

Jurisdictional arbitrage by multinational companies: a national law solution?

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This article suggests that innovative provisions in Albanian company law provide a promising initial framework for the future construction of multinational corporations' accountability for environmental and human rights abuses. Such robust national provisions hold out hope for overcoming the limitations and inhibitions presented by extraterritoriality, while exceeding the promise of universal jurisdiction, to offer a relatively detailed 'enterprise liability' construct in national company law.

Keywords: *Albanian national company law, Alien Tort Claims Act, enterprise liability, extraterritoriality, jurisdictional arbitrage, MNC power, neo-liberal market dominance*

1 INTRODUCTION

In 2008, I was privileged to be allowed to draft Albanian company law with a colleague.¹ This article will argue that deploying lessons from Albanian company law (if the Albanian model were to be suitably supplemented) holds out hope for lawyers and activists concerned to hold multinational companies (MNCs) accountable to legal standards. The Albanian model suggests that certain provisions of national law might provide an effective route both for constructing the environmental responsibilities of MNCs and for holding them to account for the environmental damage and human rights infringements that they cause.

A well-known and central difficulty concerning MNC accountability is that of 'jurisdictional arbitrage'. Frequently, in the case of environmental hazards, a parent company can hive out risky or dirty business abroad. Problematically, if there is a violation of the environment the subsidiary company will generally not be sued, either because the venture is in a state which is politically unstable and/or lacking in effective environmental regulation or enforcement practices, or because the subsidiary can be starved of finance by the parent and placed in danger of insolvency. Meanwhile, suing the parent company is problematic because each company in the MNC group is constructed as being completely separate. Each jurisdiction, moreover, has a limited jurisdictional reach, whilst, in effect, each company in the MNC group is insulated by the operation of the 'corporate veil' isolating the companies making up the group. In this sense, the MNC makes a particularly complex target for the imposition of liability: there is no single MNC 'entity', as such. Constructing a form of 'enterprise liability', however, would potentially mean that the whole MNC enterprise could be sued simultaneously, making it simpler to force the directors of each company to respect standards of environmental probity and any relevant fiduciary duties.

1. Dr Michael Blecher of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ: German International Cooperation).

I believe that national laws in the rich nations and the powerful blocks, particularly America and Europe, but increasingly in emerging states such as China, India, Brazil and Russia, are now the key to regulating MNCs' environmental and human rights duties effectively. The Albanian example implies that if states draft legislation to design directors' duties in parent and subsidiary companies as a whole (deploying an 'enterprise' concept of liability), this would significantly alter the operational culture of companies and thereby produce a more effective form of environmental and human rights liability.

The argument to be developed here will take the following approach: first, the problem of extraterritoriality will be examined; secondly, the promise of universal jurisdiction (as adopted by the United States Alien Tort Claims Act 1789 – perhaps the best known instance of national law deployed in the search for MNC accountability) will be explored and revealed as falling short of being an effective means of constructing MNC liability; finally, the case of Albania in the context of European Union (EU) enlargement will be offered as a particular framework of opportunity for the design of effective national laws constructing MNC accountability through the detailed design of national company law. The Albanian example will be used to suggest that such national approaches offer a powerful supplement to existing approaches (such as that recently suggested by Ruggie), and hold out considerable promise for improvement upon the status quo.

2 EXTRATERRITORIALITY: 'JURISDICTIONAL ARBITRAGE', MNC COMPLEXITY AND ACCOUNTABILITY FAILURES

Many scholars argue that MNCs are a central part of a system which exacerbates poverty and inequality.² The first decade of this century has not revealed a better world for the poor; rather, research shows that inequality has been rampant,³ and studies suggesting that powerful companies should have responsibilities towards the planet and to stakeholders other than shareholders are now legion.⁴ However, there are comparatively few arguments linking these problems to the structure of company law itself, and the links between MNCs, deepening poverty and the structure of company law have not yet been fully drawn.

While notions of corporate social responsibility and human rights provide powerful normative concepts and standards, they have not yet delivered the necessary degree of corporate accountability. The basic thesis of this article suggests that since sovereign states have jurisdiction directly to enforce law (unlike ('indirect') international law

2. J Dine, *Companies, International Trade and Human Rights* (Cambridge University Press, Cambridge 2005); A Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons' in M Kamminga and S Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer, The Hague 2000); J Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, New York 2004).

3. <<http://www.worldhunger.org/articles/Learn/world%20hunger%20facts%202002.htm>>, <www.oxfam.org.au/refugee/public/issues/.../statistics.php> (both accessed on 28 July 2011), United Nations Development Programme Report 2010.

4. For a few see J Zerk, *Multinational and Corporate Social Responsibilities: Limitations and Opportunities in International Law* (Cambridge University Press, Cambridge 2006); M Eroglu, *Multinational Enterprises and Tort Liabilities* (Edward Elgar, Cheltenham 2008); N Boeger, R Murray and C Villiers (eds), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008).

which normally deploys ‘soft’ standards), it may well be desirable to use national law as another lever for MNC accountability. The status quo, however, is rather complex and needs unpacking. The first point of clarification concerns the nature of MNCs, since it is not well understood that MNCs are not legal entities, *per se*.

2.1 Understanding the fictive nature of MNCs

Companies are legal *fictions*, and in order to understand the legal complexity that this legal fiction brings with it, it is necessary to start with an understanding of single companies. Companies are regarded as separate legal entities. They own their own property and bear their own liability in relation to contracts and to crimes or other wrongs. Importantly, a company is regarded as a legal person separate from its shareholders and managers. This is for several practical reasons: the company can continue to exist even if all its shareholders die or sell their shares; it can hold property in its own right and appear in front of a court in its own name. As a result, the shareholders will normally have *limited liability*.⁵ Limited liability is a limitation of risk that has enabled companies to play a vital role in, first, the industrial and, subsequently, the technological revolutions. Limiting the risk faced by investors operatively enabled the raising of large sums of money in order to fund large projects (such as railways and canals or the undertaking of expensive research and development into, for example, new medical treatments and drugs). The fact that shareholders knew with certainty the maximum amount they could lose in any given economic venture enabled them to calculate what they could afford to invest.

The growth of MNCs has been possible precisely because most legal systems regard one company holding shares in another in exactly the same way as if the company were a human individual shareholder.⁶ Most legal systems take no account of the reality of the accumulation of power represented by a large number of companies related by interlocking shareholdings, despite the fact that many companies are organised in a ‘group’ structure wherein control is exercised over a number of subsidiaries through shares held by a ‘parent’ company. While the simplest case is a hierarchy with 100 per cent shareholding by a parent company, there are numerous other ways of creating effective control of one company over others through a range of share structures and other contractual devices such as franchises and joint ventures.⁷

2.2 MNC accountability challenges

The fictive nature of companies gains a new level of complexity, therefore, in the case of MNCs, and the fundamental ‘non-existence’ of the MNC as an ‘entity’ is arguably

5. This means that once they have paid the price for their shares, shareholders are not obliged to contribute any more to the company even if the company has not enough money to pay all its creditors. (The only money available to pay the company’s debts is therefore the money owned by that company, and if it runs out, the creditors do not get paid.)

6. J Dine, *The Governance of Corporate Groups* (Cambridge University Press, Cambridge 2001); P Blumberg, ‘The American Law of Corporate Groups’ in J McCahery, S Picciotto and C Scott (eds), *Corporate Control and Accountability* (Clarendon, Oxford 1993).

7. EM Weitzenboeck, ‘Between Contract and Partnership: Dynamic Networks as Collaborative Contracts and More’ (PhD Thesis, Oslo University, April 2010).

intimately related to the problem presented by the extraterritoriality of national jurisdiction. Let us examine this a little more closely.

Each nation-state has equal sovereign power to regulate its territory and to enact its own laws. Companies are a legal *fiction*⁸ invented by national law. Each state possesses the power (and usually the exclusive power) to regulate the company and to enforce its liabilities. However, as has been suggested already, MNCs do not exist as an 'entity' defined or recognised by law. MNCs are, rather, complex structures made up of individual companies in a variety of interrelationships.⁹ While globalisation means that the world appears to be a smaller place, and while goods and people can move freely across borders, companies remain legally tied to the country where they are formed. The operation of equal sovereign power, moreover, normally means that regulations made in one jurisdiction, in the normal course of events, cannot have any impact on corporate liability in another. This is the problem of extraterritoriality. The fact that MNCs are series of companies formed in different national legal systems and tied together in various legal ways, either by holding shares in each other or by various legally binding agreements between them, presents genuine complexity. This complexity, moreover, is exploited by MNCs. There are numerous cases, for example, of parent companies exporting dirty and dangerous business to poor countries where regulations are minimal or unenforced; or of paying exploitatively low wages; and/or ignoring the environmental effects of corporate operations.¹⁰ Poorer countries, meanwhile, are often desperate for any foreign investment – and thus rendered especially vulnerable to such practices.

The practical implications of MNC complexity can be devastating. Suppose, for example, that damage is done to the health of employees of a company. The employees will find it difficult or impossible to claim against the local operator in some countries, especially if the legal system is structured to favour the MNC because of the need to attract foreign investment and/or if the legal system is corrupt or dysfunctional. Moreover, the layers of the corporate veil mean that the employees will find

8. Zerk (n 4); P Muchlinski, *Multinational Enterprises and the Law* (2nd edn Oxford University Press, Oxford 2007); Dine (n 2).

