'prolonged and fierce skirmishing' over the issue of jurisdiction in this case (Meeran, 2003, pp. 218 and 224).<sup>6</sup> Furthermore, this somewhat limited

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the production of the Model T car. An internalisation advantage may occur when it is clear that the costs associated with doing business ('transaction costs') by direct investment would be lower than the costs associated with doing business by trade or licensing. For example, it may be that transport costs are such that it is cheaper to manufacture a car in its end market, rather than trading (exporting) the car; or the costs associated with losing control over the manufacturing process by licensing production by another, make direct investment a better option.

<sup>4</sup> The great exception to this rule is the United States. See, for example, The Cuban Liberty and Democratic Solidarity (Helms Burton) Act 1996 and the international outrage it caused.

<sup>5</sup> For a recent review of extraterritorial adjudicative and prescriptive jurisdiction see De Schutter, 2007.

<sup>6</sup> For an assessment of judicial reasoning in the Cape cases, see

progress in relation to jurisdiction over human victims of ecological damage does not imply progress in relation to jurisdiction over cases brought by environmental activists in relation to solely ecological damage (Ong, 2001, p. 701).

One important innovation which has helped foreign claimants to get around legislative and adjudicative jurisdictional barriers in the United States is the creative use of the Alien Tort Claims Act (ATCA) of 1789.<sup>7</sup> The ATCA simply states that '[t]he district courts *shall have original jurisdiction* of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States' (Emphasis added).<sup>8</sup> The practical effect of the law is to convert the breach, in a foreign jurisdiction, of a fundamental principle of international law into a tort under US law. This then allows the foreign victim to make a claim in US courts for damages and other civil remedies which would be unavailable under international law. Importantly, it has recently been confirmed that there is no requirement that the foreign victim exhaust remedies available in their home state before approaching the US courts (*Sarei v. Rio Tinto PLC*, US 9<sup>th</sup> Circuit CA, 12 April 2007, p. 4172).

Initially, the courts converted into torts only those acts which were seen to violate peremptory norms (*jus cogens*) such as the bans on torture, genocide, war crimes, and slavery (*Tel-Oren v Libyan Arab Republic*, US, 1984). Later the courts allowed that, although it was important to be cautious, other international standards might also be converted under the Act, so long as they were 'of international character accepted by the civilized world and defined with specificity' (*Sosa v. Alvarez-Machain*, 2004, pp. 30-1, per Justice Souter. See Mank, 2007). Environmental harms were not considered to be covered by the Act, until the 2006 decision of the Ninth Circuit of the US Court Appeal in *Sarei v. Rio Tinto Plc*. In that decision, the court allowed present and former residents of Papua New Guinea to bring an action against Rio Tinto, a British headquartered multinational mining corporation alleging that the latter had dumped mining waste which eventually contaminated international waters, contrary to the United Nations Convention on the Law of the Sea (UNCLOS)—a treaty which the United States has not ratified. However the status of international environmental law under the ATCA remains somewhat precarious.<sup>9</sup>

No final judgement has been delivered by the US courts against a corporation in respect of a claim under the ATCA. However, some ATCA cases against corporations have been settled, and some are pending at the time of writing. For example, three ATCA actions have been initiated in New York between

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Muchlinski, 2000.

<sup>7</sup> Also referred to by the Supreme Court as the Alien Tort Claims Statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>8</sup> The law may originally have been intended to indicate that piracy would not be tolerated (Human Rights Watch (US), ACTA Campaign website).

<sup>9</sup> The case was returned to a lower court for consideration. For an update on progress, check for new versions of Mank's (2007) paper available on SSRN.

1996 and 2004 alleging that various individuals and companies connected to Royal Dutch/Shell were complicit in acts of torture, detention and execution in Nigeria of various civil society actors, most famously, Ken Saro-Wiwa in 1995 (*Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson, Wiwa v. Shell Petroleum Development Company*). The courts have accepted that they have personal and subject matter jurisdiction in the cases, but ten years since their initiation, the cases remain mired in the discovery process.

### 1.2.3 *Limited liability and corporate groups*

The principle of limited liability allows corporations, including those which form part of a multinational enterprise, to mitigate their exposure to any liability which they may attract. Regulators and victims of environmental harm are just two types of ‘involuntary creditor’ to whom a company might be indebted. The veil of incorporation shields shareholders from personal liability to creditors. If there is no money in the company to pay a fine or damages, then there will be no payment, regardless of the wealth of the shareholders.

