

1 Introduction: Regulating TNCs and the Environment

Multinational companies are critical players in the development process. For some, transnational companies (TNCs) are key actors in delivering sustainable development in poorer regions of the world, because they operate globally and bring goods to new areas of the world, as well as initiate great improvements in technology. For others, the mobility of capital and the internationalisation of production, which make international investment possible, give companies unprecedented freedoms to locate their businesses where it is most profitable to do so, often at the expense of communities and their environment. The fact that developing countries, in particular, often experience greater economic and political volatility means that foreign investors tend to engage in ventures that will yield a high rate of return over a short period, often resulting in environmental devastation and social dislocation (Sauermaann 1986).

Multinational companies are also increasingly central to environmental decision-making and patterns of resource use. This is because of the importance of their investment decisions for the development paths pursued by countries, the ecological impact of their production processes, and the volume of trade and transfer of goods they administer. The emphasis on TNCs in this article is not intended to diminish the importance of looking either at the role of state-owned companies or of small and medium-sized enterprises and their environmental impacts on poorer communities. Barriers to legal justice are significant here too. Looking at TNCs, in particular, however, helps us to explore a potentially new area in the study of law and development: the role of litigation in creating checks and balances on the activities of global corporations where globalisation creates opportunities for exploiting the lack of protection of the poor and their environment. This approach may identify strategies that communities can adopt to defend their own interests, either in the absence of state support or because of state interventions, which conflict with their interests. The incongruence between the economic power and scope of MNC activity and the legal and political tools we have available to manage the impact of this activity is at the heart of this article's concern with the role of law in development.

Access to Environmental Justice?

Litigation against TNCs in the South

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2 The Limits of Existing Regulation

The challenges posed by the globalisation of production and finance have forced policy makers and academics to pay increasing attention to the role of regulation and other governance mechanisms in promoting responsible business investment. (Picciotto and Mayne 1999; Newell 2000). Attention has focused, in particular, on the role of environmental and social obligations within international investment treaties such as the Multilateral Agreement on Investment (MAI) (Ayine and Werksman 1999), as well as informal 'private' and non-state practices of regulation manifested in codes of conduct, stewardship regimes and other non-legally binding agreements between businesses and NGOs (Newell 2000).

There is concern also regarding the lack of recognition in international environmental agreements of the role of TNCs in exacerbating social and environmental problems. The issue of TNC regulation was dropped from the agenda of the United Nations Conference on Environment and Development (UNCED) agenda and while Agenda 21 includes recommendations that affect TNCs, it does not take the form of a code of conduct. An international code of conduct to regulate the activities of TNCs has been on the international agenda since the 1970s, but has still not come to fruition. Guidelines and standards promoted by bodies such as the International Labour Organisation (ILO) and the Organisation for Economic Cooperation and Development (OECD) are (i) not widely known and therefore rarely used, (ii) entirely voluntary and without sanction, and (iii) outdated, even when compared with companies' own codes of conduct (McLaren 2000).² At best these instruments provide evidence of the expectations governments have regarding the conduct of TNCs.

Of particular concern is the imbalance between this absence of international regulation on the one hand and the growth of international agreements, which affirm the entry and exit options of investors, on the other. The provision of trade-related intellectual property rights (TRIPS) to companies through the World Trade Organisation (WTO) TRIPs agreement has shown how TNCs can control peoples' livelihood choices in direct and potentially detrimental ways (through, for example, patents on biological materials and seeds). The agreement is

part of a broader power shift in which regional trade agreements, such as the North American Free Trade Association (NAFTA), also permit companies to challenge governments and local authorities about restrictions on their activities. In place of binding commitments at the international level, there has been a growth in 'soft law' such as voluntary agreements, self-monitoring, and the proliferation of sustainability audits of corporations by external consultants.