9. See the US Third Restatement, ALI 'Restatement of the Law, Third, Foreign Relations' at para 213: 'For purposes of international law, a corporation has the nationality of the state under the law of which the corporation is organised'. And on 'Multinational Corporations': 'The Multinational enterprise or corporation ... is an established feature of international economic life, but it has not yet achieved special status in international law or in national legal system. A multinational corporation generally consisted of group of corporations, each established under the law of some state, linked by common managerial and financial control and pursuing integrated policies.' See also Zerk (n 4) at 149–50.

10. Just some of them are, A Simms and D Boyle, *Eminent Corporations* (Constable and Robinson Ltd, London 2010); G Monbiot, *Captive State: The Corporate Takeover of Britain* (Macmillan, Basingstoke 2000); D Korten, *When Corporations Rule the World* (Kumarian, West Hanford, CN 1995); N Klein, *No Logo* (Picador, London 1999); N Klein, *Fences and Windows* (Picador, New York 2002); N Hertz, *The Silent Takeover* (Heinemann, London 2001); N Chomsky, *Profit over People* (Seven Stories Press, New York 1999); G Palast, *The Best Democracy Money Can Buy* (Pluto, London 2002); B Ehrenreich, *Nickel and Dimed* (Granta, London 2002); E Schlosser, *Fast Food Nation* (London, Penguin 2002); MP Toynbee, *Hard Work* (Bloomsbury, London 2003); W Hutton, *The World We're In* (Little Brown, London 2002); M Chossudovsky, *The Globalisation of Poverty* (Pluto, Halifax, Nova Scotia 1998); P Harrison, *Inside the Third World* (3rd edn Penguin, Harmondsworth 1993); M Hertzgaard, *Earth Odyssey* (Abacus, London 1999); J Karliner, *The Corporate Planet* (Sierra Club, San Francisco, CA 1997).

it impossible to claim against the foreign ‘parent’ company because it is a separate company, structured according to the laws of a different jurisdiction, and not *legally* responsible for the acts of other companies in the MNC group even if they are very closely tied together through share-owning or contractual arrangements. Drafting a law which encapsulates the complex range of legal structures of MNCs¹¹ presents an extremely intricate challenge, for, as we can see, each MNC is a complex of companies founded and governed by the commercial laws of different nation-states. The companies can be connected in a multitude of ways, by contract, by franchising agreements and by cross-shareholding, yet, despite this density of interconnection, there is no overall legal regulation of the whole commercial enterprise.

Only in very exceptional cases will the courts in developed countries break with general practice and ‘lift the veil’ – that is, look to the reality of the situation.¹² Perhaps the most egregious example of the problem of extraterritoriality was presented by the English case, *Adams v Cape Industries*.¹³ Several hundred employees of the corporate group headed by Cape Industries had been awarded damages for injuries incurred as a result of exposure to asbestos dust in the course of their employment. Many of them were dying an unpleasant and lingering death. The damages had been awarded by a court in Texas, but Cape Industries had no assets in Texas, so the claimants could get no monetary compensation there. The claimants sought to enforce the claims in England, where Cape had its head office and considerable assets. The English Court of Appeal held that the awards could not be enforced in England against Cape even though one of the defendants was a subsidiary of Cape’s and despite the fact that the group had been restructured in order to avoid liability. The purpose of restructuring, moreover, was blatant: The US subsidiary (which had been responsible for marketing in the US, North American Asbestos Corporation (NAAC)) was put into liquidation and ceased to exist. Instead, two new companies were formed: a company in Liechtenstein whose shares were held by a subsidiary of Cape, and an Illinois company (Continental Productions Corporation (CPC)) whose shares were held by the ex-president of NAAC. The two companies were also put in charge of US marketing. As a result of this, while there remained no *legal* link between Cape and CPC because Cape no longer held any shares, the reality was that the ex-president (who held all the shares) remained loyal to Cape’s interests and controlled CPC. Additionally, in the case of CPC, a new legal link was introduced to add to the chain which connected Cape to its marketing operation. These moves were clearly and openly intended to avoid liability for the outstanding claims for asbestosis injury which Cape knew were in the pipeline. Yet, Slade J reasoned that:

Our law, for better or worse, recognises the creation of subsidiary companies, which, though in one sense the creation of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities ... We do not accept as a matter of law that the court is entitled to lift the corporate veil as 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

11. See Zerk (n 4) at 51; Weitzenboeck (n 7).

12. Zerk (n 4): see at 55 for illustrative examples of veil-lifting legislation. Interestingly she uses the UK Company Law Act 1985, s751, to show that parents might be responsible for subsidiaries if the parent were a ‘shadow director’ (now superseded by the Company Law Act 2006).

13. 1990 BCLC 479.

legal liability (if any) in respect of particular future activities of the group ... will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this way is inherent in our law.

And

If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of the subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of *Salomon v Salomon* [1897] AC 22 merely because it considers it just so to do.¹⁴

Such a legal outcome is commonplace throughout the world. This means that companies can export potentially liability-attracting activities from the rich world to poverty-stricken areas where *any* sort of employment, including scavenging from rubbish tips, is welcome and there are fewer, or no, inconvenient checks on health and safety, environmental or labour standards. The fact that in theory the subsidiary company in the poor country could be held legally answerable there is, as we have seen, no comfort. Quite apart from the possibility of corruption or dysfunction in the relevant national legal system, two further difficulties arise. First, the parent company can simply cause its creature in the poor country to disappear by instructing it to liquidate and if necessary transfer any funds to the parent company, leaving the employees with a blank space: they have no company to sue – it has just disappeared. Secondly, regulatory controls are frequently bargained away, in any case, before the company agrees to set up a business.¹⁵ These realities mean that MNCs can play regulatory or jurisdictional arbitration, seeking out the jurisdiction with the fewest protections in order to maximise profit. This is the well-known ‘race to the bottom’, encouraged and protected by commercial law, just as the slave trade was in earlier times.¹⁶

There are some exceptions to the strict doctrine of national sovereignty, though they are rare (the MNC lobby keeps a tight rein on legislation).¹⁷ Perhaps the best instance of a law purporting to tighten MNC accountability is the Foreign Corrupt Practices Act (FCPA) in the US.¹⁸ However, this Act failed to deliver on the early promise of its preceding Bill. Zerk records that:

In relation to ‘foreign corrupt practices’, for example, an early proposal to apply legislation directly to foreign subsidiaries of US-owned countries was rejected because of concerns about ‘the inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of US companies in the direct prohibitions of the Bill’. ... This is despite concerns that a failure to extend the law to foreign subsidiaries would create a ‘massive loophole through which millions of bribery dollars would continue to flow’. A form of parent-based regulation of foreign companies is used instead: US parent companies can

14. The House of Lords ruled that each company is completely separate and individual and the shareholders were also not liable for the debts of the company. This pervasive doctrine, known as the ‘company veil’, means that shareholders have ‘limited liability’; they are only liable for the amount that they paid for their shares. Similarly, if a parent–subsidiary relationship occurs, each company in the group is not responsible for any debts or violations against any other company in the group.

15. Zerk (n 4) 57; and see S Joseph, ‘Taming the Leviathans: Multinational Enterprises and Human Rights’, 46 *Netherlands International Law Review* 171.

16. See Dine (n 2) chapter 3 detailing the commercial laws helping the slave traders.

17. Zerk (n 4) chapter 3.

18. 15 USC 78dd-1.

themselves be held liable under the Foreign Corrupt Practices Act (FCPA) for the acts of foreign subsidiaries outside the USA where the US parent company has authorised or directed 'corrupt payments' to be made.¹⁹

While the new Act is a significant step forward, it fails to live up to the promise of its Bill because disgorgement is the normal remedy, meaning that individual victims will not normally benefit from the legislation.²⁰ This suggests that the profits of redress for corporate malfeasance will accrue to the state, not individual victims, leaving a huge blank space in which individual victims will have no redress, particularly in tort cases.

Enforcement, as already implied, is in any case extremely complex. The problems are multiple. Extraterritoriality is one problem, but there is genuine difficulty in finding approaches able effectively to hold MNC power accountable. Often, for example, reliance is placed, unsuccessfully, upon soft power.²¹ In the field of corporate accountability, for instance, there is a widespread commitment to voluntarism, reflected in certain codes or principles and in the discourse of 'corporate social responsibility' (CSR), which still offers little in the way of direct enforcement despite its potential future promise for generating more diffuse forms of corporate accountability.²²

Zerk²³ has documented the range of methods used by society to address the most egregious violations of human rights by MNCs: methods deploying a wide variety of pressure points, including codes, norms, reports, boycotts and internet activism.²⁴ MNCs themselves, however, are becoming involved in the debate,²⁵ and opinion on the promise of such initiatives, including scholarly opinion, remains sharply divided. A genuine question concerns the continuing influence of the Anglo-American neo-liberal philosophy, with its rampant individualism and consumerism.²⁶ The neo-liberal, Chicago economic model values individualism over all ethical principles and rests upon rationality, efficiency and information. This theory posits that a person acting

19. Zerk (n 4) at 108.

20. DC Weiss, 'The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence' (2009) 30 Michigan Journal of International Law 471. Available at SSRN: <<http://ssrn.com/abstract=1319814>>.