Importantly, there was no effort to reassess the principle of limited liability in light of the fact that shareholders might now be corporations, rather than humans. Philip Blumberg has observed that in the US, corporate groups were awarded limited liability by ‘historical accident’, by the unthinking application of the kind of formalistic logic that was typical of judicial decisions at the time. ‘Limited liability protected shareholders’, and ‘a parent corporation was a shareholder of the subsidiary. Ergo, limited liability protected parent corporations.’ This line of reasoning not only ‘ignored economic realities’, it also ‘made a mockery of the underlying objective of the doctrine.’ An enterprise could ‘fragment’ its business into a number of corporations, and the principle of limited liability would protect each fragment from the liabilities of the other. Limited liability of corporate groups has become ever-more problematic, and the challenge of responding to it has become ever-more complex, as enterprises have adopted a multinational form, and their liability has become divided across many tiers of companies operating in different jurisdictions. ‘Modern law has faced the challenge of responding to the consequences of this unwitting choice ever since’ (Blumberg, 1993, p. 59).

One reason why it might be important to trace liability back to a parent company or other constituent entity of an MNE is that they may be the only entity with enough assets available to compensate victims or pay fines. This objective takes on a particular moral urgency in cases where an MNE has been deliberately structured in order to limit its ability to pay up. Sometimes shareholders ‘shift assets out of risky operating companies precisely in order to minimize their potential...liability’. So, ‘to the extent that the corporate form insulates shareholders from tort damages or fines, shareholders are free to opt out of the laws that control the negative externalities of production, including ... environmental law, and tort law generally’. There have been some efforts to restrict the ability of MNEs and national corporate groups to mitigate their liability in this way, but they have tended to be limited and unsuccessful (Hertig and Kanda, 2004, p. 76).

Most efforts to address the more perverse effects of limited liability for MNEs (and domestic corporate groups) focus on connecting *liability* for a given harm to the entities within the enterprise which had some form of *control* over the



perpetrator of the harm. An MNE is essentially 'a single enterprise composed of a number of affiliated business establishments, each functioning simultaneously in different countries, and typically characterised by centralized control and decentralized decision-making...' (Wallace, 2002, p. 156). The *legal form* of an MNE is determined by the combined forces of its own 'internal rules', such as the articles of association of its constituent companies, and the 'external rules' of the national legal system within which those constituent companies or other entities are based. The *managerial organization* of an MNE will be 'influenced by', but 'not always coincident with' legal form (Wallace, 2002, p. 159-61). For example, within an MNE, a (legally separate) parent company may have substantial managerial control over its subsidiary. That control may flow through various ties such as share ownership, representation on the Board, or the ability to affect the financial status of the subsidiary.

MNEs for their part naturally prefer to loiter demurely behind their many corporate veils, and work tirelessly against efforts to apply enterprise liability. For example, the US-based Union Carbide Corporation formed a multinational enterprise with the ill-fated Bhopal plant at the time of the disaster. It explains its relationship with the plant in the following careful terms:

The Bhopal plant was owned and operated by Union Carbide India, Limited (UCIL), an Indian company in which Union Carbide Corporation held just over half the stock. The other stockholders included Indian financial institutions and thousands of private investors in India. The plant was designed, built and managed by UCIL, using Indian consultants and workers. In 1994, Union Carbide sold its entire stake in UCIL to MacLeod Russell (India) Limited of Calcutta, and UCIL was renamed Eveready Industries India, Limited (Eveready Industries). As a result of the sale of its shares in UCIL, Union Carbide retained no interest in — or liability for — the Bhopal site ... (Union Carbide Bhopal Website, as at April 2007).

'Union Carbide [UC] merged [in 2001] with a subsidiary of [Dow Chemicals] and became a wholly-owned subsidiary of [Dow]. Dow purchased all shares of UC stock but UC continues to exist as a separate legal entity with its own assets and liabilities. Stockholders are not responsible for liabilities, if any, of companies in which they have invested' (Union Carbide Bhopal Website up to 2004).