Such soft law is also limited, however. Codes of conduct, for example, provide few channels for verification of compliance with their terms. They are also often produced and negotiated by NGOs representing a limited sector of society and do not necessarily address the needs of the poor. Codes of conduct are often designed without the participation of those they are intended to benefit and, as a result, often fail to have the desired impact (Barrientos 1999). There is also concern that soft forms of regulation undermine the need for legally binding and state-enforced regulation of MNC investment practices (Kearney 1999). Finally, it is apparent that many of the most environmentally destructive types of investment are undertaken by companies that are less vulnerable to consumer and popular pressure, further down the supply-chain, in sectors such as mining. These companies are less likely to feel the need to be involved with codes of conduct, stewardship regimes or other forms of soft regulation (Newell 2000).

Whilst public international law and informal 'soft law' approaches to regulating TNCs are useful in creating frameworks of expectation about the responsibilities of companies to the communities in which they invest, it is clear that they provide a weak level of protection for those most vulnerable to irresponsible investment practices.

3 Strategies of Litigation against TNCs

Given the limitations of both international and 'soft law' as instruments of corporate regulation, there is a pressing need to look at what role litigation can play in defending the poor in communities where companies expose people to unacceptable environmental risks and social impacts. What role, for instance, can the law of torts, class actions and

transnational litigation play in holding companies to account for their social and environmental responsibilities? Key to assessing the limits and possibilities of such strategies is their ability to defend and promote the interests of poorer communities whose livelihoods are most threatened by destructive investments.

A number of recent high-profile cases of transnational environmental litigation suggest that holding parent companies to account for the conduct of their subsidiaries, wherever they may operate, provides a potentially vital mechanism for ensuring that globalisation does not create a 'race to the bottom' where TNCs exploit lower environmental standards and poor enforcement regimes at the expense of workers and their environment. Such litigation offers a potential vehicle for internationalising standards of protection.

Transnational litigation seeks to use the law of the company's home state (i.e. where it is domiciled) to hold the company liable for compensation for activities undertaken overseas. The basis of such claims is that the parent company exercises sufficient control over the operations of an overseas subsidiary to be legally responsible for impacts of the operations of that subsidiary. Attempts have also been made by those affected by company investments to invoke the domestic law of the home company (in this case the Alien Tort Claims Act in the US), in order to sue in tort alleging a violation of international law. Mass torts and class actions, on the other hand, invoke the law of the country in which the violation occurred, in order to press claims of negligence and thus pursue compensation. The following section reviews some cases in which these bodies of law were invoked and assesses their success in protecting communities negatively affected by the investments of TNCs.

The impact of bringing or threatening to bring cases will often be more important than the legal outcome (Baker-Shrew 1986). Often the greatest value of the case, as the case brought by indigenous communities in Ecuador against the oil company Arco shows, is in buying time to mobilise resistance around destructive projects. The mass tort case brought against Texaco in Ecuador (*Aguinda v. Texaco*) also showed how the process of bringing a

suit serves to highlight and expose existing inequalities in the law, providing a focus for future mobilisation. These 'process' achievements are very important and may be as likely to change the behaviour of the company, by generating expectations about company behaviour and affirming the legal rights of communities, as forcing the company to pay damages to plaintiffs. As Jezic and Jochnick argue 'legal victories must be viewed as pieces of larger campaigns and evaluated in terms of their benefits to local organising and activism which represent the best long-term hope for these communities' (2000:16). Forcing defendants to respond to a case in court and creating, therefore, an official record of violations confers recognition of crimes, which otherwise would not be acknowledged.

A few landmark settlements have also been won, setting important legal precedents in relation to transnational litigation. In the *Thor* case, twenty workers who suffered potentially lethal mercury poisoning in a factory in South Africa won substantial damages (£1.3 million) from the UK parent company. The parent holdings were liable because of negligent design, transfer and supervision of an intrinsically hazardous process. In the *Connolly v. RTZ* case, the UK House of Lords concluded a judgement in 1997 that allowed Edward Connolly, a worker exposed to uranium dust whilst working at the company's plant in Namibia, to bring his £400,000 compensation action to the High Court. The reason given was that support, in the form of funding, for a legal action like this was not available to the plaintiff in Namibia. In a case brought against Cape Plc by workers at their asbestos plant in South Africa, for negligence on grounds of lack of protective clothing provided to workers, the issue was not that the company had breached British or South African law, but that knowing the harmful effects of asbestos (given the levels accepted in Britain), the company adopted lower standards in South Africa. In July 1998 the Court of Appeal agreed that the victims should bring their case against Cape Plc in the English High Court. Despite a ruling by a second Court of Appeal that the cases of the five victims (and a further 3,000 cases brought subsequently) should be stayed, the Law Lords dismissed Cape's attempt to shift the trial from the UK to South Africa. This ruling may set an important precedent

for attempts by other companies to avoid having cases heard in their 'home' courts.