21. Charlemagne, 'If Obama's America Can't Make Soft Power Work, What Hope Does Europe Have?' *The Economist*, 11 March 2010, 13: 26.

22. Although I have revised my assessment of Corporate Social Responsibility as a 'moral deflection device' (as put forward in *Companies, International Law and Human Rights* (Cambridge, Cambridge University Press 2007) (from Pogge's concept and born from frustration)), I now believe that the academic and NGO community has made significant inroads upon MNCs' violations such that it may be possible to enact a hard law in an international law context. However, this will be a slow process. Using national law could be another effective channel. See below.

23. See also, for example, A de Jonge, *Transnational Corporations and International Law* (Edward Elgar, Cheltenham 2011); S Bottomley and D Kinley (eds), *Commercial Law and Human Rights* (Dartmouth, Aldershot 2002); J Woodroffe, 'Regulating Multinational Corporations in a World of Nation States' in M Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer, The Hague 1999); S Skolgy and M Gibney, 'Transnational Human Rights Obligations' (2002) 24 Human Rights Quarterly 3 (August) 781. See also Dine (n 2) especially at 3–10.

24. Zerk (n 4) especially at 21 and 94–101.

25. *Ibid*, especially at 99.

26. UN Development Progress, *Human Development Report 1996* (Oxford University Press, New York 1994); Third World Network, 'A World in Social Crisis: Basic Facts on Poverty, Unemployment and Social Disintegration', *Third World Resurgence* (No. 52) 1994.

rationally will enter a bargain which will be to his or her benefit.²⁷ The most aggressive version of this model posits that a rational person seeks maximisation of her assets.²⁸ The whole structure of Western society is predicated on this hegemonic value system²⁹ and all individuals are enculturated with some version of the theory. Since companies are man-made, they are not immune from the prevailing culture. Because of this, ethical businesses and CSR initiatives are faced with a powerful contra-indication. It is, in the light of this, unsurprisingly that Zerk argues:

it is still extremely difficult to tell how far the core ideals of the CSR communities have become embedded in corporate culture. There is still plenty of scepticism within 'civil society' about the level of commitment of multinationals to self-regulatory schemes and social and environmental reform in general. Some multinationals have seen their environmental initiatives dismissed as 'greenwash', while others have been accused of using CSR-related initiatives as a way of diverting attention away from bad press elsewhere or as a tactical concession to avoid stringent legislation at some later stage.³⁰

CSR seems even more limited when placed against the background of the operation of limited liability and the weakness of international legal enforcement mechanisms. In international trade law, in fact, there are only World Trade Organization (WTO) enforcement mechanisms, widely seen as being counterproductive for the strengthening of labour conditions and for the protection of the environment.³¹ However, it may just be that the huge CSR effort to counter environmental and human rights transgressions by MNCs may be bearing some limited fruit, though the evidence remains difficult to assess. It has been suggested that CSR standards are slowly becoming part of a normal societal understanding, and that CSR norms are becoming 'harder' – a sort of middle way between hard law and 'voluntary' law.³² Braithwaite and Drahos, for example, argue that 'when many different types of actors use many dialogic mechanisms of this sort, both impressive regime-building and impressive compliance have been repeatedly demonstrated'.³³ This kind of accountability is arguably what Ruggie means when he uses a 'social licence'³⁴ concept for MNC accountability.³⁵ The search for effective accountability, particularly in the face of the challenges of

27. OE Williamson, 'Contract Analysis: The Transaction Cost Approach' in P Burrows and CG Velanovski (eds), *The Economic Approach to Law* (Butterworth, London 1981).

28. I Ayres and J Braithwaite, *Responsive Regulation* (Oxford University Press, Oxford 1992) at 23.

29. D Hares, 'An interview with Archbishop Rowan Williams', *Guardian Weekend* 9 July 2011: 'no one can any longer regard the free market as a natural beneficent mechanism, and now more sophisticated financial instruments have made it even harder to spot when the market's causing real hurt'.

30. Zerk (n 4) 100–101.

31. RL Revesz, P Sands and RB Stewart (eds), *Environmental Law, the Economy and Sustainable Development* (Cambridge University Press, Cambridge 2000).

32. J Braithwaite and P Drahos, *Global Business Regulation* (CUP, Cambridge 2000).

33. *Ibid.*, at 32.

34. UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises: Guiding Principles on Business and Human Rights Implementing the UN 'Protect, Respect and Remedy Framework' 2011* (New York, A/HRC/17/31, 2011).

35. Zerk (n 4) at 95. CSR norms are usually bottom-up concepts. Slaughter has suggested that international law should be replicated in a similar form including 'reordering [the] relative priority [of] sources of international order'. This will change the way that MNCs are viewed – any

extraterritoriality, however, goes on.³⁶ Ruggie's final report,³⁷ moreover, offers little to overcome the problem. His 'three pillars' (which mirror the 'protect, respect and fulfil' motif of human rights standards with 'protect, respect, remedies') and his focus on 'operationalizing' seem to produce an unsatisfying lack of effective sanctions or reparations.³⁸ Paragraph 25 of his report says that '[a]s part of the duty to protect against business-related human rights abuses, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy,³⁹ while paragraph 26 details the principles of judicial mechanisms. None of this, however, appears to amount to detailed, robust standards for effective MNC accountability, and extraterritoriality remains a stubborn barrier.

Extraterritoriality, as we have seen, is a key difficulty facing attempts to hold MNCs accountable for malfeasance, whether environmental or in relation to human rights abuses. The uneasy combination of attempts and relative failures to hold MNCs accountable remains troubling. There are two remaining alternative approaches that this analysis will now consider: the first is based on the concept of universal jurisdiction, and the second, more promising, is based on the idea of building a network of national laws enshrining 'enterprise' liability for MNCs.

3 UNIVERSAL JURISDICTION AND THE FALSE PROMISE OF THE ALIEN TORT CLAIMS ACT 1789

The 'revival' of the Alien Tort Claims Act 1789 (ATCA) as a way of challenging corporate abuses has been claimed as a 'beacon of hope' by human rights activists.⁴⁰ Unfortunately, even this beacon of hope has now been extinguished or at least significantly doused. In *Kiobel v Royal Dutch Petroleum*⁴¹ the judges by a majority said that a company could not be a sole defendant in a claim in an ATCA suit:

Plaintiffs assert claims for aiding and abetting violations of the law of nations against defendants – all of which are corporations – under the Alien Tort Statute ('ATS'), 28 U.S.C. § 1350, a statute enacted by the first Congress as part of the Judiciary Act of 1789. We hold, under the precedents of the Supreme Court and our own Court over the past three decades, that in ATS suits alleging violations of customary international law, the scope of liability – who is liable for what – is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States *inter se*, and because no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a

reorganisation must start from a perception that they are crucial in an international context: A Slaughter, 'A Liberal Theory of International Law' (2000) 94 American Society of International Law Proceeding 5–8 (April) 240.

36. Zerk (n 4) rehearses many initiatives taken by NGOs and parliamentarians and other groups attempting to address extraterritoriality issues – see 160–96.

37. <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> (accessed on 9 August 2011).

38. *Ibid.*

39. *Ibid.*, para 25.

40. Earthrights, June 29 2004, press release.

41. US Second Circuit Court, Judgment September 17, 2010, italics in original.

discernable – much less universally recognized – norm of customary international law that we may apply pursuant to the ATS. Accordingly, plaintiffs' ATS claims must be dismissed for lack of subject matter jurisdiction.⁴²

Despite this, the ATCA revival was valuable, because the minutiae of the processes reveal how complex extraterritorial claims are, how difficult it is to sue MNCs and the fact that no matter how 'common sense' the solution appears to outraged human rights and environmental activists, legal solutions remain elusive. It is important to emphasise that even when the ATCA boom was at full power, some of the claims of the NGOs were of dubious validity. There was undue optimism by some human rights commentators who read the legal precedents in their 'best' light – undue partly because court procedure leaves a final escape hatch in the hands of the defendants and partly because the ATCA is a civil suit in which defendants can settle the case, and thus avoid any formal declaration of liability. I would argue that it is wrong to call such settlements *victories* because the law has not been thereby developed to cover the instances of abuse forming the substance of the claim: there is no precedent for the future. Additionally, significant hurdles in procedural law are mostly tipped in the defendant's favour.

The lessons of the ATCA revival will be studied carefully in the future as other avenues are explored, and perhaps, for this reason, it remains valid to draw some hope from ATCA. At least the revival made MNCs aware how the social global community view their activities.⁴³ The reputational risks for companies were intensified, and there were some successes in gaining compensation for victims.⁴⁴ However, when the dust of the ATCA subsides I hope that the optimistic hype is not repeated in other spheres.