The task for regulators and victims of environmental harm is to uncover relationships of control in the business practices of MNEs, and then to construct a legally acceptable reason for using this *de facto* control to establish *de jure* liability. But this difficulty is far from insurmountable in the presence of political will. In the US, there have been a number of movements towards an 'enterprise liability approach' to corporate groups, including MNEs. These have tended to be achieved under the auspices of a somewhat clumsy 'piercing the veil jurisprudence', as well as some loose references to the principles of agency. For example, groups of companies are increasingly asked to file 'unitary' tax returns, placing each entity's activities in the

broader context of the group (Blumberg, 1993, Chapter 5). In the environmental field, US law<sup>10</sup> imposes on strict and far reaching liability on parent companies and other institutional shareholders for the environmentally harmful acts of their subsidiaries under the so called 'Superfund Act'—the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 1980.<sup>11</sup> However, it seems that in practice the Act had done little to erode the principle of separate legal personality. 'While both the scope and nature of corporate environmental liability has undoubtedly expanded under CERCLA, US court decisions have generally proved consistent with traditional corporate law doctrine'. Despite much 'expansive' judicial rhetoric, where liability has been extended to a corporation's officers, shareholders or parent, the direct 'involvement' of that actor in a 'wrongful act' has been 'key to the imposition of liability' (Ong, 2001, p. 703). And in many other jurisdictions, and particularly in cases with a trans-national element, regulators and victims of environmental harm are limited to pursuing impoverished decentralized entities, unable to trace liability back to the legally separate, but practically connected and morally responsible, controlling entity at the centre of the MNE.

## 2 The international regulatory scene

Despite the popular attention devoted to the relationship between MNEs and the environment, and the clear appetite for international standards evidenced in the *Rio Tinto* case and elsewhere, relatively little international law is directed towards ensuring that corporations are directly liable for environmental harm.<sup>12</sup> Far more common are voluntary initiatives.

### 2.1 The Global Compact

In recent years, much emphasis has been placed upon the role of 'corporate social responsibility' (CSR) as a tool for regulating the impact of corporations on the environment. A key international milestone in this field occurred in 1999, when Kofi Annan called upon business leaders at the World Economic Forum to join the UN and civil society organisations in a voluntary initiative to support progress on environmental and social issues. By the spring of 2007, the resulting 'Global Compact' claimed 'over 3,800 participants, including over 2,900 businesses in 100 countries around the world' (Global Compact Website). These businesses join with participants from UN Agencies, civil society actors and labour organisations to form what can be described as a network of support for certain principles. Of the ten Principles which form the basis of the Compact, three relate to the environment.<sup>13</sup> These are that

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<sup>10</sup> For a review of corporate liability for environmental harm in a variety of other domestic jurisdictions see Ong, 2001, pp. 703-6.

<sup>11</sup> For an insight into the operation of the Act, see the US Environmental Protection Agency Superfund Website.

<sup>12</sup> But note that if a treaty applies to all 'persons', it is necessary to check whether the term includes not only 'natural' but also 'legal' persons, which would include corporations. See for example the Bamako Convention on the ban of the import into Africa and the control of transboundary waste within Africa, 29 January 1991 (Clapham, 2006, p. 267).

<sup>13</sup> The remaining seven principles relate to human rights, labour,

businesses: 'should support a precautionary approach to environmental challenges' (Principle Seven); 'undertake initiatives to promote greater environmental responsibility' (Principle Eight); and 'encourage the development and diffusion of environmentally friendly technologies (Principle Nine).

Some regard the Compact itself as a particularly vacuous contribution to an already vacuous concept. For some, the very notion of CSR—of searching for a corporate soul—is absurd or even repulsive (Corporate Watch, 2004). Organisations such as Christian Aid, who have in the past supported CSR initiatives, are now 'calling on governments to resume their duties' (Clapham, 2006, p. 195). Joel Bakan dismisses CSR as 'an oxymoron'. Even if corporations were not hardwired to be psychopathic, it would still be strange to think that they were best placed to regulate their own behaviour. 'No one would seriously suggest that individuals should regulate themselves, that laws against murder, assault and theft are unnecessary because people are socially responsible' (2004, p. 110). And corporations are even better programmed than humans to privilege their own self-interests. The legal duty to maximise shareholder value forces corporations to be 'an externalizing machine', dumping the environmental costs of its activities on other actors (Bakan, 2004, pp. 60-1). For this reason, 'corporate social responsibility is in fact illegal—at least when it is genuine' (Bakan, 2004, pp. 37 and 109. See also the CORE Website).