In each of the cases above the *claim of negligence* was based on the premise that companies have a 'duty of care' to ensure that their workers are adequately protected from the known risk of exposure to potentially lethal substances such as asbestos, uranium dust and mercury. Such cases have to tackle the corporate veil problem, whereby parent companies can shield themselves from liability by blaming 'accidents' on their subsidiaries whose operations, they claim, they have no control over. In the RTZ case in particular, the evidence revealed that the company had a firm grip on overseas operations 'exposing the fiction or artificiality of the separation of legal identity of the RTZ group of companies' (WDM 1998:5). The cases usefully highlight the application of double standards by some companies when they invest in poorer countries.

The largest ever *liability action* for an industrial accident was the Bhopal case. The decision to dismiss the case on grounds of *forum non-conveniens* (literally 'inconvenient' or 'inappropriate legal forum' to hear case) is, according to Chinen (1987:209), a 'signal to India and other countries that they will be required to bear the administrative and judicial burdens of regulating and monitoring the industries which they allow to exist within their borders'. Despite the failings of the case, in terms of the way in which it was handled by the Indian Government and the amount of compensation that was settled upon, Sripada (1989) argues, the Bhopal incident has prompted action by governments and corporations. Following the case, TNCs have been under greater pressure to disclose information regarding environmental impact and safety and to put in place proper risk assessment and avoidance measures, to which they have responded. Governments, in turn, have responded by promulgating new environmental legislation or by making existing legislation more stringent. The lesson of Bhopal is that even when cases are not successful in securing compensation for the victims of corporate negligence, the act of bringing cases against TNCs can produce positive reform.

On the other hand, there are many limitations to using litigation as a strategy for holding companies

to account. Legal strategies often reduce complex social problems to questions of monetary compensation (especially of course in tort cases or class action suits). The lack of legal literacy of the poor and their unfamiliarity with technical legal vocabulary and concepts alienates potential users of the law and makes plaintiffs highly dependent upon their legal representatives to fairly and accurately represent their concerns in a court of law. Added to this, poorer communities express distrust and suspicion towards both the legal system and lawyers, whom they feel often exploit opportunities provided by the plight of the poor for their own ends. In the aftermath of the Bhopal gas leak, US lawyers descended on the slum dwellings of the city, looking for plaintiffs to bring a case against Union Carbide (on the condition that the lawyer receives a substantial sum of any award by the Court).

In addition, a key problem in bringing legal suits in the area of negligence on health and environmental grounds is identifying cause-effect relationships between manifested effects and particular pollutants, as well as deciphering direct from indirect effects. Common law traditions, in particular, establish high standards for scientific evidence. The technical nature of industrial processes and the fact that the burden of proof rests on the plaintiff, who must use independent and reliable technical and scientific data to establish that an environmental standard has been violated, excludes all but the most wealthy or technically competent.³ The financial resources required to undertake such a technical study are also often prohibitive and add to concerns about the level of funds required to sponsor such cases and to cover the payment of fees to the defendant in the event that the case is unsuccessful. Further complicating matters, companies may withhold information that is important to bringing a case, on the grounds that such information is a 'trade secret'.

Intimidation by governments against communities considering bringing cases, either against state-owned companies or TNCs, has also been a significant deterrent. This is particularly true in countries where governments have gone to some lengths to attract foreign direct investment. George Frynas's work on Shell in Nigeria (1998, 1999) shows how intimidation and threats to personal

security have deterred potential plaintiffs from bringing cases against the company to recoup lost earnings due to damage to their lands. On a more subtle level, potential plaintiffs seem to internalise a fear of penalising companies whose employment they may rely on. Related to this is the fact that jurors themselves will often have ties through employment to the companies whose case they are hearing. In settings such as this, litigation may be too adversarial to be effective at delivering long-term and stable change for poorer communities.