3.1 Problems with ATCA

Specifically, ATCA presents problems in four respects: (1) The substance of the action (i.e., the grounds of the complaint); (2) the human rights-based system which is predicated on the assumption that only states bear the relevant duties; (3) the concept of sovereignty (which as we have seen above, creates the space for MNCs to manipulate their parent–subsidiaries structure); and (4) the hurdles of domestic procedural law (as noted above). All of these factors combined in ATCA to make a toxic brew. The pitfalls of ATCA are useful touchstones against which to test future models of response to the challenges of MNC accountability. Indeed, some of these problems might be avoided in national law if enough states could be persuaded to enact legislation addressing groups of companies as an 'enterprise', though, arguably, the first (and fourth) problems will remain challenging even then.

The first problem concerns the substance of the action – or the substantive ground of the complaint. The judges in *Kiobel* found that only very restrictive grounds could be allowed and that there was an earlier precedent, *Sosa v Alvarez-Machain*,⁴⁵ in which the Supreme Court ruled that claims must be founded 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'.⁴⁶ This ruling

42. Ibid.

43. Zerk (n 4) 207.

44. Ibid, chapter 5.

45. Supreme Court June 29 2004, 124 Sct2739, 159 LEd2d 718 (2004).

46. *Sosa v Alvarez-Machain* Supreme Court June 29 2004, 124 Sct2739, 159 LEd2d 718 (2004). Souter J delivered the opinion of the Supreme Court, para 720.

has been interpreted to mean that the cause of action must be a breach of international norms recognised in the eighteenth century.⁴⁷ Prior to the *Alvarez-Machain* Supreme Court holding, courts had permitted suits for genocide, war crimes and crimes against humanity,⁴⁸ summary execution and cruel, inhuman and degrading treatment⁴⁹ and torture.⁵⁰ Perhaps it is unfortunate, therefore, that it seems that *Kiobel* presents something of a full stop for activists, though a Supreme Court appeal is expected in 2012.

In any case, it is, as has already been suggested, a mistake to see earlier cases as ‘successes’ in the full sense of the term. *Eastman Kodak v Kavlin*,⁵¹ for example, was a case in which the court denied the defendant’s motion to dismiss by holding that the alleged conspiracy between the private defendant and state actors which caused the plaintiff’s arbitrary and inhuman detention was justiciable under ATCA, but the case settled without any consideration of the substantive issues underlying the claim. *Bodner v Banque Paribas*⁵² presents a similar story. Claims against banks for aiding and abetting the Nazi and Vichy regimes by converting, looting and plundering assets belonging to plaintiff Jewish victims were permitted to proceed, but the case settled. Similarly, *Doe v Unocal*⁵³ settled although the terrible facts in that case came as close to providing a legal precedent as the ATCA has yet reached. (In that case, Burmese plaintiffs sued Unocal for working with the Burmese military to conscript forced labour, kill, abuse and rape citizens.)

All of these cases show how complex it is to found a complicity suit, no matter how damning the facts, as the lamentable tale of Royal Dutch Shell in Ogoniland reveals.⁵⁴ The case concerned the violent oppression of the Movement for the Survival of the Ogoni People (‘MOSOP’) in Nigeria in response to coercive appropriation of Ogoniland without adequate compensation, and the severe damage to the local environment and economy that resulted from Royal Dutch Shell’s operations there. The plaintiffs allege that the Government of Nigeria acted at the request of Royal Dutch Shell, which recruited the Nigerian police and military to suppress MOSOP and to ensure that defendants’ and Shell Nigeria’s development activities could proceed ‘as usual’. The corporate defendants provided logistical support, transportation and weapons to Nigerian authorities to attack Ogoni villages and stifle opposition to Shell’s oil-extraction activities. Ogoni residents were beaten, raped, shot and/or killed during these raids. In 1995, Ken Saro-Wiwa and John Kpuien were notoriously hanged after being convicted of murder by a special tribunal in the course of which Royal Dutch Shell allegedly bribed witnesses, conspired with Nigerian authorities to orchestrate the trial, and offered to free Ken Saro-Wiwa in return for an end to MOSOP’s international protests against Shell. During the trial, members of Ken Saro-Wiwa’s family, including his elderly mother, were beaten.

47. Richey quotes a Washington lawyer as saying ‘basically the high court said that if a [US] court were to find a cause of action, it would have to be as specific and as narrow as the causes of action that existed back in 1789’: W Richey, ‘Ruling Makes it Harder for Foreigners to Sue in US Courts’ *Christian Science Monitor*, 30 June 2004.

48. *Kadic v Karadzic* 70 Fed 3rd 140 (2d Cir 1995).

49. *Trajano v Marcos* 878 F 2d 1439 (9th Cir 1989).

50. *Xuncax v Gramajo*, 886 F Supp 162 (D Mass 1995), *Abebe-Jira v Negewo* 72 F 3rd 844 (11th Cir 1996), *Mehinovic v Vuckovic*, 198 F Supp 2d 1322 (N Ga 2002).

51. 978 F Supp 1078 (SD Fla 1997).

52. 114 F Supp 2d 117 (EDNY 2000).

53. 27 F Supp 2d 117 (CD Cal 1998).

54. *Wiwa v Royal Dutch Petroleum Co.*, 226 F 3d 88 (2d Cir 2000).

Zerk elucidates the central problem with ATCA: ‘A company can be liable under ATCA either if its activity amounted to “state action” in breach of the “law of nations” or where the obligation alleged to have been breached is ... applicable directly to a private individual or company under customary international law.’⁵⁵ The four tests on which ‘state action’ could be regarded as being founded (set out in *Freeport McMonRan*⁵⁶) – the ‘nexus’ test, the ‘symbiotic relationship’ test, the ‘joint action’ test and the ‘public function’ test⁵⁷ – were not regarded as being sufficiently made out by the facts of the Saro-Wiwa case – and reveal the extent to which the ATCA was a thin thread on which to hang legal accountability for MNC violations. Other routes are therefore necessary, but it is worth remembering that the hurdles typical of ATCA may well remain relevant and will require on-going critical attention.⁵⁸

3.2 ATCA as a distraction?

The publicity surrounding these ATCA cases has been beneficial in bringing to light gross violations of the rule of law committed by companies, but in the context of considering the utility of *legal* strategies, it is arguable that the concentration on the ATCA has diverted attention from the kind of fundamental reforms necessary in order to change legal regimes comprehensively. Diverting attention from such reforms has, moreover, proved beneficial to the violating companies as human rights activists have spent energy fighting on a difficult and somewhat flimsy platform rather than concentrating on changing the rules of international human rights law to establish that companies can be violators and to provide mechanisms for calling them to account. In particular, it is notable that there has been a relative lack of attention on supporting a complete rethink of our legal design of companies themselves. Arguably, an effective route to corporate legal accountability would be to use international human rights law to impose a duty on states to recognise that transnational companies should not be permitted to hide behind legal technicalities and to insist that jurisdictions should ‘lift the veil’ between parents and subsidiaries (and, if necessary associates too), thus permitting the whole of the enterprise to be held to account in whatever jurisdiction is most favourable to the plaintiffs. In expending so much energy on ATCA, this avenue has been little explored.

I will now consider the possibility of reinventing group law by establishing the ability to sue an MNC as an ‘enterprise’ in national law.

4 TOWARDS ENTERPRISE LIABILITY IN NATIONAL LAW – THE PROMISE OF ALBANIAN NATIONAL COMPANY LAW

The concept of ‘enterprise liability’ law is not new, although few scholars and fewer parliaments have considered amending group structures to allow MNCs to be held liable for social and environmental damage. Many academics have rehearsed the

55. Although this is possible, Kiobel has restricted this to individuals rather than companies. See fn 41, ‘no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernable – much less universally recognized – norm of customary international law that we may apply pursuant to the ATS’. Italics in original.

56. 969 F Supp 362 (ED) La 1997.

57. Zerk (n 4) 209–10.

58. *Ibid*, 211–12 and chapter 5.

old view that German law is the only significant ‘enterprise culture’ allowing ‘veil lifting’.⁵⁹ However, a window of opportunity opened for me when I was asked to be part of a two-person team drafting Albanian Company Law in 2008. Eventually the law was enacted,⁶⁰ but not without significant community involvement and complex negotiations.

The original impetus for the law came from the Albanian government’s wish to try to become a Member State of the European Union. This, of course, involved extensive legislative changes and was part of a wider plan to enlarge the EU. The Balkan states were to become capitalist democratic nations, and, as part of this process, the entire economic and legal underpinning of the state needed to be reinvented. This reinvention was particularly problematic in the context of commercial law because of deep philosophical divisions between Anglo-American neo-liberal theory and the continental European social market model. These divisions, moreover, invoke a wide range of issues, including social equality, environmental degradation and employment, all of which are crucial for company law drafting and for legislation concerning groups of companies: that is to say, the design of a definition of an MNC.

This complexity implies that the EU enlargement project needs to be re-evaluated from a bottom-up perspective – that is to say, from the point of view of the implementation of new laws at the national level. In respect of this, two important factors must be borne in mind. First, tensions at the level of foundational principles must be fully taken into consideration; and secondly, the detailed possibility of drafting a new law of groups must be considered – and in particular, the utility of this for the enforcement of MNC liability for environmental and social harms. It will be suggested in this article that consideration of these two factors implies that change is best implemented by careful national drafting rather than by transplanting laws from elsewhere. It is suggested that the EU enlargement process can provide a template revealing the complexity and the various layers to be uncovered if a national group law is to be fashioned in other jurisdictions.