The Global Compact itself makes no mention of the polluter pays principle or other reference to liability for environmental harm. This can hardly be a surprise, since the initiative is entirely voluntary and considerations such as the precautionary principle tend to conflict with the 'entrepreneurial, risk-taking culture' of business (Amnesty International, 2004, p. 10). However, those who sign up to the Compact are required to submit reports as to their social and environmental impact, and this opens up interesting possibilities.

In the last decade, activists have had some success in attaching liability to corporations via their more disingenuous uses of the corporate social responsibility bandwagon. For example, in the late 1990s, Nike engaged in a publicity campaign to counterbalance allegations that its suppliers were in breach of labour standards internal to Nike, and of the laws of the South East Asian countries in which they were based. Marc Kasky brought an action in the courts of California alleging that in the course of the campaign Nike had made six misrepresentations as to its activities, namely:

- (1) "that workers who make NIKE products are . . . not subjected to corporal punishment and/or sexual abuse;"
  - (2) "that NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours;"
  - (3) "that NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions;"
  - (4) "that NIKE pays average line-workers double-the-minimum wage in Southeast Asia;"
  - (5) "that workers who produce NIKE products receive free meals and health care;"
  - (6) "that NIKE guarantees a 'living wage' for all workers who make NIKE products."
- In addition, the

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and anti-corruption.

complaint alleges that NIKE made the false claim that the Young report proves that it "is doing a good job and 'operating morally.' "

Kasky argued that, by allegedly misrepresenting its actions in this way, Nike was in breach of various consumer and trading standards regulating Californian businesses and professions (*Marc Kasky v. Nike Inc. et al.*, 2000, California Court of Appeal). The California Supreme Court found in favour of Kasky, but the matter was settled after an appeal by Nike to the Supreme Court.<sup>14</sup> It is easy to imagine how a future claim might seek to make a corporation liable for lying about environmental harm for which it is responsible. In the UK, the Advertising Standards Agency has been used in similar ways, although with no financial impact. For example, the Agency agreed with Friends of the Earth that there was insufficient evidence to support a claim, made in an advert released by Shell shortly after the execution of the activist Ken Saro-Wiwa, that most oil spills from Shell facilities were caused by local saboteurs (Friends of the Earth Press Release, 10 July, 1996). Regulators have not called for Shell to tidy up the mess, just that they not lie about its origins. It is remarkable that lying to consumers carries more penalties than the environmental harm itself—such is the importance of information in contemporary society and economy.

## 2.2 The OECD Guidelines

The OECD Guidelines for Multinational Enterprises are altogether more explicit than the Global Compact about the fact that corporate hearts need a financial jump-start. They emphasise that '[s]ound environmental management is...both a business responsibility and a business *opportunity*'. They observe that good environmental practice can secure a mixture of economic (lower operating and insurance costs, greater access to capital and customer satisfaction), legal (reduced compliance and liability charges), environmental (improved energy and resource conservation) and social (improved community and public relations) benefits (OECD, 2000, Commentary para. 31. Original Emphasis). But, in the end, it remains necessary to ensure that those responsible for running corporations are convinced that being environmentally friendly 'costs less' than causing environmental harm—either because being environmentally friendly is cheap, or because causing environmental harm is expensive. Environmental harm can only be expensive if it has consequences such as lost sales and/or investment, or because they will be made comprehensively liable for it. This requires that consumers and investors be far thicker on the ground, or that environmental liability be more keenly targeted on the relevant parts of MNEs, than they are at present.

The OECD Guidelines themselves are voluntary standards, negotiated and agreed by national governments in 1976, which have included a reference to environmental considerations since 1991. The Commentary accompanying the OECD Guidelines emphasises that they consciously 'draw upon, but do not completely mirror, any existing instrument' (Commentary para 38):

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<sup>14</sup> Under the settlement, Nike agreed to pay a \$1.5 million—about half of one day's advertising budget—to an industry-dominated labour standards organisation (Reclaim Democracy Website as at March, 2007).