The *locus standi* (legal standing) of plaintiffs is often used as a basis for dismissing cases brought against companies, unless they have a clear right to speak on behalf of victims or a direct personal interest in the law suit. Community actions are often frustrated on the grounds that they do not represent the specific grievances of individuals involved in the case. The extent to which this is so varies by country. India, for example, has an innovative system of public interest litigation in which organisations and individuals, not part of the affected class, can represent them (Cottrell 1992; Anderson and Ahmed 1996). Nevertheless, in mass tort cases in particular, where large sections of a poor community have been affected by a damaging company investment, issues of *representation* and who speaks for the victims inevitably arise. Representation by lawyers can lead to a crude amalgamation of diverse plaintiff voices and experiences. Original claims are often distorted amid concerns over legal strategy. This happened, for instance, in the cases brought against Union Carbide and Texaco.

Another significant legal obstacle to bringing transnational cases, as was mentioned above, is the principle of *forum non-conveniens*. This has been invoked by defendants on a number of occasions, as grounds for having the case heard in the country where the alleged negligence took place, rather than in a foreign court. This has been the principal means by which transnational cases against companies have been stalled. Whilst the choice of forum is normally the prerogative of the plaintiff,⁴ the defendant can invoke the principle to claim that the proposed forum is inconvenient, where there is another 'clearly and distinctly more appropriate forum' and that justice between the parties will be done in that forum. The basis for

invoking the principle is normally that another court setting provides a better venue because (i) it is closer to the incident and therefore site inspections, access to witnesses and evidence is easier (ii) that another court has the capacity, resources and time (i.e. a smaller backlog of cases) to hear the case fairly, (iii) that acts of 'forum-shopping', whereby plaintiffs select a forum on the basis of the likely financial return from any settlement, should be discouraged.⁵ The counter argument is that companies engage in 'reverse forum-shopping' to evade their obligations in their home country. Moreover, the World Development Movement argue, 'such shopping around is not the reason people from developing countries bring cases to Britain or the US. For most of them, it is their only hope of obtaining justice. The choice is not therefore between different levels of compensation but between justice and no justice at all' (1998:7). Issues raised above, such as fear of persecution, delays in local courts and funding are more probable reasons for foreign plaintiffs pursuing cases in Northern courts.

Another important vehicle for invoking transnational litigation is the Alien Tort Claims Act in the US which permits an 'alien' (non US citizen) to sue in tort alleging a violation of international law. Key to the successful use of this body of law is demonstrating that through a 'symbiotic' relationship with the state, a company is culpable for a violation of international law. The case brought against Texaco for the use of slave labour on their pipeline project in Burma is a case in point. The plaintiff had to demonstrate evidence of clear complicity with the state's use of forced labour. Again the problem of the corporate veil is pertinent – it is difficult to prove in a court of law that the parent company was aware that unpaid labour was used to build the pipeline and, therefore, was complicit with human rights violations.

This is important in the use of human rights approaches to environmental protection since only states have direct and binding human rights responsibilities and liabilities. Even if there are sources of international law (in draft UN codes of conduct, ILO Conventions and UNGA resolutions), which emphasise the obligations of companies when they invest abroad, only states can be held to account for violations of rights.

The underdevelopment of the legal personality of corporations means that the different units that make up TNCs are legally accountable only to the laws of the countries in which they are based. Given this, it is difficult in transnational litigation to pierce the corporate veil in demonstrating a clear chain of command between the headquarters of a company and its subsidiaries. Difficult in any tort case, it becomes very difficult indeed when parent companies often claim they are merely stock or shareholders and that they are only connected for book-keeping purposes. In addition, establishing intentions or sequences of events is very difficult to deduce from internal and closed board-room decision-making structures. In cases where a project design or technology has been exported by the parent company for use by a subsidiary in another country, with full knowledge of the potential dangers associated with its use, the connections are easier to establish (as in the *Thor* case discussed above).