4.1 Foundation-level tensions

The attempt of the EU to enlarge the number of Member States proves a fascinating study.⁶¹ Enlargement is a lengthy process in which there are enormous challenges demanding deep compromises. The EU has managed to design a complex process through which to allow new laws to incorporate the principles of the EU *Acquis Communautaire*, but the process is fraught with difficulties at every level. The *Acquis* itself is controversial in its scope, and there are significant political, economic and social tensions which mean that the EU as a project is debated endlessly.⁶² The EU is

59. J Dine, *The Governance of Corporate Groups* (CUP, Cambridge 2000) 55–62; Zerk (n 4) 51–6; CM Schmitthoff and F Wooldridge, *Groups of Companies* (Sweet and Maxwell, London 1991); F Wooldridge, ‘Proposed Reforms of the German GmbH’ (2007) 28 *Company Law* 381, and see also F Wooldridge, ‘Groups of Companies under Italian Law’ (2004) 25 *Company Law* 93; D Milman, *National Corporate Law in a Globalised Market* (Edward Elgar, Cheltenham 2009).

60. Albanian Law No. 9901 on Entrepreneurs and Companies 2008.

61. J Dine, M Koutsias and M Blecher, *Company Law in the New Europe, the EU Acquis, Comparative Methodology and Model Law* (Edward Elgar, Cheltenham 2007).

62. M Cremona (ed), *Development in EU External Relations Law* (OUP, Oxford 2008); S Seligmann, *Desperately Seeking Europe* (Archetype Publications, London 2003).

uncertain of its aims, objectives and identity – not least whether as an entity it is an economic market or a social institution.⁶³ From the economic and social perspective there is a clear rift, moreover, between the neo-liberal economic understanding of the way that markets work (which is crudely encapsulated in the Washington Consensus⁶⁴) and the more social market model in Germany, France, the Netherlands and the Scandinavian nations of the EU.⁶⁵ The recent enlargement of the EU, which brought in ex-communist states (combined, however, with the effects of the global recession in 2008 and the Eurozone crisis), has exacerbated these tensions. In the global political sphere it is necessary to remember such tensions and division, even when more modest projects are mooted, because such conflicts of fundamental philosophies are likely to occur in a range of mundane contexts, including that of legislative drafting. Moreover, these tensions will emerge at various points in the following discussion, and have great underlying relevance for the challenges faced in drafting national commercial law.

4.2 EU expansion and transition drafting in an unequal market place

A number of states wishing to join the EU have agreed to sign up to the arduous, tortuous process of becoming a full member. One of these states is Albania, which is a potential candidate country for EU accession following the Thessaloniki European Council of June 2003. During the accession process, candidate states have to accept the fundamental principles of the EU (though they remain contentious) and to implement reform to model their laws on EU legislation. Commercial laws are crucial for the candidate's success because the EU believes that commercial, and therefore company, law is a key determinant of the economy.

Many of the regulations that made the European market system strong were compromises between different concepts, values and influences. German and French laws had stronger roots in community-based regulations, while UK law, particularly UK company law, tends to elevate the primacy of contractual relations. For some reason, many scholars think of company law as a dry speciality focusing on technicalities of complex regulations, but the reason that the European Company (*Societas Europaea*)⁶⁶ was so difficult to draft was precisely because of the interaction between the differing social theories of Member States and their underlying philosophies. In order fully to appreciate this point, one must consider the role of commercial law in a market economy.

The role of commercial law is to allocate risk. I first began to understand the cultural and political nuances related to risks when involved in a project in Russia, and later, more completely, while drafting laws in transition economies.⁶⁷ In Russia, I was with a team of lawyers from France, Germany, Spain and England. It became clear to us that our difficulties in communicating with our Russian counterparts was more than just language-based. The Russians were approaching the law from a perspective that

63. Dine, Koutsias and Blecher (n 62) chapter 1, 'The Political Challenges' at 20–27.

64. I Glinavos, *Neoliberalism and the Law in Post Communism Transition* (Routledge, New York 2010); Dine (n 2).

65. See the European Social Charter <<https://conventions.coe.int/treaties/html/163.htm>> (accessed on 23 June 2011).

66. Council Directive 2001/86EC and Council Regulation 2157/2001/EC.

67. Drafting company law in Serbia, Montenegro, Russia, Kosovo and Albania, often with a colleague, Dr Michael Blecher.

understood commercial law as a series of regulations attributing certain roles to individuals within the system, while we, as Western Europeans, realised that a move to a market economy meant making choices about which participant in market transactions would bear the greater risk. It eventually became clear to all of us that the move to a market economy from a controlled economy entails complex political questions, not only about which market participants shall bear the risk of market transactions, but, because of that, concerning the likely distribution of power and wealth within society. Drafting laws, understood in this light, could no longer be understood as being an apolitical regulatory exercise.

A simple example serves to illustrate the fundamental role in society of regulatory drafting and the crucial responsibility of the law of contract in a free market economy. While at first sight an agreement between two individuals to buy and sell might seem a politically neutral transaction, and while the state's provision of enforcement mechanisms to back such a transaction (such as sanctions for non-performance) may appear politically uncontroversial, as soon as any disparity of bargaining power is taken into consideration it becomes clear that the state provision of enforcement mechanisms will tend to benefit the party who started in the more powerful position (since that bargaining power will have been used to gain a more beneficial bargain). Only if safeguards (such as unfair contract terms legislation) are enacted can the equation be rebalanced. Let me illustrate this with a simple example. On a cold day I once had half an hour to kill before meeting my daughters from school. I went to buy a minor electrical item in a large electrical superstore. As I had some time I read (for the first time ever) the small print of terms and conditions of the sale, and found a term which I considered to be outrageous. I presented the item to the young person at the till announcing that I would like to buy the item but mentioning that I had crossed out this particular term as I didn't accept it. This caused a delightful chaos. Of course, the person at the till could not accept the changed bargain, so he called the supervisor, who called the store manager, who called the area manager. At this point, I ran out of time and left without the item. What the interlude illustrates is that large companies are used to dictating the terms on which they will deal. Such a contract is very far from being a contract between equals.

Teubner illustrates the notion of contractual unfairness in a consumer marketplace as follows: 'A contractual term is unfair if "contrary to the requirement of good faith it causes a significant imbalance in the parties' right and obligation arising under the contract, to the detriment of the consumer"'.⁶⁸ Of course, this leaves unexplained the knotty question of which imbalances are 'fair' and what, therefore, is meant by 'good faith'. There is a sliding scale of contractual freedom in Western economies which allows some commercial laws to be enacted without proper consideration of the risk borne by the disadvantaged. MNCs can dictate terms, moreover, not only to employees and suppliers but to governments. Yet, the paradigm of the market order remains misleadingly presented, disguised as a form of neutrality and equality:

Every stable social system possesses an order of power and wealth, but unlike historically prior distributive schemes, the market order avoids the imposition of a detailed pattern. Instead of a structure of rank and privilege fixing entitlements to wealth and power, the distributive mechanism of the market allocates resources to those persons able and willing to pay the highest price for them ... The market order avows blindness to claims of privilege or

68. G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *Modern Law Review* 11.

force, so it recognises no claims of an inherent right to govern or to possess superior wealth ... The market order lets fly the centrifugal forces of radical individualism, permitting philosophers to celebrate the relative fluidity of its distributive outcome and to legitimate it by appeals to the impervious mask of market forces. No other order so successfully disguises the fact that it constitutes an order at all.⁶⁹

The argument works in exactly the same way at the international level. An agreement between states with equal bargaining power may be considered to be politically neutral, yet when states are unequal in terms of power the 'contract' is of profound political importance. In this respect, it is highly significant that the first quasi-judicial enforcement mechanisms at international level have been designed, and operate, to enforce international commercial law in a manner favouring richer nations with more diverse economies.

The neo-liberal design is an aggressive sort of capitalism. It is not, however, completely new. It bears uncanny resemblance to the way in which the English colonised North America: 'The English could congratulate themselves on the honourable way they were populating North America. They could see the Indians growing poorer but they did not conceive that they were the agents of the Indian's impoverishment. They were not taking the Indian's land by force of arms, after all. They were buying it on the open market.'⁷⁰ There were transactions called 'treaties', but these did not amount to genuine contracts characterised by any real form of *consensus ad idem*. The worldview differences were too vast. The American Indians did not *consent* to sell their land because they had different conceptions of property from that of the European settlers.⁷¹ In reality, the indigenous population were conquered by force, but conquest was papered over with contractual documents⁷² serving to make the process appear proper and legal.⁷³ Thus, it has been argued that the concept of contract was the 'Chief Cause of America'.⁷⁴ The deep issues of foundational principle dividing these communities, and reflected by a failure of communication, are remarkably similar to the issues now challenging the process of drafting new commercial laws for transition countries in a market paradigm disguising its fundamental inequalities.