The text of the Environment Chapter broadly reflects the *principles* and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration). It also takes into account the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters and reflects *standards* contained in such instruments as the ISO Standard on Environmental Management Systems (OECD, 2000, Commentary para. 30. Original emphasis).

Chapter Five of the Guidelines relates specifically to the environment and states that

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development (Chapter 5).<sup>15</sup>

It goes on to list a number of ways in which MNEs 'should' limit the risk that environmental harm will occur as a result of their activities, and mitigate the effects of any environmental harm which does occur. It states that MNEs should '[m]aintain contingency plans for preventing, mitigating, and controlling serious environmental...damage from their operations...; and mechanisms for immediate reporting to the competent authorities' (Chapter 5, para. 5). Furthermore, MNEs should be governed by the precautionary principle, and should 'not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage' (Chapter 5, para. 6). The 'basic premise of the Guidelines is that enterprises should act as soon as possible, and in a proactive way, to avoid, for instance, serious or irreversible environmental damages resulting from their activities' (Commentary para 38). In this context, the task of the Guidelines is not to 'reinterpret any existing instruments or to create new commitments or precedents on the part of governments', but 'to recommend how the precautionary approach should be implemented at the level of enterprises...' (Commentary para 39).

But the most glaring hole in the Guidelines for the purposes of the present chapter is that, beyond the comment that fines can be avoided by good environmental practice (Para. 31), there is no mention of *liability* for environmental harm. However, to the extent that a corporation claims to uphold the Guidelines, but in fact fails to do so, there may be space for a Krasky-Nike style challenge.

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<sup>15</sup> Other provisions also emphasise the need for MNEs to 'contribute' to 'environmental progress with a view to achieving sustainable development' (OECD Guidelines, 2000, General Policies, para. 1). Similarly, the 1999 OECD Principles of Corporate Governance states that the board of a company has a responsibility to 'implement systems designed to ensure that the corporation obeys applicable laws, including ...environmental...' (Section V).

What the Guidelines offer in lieu of liability is naming, which may eventually lead to shaming, in the form of lost sales or investment, ethical investors and shoppers willing. Thus, naming may lead a company voluntarily to decide to remedy the damage that they have caused. While this is not equivalent to accepting liability—indeed, such agreements are often accompanied by a statement of non-liability—it can be regarded as a measure having an effect in some respects equivalent to liability.

One conduit for naming is the system of National Contact Points (NCP) introduced in 2000. Countries adhering to the Guidelines are charged with establishing NCPs to aid in the implementation of the Guidelines. An important function of the NCPs is to

‘contribute to the resolution of issues that arise relating to implementation of the Guidelines in *specific instances*. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law’ (OECD, 2000, Procedural Guidance, Part C. Emphasis added.).

Table 1 sets out all ‘specific instances’ reported by the OECD which were described as involving environmental issues. The first point to note is they are few in number. In some cases, NCPs have been successful in resolving ‘specific instances’ of environmental harm by MNEs. For example, in 2002, Marine Harvest, a Chilean subsidiary of the multinational enterprise NUTRECO, was accused by the NGOs Friends of the Earth (The Netherlands) and Ecoceanos (Chile) of ‘not observing certain environmental and labour recommendations’. The Chilean NCP mediated the discussion between these and other actors, and issued a report. Most of the Report’s recommendations were accepted by the parties and the OECD notes that the ‘case had an important impact on the country and above all on the regions where the units of the enterprise are established’ (OECD, 2006, p. 5).

However, the varying success of NCPs can be illustrated by reference to two Canadian examples. In 2001, the Canadian NCP was notified of the ‘impending removal of local farmers from the land of a Zambian copper mining company’, co-owned by a Canadian company and a Swiss company. The removal was expected to infringe upon, among other things, the environmental Chapter V of the Guidelines. The OECD reports that ‘[w]ith the Canadian NCP acting as a communications facilitator, a resolution was reached after the company met with groups from the affected communities’<sup>16</sup> (OECD, 2006, p. 5). On the other hand, a complaint in 2002 by a Canadian labour organisation regarding the fact that Canadian companies were engaged in business in Myanmar, a country which does not adhere to the Guidelines, was less successful. The NCP was unable ‘to bring the parties together for a dialogue’ (OECD, 2006, p. 5). NGOs have tended to criticise NCPs as being inaccessible to those who wish to register complaints, and unduly opaque in their dealings (Clapham, 2006, pp. 208-9). These complaints

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<sup>16</sup> The final communication sent by the Canadian NCP to the Canadian company is available at [http://www.ncppcn.gc.ca/annual\\_2002-en.asp](http://www.ncppcn.gc.ca/annual_2002-en.asp).

are especially significant given the extent to which the Guidelines rely on naming as a regulatory mechanism.