As a strategy for addressing the immediate needs of communities affected by irresponsible investments, litigation is often viewed as a last resort option because of the slowness and complexity of the process and uncertain nature of the outcomes (often up to two years for preliminary appeals, two years substantive trial and two years appellate proceedings). As a development strategy, transnational litigation also does nothing to build up the capacity of legal systems in the South. For many of the reasons outlined above, pursuing cases against TNCs through foreign courts is not a sustainable and realistic strategy for most communities, even if cases brought in Northern courts against parent companies can establish important precedents for holding companies to account.

4 Process and Participation in the Social Control of Investment

One issue that emerges from the above discussion is how to develop a pro-poor approach to litigation, one which negotiates short- and longer-term trade-offs in such a way that litigation is carried out effectively and fairly. This means being clear about what litigation can and cannot achieve for poor communities that suffer the negative consequences of irresponsible investments. When is litigation an appropriate approach and when is it not? The

suitability of particular strategies will rest upon the type of change being sought: prevention, exposure, or compensation. Beyond this we need to consider the point at which legal remedies stop being useful and informal patterns of soft regulation become important or perform useful supplementary functions.

In most cases working with TNCs to avoid the use of dangerous production processes in the first place, by establishing impact assessment procedures, agreeing on standards or negotiating conditions on investments, will help to avoid these problems. Companies with a high public profile and wanting to project a reputation as responsible investors to shareholders and NGOs alike, may respond to such pressures. The problem comes with 'rogue' companies, those intent on exploiting lower standards in countries where governments are either unwilling or unable to ensure that adequate safeguards are put in place. These may be the types of companies whose activities are best addressed through legal means. Frynas's (1998) work on Shell's investments in Nigeria suggests that part of the attraction of investing in countries where corruption is rife and organised opposition is openly repressed, is that businesses with the right contacts and financial resources can proceed with controversial projects with few obstacles. In addition, Frynas argues that the weak bargaining position of the Nigerian state indeed 'led to better terms for Shell and others' including concessions, waivers and exemptions from the provisions of Nigerian law (Frynas 1998:468).

Further work on the *process* of bringing cases is clearly also important. How can lawyers engage with the communities they work with in such a way that the victims' interests in the case, and their concerns in bringing it, are not subsumed within narrow strategic legal calculations driven by the desire to reap the largest financial return? Lawyers themselves may be able to address issues of power and representation in cases through their own ethical codes, sharing of best practice and greater accountability to their clients. Beyond these types of self-restraint, however, it will be necessary to establish new channels of communication between lawyers and plaintiffs, perhaps through intermediaries, to ensure that the interests of both are represented equally in discussions. This may ensure

that lawyers better understand the community whose interests they are defending and that the plaintiffs can engage, more effectively, with the legal procedures through which their case is being channelled. Redressing the power imbalance between lawyer and litigant also presupposes efforts to promote legal literacy, further developing the work that NGOs and foundations are doing in providing *pro bono* legal services for the poor, as well as awareness-raising about legal rights and entitlements and how to exercise them. As well as legal aid groups, legal training of community activists will help to develop an indigenous capacity for asserting and exercising the legal rights of communities with corporations.

The same applies to relations between NGOs and communities. The issue is, when excessive foreign intervention, in terms of funding and expertise for the case, taints the victim's case with the impression that it is a proxy for foreign interests. This may undermine the credibility of a case. At the same time, where local activists are more likely to be subject to intimidation and violence, and where institutional capacity is lacking, there is role for international actors. For example, external monitoring may play a positive role in guarding against threats and corruption, but it has to be handled carefully. More generally, access for the poor to information about proposed projects, to decision making and impact assessments about investments that will affect their lives will do much to avoid reactive litigation when things go wrong.

Given the context of globalisation, which makes these issues so pertinent, it will be important, in developing research in this area, to look at the *political economy of regulation*. What are the unintended effects, for instance, of using transnational litigation to require parent companies to extend the same environmental (and other) standards to subsidiaries in countries in which they operate? Will this deter investors from investing in poorer areas? One answer is not if they are responsible investors. Multinational companies, accustomed to meeting environmental standards for developed country markets are likely to be able to insist on best practice environmental standards wherever they operate without additional cost. Indeed developing different production processes and technologies to meet diverging standards can

add to industries' costs. Another response is likely to be that countries that are less developed economically should not be expected to have the same social and environmental standards as industrialised market economies, and forcing them to do so will remove a source of competitive advantage. The purpose here is not to go into these debates, but to identify them as important to a thorough consideration of the role of law in protecting the interests of the poor in a global economy.