A further blind spot appears to operate in the almost axiomatic notion that the best way to find a quick solution for the vacuum in the law of transition countries is to transplant Western laws into them. Many scholars have questioned this theory,⁷⁵

69. H Collins, *The Law of Contract* (1986), cited in D Campbell, 'Reflexivity and Welfarism in the Modern Law of Contract' (2000) 20 *Oxford Journal of Legal Studies* 477.

70. S Banner, *How the Indians Lost their Land* (Harvard University Press, Cambridge, MA 2005).

71. See also the tensions between collectivism and individualism in the Soviet system: J Hill, 'Corporate Governance and Russia – Coming Full Circle' in G Doeker-Mach and K Zigert (eds), *Law, Legal Culture and Politics in the Twenty First Century: Essays in Honour of Alice Eh-Soon Tay* (Franz Steiner Verlag, Weisbaden 2004) at 153.

72. 1609 William Crashaw: 'A Christian may take nothing from a Heathen against his will, but in faire and lawfull bargaine'.

73. Banner (n 71) at 1.

74. Adapted from WC Sellar and RJ Yeatman, *1066 and All That* (Penguin Books, Harmondsworth 1930).

75. J Dine and F Dahan, 'Transplantation for Transition – Discussion on a Concept around Russian Reform of the Law on Reorganisation' (2003) 23 *Legal Studies* (June) 284–310.

and there is now a vast and expanding literature concerning this challenge.⁷⁶ The World Bank was initially reasonably sure that transplantation was the best approach.⁷⁷ However, it is now more tentative:

The 1990s have witnessed an enormous investment in legal reform efforts in transition and developing economies. Much of this assistance has involved the import of legal models from mature market economies. A growing body of literature offers some insights into the dynamics of legal transplantation and the conditions for success or failure. Transplants most often succeed when the foreign model is adapted to the legal traditions and institutions, and the social and economic realities, of the recipient system. Legal transplants have 'taken' much less often than one might expect. The reason may be an over-emphasis on the law's content at the expense of sensitivity to local context in the adaptation and implementation process.⁷⁸

This insensitivity is likely to have links, moreover, to the ascendancy of neo-liberalism. John Gillespie describes the initial euphoria surrounding the collapse of the Soviet Bloc:

After the Soviet Union collapsed, US legal hegemony entered a new phase. Francis Fukuyama in his influential book *The End of History and the Last Man*, published in 1992, epitomised the euphoria that greeted the demise of Soviet communism and the perceived victory of Western democracy. As he put it 'for a very large part of the world, there is no ideology with pretensions to universality that is in a position to challenge liberal democracy and universal principles of legitimacy other than the sovereignty of the people'. A decade later his triumphalism seems premature ...⁷⁹

Yet, despite reasons to doubt Fukuyama's euphoric conclusion, Gillespie believes that many scholars still concur with Fukuyama, especially where company law is concerned.⁸⁰

Critics of Fukuyama and his assumptions, however, particularly in the Law and Development Movement, suggest that transplantations failed in many regions precisely because more culturally sensitive, contextualised and detailed nuances were needed in the drafting of legislation.⁸¹ The seminal article by David Trubek and Marc Galanter⁸² has reinforced a growing disenchantment with the transplantation method, at a time, moreover, when neo-liberal conceptions (including those encapsulated in the

76. D Nelken, 'Towards a Sociology of Legal Adaption', in D Nelken and J Feest (eds), *Adapting Legal Cultures*, (Hart Publishing, Oxford 2001), and for the Asian experience see JS Gillespie, *Transplanting Commercial Law Reform* (Ashgate, Aldershot 2006).

77. World Bank, *Entering the 21st Century: World Development Report, 1999/2000* (Oxford University Press, Oxford 23).

78. Ibid.

79. Gillespie (n 77) at 5.

80. Ibid, and H Mansmann and R Kraakman, 'The End of History for Corporate Law' (2001)

89 *Georgetown Law Review* 439; W Carlin, 'Ownership, Corporate Governance, Specialization and Performance: Interpretation of Recent Evidence for the OECD Countries' in J-P Touffut (ed), *Does Company Ownership Matter?* (Edward Elgar, Cheltenham 2009); K Pistor et al., 'The Evolution of Corporate Law: A Cross-Country Comparison' (2002) *L* 791 *University of Pennsylvania Journal of International Economic Law*.

81. D Trubek, 'Towards a Social Theory of Law: An Essay on the Study of Law and Development' (1972) *82 Yale Law Journal*.

82. D Trubek, 'Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Review* 1062–102 (with Marc Galanter).

Washington Consensus) were being questioned.⁸³ Gillespie encapsulates the argument:

Trubek and Galanter found that lawyers were arrogantly drafting with conceptions of ‘ethnocentricity and naiveté’ in assuming that transplanting Western legal assistance of grafting onto host-country institution and social conditions [was the answer]. In their estimation these movements sought to impose a historical contingent legal system based on the rule of law and liberal democracy, values that were not easily received by other societies.⁸⁴

Such conflicts of value within the European context were rife.⁸⁵ Misleadingly, the conflict gives the impression of concerning detail rather than doctrine, yet it is critical to read the technical detailed rules with a ‘sober’ and diligent understanding of the more fundamental divergences in play. Where this is not done well, the law tends to become fragmented. We have already seen some examples of the difficult attempt to bridge the cultures in Europe in the European Company, which took years to draft and which is still a shadow, arguably, of the original proposal.⁸⁶ Arrangements for economic enterprises were profoundly different within continental Europe, but when the UK joined the European Economic Community the existing divisions were exacerbated. German capitalism, for example, has a philosophical concept of ‘good faith’ which is the reverse of the UK-contractual paradigm. Teubner argues that arrangements in Rhineland capitalism are predicated on trust between all of the individuals in the company, its suppliers and their financial backers:

Economic action is closely coordinated by business association and by informal business network ... These regimes give considerable autonomy to employees within the hierarchy of the organisation and to suppliers and deliverers within long-term cooperative networks. This opens opportunities for production prone to long-term cooperation, but creates simultaneously considerable risks that are typical for high autonomy and high trust relations.⁸⁷

This is very different from the Anglo-American conception of companies, and trying to bridge this divide is exceedingly tricky. Teubner argues that one problem is that European harmonisation⁸⁸ ‘has not yet seriously taken into account the “varieties of capitalism”’.⁸⁹

Sensitivity to these deep foundational matters is essential in the drafting process. Although company law is often thought to be a matter of technical regulations, there are, as has been demonstrated, profound philosophical differences subtending the law.⁹⁰ Moreover, ‘papering over the cracks’ is ineffective. Drafting is extremely time-consuming, and even in situations where philosophical differences can be muted, the challenges of blending legal technicalities often proves insurmountable. Transplantation is extremely demanding and far from satisfactory in many cases.

83. D Trubek and A Santos (eds), *The New and Economic Development: A Critical Appraisal* (CUP, New York 2006).

84. Gillespie, (n 77) at 57; Trubek and Galanter (n 83) 1062.

85. Teubner (n 69) at 14.

86. Council Directive 2001/86EC and Council Regulation 2157/2001/EC, it took 30 years.

87. Teubner (n 69) at 25.

88. C Jordan and M Lubrano, ‘Corporate Governance and Emerging Markets: Lessons from the Field’, Melbourne Law Schools, Legal Studies Research Paper No. 356, <<http://ssrn.com/abstract=118422>, 2007> on the effectiveness of Codes and other voluntary soft law initiatives.

89. Teubner (n 69) at 31.

90. R La Porta, F Lopes-de Silanes, A Shleifer and R Vishny, ‘Investor Protection and Corporate Governance’ (2000) 2 *Journal of Financial Economics* (Netherlands) 1–2.

The ATCA litigation alone reveals just how complex even the procedural considerations can be. In different jurisdictions there are a host of other background differences such as legal regulations pertaining to lawyers, judges, registrars, seals, procedures, etc, and all of this detail, in the end, *matters*.

Having stressed both the importance of attention to foundational principles and to the detail attending the drafting process, I now turn to the detail of Albanian company law itself in order to explore its utility as a framework of ‘enterprise’ liability for MNC accountability. The example reveals, arguably, how drafting national law, rather than merely transplanting law, provides a more extensive opportunity for sensitivity to differing forms of capitalism – a prerequisite, arguably, for effective regulation of MNC conduct.

4.3 The Albanian law on groups: the provisions

On 18 February 2008, the European Council adopted a new European partnership with Albania. The Stabilisation and Association Agreement (SAA) with the country was signed on 12 June 2006 and entered into force on 1 April 2009, superseding the Interim Agreement on trade and trade-related aspects, which entered into force in December 2006. The EU–Albania visa facilitation agreement entered into force in January 2008, while the readmission agreement entered into force in 2006. Albania submitted its application for EU membership on 28 April 2009.⁹¹ In 2008, the Albanian Parliament passed a new Company Law, ‘Law No. 9901, date 14 April 2008 On Entrepreneurs and Companies’.⁹² The drafting was a slow process, involving many adjustments and many stakeholder consultations. The process drew on influences from European, American and Australian laws, revealing certain pitfalls which reflect the limitations of ‘transplantation’ drafting. The law, however, shows genuine promise, notwithstanding this, for the construction of an enterprise approach to MNC liability using detailed drafting of national company law.