*Table 1: Environmental issues considered by National Contact Points to June 2006<sup>17</sup>*

Year	NCP	Subject	Host country
2001	Canada, Switzerland	Copper mining	Zambia
2002	Canada	Doing business in non-adhering country	Myanmar
2002	Chile, The Netherlands	Animal and fish feed	Chile
2003	Sweden	Gold sector (Sandvik, Atlas Copco)	Ghana
2003	France	N/A	France
2003	France	Oil pipeline	Turkey, Azerbaijan, Georgia
2004	Belgium	Copper mining (ForrestGroup)	Dem. Rep. of Congo
2004	Belgium	Hydro-electric dam (Tractebel-Suez)	Laos
2004	Belgium	Financiers of pipeline (KBC, DEXI A, ING)	Azerbaijan, Georgia, Turkey
2004	Brazil	Dam construction	Brazil
2004	France	Hydro-electric project	Laos
2004	Italy	N/A	Turkey, Azerbaijan, Georgia
2004	UK	Consortium led by British Petroleum	Azerbaijan, Georgia, Turkey
2005	Canada	Doing business in non-adhering country	Ecuador
2005	Chile	N/A	Chile
2006	Brazil	N/A	Brazil

### **2.3 The UN Norms**

The most recent development in the sphere of non-binding instruments relating to corporations and the environment is the UN Norms on the

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<sup>17</sup> This list does not include those instances or details which the OECD Secretariat chooses to withhold on the grounds that their release would prejudice the implementation of the Guidelines (OECD, 2006, Title page).

Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. These were approved in 2003 by the U.N. Sub-Commission on the Promotion and Protection of Human Rights, a body of independent human rights experts.

Section G relates specifically to 'obligations with regard to environmental protection'. It is broadly similar to the equivalent provisions in the Guidelines, and reads as follows:

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development (UN Norms, 2003, para 14).

The issue in respect of which the Norms represents an advance in the field is liability. The 'polluter pays' principle is not specifically mentioned in the text of the Norms. However it is implied by the following term:

Transnational corporations and other business *enterprises shall provide prompt, effective and adequate reparation* to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law (Para. 18. Emphasis added).

Furthermore, the Commentary relating specifically to the environmental provisions notes that businesses 'shall be responsible for the environmental and human health impact of all of their activities, including any products or services they introduce into commerce' (UN Norms, 2003, para. b of Commentary to G(14)).

Although non-binding, the Norms are expected eventually to have some legal effect for a variety of reasons. First, the Norms resulted from the kind of formal UN process of consultation which has produced soft law in other fields, are likely to be referred to by international legal bodies, and draw on existing international standards. Furthermore, they are 'self-consciously normative' in tone, framed in terms of what 'shall' than what 'should' happen (Amnesty International, 2004, pp. 6-7). In this vein, the Norms pay attention to the practical matter of implementation and enforcement, drawing on existing national and corporate mechanisms. For example, States are urged to 'establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises' (Para. 17). Companies are told to incorporate the Norms into their internal policy and into their contracts with other parties, and train their staff



to ensure that they are aware of the Norms (Para. 15). Where this occurs, there might be scope for activists to launch a Krasky-style attack on corporations which do not then uphold the Norms. Nonetheless, the Norms in no way secure corporate liability for environmental harm.