The economic imperatives that are said to be encouraging governments into a role of 'competition states' will play an important part in enabling or frustrating the pursuit of legal strategies that seek to hold companies to account at all levels of their activity. These imperatives will help determine the desirability and plausibility of internationalising standards of conduct, the degree to which the legal confrontation of companies will be tolerated by governments anxious to attract investors, and the willingness of courts to hear cases of alleged negligence in foreign jurisdictions. Such political economy questions will also be important to our consideration of the combinations of strategies, legal and other, that are most likely to deliver pro-poor outcomes. If legal attacks are likely to drive investors away in ways which may be detrimental to the livelihood security of poorer communities, are there other (less confrontational) ways of engaging the company in debate about their responsibilities to respect the rights of communities in which they invest, without demanding disinvestment with potentially dislocating effects? Where there are few viable economic alternatives, these are key issues. The *OK Tedi* case, for example, against the mining company BHP, shows that, despite a courtroom settlement endorsing the right of the community to a safe environment and the notion that subsistence economies are entitled to legal protection, social justice cannot be realised without addressing the community's dependence on an environmentally destructive industry that has denied the possibility of an alternative subsistence economy (Kirsch 2000). Given the structural power of the company and the lack of options open to the community (close the plant and the economy collapses or keep it open and endure further environmental contamination), a combination of legal and non-legal approaches are likely to be necessary.

People's tribunals, and other informal and quasi-legal fora for hearing cases against companies may be useful in this regard and merit greater attention. Such popular fora can help produce informal patterns of regulation by raising awareness and generating expectations about companies' conduct, even if they are unable to force companies to pay compensation for what they have done. Tribunals such as the Permanent Peoples' Tribunal (1992) and the International Water Tribunal Foundation support communities lacking in legal and financial resources, which are normally excluded from legal processes, and help to bring to light cases that otherwise may not be heard. Such processes seek to extend national and international legislation, as well as stimulate the proper implementation of existing legislation.⁶

Some of the qualifiers about the impact of soft law that were introduced at the start of this article apply here, however. Such procedures are unlikely to be able to call to account some of the worst violators of social and environmental standards who are less subject to popular pressure and less willing to participate in fora that have no official legal standing. These mechanisms will also be less useful in resolving open conflict between a company and a community affected negatively by its investment, where there is not much scope for conciliation and the power imbalance is such that the authority of law and the backing of sanctions may be necessary to ensure that conflicts are resolved peacefully. The strategic question, once again, will be how to develop legal and non-legal strategies in mutually supportive ways.

We should not lose sight of the importance of the state when thinking through the possibilities of pro-poor litigation. The state is often the first point of contact for communities in cases where their rights have been infringed. The state may sponsor their claims and take the issues up with the companies whose licenses they could, in theory, revoke. Building the capacity of communities to bring claims to states within open and democratic fora for expression of concern and representation of their interests will be important in this regard. Where states do sponsor communities' claims, however, as in the Bhopal case, the state is also likely to be accused of negligence by the company (Scovazzi 1991). Governments, in theory of course,

also have the capacity and responsibility to ensure that adequate measures are in place to prevent accidents in the first place by guaranteeing impact assessments and full consultations on proposed controversial projects.

Community action will also play a key role. In the *Are* case, in which a Japanese company invested in Malaysia to avoid more stringent domestic impact assessment requirements, aside from the legal battle and the role of the community in raising funds to fight the case, community action was successful in procuring voluntary donations to provide a trust fund for the victims (Slinn 1992). Anderson also shows that community action was critical to the Bhopal case in shoring up the limits of the legal process in terms of creating access for the poor. In this sense the formal legal process, as Slinn concludes, 'is only effective in enhancing accountability to the victims of environmental harms when used as part of a sustained local activist campaign' (1992:xx). Detailed case histories that identify the medium- and long-term consequences of litigation for communities may help us to get at the key development questions, identifying not only why a case was successful or unsuccessful, but attempting to unpack the ways in which and levels at which it was successful and for whom.