The Albanian legislative provisions

Article 207

Parents and Subsidiaries

- (1) A parent-subsidiary relationship shall be deemed to exist where one company regularly behaves and acts subject to the directions or instructions of another company. That control shall be called control group.
- (2) If a company, based on its capital share in another company or based on an agreement with that company, has the right to appoint at least 30 per cent of members of the Board of Administration or Supervisory Board or of the administrators of that company, or if it has at least 30 per cent of votes at the General Meeting, it shall be considered a parent of the other company and the other company as its subsidiary. That control shall be called an equity group.
- (3) The parent’s rights over the subsidiary as specified in Paragraph 2 of the present Article shall be considered such even where those rights are exercised

91. <ec.europa.eu/enlargement/potential.../albania/index_en.htm>.

92. Michael Blecher and Janet Dine were the major draughtsmen of the text.

through another company, controlled by the parent or a third party acting on account of that other company or the parent itself.

- (4) The third party shall be presumed to act on account of the parent if it falls under the specifications laid down in Article 13 Paragraph 2 and 3 of the present Law.

Article 208

Legal Consequences of a Parent-Subsidiary Relationship

- (1) Where there is a parent-subsidiary relationship as defined in Article 207 Paragraph 1 of the present Law, the parent shall have a duty to compensate the subsidiary for its annual losses.
- (2) Partners, members or shareholders of the subsidiary shall at any time have the right to request the parent to buy their shares or securities in the company.
- (3) Creditors of the subsidiary shall at any time have the right to require the parent to offer adequate security for their claims owed by the subsidiary.
- (4) Creditors of the subsidiary shall include persons who have incurred damage due to a subsidiary's actions wherever the subsidiary is registered.

Article 209

Fiduciary Duties Arising in Equity Group

- (1) In a parent-subsidiary relationship as defined by Article 207 Paragraph 2 or the present law, the representations of the parent must take account of the following:
 - (a) any duty of the parent under Articles 14 to 18 of the present Law, or in case of a limited liability company, Articles 98 of the present Law, and in case of a joint stock company, Article 163 of the present Law;
 - (b) the way a decision might affect or benefit the group of companies as a whole;
 - (c) interests of the subsidiary company.
- (2) A representative of the parent shall be deemed to be in breach of fiduciary duties if the independent board members would not in view of the above-listed have taken that decision.
- (3) The representative of the parent shall be obliged to comply with the provisions regulating fiduciary duties to the subsidiary, including the obligation to act in the best interest of the subsidiary.

Article 210

Liability for Breach of Fiduciary Duties

- (1) Where a representative of the parent acts in breach of the fiduciary duties under Article 209 of this present Law, the parent in whose name the representative has acted shall be obliged to compensate the damage caused thereby.
- (2) In the circumstances set out in Paragraph 1, of the present Article, members of the parent's administration organs shall be jointly and severally liable for the damage caused.

- (3) Members of the subsidiary's management organs who act in breach of the fiduciary duties shall be held liable jointly and severally, along with the persons specified under Paragraph 2 of the present Article

Article 211

Action for Compensation of Damage

- (1) If a subsidiary has not, within 90 days of the discovery of the damage referred to in Article 209 Paragraph 1 of the present Law, initiated a necessary procedure to claim compensation for the damage, the subsidiary's claim may be filed:
 - (a) Where the subsidiary is a partnership, by every partner;
 - (b) Where the subsidiary is a limited liability company, by the member representing at least 5 per cent of the total vote in the General Meeting or a smaller amount specified by the statute, and/or any of its creditors. Article 91 Paragraph 6 of the present law shall be the applicable provision in that case;
 - (c) Where the subsidiary is a joint stock company, by the shareholders representing at least 5 per cent of the basic capital or a smaller portion set by the statute, and/or any of its creditors whose claims against the company amount to at least 5 per cent of the basic capital.
- (2) A claim under the present Article must be submitted within 3 years from the time the damage becomes evident.
- (3) Creditors of the subsidiary shall also include persons who have incurred damage due to a subsidiary's action, wherever the subsidiary is registered.

Article 212

Sell-out Right

If the parent holds 90 per cent or more of the subsidiary's shares, the holders of the remaining shares shall have the right to request the parent to buy those shares at the market price within 6 months of the request.

Commentary

A key strength of articles 207 to 212 of the Albanian Company Law is that it takes into account 40 years of debate within the EU and between its Member States, as well as debate at the global level⁹³ regarding the way in which MNCs/groups should be legally drafted. The philosophical tensions concerning various company models means that drafting legislative provisions concerning groups of companies is imbued with particular difficulty, especially concerning the complex issues of extraterritoriality, the limitations of transplanting laws, the complications of transition economies and the operation of the company veil. This makes the drafting process especially

93. UN Commission of Transnational Corporations or 'Group of Eminent Persons', *The Impact of Multinational Corporations on Development and on International Relations* (UN pub E74 IIA 5), 25, OECD Guidelines for Multinationals Principles of Corporate Governance, 2005.

challenging, but embedded in the Albanian legal provisions is, nonetheless, a robust attempt to address the realities (and by corollary the negative effects) of power relations which arise in company groups.⁹⁴

Article 98, for example, obliges Administrators to consider their duties ‘in good faith and in the best interests of the company as a whole, paying particular attention to the impact of its operation on the environment’.⁹⁵ The maximisation of the company’s own assets, and the question of compliance with legal expectations, moreover, is conceptualised within the legislation as being not only in the interest of all the investors (shareholders), but also in the interest of creditors, employees and the economic system as a whole. In short, the ‘interest of the company’ explicitly recognises the social embeddedness of the company and its broader social parameters.⁹⁶ Globalisation, however, presents a challenge to this more holistic national approach. Globalisation means that the coincidence of shareholders’, creditors’, employees’ and ‘public’ interests in the economic success of the individual company may even be destroyed if the company is integrated into a larger group of companies which may no longer pursue the interest of the individual company – especially if the company is affiliated in a group which has different ethical principles in view. This reality was part of the background challenge for the Albanian drafting process. We were very aware that as globalisation has speeded up, ever greater numbers of companies have become affiliated with international companies, while the laws of national parliaments may not have legislated higher standards for companies. While human rights and international law standards have challenged some of the worst outrages as CSR non-governmental organisations (NGOs) communicate these matters in a manner that is more immediately accessible to the public, there is obviously the on-going need to cope with the undesired political, social and economic effects, or ‘externalities’, which such groups produce. It is essential to subject them to adequate national and international regulatory frameworks. However, as we have seen, there is as yet no international answer to the central problem of the extraterritoriality issue and ‘jurisdictional arbitrage’. In part, philosophical and political difficulties explain this failure – certainly in the EU context. The EU has not, as a result, pursued the finalisation of its proposal for a Ninth Directive on Company Groups,⁹⁷ and there is no EU legislation on group liabilities. Instead, the EU’s legal attitude has become ‘pragmatic’, addressing single

94. Dine (n 2) especially Chapter 1.

95. Limited Company provisions, Article 163 mirrors the same Articles in Joint Stock Companies.

96. This is a stakeholder view of companies, very different from the Anglo-American concept, although the 2006 Company Law in the UK has possibly softened the shareholder theory. Section 172 enacting director’s duties says that directors have a duty to the company to act in a way, ‘in good faith, to promote the success of the company for the benefit of its members as a whole’. To do this the director is told that they are to have ‘regard’ to a range of other matters; ‘the consequences of any decisions in the long term; the company’ employees; the need to foster the company’s business relationship with suppliers, customers; and others, the impact of the company’s operation of the community and the environment; the desirability of the company’s maintaining a reputation for high standards of business conduct; and the need to act fairly between members of the company’.