#### 2.4 Getting serious

A range of conventions seek to secure corporate liability for environmental harm in a small number of potentially harmful sectors. For example, companies operating in the nuclear industry are also subject to strict, albeit limited, liability under various specialist conventions (See Ong, 2001, pp. 698-9). Such regimes often include a collective fund for compensation financed by compulsory insurance. An example is the Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention), 1992, and its accompanying International Convention Civil Liability Fund for Compensation for Oil Pollution Damage (Fund Convention), 1992.<sup>18</sup> Under this regime, liability for damage caused from oil leaking or discharged from a ship after a collision is borne by the owner of the ship. Governments and regulatory authorities can be compensated for losses incurred 'for clean up operations of preventive measures'; while private actors, such as fishermen and hotel owners, can claim for damages resulting from the pollution, for example to their nets or to their trade. With very few exceptions, the ship owner's liability is strict. In the case of fault by the owner, that liability is also unlimited. The Fund Convention ensures that where compensation is not available from the owner, it can be obtained from a general fund (Secretariat for the International Oil Pollution Compensation Funds, 2007, p. 7).<sup>19</sup>

The broadest and most robust effort to date to address corporate liability for environmental harm is the Council of Europe's Lugano Convention on Civil Liability for damage resulting from activities dangerous to the environment (1993). This seeks, among other things, to ensure 'adequate compensation for damage resulting from activities dangerous to the environment...' (Article 1). Actions may be brought against the operator responsible in the national courts of the place where the damage was suffered, or where the defendant habitually resides, or 'where the dangerous activity was conducted' (Article 19(1)). The ability of corporations to strategically mitigate their exposure to damages is tackled by the requirement that States Parties for them obtain insurance (See, for example, Lugano Convention, Article 12). However, it is

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<sup>18</sup> These began life as the 1969 Convention on Civil Liability for Oil Pollution Damage, entered into force in 1975, denounced by many nations and amended by protocol to form the 1992 Convention, in force in 1996; and the 1971 International Convention Civil Liability Fund for Compensation for Oil Pollution Damage, which, due to denunciations, ceased to be in effect in 2002, and was replaced by the 1992 Convention, in force 1996 (Secretariat for the International Oil Pollution Compensation Funds, 2007, p. 1).

<sup>19</sup> Closely modelled on that 1969 Convention, the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, seeks to ensure that those who suffer damage as a consequence of oil leaking from ships' bunkers receive adequate compensation. The latter has yet to achieve the support necessary to enter into force.

perhaps testimony to the degree to which the treaty's title lives up to its content that it is currently languishing with just nine signatures.

On a more positive note, the Lugano Convention served as inspiration for Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. The damage covered includes direct or indirect damage to the aquatic environment, protected species and natural habitats, and contamination of the land which creates a significant risk to human health. Strict liability is imposed on operators for damage caused by inherently dangerous activities, and fault-based liability for damage caused by other activities. National regulatory authorities are to take the necessary action to impose liability, but members of the public can ask for action to be taken, and can challenge the action and inaction of regulators by judicial review (See Wijnants, 2005).

### **3 Conclusion**

There are significant theoretical and practical difficulties associated with imposing liability for environmental harm upon corporations, in particular those involved in MNEs. Their complex, transnational structures ensure that MNEs can be difficult to track, let alone pin, down. They can locate their facilities where environmental regulation is weak or not enforced; or, when faced with the threat of litigation, 'shop' for a forum in which their liability to victims is likely to be relatively low, or where court procedures are more likely to stall. When cornered, MNEs are often able to use the principle of limited liability to keep their resources out of the reach of creditors. But many of these difficulties are legal constructs. The corporate form is a legal construct and as such can be moulded, or even dismantled, by legal reform. Whether these difficulties are surmounted is to a large degree dependant upon the prevailing political wind.

The legal framework regarding corporate liability for environmental harm is much like a dusty patchwork quilt: quaint, custodian of much corporate history, but moth-eaten and prone to fraying under duress. In the absence of a robust international legal system, those who seek to hold MNEs to account for environmental harm have sought to use national law, such as the ATCA and trading standards, to give effect to international law and norms. But closing the gargantuan gaps through which MNEs are able to evade liability for environmental harm requires some more holistic national and international action.

States might try to take forward the Lugano framework, implementing and extending it. The home states of MNEs might challenge global objections to giving national legislation extraterritorial effect, and encourage greater enthusiasm among judiciary for exercising extraterritorial jurisdiction over entities registered in host states, and for pursuing their parent companies at home. Such options are complicated and would have legal, economic and diplomatic implications. But these surely weigh lightly against the ghastly, iconic wreckage of Bhopal, the Niger Delta and other sites of environmental harm.

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