5 Conclusion

At the moment the popularity of *forum non-conveniens* as grounds for not hearing cases in foreign courts, the difficulty of using the *Alien Tort Claims Act* and, in many cases, the impenetrability of the corporate veil, means that companies looking to exploit lower environmental and social standards in developing countries are often in a position to do so without fear of meaningful legal redress. Invoking bodies of law from different countries⁷ as well as aspects of international law, in particular, is underdeveloped in litigation practice. Hence, even though the Bhopal gas leak, for example, violated numerous existing international principles, 'it is striking that the litigation to date has made no reference to international standards' (Anderson 1991:88).

Instruments such as the Brussels Convention of 1968, to which all EU countries are signatories, states, however, (in Article 2) that a company

should be sued in the country where its registered office is. Moreover, the Howitt resolution (*EU Standards for European Enterprises: Towards a European Code of Conduct*), passed on 14 January 1999 by the European Parliament, will try to create a legally binding framework for regulating European TNCs operating in developing countries. If successful, the legislation would set an important precedent with regard to home country responsibility for the activities of their companies overseas. International agreements regulating transnationals provide one long-term solution for clarity, consistency and compatibility. Negotiated international standards, agreed by the international community, have the added benefit of not being imposed by Western countries in the way that internationalisation of parent company standards might be; whilst at the same time they address the fears of Western-based TNCs that they are being unfairly targeted and that if they withdraw from a developing country, replacement investors are likely to adopt lower social and environmental standards. Despite their weaknesses then, negotiated international standards should be a key component of a package of *multi-pronged, multi-level* legal and non-legal strategies combining *formal and informal* mechanisms that reinforce a system of obligations for TNCs.

From a development perspective in which socially and environmentally responsible business practice is the goal, it is critical to achieve a 'deterrent effect', whereby companies build safeguards into their operations for fear of the penalties they may accrue for acting irresponsibly. This was an issue raised in the Bhopal case. A call was made for damages 'sufficient to deter' Union Carbide and all TNCs 'involved in similar business activities' from 'wilful, malicious and wanton disregard of the rights and safety of the citizens of India' (Baxi and Dhandra 1990). Where companies anticipate the possibility of a case against them by a community, either on the basis of past experience or the reaction to another company, precedents may be set that encourage more responsible investments. As well as securing short-term compensation, this surely has to be the aim of litigation – not just making companies liable for their activities wherever they happen to be based, but ensuring that weaker systems of governance or enforcement in developing countries, which expose the poor and their

environment to risks that would not be acceptable in the North, are not a legitimate basis for comparative advantage.

Notes

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2. They are also only weakly implemented through National Contact Points, which offer advice to businesses about the application of the guidelines (McLaren 2000).
3. As Frynas argues (1999:124) 'The oil industry normally has a superior knowledge compared to individual litigants. Consequently, it may often be difficult for the plaintiff to argue that the oil company was unreasonably negligent or did not adopt accepted standards during its operations'.
4. In the Bhopal case the Court noted that the usual presumption in favour of the plaintiff's choice of forum was less applicable if the plaintiffs were foreign (Chinen 1987). A US citizen injured by the extraterritorial toxic tort of a US MNC would be far better placed to defeat a motion to dismiss (Baker-Shew 1986).
5. The principle has been applied differently within the common law of different countries. In Australia the principle was invoked to positive effect (for the affected communities) in the OK Tedi case concerning the Australian mining company BHP's mining venture in Papua New Guinea.
6. See for example the Charter of Rights against Industrial Hazards produced by the Permanent Peoples' Tribunal. This tries to invoke in Article 3, for example, the right of persons to hold individuals, companies or government agencies to account for industrial hazards and emphasises the liability of parent companies to their subsidiaries.
7. However, it is not uncommon in commercial cases in the UK for judges to adjudicate a case based on the law of another country (WDM 1998).

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