97. The Proposal was strongly influenced by German ‘Konzernrecht’ which tries to favour dominance agreements and to discriminate de facto between groups. In spite of its reference to both cases of group building, the new Company Law has not adopted this valuation. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [Official Journal L 310 of 25 November 2005, p. 1] is a small step in the attempt to harmonise the issue.

problem areas of corporate groups such as annual accounting in a group and the acquisition of major shareholdings in publicly held companies by take-over bids.⁹⁸

While the German law is normally understood to present the most sophisticated legislation on group liability, the drafting process of the provisions of the Albanian Law was conducted with all the scholarship on the limitations of transplanting laws vividly in mind, as well as the central importance of fair trading in the global international market. Article 207, paragraph (1) is, in fact, the most innovative part of the Albanian structure. This explicitly defines the first form of parent–subsidiary relationship, known as a ‘control group’. The concept merges the concept of dominance from German Law on groups (*Konzernrecht*) and deploys the notion, drawn from other jurisdictions of the ‘controlling influence’ or ‘dominance’, in order to determine whether ‘a subsidiary is “accustomed to act in accordance with the directions or instructions” of the parent company’. Article 207 (1) goes beyond the German approach, however. The Article does not require that such control is based on shareholdings, agreements or based on contract, thus improving on the German concept which has proved too restrictive (it accepts special group regulations only where dominant influence and control are mediated by a shareholding relationship or based on contract).⁹⁹ The Albanian approach is more realistic and critical. It accepts that one of the most important factors defining the existence of a significant relationship between companies is the flow of money rather than the share structure, and accordingly deploys a dominance concept without referring to significant ownership and voting powers.¹⁰⁰ The concept is broad enough, moreover, to include relationships such as franchising or other kinds of supply or distribution, outsourcing of certain enterprise functions or quality-assurance systems which ‘at the surface’ are using the contractual instrument, but which ‘in reality’ build organisations that may be treated according to group parameters.¹⁰¹

While Zerk has argued that there is no reason why an enterprise theory might be constructed on a control basis rather than on an equity basis,¹⁰² she arguably misses a significant point. She argues that

[w]hat is crucial in each case is the presence of a “control” relationship between parent and foreign affiliate (however related) that is sufficient to justify the imposition of liability on the parent in the particular case. ... to establish “primary” liability, the plaintiff would need to demonstrate the parent company’s familiarity with the risk associated with the relevant activities and close involvement with the day-to-day operation of its foreign affiliate.¹⁰³

The radical change presented by Article 207 is closer to the reality that the enterprise theory needs to encompass: once the group is recognised as an enterprise, the *whole of*

98. The Directive on Take Over Bids was finalised in 2003. There is a good account of the EU attempts to draft a Directive concerning Groups (The draft Ninth Directive) in Vanessa Edwards’ book, *EC Company Law* (Oxford, OUP 1999) see particularly 390–91. Footnote 24 reminds us that the late Professor Gower was a particularly ardent advocate of Commercial legislation on groups, going so far as to state that ‘to my way of thinking, the one thing that the EC ought to be concentrated on the corporate field is doing something about groups ... something has got to be done about this, instead of bothering about piddling little things like harmonising rules about the one-member private limiting company!’

99. TBB Zeitschrift für Wirtschaftsrecht (1993) 589.

100. See also J Dine, *The Governance of Corporate Groups* (CUP, Cambridge 2000) 181, note 4.

101. Weitzenboeck (n 7).

102. Zerk (n 4) at 235.

103. *Ibid.*

the group, not just the parent company, could be sued, whatever its business is. Of course, there would be exceptions, but these could be controlled, perhaps using a concept such as the affiliates being on a ‘frolic on their own’. In this way, some of the intractable obstacles and difficulties that dogged the ATCA could be removed. One crucial difference of approach concerns the role of the chain of causation. This would no longer need to be proved between individual companies, but rather there would be a defeasible presumption of liability placed upon each entity in the MNC group. This removes, for example, the related hurdle of proving whether entity had control of the tortious situation, and as Zerk recognises, ‘[a]lthough there may be contractual disclaimers of liability and indemnities, this should not affect ... liability in tort towards a third party’.¹⁰⁴

The parameters of the definition remain open to interpretive dispute, of course. Control must actually be realised by concrete ‘directions or instructions’ which are carried out not only in one or a few single cases but require some degree of repetition: the subsidiary must be ‘accustomed’ to, or used to acting in compliance with them. This particular approach was built on an insolvency provision in the UK¹⁰⁵ merged with a generalisation of the German and formal and *de facto* group rule.¹⁰⁶ Article 207(2) of the Albanian Law mirrors the German equity concept on groups, in effect, which defines the rights of control groups and its constituents.¹⁰⁷

However, viewed in the light of the global context, Articles 207(1) and (4) are perhaps the most innovative provisions. Article 207(1) uses the control group concept and stipulates that ‘[c]reditors of the subsidiary shall include persons who have incurred damage due to a subsidiary’s action wherever the subsidiary is registered’. This means that tort victims of an MNC, including subsidiaries or entities, are conceptualised as creditors as a result of their claims. This is indeed a groundbreaking approach, but still requires further regulations in order to consolidate the definitions deployed and, particularly to draft tighter definitions concerning ‘control’.

Article 208 implements provisions for both control groups and equity groups and it is notable that the details in the law defining ‘equity groups’ remains clearer than for ‘control groups’ (see Arts 209–212). The control group legislation still lacks some of the important provisions found in the equity group law, but it is useful that Articles 98 and 163 (‘Limited Liability Companies’ and ‘Joint Stock Companies’) are found in both group designs, because *all* of the companies which are found in the enterprise will have fiduciary duties for directors. Articles 98 and 163 of the Albanian law deals with fiduciary duties, which are constructed as being common to all company

104. *Ibid.*

105. UK Company Law Act 2006, shadow directors 1985. Now subsumed in Company Law Act 2006, s251.

106. Paragraph 311 *et seq* German Law on Shares (Aktengesetz).

107. Article 207(2) of the Albanian Company Law mirrors the Fourth Directive 78/660/EEC on companies’ annual accounts and (Article 1 of) the Seventh Directive 83/349/EEC on consolidated (= group-) accounts use a group concept which the new Company Law loosely follows in its definition of ‘equity groups’, Article 207 (2). Thresholds are, however, loosely referring to the standards introduced by the Takeover Directive 2004/25/EC and its transposition in some Member States (like Germany): Article 207 (2) requires for an equity group relationship that, based on its capital share or on agreement, the *parent company* has the right to appoint at least 30 per cent of members of the *subsidiary*’s Board of Directors or Supervisory Board or of the Managing Directors, or if the parent has at least 30 per cent of votes at the subsidiary’s General Meeting.

forms and therefore part of any group. Such fiduciary duties are crucial in the design of company law, since they can be a way of balancing the inevitable disadvantages in contractual bargains. There still remains, however, a potential loophole in the Albanian Law, implying that other arrangements are needed to prevent the group from bypassing the law. At present, for example, the group provisions exclude partnerships, and the law should also include contractual arrangements. As we have seen, complex arrangements like joint-ventures or franchises are very powerful, and they should have responsibilities imposed by law and they should be fully responsive to the realities of their structure.¹⁰⁸

Article 209 (2) establishes a breach of duty for a representative of the parent company. The standard is that if no independent directors of the subsidiary company could have reached the decision that was made, in that case the representative will be liable. This standard allows the court to consider all the aspects of a business decision, including the long-term advantages of a group decision even if measured against short-term disadvantages – factors likely to influence the decisions of the independent directors of subsidiary companies, who cannot but respect their company's embeddedness in the group. The consequences for breach of duty of both the parent's and the subsidiary's 'administration' (i.e. managing directors; boards of directors or supervisory boards) are provided by Article 210. The right to derivative action is provided by Article 211.

It is apparent that the Albanian law of groups contains some robust and important provisions containing promising avenues for the control of MNC human rights and environmental violations. However, more work needs to be done. In particular, the control group provisions need supplementation with provisions from the equity group provisions, including the fiduciary duty to take into account the interests of the company group as a whole and to take account of the interests of the subsidiary. Overall, it is apparent that the broader conception of the company envisaged by these provisions of Albanian company law borrows in part from the continental European social market in which the company is a living entity with employees, shareholders, customers, suppliers, and where wider implications for human beings and the environment more naturally form part of the company's normative remit. Administrators within Albanian company law are explicitly placed, moreover, under a duty to perform 'in good faith and in the best interests of the company as a whole, paying particular attention to the impact of its operation on the environment'.¹⁰⁹

5 CONCLUSION

While Albanian company law cannot revolutionise the world, it could have a role in democratising the MNC accountability power vacuum, particular if other jurisdictions legislate to control MNCs along similar models. It is crucial, however, that the Albanian model should be further refined. If such laws are to withstand international special interests, particularly the MNCs' lobbies, and any shocks that can be thrown in the path of courts and litigants, it is imperative that drafting should be stringent. This is particularly vital in the light of the broader picture in which democracy stands

108. EM Weitzenboeck, 'Between Contract and Partnership: Dynamic Networks as Collaborative Contracts and More' (PhD Thesis, Oslo University, April 2010).

109. Articles 98 and 163 of the Albania Law on Entrepreneurs and Companies No. 9901, 2008.

imperilled by globalisation and in which MNC accountability is weakened by extra-territoriality principles. This situation is long overdue; a change for:

globalization's effects are everywhere to be seen. The poor are getting poorer, the rich, richer ... Mega-mergers leading to the establishment of giant oligopolies now control our marketplaces. These oligopolies, aided by loose government regulation, eliminate competition. Ignoring the cheerful, blind ideology of free marketers, they force up prices for vital goods like drugs, and capture disproportionately high profits ... Elected democratic governments have been weakened, and lack the powers, resources and institutions to protect their citizens and firms and compensate citizens when shocks occur ... leading to disillusionment with spineless parliaments; and with leaders that have given away to invisible 'markets' key powers to allocate resources.¹¹⁰

Clearly the control of MNC power is a decisively important consideration. National laws present an opportunity for the construction of decisive sanctions and controls. While the proposed model put forward here requires refinement, it is very much to be hoped that the academic legal community will analyse it and refine the possible legislative models, press such reforms upon governments and legislatures and promote the international spread of a network of strong national accountability structures for MNC human rights and environmental liabilities.

110. A Pettifor, *The Coming First World Debt Crisis* (Palgrave, Basingstoke 2006) at 51–2.